



Decision of the Competition and Markets Authority

Online resale price maintenance in the
light fittings sector

Case 50343

3 May 2017

© Crown copyright 2017

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

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

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

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 Names have been replaced by a general descriptor of the individual's role.

CONTENTS

1.	INTRODUCTION AND EXECUTIVE SUMMARY	5
A.	The Glossary	6
2.	THE INVESTIGATION	8
3.	FACTS	11
A.	Addressees	11
I.	Poole Lighting Limited.....	11
II.	The National Lighting Company Limited	11
III.	Saxby Lighting Limited	12
IV.	Endon Lighting Limited	13
B.	Lighting sector overview	13
I.	Lighting	14
II.	Light fittings suppliers	14
III.	Light fittings resellers	15
IV.	Importance of the internet as a retail channel	15
V.	Suppliers' reactions to the internet.....	17
C.	Poole's online pricing policies.....	18
I.	Introduction	18
II.	The Saxby lighting online pricing policy	21
III.	The Endon lighting online pricing policy	30
IV.	Alignment of online pricing policies by Poole	40
D.	Market definition	47
I.	Purpose of, and framework for, assessing the relevant market	47
II.	Relevant product market.....	48
III.	Relevant geographic market	50
IV.	Conclusion on market definition	52
4.	LEGAL ASSESSMENT	53
A.	Introduction.....	53
B.	Undertakings	54
I.	Key legal principles	54
II.	Conclusion on undertakings.....	55
C.	Agreement and/or concerted practice	56
I.	Key legal principles	56
II.	Agreement and/or concerted practice – Saxby and [Reseller X]	60
III.	Conclusion on the agreement and/or concerted practice between Saxby and [Reseller X]	67
IV.	Agreement and/or concerted practice – Endon and [Reseller X]	69
V.	Conclusion on the agreement and/or concerted practice between Endon and [Reseller X].....	81

D.	Object of preventing, restricting, or distorting competition	84
I.	Key legal principles	84
II.	Legal assessment – Saxby Agreement.....	88
III.	Conclusion on the object of the Saxby Agreement	91
IV.	Legal assessment – Endon Agreement	91
V.	Conclusion on the object of the Endon Agreement.....	94
E.	Appreciable restriction of competition.....	94
I.	Key legal principles	95
II.	Legal assessment	95
F.	Effect on trade	96
I.	Effect on trade between EU Member States	96
II.	Effect on trade within the UK.....	98
G.	Exclusion or exemption	99
I.	Exclusion	99
II.	Block exemption.....	99
III.	Individual exemption	100
H.	Attribution of liability	101
I.	Key legal principles	101
II.	Liability for the Saxby Infringement	103
III.	Liability for the Endon Infringement.....	106
5.	THE CMA'S ACTION	107
A.	The CMA's decision	107
B.	Directions	107
C.	Financial penalties.....	108
I.	General	108
II.	The CMA's margin of appreciation.....	108
III.	Small agreements	109
IV.	Intention/negligence.....	109
V.	Calculation of penalties.....	112

1. INTRODUCTION AND EXECUTIVE SUMMARY

- 1.1. This Decision is addressed to Poole Lighting Limited (**Poole**), Saxby Lighting Limited (**Saxby**), Endon Lighting Limited (**Endon**), and their ultimate parent company The National Lighting Company Limited (**NLC**) (together, the **NLC Group**).
- 1.2. By this Decision, the Competition and Markets Authority (the **CMA**) has concluded that:
- NLC, Poole and Saxby infringed the prohibition in section 2(1) of the Competition Act 1998 (the **Act**) (the **Chapter I prohibition**) and/or Article 101 of the Treaty on the Functioning of the European Union (the **TFEU**) by participating in an agreement and/or concerted practice with a reseller, [Reseller X], from 31 October 2012 (at the latest) to 25 February 2013, that [Reseller X] would not sell Saxby branded products online below a specified online price (the **Saxby Agreement**). The Saxby Agreement had as its object the prevention, restriction or distortion of competition within the UK and/or between EU Member States (through resale price maintenance) (**RPM**) and may have affected trade within the UK and/or between EU Member States (the **Saxby Infringement**).
 - NLC, Poole and Endon infringed the Chapter I prohibition and/or Article 101 of the TFEU by participating at various times in an agreement and/or concerted practice with a reseller, [Reseller X], from 31 May 2013 (at the latest) to 15 June 2016, that [Reseller X] would not sell Endon branded products online below a specified online price (the **Endon Agreement**). The Endon Agreement had as its object the prevention, restriction or distortion of competition within the UK and/or between EU Member States (through RPM) and may have affected trade within the UK and/or between EU Member States (the **Endon Infringement**).
- 1.3. The CMA has applied Rule 10(2) of the CMA's procedural rules (the **CMA Rules**)¹ in this case and has addressed this Decision only to the suppliers identified in paragraph 1.1 above.

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

A. The Glossary

Term	Definition
Act	Competition Act 1998
Agreements	The Saxby Agreement and the Endon Agreement
Infringements	The Saxby Infringement and the Endon Infringement
ASM	Area Sales Manager
CAT	Competition Appeal Tribunal
Chapter I prohibition	The prohibition imposed by section 2(1) of the Act
CMA	The Competition and Markets Authority
CMA Rules	The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/458)
Commission	The European Commission
Court of Justice	The Court of Justice of the European Union (formerly the European Court of Justice)
Decision	This Decision dated 3 May 2017
Endon	Endon Lighting Limited, a company ultimately owned by NLC
Endon Agreement	The agreement and/or concerted practice between Endon ² and [Reseller X] that [Reseller X] would not sell Endon branded products online below the price specified by the Endon Policy
Endon Infringement	The infringement of the Chapter I prohibition and/or Article 101 regarding Endon branded light fittings, as particularised in paragraph 1.2
Endon Policy	The arrangements between Endon ³ and its resellers according to which resellers would not sell Endon branded products online at prices below a maximum discount of 20% off the RRP excluding VAT
Endon Relevant Period	31 May 2013 (at the latest) to 15 June 2016
EU	The European Union
General Court	The General Court of the European Union (formerly the Court of First Instance)
ILA	Internet Licence Agreement

² Or Poole, from 1 January 2015, when Endon's business was merged into Poole. Both Endon and Poole were wholly owned by NLC throughout the Endon Relevant Period.

³ Or Poole, from 1 January 2015, when Endon's business was merged into Poole. Both Endon and Poole were wholly owned by NLC throughout the Endon Relevant Period.

[X]	[X]
NLC	The National Lighting Company Limited
NLC Group	NLC, Poole, Saxby and Endon
OFT	The Office of Fair Trading, one of the CMA's predecessor organisations
Penalties Guidance	<i>Guidance as to the appropriate amount of a penalty</i> (OFT423, September 2012), adopted by the CMA Board
Poole	Poole Lighting Limited, a company ultimately owned by NLC
RPM	Resale price maintenance
RRP	Recommended retail price
Saxby	Saxby Lighting Limited, a company ultimately controlled by NLC ⁴
Saxby Agreement	The agreement and/or concerted practice between Saxby and [Reseller X] that [Reseller X] would not sell certain Saxby branded products online below the price specified by the Saxby Policy
Saxby Infringement	The infringement of the Chapter I prohibition and/or Article 101 regarding Saxby branded light fittings, as particularised in paragraph 1.2
Saxby Policy	The arrangements between Saxby and its resellers according to which resellers would not sell certain Saxby branded products online at prices below a maximum discount of 20% off the trade price
Saxby Relevant Period	31 October 2012 (at the latest) to 25 February 2013
Statement of Objections	The Statement of Objections dated 9 February 2017
TFEU	Treaty on the Functioning of the European Union
VABER	Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010), known as the Vertical Agreements Block Exemption Regulation
Vertical Guidelines	Commission Guidelines on Vertical Restraints [2010] OJ C130/01

⁴ As explained in paragraphs 4.191 and 4.192 below, for the duration of the Saxby Relevant Period, Saxby's business was operated by Poole and Poole exercised decisive influence over Saxby.

2. THE INVESTIGATION

- 2.1. On 18 May 2012, the Office of Fair Trading (**OFT**), one of the CMA's predecessor organisations, issued a warning letter to Endon following receipt of information which suggested that Endon may have been imposing minimum resale prices on online retailers of domestic light fittings. The OFT informed Endon that imposing minimum retail prices on distributors could amount to an infringement of the Chapter I prohibition and Article 101 TFEU.
- 2.2. On the same date, the OFT also sent an advisory letter to [Saxby] stating that information had been received which suggested that [Saxby] may have been imposing minimum resale prices on online retailers of domestic light fittings.
- 2.3. In November 2015, the CMA⁵ received a complaint from a reseller about attempts by Poole to restrict the reseller's online prices of Endon branded products.⁶
- 2.4. As a result of receiving information from a separate investigation relating to bathroom fittings,⁷ the CMA issued an advisory letter to Saxby on 24 May 2016.⁸ The CMA stated that it had reasonable grounds for suspecting that Saxby may have been involved in anti-competitive agreements or practices with retailers which restricted the price at which bathroom fittings products supplied by Saxby were advertised and/or sold online by retailers. The CMA recommended that Saxby consider conducting a self-assessment to ensure that it was complying with competition law. On 7 June 2016, Poole responded by stating, '*We take these allegations very seriously and will carry out internal investigations to ensure our staff is not in breach of any such regulations.*'⁹
- 2.5. In August 2016, the CMA opened a formal investigation under the Act, having determined that it had reasonable grounds for suspecting that Poole had infringed the Chapter I prohibition and/or Article 101 TFEU by restricting the price at which its resellers sold domestic light fittings online.
- 2.6. On 16 August 2016, the CMA entered Poole's business premises under section 27 of the Act and required documents relevant to its investigation to be produced and information relevant to its investigation to be provided.

⁵ On 1 April 2014, the CMA took over the functions of the OFT in respect of competition law enforcement.

⁶ Email from complainant reseller to CMA dated 30 November 2015 (URN 00989).

⁷ Case CE/9857-14: Online resale price maintenance in the bathroom fittings sector.

⁸ Letter from CMA to [Managing Director] (Saxby Lighting Limited) dated 24 May 2016 (URN 00569).

⁹ Letter from [Managing Director] (Poole Lighting Limited) to CMA dated 7 June 2016 (URN 00575).

- 2.7. The CMA required further documents and information from Poole under section 26 of the Act.¹⁰
- 2.8. NLC and its subsidiaries applied to the CMA for leniency shortly after the CMA had begun its investigation and was granted a provisional Type B leniency marker. NLC and its subsidiaries provided further documents and information to the CMA under its leniency procedures.
- 2.9. During the course of the investigation, the CMA required documents and information under section 26 of the Act from a number of resellers of Saxby and Endon branded lighting products.¹¹
- 2.10. The CMA held a State of Play meeting with NLC on 20 December 2016.
- 2.11. On 31 October 2016 and 11 November 2016, the CMA conducted interviews with [Sales Director] (Sales Director of Poole) and [Sales & Marketing Director] (former Sales Director of Endon). The CMA also conducted a telephone interview with [E-commerce Manager] (former E-commerce Manager of [Reseller X]) on 20 December 2016.
- 2.12. On 22 December 2016, the NLC Group expressed a genuine interest and willingness to enter into settlement discussions with the CMA in relation to the case.
- 2.13. On 6 February 2017, the NLC Group entered into a leniency agreement with the CMA under the CMA's leniency policy in relation to its involvement in the Infringements.
- 2.14. On 9 February 2017, the CMA issued a Statement of Objections to NLC, Poole, Saxby and Endon, in which it proposed to make a decision that they had infringed the Chapter I prohibition of the Act and/or Article 101 TFEU. In the circumstances of this case the CMA applied Rule 5(3) of the CMA Rules and addressed the Statement of Objections only to the suppliers and not to the counterparty to the agreements or concerted practices.¹²
- 2.15. The CMA informed [Reseller X] that it had issued the Statement of Objections to the NLC Group and provided [Reseller X] with an opportunity to request a non-confidential version of the Statement of Objections and to make representations on the CMA's proposed decision. [Reseller X] did not

¹⁰ Section 26 notice to Poole Lighting Limited dated 17 August 2016 (URN 00632).

¹¹ [Reseller]; [Reseller]; [Reseller]; [Reseller]; [Reseller]; [Reseller]; [Reseller]; [Reseller]; [Reseller]; [Reseller X]; [Reseller].

¹² Likewise, the CMA has applied Rule 10(2) of the CMA Rules and addressed this Decision to NLC, Poole, Saxby and Endon only.

request a non-confidential version of the Statement of Objections and did not make any representations.

- 2.16. Following receipt of the Statement of Objections, the NLC Group re-confirmed its interest in settlement discussions.
- 2.17. Following such discussions, on 24 April 2017, the NLC Group offered to settle the case. The NLC Group voluntarily, clearly and unequivocally admitted the facts and allegations of infringement as set out in the Statement of Objections,¹³ which are now reflected in the Decision, and agreed to co-operate in expediting the process for concluding the case. On 27 April 2017, the CMA confirmed that it would settle the case with the NLC Group and that it intended to proceed to issue an infringement decision.

¹³ Subject to limited submissions communicated to and agreed by the CMA.

3. FACTS

A. Addressees

I. Poole Lighting Limited

3.1. Poole is a UK-based business which is principally active in the design and distribution of domestic light fittings.¹⁴ Poole had a turnover of £47.7 million in the financial year ended 31 December 2015.¹⁵

3.2. Poole is a private limited company registered at Companies House under company number 04740426.¹⁶

3.3. Poole supplies lighting products under three main brands:¹⁷

- Saxby
- Endon
- Interiors 1900

3.4. Poole also designs and distributes private 'own label' lighting products directly to major UK and international retailers.¹⁸

II. The National Lighting Company Limited

3.5. Poole is 100% owned by NLC and this has been the case since 2003.¹⁹ All of NLC's lighting business in the UK is conducted via Poole.²⁰ NLC is also the holding company and ultimate parent company of Brilliant AG and Direct China Limited.²¹ NLC had a turnover of £120.8 million in the financial year ended 31 December 2015.²²

¹⁴ Financial statements Poole Lighting Limited For the year ended 31 December 2015, p2 (URN 01233).

¹⁵ Financial statements Poole Lighting Limited For the year ended 31 December 2015, p6 (URN 01233).

¹⁶ Financial statements Poole Lighting Limited For the year ended 31 December 2015, cover page (URN 01233).

¹⁷ Question 2 of Poole Lighting Limited's response to section 26 notice dated 17 August 2016 (URN 00629), including Attachment 2 (URN 00622).

¹⁸ Question 2 of Poole Lighting Limited's response to section 26 notice dated 17 August 2016 (URN 00629).

¹⁹ Financial statements Poole Lighting Limited For the year ended 31 December 2015, p23 (URN 01233) and Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 6 (URN 01215).

²⁰ Financial statements The National Lighting Company Limited For the year ended 31 December 2015, p1 (URN 01235).

²¹ Question 17 of Poole Lighting Limited's response to request for information dated 2 December 2016 (URN 01142).

²² Financial statements The National Lighting Company Limited For the year ended 31 December 2015, p6 (URN 01235).

- 3.6. NLC is a private limited company registered at Companies House under company number 02986906.²³ The directors who served in the last financial year were:²⁴

[Director]

[Director]

[Director]

[Director]

[Director]

- 3.7. NLC's shareholders listed as at the date of its last return on 4 November 2015 were as follows:²⁵

[Shareholder]

[Shareholder]

[Shareholder]

[Shareholder]

[Shareholder]

III. Saxby Lighting Limited

- 3.8. Saxby is a private limited company registered at Companies House under company number 04136473.²⁶ The company is no longer trading.²⁷

- 3.9. Historically, Saxby products were typically generic commodity lighting products sourced from China and sold primarily to electrical wholesalers.²⁸ From 2013, the design and development of the main Saxby lighting range was carried out by Poole. This was to utilise the skills of Poole's in-house design team and introduce higher quality Saxby lighting products that could be differentiated from others on the market.²⁹

²³ Financial statements The National Lighting Company Limited For the year ended 31 December 2015, cover page (URN 01235).

²⁴ NLC Annual return made up to 4 November 2015 (URN 01236).

²⁵ NLC Annual return made up to 4 November 2015 (URN 01236).

²⁶ Financial statements Saxby Lighting Limited For the year ended 31 December 2015, cover page (URN 01242).

²⁷ Financial statements Saxby Lighting Limited For the year ended 31 December 2015, p5 (URN 01242).

²⁸ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 14 (URN 01215).

²⁹ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 32 (URN 01215).

- 3.10. On 1 January 2014, NLC formally acquired Saxby from [Shareholder] and transferred its trade and assets to Poole.³⁰ Prior to this, from around 2006, Poole provided resource and management to the Saxby business.³¹ From 2010, the management, distribution and administration of Saxby's products were carried out by Poole.³² For the reasons set out in paragraphs 4.191 and 4.193 below, the CMA considers that Saxby, Poole and NLC formed a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU throughout the Saxby Relevant Period.

IV. Endon Lighting Limited

- 3.11. Endon is a private limited company registered at Companies House under company number 03626838.³³ The company is no longer trading.³⁴
- 3.12. Endon products are typically decorative and functional lighting products.³⁵ Endon lighting products are sold through independent lighting retailers (both bricks and mortar and online), as well as national accounts such as B&Q, John Lewis and Laura Ashley.³⁶
- 3.13. NLC acquired Endon in August 2007.³⁷ Prior to 1 January 2015, Endon was a wholly owned subsidiary of NLC with a separate management team from Poole. On 1 January 2015, the trade and assets of Endon were transferred to Poole.³⁸
- 3.14. As Endon and Poole were both wholly owned by NLC throughout the Endon Relevant Period, the CMA considers that Endon, Poole and NLC formed a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU throughout the Endon Relevant Period.³⁹

B. Lighting sector overview

- 3.15. This section provides an overview of those aspects of the lighting sector that are relevant to this investigation.

³⁰ Financial statements The National Lighting Company Limited For the year ended 31 December 2014, pp29–30 (URN 01234).

³¹ Email from [Lawyer] (representing NLC) to the CMA dated 4 November 2016 (URN 01001).

³² Email from [Lawyer] (representing NLC) to the CMA dated 4 November 2016 (URN 01001).

³³ Financial statements Endon Lighting Limited For the year ended 31 December 2015, cover page (URN 01239).

³⁴ Financial statements Endon Lighting Limited For the year ended 31 December 2014, p2 (URN 01238).

³⁵ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 9 (URN 01013).

³⁶ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 9 (URN 01013).

³⁷ Financial statements Endon Lighting Limited For the period 1 June 2007 to 31 December 2007, p3 (URN 01237).

³⁸ Financial statements Poole Lighting Limited For the year ended 31 December 2014, p20 (URN 01232).

³⁹ See paragraphs 4.197–4.199 below.

I. Lighting

- 3.16. There are three broad product segments in the UK lighting sector:
- lamps (ie sources of light);
 - luminaires (ie light fittings which house sources of light); and
 - controls.⁴⁰
- 3.17. For ease of understanding, luminaires will be referred to as light fittings throughout this Decision.
- 3.18. The sector can be further delineated according to end use application, ie domestic or non-domestic.⁴¹ The focus of this Decision is the supply of light fittings for domestic use since this is Poole's principal activity.⁴²
- 3.19. Light fittings include, among other things, light shades, table lamps, ceiling light fittings, wall light fittings and security light fittings.⁴³
- 3.20. Competition takes place at both the upstream level (rival suppliers competing for sales of their product to resellers⁴⁴ and ultimately end users) and the downstream level (rival resellers competing for sales to end users). At the downstream level, competition takes place both between different brands (inter-brand competition) and between different resellers of the same brand (intra-brand competition).

II. Light fittings suppliers

- 3.21. The market research company, AMA Research Limited (**AMA Research**), estimates the size of the UK light fittings sector to be £1.22 billion in 2015 based on manufacturers' selling prices.⁴⁵ This can be broken down as follows:
- domestic light fittings: £438 million;⁴⁶ and
 - non-domestic light fittings: £779 million.⁴⁷

⁴⁰ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p19 (URN 01143).

⁴¹ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p25 (URN 01143).

⁴² Financial statements Poole Lighting Limited For the year ended 31 December 2015, p2 (URN 01233).

⁴³ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p57 (URN 01143).

⁴⁴ In this Decision, 'reseller' means any organisation that sells light fittings to domestic or non-domestic end-users, including retailers, merchants, electrical wholesalers and contractors/installers. See AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p83 (URN 01143).

⁴⁵ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p57 (URN 01143).

⁴⁶ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p62 (URN 01143).

⁴⁷ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p63 (URN 01143).

- 3.22. The UK light fittings sector is fragmented and comprises a large number of small organisations.⁴⁸ On its website, Poole describes itself as '*the largest provider of domestic lighting to UK national account and independent retailers.*'⁴⁹ In 2015, Poole generated turnover of approximately £[X] million in the supply of domestic light fittings in the UK.⁵⁰ This equates to a share of supply of approximately [X]% based on the AMA Research figures. The other large suppliers of domestic light fittings in the UK had [X] shares of supply. These are Dar Lighting, Searchlight, Astro Lighting, Elstead Lighting and Franklite.⁵¹

III. Light fittings resellers

- 3.23. Domestic light fittings are supplied to end users via DIY multiples (39%), department stores/high street multiples (28%), lighting specialists and internet/mail order (22%) and, to a lesser extent, grocery multiples (11%).⁵²
- 3.24. According to AMA, the spread of internet shopping has expanded into lighting and some resellers have set up transactional websites, offering both retail and trade accounts.⁵³ In addition, some manufacturers and distributors have set up transactional websites to enable direct sales to consumers.⁵⁴

IV. Importance of the internet as a retail channel

- 3.25. Online retailing is important in the homewares sector, which includes lighting.⁵⁵ Most DIY multiples, department stores and grocery multiples which offer homewares products for sale do so both in-store and online.⁵⁶ Poole has also confirmed that most bricks and mortar resellers trade online.⁵⁷

⁴⁸ According to AMA, '*The supply chain remains fragmented with a small number of very large organisations tending to target all sectors of the lighting market and a large number of very small organisations, often supplying niche sectors*' and '*[s]upply of luminaires is much more fragmented than that of lamps, with a large number of smaller suppliers active in the market*', AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p70 and p76 (URN 01143).

⁴⁹ <http://www.poolelighting.com/about.php>, accessed on 10 January 2017 (URN 01212).

⁵⁰ Question 12(b) of Poole Lighting Limited's response to request for information dated 2 December 2016 (URN 01142) and Poole Lighting Limited's updated response to financial questions received on 25 January 2017 (URN 01284).

⁵¹ Question 15 of Poole Lighting Limited's response to request for information dated 2 December 2016 (URN 01142).

⁵² AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p84 (URN 01143).

⁵³ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p82 (URN 01143).

⁵⁴ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p82 (URN 01143).

⁵⁵ Homewares include lighting, home accessories, tableware, kitchenware and bakeware, household linens and textiles, bathroom textiles, other household linen, and curtains and blinds, Mintel, *Homewares – UK, January 2015*, pp 8–9 (URN 01240).

⁵⁶ Mintel, *Homewares – UK, January 2015*, p18 and p48 (URN 01240).

⁵⁷ Question 3 of Poole Lighting Limited's response to section 26 notice dated 17 August 2016 (URN 00629).

[Sales Director] of Endon estimated that from 2012 to mid-2015 a third of Endon's light fittings were sold online.⁵⁸

- 3.26. The market research company, Mintel Group Limited (**Mintel**), estimated in 2015 that 59% of people who had bought homewares in the last 12 months had bought something online, with 36% having purchased from an internet-only platform such as Amazon or eBay.⁵⁹
- 3.27. Price is an important factor influencing a customer's choice of reseller for domestic light fittings.⁶⁰ This is particularly the case for sales made online, as internet searches allow consumers to compare easily the prices of different online resellers for a particular product and identify those that offer the lowest prices.
- 3.28. The internet is also an important driver of price competition between sales made through online channels and those made through offline channels (ie in-store or over the telephone). This is due to:
 - The increased transparency of prices on the internet: Many consumers will use the internet as a search and comparison tool, regardless of where they ultimately purchase the light fitting.⁶¹ The internet creates a 'reference price' for both online and offline sales, allowing consumers to demand a better deal from offline channels by, for example, requesting a store to 'price-match' an offer made online.⁶²
 - The ability of resellers using the online sales channel to sell at lower prices: The overheads associated with online sales tend to be lower than those associated with sales through stores (eg the cost of establishing and maintaining physical premises and staff costs). Therefore, resellers selling online may be able to offer lower prices than resellers focused on 'offline' sales channels.
- 3.29. The ability to sell or advertise products at discounted prices on the internet can intensify price competition between resellers due to the increased transparency and reduced search costs from internet shopping. Greater

⁵⁸ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 38 (URN 01013).

⁵⁹ Mintel, *Homewares – UK, January 2015*, p18 and p24 (URN 01240).

⁶⁰ According to Mintel, the key qualities internet users look for when shopping for lighting are a special offer price and functional design, Mintel, *Homewares – UK, January 2015*, p80 (URN 01240).

⁶¹ AMA Research states: '[T]he growth of the Internet has meant more consumers using this to review and search for appropriate products, even if the consumer then appoints an electrical contractor to install the lighting.' AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p84 (URN 01143).

⁶² For example, according to a reseller of Endon products with a showroom, 'I sometimes get asked by my customers to match/beat online prices which is something we advertise we do.' [Reseller]'s response to Question 1 of section 26 notice dated 5 September 2016 (URN 00823).

price competition increases resellers' incentives to act efficiently and pass on cost savings to consumers in the form of lower retail prices.

3.30. Therefore, preventing or restricting resellers' ability to determine their own online resale prices, and in particular preventing or restricting discounting below a fixed level, would be likely to:

- reduce price competition from online sales of light fittings;
- reduce downward pressure on the retail price of light fittings; and
- thereby potentially result in higher prices to consumers.

V. Suppliers' reactions to the internet

3.31. The CMA has reasonable grounds for suspecting that, in addition to Saxby, Endon and Poole, a number of other suppliers of light fittings have, over recent years, attempted to prevent or reduce price competition from online sales through arrangements similar in nature to the Infringements.⁶³ This is based on evidence obtained by the OFT and CMA prior to and during the course of this investigation. For example:

- Evidence received by the OFT in 2012 alleged that [X] may have been imposing minimum resale prices on online retailers of domestic light fittings. This led to warning letters being issued to a number of suppliers, including Endon.⁶⁴
- [Sales Director] of Endon explained in his witness evidence that '*other competitors in the market, including [Supplier], [Supplier], [Supplier] and [Supplier], were also operating a similar RPM policy.*⁶⁵ This is corroborated by an internal Poole email dated 5 April 2011, in which [Area Sales Manager] of Endon noted: '*[a]ttached is the "Selective Distributor Agreement" [Supplier] used to protect its prices on the Internet. They went about it in a similar way to [Supplier]...*' and '*[Supplier] [...] only informed people verbally that the account was on stop until they put the prices back up.*⁶⁶

⁶³ The CMA had to consider how to make the best use of its limited resources. The CMA decided to pursue the investigation into Poole's arrangements having had regard to the evidence it had in its possession and the CMA's prioritisation principles (available at www.gov.uk/government/publications/cma-prioritisation-principles).

⁶⁴ See paragraphs 2.1 and 2.2 above.

⁶⁵ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 16 (URN 01013).

⁶⁶ Email from [Area Sales Manager] (Endon) to [Retail Sales Manager] (Endon) and [Sales Director] (Endon) dated 5 April 2011 (URN 00004).

- [Sales Director] of Poole explained in his witness evidence that '*[a] pricing policy was now the 'norm' in the market for most decorative lighting companies and customers expected one to be in place to protect them from being undercut by other online resellers. There were five key suppliers who I believed already operated pricing policies: [Supplier], [Supplier], [Supplier], [Supplier] and [Supplier].*'⁶⁷

3.32. [Sales Director] of Poole explained in his witness evidence that he based the formula for the Saxby pricing policy on similar policies in the market.⁶⁸ In addition, in an email on 30 September 2015, [Sales Director] of Poole stated '*The discounts allowed are exactly the same that [Supplier] and [Supplier] permit, and that they actively police.*'⁶⁹ This indicates that there may be a similarity of pricing practices across the light fittings industry.

C. Poole's online pricing policies

I. Introduction

3.33. The following Section (Section C) sets out the relevant factual background to the Infringements including:

- the Saxby lighting online pricing policy
- the Endon lighting online pricing policy
- the alignment of the online pricing policies by Poole.

3.34. The CMA has based its findings principally on contemporaneous evidence, including:

- internal Poole email correspondence relating to the operation or enforcement of the online pricing policies
- minutes of internal sales meetings
- email correspondence between Poole and its resellers
- transcript of a sales meeting.

⁶⁷ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 16 (URN 01215).

⁶⁸ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 17 (URN 01215).

⁶⁹ Email from [Sales Director] (Poole) to [Managing Director] (Poole), [Shareholder and Director] (NLC) and [Managing Director] ([Company]) dated 30 September 2015 (URN 00386).

3.35. Where relevant, the CMA has also relied on:

- information obtained directly from Poole or its resellers from responses to formal requests for information sent under section 26 of the Act
- witness statements given by employees of Poole who were involved in the Infringements
- a transcript of an interview with a former employee of [Reseller X]
- information received from Poole further to its application for leniency.

3.36. The evidence described below demonstrates that employees of Saxby, Endon and Poole were aware of the potential illegality of the online pricing policies and were careful not to communicate their pricing instructions to resellers in writing.⁷⁰ Indeed, in some instances, where communications were put in writing, instructions were issued for them to be deleted from the server.⁷¹ In addition, the nature of the pricing policies was such that Saxby, Endon and Poole rarely needed to contact resellers about the policies when resellers were complying with them because they were based on pricing formulae which were similar to others in the industry.⁷² As a result, this limited the need for written communication about the online pricing policies.⁷³

3.37. Despite this, the CMA has obtained the written evidence described in this Section which demonstrates the existence of online pricing policies operated by Saxby, Endon and Poole, and implemented by resellers, that were aimed at restricting resellers' ability to set their online retail prices in relation to light fittings. This written evidence is corroborated by evidence describing the oral discussions that took place at that time, including witness evidence, responses to section 26 notices and a contemporaneous record of a meeting in May 2016 discussing the Endon policy.

3.38. Table 1 below sets out the key employees of Saxby, Endon, Poole and [Reseller X] referred to in the remainder of this Decision. The employees' names and roles are listed to facilitate an understanding of the evidence.

⁷⁰ See paragraphs 3.55–3.56, 3.73–3.77 and 3.89 below.

⁷¹ See paragraph 4.88 below.

⁷² See paragraph 3.32 above.

⁷³ See, for example, C-204/00 P etc *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, paragraphs 55 to 57.

Table 1: Relevant employees

[E-commerce Manager]	E-commerce Manager, [Reseller X] ([§<])
[Area Sales Manager]	ASM for Saxby and Endon ([§<])
[Area Sales Manager]	ASM for Saxby and Endon ([§<])
[National Sales Manager]	National Sales Manager, Saxby and later Endon ([§<])
[Area Sales Manager]	ASM for Saxby and Endon ([§<])
[Area Sales Manager]	ASM for Saxby and Endon ([§<])
[Area Sales Manager]	ASM for Saxby and Endon ([§<])
[Area Sales Manager]	ASM for Saxby, Endon and Interiors ([§<])
[Retail Sales Manager]	Retail Sales Manager for Saxby and Endon ([§<])
[E-commerce Manager]	E-commerce Manager, [Reseller X] ([§<])
[Area Sales Manager]	ASM for Saxby ([§<])
[Area Sales Manager]	ASM for Endon ([§<])
[Managing Director]	Managing Director, Poole ([§<])
[Area Sales Manager]	ASM for Saxby ([§<])
[Area Sales Manager]	ASM for Saxby and Endon ([§<])
[Area Sales Manager]	ASM for Saxby
[Office Manager]	Office Manager, Saxby
[Sales Director]	Sales Director for Saxby, Endon and Interiors ([§<]) Sales Director for Saxby and Poole ([§<])
[Product Development Director]	Product Development Director, Endon ([§<])
[Online Marketing Manager]	Online Marketing Assistant/Manager, [Reseller X] ([§<])
[Sales Director]	Sales & Marketing Director, Endon ([§<])

II. The Saxby lighting online pricing policy

3.39. The following section considers the Saxby online pricing policy, including:

- content of the policy
- origin and aims of the policy
- evolution of the policy
- concerns about legality, and
- monitoring of the policy and consequences of non-compliance.

3.40. From around 2006, Poole was appointed to provide resource and management to the Saxby business,⁷⁴ and from 2010 the management, distribution and administration of Saxby's products were carried out by Poole.⁷⁵ In January 2014, NLC formally acquired Saxby and transferred its trade and assets to Poole.⁷⁶ [Sales Director], Poole's Sales Director, therefore also acted as the Sales Director for Saxby from at least 2010.⁷⁷ [Sales Director] was assisted from 2012 until July 2016 by a Saxby employee, [National Sales Manager], the Saxby National Sales Manager, who had day-to-day contact with the Area Sales Managers (**ASMs**).⁷⁸

The Saxby online pricing policy

3.41. The Saxby online pricing policy was introduced in early 2012 when [Sales Director] of Poole, together with senior Saxby ASMs, introduced a maximum 20% discount off the 'trade price' for online sales of Saxby products (ie light fittings).⁷⁹ The 'trade price' was issued to resellers as the suggested resale price excluding VAT.⁸⁰ [Sales Director] of Poole explained the pricing formula as follows:⁸¹

'For example, if a product was listed on the price list as £100, the policy was that it should not be sold for less than £80 plus VAT which equals £96 (assuming VAT at 20%).'

⁷⁴ Email from [Lawyer] (representing NLC) to the CMA dated 4 November 2016 (URN 01001).

⁷⁵ Email from [Lawyer] (representing NLC) to the CMA dated 4 November 2016 (URN 01001).

⁷⁶ See paragraph 3.10 above.

⁷⁷ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 6 and 13 (URN 01215).

⁷⁸ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 8 (URN 01215).

⁷⁹ Statement of Witness: [Sales Director] dated 19 January 2017, paragraphs 17 and 23 (URN 01215).

⁸⁰ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 17 (URN 01215).

⁸¹ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 17 (URN 01215).

- 3.42. For this reason, the policy was also sometimes expressed as being retail price minus 4%, ie £96.
- 3.43. There was some inconsistency between ASMs in explaining the policy to resellers. The evidence demonstrates that, at times, some ASMs described the policy as a requirement to sell Saxby light fittings online at the trade price or at a maximum discount of 10% off the trade price.⁸² [Sales Director] of Poole recalled that there was also some uncertainty about whether the discount was from the trade price (excluding VAT) or the retail price (including VAT).⁸³ [Sales Director] of Poole confirmed, however, that the general principle was that the 20% maximum discount was from the trade price and this was the expectation of resellers in the market.⁸⁴

Origin and aims of the Saxby online pricing policy

- 3.44. In early 2011, Saxby decided to launch a new range of light fittings for bathrooms to emulate the success of another competitor which had succeeded in expanding from bathrooms into other categories of light fittings due to its products' unique designs.⁸⁵ Poole's design and manufacturing team developed the new range of light fittings for bathrooms on behalf of Saxby.⁸⁶

- 3.45. In his witness statement, [Sales Director] of Poole stated that:⁸⁷

'The Poole management team had discussions about increasing customer orders in order to recoup the significant investment made in the new range. I recall that Poole were under pressure from customers to maintain a pricing level before they would agree to stock Saxby's new range, to ensure that they would make money on it. A pricing policy was now the 'norm' in the market for most decorative lighting companies and customers expected one to be in place to protect them from being undercut by other online

⁸² For example, see email from [Area Sales Manager] (Saxby) to [Sales Director] (Poole) dated 3 January 2012 (URN 00010) stating 'I am encouraging all customers on my Area (sic) to sell at Trade (sic) and by doing so keeping the Saxby name as a quality branded product', and the minutes of a sales team meeting on 5 January 2012 which state 'Bathroom products must be sold at trade on the internet': Saxby Sales Meeting Minutes dated 5 January 2012 (URN 00012). In addition, see an email exchange in November 2012 in which a representative from [Reseller] had stated that: 'we have been informed that our minimum internet should be no less than trade - 10%. Email from [Employee] ([Reseller]) to [National Sales Manager] (Saxby) dated 14 November 2012 (URN 00042).

⁸³ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 20 (URN 01215).

⁸⁴ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 20 (URN 01215).

⁸⁵ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 15 (URN 01215).

⁸⁶ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 15 (URN 01215).

⁸⁷ Statement of Witness: [Sales Director] dated 19 January 2017, paragraphs 16 and 17 (URN 01215).

resellers. There were five key suppliers whom I was aware already operated pricing policies: [Supplier], [Supplier], [Supplier], [Supplier] and [Supplier].

A broad consensus emerged regarding the way in which these challenges should be handled and **due to the investment made in the new bathroom range and the expectations of resellers in the market, I made the decision in concert with other senior ASMs** (including [National Sales Manager], [Area Sales Manager] and [Area Sales Manager] [sic]) **to impose a pricing policy [...].**' (emphasis added by CMA)

- 3.46. On 8 December 2011, a Saxby sales team meeting took place at which [Sales Director] of Poole instructed the Saxby ASMs to keep an eye on the pricing policy of the new range of light fittings for bathrooms once launched. The minutes state:⁸⁸

'[Sales Director] Bathroom update, catalogues well received by all, one given to each ASM and more to follow [...]

Please keep an eye on the pricing policy of the bathroom product once launched any price war will result in discount being reduced to the offending customer.' (emphasis added by CMA)

- 3.47. The process for implementing the pricing policy was that the ASMs would orally explain to each reseller the expected online resale prices of the new range of light fittings for bathrooms, based on the discussion at the 8 December 2011 sales meeting.⁸⁹ At the end of 2011, DVDs containing images of the new range of light fittings for bathrooms were hand delivered by the ASMs to resellers.⁹⁰

- 3.48. The new Saxby range of light fittings for bathrooms was launched at the Kitchen, Bedroom & Bathroom (KBB) show from 4 to 7 March 2012.⁹¹ Just prior to the KBB show, on 4 March 2012, [Sales Director] of Poole was copied in to an email from a reseller to [Area Sales Manager] of Saxby stating:⁹²

'I would be grateful if we could go through this tomorrow as we are not selling your new bathroom range as we are respecting the prices that [Sales Director] is looking to maintain, but others are not.'

⁸⁸ Saxby Sales Meeting Minutes dated 8 December 2011 (URN 00008).

⁸⁹ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 20 (URN 01215).

⁹⁰ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 20 (URN 01215).

⁹¹ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 23 (URN 01215).

⁹² Annexure 1 to the Leniency Application dated 18 October 2016 - Email from [Sales Director] (Poole) to [Area Sales Manager] (Poole) dated 4 March 2012 (URN 00998).

- 3.49. [Sales Director] of Poole does not recall any specific conversations with resellers regarding the pricing policy at the KBB show.⁹³ However, [Sales Director] of Poole recalls that there would have been conversations about resellers wanting to ensure that Saxby tried to maintain a level of pricing online and prevent discounting.⁹⁴ In addition, a few resellers stayed in Birmingham overnight as guests of Saxby and had dinner with [Sales Director], and he states that they would have had discussions about pricing policies.⁹⁵ The pricing policy was therefore implemented from March 2012 during the weeks and months that followed the launch of the bathrooms lighting range.⁹⁶

Evolution of the Saxby online pricing policy

- 3.50. There appears to have been some confusion in late 2012 and early 2013 within Poole and Saxby and the market more generally as to whether Saxby's online pricing policy applied only to Saxby light fittings for bathrooms or to the whole Saxby range of light fittings. In an email from [National Sales Manager] of Saxby to [Sales Director] of Poole on 5 December 2012, following reports of discounts of Saxby products online by up to 52%, [National Sales Manager] asked: *'Am I now to police all Saxby line or just Bathroom?'*⁹⁷
- 3.51. In an email on 17 January 2013, [National Sales Manager] of Saxby confirmed to [Employee] of Saxby that:⁹⁸ *'I police the internet on Bathroom products only. It may be worth sending this email to the respective ASM's for their information.'*
- 3.52. There was also confusion on the part of resellers about which ranges were covered by the policy. For example, in an email from [E-commerce Manager] of [Reseller X] to [National Sales Manager] of Saxby on 18 January 2013, the reseller stated that:⁹⁹

'We were first made aware of the pricing change to the Saxby Knight range back in October [2012] (I think). [...]. We were then contacted several weeks later and asked to increase the prices on all of the bathroom ranges and, again, this was completed immediately. However,

⁹³ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 23 (URN 01215).

⁹⁴ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 23 (URN 01215).

⁹⁵ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 23 (URN 01215).

⁹⁶ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 23 (URN 01215).

⁹⁷ Email from [National Sales Manager] (Saxby) to [Sales Director] (Poole) dated 5 December 2012 (URN 00046).

⁹⁸ Email from [National Sales Manager] (Saxby) to Saxby Sales dated 17 January 2013 (URN 00050).

⁹⁹ Email from [E-commerce Manager] ([Reseller X]) to [National Sales Manager] (Saxby) dated 18 January 2013 (URN 00051).

during mid December **after finding many retailers selling the products much less than ourselves I tried to contact [Area Sales Manager] to establish what the policy is.** [...] After having an email conversation with [Office Manager] (see attached) highlighting several products (a more comprehensive list can be provided) that we were being massively undercut on, she advised me that they weren't in breach of any guidelines.' (emphasis added by CMA)

- 3.53. In July 2013, the pricing policy was extended to cover all Saxby lighting products (not just light fittings for bathrooms).¹⁰⁰ An Internet Licence Agreement (**ILA**) was introduced in March 2013 and came into effect in July 2013.¹⁰¹ The Saxby ILA was an adaptation of the Endon ILA.¹⁰²
- 3.54. In September 2013, a decision was made that the pricing policy would not apply to clearance/commodity lighting products.¹⁰³

Concerns about legality

- 3.55. Saxby was aware of the potential illegality of the online pricing policy and attempted to enforce the policy without putting anything in writing. For instance:

- The minutes of the Saxby sales meeting on 8 May 2013 state:¹⁰⁴

*'Monitoring Internet – only companies with signed agreements will be allowed to have Saxby products on their sites. **NB: Not to be stated in written format to any customer**'* (emphasis as in original)

[Sales Director] explained to the CMA the meaning of the statement '*Not to be stated in written format to any customer*': '*I think it would be for the*

¹⁰⁰ Statement of Witness: [Sales Director] dated 19 January 2017, paragraphs 33 and 38 (URN 01215) and confirmed in Saxby Meeting Minutes dated 8 May 2013 (URN 00068). [Sales Director] of Poole confirmed in his witness evidence that the minutes of the 8 May 2013 meeting were mistaken and should have read that the pricing policy was trade price less 20% across the entire Saxby lighting range, including the bathrooms range, Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 33 (URN 01215).

¹⁰¹ Statement of Witness: [Sales Director] dated 19 January 2017, paragraphs 29 and 38 (URN 01215).

¹⁰² Annexure 2 to the Leniency Application dated 18 October 2016 – Email from [Retail Sales Manager] (Endon) to [Sales Director] (Poole) dated 25 September 2012 (URN 00998) and Annexure 3 to the Leniency Application dated 18 October 2016 - Email from [Marketing Manager] (Saxby) to [Sales Director] (Poole) dated 6 March 2013 (URN 00998). See further paragraph 3.67 below.

¹⁰³ Saxby Meeting Minutes dated 5 September 2013 (URN 00093) and Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 39 (URN 01215).

¹⁰⁴ Saxby Meeting Minutes dated 8 May 2013 (URN 00068).

*fact that we would have recognised that it's not good practice to be telling people what to have as pricing levels.*¹⁰⁵

- On 29 November 2013, [National Sales Manager] of Saxby emailed a reseller named [Reseller] to highlight that its prices were lower than the maximum 20% discount from the trade price.¹⁰⁶ The reseller replied that it was illegal for Saxby to impose resale price maintenance and refused to comply with Saxby's request to change its prices.¹⁰⁷ The reseller also pointed out that the OFT had previously imposed fines for resale price maintenance.¹⁰⁸

3.56. Following the response from [Reseller], on 3 December 2013, [National Sales Manager] of Saxby asked to discuss the '*law on price fixing*' with [Sales Director] of Poole.¹⁰⁹ In his witness statement, [Sales Director] recalled meeting with [National Sales Manager] on 6 December 2013:¹¹⁰

'I cannot recall the details of the meeting, which was brief, but the issue of price fixing that was raised by [Reseller] would have been discussed.'

3.57. On 1 January 2014, NLC formally acquired Saxby and transferred its trade and assets to Poole. Poole continued to operate the Saxby pricing policy. Further detail regarding the continuation of the policy and alignment with the Endon pricing policy following the merger with Poole is provided in Part IV below.

Monitoring of the Saxby online pricing policy and consequences of non-compliance

3.58. Saxby and Poole employees sought to monitor and take action against reseller non-compliance with the online pricing policy through the following mechanisms:

- Monitoring of retail prices via reports of discounting from resellers.

¹⁰⁵ Transcript of interview with [Sales Director] dated 31 October 2016, CD 2, p25, lines 19-21 (URN 01000).

¹⁰⁶ Email from [National Sales Manager] (Saxby) to [Employee] ([Reseller]) dated 29 November 2013 (URN 00139).

¹⁰⁷ Email from [Employee] ([Reseller]) to [National Sales Manager] (Saxby) dated 29 November 2013 (URN 00139).

¹⁰⁸ Email from [Employee] ([Reseller]) to [National Sales Manager] (Saxby) dated 29 November 2013 (URN 00139).

¹⁰⁹ Email from [National Sales Manager] (Saxby) to [Sales Director] (Poole) dated 3 December 2013 (URN 00145) attaching points for discussion with [Sales Director] (URN 00146).

¹¹⁰ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 45 (URN 01215).

- [Sales Director] of Poole and Saxby ASMs asking resellers to increase their prices in line with the policy.
- Warnings to resellers breaching the policy that their accounts would be suspended, or actual suspension of accounts.

3.59. The evidence shows that resellers sent emails or called [Sales Director] of Poole or the Saxby ASMs to complain about other resellers selling Saxby light fittings at discounted prices online. [Sales Director] of Poole explained in his witness evidence that Saxby used threats of detrimental consequences to persuade resellers to increase their prices in line with the Saxby pricing policy:¹¹¹

‘The relevant ASM would contact the internet company (either by phone or email) to explain that they had been identified as selling the bathroom range at too low a price, and would request the company to raise their prices. The companies would be given 48 hours to comply. [...] If, after 48 hours, the company had not complied their account would be suspended.’
(emphasis added by CMA)

3.60. The CMA notes the following examples of ASMs discussing monitoring of prices and asking resellers to raise their prices:

- On 3 January 2012, [Area Sales Manager] of Saxby emailed [Sales Director] of Poole forwarding an email from a reseller ([Reseller]) which had complained about another reseller selling Saxby products ‘with a 25% discount’. [Area Sales Manager] of Saxby stated:¹¹²

*‘As discussed at the Sales Meeting my customer checks weekly discounts on the internet with their Suppliers [...]. I am encouraging all customers on my Area to sell at Trade and by doing so keep the Saxby name as a quality branded product.’*¹¹³ (emphasis added by CMA)

[Sales Director] forwarded the email to all Saxby ASMs, noting:¹¹⁴

‘Please can you red [sic] [Area Sales Manager]’s email below and let us know if you are aware of who this company is.’

¹¹¹ Statement of Witness: [Sales Director] dated 19 January 2017, paragraphs 26–27 (URN 01215).

¹¹² Email from [Area Sales Manager] (Saxby) to [Sales Director] (Saxby) dated 3 January 2012, forwarding an email from [Reseller] to [Area Sales Manager] dated 3 January 2012 (URN 00009).

¹¹³ As explained in paragraph 3.43 above, there was some inconsistency between ASMs in explaining the Saxby pricing policy to resellers. At times, some ASMs described the policy as a requirement to sell Saxby products at the trade price.

¹¹⁴ Email from [Sales Director] (Saxby) to Saxby ASMs dated 3 January 2012 (URN 00009).

- On 13 February 2012, [Area Sales Manager] of Saxby forwarded another complaint by [Reseller] to [Sales Director] of Poole and [Area Sales Manager] of Saxby. [Area Sales Manager] stated:¹¹⁵

'My customer below polices the internet and have found [Reseller] in [X] selling our bathroom range @ 25%. [...] If we can look into this as soon as possible please and let me know when all is well so I can let my customer know.' (emphasis added by CMA)

- In an email dated 23 August 2012, [Sales Director] of Poole emailed the sales team at [Reseller] in response to concerns regarding [Reseller]'s prices. [Sales Director] of Poole stated:¹¹⁶

'We try our best to keep an eye on internet pricing, but it would seem that some customers are slipping through the net. I can assure you that I will be speaking with [Reseller] and will ensure the prices are lifted accordingly.' (emphasis added by CMA)

- In an email dated 26 September 2012, [Area Sales Manager] of Saxby emailed [Employee] of [Reseller] asking the company to raise its prices:¹¹⁷

'As a company we are trying to resolve the internet traders and selling price, basically some of our Bathroom range is online at a cheap price.

We are pushing for accounts to put prices on Net at Trade Price so it is not to devalue the product..

Your account has come up on the radar as the products are a touch to [sic] cheap... Would you please lift prices to show trade.'¹¹⁸
(emphasis added by CMA)

- In an email dated 26 September 2012, [National Sales Manager] of Saxby emailed [Employee] of [Reseller] to remind him of the policy:¹¹⁹

¹¹⁵ Email from [Area Sales Manager] (Saxby) to [Sales Director] (Saxby) and [Area Sales Manager] (Saxby) dated 13 February 2012 (URN 00014).

¹¹⁶ Email from [Sales Director] (Poole) to [Reseller] and [Area Sales Manager] (Saxby) dated 21 August 2012 (URN 00028).

¹¹⁷ Email from [Area Sales Manager] (Saxby) to [Employee] ([Reseller]) dated 26 September 2012 (URN 00030).

¹¹⁸ As explained in paragraph 3.43 above, there was some inconsistency between ASMs in explaining the Saxby pricing policy to resellers. At times, some ASMs described the policy as a requirement to sell Saxby products at the trade price.

¹¹⁹ Email from [National Sales Manager] (Saxby) to [Employee] ([Reseller]) dated 26 September 2012 (URN 00031).

*'We are making a level playing field on Bathroom products and we would like them to be sold at no less than trade.'*¹²⁰

- On 29 September 2012, [National Sales Manager] of Saxby contacted [Employee] of [Reseller] to request that reseller's 'assistance on pricing'. [Employee] of [Reseller] replied that:¹²¹

'I'm changing the online pricing on the BATHROOM range as I type this email, all prices should be adjusted on the website and Google by 9am Monday morning. [...]

I have had a look online , No one else has changed their pricing at all so looks like we are the first I will call you in the week if anyone else has not followed suit.'

- In his monthly report for September 2012, [Area Sales Manager] of Saxby stated:¹²²

'Internet traders that have not followed our pricing policy have been contacted and I believe raised the unit sale price in line with our requirements.'

- In an email from [National Sales Manager] of Saxby to [Employee] of [Reseller] dated 14 November 2012, [National Sales Manager] of Saxby assured the reseller that:¹²³

'We are looking at internet trading on a daily basis and thank you for your help and support.'

- 3.61. Resellers who refused to change their prices in line with the online pricing policy were warned that their accounts would be suspended. In some cases, accounts were in fact suspended following warnings, for example:

¹²⁰ As explained in paragraph 3.43 above, there was some inconsistency between ASMs in explaining the Saxby pricing policy to resellers. At times, some ASMs described the policy as a requirement to sell Saxby products at the trade price.

¹²¹ Email from [Employee] ([Reseller]) to [National Sales Manager] (Poole) dated 29 September 2012 (URN 00033).

¹²² Email from [Area Sales Manager] (Saxby) to [Sales Director] (Poole) dated 1 October 2012 (URN 00034), attaching September Monthly Report (URN 00035).

¹²³ Email from [National Sales Manager] (Saxby) to [Employee] ([Reseller]) dated 14 November 2012 (URN 00042).

- In an email from [National Sales Manager] of Saxby to [Reseller] dated 26 October 2012, [National Sales Manager] notified the company that its account was to be suspended:¹²⁴

'After numerous requests with reference to internet trading, I am suspending your account as you are in breach of our intellectual rights.'

The reseller's response demonstrates that it understood that its account was being suspended due to non-compliance with the Saxby online pricing policy:¹²⁵

'We have complied with our pricing however, I am finding other suppliers selling below the advised prices.'

- In an email from [Employee] of [Reseller] to [Area Sales Manager] of Saxby dated 28 January 2013, the reseller stated:¹²⁶

*'[Employee], the guy who looks after the web side of the business for us is understandably giving me grief because Ive [sic] assured him we wouldn't be undercut by other online retailers, and **I was given your assurance that you would be stopping the accounts of suppliers who did not "play ball"***

Please let me know when sorted.' (emphasis added by CMA)

III. The Endon lighting online pricing policy

3.62. The following section considers the Endon online pricing policy, including:

- content of the policy
- origin and aims of the policy
- link between the policy and the Internet Licence Agreement
- concerns about legality, and
- monitoring of the policy and consequences of non-compliance.

¹²⁴ Email from [National Sales Manager] (Saxby) to [Reseller] dated 26 October 2012 (URN 00042).

¹²⁵ Email from [Reseller] to [National Sales Manager] (Saxby) dated 13 November 2012 (URN 00042).

¹²⁶ Email from [Employee] ([Reseller]) to [Area Sales Manager] (Saxby) dated 28 January 2013 (URN 00055).

The Endon online pricing policy

- 3.63. The Endon online pricing policy was introduced in early 2010.¹²⁷ Endon's Sales Director, [Sales Director], created a formula for the online pricing policy based on the price list issued to resellers (ie RRP excluding VAT) and imposed a maximum 20% discount from that price for online sales of Endon products (ie light fittings).¹²⁸ [Sales Director] of Endon explained the pricing formula as follows:¹²⁹

'For example, if a product was on the price list as £100, the policy was that it should not be sold for less than £80 plus VAT which equals £96 (assuming VAT at 20%). For this reason, the policy was also sometimes expressed as being RRP minus 4%, i.e. £96.'

- 3.64. The Endon pricing policy was therefore effectively the same as the Saxby policy although the two policies had different origins.

Origin and aims of the Endon online pricing policy

- 3.65. [Sales Director] of Endon introduced the pricing policy in 2010 following discussions with resellers over concerns regarding online discounting. In his witness statement, [Sales Director] described the rationale for the introduction of the policy as follows:¹³⁰

*'The catalyst for the Endon pricing policy [...] dates to the annual NEC Furniture Show in 2010 (which ran from 24th to 27th January) [...]. Endon had a large stand at the NEC furniture show displaying a significant number of our products. I recall that over the course of one of the show days, four or five of the Endon's largest online customers [...] who also had bricks and mortar stores (so called 'brick-and-click' resellers) asked to speak with me individually. The customers all emphasised that [...] it was becoming increasingly difficult for these customers to sell Endon products due to other companies undercutting them online. I specifically recall that the **customers all spoke to me individually and made it clear that Endon needed to take action regarding squeezed margins as a consequence of falling prices.** [...] I understood what they said to mean, we respect you and your products but **the margins are such that we will not be able to make any profit unless prices are controlled.** [...] I recall that other competitors in the market, including [Supplier], [Supplier], [Supplier] and [Supplier], were also operating a similar RPM policy.'* (emphasis added by CMA)

¹²⁷ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 19 (URN 01013)

¹²⁸ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 16 (URN 01013).

¹²⁹ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 17 (URN 01013)

¹³⁰ Statement of Witness: [Sales Director] dated 22 December 2016, paragraphs 13–16 (URN 01013).

- 3.66. An internal email indicates that, at the time, other suppliers of light fittings were also considering ways to deter discounting by internet resellers (without appearing to be fixing the price). The email shows an appreciation for competition law, an awareness of the prohibition against RPM and the possibility of a fine for a breach of the prohibition. The email suggests that it would be possible to avoid the prohibition on RPM through the use of a selective distribution agreement, which identifies products as 'brands', with criteria for maintaining the value of the 'brand' and by not putting any pricing restriction down in writing. In an email from [Area Sales Manager] of Endon to [Retail Sales Manager] and [Sales Director] of Endon dated 5 April 2011, [Area Sales Manager] attached a '*Selective Distributor Agreement*' used by one of Endon's competitors, [Supplier], which he considered was used to protect prices on the internet:¹³¹

'Attached is the "Selective Distributor Agreement" [Supplier] used to protect its prices on the Internet. They went about it in a similar way to [Supplier] by basically registering the four key product ranges as Brands [sic]. So if a customer should discount or nationally advertise prices at a discounted price, (10% was the allowable tolerance) then they were seen to be "harming or devaluing the brand"

*[Employee] the MD; said he spent a lot of money and worked with top London Lawyers [sic] to make sure it was watertight and that no customer could challenge it and win! This agreement was originally drafted for big companies such as Levis and Fabergé to stop companies like Tesco from discounting heavily. **Thats [sic] why you will see odd conditions in the contract ([Supplier] was similar) regarding displaying the products prominently; minimum stock levels and fully trained staff. This was all to show (in court) that [Supplier] took the "Brand" very seriously and it was not about price fixing.***

Myself and many customers feel they effectively shot themselves in the foot when they sent emails to customers telling them they must not discount and only sell at the prices that were allowable; this is now in writing that they were effectively controlling the prices customers sell at. Apparently [Supplier] have never done this and only informed people verbally that the account was on stop until they put the prices back up. This would be much harder to prove for the OFT should this end up in court. [...]

PS the 10% of Turnover [sic] fine can also be found stated on the OFT website.' (emphasis added by CMA)

¹³¹ Email from [Area Sales Manager] (Endon) to [Retail Sales Manager] (Endon) dated 5 April 2011 (URN 00004).

Link between the Endon online pricing policy and the Internet Licence Agreement

3.67. Like Saxby,¹³² Endon also sought to manage the selling of its lighting products online through the implementation of an ILA. The exact date of the first introduction of the Endon ILA is unclear,¹³³ however, it is clear from the evidence that follows that, in 2011, after the introduction of the online pricing policy, Endon decided to roll out an ILA for all customers.

3.68. Although one aim of the ILA was to ‘*streamline customers to those who were generating meaningful business*’,¹³⁴ [Sales Director] of Endon has explained that a key purpose of the ILA was to reduce the levels of online discounting:¹³⁵

*‘One of the key challenges with the introduction of the pricing policy was how to implement the policy. We did this through the introduction of the ILA. **The pricing policy was communicated to resellers at the time of signing or renewing the ILA. Although the Endon pricing policy was not included in the ILA for obvious legal reasons, resellers signing the ILA understood that the Endon pricing policy was a condition of the ILA. The ILAs acted as a veil.** If resellers did not comply with Endon pricing policy then we could threaten to terminate the ILA meaning that the reseller would not be able to sell Endon products over the internet or not renew the ILA. It did not happen very often but if it did, we would dress it up and find another explanation for not renewing the ILA.’* (emphasis added by CMA)

3.69. [Sales Director] of Endon described in his witness statement how the Endon pricing policy was implemented:¹³⁶

*‘I took responsibility for relaying the pricing policy to customers. **Whenever a new customer requested images of Endon products to sell online, I would either visit the customer in person or telephone them to explain the online pricing policy.** This would have been communicated, more or less, along the following lines “If you want to check online we do impose a*

¹³² See paragraph 3.53 above.

¹³³ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 25 (URN 01013). [Sales Director] states that: ‘I have no documentary evidence as to the exact date or period of its introduction. [Retail Sales Manager] thought that an early version of an ILA may have been in existence before she joined Endon in 2009. Unfortunately, I cannot expand upon this because I cannot recall. My best approximation is that prior to 2011 the ILA is likely to have been a more informal licence agreement for the use of Endon images but that in 2011 a more formal ILA was introduced.’

¹³⁴ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 29 (URN 01013).

¹³⁵ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 31 (URN 01013).

¹³⁶ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 19 (URN 01013).

pricing policy as we want everyone to get a fair margin, so we are happy to sell to you if you toe the line”.’ (emphasis added by CMA)

- 3.70. [Sales Director] of Endon considered that the Endon online pricing policy was understood by customers:¹³⁷

‘I was making plain the situation and it was in turn understood by prospective customers.’

- 3.71. [Sales Director] of Endon also confirmed in interview with the CMA that all resellers with an ILA would have understood that they were required to set their online prices in accordance with the online pricing policy:¹³⁸

‘Anybody who was dealing with us and was using our images would have a licence agreement and thereby be familiar with what our pricing policy was.’

Concerns about legality

- 3.72. The Endon online pricing policy was introduced in early 2010.¹³⁹ The evidence suggests that there were some periods after this when the pricing policy was less actively enforced by Endon in light of concerns about its legality. However, there is no evidence that the pricing policy was ever formally withdrawn prior to the CMA’s investigation. According to [Sales Director]’s witness evidence, resellers assumed it still applied throughout the period until at least March 2015 (his effective departure from Endon).¹⁴⁰

- 3.73. In February 2011, Endon became aware of concerns about the legality of online pricing policies in the sector, and sought legal advice on the Endon pricing policy. Following that advice, Endon engaged in compliance training and stopped actively enforcing the policy:¹⁴¹

‘In February 2011, Endon became aware of a letter from the ‘[X]’ claiming that certain resale price maintenance (“RPM”) practices carried out by a competitor were anti-competitive. [...] On the basis of this letter we sought legal advice regarding our own pricing practices, which was received. In accordance with the legal advice we undertook internal compliance training. [...] Following this training I recall a distinct period when the Endon business was whiter than white. Although we still issued RRP price lists, these were

¹³⁷ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 19 (URN 01013).

¹³⁸ Transcript of interview with [Sales Director] dated 11 November 2016, CD 2, p7, line 11 (URN 01003).

¹³⁹ See paragraph 3.63 above.

¹⁴⁰ Statement of Witness: [Sales Director] dated 22 December 2016, paragraphs 36 and 41 (URN 01013). See also Transcript of interview with [Sales Director] dated 11 November 2016, CD 2, p10, line 24 (URN 01003): when asked in interview if the level of reseller compliance changed over time, [Sales Director] replied ‘Overall no I don’t think so’.

¹⁴¹ Statement of Witness: [Sales Director] dated 22 December 2016, paragraphs 32–33 (URN 01013).

not enforced and Endon was not actively engaging in any RPM activities. Endon focused on supplying a smaller group of established account customers online and therefore received fewer complaints.'

- 3.74. However, the pricing policy was never formally withdrawn and within a few months the number of complaints from resellers about low online prices increased again. This led to Endon recommencing active enforcement of the policy, despite the ongoing concerns about the legality of the policy:¹⁴²

*'...eventually the more established account customers started undercutting each other and I would receive a call from customer A complaining about customer B undercutting, and would agree to look into it. I would contact customer B, who would complain that customer A had done the same the week before. **As a result, in around mid to late 2011, the decision was taken to reintroduce the internet pricing policy.**'* (emphasis added by CMA)

- 3.75. On 18 May 2012, Endon also received a warning letter from the OFT regarding a potential infringement of competition law as a result of RPM practices.¹⁴³ Although Endon did not enforce the policy as actively as before and it was not explained to resellers explicitly (as Endon was trying to avoid detection), *'customers were under no illusions and knew it formed part of the agreement when they signed the ILA'*.¹⁴⁴ In his witness statement, [Sales Director] stated that:¹⁴⁵

*'Following the OFT [warning] letter, we continued to restrict the number of internet accounts and close down accounts that had small turnover and reverted back to not actively enforcing the RPM policy. **However, although the pricing policy would not have been explained in explicit terms, customers were under no illusions and knew it formed part of the agreement when they signed the ILA. [...]** Our approach to offending conduct was much less vigorous than in the earlier period but we still continued with the policy.'* (emphasis added by CMA)

- 3.76. In his witness statement, [Sales Director] stated that due to ongoing complaints from resellers, he continued enforcing the Endon pricing policy notwithstanding the warning letter from the OFT:¹⁴⁶

¹⁴² Statement of Witness: [Sales Director] dated 22 December 2016, paragraphs 34–35 (URN 01013).

¹⁴³ See paragraph 2.1 above.

¹⁴⁴ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 36 (URN 01013).

¹⁴⁵ Statement of Witness: [Sales Director] dated 22 December 2016, paragraphs 36–37 (URN 01013).

¹⁴⁶ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 38 (URN 01013).

*'From 2012 to mid-2015, the Endon business went through a difficult and chaotic period including the merger with Poole. The Endon management team were aware of the restrictions regarding RPM practices, but were also witnessing a steady decline of the Endon business and increasing numbers of complaints from customers complaining about other resellers heavily discounting online. During this period a third of the business was online and I came under significant pressure from resellers to do something to protect them from being undercut. **During this period, there was a gradual descent back into the pricing Endon policy, as I believed this was the only way to preserve the Endon business and its employees.** I cannot recall exactly when the pricing policy was reintroduced, but believe it was towards the end of 2013/early part of 2014.'* (emphasis added by CMA).

- 3.77. Given Endon's awareness of the illegality of its policy to restrict retail prices, Endon sought to reduce the risk of detection. Endon instructed its employees not to include any references to pricing restrictions in emails. For instance, in an email dated 14 November 2012, [Retail Sales Manager] of Endon forwarded an email from [Area Sales Manager] of Endon to [Sales Director] of Endon asking to discuss the content of an email from a reseller regarding *'a few companies online selling higher than 20% discount'*. [Sales Director] replied:¹⁴⁷

'Thankks [sic] for the info [Area Sales Manager], but this info should not be committed to e mail.'

In interview with the CMA, [Sales Director] explained that he made this comment because he was conscious that enforcing a pricing policy was *'wrong'*.¹⁴⁸

- 3.78. On 1 January 2015, the trade and assets of Endon were transferred to Poole and Poole continued to operate the Endon pricing policy. [Sales Director] explained to the CMA in interview: *'when it became clear that it'd be myself as the successor [to [Sales Director]] I clearly wanted to continue what they were doing because they were doing a good job and customers were working with it'*.¹⁴⁹ Further detail regarding the continuation of the policy and alignment with the Saxby pricing policy following the merger with Poole is provided in Part IV below.

¹⁴⁷ Email from [Sales Director] (Endon) to [Retail Sales Manager] (Endon) and [Area Sales Manager] (Endon) dated 14 November 2012 (URN 00044).

¹⁴⁸ Transcript of interview with [Sales Director] dated 11 November 2016, CD 2, p36, lines 3–4 (URN 01003).

¹⁴⁹ Transcript of interview with [Sales Director] dated 31 October 2016, CD 2, p8, lines 12–15 (URN 01000).

Monitoring of the Endon online pricing policy and consequences of non-compliance

3.79. Endon employees sought to monitor and take action against reseller non-compliance with the Endon pricing policy through the following mechanisms:

- Monitoring of retail prices via reports of discounting from resellers.
- [Sales Director] and Endon ASMs asking resellers to increase their prices in line with the policy.
- Warnings to resellers breaching the policy that their accounts would be suspended or their ILAs would be revoked, or actual suspension of accounts.

3.80. In his witness statement, [Sales Director] of Endon stated that if a reseller was not following the pricing policy, he was active in following up with the relevant company to ask it to increase its prices:¹⁵⁰

*'In the event that I received a complaint from resellers about an online company pricing below the policy, I would contact the company and explain that their prices were a bit low. [...] **Once contacted about the pricing, companies would generally thank me for identifying the error and immediately adjust their prices online.** Largely, the response was positive and that would be the end of the matter'* (emphasis added by CMA)

3.81. In his witness statement, [Sales Director] of Endon stated that if a reseller was not following the Endon pricing policy and refused to increase its prices he would give the company 24 hours to comply or its account would be 'put on stop', meaning that its account would be suspended:¹⁵¹

*'[...] I would give these companies 24 hours to increase their prices. **If after 24 hours the price had not increased, their account would be put on 'stop'.** I recall that a significant number of accounts were put on stop.'* (emphasis added by CMA)

3.82. This is corroborated by other evidence. For example:

- In response to a request for information from the CMA, [Reseller] stated:¹⁵²

¹⁵⁰ Statement of Witness: [Sales Director] dated 22 December 2016, paragraphs 20–21 (URN 01013).

¹⁵¹ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 21 (URN 01013).

¹⁵² Question 4 of [Reseller]'s response to section 26 notice dated 5 September 2016 (URN 00832).

'We were informed our account would be put on stop if we sold Endon products for less than policy [sic] required.'

- On 14 February 2011, in an email from [Retail Sales Manager] of Endon to Endon's Credit Control Manager, [Credit Control Manager], copying in Endon ASMs, [Retail Sales Manager] stated:¹⁵³

*'Gents – I suggest if any of the above [account numbers and names] belong to you, you contact them ASAP and **advise that they are on stop due to their internet pricing/lack of license agreement. [...]** Accounts will come off stop once I have been informed that prices have been altered.'* (emphasis added by CMA)

3.83. Requests to increase prices were typically made orally given the concerns about making such requests in writing.¹⁵⁴ For example, [Reseller] said that it was unable to provide any documents to the CMA about the Endon pricing policy because *'[a]ll instructions were carried out verbally.'*¹⁵⁵

3.84. The CMA also notes the following examples of monitoring of prices by resellers and Endon employees, some of which further demonstrate that Endon employees contacted resellers that were pricing below the prescribed level:

- On 14 November 2012, [Area Sales Manager] of Endon emailed [Retail Sales Manager] of Endon to pass on concerns from a reseller, [Reseller], that some companies were discounting Endon products more than 20% and *'trying to break your [Endon's] rules'*. The email from the customer stated that:¹⁵⁶

'Just noticed a few companies online selling higher than 20% discount. Links below, can you take a look for me. Obviously, our sales have increased over the past 2 months so things are getting better. But we are still left with companies out their [sic] trying to break your rules. Really its [sic] not on... This took me 5 minutes to compile, very simple for anyone at Endon to do. So i [sic] need to ask, why is it not being done at your head office? [...]

¹⁵³ Email from [Retail Sales Manager] (Endon) to [Credit Control Manager] (Endon) dated 14 February 2011 (URN 00003).

¹⁵⁴ For example, see paragraph 3.77 above.

¹⁵⁵ Question 6 of [Reseller]'s response to section 26 notice dated 5 September 2016 (URN 00832).

¹⁵⁶ Email from [Area Sales Manager] (Endon) to [Retail Sales Manager] (Endon) dated 14 November 2012 (URN 00044).

This one below shows a perfect example of people trying to be a penny cheaper than 20%, so that they win business by ranking higher than everyone else; [Link removed].’ (emphasis added by CMA)

- On 16 October 2013, in an email from [Employee] of [Reseller] to [Retail Sales Manager] of Endon, [Reseller] reported that another company, [Reseller], was discounting Endon products online and reported that it was possible to get updates about resellers’ online prices through Amazon. [Retail Sales Manager] of Endon replied that:¹⁵⁷

‘Thank you for this information, I know it seems frustrating but we are dealing with this.

Any information you can provide is useful so please keep sending. I’ll look into the Amazon thing.’

- On 11 May 2014, in an email from [Employee] of [Reseller] to [Area Sales Manager] of Endon, [Reseller] reported that another company was heavily discounting. [Area Sales Manager] of Endon replied: *‘Noted and reported!’*¹⁵⁸
- On 25 May 2014, in an email from [Employee] of [Reseller] to [Area Sales Manager] of Endon, [Employee] reported that a company was giving a 25% discount online on a particular product and provided a screenshot. [Area Sales Manager] of Endon then forwarded the email to [Retail Sales Manager] of Endon and asked her to *‘have a look please’*.¹⁵⁹ [Sales Director] of Endon then asked [Area Sales Manager], the relevant Endon ASM:

‘Can you have any [sic] urgent word please.’¹⁶⁰ (emphasis added by CMA)

- On 12 January 2015, [Sales Director] of Endon emailed [Employee] of [Reseller] stating that some of [Reseller]’s prices had not been calculated correctly:¹⁶¹

‘I suspect you have used the wrong calculation in arriving at your RRP’s on the recently added products from our supplement.

For example the Quinn-4 should be retail £105 with an online price of £100.80, your price is £84.

¹⁵⁷ Email from [Retail Sales Manager] (Endon) to [Employee] ([Reseller]) dated 16 October 2013 (URN 00108).

¹⁵⁸ Email from [Area Sales Manager] (Endon) to [Employee] ([Reseller]) dated 11 May 2014 (URN 00180).

¹⁵⁹ Email from [Area Sales Manager] (Endon) to [Retail Sales Manager] (Endon) dated 25 May 2014 (URN 00187).

¹⁶⁰ Email from [Sales Director] (Endon) to [Area Sales Manager] (Endon) dated 27 May 2014 (URN 00189).

¹⁶¹ Email from [Sales Director] (Endon) to [Employee] ([Reseller]) dated 12 January 2015 (URN 00271).

*You have taken the 20% discount but not added the VAT.
A sure way to get it right is to simplt [sic] take 4% from the RRP'*

IV. Alignment of online pricing policies by Poole

3.85. The following section considers the alignment of the online pricing policies by Poole, including:

- merger of Saxby, Endon and Poole
- alignment of the Saxby and Endon policies by Poole, and
- monitoring of the aligned online pricing policies and consequences of non-compliance.

Merger of Saxby and Endon with Poole

3.86. On 1 January 2014, NLC formally acquired Saxby from [Shareholder] and its trade and assets were transferred to Poole (Poole having controlled Saxby's business since at least 2010).

3.87. On 1 January 2015, the trade and assets of Endon were also transferred to Poole. In August 2015, following [Sales Director] of Endon's departure, [Sales Director] of Poole took over the role as the Sales Director for Endon and Interiors 1900, in addition to the Saxby brand.¹⁶²

Alignment of the Saxby and Endon online pricing policies by Poole

3.88. In September 2015, Poole merged the pricing policies relating to Saxby and Endon into one online pricing policy that covered both brands with the exception of certain generic products, which tended to be Saxby products. Examples of Poole finalising and disseminating the updated policy include:

- On 30 September 2015, [Sales Director] of Poole emailed [Managing Director] (Managing Director of Poole), [Shareholder and Director] (Shareholder and Director of NLC and Poole) and [Company Managing Director] (Managing Director of [Company] trading as [Supplier]¹⁶³) to state that:¹⁶⁴

'We have now implemented our new internet pricing policy for customers, and from the 1st October [2015] they will not be allowed

¹⁶² Statement of Witness: [Sales Director] dated 19 January 2017, paragraphs 6 and 13 (URN 01215).

¹⁶³ [Company] is not part of the NLC group but has common shareholders with NLC. [§<]. Questions 17 and 18 of Poole Lighting Limited's response to request for information dated 2 December 2016 (URN 01142).

¹⁶⁴ Email from [Sales Director] (Poole) to [Managing Director] (Poole) dated 30 September 2015 (URN 00386).

to sell a large portion of our range for less than 4% below our trade price. I have attached a copy of the Endon and Saxby range, highlighting in green the products that people have the freedom to sell at whatever price they wish. All others, including [Reseller] will be governed by the rule. Please can you ensure that you also bring your online pricing into line to reflect these prices.

*Customers are all in agreement that this is essential to protect our business in the longer term. The discounts allowed are exactly the same that [Supplier] and [Supplier] permit, and that they actively police. **Any customers found deviating from the price will be given a warning and asked to rectify the problems within 48 hours. Failure to do so will result in us withdrawing their internet agreement and image license. If the problem still persist [sic] after this time it will result in us closing their account.** This might seem brutal, but this is proven to be the best method to protect our business. I have personally spoken to many of the license holders and they are all in agreement (**nothing has been put in writing**).*

I hope you can see the merit in taking such action and that you will implement without problem.’ (emphasis added by CMA)

[Managing Director] replied:¹⁶⁵

‘I have discussed with [Shareholder and Director] who has said he will discuss with [Company Managing Director] and ensure we get a definitive response.’

NLC does not have any record of a formal response to this email.¹⁶⁶

- On 3 November 2015, after various emails from ASMs requesting clarity about the online pricing policies applicable to Poole’s three brands, [Sales Director] of Poole sent an email confirming that the maximum discount for Saxby and Endon was 20% off the retail price:¹⁶⁷

*‘After further discussions with our Interiors team I would like to confirm the following parameters for online customers.
Interiors discounting is retail price (inc VAT) -10%¹⁶⁸*

¹⁶⁵ Email from [Managing Director] (Poole) to [Sales Director] (Poole) dated 30 September 2015 (URN 00386).

¹⁶⁶ Question 19(c) of Poole Lighting Limited’s response to request for information dated 2 December 2016 (URN 01142).

¹⁶⁷ Email from [Sales Director] (Poole) to the Interiors sales team dated 3 November 2015 (URN 00457).

¹⁶⁸ Poole acquired Interiors 1900 Limited on 1 May 2015. The CMA has reasonable grounds for suspecting that Poole operated an online pricing policy in relation to the Interiors 1900 brand but makes no findings in this regard.

Saxby & Endon is retail price (inc VAT) – 20%

3.89. The evidence demonstrates that Poole remained concerned not to put discussions about the policies in writing due their potential illegality, but Poole nevertheless continued to implement and enforce the policies:

- On 1 September 2015, [Sales Director] of Poole emailed [Area Sales Manager] of Poole asking him not to communicate pricing requests via email:¹⁶⁹

'Please do not communicate pricing requests via email in future. He could hold you to price fixing allegations.'

- On 30 September 2015, [Area Sales Manager], a Poole ASM, emailed [Sales Director] of Poole to ask whether the newly created price list could be sent to customers. [Sales Director] of Poole replied:¹⁷⁰

'You can, but please call to explain the colour coding, rather than put it in an email.'

- On 2 October 2015, [Area Sales Manager] of Poole emailed [Employee] of [Reseller] to explain the aligned online pricing policy:¹⁷¹

'Thank you for returning your internet trading agreement form. As part of this we ask that all online sellers do not devalue our product.'

*I have attached a guide to this email which show products highlighted in green. These items are deemed generic in the market place and therefore you can cost as you see fit. However **all other items must be sold at a maximum discount of 4% off the retail price.***

As I mentioned this applies to all online sellers so no one will have an advantage over anyone else.

Typically, as part of the regular checks done by our team a few items have been highlighted on your site as heavily discounted.

Can I ask you to review this asap please? (emphasis added by CMA)

¹⁶⁹ Email from [Sales Director] (Poole) to [Area Sales Manager] (Poole) dated 1 September 2015 (URN 00324). [Area Sales Manager] was an ASM for the Interiors 1900 brand: Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 11 (URN 01215).

¹⁷⁰ Email from [Sales Director] (Poole) to [Area Sales Manager] (Poole) dated 30 September 2015 (URN 00374).

¹⁷¹ Email from [Area Sales Manager] (Poole) to [Employee] ([Reseller]) dated 2 October 2015 (URN 00404).

- On 5 October 2015, [Sales Director] of Poole reminded [Area Sales Manager] of Poole not to put anything in writing in replying to [Reseller]:¹⁷²

‘Do not put anything in writing with regards to this!’

- On 5 October 2015, [Sales Director] of Poole also reminded other Poole ASMs not to put in writing requests to resellers to increase their prices:¹⁷³

*‘Just to make it clear one final time, you **cannot** write emails to customers telling them to lift their pricing.’ (emphasis as in original)*

- On 1 December 2015, [Sales Director] of Poole forwarded to [Managing Director] of Poole an email from [Employee] of [Reseller] in which [Reseller] alleged that Poole had engaged in price-fixing and said that [Reseller] had ‘*spoken to the Government department to do with “Anti-Competitive Activities”*’. [Sales Director] of Poole told [Managing Director] of Poole ‘*You need to be aware of this.*’¹⁷⁴
- On 22 February 2016, [Area Sales Manager] of Poole emailed [Employee] and [National Sales Manager] of Poole asking them to attend a meeting with him and a reseller ‘*to discuss the Internet prices as we require them to be displayed. I have been instructed by [Sales Director] to talk to them about the prices [...] I can not [sic] send this request by mail.*’¹⁷⁵ (emphasis added by CMA)
- On 27 April 2016, [Retail Sales Manager] of Poole forwarded to [Sales Director] of Poole a news alert titled ‘*BREAKING: Bathroom products firm fined by regulator*’.¹⁷⁶ The alert related to the CMA’s investigation of online resale price maintenance in the bathroom fittings sector.¹⁷⁷

Monitoring of the aligned online pricing policies and consequences of non-compliance

- 3.90. The evidence shows that Poole continued to monitor reseller compliance with the online pricing policies via reports of discounting from resellers:

¹⁷² Email from [Sales Director] (Poole) to [Area Sales Manager] (Poole) dated 5 October 2015 (URN 00406).

¹⁷³ Email from [Sales Director] (Poole) to ASMs dated 5 October 2015 (URN 00407).

¹⁷⁴ Email from [Sales Director] (Poole) to [Managing Director] (Poole) dated 1 December 2015 (URN 00473).

¹⁷⁵ Email from [Area Sales Manager] (Poole) to [Employee] (Poole) and [National Sales Manager] (Poole) dated 22 February 2016 (URN 00501).

¹⁷⁶ Email from [Retail Sales Manager] (Poole) to [Sales Director] (Poole) dated 27 April 2016 (URN 00541).

¹⁷⁷ Case CE/9857-14: Online resale price maintenance in the bathroom fittings sector.

- A record of a telephone conversation on 26 May 2015 between [Area Sales Manager] of Poole and [Reseller] shows Poole's intention to police Saxby online prices in a similar way to Endon:¹⁷⁸

*'theyve [sic] been very quiet this year [...] and its [sic] not Saxby related generally [sic] but does have an ongoing issue with being grossly undercut by online sellers In particular mirrors and Knight/ Taurus fittings. Told him we could help out with POS, marketing materials and pricing. [...] **Hopeful that we can follow Endons [sic] lead on online policing once mergers finished.**'* (emphasis added by CMA)

- On 27 July 2015, [Employee] of [Reseller] emailed [Sales Director] of Poole to ask:¹⁷⁹

'Who would be the best person to contact regarding Endon discounting issues?'

[Sales Director] replied:¹⁸⁰ *'It's me for the time being.'*

Later that day, [Employee] of [Reseller] sent a series of links to other resellers' websites to [Sales Director] of Poole and [Employee] of [Reseller].¹⁸¹ The email had the subject '*Discounting*'. [Sales Director] replied:¹⁸²

'Many thanks for your email, [Employee], I will speak with the offending customers personally' (emphasis added by CMA)

- On 11 November 2015, [Area Sales Manager] of Poole emailed [Employee] (surname unknown) of [Reseller], stating:¹⁸³

*'It has been brought to my attention that some of your internet prices are below that as agreed as being trade less 20% plus vat, in particular the Fargo ranges from Endon. **Would you please bring these in line with the agreed pricing structure.**'* (emphasis added by CMA)

- On 31 March 2016, [Product Development Director] of Poole noticed some apparent confusion by customers about the Saxby and Endon

¹⁷⁸ [Area Sales Manager] Call Log (URN 00458).

¹⁷⁹ Email from [Employee] ([Reseller]) to [Sales Director] (Poole) dated 27 July 2015 (URN 00313).

¹⁸⁰ Email from [Sales Director] (Poole) to [Employee] ([Reseller]) dated 27 July 2015 (URN 00313).

¹⁸¹ Email from [Employee] ([Reseller]) to [Sales Director] (Poole) and [Employee] ([Reseller]) dated 27 July 2015 (URN 00315).

¹⁸² Email from [Sales Director] (Poole) to [Employee] ([Reseller]) dated 28 July 2015 (URN 00315).

¹⁸³ Email from [Area Sales Manager] (Poole) to [Employee] (surname unknown) ([Reseller]) and Sales ([Reseller]) dated 11 November 2015 (URN 00460).

online pricing policies and that certain customers were not adding back VAT to the online prices. [Product Development Director] of Poole asked [Sales Director] of Poole:¹⁸⁴

'It seems that everyone is taking this price as including VAT and not adding VAT to it?

For example if you look at the muni table lamp on the web it is going out at £124.80 (which is Retail £130) less 4% but should retail be £156 including VAT and then take the 4% off. [...]

*Can you let me know as **it seems everyone is doing this wrong?***
(emphasis added by CMA)

- On 22 April 2016, [National Sales Manager] of Poole received an email from [Reseller] reporting that a number of suppliers were selling Endon products below trade price less 4%:¹⁸⁵

'Looking at the Endon products online, there are a number of suppliers selling below Trade – 4%.

An example of one product is below: Trade price – 4% would be £37.44 inc VAT and as you can see below all of the sellers are breaching that rule. There are other examples I can send through. Are all sellers updating their pricing??'

- On 9 August 2016, in an email from [Area Sales Manager] of Poole to [Area Sales Manager] of Poole, [Area Sales Manager] reported that, whilst one customer had been following the pricing policy, a number of other online retailers had not been. [Area Sales Manager] of Poole reported that this was creating problems for the reseller following the policy:¹⁸⁶

'[Employee] at [Reseller] [sic] put all His [sic] prices up for two weeks to trade +vat less 20% , and sold nothing , as surprise surprise no one else bothered .

He now will price match , [Employee] is one of the better online retailers , and would rather earn margin , Both [Sales Director] and [Retail Sales Manager] are aware of [Employee] [sic] support , but alas He [sic] seems to stand alone.'

¹⁸⁴ Email from [Product Development Director] (Poole) to [Sales Director] (Poole) dated 31 March 2016 (URN 00526).

¹⁸⁵ Email from [National Sales Manager] (Poole) to [Retail Sales Manager] (Poole) dated 22 April 2016 forwarding email from [Employee] ([Reseller]) (URN 00531).

¹⁸⁶ Email from [Area Sales Manager] (Poole) to [Area Sales Manager] (Poole) dated 9 August 2016 (URN 00599).

3.91. Poole also continued to enforce the pricing policies. In particular, in order to persuade resellers to change their prices to the agreed levels, Poole threatened to suspend accounts or revoke the ILA, withdrawing the reseller's right to use Poole's official images. For instance:

- On 9 June 2015, [Area Sales Manager] of Poole emailed [Sales Director] of Poole attaching a spreadsheet which provided explanations for declining accounts in his area. Two of the entries in the spreadsheet listed '*internet prices*' as the reason for the account closure.¹⁸⁷
- On 28 July 2015, [Sales Director] of Poole emailed the Endon ASMs and asked them to have a '*quiet word*' with customers not adhering to the Endon pricing policy.¹⁸⁸

*'In light of the internet email I sent last week I have been issued with the following examples of customers not adhering to our policy. Please can you take 10 minutes to look at the ones you are responsible for and have a quiet word with them. **If they do not alter them I will be forced to revoke their license.**'* (emphasis added by CMA)

- On 27 January 2016, [Area Sales Manager] of Poole asked [Sales Director] of Poole whether [Sales Director] was happy for a reseller to have Endon images for its website, noting that '*I have called them [...] and told him he [...] must adhere to our pricing policy on line*'.¹⁸⁹ [Sales Director] replied:¹⁹⁰

*'I'm OK with this providing they adhere to our terms and sign the agreement. **One instance of not playing ball and I will revoke their license.**'* (emphasis added by CMA)

- [Reseller X] received an instruction to: '*sell Poole "unique" products at a fixed price on google in line with other customers **otherwise we would face being taken to court over image rights***'.¹⁹¹ (emphasis added by CMA)
- In an email dated 5 May 2016 from [Employee] of [Reseller] to [National Sales Manager] of Poole, [Employee] explained the action that he was

¹⁸⁷ Email from [Area Sales Manager] (Poole) to [Sales Director] (Poole) dated 9 June 2014 (URN 00299), attaching spreadsheet (URN 00300): see entries for [Reseller] and [Reseller]. Another entry lists '*internet trader*' as the reason for the account closure: see entry for [Reseller].

¹⁸⁸ Email from [Sales Director] (Poole) to Poole ASMs dated 28 July 2015 (URN 00314).

¹⁸⁹ Email from [Area Sales Manager] (Poole) to [Sales Director] (Poole) dated 27 January 2016 (URN 00484).

¹⁹⁰ Email from [Sales Director] (Poole) to [Area Sales Manager] (Poole) dated 27 January 2016 (URN 00484).

¹⁹¹ Response to Question 1 of section 26 notice to [Reseller X] dated 30 September 2016 (URN 00969).

taking to follow the Saxby and Endon pricing policy after its account was suspended:¹⁹²

‘Following our telephone conversation regarding [Reseller]s account being suspended I am happy for your purposes (Please do not share with others parties not involved) to send proof of the extensive database changes in place and ready for uploading. [...]. I understand fully your wants for having a fixed discount across the board [...].’
(emphasis added by CMA)

- 3.92. Since the commencement of the CMA’s investigation on 16 August 2016, Poole has terminated its online pricing policies by informing resellers that there is no longer a pricing policy in place.¹⁹³
- 3.93. Poole is also developing compliance measures to ensure that employees are aware of the law relating to resale price maintenance.¹⁹⁴

D. Market definition

I. Purpose of, and framework for, assessing the relevant market

- 3.94. When applying the Chapter I prohibition and Article 101(1) TFEU, the CMA is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement in question has as its object or effect the appreciable prevention, restriction or distortion of competition.¹⁹⁵
- 3.95. In the present case, the CMA considers that it is not necessary to reach a definitive view on market definition in order to determine whether there is an agreement between undertakings which has as its object the appreciable prevention, restriction or distortion of competition.¹⁹⁶
- 3.96. However, for the purposes of establishing the level of any financial penalties that may be imposed on an undertaking for a breach of the Chapter I prohibition and/or Article 101 TFEU, the CMA will consider an undertaking’s ‘relevant turnover’, which is the turnover of the undertaking in the relevant

¹⁹² Email from [Employee] ([Reseller]) to [Area Sales Manager] (Poole) dated 5 May 2016 (URN 00555).

¹⁹³ Question 20 of Poole Lighting Limited’s response to request for information dated 2 December 2016 (URN 01142).

¹⁹⁴ Question 20 of Poole Lighting Limited’s response to request for information dated 2 December 2016 (URN 01142).

¹⁹⁵ Case T-62/98 *Volkswagen AG v Commission* EU:T:2000:180, paragraph 230, and Case T-29/92 *SPO and Others v Commission* EU:T:1995:34, paragraph 74.

¹⁹⁶ See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, in which the CAT held, at [176], that in Chapter I cases ‘determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement’.

product and geographic markets affected by the infringement in the undertaking's last business year.¹⁹⁷ Therefore, the CMA has considered which products or services are most likely to account for relevant turnover for the purposes of establishing a financial penalty.

- 3.97. To that effect, the CMA must be '*satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement*'.¹⁹⁸ The Court of Appeal has made clear that the market which is identified for the purposes of setting an appropriate penalty may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement, rather than by a relatively exact application of principles that would be relevant for a formal analysis.¹⁹⁹

II. Relevant product market

- 3.98. The Infringements relate primarily to the supply of domestic light fittings. The CMA has considered whether domestic light fittings constitute a separate market from non-domestic light fittings.
- 3.99. The CMA considers that domestic light fittings constitute a separate product market from non-domestic light fittings for the following reasons:
- In previous merger decisions, the Commission has consistently distinguished between 'consumer/residential light fixtures' and 'professional/industrial light fixtures'.²⁰⁰ According to the Commission, 'professional' light fixtures are primarily focused on functionality and are usually installed by professional installers because they require additional work before being operational. By contrast, 'consumer/residential' light fixtures are more easy to use given their pre-wire application, so can be installed by non-professionals. The Commission has also commented that 'professional' light fixtures are more expensive and are mainly distributed through electric wholesalers, while 'residential' light fixtures are predominantly distributed through retail markets such as DIY stores.

¹⁹⁷ *Guidance as to the appropriate amount of a penalty* (OFT 423, September 2012), adopted by the CMA Board, paragraph 2.7.

¹⁹⁸ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 170.

¹⁹⁹ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 173.

²⁰⁰ Case M.6357 *Koninklijke Philips/Indal Group*, decision of 23 November 2011, paragraph 11, Case M.6194 *Osram/Siteco Lighting*, decision of 22 June 2011, paragraphs 12–13.

- The main driver of demand for domestic light fittings is replacement purchase, whereas the non-domestic sector is more reliant on new build and refurbishment activity.²⁰¹ The majority of domestic light fittings are replaced due to decorative styling choices rather than through the failure of the light fitting, whereas in the non-domestic sector, replacement tends to be undertaken on a planned or reactive basis in response to the expected life-span of the fitting.²⁰²
- Domestic light fittings tend to be distributed via traditional retail channels such as DIY stores.²⁰³ By contrast, distribution in the non-domestic sector is more complex and depends on the location and scale of individual projects.²⁰⁴ Given the specialist nature of the non-domestic lighting sector, distribution is dominated by wholesalers/distributors (58%).²⁰⁵
- Market reports distinguish between domestic light fittings and non-domestic light fittings, suggesting that these are viewed as distinct within the industry.²⁰⁶

3.100. The CMA has considered whether the market for domestic light fittings should be defined more narrowly. Poole submitted that (i) the wholesale channel is in a separate market from the retail channel; and (ii) sales to national multiple retailers are in a separate market from sales to specialist independent retailers.

- **Wholesale/retail channel:** Poole's online pricing policies applied to full ranges of domestic light fittings and to a range of resellers making sales online to end-users, including retailers and electrical wholesalers. Indeed, the reseller party to the Infringements, [Reseller X], describes itself as an '*independent wholesaler*' and is a member of [S<], and [S<].²⁰⁷ Therefore, the CMA considers that it is appropriate to aggregate all sales of domestic light fittings to resellers for the purposes of this investigation.
- **National multiple retailers/specialist independent retailers:** Poole's online pricing policies applied to specialist independent retailers. Poole submitted that sales through national multiple retailers are not

²⁰¹ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p58 and p63 (URN 01143).

²⁰² AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p58 (URN 01143).

²⁰³ See paragraph 3.23 above.

²⁰⁴ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p82 (URN 01143).

²⁰⁵ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, p88 (URN 01143).

²⁰⁶ See AMA Research (2014), *Lighting Market Report – UK 2014-2018 Analysis* (URN 01243) and AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis* (URN 01143).

²⁰⁷ See [S<], accessed on 18 January 2017 (URN 01241).

substitutable for sales through specialist independent retailers on the demand-side or supply-side. For example, on the demand-side, Poole submitted that products supplied to specialist independent retailers are generally more expensive and higher value than those supplied to national multiple retailers, and there are different end customers who tend to use each retail channel. On the supply-side, Poole submitted that there were significant differences between running an 'OEM/own label' business to running an independent retailer's business, and that it would not be possible for an 'OEM/own label' supplier to national multiple retailers to switch capacity quickly and effectively and without the need for substantial sunk investments to supply specialist independent retailers.²⁰⁸

The CMA has not investigated this issue in detail given that the primary purpose of defining the market in an RPM case is for the purposes of calculating the penalty. In light of the evidence provided by Poole on supply side substitutability, the different competitive conditions and competitors in the two channels, and the evidence that Poole's online pricing policies applied to specialist independent retailers, the CMA has concluded that, for the purposes of this investigation, the relevant product market is the supply of domestic light fittings to specialist independent retailers.

- 3.101. For the reasons set out above, the CMA finds that the relevant product market is the supply of domestic light fittings to specialist independent retailers and wholesalers.

III. Relevant geographic market

- 3.102. The CMA has considered factors for determining the relevant geographic market for domestic light fittings supplied to specialist independent retailers and wholesalers. The CMA has considered whether the market is likely to be narrower or wider than the whole of the UK.
- 3.103. The CMA considers that the market is not likely to be narrower than the UK because, for example, the evidence that the CMA has indicates that:
- manufacturers of domestic light fittings tend to supply their products to resellers across the UK, rather than on a regional basis;²⁰⁹

²⁰⁸ For example, before NLC integrated Endon into Poole, [3<]. See Annex to letter from [Lawyer] (representing NLC) to the CMA dated 30 March 2017, and the relevant business plan provided to the CMA on 4 April 2017.

²⁰⁹ For example, Poole describes itself as '*the largest provider of domestic lighting to UK national account and independent retailers*' (<http://www.poolelighting.com/about.php>) (URN 01212); Dar Lighting Limited's website

- UK resellers purchase domestic light fittings as a minimum from across the UK from UK-based suppliers or distributors, rather than on a regional basis;²¹⁰ and
- the Infringements cover the supply of domestic light fittings to specialist independent retailers and wholesalers across the whole of the UK.

- 3.104. In a previous decision, the Commission defined the market for ‘professional/industrial light fixtures’ as national in scope, although more recently has left open the possibility that the geographic market could be wider.²¹¹ The Commission noted that market players’ shares are very different in different Member States and that a national distribution network is crucial for the success of a given producer.²¹² The CMA understands that this is also the case in relation to domestic light fittings: the six largest suppliers in the UK (including Poole) are all UK-based companies²¹³ and the other major suppliers identified in AMA’s market report have UK bases, giving them access to a national distribution network.²¹⁴
- 3.105. Although there are also factors indicating that manufacturers compete to supply light fittings across borders within the EEA,²¹⁵ the CMA considers that the available evidence is not sufficiently comprehensive or compelling to define a market wider than the UK.
- 3.106. For the reasons set out above, the CMA finds that the relevant geographic market is the UK.

states: ‘[w]e have the most experienced, enthusiastic team of sales representatives in the lighting industry covering the whole of the UK and Ireland who, together with our knowledgeable sales administrators, service the needs of over 1000 retailers in a friendly and efficient manner’ (<http://www.darlighting.co.uk/about>) (URN 01213); Elstead Lighting’s website states: ‘Elsstead is one of the leading residential lighting manufacturer and distributors in the UK.’ (<http://www.elssteadlighting.com/manufacturing--design-pa-1863.php>) (URN 01214).

²¹⁰ Indeed, the CMA has evidence that some resellers would be willing to purchase products from further afield. For example, [Reseller] stated, ‘I source lighting from suppliers all over Europe’, [Reseller]’s response to Question 8 of section 26 notice dated 5 September 2016 (URN 00823); [Reseller] purchases light fittings from Germany, [Reseller]’s response to Question 8 of section 26 notice dated 5 September 2016 (URN 00832).

²¹¹ Case M.6357 *Koninklijke Philips/Indal Group*, decision of 23 November 2011, paragraph 57, IV/M.258 CCIE/GTE, decision of 25 September 1992, paragraph 20.

²¹² Case M.6357 *Koninklijke Philips/Indal Group*, decision of 23 November 2011, paragraph 60.

²¹³ See paragraph 3.22 above.

²¹⁴ AMA Research (2016), *Lighting Market Report – UK 2016-2020 Analysis*, pp76–78 (URN 01143).

²¹⁵ For example, in a previous decision, the Commission noted that the results from its market investigation suggested that the main players in the market for ‘professional/industrial light fixtures’ are active on an EEA scale and transport costs are low, Case M.6357 *Koninklijke Philips/Indal Group*, decision of 23 November 2011, paragraph 59.

IV. Conclusion on market definition

- 3.107. In view of the foregoing, the CMA finds that the relevant market in this case is the supply of domestic light fittings to specialist independent retailers and wholesalers in the UK.

4. LEGAL ASSESSMENT

A. Introduction

4.1. This Chapter sets out the CMA's legal assessment of the pricing policies:

- Saxby²¹⁶ agreed with its resellers that the resellers would not sell certain Saxby branded products online at prices below a maximum discount of 20% off the trade price (the **Saxby Policy**);²¹⁷ and
- Endon²¹⁸ agreed with its resellers that the resellers would not sell Endon branded products online at prices below a maximum discount of 20% off the RRP excluding VAT (the **Endon Policy**).²¹⁹

4.2. For administrative efficiency, the CMA has identified one reseller, namely [Reseller X], as an example from the numerous resellers selling Saxby and Endon branded products online in order to demonstrate the existence of an agreement and/or concerted practice with each of Saxby and Endon.

4.3. The CMA has reasonable grounds for suspecting that numerous other resellers selling Saxby and Endon branded products online were subject to the Saxby Policy and the Endon Policy, and resellers generally adhered to the suppliers' pricing requests.²²⁰ However, the CMA makes no findings in respect of other resellers of Saxby and Endon branded products.

4.4. While the CMA considers that [Reseller X] is a party to infringing agreements with Saxby and Endon, the CMA has decided not to address this Decision to [Reseller X].²²¹ The evidence demonstrates that the Saxby Policy and the Endon Policy were operated as standard policies applicable to numerous resellers. The CMA therefore considers it reasonable and proportionate to apply Rule 10(2) in this case and address this Decision only to the suppliers identified in paragraph 1.1 above. This does not preclude the CMA from taking enforcement action against resellers in any future cases.

²¹⁶ As explained in paragraphs 4.191–4.192 below, for the duration of the Saxby Relevant Period, Saxby's business was operated by Poole and Poole exercised decisive influence over Saxby. For ease of reference, we refer to Saxby only.

²¹⁷ See paragraph 3.41 above.

²¹⁸ As explained in paragraph 3.13 above, Endon's business was merged into Poole in January 2015. Both Endon and Poole were wholly owned by NLC throughout the Endon Relevant Period. For ease of reference, we refer to Endon only.

²¹⁹ See paragraph 3.63 above.

²²⁰ See paragraphs 4.28–4.33 and 4.60–4.70 below.

²²¹ Under Rule 10(2) of the CMA's Rules, where the CMA considers that an agreement infringes the Chapter I prohibition or the prohibition in Article 101(1) TFEU, the CMA may address its infringement decision to fewer than all the persons who are or were party to that agreement.

- 4.5. For present purposes, the CMA's findings are made by reference to the following provisions of the UK and EU competition rules:
- Section 2 of the Act prohibits (among other matters) agreements and concerted practices between undertakings which may affect trade within the UK and have as their object the prevention, restriction or distortion of competition within the UK, unless an applicable exclusion is satisfied or the agreements in question are exempt in accordance with the provisions of Part 1 of the Act. References to the UK are to the whole or part of the UK.²²² The prohibition imposed by section 2 of the Act is referred to as 'the Chapter I prohibition'.
 - Article 101(1) of the TFEU prohibits (among other matters) agreements and concerted practices between undertakings which may affect trade between EU Member States and which have as their object the prevention, restriction or distortion of competition within the EU, unless they are exempt in accordance with Article 101 (3) TFEU.
- 4.6. For the reasons set out below, the CMA's findings are that Saxby and Endon²²³ infringed the Chapter I prohibition and/or Article 101 TFEU through agreements and/or concerted practices with [Reseller X] that [Reseller X] would not sell Saxby or Endon branded products online below a specified online price.

B. Undertakings

I. Key legal principles

- 4.7. For the purposes of the Chapter I prohibition and Article 101 TFEU, the focus is on the activities of an 'undertaking'. The concept of an 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.²²⁴
- 4.8. 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 [...]*'.²²⁵

²²² Section 2(1) and (7) of the Act.

²²³ Or Poole, from 1 January 2015, when Endon's business was merged into Poole. Both Endon and Poole were wholly owned by NLC throughout the Endon Relevant Period.

²²⁴ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, paragraph 21.

²²⁵ Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

- 4.9. The term ‘undertaking’ also designates an economic unit, even if in law that unit consists of several natural or legal persons.²²⁶

II. Conclusion on undertakings

- 4.10. For the reasons set out below, the CMA finds that each of Saxby, Endon, Poole, NLC and [Reseller X] was an entity engaged in economic activity during each entity’s period of participation in the Agreements:²²⁷

- Saxby, Endon and Poole (and, indirectly, their ultimate parent company, NLC), were engaged in the design and supply of lighting products.²²⁸
- [Reseller X] was engaged in the retail sale of lighting products.²²⁹

- 4.11. The CMA concludes that, in respect of the Saxby Agreement, for the purposes of the Chapter I prohibition and/or Article 101 TFEU:

- Saxby, Poole and NLC were each undertakings and formed part of a single economic unit;²³⁰ and
- [Reseller X] was an undertaking.

- 4.12. The CMA concludes that, in respect of the Endon Agreement, for the purposes of the Chapter I prohibition and/or Article 101 TFEU:

- Endon, Poole and NLC were each undertakings and formed part of a single economic unit;²³¹ and
- [Reseller X] was an undertaking.

²²⁶ Case C-97/08 P *Akzo Nobel NV v Commission*, EU:C:2009:536, paragraph 55.

²²⁷ See Chapter 4, Section H, for an assessment of the liability of each entity and the period for which each is found liable for the Infringements.

²²⁸ See the detailed descriptions of Saxby, Endon, Poole and NLC at paragraphs 3.1–3.14 above.

²²⁹ [S<].

²³⁰ See paragraphs 4.191–4.193 below.

²³¹ See paragraphs 4.197–4.198 below.

C. Agreement and/or concerted practice

4.13. For the reasons set out below, the CMA finds that:

- Saxby²³² entered into an agreement and/or concerted practice with [Reseller X] that [Reseller X] would not sell certain Saxby branded products online below the price specified by the Saxby Policy; and
- Endon²³³ entered into an agreement and/or concerted practice with [Reseller X] that [Reseller X] would not sell Endon branded products online below the price specified by the Endon Policy.

I. Key legal principles

4.14. The Chapter I prohibition and Article 101 TFEU apply both to ‘agreements’ and ‘concerted practices’. It is not necessary, for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice.²³⁴ The aim of the Chapter I prohibition and Article 101 TFEU is to catch different forms of coordination between undertakings and thereby to prevent undertakings from being able to evade the competition rules simply on account of the form in which they coordinate their conduct.²³⁵

Agreement

4.15. The Chapter I prohibition and Article 101 TFEU catch a wide range of agreements, including oral agreements and ‘gentlemen's agreements’.²³⁶ An

²³² As explained in paragraphs 4.191–4.192 below, for the duration of the Saxby Relevant Period, Saxby's business was operated by Poole and Poole exercised decisive influence over Saxby. For ease of reference, we refer to Saxby only.

²³³ Or Poole, from 1 January 2015, when Endon's business was merged into Poole. Both Endon and Poole were wholly owned by NLC throughout the Endon Relevant Period. For ease of reference, we refer to Endon only.

²³⁴ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, EU:C:2009:343, paragraph 23 (citing Case C-49/92P *Commission v Anic Participazioni* [1999] EU:C:1999:356, paragraph 131). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, [206(ii)].

²³⁵ Case C-382/12 P, *MasterCard Inc. v. European Commission*, EU:C:2014:2201, paragraph 63 and the case law cited. The unlawful co-ordination between undertakings may, for example, be characterised as a ‘concerted practice’ during the first phase of an infringement, but may subsequently have solidified into an ‘agreement’, and then been further affirmed, or furthered or implemented by, a ‘decision of an association’. This does not prevent the competition authority from characterising the co-ordination as a single continuous infringement. See Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission*, EU:T:2002:70, paragraphs 186–188; Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, EU:C:2006:734, paragraph 32. See also Case T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission*, ECLI:EU:T:1999:80, paragraph 696: ‘In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty.’

²³⁶ Case C-41/69 *ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular, paragraphs 106–114.

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.²³⁷ An agreement may also consist of either an isolated act, or a series of acts, or a course of conduct.²³⁸

- 4.16. The key question in establishing an agreement 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.’²³⁹
- 4.17. The General Court has held that: ‘[...] it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way [...]’.²⁴⁰
- 4.18. However, it is not necessary to establish a joint intention to pursue an anti-competitive aim.²⁴¹ The fact that a party may have played only a limited part in setting up an agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties, does not mean that it is not party to the agreement.²⁴²
- 4.19. In the absence of an explicit agreement (for example, written down or based on a contract) between the parties to conduct themselves on the market in a specific way, tacit acquiescence by a party to conduct itself in the manner proposed by the other party is sufficient to give rise to an agreement for the purpose of the Chapter I prohibition and Article 101 TFEU.²⁴³
- 4.20. The Commission’s Vertical Guidelines, summarising the relevant case law and citing the judgments of the Court of Justice of the European Union

²³⁷ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 at [658]. See also Commission Decision 2003/675/EC *Video Games, Nintendo Distribution and Omega-Nintendo* [2003] OJ L255/33, paragraph 247.

²³⁸ Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 81.

²³⁹ Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, paragraph 69 (upheld on appeal in Joined cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, EU:C:2004:2, paragraphs 96–97).

²⁴⁰ Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

²⁴¹ Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission*, EU:T:2006:265, paragraph 77 (upheld on appeal in Joined cases C-501/06P etc *GlaxoSmithKline Unlimited v Commission*, EU:C:2009:610).

²⁴² *Agreements and Concerted Practices (OFT401)*, December 2004 (adopted by the CMA Board), paragraph 2.8. See also Case T-25/95 *Cimenteries CBR and Others v Commission*, EU:T:2000:77, paragraphs 1389 and 2557 (this judgment was upheld on liability by the Court of Justice in Joined cases C-204/00 P etc *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, although the fine was reduced); and Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraphs 79–80.

²⁴³ Case C-74/04 P *Commission v Volkswagen AG* EU:C:2006:460, paragraph 39; Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, and European Commission, *Guidelines on Vertical Restraints* [2010] OJ C130/01 (**Vertical Guidelines**), paragraph 25(a).

(**Court of Justice**), describe how to establish tacit acquiescence to a unilateral policy:

*'[...] in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice.'*²⁴⁴

- 4.21. The Vertical Guidelines provide examples of when tacit acquiescence may be deduced. Evidence of coercive behaviour or compulsion may point towards tacit acquiescence and is a relevant factor to consider. For instance:

*'[...] for vertical agreements, **tacit acquiescence may be deduced from the level of coercion** exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, **a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement in practice its policy.***²⁴⁵

- 4.22. However, a system of monitoring and penalties may not be necessary in all cases for there to be a concurrence of wills based on tacit acquiescence.²⁴⁶

Concerted practice

- 4.23. The prohibition on concerted practices prohibits, amongst other things, coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.²⁴⁷

²⁴⁴ Vertical Guidelines, paragraph 25(a).

²⁴⁵ Vertical Guidelines, paragraph 25(a) (emphasis added).

²⁴⁶ Case C-260/09 P *Activision Blizzard Germany GmbH v Commission*, EU:C:2011:62, paragraph 77.

²⁴⁷ Cases 48/69 etc *ICI Ltd v Commission*, EU:C:1972:70, paragraph 64. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 26; *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, [151]–[153]; and Commission Decision 82/367/EEC *Hasselblad* (IV/25757) [1981] L161/18, in which the Commission stated at recital 47 (in a vertical context) that: 'For a concerted practice to exist it is sufficient for an independent undertaking knowingly and of its own accord to adjust its behaviour in line with the wishes of another undertaking.'

- 4.24. Although the nature and extent of a concerted practice is addressed in the case law primarily in the context of so-called horizontal relationships (that is, between actual or potential competitors), it is also applicable to vertical relationships (that is, between undertakings at different levels of the supply chain).²⁴⁸ The Court of Appeal has observed that:

*‘The Chapter I prohibition catches agreements and concerted practices whether between undertakings at different levels or between those at the same level of commercial operation. An agreement between a supplier and a commercial customer, which may be called a vertical agreement, may breach the same prohibition as much as an agreement between competing suppliers of the same product or same type of product, which can be referred to as a horizontal agreement.’*²⁴⁹

- 4.25. In the context of vertical discussions between a manufacturer and a retailer, the Competition Appeal Tribunal (**CAT**) has stated that:

*‘It is [...] plain that an undertaking may be passively party to an infringement of the Chapter I prohibition. That is so, in particular, where it had taken part in a meeting or other contacts, and has done nothing to distance itself from the matters discussed. In those circumstances the undertaking is taken to have tacitly approved of the unlawful initiative, unless it has publicly distanced itself or informed the OFT.’*²⁵⁰

²⁴⁸ See, for example, Case T-43/92 *Dunlop Slazenger International Ltd v Commission*, EU:T:1994:259 paragraph 101ff (concerted practice between Dunlop Slazenger and certain of its exclusive distributors in respect of various measures to enforce an export ban). See also the Commission Decision 2003/675/EC *Video Games, Nintendo Distribution and Omega-Nintendo* (COMP/35.587 etc) [2003] OJ L255/33, paragraphs 323–324 (agreements and/or concerted practices between Nintendo and its independent distributors to restrict parallel trade). Other examples include: Commission Decision 72/403/CEE *Pittsburgh Corning Europe* (IV/26894) [1972] L272/35 (where a concerted practice was found between a supplier and a distributor); and Commission Decision 88/172/EEC *Konica* (IV/31.503) [1988] OJ L78/34, paragraph 36 (where there was a concerted practice between a supplier and a distributor).

²⁴⁹ *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, [28].

²⁵⁰ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [1043].

II. Agreement and/or concerted practice – Saxby and [Reseller X]

Saxby's communication of the Saxby Policy

4.26. The CMA finds that Saxby introduced the Saxby Policy in March 2012. As part of the Saxby Policy, the CMA finds that Saxby:²⁵¹

- instructed its resellers, including [Reseller X], not to sell certain Saxby branded products online below a specified price;
- monitored its resellers' online prices, including those of [Reseller X], via reports of discounting from other resellers; and
- contacted resellers, including [Reseller X], that offered Saxby branded products for sale online at a price lower than the specified price. At times, Saxby threatened and/or took enforcement action against such resellers.

4.27. The CMA's findings are supported by the evidence set out at Chapter 3, Section C and Chapter 4, Section C, Part II and in particular the following findings of fact:

- In late 2011, Saxby discussed internally the introduction of the Saxby Policy, the purpose of which was to restrict online discounting of its bathrooms lighting products by implementing a minimum online price.²⁵²
- From March 2012, Saxby launched and implemented the Saxby Policy in relation to bathrooms lighting products and communicated its pricing instructions to resellers orally.²⁵³
- Saxby was aware of the illegality of fixing prices and for this reason deliberately avoided written communications relating to the Saxby Policy.²⁵⁴
- Saxby sought to monitor and take action against reseller non-compliance with the Saxby Policy by:
 - monitoring online prices via reports of discounting from resellers;²⁵⁵

²⁵¹ As explained in paragraphs 4.191–4.192 below, for the duration of the Saxby Relevant Period, Saxby's business (including Saxby's pricing policies) was operated by Poole and Poole exercised decisive influence over Saxby. For ease of reference, we refer to Saxby only.

²⁵² See paragraphs 3.45–3.46 and 3.47.

²⁵³ See paragraphs 3.47–3.49.

²⁵⁴ See paragraphs 3.47 and 3.55–3.56.

²⁵⁵ See paragraphs 3.59–3.60 and 4.41 and 4.43.

- asking resellers to bring their pricing in line with the Saxby Policy;²⁵⁶
- threatening and/or putting resellers' accounts on hold.²⁵⁷

Reseller adherence to the Saxby Policy

4.28. The CMA has reasonable grounds for suspecting that many resellers agreed to adhere to the Saxby Policy. However, for reasons of administrative efficiency the CMA has chosen to focus its assessment on one reseller, namely [Reseller X].

4.29. The Saxby Policy could only be effective in its aim of protecting resellers' margins²⁵⁸ if there was general adherence to the Saxby Policy by resellers making online sales of the relevant Saxby products. [Sales Director] of Poole believed that resellers considered the pricing policy to be essential. In an email of 30 September 2015 describing the merged Saxby and Endon policy, [Sales Director] of Poole stated:²⁵⁹

'Customers are all in agreement that this is essential [...] I have personally spoken to many of the license holders and they are all in agreement.'

4.30. While some resellers may have occasionally sold Saxby branded products online below the price specified by the Saxby Policy, [Sales Director] of Poole explained that others were adhering to the policy:²⁶⁰

'As far as I am aware, levels of reseller compliance with the pricing policy varied. I know for a fact that we had some resellers that were adhering to the pricing policy but they would regularly ring to complain that many other resellers were not complying.'

4.31. Monitoring of adherence to the Saxby Policy was carried out by resellers and *'ASMs would sporadically monitor the internet to identify any companies not adhering to the pricing policy'*.²⁶¹ This helped Saxby to identify instances of price undercutting by non-compliant resellers.

4.32. Saxby used threats of and/or actual sanctions to enforce adherence.²⁶² Where instances of non-adherence with the Saxby Policy were identified, Saxby followed up with the reseller in question. There is evidence that Saxby

²⁵⁶ See paragraphs 3.59–3.60 and 4.39–4.40.

²⁵⁷ See paragraphs 3.59, 3.61, 3.91, 4.44 and 4.49.

²⁵⁸ See paragraph 3.45.

²⁵⁹ Email from [Sales Director] (Poole) to [Managing Director] (Poole) dated 30 September 2015 (URN 00386).

²⁶⁰ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 43 (URN 01215).

²⁶¹ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 25 (URN 01215).

²⁶² See paragraphs 3.59–3.61 and 4.44–4.49.

believed that its monitoring and follow up was effective in ensuring compliance. For example, in his monthly report for September 2012, [Area Sales Manager] of Saxby stated '*Internet traders that have not followed our pricing policy have been contacted and I believe raised the unit sale price in line with our requirements.*'²⁶³

- 4.33. The CMA considers that many resellers were willing to comply with the Saxby Policy and other resellers that may have wanted to discount online had little choice but to agree to comply. However, the CMA makes no findings in respect of resellers of Saxby branded products other than [Reseller X].

[Reseller X]'s agreement to the Saxby Policy

- 4.34. On the basis of the evidence set out in Chapter 3, Section C and the findings of fact below, the CMA finds that Saxby entered into an agreement and/or concerted practice with [Reseller X] that [Reseller X] would not sell certain Saxby branded products online at prices below trade price less 20% plus VAT (ie that [Reseller X] would adhere to the Saxby Policy). For the purposes of the Chapter I prohibition and Article 101 TFEU, there is evidence that the duration of the agreement and/or concerted practice between Saxby and [Reseller X] to adhere to the Saxby Policy was almost four months, from 31 October 2012 (at the latest) to 25 February 2013 (the **Saxby Relevant Period**).
- 4.35. [Reseller X] has been a Saxby reseller since around [REDACTED].²⁶⁴ [Reseller X] started selling Saxby products online in around [REDACTED].²⁶⁵ It sells Saxby branded products online via its transactional website, [REDACTED]. [E-commerce Manager] was the E-commerce Manager at [Reseller X] throughout the Saxby Relevant Period.²⁶⁶
- 4.36. Email evidence between [Reseller X] and Saxby indicates that, in October 2012, [REDACTED], Saxby communicated to [Reseller X] an instruction not to sell the '*Saxby Knight*' range of products online below the price specified by Saxby.

²⁶³ Email from [Area Sales Manager] (Saxby) to [Sales Director] (Poole) dated 1 October 2012 (URN 00034), attaching September Monthly Report (URN 00035). See also paragraph 3.60.

²⁶⁴ Question 3 of [Reseller X]'s response to section 26 notice dated 11 November 2016 (URN 00992).

²⁶⁵ Question 3 of [Reseller X]'s response to section 26 notice dated 11 November 2016 (URN 00992).

²⁶⁶ [E-commerce Manager]'s LinkedIn profile states that he was E-commerce Manager at [Reseller X] between [REDACTED] and [REDACTED] (URN 01286) (accessed 8 February 2017).

In an email to [National Sales Manager] of Saxby, [E-commerce Manager] of [Reseller X] stated:²⁶⁷

'We were first made aware of the pricing change to the Saxby Knight range back in October (I think).'

- 4.37. In interview, [E-commerce Manager] of [Reseller X] stated that he could not recall how the pricing change on the Saxby Knight range was communicated:²⁶⁸

'It will either have been a phone call or the new price files sent through, usually through the post, from our buying group.'

- 4.38. In response to Saxby's instruction, [Reseller X] said that it changed its online prices immediately (and therefore during October 2012):²⁶⁹

'We immediately changed our prices as per my conversation with [Area Sales Manager].' (emphasis added by CMA)

- 4.39. Email evidence between [Reseller X] and Saxby indicates that several weeks later [Reseller X] was instructed by Saxby to increase its prices on all Saxby bathroom ranges (not just the 'Saxby Knight' range), and that [Reseller X] said they did so:²⁷⁰

*'We were then contacted several weeks later and asked to increase the prices on all of the bathroom ranges and, **again this was completed immediately.**'* (emphasis added by CMA)

- 4.40. [E-commerce Manager] of [Reseller X] explained to the CMA that [Reseller X] was contacted by Saxby by telephone and that communications tended to be oral.²⁷¹

- 4.41. On at least one occasion in December 2012, [Reseller X] reported other resellers to Saxby for selling Saxby products online below the prices prescribed by Saxby. This shows that both [Reseller X] and Saxby

²⁶⁷ Email from [E-commerce Manager] ([Reseller X]) to [National Sales Manager] (Saxby) dated 18 January 2013 (URN 00051).

²⁶⁸ Transcript of interview with [E-commerce Manager] dated 20 December 2016, p18, lines 12–14 (URN 01036). According to [Reseller X], *'This was usually done by phone conversation'*, Question 7(b) of [Reseller X]'s response to section 26 notice dated 11 November 2016 (URN 00992).

²⁶⁹ Email from [E-commerce Manager] ([Reseller X]) to [National Sales Manager] (Saxby) dated 18 January 2013 (URN 00051).

²⁷⁰ Email from [E-commerce Manager] ([Reseller X]) to [National Sales Manager] (Saxby) dated 18 January 2013 (URN 00051).

²⁷¹ Transcript of interview with [E-commerce Manager] dated 20 December 2016, p10, lines 3–9; p18, line 22 (URN 01036).

understood there to be an agreement and/or concerted practice between Saxby and resellers, including [Reseller X], that they would not sell below these prices. [E-commerce Manager] of [Reseller X] sent an email to Saxby on 17 December 2012 stating that [Reseller X] had changed its prices in response to the instructions from Saxby:²⁷²

*'[...] the links below show many retailers still not adhering to the prices you guys are enforcing. **We have been the first to change when we have been asked** and as a result of this, we are losing out on sales. [...] if you can't get everyone else to do it then it leaves us with only two options, we either begin competing on price again, or we simply have to stop promoting any Saxby products'.*²⁷³ (emphasis added by CMA)

- 4.42. In interview with the CMA, [E-commerce Manager] of [Reseller X] explained the outcome he was hoping for by sending this email:²⁷⁴

*'The outcome I wanted was for them to drop all of this that they were trying to do, so that we could just trade as we wanted to. The problem was, like I say, **we were backed in to a corner and did what we felt we had no choice to, what [sic] was to agree with their pricing.**'* (emphasis added by CMA)

- 4.43. At some point between 17 December 2012 and 10 January 2013, [Reseller X] reduced the prices of some Saxby products. On 10 January 2013, [Area Sales Manager] of Saxby sent an email to [National Sales Manager] of Saxby about receiving a complaint from [Reseller] (another Saxby reseller) relating to [Reseller X]'s online pricing of Saxby products:²⁷⁵

'[Reseller X] have the knight fitting on the internet at £65.94 just been brought to my attention by a customer who is playing ball on the internet pricing'.

- 4.44. On 18 January 2013, [National Sales Manager] of Saxby informed the [Reseller X] sales team that he had put [Reseller X]'s account on hold *'due to internet trading'* and [Reseller X] being in *'breach of our [Saxby's] terms on intellectual rights'*.²⁷⁶

²⁷² Email from [E-commerce Manager] ([Reseller X]) to Saxby Sales dated 17 December 2012 (URN 00047).

²⁷³ Email from [E-commerce Manager] ([Reseller X]) to Saxby Sales dated 17 December 2012 (URN 00047).

²⁷⁴ Transcript of interview with [E-commerce Manager] dated 20 December 2016, p21, lines 4–7 (URN 01036).

²⁷⁵ [Area Sales Manager] (Saxby) email to [National Sales Manager] (Saxby) dated 10 January 2013 (URN 00049)

²⁷⁶ Email from [National Sales Manager] (Saxby) to [E-commerce Manager] ([Reseller X]) dated 18 January 2013 (URN 00051).

- 4.45. [E-commerce Manager] of [Reseller X]'s reply shows that he understood the reason [Reseller X]'s account had been put on hold was an issue with the pricing policy being enforced by Saxby and he went on to say that [Reseller X] had been adhering to the policy.²⁷⁷

*'I am assuming it is with regards to the pricing structure that is being enforced **to which we had adhered to at every stage.**'* (emphasis added by CMA)

- 4.46. In interview with the CMA, [E-commerce Manager] of [Reseller X] explained his interpretation of [National Sales Manager]'s comment, *'You are in breach of our terms on intellectual rights'*.²⁷⁸

'It was shrouded by this internet trading agreement. But it was, reading between the lines, pretty obvious what they were referring to.'

- 4.47. In interview with the CMA, [E-commerce Manager] of [Reseller X] explained that [Reseller X] had its account put on hold on more than one occasion:

*'[...] we were being told what to sell things at and if we didn't agree with it there was consequences.'²⁷⁹ [...] The consequences that we encountered were **we had our account closed on one or two occasions**, which they blamed down to accounting issues or to do with the internet licences. But it was always around the time when we were being told we weren't selling it at the right price.'²⁸⁰ (emphasis added by CMA)*

- 4.48. In the email of 18 January 2013, [E-commerce Manager] of [Reseller X] explained that he had believed [Reseller X] was operating within the guidelines in the pricing structure and thus still adhering to the pricing instructions. The email explains that in *'mid December'* 2012 [Reseller X] reduced its prices on some Saxby branded products after having seen other resellers selling products online at lower prices.²⁸¹ [E-commerce Manager] of [Reseller X] said that when [Reseller X] checked the prices for these products with [Office Manager] of Saxby, she had said that these prices were within the guidelines:²⁸²

²⁷⁷ Email from [E-commerce Manager] ([Reseller X]) to [National Sales Manager] (Saxby) dated 18 January 2013 (URN 00051).

²⁷⁸ Transcript of interview with [E-commerce Manager] dated 20 December 2016, p19, lines 15–17 (URN 01036).

²⁷⁹ Transcript of interview with [E-commerce Manager] dated 20 December 2016, p10, lines 8–9 (URN 01036).

²⁸⁰ Transcript of interview with [E-commerce Manager] dated 20 December 2016, p10, lines 12–16 (URN 01036).

²⁸¹ Email from [E-commerce Manager] ([Reseller X]) to [National Sales Manager] (Saxby) dated 18 January 2013 (URN 00051).

²⁸² Email from [E-commerce Manager] ([Reseller X]) to [National Sales Manager] (Saxby) dated 18 January 2013 (URN 00051).

'[...] After having an email conversation with [Office Manager] [of Saxby] [...] highlighting several products [...] that we were being massively undercut on, she advised me that they weren't in breach of any guidelines. Therefore, in order to begin selling again, we reduced our prices to become more competitive whilst remaining within the guidelines.'

- 4.49. [E-commerce Manager] of [Reseller X] explained to the CMA in interview that, having clarified Saxby's price instructions, [Reseller X] would have followed those instructions in order to have its account reactivated. He explained:

*'From recollection there were specific occasions where there was products that we weren't selling at what they wanted us to and we were, in effect, told that if they weren't at that price that it wouldn't be released.'*²⁸³

*'[A]t this point, we'd got multiple orders, multiple customers that were waiting for orders and **we had no choice but to do what they wanted** in order to fulfil them.'*²⁸⁴ (emphasis added by CMA)

- 4.50. On 25 February 2013, [E-commerce Manager] of [Reseller X] complained to [Area Sales Manager] and [National Sales Manager] of Saxby about [Reseller X]'s lack of sales of Saxby products due to [Reseller X]'s adherence to the pricing structure specified by Saxby:²⁸⁵

*'I'm getting it in the neck now as to why we are no longer selling any of the Saxby range. **It's been nearly 3 months since we put our prices up (as you asked)***²⁸⁶ *and it still isn't universal. We've [...] given you the opportunity to implement what it is you have been trying to with other retailers. **It isn't working so I have no choice but to begin competing again**; it's pointless us advertising a product no one is going to buy.'* (emphasis added by CMA)

- 4.51. [Reseller X] explained its interpretation of this email in response to a section 26 request from the CMA:²⁸⁷

'[E-commerce Manager] expresses his frustration and The Director's frustration as to the reason why [Reseller X] was no longer able to sell Saxby

²⁸³ Transcript of interview with [E-commerce Manager] dated 20 December 2016, p12, lines 1–4 (URN 01036).

²⁸⁴ Transcript of interview with [E-commerce Manager] dated 20 December 2016, p19, lines 10–12 (URN 01036).

²⁸⁵ Email from [E-commerce Manager] ([Reseller X]) to [Area Sales Manager] (Saxby) dated 25 February 2013 (URN 00056).

²⁸⁶ In response to a section 26 request, [Reseller X] explained that this meant that [Reseller X] '*increased the prices as [Reseller X] was asked to by Saxby to come into line with their price fixing out of fear of legal action*', see Question 8(c) of [Reseller X]'s response to section 26 notice dated 11 November 2016 (URN 00992).

²⁸⁷ Question 8(a) of [Reseller X]'s response to section 26 notice dated 11 November 2016 (URN 00992).

lights. This was due to [Reseller X]'s prices being high compared to other online suppliers at the time.'

III. Conclusion on the agreement and/or concerted practice between Saxby and [Reseller X]

4.52. In view of the foregoing, the CMA has concluded that:

- [Reseller X] was reseller of Saxby products from [Saxby] and sold the products online from [Saxby].²⁸⁸
- In October 2012²⁸⁹ and again '*several weeks later*',²⁹⁰ Saxby instructed [Reseller X] to set its online prices so that they were no lower than the prices specified by Saxby for certain Saxby products.
- [Reseller X] told Saxby in December 2012 and January 2013 that it had been adhering to the Saxby Policy as instructed.²⁹¹
- [E-commerce Manager] of [Reseller X] told the CMA that [Reseller X] had adhered to the Saxby Policy as instructed.²⁹²
- [Reseller X] understood that selling Saxby's products online below the price specified by Saxby would result in Saxby putting [Reseller X]'s account on hold.²⁹³
- In January 2013, Saxby ceased to supply [Reseller X] because [Reseller X] was selling some Saxby products online below the price specified by Saxby.²⁹⁴ The account was re-activated when [Reseller X] agreed to increase its online prices so that they were no lower than the prices specified by Saxby.²⁹⁵
- On at least one occasion, [Reseller X] reported resellers to Saxby for selling Saxby products online at a lower price than [Reseller X], ie below the price specified by Saxby Policy.²⁹⁶ This shows that both [Reseller X] and Saxby understood there to be an agreement and/or concerted

²⁸⁸ See paragraph 4.35 above.

²⁸⁹ See paragraph 4.36 above.

²⁹⁰ See paragraph 4.39 above.

²⁹¹ See paragraphs 4.38, 4.39, 4.41 and 4.45 above.

²⁹² See paragraph 4.42 above.

²⁹³ See paragraphs 4.44–4.49 above.

²⁹⁴ See paragraphs 4.44–4.49 above.

²⁹⁵ See paragraphs 4.48 and 4.49 above.

²⁹⁶ See paragraph 4.41–4.42 above.

practice between Saxby and resellers, including [Reseller X], that they would not price below the specified level.

4.53. The CMA has taken into account the context of the arrangements between Saxby and [Reseller X], including the evidence that employees of Saxby were aware of the potential illegality of the Saxby Policy and were careful not to communicate their pricing instructions in writing.²⁹⁷ In addition, the nature of the Saxby Policy was such that Saxby rarely needed to contact [Reseller X] about the Saxby Policy when [Reseller X] was complying with it because it was based on a pricing formula. As a result, this limited the need for written communication about the Saxby Policy.²⁹⁸

4.54. In light of the above conclusions, the CMA finds a concurrence of wills between [Reseller X] and Saxby that [Reseller X] would not sell certain Saxby branded products online below the price specified by the Saxby Policy. In particular:

- Saxby instructed [Reseller X] not to sell certain Saxby branded products online below the price specified by the Saxby Policy, with the threat of negative consequences if [Reseller X] failed to comply; and
- [Reseller X]:
 - understood the instructions from Saxby and the potential consequences if it did not comply; and
 - in practice, agreed to abide by and/or implemented Saxby's instructions not to sell certain Saxby branded products online below the price specified in the Saxby Policy, including making price adjustments where instructed to do so by Saxby.

This constitutes an agreement for the purposes of the Chapter I prohibition and Article 101 TFEU.

4.55. In the alternative, the CMA finds that the arrangements identified above constituted at the very least a concerted practice between Saxby and [Reseller X], on the basis that [Reseller X] knew Saxby's wishes as regards the Saxby Policy and adjusted its online pricing behaviour as a result, thereby knowingly substituting practical cooperation for the risks of price competition between resellers.

²⁹⁷ See paragraphs 3.36 and 4.40 above.

²⁹⁸ See, for example, *C-204/00 P etc Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, paragraphs 55–57.

- 4.56. The CMA finds that the duration of the agreement and/or concerted practice not to sell certain Saxby branded products online below the price specified in the Saxby Policy was 31 October 2012 (at the latest) to 25 February 2013.
- 4.57. The CMA therefore concludes that [Reseller X] was party to an agreement and/or concerted practice with Saxby from 31 October 2012 (at the latest) to 25 February 2013.

IV. Agreement and/or concerted practice – Endon and [Reseller X]

Endon's communication of the Endon Policy

- 4.58. The CMA finds that Endon introduced the Endon Policy in early 2010. As part of the Endon Policy, the CMA finds that Endon:²⁹⁹
- instructed its resellers, including [Reseller X], not to sell Endon branded products online below a specified price;
 - monitored its resellers' online prices, including those of [Reseller X], via reports of discounting from other resellers; and
 - contacted resellers, including [Reseller X], that offered Endon branded products for sale online at a price lower than the specified price. At times, Endon threatened and/or took enforcement action against such resellers.
- 4.59. The CMA's findings are supported by the evidence set out at Chapter 3, Section C and Chapter 4, Section C, Part IV and in particular the following findings of fact:
- In early 2010, Endon introduced the Endon Policy across its product range, the purpose of which was to restrict online discounting of its products by implementing a minimum online price.³⁰⁰
 - Endon communicated the Endon Policy to resellers orally whenever they requested images of Endon products to sell online.³⁰¹

²⁹⁹ Or Poole, from 1 January 2015, when Endon's business was merged into Poole. Both Endon and Poole were wholly owned by NLC throughout the Endon Relevant Period. For ease of reference, we refer to Endon only.

³⁰⁰ See paragraphs 3.65–3.66.

³⁰¹ See paragraph 3.69.

- In 2011 at the latest, Endon introduced an ILA which it used as a way to restrict resellers' online pricing. Endon used the ILA as a mechanism for ensuring its resellers complied with the Endon Policy.³⁰²
- Resellers, including [Reseller X], understood that an unwritten condition of the ILA was adherence to the Endon Policy.³⁰³
- From October 2015, the Endon Policy and the Saxby Policy were merged into one online pricing policy that covered both brands, with the exception of certain generic products which tended to be Saxby products.³⁰⁴ For ease, the CMA uses the term Endon Policy to refer to any incarnation of Endon's agreement with its resellers that the resellers would not sell Endon branded products online below a specified online price.
- Endon was aware of the illegality of fixing prices and for this reason deliberately avoided written communications relating to the Endon Policy.³⁰⁵
- Endon sought to monitor and take action against reseller non-compliance with the Endon Policy by:
 - monitoring of online prices via reports of discounting from resellers;³⁰⁶
 - encouraging resellers to report other resellers that were pricing below the specified price;³⁰⁷
 - asking resellers to bring their pricing in line with the Endon Policy;³⁰⁸
 - revoking ILAs so that resellers could no longer sell Endon products online;³⁰⁹
 - threatening and/or putting resellers' accounts on hold.³¹⁰

³⁰² See paragraphs 3.67–3.71.

³⁰³ See paragraphs 3.68, 3.70–3.71, 4.78–4.80 and 4.97.

³⁰⁴ See paragraph 3.88 above.

³⁰⁵ See paragraphs 3.72–3.77 and 3.89.

³⁰⁶ See paragraphs 3.80, 3.84, 4.65, 4.74, 4.81 and 4.83–4.89.

³⁰⁷ See paragraphs 3.84, 4.76 and 4.95.

³⁰⁸ See paragraphs 3.80, 3.83, 3.84, 4.82–4.90.

³⁰⁹ See paragraphs 3.91, 4.79–4.80 and 4.97.

³¹⁰ See paragraphs 3.81–3.82 and 4.94–4.95.

Reseller adherence to the Endon Policy

4.60. The CMA has reasonable grounds for suspecting that many resellers agreed to adhere to the Endon Policy. However, for reasons of administrative efficiency the CMA has chosen to focus its assessment on one reseller, namely [Reseller X].

4.61. The Endon Policy could only be effective in its aim of protecting resellers' margins³¹¹ if there was general adherence to the Endon Policy by resellers making online sales of Endon products. [Sales Director] of Endon explained to the CMA that the majority of resellers welcomed the Endon Policy.³¹²

*'By and large **most resellers were very much for it. In fact I think they were all for it. Anybody with a legitimate business model they were for it***. (emphasis added by CMA)

4.62. When asked in interview about how the Endon Policy was generally received by resellers and to name resellers that were on board with it, [Sales Director] of Endon replied:

*'**the more successful resellers were right on-board with it.***³¹³*[...] So for the majority of the time everybody, you know, we very rarely had to do much about it.*³¹⁴*[...] So **generally speaking everybody was in line.** Maybe on one product someone would go off. So the majority of our customers were in line.*³¹⁵ (emphasis added by CMA)

4.63. While the CMA understands that some resellers may have occasionally sold Endon branded products online below the price specified by the Endon Policy, [Sales Director] of Endon explained to the CMA:³¹⁶

*'As far as I am aware, **resellers were generally compliant with the Endon policy.** I cannot recall the names of individual resellers that either complied or did not comply with the Endon policy [...]*' (emphasis added by CMA)

4.64. [Sales Director] of Poole also explained to the CMA in interview: *'when it became clear that it'd be myself as the successor [to [Sales Director]] I **clearly wanted to continue what they were doing because they were***

³¹¹ See paragraphs 3.65–3.66.

³¹² Transcript of interview with [Sales Director] dated 11 November 2016, CD 2, p 9, lines 10–12 (URN 01003).

³¹³ Transcript of interview with [Sales Director] dated 11 November 2016, CD 1, p40, lines 17–18 (URN 01002).

³¹⁴ Transcript of interview with [Sales Director] dated 11 November 2016, CD 1, p40, lines 25–26 (URN 01002).

³¹⁵ Transcript of interview with [Sales Director] dated 11 November 2016, CD 1, p41, lines 2–4 (URN 01002).

³¹⁶ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 19 (URN 01013).

doing a good job and customers were working with it.³¹⁷ (emphasis added by CMA)

- 4.65. Monitoring of adherence to the Endon Policy was carried out by resellers. This helped Endon to identify instances of price undercutting by non-compliant resellers. In his witness statement, [Sales Director] of Endon noted:³¹⁸

‘Whilst we did not monitor the adherence to the policy our customers did and we responded accordingly. In essence we would be informed by a retailer that another retailer, or other retailers, were not complying [...] and we would be asked to address the matter. The policy was self-governing. It was the customers who policed it’. (emphasis added by CMA)

- 4.66. [Sales Director] of Endon stated that if a reseller was not following the pricing policy, he was active in following up with the relevant company to ask it to increase its prices and that, generally, it did so:³¹⁹

‘In the event that I received a complaint from reseller about an online company pricing below the policy, I would contact the company and explain that their prices were a bit low. [...] Once contacted about the pricing, companies would generally thank me for identifying the error and immediately adjust their prices online. Largely, the response was positive and that would be the end of the matter’

- 4.67. Endon also encouraged resellers to report other resellers that weren’t adhering to the Endon Policy.³²⁰

- 4.68. Endon used threats of and/or actual sanctions to enforce adherence.³²¹

- 4.69. Poole considered that customers continued to agree to the Endon Policy after Endon had merged with Poole. In an email of 30 September 2015, [Sales Director] of Poole stated:³²²

‘Customers are all in agreement that this is essential [...] I have personally spoken to many of the license holders and they are all in agreement.’

³¹⁷ Transcript of interview with [Sales Director] dated 31 October 2016, Disc 2, p8, lines 12–15 (URN 01000).

³¹⁸ Statement of Witness: [Sales Director] dated 22 December 2016, paragraphs 24 (URN 01013).

³¹⁹ Statement of Witness: [Sales Director] dated 22 December 2016, paragraphs 20 and 21 (URN 01013).

³²⁰ For example, in response to an email from a reseller, [Reseller], complaining about another reseller’s online prices, [Retail Sales Manager] of Endon stated ‘Any information you can provide to us is useful so please keep sending’. Email from [Retail Sales Manager] (Endon) to [Employee] ([Reseller]) dated 16 October 2013 (URN 00108). See also paragraphs 4.75–4.76 and 4.95 below.

³²¹ See paragraphs 3.81–3.82, 3.91, 4.79–4.80, 4.94–4.95 and 4.97.

³²² Email from [Sales Director] (Poole) to [Managing Director] (Poole) dated 30 September 2015 (URN 00386).

- 4.70. The CMA considers that many resellers were willing to comply with the Endon Policy and other resellers that may have wanted to discount online had little choice but to agree to comply. However, the CMA makes no findings in respect of resellers of Endon branded products other than [Reseller X].

[Reseller X]'s agreement to the Endon Policy

- 4.71. On the basis of the evidence set out in Chapter 3, Section C and the findings of fact below, the CMA finds that Endon entered into an agreement and/or concerted practice with [Reseller X] that [Reseller X] would not sell Endon branded products online at prices below RRP less 20% plus VAT (ie that [Reseller X] would adhere to the Endon Policy). For the purposes of the Chapter I prohibition and Article 101 TFEU, there is evidence that the duration of the agreement and/or concerted practice between Endon and [Reseller X] to adhere to the Endon Policy was at least three years and two weeks, from 31 May 2013 (at the latest) to 15 June 2016 (the **Endon Relevant Period**). The Endon Relevant Period therefore covers the period before and after Endon was merged into Poole in January 2015, but in any case both Endon and Poole were wholly owned by NLC throughout the Endon Relevant Period and so were part of a single economic unit.
- 4.72. [Reseller X] has been an Endon reseller since around [X].³²³ [Reseller X] started selling Endon products online in around [X].³²⁴ It sells Endon branded products online via its transactional website, [X]. [E-commerce Manager] was the E-commerce Manager at [Reseller X] until [X].³²⁵ His successor was [E-commerce Manager].³²⁶
- 4.73. The evidence shows that [Reseller X] understood that Poole required it to *'sell Poole "unique" products at a fixed price on google in line with other customers'*.³²⁷
- 4.74. [Sales Director] of Endon explained to the CMA that *'[w]henver a new customer requested images of Endon products to sell online, I would either visit the customer in person or telephone them to explain the online pricing*

³²³ Question 1 of [Reseller X]'s response to section 26 notice dated 11 November 2016 (URN 00992).

³²⁴ Question 3 of [Reseller X]'s response to section 26 notice dated 11 November 2016 (URN 00992).

³²⁵ [E-commerce Manager]'s LinkedIn profile states that he was E-commerce Manager at [Reseller X] between [X] and [X] (URN 01286) (accessed 8 February 2017).

³²⁶ [E-commerce Manager]'s LinkedIn profile states that he was Sales Executive/E-commerce at [Reseller X] from [X] to [X] (URN 00996) (accessed 6 February 2017).

³²⁷ Question 1 of [Reseller X]'s response to section 26 notice dated 30 September 2016 (URN 00969). The question asked: *'Please describe any conversations with Poole about online retail prices of any brands/products supplied by it, since 1 January 2010.'*

policy.³²⁸ [Reseller X] started selling Endon products online in around May 2013.³²⁹

- 4.75. In an email of 20 August 2013, [E-commerce Manager] of [Reseller X] complained to [Area Sales Manager] of Endon about another reseller's online prices. [E-commerce Manager] of [Reseller X] said that [Reseller X] was '*working to*' certain prices but he had noticed that another reseller had not been doing so since [Reseller X] had started listing Endon products online. This indicates that the Endon Policy had been communicated to [Reseller X] in May 2013, when [Reseller X] started selling Endon products online, and [Reseller X] had been '*working to*' the prices specified by Endon and monitoring other resellers' compliance with the Endon Policy since May 2013.³³⁰

'Just thought I would let you know about an online retailer that's still not working to the prices we are. [Reseller] are selling much cheaper than anyone else. They have been doing so pretty much since we started listing Endon on our site. Can you come back to me with a plan? Alternatively, I will have to look at competing.'³³¹ (emphasis added by CMA)

- 4.76. [E-commerce Manager] of [Reseller X] provided an explanation of this email to the CMA in interview:³³²

'It looks like this was when we were being told what the prices they wanted us to sell at. And also we were always told to let them know the people that don't.'

- 4.77. [E-commerce Manager] of [Reseller X] confirmed that the statement '*working to the prices we are*' referred to the prices that [Reseller X] was adhering to³³³ and [Reseller X] itself provided the same explanation of the email to the CMA:³³⁴

'[Reseller X] was adhering to Endon's sell prices that they had enforced on [Reseller X] but had noticed that other sellers were not adhering to the Endon sell price'. (emphasis added by CMA)

³²⁸ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 19 (URN 01013).

³²⁹ Question 3 of [Reseller X]'s response to section 26 notice dated 11 November 2016 (URN 00992).

³³⁰ Email from [E-commerce Manager] ([Reseller X]) to [Area Sales Manager] (Endon) dated 20 August 2013 (URN 00089)

³³¹ Email from [E-commerce Manager] ([Reseller X]) to [Area Sales Manager] (Endon) dated 20 August 2013 (URN 00089)

³³² Transcript of interview with [E-commerce Manager] dated 20 December 2016, p23, lines 9–11 (URN 01036).

³³³ Transcript of interview with [E-commerce Manager] dated 20 December 2016, p23, lines 12–14 (URN 01036).

³³⁴ [Reseller X]'s response to Question 10(c) of section 26 notice dated 11 November 2016 (URN 00992).

- 4.78. [Reseller X]'s agreement to Endon's pricing instructions was reiterated on 4 February 2014 and again on 28 October 2015 when [Reseller X] signed the Endon ILA.³³⁵ Adherence to the Endon Policy was an unwritten condition of the ILA. [Sales Director] of Endon explained in his witness statement that resellers understood this:

*'The pricing policy was communicated to resellers at the time of signing or renewing the ILA. Although the Endon pricing policy was not included in the ILA for obvious legal reasons, **resellers signing the ILA understood that the Endon pricing policy was a condition of the ILA.** The ILAs acted as a veil.'*³³⁶ (emphasis added by CMA)

*'[...] customers were under no illusions and knew it [the Endon Policy] formed part of the agreement when they signed the ILA.'*³³⁷

- 4.79. The evidence shows that [Reseller X] understood that there was a link between the Endon Policy and the ILA. In particular, [Reseller X] knew that there would be negative consequences for non-adherence with the Endon Policy that were linked to the ILA, which granted [Reseller X] a right to use Poole's images online.³³⁸

'[o]ur images rights would be taken away from us and if we kept their images on our website we would face leagal [sic] action.'

- 4.80. [Reseller X] also understood that the Endon Policy applied to other resellers that had signed the ILA and was told that there had been consequences linked to the ILA for other resellers who had not complied with Poole's pricing instructions:

*'[Area Sales Manager] had stated that he had talked to other companies and told them to come into line with their pricing. These were companies that appeared on google shopping [...].'*³³⁹

*'[Area Sales Manager] had stated that they had proceeded with with [sic] other sellers over image rights.'*³⁴⁰

- 4.81. There is evidence that Poole sought to ensure that [Reseller X] complied with the Endon Policy. On 1 September 2015, [National Sales Manager] of

³³⁵ Respectively URN 01144 and URN 01145. In a Poole spreadsheet titled 'Current License Holders' [Reseller X] is listed as an Endon licence holder for 2012 to 2015 (URN 00310).

³³⁶ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 31 (URN 01013).

³³⁷ Statement of Witness: [Sales Director] dated 22 December 2016, paragraph 36 (URN 01013).

³³⁸ Question 4 of [Reseller X]'s response to section 26 notice dated 30 September 2016 (URN 00969).

³³⁹ Response to Question 3(d) of section 26 notice to [Reseller X] dated 30 September 2016 (URN 00969).

³⁴⁰ Response to Question 12(d) of section 26 notice to [Reseller X] dated 11 November 2016 (URN 00992).

Poole forwarded to [Sales Director] of Poole a marketing email he had received from [Reseller X] entitled ‘*Super September!!!*’. [National Sales Manager] of Poole commented ‘*[Reseller X] are on to it Quick!! [sic]*’. [Sales Director] of Poole replied: ‘*O [sic] long as they are not discounting more than 10% off retail plus VAT*’.³⁴¹

- 4.82. [E-commerce Manager] left [Reseller X] in [§] and his successor was [E-commerce Manager].³⁴² The CMA has evidence of [Reseller X]’s continued agreement to the Endon Policy during both [E-commerce Manager] and [E-commerce Manager]’s tenures at [Reseller X]. In early 2016 Poole orally reminded [Reseller X] to comply with the Endon Policy:³⁴³

‘[Area Sales Manager] a rep for poole came to see us and stated that we would have to sell “unique” items at their fixed price’.

- 4.83. On 24 May 2016, [Employee] of Poole sent an email to [National Sales Manager] of Poole about a complaint from a reseller about other resellers’ online pricing, including [Reseller X]’s pricing of one product:³⁴⁴

‘He did a search of the tabitha for an example while I was there and [Reseller X] came back at £60.00 and everyone else was at £96.00. [...] He states his [sic] going to send me a list of offenders [...]’.

- 4.84. In response [National Sales Manager] of Poole explained:³⁴⁵

*‘We are waiting for a definitive list as to what is Saxby and what is Endon branded products, as the matter with [Reseller X] is that the Mirror is in the Saxby catalogue and we don’t have a say in what they sell it out for.’*³⁴⁶

- 4.85. [National Sales Manager] of Poole subsequently corrected himself about whether the product was covered by the Endon Policy:³⁴⁷

³⁴¹ Email from [Sales Director] (Poole) to [National Sales Manager] (Poole) dated 1 September 2015 (URN 00326).

³⁴² See paragraph 4.72 above.

³⁴³ Response to Question 1 and 3(b) of section 26 notice to [Reseller X] dated 30 September 2016 (URN 00969). [Reseller X] confirmed that a ‘1st request’ was made ‘[e]arlier in the year’ and a ‘2nd request’ was made on 27 May 2016.

³⁴⁴ Email from [Employee] (Poole) to [National Sales Manager] (Poole) dated 24 May 2016 (URN 00740).

³⁴⁵ Email from [National Sales Manager] (Poole) to [Employee] (Poole) dated 25 May 2016 (URN 00740).

³⁴⁶ As explained in paragraphs 3.88 and 4.59 above, from October 2015, the Endon Policy and the Saxby Policy were merged into one online pricing policy that covered both brands, with the exception of certain generic products which tended to be Saxby products.

³⁴⁷ Email from [National Sales Manager] (Poole) to [Employee] (Poole) dated 25 May 2016 (URN 00740).

'My mistake it is a Decorative product, so it should not be undersold. I am taking this up with [Reseller X].'

- 4.86. On 25 May 2016, [National Sales Manager] of Poole sent an email to [Area Sales Manager] of Poole stating:³⁴⁸

'Please go and see [Reseller X] as a matter of urgency to stop them under selling Endon products on line.'

- 4.87. In response, [Area Sales Manager] of Poole stated that he had an appointment to see [Employee] (surname unknown) of [Reseller X] *'who does all the internet trading and he uploads all pricing on the website. I take it that [Reseller X] are discounting Endon more than 4%'*.³⁴⁹

- 4.88. [National Sales Manager] of Poole replied: ³⁵⁰

'Yes they are, as you know don't communicate this on email, I will have these emails taken off the server!!'

- 4.89. Following the email exchange above, [Area Sales Manager] of Poole held a meeting with [E-commerce Manager] and [Online Marketing Manager]³⁵¹ of [Reseller X] on 27 May 2016 in order to bring all of [Reseller X]'s online prices into line with the Endon Policy.

- 4.90. [E-commerce Manager] and [Online Marketing Manager] of [Reseller X] were orally reminded by [Area Sales Manager] of Poole not to sell Endon products online below RRP minus 4%:

'So this is why we're trying to police it in this sense of like 4% that means that everybody makes a good margin on the internet'.³⁵²

- 4.91. [Area Sales Manager] of Poole made [E-commerce Manager] and [Online Marketing Manager] of [Reseller X] aware that the Endon Policy applied to the online sales price, not just the advertised price:

³⁴⁸ Email from [National Sales Manager] (Poole) to [Area Sales Manager] (Poole) dated 25 May 2016 (URN 00568).

³⁴⁹ Email from [Area Sales Manager] (Poole) to [National Sales Manager] (Poole) dated 25 May 2016 (URN 00568).

³⁵⁰ Email from [National Sales Manager] (Poole) to [Area Sales Manager] (Poole) dated 25 May 2016 (URN 00568).

³⁵¹ [Online Marketing Manager]'s LinkedIn profile states that she was Online Marketing Assistant/Online Marketing Manager at [Reseller X] from [X<] to [X<] (URN 01287) (accessed 8 February 2017).

³⁵² Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p8, lines 14–15 (URN 00976). The audio recording of this meeting is located at URN 01106.

[Area Sales Manager]: [...] we've had people discount them at the basket stage. [...] So obviously they've advertised here [...] It's gone to the basket and it's given 10% away.'

[E-commerce Manager]: Yeah, and you're not bothered about that?

[Area Sales Manager]: We are.³⁵³

- 4.92. At the meeting, [Online Marketing Manager] of [Reseller X] said that [Reseller X] had usually or always complied with the Endon Policy (the transcript shows that [Online Marketing Manager] said [Reseller X] 'usually' complied, then corrected herself to say they 'always' complied):

[E-commerce Manager]: [...] How long have we got to comply then [...]?

[Area Sales Manager]: As long as you're going to comply then I can go back [...]

[Online Marketing Manager]: **We usually do. I mean we always do.**³⁵⁴
(emphasis added by CMA)

[Online Marketing Manager]: It's just we want everyone to be doing the same. [...] Because where we have done in the past, nobody else seems to [...].³⁵⁵

- 4.93. [E-commerce Manager] of [Reseller X] also said to Poole that whenever asked by Poole to amend its online prices, [Reseller X] had always done so. This demonstrates that [Reseller X] had 'come into line' and implemented Poole's pricing instructions 'every time'.³⁵⁶

'[...] we've been down this [...] road a couple of times before where we've been told to come into line with pricing. [...] Fair enough. Not a problem. We come into line and then I see on Google Shopping that no one else is in line with it. And then we do lose out off the back of that. [...] every time we do comply with you, we do take a hit you know what I mean?' (emphasis added by CMA)

³⁵³ Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p6, lines 16–25 (URN 00976).

³⁵⁴ Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p10, lines 10–13 (URN 00976).

³⁵⁵ Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p12, lines 19–21 (URN 00976).

³⁵⁶ Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p3, lines 2–13 (URN 00976).

- 4.94. [Area Sales Manager] of Poole explained to [E-commerce Manager] and [Online Marketing Manager] of [Reseller X] at the meeting that resellers that had not complied with the Endon Policy had had their accounts put on hold, with the implication that [Reseller X] would suffer the same consequences if it did not do so:

*'There's three of them out of the top ten which are not complying to it. [...] **But with those three their accounts are on hold. So even if somebody does buy off them, they can't buy it off us***'.³⁵⁷

*'There is [...] three, four companies on there. If you have a look at certain products which are cheaper, but **they have had their accounts on hold. [...] So they cannot supply. [...] Until they get into line***'.³⁵⁸

*'See, we had one where he just literally one weekend he's just put a flash sale on [...] 30% off every Endon item. So all of a sudden he's got a massive loads of orders. [...] but **we've sort of like stopped his account now so he can't do it***'.³⁵⁹ (emphasis added by CMA)

- 4.95. At the meeting on 27 May 2016, [Area Sales Manager] of Poole explained to [E-commerce Manager] and [Online Marketing Manager] of [Reseller X] that Poole was monitoring compliance by resellers with the Endon Policy and encouraged [Reseller X] to monitor other resellers' online prices as well:

*'If you do come up against – because obviously we are policing this as much as we can do with everybody whose [sic] got an Endon account. If say, like, you do find one [...] **if you ping an email across to me who they are, at least then I can let you know that their account's on hold or [...] this one's been missed we'll put it on hold vice versa. [...] then we can go and talk to them as well [...]***'.³⁶⁰ (emphasis added by CMA)

*'all the ASMs are policing them.'*³⁶¹

- 4.96. At the meeting, [E-commerce Manager] of [Reseller X] promised to implement immediately the latest prices specified by Poole and [Online

³⁵⁷ Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p3, lines 24–26 (URN 00976).

³⁵⁸ Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p2, lines 22–27; p3, line 1 (URN 00976).

³⁵⁹ Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p14, lines 4–12 (URN 00976).

³⁶⁰ Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p4, lines 15–22 (URN 00976).

³⁶¹ Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p5, line 14 (URN 00976).

Marketing Manager] of [Reseller X] sought assurance that [Reseller X]'s account would not be put on stop:

[E-commerce Manager]: ***We'll get in line, but like I say, there's only two of us on it. [...] So...if you can like give me a week or two.***

[Area Sales Manager]: ***Yeah. I'll, I'll, I'll put a date down for the second week in July. [...]***

[Online Marketing Manager]: ***The thing is if we've got the two weeks grace we won't be [...] stopped in any way? It will be alright.***³⁶²

[E-commerce Manager]: ***'We'll start the work on it straight away. [...] Then we should hit that target.'***³⁶³
(emphasis added by CMA)

- 4.97. [Reseller X] itself also confirmed to the CMA that it agreed to Poole's pricing instructions so as to avoid any consequences linked to the ILA:³⁶⁴

'[Reseller X] complied to the instructions given in the meeting fearing that we would have image rights pulled away from us or face legal action as [Area Sales Manager] had stated that they had proceeded with with [sic] other sellers over image rights.' (emphasis added by CMA)

- 4.98. Following the meeting of 27 May 2016, [E-commerce Manager] of [Reseller X] created a spreadsheet listing all products covered by the Endon Policy with a column setting out the '***PRICE WE HAVE TO DISPLAY ON GOOGLE***³⁶⁵ in order to comply.³⁶⁶
- 4.99. Poole followed up with [Reseller X] about changing its online prices on 1 June 2016. An email from [Area Sales Manager] of Poole to [National Sales Manager] of Poole stated:³⁶⁷

³⁶² Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p15, lines 1–22 (URN 00976).

³⁶³ Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p15, lines 23–25 (URN 00976).

³⁶⁴ [Reseller X]'s response to Question 12(d) of section 26 notice dated 11 November 2016 (URN 00992).

³⁶⁵ Spreadsheet provided as part of [Reseller X]'s response to Question 12(d) of section 26 notice dated 11 November 2016 (URN 00991); see also [Reseller X]'s response to Question 12(e) of section 26 notice dated 11 November 2016 (URN 00992). [Reseller X] stated: '*See spreadsheet in order to adhere to fixed prices*'.

³⁶⁶ [Reseller X]'s response to Question 14(a) of section 26 notice dated 11 November 2016 (URN 00992).

³⁶⁷ Email from [Area Sales Manager] (Poole) to [National Sales Manager] (Poole) dated 1 June 2016 (URN 00740).

'I have spoken to [Reseller X] and they have been working on the internet site It will be completed in the next day if it all goes to plan'.

- 4.100. An email dated 10 June 2016 from [E-commerce Manager] of [Reseller X] to [Area Sales Manager] of Poole shows that, following the meeting with Poole on 27 May 2016, [Reseller X] increased its prices on 8 June 2016:³⁶⁸

'Here are a few people not adhering to the trade less 4% [links]

Just so you know we have had our prices adjusted for 2 days now and have lost sales due to this.

If other sellers are still selling below the pricing structure in place within a week, we will be returning to our competitive pricing plan.'

- 4.101. On 15 June 2016 [E-commerce Manager] of [Reseller X] sent an email to [Area Sales Manager] of Poole reporting another online reseller for having *'lower prices than they should have [...]. Not sold a single Endon item since the change'*.³⁶⁹

- 4.102. [Reseller X] estimated that it stopped implementing the prices prescribed by Poole following its email dated 15 June 2016:³⁷⁰

'Once created [spreadsheet of prices] this was implemented in our pricing up until the 15th June (estimate)'.

V. Conclusion on the agreement and/or concerted practice between Endon and [Reseller X]

- 4.103. In view of the foregoing, the CMA has concluded that:

- [Reseller X] was a reseller of Endon products from [X] and sold the products online from [X].³⁷¹
- On at least two occasions (once in May 2013³⁷² and another in May 2016³⁷³), Endon instructed [Reseller X] to set its online prices so that they were no lower than the prices specified by Endon.

³⁶⁸ Email from [E-commerce Manager] ([Reseller X]) to [Area Sales Manager] (Poole) dated 10 June 2016 (URN 00993).

³⁶⁹ Email from [E-commerce Manager] ([Reseller X]) to [Area Sales Manager] (Poole) dated 15 June 2016 (URN 00994).

³⁷⁰ [Reseller X]'s response to Question 14(a) of section 26 notice dated 11 November 2016 (URN 00992).

³⁷¹ See paragraph 4.72 above.

³⁷² See paragraphs 4.74–4.77 above.

³⁷³ See paragraphs 4.89–4.90 above.

- On at least two occasions,³⁷⁴ Endon required [Reseller X] to sign an ILA which included an unwritten condition to adhere to the Endon Policy.³⁷⁵ [Reseller X] agreed to the terms of the ILA in February 2014 and again in October 2015.³⁷⁶
- [Reseller X] understood that selling Endon products online below the price specified by Endon would result in Endon putting [Reseller X]'s account on hold³⁷⁷ or withdrawing [Reseller X]'s right to use Endon's images under the ILA.³⁷⁸
- [Reseller X] told Endon that it had been adhering to the Endon Policy as instructed.³⁷⁹ For example, [Reseller X] confirmed to Endon in May 2016 that it complied with the Endon Policy (*'[w]e usually do. I mean we always do'*).³⁸⁰
- [Reseller X] told the CMA that [Reseller X] had adhered to the Endon Policy as instructed.³⁸¹
- [Reseller X] told Endon in May 2016 that it would comply with the Endon Policy going forward, and did so.³⁸²
- On at least three occasions,³⁸³ [Reseller X] reported resellers to Endon for selling Endon products online at a lower price than [Reseller X], ie below the price specified by the Endon Policy. This shows that both [Reseller X] and Endon understood there to be an agreement and/or concerted practice between Endon and resellers, including [Reseller X], that they would not price below the specified level.

4.104. The CMA has taken into account the context of the arrangements between Endon and [Reseller X], including the evidence that employees of Endon were aware of the potential illegality of the Endon Policy and were careful not to communicate their pricing instructions in writing.³⁸⁴ Indeed, in one instance where communications about the arrangements with [Reseller X] were put in writing, instructions were issued for them to be deleted from the

³⁷⁴ See paragraphs 4.78 above.

³⁷⁵ See paragraph 4.78–4.80 above.

³⁷⁶ See paragraphs 4.78 above.

³⁷⁷ See paragraph 4.94–4.95 above.

³⁷⁸ See paragraphs 4.78–4.80 and 4.97 above.

³⁷⁹ See paragraphs 4.92–4.93 above.

³⁸⁰ See paragraph 4.92 above.

³⁸¹ See paragraph 4.77 and 4.97 above.

³⁸² See paragraph 4.96–4.102 above.

³⁸³ See paragraph 4.75, 4.100 and 4.101 above.

³⁸⁴ See paragraph 3.36 above.

server.³⁸⁵ In addition, the nature of the Endon Policy was such that Endon rarely needed to contact [Reseller X] about the Endon Policy when [Reseller X] was complying with it because it was based on a pricing formula. As a result, this limited the need for written communication about the Endon Policy.³⁸⁶

4.105. In light of the above conclusions, the CMA finds a concurrence of wills between [Reseller X] and Endon³⁸⁷ that [Reseller X] would not sell Endon branded products online below the price specified by the Endon Policy. In particular:

- Endon instructed [Reseller X] not to sell Endon branded products online below the price specified by the Endon Policy, with the threat of negative consequences if [Reseller X] failed to comply; and
- [Reseller X]:
 - understood the instructions from Endon and the potential consequences if it did not comply; and
 - in practice, agreed to abide by and/or implemented Endon's instructions not to sell Endon branded products online below the price specified in the Endon Policy, including making price adjustments where instructed to do so by Endon.

This constitutes an agreement for the purposes of the Chapter I prohibition and Article 101 TFEU.

4.106. In the alternative, the CMA finds that the arrangements identified above constituted at the very least a concerted practice between Endon and [Reseller X], on the basis that [Reseller X] knew Endon's wishes as regards the Endon Policy and adjusted its online pricing behaviour as a result, thereby knowingly substituting practical cooperation for the risks of price competition between resellers.

4.107. The CMA finds that the duration of the agreement and/or concerted practice not to sell Endon branded products online below the price specified in the Endon Policy was 31 May 2013 (at the latest) to 15 June 2016. Although

³⁸⁵ See paragraph 4.88 above.

³⁸⁶ See, for example, *C-204/00 P etc Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, paragraphs 55–57.

³⁸⁷ Or Poole, from 1 January 2015, when Endon's business was merged into Poole. Both Endon and Poole were wholly owned by NLC throughout the Endon Relevant Period and are therefore a single economic unit. For ease of reference, we refer to Endon only.

[Reseller X] occasionally sold some Endon branded products online below the prices specified by the Endon Policy from time to time, such instances of non-compliance were identified by Endon and [Reseller X] subsequently adjusted its prices.³⁸⁸ The evidence demonstrates that when asked to amend its prices by Endon, [Reseller X] agreed to do so.³⁸⁹ Moreover, there is no evidence that [Reseller X] notified Endon that it would no longer comply with the Endon Policy or otherwise publicly distanced itself from the Endon Policy at any time throughout the Endon Relevant Period.³⁹⁰

- 4.108. The CMA therefore concludes that [Reseller X] was party to an agreement and/or concerted practice with Endon from 31 May 2013 (at the latest) to 31 December 2014, and with Poole from 1 January 2015 to 15 June 2016.

D. Object of preventing, restricting, or distorting competition

- 4.109. For the reasons set out below, the CMA finds that the Agreements had as their object the prevention, restriction or distortion of competition.

I. Key legal principles

General

- 4.110. The Chapter I prohibition and Article 101 TFEU prohibit agreements between undertakings which have as their object the prevention, restriction or distortion of competition.
- 4.111. The term ‘object’ in both prohibitions refers to the sense of ‘aim’, ‘purpose’, or ‘objective’, of the coordination between undertakings in question.³⁹¹
- 4.112. Where an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement has had, or would have, any anti-competitive effects in order to establish an infringement.³⁹²
- 4.113. The Court of Justice has held that object infringements are those forms of coordination between undertakings that can be regarded, by their very

³⁸⁸ See paragraphs 4.82–4.90, 4.96–4.100 above.

³⁸⁹ See paragraphs 4.92–4.93 and 4.96–4.100 above.

³⁹⁰ See paragraph 4.25 above.

³⁹¹ See, for example, respectively: Case 56/64 *Consten & Grundig v Commission*, EU:C:1966:41, paragraph 343 (‘...Since the agreement thus aims at isolating the French market... it is therefore such as to distort competition...’); Case 96/82 *IAZ and Others v Commission*, EU:C:1983:310, paragraph 25; C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643 (**BIDS**), paragraphs 32–33.

³⁹² See, for example, C-8/08 *T-Mobile Netherlands BV v NMa*, EU:C:2009:343, paragraphs 28–30 and the case law cited therein, and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, at 269.

nature, as being harmful to the proper functioning of normal competition.³⁹³

The Court of Justice has characterised as the ‘*essential legal criterion*’ for a finding of anti-competitive object that the coordination between undertakings ‘*reveals in itself a sufficient degree of harm to competition*’ such that there is no need to examine its effects.³⁹⁴

4.114. In order to determine whether an agreement reveals a sufficient degree of harm such as to constitute a restriction of competition ‘by object’, regard must be had to:

- the content of its provisions;
- its objectives; and
- the economic and legal context of which it forms a part.³⁹⁵

4.115. Although the parties’ subjective intention is not a necessary factor in determining whether an agreement is restrictive of competition, there is nothing prohibiting that factor from being taken into account.³⁹⁶

4.116. An agreement may be regarded as having an anti-competitive object even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives.³⁹⁷

Resale Price Maintenance

4.117. Article 101(1)(a) TFEU and section 2(2)(a) of the Act expressly prohibit agreements and/or concerted practices which ‘*directly or indirectly fix purchase or selling prices*’.

4.118. RPM is defined in the Vertical Guidelines as ‘*agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer*’.³⁹⁸ RPM has been found consistently in EU and national decisional practice (including the UK) to constitute a restriction of

³⁹³ C-67/13 P *Groupeement des Cartes Bancaires v Commission*, EU:C:2014:2204 (**Cartes Bancaires**), paragraph 50; affirmed in C-373/14 P *Toshiba v Commission* EU:C:2016:26 (**Toshiba**), paragraph 26.

³⁹⁴ *Cartes Bancaires*, paragraphs 49 and 57. See also *Toshiba*, paragraph 26.

³⁹⁵ *Cartes Bancaires*, paragraph 53 and *Toshiba*, paragraph 27. According to the Court of Justice in *Cartes Bancaires*, paragraphs 53 and 78, in determining that context, it is also necessary to take into consideration all relevant aspects of the context, having regard in particular to 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.

³⁹⁶ *Cartes Bancaires*, paragraph 54; affirmed in C-286/13 P *Dole v Commission*, EU:C:2015:184, paragraph 118.

³⁹⁷ *BIDS*, paragraph 21.

³⁹⁸ Vertical Guidelines, paragraph 48

competition by object.³⁹⁹ The Court of Justice has also held that the imposition of fixed or minimum resale prices on distributors is restrictive of competition by object.⁴⁰⁰

- 4.119. The European Courts have established that it is not unlawful for a supplier to impose a maximum resale price or to recommend a particular resale price. However, describing a price as a ‘recommended’ retail price does not prevent this from amounting to *de facto* RPM, if the reseller does not remain genuinely free to determine its resale price (for example, if there is pressure or coercion exerted by the supplier to adhere to the recommended price).⁴⁰¹
- 4.120. The Court of Justice has confirmed that ‘*it is necessary to ascertain whether such a retail price is not, in reality, fixed by indirect or concealed means, such as the fixing of the margin of the [reseller],*⁴⁰² *threats, intimidation, warnings, penalties or incentives*’.⁴⁰³ This would include, for example, threats to delay or suspend deliveries or to terminate supply in the event that the

³⁹⁹ See cases further below in this section, including cases such as: Commission Decision 73/322/EEC *Deutsche Phillips* (IV/27.010) [1973] OJ L293/40; Commission Decision 77/66/EEC *GERO-fabriek* (IV/24.510) [1977] OJ L16/8; Commission Decision 80/1333/EEC *Hennessy-Henkell* (IV/26.912) [1980] OJ L383/13; Commission Decision 97/123/EC *Novalliance/Systemform* (IV/35.679) [1997] OJ L47/11; Commission Decision 2001/135/EC *Nathan-Bricolux* (COMP.F.1/36.516) [2001] OJ L 54/1, paras 86–90; in *Volkswagen II*, Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4, annulled on appeal Case T-208/01 *Volkswagen AG v Commission* EU:T:2003:326 and Case C-74/04 P *Commission v Volkswagen AG*, EU:C:2006:460; *CD prices*, Commission Press Release IP/01/1212, 17 August 2001; Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975). See also CMA decision of 24 May 2016 *Commercial refrigeration* (CE/9856-14); CMA decision of 10 May 2016 *Bathroom fittings* (CE/9857-14); *HUSKY*, Czech NCA decision of 28 January 2011, upheld on appeal by Brno Regional Court judgment of 26 April 2012; *Young Digital Planet*, Polish NCA decision of 30 October 2012; *Hyundai Motor Vehicles*, Bulgarian NCA decision of 6 November 2012; *Vila*, Danish NCA settlement decision of 30 October 2013; *Pioneer v Bundeswettbewerbsbehörde*, Austrian Cartel Court rulings of March–June 2014; *Witt Hvidevarer*, Danish NCA settlement of 10 July 2014; and decision by the Austrian Competition Authority against *Samsung Electronics Austria GmbH* of 4 November 2015 (BWB/K-396).

⁴⁰⁰ See Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284, paragraph 44, where the Court of Justice held that ‘*provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of [Article 101 (1)] which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty*’. Vertical Guidelines, paragraphs 223–229. See also Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102/1 (VABER), recital 10.

⁴⁰¹ Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504; and Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485. See also VABER, Article 4(a); and Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41, paragraph 25.

⁴⁰² Vertical Guidelines, paragraph 48.

⁴⁰³ Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485, paragraph 71. See also Case C-260/07 *Pedro IV Servicios SL v Total España SA*, EU:C:2009:215, paragraph 80; and Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4 (which includes warnings against deep discounting).

retailer does not observe a given price level.⁴⁰⁴ Other measures include the withdrawal of credit facilities, prevailing on other dealers not to supply⁴⁰⁵ and threatened legal action, pressuring telephone calls and letters.⁴⁰⁶

4.121. RPM can be achieved not only directly, for example, via a contractual provision that directly sets a fixed or minimum resale price,⁴⁰⁷ but also indirectly.⁴⁰⁸

4.122. Examples of indirect RPM include the following:

- fixing the maximum level of discount that resellers can grant from a prescribed price level;⁴⁰⁹
- incentives to adhere to a given price level;⁴¹⁰
- requiring the consent of the supplier if the retailer wishes to fix the prices above or below certain pre-defined levels, and/or pre-authorisation of discounts;⁴¹¹ and
- clauses setting a maximum resale price in combination with a prohibition on commercial conduct liable to damage the supplier's brand (eg a ban on promotional activity/discounts).⁴¹²

4.123. Lastly, RPM can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of a price-monitoring system or the obligation on resellers to report other members of the distribution network who deviate from the standard price level.⁴¹³ However, the use of such measures does not, in itself, constitute RPM.⁴¹⁴

⁴⁰⁴ Vertical Guidelines, paragraph 48. See also Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65; and Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4.

⁴⁰⁵ Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65.

⁴⁰⁶ Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4.

⁴⁰⁷ Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284; Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, EU:C:1987:418; Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, EU:C:1988:183; Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975); *Agreements between Lladro Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

⁴⁰⁸ See analysis of the case law that follows. See also Vertical Guidelines, paragraph 48.

⁴⁰⁹ Case C-260/07 *Pedro IV Servicios SL v Total España SA*, EU:C:2009:215, paragraph 80.

⁴¹⁰ Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485, paragraph 71; and Case C-260/07 *Pedro IV Servicios SL v Total España SA*, EU:C:2009:215, paragraph 80. For example rebates or reimbursement of advertising costs conditional upon observance.

⁴¹¹ Commission Decision 80/1333/EEC *Hennessy-Henkell* (IV/26.912) [1980] OJ L383/13.

⁴¹² Commission Decision 2001/135/EC *Nathan-Bricolux* (COMP.F.1/36.516) [2001] OJ L 54/1.

⁴¹³ Vertical Guidelines, paragraph 48.

⁴¹⁴ Vertical Guidelines, paragraph 48.

II. Legal assessment – Saxby Agreement

- 4.124. The CMA has assessed the content, objectives and legal and economic context of the Agreements and found that they constitute object restrictions as explained below.

Content of the Saxby Agreement

- 4.125. The CMA finds that the content of the Saxby Agreement was to prevent or restrict [Reseller X] from selling certain Saxby branded products (namely, light fittings for bathrooms) online below the price specified by the Saxby Policy, which was a maximum 20% discount off the trade price.⁴¹⁵ The policy was also sometimes expressed as being retail price minus 4%.⁴¹⁶
- 4.126. In the legal and economic context in which it operated,⁴¹⁷ the CMA finds that the Saxby Agreement restricted [Reseller X]'s ability to discount its online sales prices for certain Saxby branded products. The CMA therefore concludes that the Saxby Agreement amounted to RPM in respect of online sales.
- 4.127. When viewed in the light of the actions taken by Saxby to contact resellers who sold Saxby branded products online below the price specified by the Saxby Policy, and the actual or threatened sanctions for pricing below this level, the CMA considers that [Reseller X] was not free to determine its online sales prices. If [Reseller X] attempted to sell Saxby branded products online below the price specified by the Saxby Policy, Saxby would request it to increase its online prices and/or threaten to suspend [Reseller X]'s account.⁴¹⁸ On at least one occasion, Saxby suspended [Reseller X]'s account until [Reseller X] changed its prices so that they were at or above the prices specified by the Saxby Policy.⁴¹⁹
- 4.128. RPM has been found consistently at both the EU and the national level (including the UK) to have the object of preventing, restricting or distorting competition.⁴²⁰

⁴¹⁵ See paragraphs 3.41, 4.36–4.37 and 4.39–4.40 above.

⁴¹⁶ See paragraph 3.42 above.

⁴¹⁷ See Chapter 3, Section B above, and paragraphs 4.136–4.137 below.

⁴¹⁸ See paragraphs 4.39, 4.43, 4.44 and 4.47 above.

⁴¹⁹ See paragraphs 4.44–4.49 above.

⁴²⁰ See paragraph 4.118 above.

Objectives of the Saxby Agreement

- 4.129. The Saxby Agreement prevented [Reseller X] from selling certain Saxby branded products online below the price specified by the Saxby Policy. It is clear from the fact that Saxby imposed sanctions for non-compliance with the Saxby Policy, for example, putting [Reseller X]'s account on hold, that the objective of the Saxby Agreement was to fix minimum resale prices in practice.⁴²¹
- 4.130. The CMA considers that, in the absence of the Saxby Agreement, [Reseller X] would have been able to determine independently its own price for online sales of Saxby branded products. In this way, [Reseller X] would have had the freedom to attract and win customers by using the internet to signal to customers the existence of a price advantage over its competitors. As such, this would have increased the scope for price competition between [Reseller X] and other resellers of Saxby branded products.
- 4.131. In the light of the above, the CMA considers that the objective of the Saxby Agreement was to:
- reduce price competition between resellers from online sales; and
 - reduce downward pressure on the prevailing price of Saxby branded products in the market.
- 4.132. The evidence shows that Saxby had various reasons for the Saxby Policy, including
- to ensure that customers agreed to stock Saxby's new bathrooms range;⁴²²
 - '*due to the investment made in the new bathroom range and the expectations of resellers in the market*',⁴²³ and
 - so as '*not to devalue the product*'.⁴²⁴
- 4.133. As noted at paragraph 4.116 above, an agreement may be regarded as having an anti-competitive object, even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives.⁴²⁵

⁴²¹ See paragraphs 3.58 to 3.61 and 4.44–4.49 above.

⁴²² See paragraph 3.45 above.

⁴²³ See paragraph 3.45 above.

⁴²⁴ See paragraph 3.60 above.

⁴²⁵ *BIDS*, paragraph 21.

4.134. However, Saxby recognised that the Saxby Policy restricted its resellers' ability to compete in the sales of Saxby branded products online. For example:

- Saxby wanted to ensure that resellers '*would make money*' on Saxby's new bathrooms range;⁴²⁶
- monitoring of the Saxby Policy sought to avoid '*any price war*';⁴²⁷
- [Reseller X] stated to Saxby on 25 January 2013: '*I have no choice but to begin competing again*';⁴²⁸ and
- Saxby was aware that the Saxby Policy was potentially illegal RPM and attempted to enforce it without putting anything in writing.⁴²⁹

4.135. The CMA considers that this evidence of subjective intention above supports its conclusion that the Saxby Agreement had the object of preventing, restricting or distorting competition through RPM in the supply of Saxby branded products in the UK.

Legal and economic context of the Saxby Agreement

4.136. Chapter 3, Section B above provides an overview of the domestic light fittings sector. In reaching its findings that the Saxby Agreement had the object of restriction competition, the CMA has had regard to the actual context in which the Saxby Agreement operated, including:

- the goods affected by it;⁴³⁰
- the conditions of the functioning and structure of the market;⁴³¹ and
- the relevant legal and economic context.⁴³²

4.137. The CMA considers that the legal and economic context in which domestic light fittings are supplied (including the importance of the internet as a retail channel) is a context in which a restriction on the prices at which Saxby products can be sold online by its very nature restricts competition.

⁴²⁶ See paragraph 3.45 above.

⁴²⁷ See paragraph 3.46 above.

⁴²⁸ See paragraph 4.50 above.

⁴²⁹ See paragraphs 3.55–3.56 above.

⁴³⁰ See paragraphs 3.15–3.19 and 3.98–3.101 above.

⁴³¹ See paragraphs 3.20–3.24 above.

⁴³² See paragraphs 3.25–3.32 above.

III. Conclusion on the object of the Saxby Agreement

4.138. For the reasons set out above, the CMA finds that the Saxby Agreement had as its object the prevention, restriction or distortion of competition (through RPM) in the supply of Saxby products within the UK.

IV. Legal assessment – Endon Agreement

Content of the Endon Agreement

4.139. The CMA finds that the content of the Endon Agreement was to prevent or restrict [Reseller X] from selling Endon branded products online below the price specified by the Endon Policy, which was a maximum discount of 20% off the RRP excluding VAT.⁴³³ The policy was also sometimes expressed as being RRP minus 4%.⁴³⁴

4.140. In the legal and economic context in which it operated,⁴³⁵ the CMA finds that the Endon Agreement restricted [Reseller X]’s ability to discount its online sales prices for certain Endon branded products. The CMA therefore concludes that the Endon Agreement amounted to RPM in respect of online sales.

4.141. When viewed in the light of the actions taken by Endon⁴³⁶ to contact resellers who sold Endon products online below the price specified by the Endon Policy, and the actual or threatened sanctions for pricing below this level, the CMA considers that [Reseller X] was not free to determine its online sales prices. If [Reseller X] attempted to sell Endon branded products online below the price specified by the Endon Policy, Endon would request it to increase its online prices⁴³⁷ and/or threaten to suspend or close [Reseller X]’s account⁴³⁸ or threaten to withdraw [Reseller X]’s rights to use Endon images online.⁴³⁹

⁴³³ See paragraphs 3.63, 4.74–4.76, 4.82, 4.89–4.91 and 4.100 above.

⁴³⁴ See paragraph 3.63 above.

⁴³⁵ See Chapter 3, Section B above, and paragraphs 4.151–4.152 below.

⁴³⁶ Or Poole, from 1 January 2015, when Endon’s business was merged into Poole. Both Endon and Poole were wholly owned by NLC throughout the Endon Relevant Period and are therefore a single economic unit. For ease of reference, we refer to Endon only.

⁴³⁷ See paragraphs 4.82 and 4.89–4.90 above.

⁴³⁸ See paragraphs 4.94–4.95 above.

⁴³⁹ See paragraphs 3.68–3.69; 4.78–4.80 and 4.97 above.

- 4.142. The CMA considers that the ILA formed part of and reinforced the Endon Agreement by acting as an enforcement mechanism for ensuring [Reseller X]'s compliance.⁴⁴⁰
- 4.143. RPM has been found consistently at both the EU and the national level (including the UK) to have the object of preventing, restricting or distorting competition.⁴⁴¹

Objectives of the Endon Agreement

- 4.144. The Endon Agreement prevented [Reseller X] from selling Endon branded products online below the price specified by the Endon Policy. It is clear from the fact that Endon imposed sanctions on resellers for non-compliance with the Endon Policy and informed [Reseller X] of those sanctions, that the objective of the Endon Agreement was to fix minimum resale prices in practice.⁴⁴²
- 4.145. The CMA considers that, in the absence of the Endon Agreement, [Reseller X] would have been able to determine its own prices for online sales of Endon branded products. In this way, [Reseller X] would have had the freedom to attract and win customers by using the internet to signal to customers the existence of a price advantage over its competitors. As such, this would have increased the scope for price competition between [Reseller X] and other resellers of Endon branded products.
- 4.146. In the light of the above, the CMA considers that the objective of the Endon Agreement was to:
- reduce price competition between resellers from online sales; and
 - reduce downward pressure on the prevailing price of Endon branded products in the market.
- 4.147. The evidence shows that Endon had various reasons for the Endon Policy, including
- to ensure that customers stocked Endon product;⁴⁴³

⁴⁴⁰ See paragraphs 4.78–4.80.

⁴⁴¹ See paragraphs 4.118 above.

⁴⁴² See paragraphs 4.78–4.80 and 4.94–4.97 above.

⁴⁴³ See paragraph 3.65 above.

- *'to streamline customers to those who were generating significant business',*⁴⁴⁴ and
- to protect the Endon brand.⁴⁴⁵

4.148. As noted at paragraph 4.116 above, an agreement may be regarded as having an anti-competitive object, even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives.⁴⁴⁶

4.149. However, Endon recognised that the Endon Policy restricted its resellers' ability to compete in the sales of Endon branded products online. For example:

- [Sales Director] of Endon recalls that customers *'made it clear that Endon needed to take action regarding squeezed margins as a consequence of falling prices'*.⁴⁴⁷
- [Sales Director] of Endon recalls that he informed customers: *'If you want to check online, we do impose a pricing policy as we want everyone to get a fair margin'*.⁴⁴⁸
- [Area Sales Manager] of Poole informed [E-commerce Manager] of [Reseller X] on 27 May 2016 that: *'So this is why we're trying to police it in this sense of like 4% that means that everybody makes a good margin on the internet'*.⁴⁴⁹
- Endon was aware that the Endon Policy was potentially illegal RPM and attempted to enforce it without putting anything in writing.⁴⁵⁰ For instance, in a meeting on 27 May 2016, [E-commerce Manager] of [Reseller X] asked [Area Sales Manager] of Poole *'Isn't it illegal to fix prices?'*. [Area Sales Manager] of Poole replied *'It is illegal to fix prices. That's why we won't put anything in writing.'*⁴⁵¹

4.150. The CMA considers that this evidence of subjective intention above supports its conclusion that the Endon Agreement had the object of preventing,

⁴⁴⁴ See paragraph 3.68 above.

⁴⁴⁵ See paragraph 3.66 above.

⁴⁴⁶ *BIDS*, paragraph 21.

⁴⁴⁷ See paragraph 3.65 above.

⁴⁴⁸ See paragraph 3.69 above.

⁴⁴⁹ See paragraph 4.90 above.

⁴⁵⁰ See paragraphs 3.72–3.77 above.

⁴⁵¹ Transcript of [Reseller X] recording of own meeting with Poole dated 27 May 2016, p7, line 27; p8, lines 1-3 (URN 00976).

restricting or distorting competition through RPM in the supply of Endon branded products in the UK.

Legal and economic context of the Endon Agreement

4.151. Chapter 3, Section B above provides an overview of the domestic light fittings sector. In reaching its findings that the Endon Agreement had the object of restriction competition, the CMA has had regard to the actual context in which the Endon Agreement operated, including:

- the goods affected by it;⁴⁵²
- the conditions of the functioning and structure of the market;⁴⁵³ and
- the relevant legal and economic context.⁴⁵⁴

4.152. The CMA considers that the legal and economic context in which domestic light fittings are supplied (including the importance of the internet as a retail channel) is a context in which a restriction on the prices at which Endon products can be sold online by its very nature restricts competition.

V. Conclusion on the object of the Endon Agreement

4.153. For the reasons set out above, the CMA finds that Endon Agreement had as its object the prevention, restriction or distortion of competition (through RPM) in the supply of Endon products within the UK.

E. Appreciable restriction of competition

4.154. For the reasons set out below, the CMA finds that each of the Agreements appreciably prevented, restricted or distorted competition for the supply of domestic light fittings to specialist independent retailers and wholesalers within the EU (for the purposes of Article 101 TFEU) and the UK (for the purposes of the Chapter I prohibition).

⁴⁵² See paragraphs 3.15–3.19 and 3.98–3.101 above.

⁴⁵³ See paragraphs 3.20–3.24 above.

⁴⁵⁴ See paragraphs 3.25–3.32 above.

I. Key legal principles

- 4.155. An agreement that is restrictive of competition by ‘object’ will fall within the Chapter I prohibition or Article 101 TFEU only if it has as its object an appreciable prevention, restriction or distortion of competition.⁴⁵⁵
- 4.156. 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.⁴⁵⁶ In accordance with section 60(2) of the Act,⁴⁵⁷ 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.

II. Legal assessment

- 4.157. The CMA has found that each of the Agreements had the object of preventing, restricting or distorting competition (see paragraphs 4.138 and 4.153 above). Given that the effect on trade test is satisfied (see paragraph 4.166 below), the CMA therefore also finds that the Agreements constituted, by their very nature, an appreciable restriction of competition in the supply of lighting products for the purposes of the Chapter I prohibition and Article 101 TFEU.
- 4.158. In any event, and in the alternative, the CMA finds that the Agreements had an appreciable impact on competition for the supply of domestic light fittings to specialist independent retailers and wholesalers within the EU (for the purposes of Article 101 TFEU) and the UK (for the purposes of the Chapter I prohibition). This conclusion is based on the following findings:

⁴⁵⁵ 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 Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 16 citing, among other cases, Case 5/69 *Völk v Vervaecke*, EU:C:1969:35, paragraph 7. See also *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.15.

⁴⁵⁶ Case C-226/11 *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.

⁴⁵⁷ 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.

- The Agreements covered the whole of the UK, rather than being confined to a particular region or locality.
- Poole estimates that it was the largest supplier of domestic light fittings in the UK in 2015. The CMA estimates Poole's share of supply to be approximately [X]%.⁴⁵⁸
- Saxby had turnover of £5.4 million in 2012 and £7.4 million in 2013,⁴⁵⁹ Endon had turnover of £13.6 million in 2013 and £13.7 million in 2014,⁴⁶⁰ and Poole had turnover of £26.8 million in 2012, £24.6 million in 2013,⁴⁶¹ £34.4 million in 2014, and £47.7 million in 2015.⁴⁶²

F. Effect on trade

4.159. For the reasons set out below, the CMA finds that each of the Agreements satisfies the requisite test for an effect on trade.

I. Effect on trade between EU Member States

Key legal principles

4.160. Article 101 TFEU applies where an agreement or concerted practice may⁴⁶³ affect trade between EU Member States to an appreciable extent.⁴⁶⁴

4.161. In order that trade may be affected by an agreement, '*it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that [the] agreement may have an influence,*

⁴⁵⁸ See paragraph 3.22 above. The CMA estimates Poole's share of supply of domestic light fittings to specialist independent retailers and wholesalers to be approximately [X]% based on an estimated total market size of £96.4 million and Poole sales of £[X] million in 2015. See AMA Research (2016), Lighting Market Report – UK 2016-2020 Analysis, p84 (URN 01143), which estimates that sales of domestic light fittings via lighting specialists and internet/mail order channels comprised 22% of the total domestic light fittings market of £438 million.

⁴⁵⁹ Question 14 of Poole Lighting Limited's response to request for information dated 2 December 2016 (URN 01142).

⁴⁶⁰ Financial statements Endon Lighting Limited For the year ended 31 December 2014, p7 (URN 01238).

⁴⁶¹ Financial statements Poole Lighting Limited For the year ended 31 December 2013, p6 (URN 00995).

⁴⁶² Financial statements Poole Lighting Limited For the year ended 31 December 2015, p6 (URN 01233). In *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14, paragraph 60, the CAT took into account that the parties to the infringement were '*substantial undertakings*' (one of which had turnover of £10 million) in concluding that the alleged infringement was appreciable.

⁴⁶³ It is not necessary to demonstrate that an agreement has had an actual impact on trade – it is sufficient to establish that the agreement is capable of having such an effect: joined cases T-2-2/98 etc *Tate & Lyle plc and Others v Commission*, EU:T:2001:185, paragraph 78.

⁴⁶⁴ Case 22/71 *Béguelin Import Co. v S.A.G.L. Import Export*, EU:C:1971:113, paragraph 16.

direct or indirect, actual or potential, on the pattern of trade between Member States'.⁴⁶⁵

- 4.162. For the purposes of assessing whether an agreement may affect trade between Member States the CMA will have regard to the approach set out in the Commission's Effect on Trade Guidelines.⁴⁶⁶
- 4.163. The assessment of whether an agreement is capable of affecting trade between Member States involves consideration of various factors which, taken individually, may not be decisive.⁴⁶⁷ These factors include the nature of the agreement, the nature of the products covered by the agreement, the position and importance of the undertakings concerned and the economic and legal context of the agreement.⁴⁶⁸
- 4.164. The assessment of whether an agreement has an 'appreciable' effect on trade between Member States similarly depends on various factors and the circumstances of each case.⁴⁶⁹ For example, the stronger the market position of the undertakings concerned, the more likely it is that an agreement that is capable of affecting trade between Member States can be held to do so appreciably.⁴⁷⁰
- 4.165. In past cases, the Court of Justice has considered the appreciability requirement to be fulfilled when the sales of the undertakings concerned accounted for approximately 5% of the relevant market.⁴⁷¹ However, market share alone is not always the decisive factor. In particular, it is necessary also to take into account the turnover of the undertakings in the products concerned.⁴⁷²

⁴⁶⁵ Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38, p249.

⁴⁶⁶ *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.23, and Commission Notice, *Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty* [2004] OJ C101/07 (**Effect on Trade Guidelines**)

⁴⁶⁷ Effect on Trade Guidelines, paragraph 28, citing Case C-250/92 *Gottrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvarerelskab AmbA*, EU:C:1994:413, paragraph 54.

⁴⁶⁸ Effect on Trade Guidelines, paragraphs 28 and 32.

⁴⁶⁹ Effect on Trade Guidelines, paragraph 45.

⁴⁷⁰ Effect on Trade Guidelines, paragraph 45.

⁴⁷¹ Effect on Trade Guidelines, paragraph 46 citing Case 19/77 *Miller International Schallplatten GmbH v Commission*, EU:C:1978:19, paragraphs 9–10 and Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 58.

⁴⁷² Effect on Trade Guidelines, paragraph 46 citing joined cases 100/80 *SA Music Diffusion Française v Commission*, EU:C:1983:158, paragraph 86. See also Effect on Trade Guidelines, paragraph 48 to the effect that the sales of an undertaking in absolute terms may be sufficient to support a finding that the impact on trade is appreciable, particularly in the case of agreements that by their very nature are liable to affect inter-State trade.

Legal assessment

4.166. The CMA finds that each of the Agreements had the potential to affect trade between EU Member States to an appreciable extent. The CMA has based its finding on the following:

- Each of the Agreements involved RPM and covered products that were supplied throughout the whole of the UK.⁴⁷³
- The products that were the subject of each of the Agreements could be easily traded across borders as there were no significant cross-border barriers, in particular when sold through resellers online, and the Commission has previously found evidence of competition across borders in the EEA in relation to ‘professional/industrial light fixtures’.⁴⁷⁴
- The Agreements related to online commerce which, by its nature, is likely to reach consumers in other EU Member States.
- The turnover and market position⁴⁷⁵ of the undertaking concerned.
- NLC’s lighting business itself covers at least two EU Member States given NLC’s majority shareholding in the German company, Brilliant AG, as well as Poole.⁴⁷⁶

II. Effect on trade within the UK

4.167. The Chapter I prohibition applies to agreements which may affect trade within the UK.⁴⁷⁷

4.168. As regards the question whether the effect on trade within the UK should be appreciable, the 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

⁴⁷³ See paragraphs 4.126 and 4.140 above.

⁴⁷⁴ See paragraphs 3.103–3.105 above.

⁴⁷⁵ See paragraphs 3.22 and 4.158 above.

⁴⁷⁶ See paragraph 3.5 above.

⁴⁷⁷ The UK includes any part of the UK in which an agreement operates or is intended to operate: section 2(7) of the Act. As is the case in respect of Article 101 TFEU, it is not necessary to demonstrate that an agreement has had an actual impact on trade – it is sufficient to establish that the agreement is capable of having such an effect: joined cases T-202/98 etc *Tate & Lyle plc and Others v Commission*, EU:T:2001:185, paragraph 78.

respectively.⁴⁷⁸ In a subsequent case, the CAT held that it was not necessary to reach a conclusion on that question.⁴⁷⁹

- 4.169. The CMA finds that the Agreements may have affected trade within the UK or a part of the UK. This is because the products which were the subject of the Agreements were supplied throughout the UK.

G. Exclusion or exemption

I. Exclusion

- 4.170. The Chapter I prohibition does not apply in any of the cases in which it is excluded by or as a result of Schedules 1 to 3 of the Act.⁴⁸⁰

- 4.171. The CMA finds that none of the relevant exclusions applies to the Agreements.

II. Block exemption

- 4.172. An agreement is exempt from Article 101(1) TFEU if it falls within a category of agreement which is exempt by virtue of a block exemption regulation.

- 4.173. Pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it does not affect trade between EU Member States but otherwise falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation.

- 4.174. It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.⁴⁸¹

- 4.175. Vertical agreements that restrict competition may be exempt from the Chapter I prohibition/Article 101(1) TFEU if they fall within the Vertical Agreements Block Exemption Regulation (the 'VABER').⁴⁸² The VABER exempts such agreements where the relevant market shares of the supplier

⁴⁷⁸ *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11 at 459–461.

⁴⁷⁹ *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 at 48–51 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.

⁴⁸⁰ Section 3 of the Act sets out the following exclusions: Schedule 1 covers mergers and concentrations, Schedule 2 covers competition scrutiny under other enactments; and Schedule 3 covers general exclusions.

⁴⁸¹ See by analogy section 9(2) of the Act.

⁴⁸² Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

and the buyer each do not exceed 30%, unless the agreement contains one of the so-called ‘hardcore’ restrictions in Article 4 of the VABER.⁴⁸³

- 4.176. Article 4(a) of the VABER provides that the exemption provided for under the VABER does not apply to those agreements which directly or indirectly have as their object *‘the restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered, by any of the parties.’*
- 4.177. The Agreements prevented [Reseller X] from selling Saxby and Endon branded products online below the price specified by the Saxby Policy and the Endon Policy. Therefore, the Agreements restricted the buyer’s ability to determine its sale price (ie it amounted to RPM). The CMA therefore finds that Article 4(a) of the VABER is engaged in the present case such that the block exemption under the VABER does not apply to either of the Agreements. It follows that neither of the Agreements are exempt from the application of the Chapter I prohibition (by virtue of section 10 of the Act) or Article 101 TFEU.

III. Individual exemption

- 4.178. Agreements which satisfy the criteria set out in section 9 of the Act/Article 101(3) TFEU are exempt from the Chapter I prohibition/Article 101(1) TFEU.
- 4.179. There are four cumulative criteria to be satisfied:
- the agreement contributes to improving production or distribution, or promoting technical or economic progress;
 - while allowing consumers a fair share of the resulting benefit;
 - the agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and
 - the agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

⁴⁸³ See Articles 2–4 of the VABER.

- 4.180. In considering whether an agreement satisfies the criteria set out in section 9 of the Act, the CMA will have regard to the Commission's Article 101(3) Guidelines.⁴⁸⁴
- 4.181. The CMA notes that 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).⁴⁸⁵ However, each case ultimately falls to be assessed on its merits.
- 4.182. It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.⁴⁸⁶

H. Attribution of liability

I. Key legal principles

- 4.183. For each party that the CMA finds to have infringed the Chapter I prohibition and Article 101 TFEU, the CMA will first identify the legal entity that was directly involved in the infringement. It will then determine whether liability for the infringement should be shared with any other legal entity, in which case each legal entity's liability will be joint and several on the basis that all form part of the same undertaking.
- 4.184. Companies belonging to the same corporate group will often constitute a single undertaking within the meaning of the Chapter I prohibition/Article 101 TFEU allowing the conduct of a subsidiary to be attributed to the parent. A parent company may be held jointly and several liable for an infringement committed by a subsidiary company where, at the time of the infringement, the parent company was able to and did exercise decisive influence over the conduct of the subsidiary, so that the two form part of a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU.⁴⁸⁷

⁴⁸⁴ Commission Notice, *Guidelines on the Application of Article 81(3) of the Treaty* [2004] OJ C101/97 (Article 101(3) Guidelines). See also *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 5.5.

⁴⁸⁵ Article 101(3) Guidelines, paragraph 46 and Vertical Guidelines, paragraph 47.

⁴⁸⁶ Article 101(3) Guidelines, see paragraphs 51–58; Vertical Guidelines, paragraph 47. See also section 9(2) of the Act.

⁴⁸⁷ Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 60–61; and Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130. See also Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 50.

- 4.185. Where a subsidiary is wholly owned, there is a presumption that its parent company exercised decisive influence over the subsidiary.⁴⁸⁸
- 4.186. As to the interpretation of ‘decisive influence’, the CAT noted in *Durkan*⁴⁸⁹ that such influence may be indirect and can be established even where the parent does not interfere in the day-to-day business of the subsidiary or where the influence is not reflected in instructions or guidelines emanating from the parent to the subsidiary. Instead, one must look generally at the relationship between the two entities, and the factors to which regard may be had when considering the issue of decisive influence ‘are not limited to commercial conduct but cover a wide range’.⁴⁹⁰
- 4.187. In examining whether a parent company has the ability to exercise decisive influence over the market conduct of its subsidiary, account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to its parent company and, therefore, of economic reality.⁴⁹¹
- 4.188. The actual exercise of decisive influence must be demonstrated on the basis of factual evidence including, in particular, through an analysis of the management powers that the parent companies have over the subsidiary.⁴⁹² The actual exercise of decisive influence can be shown directly by the parent’s specific instructions or rights of co-determination of commercial policy and also can be inferred indirectly from the totality of the economic, organisational and legal links between the parent company and the relevant subsidiary.⁴⁹³ Influence over aspects such as corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters are relevant even if each of those factors taken in isolation does not have sufficient probative value.⁴⁹⁴

⁴⁸⁸ Case T-517/09 *Alstom v Commission*, EU:T:2014:999, paragraph 55; Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraphs 60–61. Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130; and Case T-325/01 *DaimlerChrysler AG v Commission*, EU:T:2005:322, paragraphs 217–221.

⁴⁸⁹ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6.

⁴⁹⁰ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6 [22].

⁴⁹¹ See Joined cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce Inc. v Commission and Commission v Fresh Del Monte Produce Inc.*, EU:C:2015:416, paragraph 76. See also Case C-440/11 P *European Commission v Stichting Administratiekantoort Portielje and Gosselin Group NV*, EU:C:2013:514, paragraph 66; and Case T-45/10 *GEA Group AG v Commission*, EU:T:2015:507, paragraph 133.

⁴⁹² T-77/08 *The Dow Chemical Company v Commission* ECLI:EU:T:2012:47 confirmed on appeal C-179/12 *The Dow Chemical Company v Commission* ECLI:EU:C:2013:605.

⁴⁹³ T-314/01 *Avebe v Commission* ECLI:EU:T:2006:266, paragraph 136 and case-law cited; T-77/08 *The Dow Chemical Company v Commission* ECLI:EU:T:2012:47 paragraph 77; *Durkan v Office of Fair Trading* [2011] CAT 6, paragraphs 19–22.

⁴⁹⁴ T-132/07 *Fuji Electric Co. Ltd v Commission* ECLI:EU:T:2011:344, paragraph 183.

- The actual exercise of decisive influence by the parent company over the subsidiary may be deduced from any, or a combination, of the following non-exhaustive factors:
- board composition and board representation by the parents on the board of the subsidiary;⁴⁹⁵
- overlapping senior management;⁴⁹⁶
- the business relationship between the parent company and the subsidiary;⁴⁹⁷
- presence of the parent company in the same business sector;⁴⁹⁸
- sole representation by the parent company in the administrative proceedings;⁴⁹⁹
- parent and subsidiary presenting themselves to the outside world as forming part of the same group, such as references in the annual reports, description of being part of the same group;⁵⁰⁰ and
- the level of control over the important elements of the business strategy of the subsidiary, the level of integration of the subsidiary into the parent company's corporate structure and how far the parent company, through representatives on the board of the subsidiary, was involved in the running of the subsidiary.⁵⁰¹

II. Liability for the Saxby Infringement

- 4.189. The legal entity that was directly involved in the Saxby Infringement throughout the Saxby Relevant Period was Saxby.
- 4.190. Accordingly, the CMA finds Saxby liable for the Saxby Infringement. Any resulting financial penalty which the CMA may decide to impose will therefore be imposed on Saxby.

⁴⁹⁵ Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraph 38.

⁴⁹⁶ Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 184.

⁴⁹⁷ T-132/07 *Fuji Electric Co. Ltd v Commission* ECLI:EU:T:2011:344, paragraph 184.

⁴⁹⁸ Commission Decision 2007/691/EC *Fittings* (COMP/F/38.121) [2007] OJ L283/63.

⁴⁹⁹ Case C-286/98 *P. Stora Kopparbergs Bergslags AB v Commission*, EU:C:2000:630.

⁵⁰⁰ Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraphs 33–36 and 62–66.

⁵⁰¹ *Durkan v Office of Fair Trading* [2011] CAT 6, paragraph 31.

Saxby and Poole

4.191. The CMA finds that Poole was able to and did exercise decisive influence over Saxby throughout the Saxby Relevant Period. In reaching this conclusion, the CMA has considered a range of factors relating to the economic, organisational and legal links that tie Saxby to Poole. In particular, the CMA notes the following:

- [Shareholder and Director] (who had an interest in Poole via his shareholding in NLC), [Director] and [Director] were directors on the Boards of both Saxby and Poole throughout the Saxby Relevant Period.⁵⁰² [Managing Director] was Managing Director of Saxby and Company Secretary of Poole.⁵⁰³
- From around 2006, Poole provided resource and management to the Saxby business at the request of [Shareholder and Director].⁵⁰⁴ From 2010 and throughout the Saxby Relevant Period, the management, distribution and administration of Saxby's products were carried out by Poole.⁵⁰⁵ NLC stated to the CMA that *'[b]etween 2010-2014, Poole was running approx. 90% of the Saxby operation.'*⁵⁰⁶
- From early 2013, Poole designed and developed Saxby's main range of products.⁵⁰⁷
- [Sales Director] of Poole managed the Saxby brand in addition to the Poole national customer accounts.⁵⁰⁸
- Poole management instigated the Saxby Policy and [Sales Director] of Poole oversaw its implementation.⁵⁰⁹
- Poole operated in the same business sector as Saxby.⁵¹⁰
- Saxby has been represented by NLC, Poole's parent company, throughout the CMA's investigation.

⁵⁰² Saxby Annual return made up to 5 January 2013 (URN 01198) and Poole Annual return made up to 22 April 2013 (URN 01211).

⁵⁰³ Saxby Annual return made up to 5 January 2013 (URN 01198) and Poole Annual return made up to 22 April 2013 (URN 01211).

⁵⁰⁴ Email from [Lawyer] (representing NLC) to the CMA dated 4 November 2016 (URN 01001).

⁵⁰⁵ Email from [Lawyer] (representing NLC) to the CMA dated 4 November 2016 (URN 01001).

⁵⁰⁶ Email from [Lawyer] (representing NLC) to the CMA dated 4 November 2016 (URN 01001).

⁵⁰⁷ Statement of Witness: [Sales Director] dated 19 January 2017, paragraph 32 (URN 01215).

⁵⁰⁸ See paragraph 3.40 above.

⁵⁰⁹ See paragraphs 3.45–3.49 above.

⁵¹⁰ See paragraphs 3.4 and 3.9 above.

- Saxby's website states: '*[w]e have been a trading division of Poole Lighting Ltd since 2007.*'⁵¹¹
- Having conducted the relevant searches of the Companies House register, the CMA understands that Poole did not own any shareholding in Saxby during the Saxby Relevant Period. However, due to the close links between Saxby and Poole, including the common directorships referred to above, it seems that the parties themselves considered that Poole exercised decisive influence over Saxby. For example, NLC submitted to the CMA that Poole and Saxby were both ultimately owned by the same majority shareholder, [Shareholder and Director], throughout the Saxby Relevant Period.⁵¹² The relevant parties' beliefs, even if they were incorrect, are relevant to whether Poole was able in practice to, and actually did, exercise decisive influence over Saxby.

4.192. In light of the above considerations, the CMA concludes that Saxby and Poole formed a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU throughout the Saxby Relevant Period.⁵¹³

Poole and NLC

4.193. Poole was 100% owned by NLC throughout the Saxby Relevant Period.⁵¹⁴ Therefore, the CMA concludes that Poole and its parent company, NLC, formed a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU for the entire Saxby Relevant Period.

Conclusion on joint and several liability

4.194. In the light of the above, the CMA finds NLC jointly and severally liable, together with Saxby and Poole, for the Saxby Infringement.

⁵¹¹ <http://www.saxbylighting.com/about-us>, accessed on 18 January 2017 (URN 01193).

⁵¹² Email from [Lawyer] (representing NLC) to the CMA dated 4 November 2016 (URN 01001).

⁵¹³ In the alternative, even if Saxby and Poole did not form a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU, the CMA finds each of Saxby and Poole liable for the Saxby Infringement because each of them intended to contribute by its own conduct to the common objectives pursued by all the participants and was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives, or it could reasonably have foreseen it and was prepared to accept the risk. See Case C-542/14 *SIA 'VM Remonts' (formerly SIA 'DIV un KO') and Others v Konkurences padome*, ECLI:EU:C:2016:578, paragraphs 28–29.

⁵¹⁴ See paragraph 3.5 above.

III. Liability for the Endon Infringement

4.195. The legal entities that were directly involved in the Endon Infringement throughout the Endon Relevant Period were:

- Endon (from 31 May 2013 to 31 December 2014); and
- Poole (from 1 January 2015, when an internal reorganisation resulted in the Endon business being merged into Poole, to 15 June 2016).

4.196. Accordingly, the CMA finds Endon and Poole liable for the Endon Infringement during their respective periods of involvement. Any resulting financial penalty which the CMA may decide to impose will therefore be imposed on Endon and Poole.

4.197. Endon was 100% owned by NLC throughout the Endon Relevant Period.⁵¹⁵ Therefore, the CMA concludes that Endon and its parent company, NLC, formed a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU for Endon's entire period of involvement in the Endon Infringement, ie from 31 May 2013 to 31 December 2014.⁵¹⁶

4.198. Poole was 100% owned by NLC throughout the Endon Relevant Period.⁵¹⁷ Therefore, the CMA concludes that Poole and its parent company, NLC, formed a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU for Poole's entire period of involvement in the Endon Infringement, ie from 1 January 2015 to 15 June 2016.

Conclusion on joint and several liability

4.199. In the light of the above, the CMA finds NLC jointly and severally liable, together with Endon and Poole during their respective periods of involvement, for the Endon Infringement.

⁵¹⁵ See paragraph 3.13–3.14 above.

⁵¹⁶ Endon's business activities continued to be involved after 31 December 2014, but they were merged into Poole.

⁵¹⁷ See paragraph 3.5 above.

5. THE CMA'S ACTION

A. The CMA's decision

5.1. On the basis of the evidence set out above, the CMA has concluded that:

- NLC, Poole and Saxby infringed the Chapter I prohibition and/or Article 101 TFEU by participating in an agreement and/or concerted practice with [Reseller X] that [Reseller X] would not sell Saxby branded products online below a specified online price, which had as its object the prevention, restriction or distortion of competition within the UK and/or between EU Member States and which may have affected trade within the UK and/or between EU Member States.
- NLC, Poole and Endon infringed the Chapter I prohibition and/or Article 101 TFEU by participating at various times in an agreement and/or concerted practice with [Reseller X] that [Reseller X] would not sell Endon branded products online below a specified online price, which had as its object the prevention, restriction or distortion of competition within the UK and/or between EU Member States and which may have affected trade within the UK and/or between EU Member States.

5.2. Specifically, the CMA has concluded that:

- the duration of the infringement in respect of the agreement between NLC, Poole, Saxby and [Reseller X] was from 31 October 2012 (at the latest) to 25 February 2013; and
- the duration of the infringement in respect of the agreement between NLC, Poole, Endon (at various times) and [Reseller X] was from 31 May 2013 (at the latest) to 15 June 2016.

5.3. The remainder of this Chapter sets out the enforcement action which the CMA is taking and its reasons for taking that action.

B. Directions

5.4. The CMA considers that the Infringements have ceased.⁵¹⁸ Therefore, the CMA considers that it is not necessary to give directions to any party in this case.⁵¹⁹

⁵¹⁸ See paragraphs 3.92 and 3.93 above.

⁵¹⁹ Section 32(1) of the Act provides that if the CMA has made a decision that an agreement infringes the Chapter I prohibition and Article 101(1) TFEU, it may give to such person(s) as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

C. Financial penalties

I. General

5.5. Section 36(1) of the Act provides that on making a decision that an agreement⁵²⁰ has infringed the Chapter I prohibition or Article 101(1) TFEU, the CMA may require an undertaking 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 in force at the time when setting the amount of the penalty (the **Penalties Guidance**).⁵²¹

5.6. The CMA finds NLC, Poole, Saxby and Endon (which are all part of the same single economic unit) jointly and severally liable for the Infringements. Therefore, the CMA considers that it is appropriate to impose a financial penalty jointly and severally on:

- NLC, Poole and Saxby for the Saxby Infringement; and
- NLC, Poole and Endon for the Endon Infringement.

II. The CMA's margin of appreciation

5.7. Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act⁵²² and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the 2000 Order),⁵²³ 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.⁵²⁴

5.8. The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.⁵²⁵ Rather, the CMA makes its assessment on a case-by-case basis,⁵²⁶ having regard to all the relevant

⁵²⁰ Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.

⁵²¹ The guidance currently in force is the OFT's *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board.

⁵²² Section 36(8) is addressed at paragraphs 5.54 and following below.

⁵²³ SI 2000/309, as amended by the Competition Act (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

⁵²⁴ *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

⁵²⁵ See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, at [78].

⁵²⁶ 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

circumstances and the twin objectives of the CMA's policy on financial penalties, namely:

- to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and
- to ensure that the threat of penalties will deter both the infringing undertaking and other undertakings from engaging in anti-competitive activities.⁵²⁷

III. Small agreements

- 5.9. Section 39(3) of the Act provides that a party to a 'small agreement' is immune from financial penalties for infringements of the Chapter I prohibition. This immunity does not apply to infringements of Article 101 TFEU. A 'small agreement' is an agreement between undertakings whose combined applicable turnover does not exceed £20 million for the business year ending in the calendar year preceding the one during which the infringement occurred.⁵²⁸
- 5.10. The turnover of Poole alone exceeded £20 million in calendar years 2012 and 2015.⁵²⁹ Accordingly, the NLC Group does not benefit from immunity from penalty under section 39(3) of the Act.

IV. Intention/negligence

- 5.11. The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition and/or Article 101 TFEU only if it is satisfied that the infringement has been committed intentionally or negligently.⁵³⁰ However,

maxim that each case stands on its own facts is particularly pertinent'. See also Eden Brown and Others v OFT [2011] CAT 8, at [97] where the CAT observed that '[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case'.

⁵²⁷ Section 36(7A) of the Act and Penalties Guidance, paragraph 1.4.

⁵²⁸ Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), Regulation 3. The term 'applicable turnover' means the turnover determined in accordance with the Schedule to the Regulations.

⁵²⁹ See paragraph 4.158 above.

⁵³⁰ Section 36(3) of the Act.

the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.⁵³¹

5.12. 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’.*⁵³²

5.13. 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 of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty.’*⁵³³

5.14. The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement or conduct in question has as its object the restriction of competition.⁵³⁴ For the reasons given at paragraphs 4.124 to 4.153 above, the CMA considers that the Infringements had as their object the prevention, restriction or distortion of competition.

5.15. Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.⁵³⁵

5.16. In the light of the evidence set out at Chapters 3 and 4 above, the CMA considers that NLC, Poole, Saxby and Endon were aware of the anti-competitive nature of their conduct. For example:

- Endon received a warning letter from the OFT in May 2012 informing Endon that imposing minimum retail prices on distributors could amount to an infringement of the Chapter I prohibition and Article 101 TFEU.⁵³⁶

⁵³¹ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs 453–457; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221.

⁵³² *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221.

⁵³³ Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 124.

⁵³⁴ See *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.9.

⁵³⁵ See Case C-681/11 *Bundeswettbewerbsbehörde v Schenker & Co. AG*, EU:C:2013:404, paragraph 38. See also *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.10.

⁵³⁶ See paragraph 2.1 above.

- [Sales Director] of Poole explained to the CMA the meaning of the statement *'Not to be stated in written format to any customer'* in Saxby sales meeting minutes: *'I think it would be for the fact that we would have recognised that it's not good practice to be telling people what to have as pricing levels'*.⁵³⁷
- [National Sales Manager] of Saxby asked to discuss the *'law on price fixing'* with [Sales Director] of Poole⁵³⁸ and instructed [Area Sales Manager] of Poole not to communicate concerns about resellers' pricing on email: *'[...] as you know don't communicate this on email, I will have these emails taken off the server!'*.⁵³⁹
- [Area Sales Manager] of Endon considered how to avoid the prohibition on RPM through the use of a selective distribution agreement. The email shows an appreciation for competition law, an awareness of the prohibition against RPM and the possibility of a fine for a breach of the prohibition, noting *'the 10% of Turnover [sic] fine can also be found stated on the OFT website'*.⁵⁴⁰
- [Area Sales Manager] of Poole explained to [E-commerce Manager] of [Reseller X]: *'It is illegal to fix prices. That's why we won't put anything in writing'*.⁵⁴¹
- [Sales Director] of Endon told [Area Sales Manager] of Endon: *'[T]his info should not be committed to e mail.'* In interview with the CMA, [Sales Director] explained that he made this comment because he was conscious that enforcing a pricing policy was *'wrong'*.⁵⁴²
- [Retail Sales Manager] of Poole forwarded to [Sales Director] of Poole a news alert titled *'BREAKING: Bathroom products firm fined by regulator'* which referred to the CMA's investigation of online resale price maintenance in the bathroom fittings sector.⁵⁴³

5.17. Even disregarding the evidence in the paragraph above, the CMA considers that NLC, Poole, Saxby and Endon ought to have known that their actions would result in a restriction or distortion of competition.⁵⁴⁴ The Infringements are well-established competition law infringements and the parties ought to

⁵³⁷ See paragraph 3.55 above.

⁵³⁸ See paragraph 3.56 above.

⁵³⁹ See paragraph 4.88 above.

⁵⁴⁰ See paragraph 3.66 above.

⁵⁴¹ See paragraph 4.149 above.

⁵⁴² See paragraph 3.77 above.

⁵⁴³ See paragraph 3.89 above.

⁵⁴⁴ See *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.12.

have known that the Infringements would reduce price competition between resellers.

- 5.18. The CMA has therefore found that NLC, Poole, Saxby and Endon committed the Infringements intentionally or, at the very least, negligently.

V. Calculation of penalties

- 5.19. As noted at paragraph 5.5 above, when setting the amount of the penalty, the CMA must have regard to the guidance on penalties in force at that time. The Penalties Guidance establishes a six-step approach for calculating the penalty. The six steps and their application in this case are set out below.

Step 1 – the starting point

- 5.20. The starting point for determining the level of financial penalty that will be imposed on an undertaking is calculated having regard to the relevant turnover of the undertaking and the seriousness of the infringement.⁵⁴⁵

Relevant turnover

- 5.21. The 'relevant turnover' is defined in the Penalties Guidance as the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.⁵⁴⁶ The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.⁵⁴⁷

- 5.22. In the present case, the relevant turnover of the NLC Group comprises:

- For the Saxby Infringement, Saxby turnover from the supply of light fittings for bathrooms in the UK for the financial year ending 31 December 2012, which results in a relevant turnover of £[§<].⁵⁴⁸

⁵⁴⁵ Penalties Guidance, paragraphs 2.3 to 2.6.

⁵⁴⁶ Penalties Guidance, paragraph 2.7. The CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v OFT* and *JJB Sports plc v OFT* [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).

⁵⁴⁷ Penalties Guidance, paragraph 2.7.

⁵⁴⁸ Taking account of the CAT's approach to relevant turnover in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13 at [205-206], the CMA has decided that it is appropriate to make an exception to the Penalties Guidance for the Saxby Infringement and only count the turnover directly covered by the restriction, that is the Saxby bathrooms range. This is due to the unusual and exceptional circumstances in which the

- For the Endon Infringement, turnover from the supply of domestic light fittings to specialist independent retailers and wholesalers in the UK for the financial year ending 31 December 2015, which results in a relevant turnover of £[§<].

Seriousness of the Infringements

- 5.23. To reflect the seriousness of an infringement, the CMA will apply a starting point of up to 30% of an undertaking's relevant turnover.⁵⁴⁹ The actual percentage that is applied to the relevant turnover depends, in particular, on the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.⁵⁵⁰ When making its assessment of the seriousness of an infringement, the CMA will consider a number of factors, including the nature of the products or services, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the infringement's effect on competitors and third parties. The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future. The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.⁵⁵¹
- 5.24. The starting point for the penalty in this case takes into account the fact that the Infringements amounted to RPM, which constitutes vertical 'price fixing' and a 'hardcore' restriction.⁵⁵² The CMA considers RPM to be a serious infringement of the Chapter I prohibition and Article 101 TFEU. The CMA has taken into account the need to deter both the NLC Group and other undertakings from engaging in such infringements in the future.
- 5.25. However, the CMA notes that the Infringements do not fall within the category of the most serious infringements of the Chapter I prohibition and Article 101 TFEU (such as horizontal price fixing, market sharing and other cartel activities), which would ordinarily attract a starting point towards the upper end of the 30% range.
- 5.26. The CMA has also taken into account the following factors in assessing the seriousness of the Infringements:

turnover generated by the supply of the products directly covered by the Saxby Infringement comprise only 2% of total sales in the relevant product market.

⁵⁴⁹ Penalties Guidance, paragraph 2.5.

⁵⁵⁰ Penalties Guidance, paragraph 2.4.

⁵⁵¹ Penalties Guidance, paragraph 2.6.

⁵⁵² See Article 4(a) of the VABER.

- *The nature of the products:* The relevant product market for the purposes of the Infringements is the supply of domestic light fittings to specialist independent retailers and wholesalers.⁵⁵³ Price, including prices offered online, is an important parameter of competition in the supply of domestic light fittings.⁵⁵⁴ However, the CMA notes that the Saxby Infringement only covered one product range, namely light fittings for bathrooms, which represented a very small proportion of the overall market.⁵⁵⁵
- *The structure of the market and Poole's market share:* The upstream supply of light fittings is fragmented and comprises a large number of small organisations.⁵⁵⁶ Poole has an overall share of around [X]% of the supply of domestic light fittings in the UK ([X]% in respect of supply to specialist independent retailers and wholesalers) and describes itself as '*the largest provider of domestic lighting to UK national account and independent retailers*'.⁵⁵⁷ Therefore, whilst Poole is a market leader, it does not have a high market share.
- *Entry conditions:* The CMA considers that entry conditions are not a significant overall factor in assessing seriousness in this particular case.
- *Impact on competitors and third parties:* The Infringements had a clear impact on [Reseller X], in relation to whom the NLC Group sought to prevent or restrict its ability to determine its own resale prices. In turn, the Infringements would likely have reduced price competition from online sales of domestic light fittings products and reduced downward pressure on the retail price of domestic light fittings.⁵⁵⁸

5.27. In view of the foregoing, the CMA has applied a starting point of 18% of relevant turnover for the Saxby Infringement and 19% of relevant turnover for the Endon Infringement.

Step 2 – adjustment for duration

5.28. The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement.⁵⁵⁹ Where the total duration of an infringement is less than one

⁵⁵³ See paragraph 3.107 above.

⁵⁵⁴ See paragraph 3.27 above

⁵⁵⁵ See paragraph 4.125 and 5.22 above.

⁵⁵⁶ See paragraph 3.22 above.

⁵⁵⁷ See paragraphs 3.22 and 4.158 above.

⁵⁵⁸ See paragraphs 3.25 to 3.30 above.

⁵⁵⁹ Penalties Guidance, paragraph 2.12.

year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the infringement.⁵⁶⁰ Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional circumstances decide to round up the part year to a full year.⁵⁶¹

- 5.29. The CMA has found that the Saxby Infringement lasted from 31 October 2012 (at the latest) to 25 February 2013 (3 months, 25 days). The CMA has accordingly applied a multiplier of 1.00 to the figure reached at the end of step 1 for the Saxby Infringement.
- 5.30. The CMA has found that the Endon Infringement lasted from 31 May 2013 (at the latest) to 15 June 2016 (3 years, 15 days). The CMA has accordingly applied a multiplier of 3.25 to the figure reached at the end of step 1 for the Endon Infringement.

Step 3 – adjustment for aggravating and mitigating factors

- 5.31. 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.⁵⁶² A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.⁵⁶³ In the circumstances of this case, the CMA has adjusted the penalty at step 3 to take account of the factors set out below.

*Aggravating factors*⁵⁶⁴

Involvement of directors or senior management

- 5.32. The involvement of directors or senior management in an infringement can be an aggravating factor. In this case, the CMA has applied an increase to the penalty for the Saxby Infringement and the Endon Infringement for the involvement in the Infringements of Poole's Sales Director, [Sales Director], and Endon's Sales & Marketing Director, [Sales Director].
- 5.33. In respect of the Saxby Policy, [Sales Director] stated that '*I made the decision in concert with other senior ASMs [...] to impose a pricing policy*

⁵⁶⁰ Penalties Guidance, paragraph 2.12.

⁵⁶¹ Penalties Guidance, paragraph 2.12.

⁵⁶² Penalties Guidance, paragraph 2.13.

⁵⁶³ Penalties Guidance, paragraphs 2.14 and 2.15.

⁵⁶⁴ Penalties Guidance, paragraph 2.14.

[...].⁵⁶⁵ [Sales Director] was also involved in taking enforcement action against resellers that did not comply with the Saxby Policy.⁵⁶⁶

- 5.34. Similarly, in respect of the Endon Policy, [Sales Director] created the formula for the online pricing policy and '*took responsibility for relaying the pricing policy to customers.*'⁵⁶⁷ [Sales Director] was also involved in taking enforcement action against resellers that did not comply with the Endon Policy.⁵⁶⁸ [Sales Director] was on the Endon Board until December 2014.⁵⁶⁹
- 5.35. Further, [Managing Director] (Poole's Managing Director) and [Shareholder and Director] (Shareholder and Director of NLC and Poole) were aware of the Endon Policy.⁵⁷⁰ Consequently, the CMA considers that not only were the senior directors of Poole and Endon involved in the Endon Infringement, but NLC was, or should have been, aware of the Endon Policy.
- 5.36. The CMA considers that increases of 5% for director or senior management involvement in the Saxby Infringement and 10% for director or senior management involvement in the Endon Infringement are appropriate and proportionate in the circumstances of this case.

Failure to comply with competition law following receipt of a warning letter

- 5.37. In May 2012, Endon received a letter from the OFT warning it that it was potentially infringing competition law as a result of RPM practices.⁵⁷¹ Following the warning letter, Endon acknowledged internally the potential illegality of its conduct but nonetheless continued the conduct and attempted to hide it.⁵⁷² Although Endon did not enforce the Endon Policy as actively as before, the Endon Policy was not formally withdrawn.⁵⁷³ It was then actively reintroduced in 2013.⁵⁷⁴

⁵⁶⁵ See paragraph 3.45 above.

⁵⁶⁶ See paragraph 3.58 above.

⁵⁶⁷ See paragraphs 3.63 and 3.69 above.

⁵⁶⁸ See paragraph 3.79 above.

⁵⁶⁹ <https://beta.companieshouse.gov.uk/company/03626838/officers>, accessed on 3 April 2017.

⁵⁷⁰ On 30 September 2015, [Sales Director] of Poole emailed [Managing Director] and [Shareholder and Director] to state that: '*We have now implemented our new internet pricing policy for customers, and from the 1st October [2015] they will not be allowed to sell a large portion of our range for less than 4% below our trade price.*'

[Managing Director] replied: '*I have discussed with [Shareholder and Director] [...]*'. See paragraph 3.88 above.

⁵⁷¹ See paragraph 2.1 above.

⁵⁷² See paragraphs 3.76 and 3.77 above.

⁵⁷³ See paragraph 3.75 above.

⁵⁷⁴ See paragraph 3.76 above.

- 5.38. The CMA considers that this is a particularly serious aggravating factor. Warning letters are an important tool in encouraging compliance with competition law. It is important that warning letters are taken seriously and that recipients read any such letters carefully and respond as requested. In circumstances where a warning letter was issued by the OFT about similar conduct only a year before the start of the Endon Infringement and Endon was aware of the likely illegality of its conduct,⁵⁷⁵ the CMA considers that it is appropriate and proportionate to increase the penalty for the Endon Infringement by 25% in this case for failure to comply with competition law following receipt of a warning letter.
- 5.39. The CMA considered whether the facts warranted a more significant uplift to the penalty for this factor. However, having considered representations from NLC, the CMA concluded that in the particular circumstances of this case a 25% uplift is appropriate and proportionate. In reaching this conclusion, the CMA also took account of the fact that this is the first time it has treated these circumstances as an aggravating factor and applied an uplift.
- 5.40. Saxby did not receive a warning letter from the OFT prior to the Saxby Infringement. Accordingly, the CMA has not applied an uplift to the penalty for the Saxby Infringement.

*Mitigating factors*⁵⁷⁶

Compliance

- 5.41. The CMA may decrease the penalty at step 3 where adequate steps have been taken by an undertaking with a view to ensuring future compliance with competition law.⁵⁷⁷
- 5.42. Following the CMA's investigation and the settlement discussions in the present case, NLC has engaged constructively with the CMA to introduce a comprehensive competition law compliance programme, to which its Board has fully and publically committed.
- 5.43. The CMA considers that the identified compliance activities by NLC demonstrate a clear and unambiguous commitment to and accountability for competition law compliance by the Board and senior management, in that they have engaged in appropriate steps relating to risk identification, assessment, mitigation and review. In particular, the CMA has been provided

⁵⁷⁵ See paragraph 3.77 above.

⁵⁷⁶ Penalties Guidance, paragraph 2.15.

⁵⁷⁷ Penalties Guidance, paragraph 2.15.

with evidence that ASMs and the Board will be trained in competition compliance and that adherence to the competition law compliance policy will form an integral part of the NLC Group employment policy. In addition, the NLC Group will submit a report to the CMA on its compliance activities every year, for the next three years.

- 5.44. The CMA therefore considers that it is appropriate to decrease the penalty for each of the Infringements by 10% to reflect the NLC Group's compliance activities.

Step 4 – adjustment for specific deterrence and proportionality

- 5.45. The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future), or to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.⁵⁷⁸ 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.
- 5.46. Where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the infringing undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.⁵⁷⁹

Step 4 adjustment of the penalty for the Saxby Infringement

- 5.47. The penalty for the Saxby Infringement after step 3 is [X]. The CMA has applied a [X]% uplift to that amount, to arrive at a figure of £277,418, 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 particular regard to NLC's size and financial position, including the fact that NLC has a significant proportion of its turnover outside the relevant

⁵⁷⁸ Penalties Guidance, paragraph 2.16. The CMA has considered a range of financial indicators in this regard, based on published accounting information and information provided by NLC at the time of calculating the penalty. Those financial indicators included total worldwide turnover for the last financial year, total worldwide turnover over a three year average, net assets for the last financial year, adjusted net assets for the last financial year, profit after tax for the last financial year, and profit after tax over a three year average.

⁵⁷⁹ Penalties Guidance, paragraph 2.20.

turnover, as well as the nature of the Saxby Infringement as a serious breach of competition law.

5.48. The CMA notes that the adjusted figure represents approximately:

- 0.2% of NLC's average annual worldwide turnover (over the three year period ending 2015);
- 0.5% of NLC's adjusted net assets;⁵⁸⁰
- 4.1% of NLC's average annual profit after tax (over the three year period ending 2015).

Step 4 adjustment of the penalty for the Endon Infringement

5.49. The penalty for the Endon Infringement after step 3 is [£]. This figure is significant compared to the overall size and financial position of NLC and in the circumstances of the infringement. This is in part because the Endon Infringement lasted for more than three years and NLC generates a material proportion of its turnover in the relevant market. Notwithstanding the serious nature of the Endon Infringement, the CMA considers that the penalty after step 3 should be decreased by [£]%, to a figure of £4,657,388, to ensure that the level of penalty is not disproportionate or excessive. The CMA considers that such a decrease is appropriate having particular regard to NLC's size and financial position.

5.50. The CMA notes that the adjusted figure represents approximately:

- 3.8% of NLC's average annual worldwide turnover (over the three year period ending 2015);
- 9% of NLC's adjusted net assets;⁵⁸¹
- 69% of NLC's average annual profit after tax (over the three year period ending 2015).

5.51. The CMA is imposing a financial penalty on the NLC Group for its participation in two separate infringements. The CMA has therefore taken a step back and carried out a cross check across the two penalties to ensure

⁵⁸⁰ Being net assets in the financial year ending 2015, together with dividends paid out in the financial years ending 2013, 2014 and 2015.

⁵⁸¹ Being net assets in the financial year ending 2015, together with dividends paid out in the financial years ending 2013, 2014 and 2015.

that, taken together, they do not lead to the imposition of a total penalty across both Infringements that is excessive or disproportionate.⁵⁸²

- 5.52. The CMA notes that, when the CMA's penalty for the Endon Infringement at step 4 (£4,657,388 after adjustment) is combined with the CMA's penalty for the Saxby Infringement at step 4 (£277,418 after adjustment), the NLC Group's total penalty at step 4 amounts to £4,934,806, which represents:
- 4.1% of NLC's average annual worldwide turnover (over the three year period ending 2015);
 - 9% of NLC's adjusted net assets;⁵⁸³
 - 73% of NLC's average annual profit after tax (over the three year period ending 2015).
- 5.53. Assessing the combined penalty for the two infringements in the round, the CMA considers that a penalty of £4,934,806 after 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

- 5.54. The CMA may not impose a penalty for an infringement that exceeds 10% of an undertaking's 'applicable turnover', that is the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision.⁵⁸⁴ The CMA has assessed the NLC Group's penalties against this threshold. This assessment has not necessitated any reduction to either of the penalties at step 5 of the penalty calculation.
- 5.55. In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another Member State in respect of the same agreement or conduct.⁵⁸⁵ As

⁵⁸² 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'.

⁵⁸³ Being net assets in the financial year ending 2015, together with dividends paid out in the financial years ending 2013, 2014 and 2015.

⁵⁸⁴ Section 36(8) of the Act and the 2000 Order, as amended. See also Penalties Guidance, paragraph 2.21.

⁵⁸⁵ Penalties Guidance, paragraph 2.24.

there is no such applicable penalty or fine, no adjustments are necessary in this case in that regard.

Step 6 – application of reductions under the CMA’s leniency programme and for settlement

- 5.56. The CMA will reduce an undertaking’s penalty where the undertaking has a leniency agreement with the CMA, entered into as a result of an application for leniency and in accordance with the CMA’s published guidance on leniency, provided always that the undertaking meets the conditions of the leniency agreement.⁵⁸⁶ The NLC Group was granted a 30% reduction from financial penalties under the CMA’s leniency policy on 21 February 2017. Provided that the NLC Group continues to co-operate and comply with the conditions of the CMA’s leniency policy, as set out in the leniency agreement between the NLC Group and the CMA dated 21 February 2017, a reduction of 30% will apply to the level of any financial penalty that would be applied to the NLC Group if leniency had not been granted.
- 5.57. The CMA will also apply a penalty reduction where an undertaking agrees to settle with the CMA, which will involve, among other things, the undertaking admitting its participation in the infringement.⁵⁸⁷
- 5.58. The NLC Group expressed a genuine interest and willingness to enter into settlement discussions with the CMA before the CMA issued the Statement of Objections. However, in the circumstances of this case, settlement discussions took place after the CMA had issued the Statement of Objections. This was due to the application of Rule 5(3) of the CMA Rules, pursuant to which the Statement of Objections was addressed only to the NLC Group and not to the counterparty to the agreements or concerted practices.⁵⁸⁸ Therefore, settlement discussions took place after [Reseller X] had been given an opportunity to make representations on the Statement of Objections.
- 5.59. As part of settlement the NLC Group cooperated with the CMA and expedited the process for concluding the investigation both prior to and after the issue of the Statement of Objections.

⁵⁸⁶ Penalties Guidance, paragraph 2.25 and *Applications for leniency and no-action in cartel cases* (OFT1495, July 2013), adopted by the CMA Board.

⁵⁸⁷ Penalties Guidance, paragraph 2.26.

⁵⁸⁸ See paragraph 2.14 above.

- 5.60. The NLC Group has admitted the facts and allegations of infringement as set out in the Statement of Objections,⁵⁸⁹ which are now reflected in this Decision. In light of those admissions, and the NLC Group's cooperation in expediting the process for concluding the investigation, the CMA has reduced the NLC Group's financial penalties by 20% at step 6.

Payment of penalty

- 5.61. The CMA requires the NLC Group to pay the penalty applicable to it as set out in the tables below, resulting in a combined penalty payable of £2,763,000.⁵⁹⁰ The individual figures in the tables below are rounded to the nearest pound.

Saxby Infringement

Step	Description	Adjustment	Figure
	Relevant turnover		£[X]
1	Starting point as a percentage of relevant turnover	18%	£[X]
2	Adjustment for duration	x 1.00	£[X]
3	Adjustment for aggravating and mitigating factors	<i>Aggravating: Senior management involvement</i>	+ 5%
		<i>Mitigating: Compliance</i>	-10%
		Total adjustment	-5%
4	Adjustment for specific deterrence and proportionality	+[X]%	£277,418
5	Adjustment to prevent the statutory maximum being exceeded	N/A	N/A
	Total penalty		£277,418
6	Leniency discount	- 30%	£194,193

⁵⁸⁹ Subject to limited submissions communicated to and agreed by the CMA.

⁵⁹⁰ The CMA considers it appropriate to round the penalty to £2,763,000 in the circumstances of this case.

	Settlement discount	- 20%	£155,354
	Total penalty payable for the Saxby Infringement		£155,354

Endon Infringement

Step	Description		Adjustment	Figure
	Relevant turnover			£[<]
1	Starting point as a percentage of relevant turnover		19%	£[<]
2	Adjustment for duration		x 3.25	£[<]
3	Adjustment for aggravating and mitigating factors	<i>Aggravating: Senior management involvement</i>	+ 10%	£[<]
		<i>Aggravating: Failure to comply with competition law following receipt of a warning letter</i>	+ 25%	£[<]
		<i>Mitigating: Compliance</i>	-10%	(£[<])
		Total adjustment	+25%	£[<]
4	Adjustment for specific deterrence and proportionality		- [<]%	£5,369,417
5	Adjustment to prevent the statutory maximum being exceeded		N/A	N/A
	Total penalty			£4,657,388
6	Leniency discount		- 30%	£3,260,171
	Settlement discount		- 20%	£2,608,137
	Total penalty payable for the Endon Infringement			£2,608,137

5.62. The penalty will become due to the CMA in its entirety on 4 July 2017⁵⁹¹ and must be paid to the CMA by close of banking business on that date. If that date has passed and:

- the period has expired during which an appeal may be made against the imposition, or amount, of that penalty without an appeal having been made, or
- such an appeal has been made and determined,

the CMA may commence proceedings to recover from the undertaking in question any amount payable which remains outstanding, as a civil debt due to the CMA.⁵⁹²

SIGNED:

[]

3 May 2017

Ann Pope

Senior Director of Antitrust Enforcement

for and on behalf of the Competition and Markets Authority

⁵⁹¹ The next working day two calendar months from the expected date of receipt of the Decision.

⁵⁹² Section 37(1) of the Act.