

Decision of the Competition and Markets Authority

Online sales ban in the golf equipment
sector

Case 50230

24 August 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 Names have been replaced by a general descriptor of the individual's role.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	9
A.	Origins of the investigation	9
B.	Scope and commencement of the investigation	9
C.	CMA issued SO and appointment of the Case Decision Group ...	10
D.	CMA issued an Alternatives Paper and Draft Penalty Statement to Ping	10
E.	Further evidence gathered by the CMA.....	13
F.	CMA issued a Letter of Facts	13
G.	State of Play meeting prior to issue of the Decision	14
3.	FACTS	15
A.	Ping Europe Limited	15
B.	Golf sector overview	15
I.	Golf	16
II.	Golf club manufacturers	17
III.	Retail of golf clubs.....	22
IV.	Importance of the internet as a retail channel for the sale of golf clubs	34
C.	Ping's commercial policies and the Online Sales Ban	38
I.	Ping's commercial distribution of golf clubs	38
II.	Origins and aims of the Online Sales Ban	45
III.	Implementation of the Online Sales Ban	52
D.	Market definition	61
I.	Relevant product market.....	62
II.	Relevant geographic market	63
III.	Conclusion on market definition	64
4.	Legal assessment.....	65
A.	Undertakings	65
B.	Agreement.....	66
I.	Key legal principles	66
II.	Ping's implementation of the Online Sales Ban in relation to all Account Holders.....	67
III.	Agreement - [Account Holder 1].....	67
IV.	Agreement - [Account Holder 2].....	69
C.	Object of preventing, restricting or distorting competition	70
I.	Key legal principles	70
II.	Legal Assessment of the Online Sales Ban as an object infringement	76
III.	Objective justification	90

IV.	Conclusion on the object of preventing, restricting or distorting competition.....	117
D.	Appreciable restriction of competition.....	118
E.	Effect on trade	119
F.	Exclusion or exemption	123
G.	Attribution of liability	138
H.	Ping's Fundamental Charter Rights.....	138
5.	THE CMA'S ACTION	141
A.	The CMA's decision.....	141
B.	Directions	141
C.	Financial penalty	144

1. INTRODUCTION AND EXECUTIVE SUMMARY

- 1.1. By this decision (**Decision**), the Competition and Markets Authority (**CMA**) concludes that Ping Europe Limited (**Ping**) has infringed the prohibition in section 2(1) of the Competition Act 1998 (**Act**) (**Chapter I prohibition**) and Article 101 of the Treaty on the Functioning of the European Union (**TFEU**) by entering into an agreement with [X] ([Account Holder 1]) which bans the online sales of Ping golf clubs and [X] ([Account Holder 2]) which banned the online sales of Ping golf clubs (**Agreements**). Each of the Agreements has or had as its object the prevention, restriction or distortion of competition within the UK and between EU Member States and may affect or may have affected trade within the UK and between EU Member States (**Infringements**).
- 1.2. This Decision is addressed to Ping only. In this case, the CMA has applied Rule 10(2) of the CMA's procedural rules (**CMA Rules**),¹ to address this Decision only to Ping and not to either of the counterparties to the Agreements with Ping.
- 1.3. The Infringements are ongoing in respect of the agreement with [Account Holder 1]. The CMA issues directions to Ping under section 32 of the Act to bring to an end the ongoing aspects of the Infringements (ie in respect of the agreement with [Account Holder 1]) and to refrain from the same or equivalent restrictions of competition as the Infringements.
- 1.4. The CMA hereby imposes a financial penalty on Ping for the Infringements.

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

A. The Glossary

Term	Definition
Account Holder	Retailers approved by Ping to sell Ping golf clubs
Agreements	The agreement between Ping and [Account Holder 1] which bans the online sale of Ping golf clubs and [Account Holder 2] which banned the online sale of Ping golf clubs
[X]	[X]
Article 101(3) Guidelines	Commission Notice <i>Guidelines on the Application of Article 81(3) of the Treaty</i> [2004] OJ C101/97
Bricks and mortar retailer	Retailers that have a physical store or shop
CDG	Case Decision Group
Complainant	On 13 May 2015, the CMA received a complaint relating to the online sales ban operated by Ping in respect of Ping golf clubs. The party which provided this complaint is referred to as the Complainant
Custom Fit Club	A golf club which is capable of being customised by, for example, modifying shaft types, shaft lengths, clubface lie angles, and grips
Custom Fitting	A fitting process by which a golfer's basic measurements are taken (also known as a static fitting) which is generally followed by a swing test assessment (also known as a face to face dynamic custom fitting). See paragraph 3.24 for a full explanation
[X]	[X]
Draft Penalty Statement	Draft Penalty Statement issued to Ping on 31 March 2017, URN A0962.2
Draft Penalty Statement Written Representations	Response on behalf of Ping to the CMA's Draft Penalty Statement submitted on 25 April 2017, URN A0963.2
Dynamic Face to Face Custom Fitting Policy	The policy as set out in clause 19 of Ping's Terms and Conditions in the Trade Price List effective 1st August 2011 (and subsequent versions including, most recently, 1st January 2017)
Golf clubs	All types of golf clubs (collectively or individually), including woods (drivers, fairway woods and hybrids), irons, wedges and putters
Golf Datatech Market Share Report	Golf Datatech, United Kingdom Retail Market Share Report, 2015, URN A280005

Guidelines on Vertical Restraints	<i>Guidelines on Vertical Restraints</i> [2010] OJ C130/1
Hardware/Hard Goods	Golf clubs
Infringements	Ping's agreement with [Account Holder 1] which bans the online sale of Ping golf clubs and with [Account Holder 2] which banned the online sale of Ping golf clubs
Internet Policy	The Ping policy first communicated to Account Holders on 19 May 2000 and subsequently set out in clause 18 of Ping's Terms and Conditions in Ping's UK Trade Price List effective 1st September 2006 (and subsequent versions including, most recently, 1st January 2017). It contains the Online Sales Ban (defined below)
ISO	Initial Season Order placed by Account Holders of Ping golf clubs for a certain level of stock depending on the type of account
Online retailer	Retailers which operate a transactional website for the sale of golf clubs ie websites which allow consumers to click to basket and complete a purchase online
Online Sales Ban	Ping's prohibition of the sale of Ping golf clubs online on Account Holders' own websites as contained in Ping's Internet Policy
Oral Hearing	Ping oral hearing held on 18 October 2016
Oral Representations	Transcript of Oral Hearing, URN A0952.1
Ping	Ping Europe Limited
Trade Price List	Ping's price list of Ping products (both golf clubs and Soft Goods) circulated to all Account Holders and incorporating Ping's Terms and Conditions
Relevant Period	The period of Ping's participation in the Agreements, which, in the case of the Agreement between Ping and [Account Holder 1], the CMA has found began from at least 30 July 2012 and is continuing at the date of this Decision
SMS Golf Intelligence Report	The Golf Intelligence Report 2016, published in Golf Retailing magazine in February 2016, URN A280051
SMS Survey Results Extract	Sports Marketing Surveys Inc. Clubs and Custom Fitting November 2016, URN A0949.4
Soft Goods	Golf equipment accessories, including trolleys and bags
Terms and Conditions	Ping's Terms and Conditions of Sale as communicated in Ping's Trade Price List (as amended)

US Golf Datatech Study	Golf Datatech LLC Examination of Custom Fitting for Golf Equipment in the United States, 2015 Consumer Attitudes and Experiences, published July 2015, URN A0921.3e.
VABER	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
Written Representations	Ping's response to the Statement of Objections, 5 September 2016, URN A0921.2

- 2.6. On 9 March 2016, the CMA conducted voluntary interviews with [X]⁶ (UK Sales Manager⁷) and [X]⁸ (European Sales Director⁹). On 10 March 2016, the CMA conducted an interview with [X]¹⁰ (Managing Director of Ping¹¹).
- 2.7. Ping facilitated a site visit for two members of the CMA's case team to visit one of Ping's authorised retailers to watch a Custom Fitting demonstration on 28 April 2016.

C. CMA issued SO and appointment of the Case Decision Group

- 2.8. On 9 June 2016, the CMA issued an SO to Ping.¹² This was subsequently reissued on 15 August 2016¹³ and non-confidential versions of the SO were issued to [Account Holder 1] and [Account Holder 2] on 17 August 2016.¹⁴ Following the issue of the SO, a Case Decision Group (**CDG**) was appointed within the CMA to decide whether or not, based on the facts and evidence before it, and taking account of Ping's representations, the legal test for establishing an infringement had been met, and whether the Investigation remained an administrative priority.
- 2.9. Following the issue of the SO:
- Ping submitted Written Representations on the SO on 5 September 2016. Ping provided Oral Representations at a hearing on 18 October 2016.
 - [Account Holder 1] and [Account Holder 2] provided written representations on 19 September 2016 and 15 September 2016 respectively.¹⁵

D. CMA issued an Alternatives Paper and Draft Penalty Statement to Ping

⁶ Transcript of interview with the UK Sales Manager dated 9 March 2016, page 6, URN A0865.

⁷ [X] is a UK Sales Manager at Ping, a position he has held since 2000.

⁸ Transcript of interview with the European Sales Director dated 9 March 2016, page 6, URN A0864.

⁹ [X] is Ping's European Sales Director, a position he has held since 2012. Previously he was Ping's UK Sales Manager from 2005/06 to 2012.

¹⁰ Transcript of interview with the Managing Director dated 10 March 2016, page 6, URN A0863.

¹¹ [X] is the Managing Director of Ping, a position he has held since 1 January 1997.

¹² The CMA applied Rule 5(3) of the CMA's Rules and addressed the SO only to Ping and did not to address the SO to [Account Holder 1] and [Account Holder 2].

¹³ The SO was reissued with material removed for procedural reasons, URN A0918.2.

¹⁴ The CMA chose to focus its assessment on these two Ping Account Holders; [X] (URN A0193.1). Ping acknowledges that it introduced the Internet Policy in its Terms and Conditions from 2006 and, as explained in Section 3C Ping supplies only authorised retailers which agree and accept Ping's Terms and Conditions. The CMA therefore considers it reasonable and proportionate to apply Rule 10(2) and address this Decision to Ping only.

¹⁵ [Account Holder 1] response dated 19 September 2017, URN A20064, and [Account Holder 2] response dated 15 September 2016, URN A90032.1.

- 2.10. Following the Oral Hearing where the CDG had invited Ping to explain why alternative measures were not available to achieve its aims, Ping requested on 7 December 2016¹⁶ that the CMA set out what it considered were the alternatives available to the Online Sales Ban to which Ping could respond. The CMA issued a paper on 14 February 2017 (**Alternatives Paper**) setting out alternative measures which might be available to Ping to achieve its aims and requesting a response from Ping by 7 March 2017 (ie three weeks).¹⁷
- 2.11. The letter set out the CMA's position that the evidential burden of establishing whether the Online Sales Ban was justified was Ping's and whilst the CDG did not consider it was required to do so, the Alternatives Paper set out what it provisionally considered were realistic alternatives to achieve the legitimate aims Ping had submitted the Online Sales Ban pursued. The Alternatives Paper invited Ping to make Written Representations and offered Ping a further meeting to develop its case orally.
- 2.12. Ping's lawyers said it could not respond to the Alternatives Paper by the date provided, citing availability of relevant staff and Counsel. Instead Ping indicated that it *'would respond with Written Representations to this CMA paper by 28th April 2017.'*¹⁸
- 2.13. On 24 February 2017, having regard to the reasons given by Ping for its inability to meet the original deadline, the Senior Responsible Officer (**SRO**) granted an extension of three weeks to 28 March 2017, giving Ping six weeks to provide a response, which the SRO considered was appropriate and reasonable, and should allow Ping sufficient time to coordinate its employees' and Counsel's availability. The letter again offered to arrange a meeting with CDG members for Ping to make its case orally.¹⁹ The letter reminded Ping that if it disagreed with the deadline it could request that the Procedural Officer review that decision. The extension letter stated that if the CMA's extended administrative deadline was not respected, the CMA might take further procedural steps in its investigation on the basis of the evidence before the CDG and issue a draft penalty statement to Ping.
- 2.14. By letter dated 3 March 2017 Ping's lawyers stated that Ping would endeavour to respond as soon as practicable but that its client's position on

¹⁶ Ping response dated 7 December 2016, URN A0950.1.

¹⁷ Alternatives Paper dated 14 February 2017, URN A0955.2 and letter, URN A0955.1.

¹⁸ Email from Ping's lawyers dated 14 February 2017, URN A0956, CMA letter dated 16 February 2017, URN A0957.1, Letter from Ping's lawyers dated 21 February 2017, URN A0958.1.

¹⁹ CMA letter dated 24 February 2017, URN A0959.1. The CMA notes this six weeks to respond on alternatives is close to the full time the CMA provides to respond to a SO (40 working days, and *'no more than 12 weeks'*), paragraph 12.3, *CMA Guidance on the investigation procedures in Competition Act 1998*, March 2014, CMA 8.

when it would respond was unchanged. Ping did not refer its disagreement with the deadline to the Procedural Officer for a review.²⁰

- 2.15. On 31 March 2017, having not received any further representations from Ping by the extended administrative deadline of 28 March 2017, the CMA provided Ping with the Draft Penalty Statement and invited it to make written and oral representations on it.²¹ That letter stated that *'If Ping submits a response to the Alternatives Paper, the CDG will consider at that time the extent to which it is appropriate to take account of the evidence or views in Ping's response, before taking a final decision on whether it is appropriate to reach an infringement decision, and if so, whether and in what amount to impose a financial penalty on Ping'*.
- 2.16. Ping provided Written Representations on the Draft Penalty Statement on 25 April 2017 but declined the opportunity to make oral representations, although it had previously indicated that it wished to do so.²² Ping also confirmed by letter on 25 April 2017 that it would not submit a response to the Alternatives Paper as: *'given the CMA's apparent predetermination of the issue, Ping no longer see any purpose in doing so. Being candid, Ping no longer feels that it can receive a fair hearing.'*²³
- 2.17. In subsequent correspondence, the CMA made clear that it had not reached any final view on the issues and remained open minded. The CMA repeatedly indicated its willingness to receive and consider Ping's submissions on the Alternatives Paper. Ping declined to make any such submissions.
- 2.18. The CMA further explained to Ping's lawyers on 27 April 2017 that: *'We do hope that Ping sends us its submissions as it said it would. We had sent the Alternatives Paper to Ping on 14 February, following Ping's request last December that CMA provide this in order that Ping could respond. Ping has on a number of occasions said that it would provide such a response by 28 April....As explained, the CDG has taken no final decisions and retains an open mind. Should Ping submit a response on Friday (as we had anticipated given that Ping has indicated throughout that it would do so), then it would be for the CDG to consider it carefully for the purposes of reaching a final decision. You said that you will take your client's*

²⁰ Ping letter dated 3 March 2017, URN A0960.1.

²¹ Ping letter dated 31 March 2017, URN A09621, and Draft Penalty Statement, URN A0962.2.

²² Ping letter dated 7 April 2017, URN A0962.4.

²³ Ping letter dated 25 April 2017, URN A0963.1.

*instructions.*²⁴ Ping responded to this email²⁵ on 16 May 2017 setting out in detail its position in relation to the CMA's conduct of the investigation and its approach to requesting a response from Ping on the Alternatives Paper. Ping stated in this letter that *'by its actions the CMA has now shown that Ping cannot get a fair hearing before the CMA'* and that *'the CMA's actions have shown pre-judgment on its part.'*²⁶

- 2.19. The CMA wrote to Ping again on 25 May 2017 and allowed Ping an additional two weeks (until 9 June 2017) to provide its response to the Alternatives Paper.²⁷ In this letter the CMA reiterated that: *'the CMA has exercised its powers in good faith throughout this administrative procedure, uninfluenced by any prejudice. The CMA has always sought to act fairly, in particular by giving Ping a reasonable opportunity to put forward evidence and arguments in justification of its conduct before reaching any final conclusions. That is what it sought to do when it invited representations in respect of the Alternatives Paper on whether the measures identified were less restrictive for the purposes of assessing objective justification. The CMA has at all times been open-minded about the outcome of this investigation and that remains the case.'* Ping again declined to respond.²⁸ Had the CMA received submissions from Ping in response to the Alternatives Paper, then the CMA would have considered those submissions with an open mind before taking a decision.

E. Further evidence gathered by the CMA

- 2.20. The CMA required further documents and information from Ping under section 26 of the Act on 20 October 2016²⁹, 21 December 2016³⁰ and 18 May 2017³¹. Ping and Ping Inc. submitted additional information to the CMA responding to points raised at the Oral Hearing on 7 December 2016³² and 6 December 2016³³ respectively.

F. CMA issued a Letter of Facts

²⁴ As reflected in the CMA's letter of 31 March 2017 (URN A0962.1) and as was confirmed in the CMA's call to Ping on 26 April 2017 (see call note URN A0966) and follow up email of 27 April 2017, URN A0965.

²⁵ The CMA also sent a letter to Ping on 9 May 2017, URN A0969.1.

²⁶ Ping letter to the CMA dated 16 May 2017, URN A0970.1.

²⁷ CMA letter dated 25 May 2017, paragraphs 3 and 4, URN A09831.1.

²⁸ CMA call to Ping on 1 June 2017 (URN A0985) and Ping email confirming discussion, URN A0987.

²⁹ Section 26 notice to Ping dated 20 October 2016, URN A0930.1.

³⁰ Section 26 notice to Ping dated 21 December 2016, URN A0951.1.

³¹ Section 26 notice to Ping dated 18 May 2017, URN A0980.1.

³² Ping response dated 7 December 2016, URN A0949.2.

³³ Ping Inc letter dated 6 December 2016, URN P1004.1.

- 2.21. On 29 June 2017, the CMA issued a Letter of Facts to Ping which set out additional evidence on which the CMA was proposing to rely to establish the Infringements and referring to evidence which is relied upon in a different way to that relied upon in the SO.³⁴ On 12 July 2017, Ping provided a response to the Letter of Facts.³⁵
- 2.22. On 17 July 2017, the CMA issued non-confidential versions of the Letter of Facts to [Account Holder 1] and [Account Holder 2].

G. State of Play meeting prior to issue of the Decision

- 2.23. The CMA held a state of play meeting by telephone with Ping on 1 August 2017 at which the CMA informed Ping that it expected to proceed towards findings of infringements against Ping.

³⁴ Letter of Facts, URN A0989.2.

³⁵ Ping Response to the Letter of Facts, URN A0992.1.

3. FACTS

A. Ping Europe Limited

- 3.1. Ping is a UK based manufacturer and distributor of golf clubs, golf accessories and clothing. In the UK Ping has manufacturing, warehousing and distribution facilities in Gainsborough. Ping had a turnover of [X] in the financial year ended 31 December 2016.³⁶ Ping has one subsidiary, Ping Scandinavia AB, established in Sweden.
- 3.2. Ping is a private limited company registered at Companies House under company number 01129505. As at the date of this Decision the company directors are [X] (Managing Director), [X], [X], [X] and [X] is the company secretary. The company directors were in post during the Relevant Period.³⁷ Ping is ultimately owned by the Solheim family.³⁸ The 789 shares are owned as follows:³⁹
- [Shareholder] [X] (35%);
 - [Shareholder] [X] (32.5%); and
 - [Shareholder] [X] (32.5%).
- 3.3. The Ping brand was founded by [X] in the 1950s and remains family owned. Ping golf clubs are manufactured and distributed by a number of separate companies in different geographical territories including Ping Inc. based in the US.⁴⁰

B. Golf sector overview

- 3.4. This section provides an overview of those aspects of the golf sector and the supply chain in relation to golf clubs in the UK⁴¹ that are relevant to this Decision. It provides a description of:
- golf; and
 - the golf club sector, including key characteristics of the supply chain (manufacturers and retailers), Custom Fitting and the importance of the internet as a retail channel for the sale of golf clubs.

³⁶ Ping Group of companies' accounts made up to 31 December 2016, URN A0981.1.

³⁷ Ping AR01 Annual Return made up to 13 July 2015, URN A280009. [X] was also a director until her appointment was terminated on 8 July 2017.

³⁸ Ping CS01, Confirmation Statement of 22 July 2016, identifies [X], [X] and [X] (having the right to exercise, or actually exercising, significant influence or control over the activities of a trust) as Persons with Significant Control. [X] ceased to be a Person with Significant Control on 8 July 2017.

³⁹ Ping AR01 Annual Return made up to 13 July 2015, URN A280009, and Ping CS01, Confirmation Statement of 22 July 2016.

⁴⁰ See page 6, URN A0952.1.

⁴¹ Information is provided about EU sales made online in Section 3BIV below.

I. Golf

- 3.5. Golf is one of the most popular sports in the UK.⁴² A Sports Marketing Surveys Inc (**SMS**) Report for 2015 (**SMS Golf Intelligence Report**) indicates that 3.3 million adults played on a full length golf course in 2015 in Great Britain, including 1.5 million core golfers (ie playing twelve times a year or more).⁴³
- 3.6. Golfers generally choose to buy their own golf clubs to play, rather than hire equipment.⁴⁴ The Keynote – Sports Equipment Market Update states: ‘*The highest consumer expenditure [on sports equipment in the UK] occurs within the golf sector, due to its high-priced equipment.*’⁴⁵ The total value of UK consumer expenditure on golf equipment (including golf clubs and all golf accessories and clothing) was £340 million in 2014.⁴⁶ In relation to golf clubs only, retail sales amounted to over £[150-160] million in 2015.⁴⁷ An SMS Clubs & Custom Fitting Report (**SMS Survey Results Extract**) indicates that [60-70]% of surveyed UK golfers had bought golf equipment in the last 12 months.⁴⁸
- 3.7. Different types of golf clubs are needed to play golf. The main categories are woods, irons, hybrids, wedges and putters - which are used for different purposes during a golf round. Golf’s governing body, the Royal & Ancient, describes the main categories of clubs needed to play golf as follows: ⁴⁹
- Woods -
 - Drivers: These clubs are designed to send the ball as far away as possible, almost exclusively used from the teeing-ground (the area from where play begins for each hole). The driver is usually the longest club in the bag and has fewer degrees of loft⁵⁰ than any other club (excluding the putter).
 - Fairway woods - These clubs are designed to make it easier to strike a ball sitting on the ground. They have smaller club heads than drivers.

⁴² Keynote – Sports Equipment Market Update 2015, page 20, paragraph 5, URN A280003.

⁴³ SMS Golf Intelligence Report, page 32, URN A280051.

⁴⁴ According to the Keynote – Sports Equipment Market Update 2015, page 21: ‘*Golf equipment is generally expensive, with the quality of the equipment often deemed to affect the performance of the player. With golf clubs and driving ranges having a reputation for being fairly formal, participants rarely hire equipment when visiting but instead bring their own, and so are willing to pay substantial amounts to participate in the sport.*’, URN A280003.

⁴⁵ Keynote – Sports Equipment Market Update 2015, page 20, paragraph 5, URN A280003.

⁴⁶ Keynote – Sports Equipment Market Update 2015, page 19, Table 3.2, URN A280003.

⁴⁷ Golf Datatech Market Share Report, 2015, URN A280005. See Table 3.1 for detail.

⁴⁸ SMS Survey Results Extract, November 2016, page 4, URN A0949.4.

⁴⁹ The Royal & Ancient (www.randa.org/TheRandA/AboutTheRandA/About-Us) together with the United States Golf Association govern the sport of golf worldwide, URN A280014 and URN A280015.

⁵⁰ For these purposes ‘loft’ means the upward inclination given to the ball in a stroke.

- Irons - These clubs are designed for shots approaching the green or for scything through the rough. These clubs have shorter shafts and flatter faces than woods and have lofts ranging from approximately 16 degrees (one-iron) to 41 degrees (nine-iron).
- Hybrid clubs – These clubs contain elements of fairway woods and long irons. They have been introduced relatively recently.
- Wedges - These clubs are most frequently used for hitting the ball short distances onto the green, getting out of or over hazards and chipping the ball from the fringe. They have lofts above 42 degrees and are designed to be high trajectory, high spin and high accuracy clubs.
- Putters - Clubs designed primarily for use on the putting green.

- 3.8. Given the different characteristics of these clubs and their impact on the distance and loft of the ball once it is hit, a golfer needs to carry a range of clubs (some from each category) in order to complete a round of golf.⁵¹ According to the SMS Golf Intelligence Report, the average spent by UK golfers on golf clubs in 2015 was as follows⁵²: £203 on drivers; £153 on fairway woods; £439 on a set of irons; £126 on hybrids; and £101 on wedges.
- 3.9. New models of clubs must conform to the rules of golf equipment as set out by the Royal & Ancient which decides whether a club is contrary to the rules of golf equipment, or is deemed to significantly change the nature of the game.⁵³ Consequently, clubs must be designed and manufactured so as to meet certain specifications. This places limitations on the technology which can be utilised by manufacturers of golf clubs and the impact of changes that can be made to new models.
- 3.10. Competition in the golf club sector takes place at both the upstream level (rival manufacturers competing for sales to retailers and ultimately consumers) and downstream level (rival retailers competing for sales to consumers).

II. Golf club manufacturers

- 3.11. There are several manufacturers distributing golf clubs in the UK, including Callaway, Cobra, Mizuno, Ping, TaylorMade and Titleist. Each of these manufacturers supplies both golf clubs and some other products used for golf, including golf bags, trolleys and gloves (**Soft Goods**). Most of the

⁵¹ A golfer must not carry more than 14 clubs at any time <http://www.randa.org/Rules-of-Golf/MainRules/4-Clubs/SubRules/4-Maximum-of-Fourteen-Clubs>. There is no minimum number of clubs, URN A280016.

⁵² SMS Golf Intelligence Report 2016, published in Golf Retailing in February 2016, pages 43 to 60, URN A280051. The report does not include a figure for average spend on putters.

⁵³ <https://www.randa.org/Rules-of-Golf/Appendices/Appendix-II-DESIGN-OF-CLUBS/Appendix-II>, URN A280016.

leading manufacturers supply all categories of club, with some specialising in the manufacture of one or two categories of clubs.

- 3.12. Table 3.1 below contains data collated by Golf Datatech LLC (**Golf Datatech**)⁵⁴ on manufacturers' UK shares of supply by category of club.

Table 3.1: 2015 Manufacturer shares of supply in UK based on retail sales (Golf Datatech data)

Golf club manufacturer	2015 UK shares of supply by club category ⁵⁵							
	Woods		Irons		Wedges		Putters	
	By unit sales	By value	By unit sales	By value	By unit sales	By value	By unit sales	By value
Callaway	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[10-20]%	[30-40]%	[30-40]%
Cleveland	[0-10]%	[0-10]%	[0-10]%	[0-10]%	[20-30]%	[20-30]%	[0-10]%	[0-10]%
Cobra	[0-10]%	[0-10]%	[0-10]%	[0-10]%	[0-10]%	[0-10]%	N/A	N/A
Mizuno	[0-10]%	[0-10]%	[0-10]%	[10-20]%	[0-10]%	[0-10]%	[0-10]%	[0-10]%
Ping	[20-30]%	[20-30]%	[20-30]%	[20-30]%	[0-10]%	[10-20]%	[10-20]%	[10-20]%
TaylorMade	[20-30]%	[20-30]%	[10-20]%	[10-20]%	[0-10]%	[0-10]%	[10-20]%	[10-20]%
Titleist	[0-10]%	[10-20]%	[0-10]%	[0-10]%	[20-30]%	[30-40]%	[0-10]%	[10-20]%
Others ⁵⁶	[20-30]%	[10-20]%	[20-30]%	[10-20]%	[10-20]%	[0-10]%	[20-30]%	[10-20]%
TOTAL	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]

Source: Golf Datatech, United Kingdom Retail Market Share Report, 2015.

- 3.13. The Golf Datatech Market Share Report indicates that in 2015 Ping was the leading manufacturer of irons and woods (based on sales of clubs in the UK by value and volume) and is fourth largest behind Titleist, Cleveland and Callaway in the supply of wedges and (second largest behind Callaway) in the supply of putters.⁵⁷ The SMS Golf Intelligence Report provides alternative data for the top five golf club manufacturers by golf club type

⁵⁴ Golf Datatech LLC provides specialised market research covering retail sales of golf equipment in the UK (<http://www.golfdatatech.com/>), URN A280017. Ping uses Golf Datatech data to analyse its market performance, see table provided to CMA on 17 December 2015 State of Play meeting, URN A0824.

⁵⁵ Source: Golf Datatech Market Share Report 2015, URN A280005.

⁵⁶ 'Others' includes, but is not limited to, the following manufacturers: Adams, Benross, Fazer, Masters, MD Golf, Nike, Rife, Sigma Golf, Srixon, Tour Edge, Wilson, Yes Golf and Yonex. In each case these brands have individual market shares by both unit sales and value of less than [1-10]% in all categories.

⁵⁷ The Managing Director and European Sales Director both told the CMA that Callaway, TaylorMade and Titleist are Ping's closest competitors: see respectively, transcript of interview with the Managing Director dated 10 March 2016, pages 16 to 17, URN A0863 and transcript of interview with the European Sales Director dated 9 March 2016, pages 10 to 11, URN A0864.

based on UK sales in 2015 (see Table 3.2 below).⁵⁸ This also provides a breakdown of woods into drivers, fairway woods and hybrids.

Table 3.2: 2015 Manufacturer shares of supply in UK based on retail sales (SMS data)

Golf club manufacturer	2015 UK shares of supply by club category by top 5 manufacturers ⁵⁹											
	Irons		Drivers		Fairway Woods		Hybrids		Wedges		Putters	
	Vol (%)	Rank by Value	Vol (%)	Rank by Value	Vol (%)	Rank by Value	Vol (%)	Rank by Value	Vol (%)	Rank by Value	Vol (%)	Rank by Value
Callaway ⁶⁰	[10 – 20] %	2	[10 – 20] %	3	[20 – 30] %	1	[10– 20] %	1	[10 – 20] %	3	[30 – 40] %	1
Cleveland	-	-	-	-	-	-	-	-	[10 – 20] %	2	-	-
Cobra	[0– 10] %	5	[0 – 10] %	5	[0 – 10] %	5	[0– 10] %	5	-	-	-	-
Mizuno	[1 – 10] %	4	-	-	-	-	-	-	[10 – 20] %	5	-	-
Ping	[20 – 30] %	1	[20 – 30] %	2	[20 – 30] %	2	[10 – 20] %	2	[0 – 10] %	4	[10– 20] %	3
TaylorMade	[10– 20] %	3	[20 – 30] %	1	[20 – 30] %	3	[20 – 30] %	3	-	-	[10 – 20] %	4
Titleist	-	-	[0 – 10] %	4	[0 – 10] %	4	[0– 10] %	4	[20 – 30] %	1	[10 – 20] %	2
Wilson	-	-	-	-	-	-	-	-	-	-	[0 – 10] %	5

Source: SMS Golf Intelligence Report, 2015.

- 3.14. The SMS Golf Intelligence Report indicates that in 2015 Ping was the leading manufacturer of irons (in terms of both volume and value) and the second largest manufacturer of drivers⁶¹ (in terms of volume and value), behind TaylorMade. With respect to fairway woods, Ping, TaylorMade and Callaway each had a [20–30]% share of the market in terms of sales volumes and Ping was also the second largest manufacturer of fairway

⁵⁸ The SMS Golf Intelligence Report (URN A280051) separates the golf clubs in a slightly different way to the Golf Datatech Market Share Data, referring to drivers, fairway woods, hybrids, putters, wedges and irons.

⁵⁹ SMS Golf Intelligence Report, 2015, URN A280051. Data is provided for the top five manufacturers by value and volume only. The SMS Golf Intelligence Report only provides top 5 rankings by value.

⁶⁰ Including the Odyssey brand.

⁶¹ The SMS Golf Intelligence Report states that: ‘Three main companies dominate the market [TaylorMade, Ping and Callaway] and the better the player, the more they care about brand name when they make a purchase.’, page 43, URN A280051.

woods by sales value. Ping also had a strong presence in the supply of hybrids⁶² (third largest supplier in terms of volume and second largest supplier in terms of value) and putters (second largest supplier in terms of volume and third largest supplier in terms of value)⁶³. With respect to wedges⁶⁴, Ping was the fifth largest supplier in terms of volume and fourth largest supplier in terms of value.⁶⁵

- 3.15. Ping provided evidence, based on Golf Datatech revenue data (see Table 3.3 below), which indicated that it had a total ‘brand’ market share in the UK of between [10-20]-[20-30]% in the 10 years between 2006 and 2015, with a figure of approximately [20-30]% in 2015 YTD (December), making it the market leader by revenue in that year.⁶⁶

Table 3.3: 2006-2015 (YTD) market shares across brands in the UK



Source: Ping: 10 Year Datatech UK Market Shares by Value

- 3.16. All categories of club are manufactured to a variety of specifications to suit different golfers (for example, clubs are available for right-handed and left-handed players and in different shaft lengths and flexes). The leading manufacturers across all main categories of clubs (including Callaway, Ping, TaylorMade and Titleist) also supply Custom Fit Clubs which allow a golfer to specify variables, including shaft type, shaft length, clubface lie angle, grip type and grip thickness, based on the golfer’s personal measurements and specifications.⁶⁷ These manufacturers supply their respective retailers with

⁶² ‘This market is one of the fastest growing in the golf sector – over the last decade their usage, both among Tour players and the wider public, has greatly increased. In terms of manufacturers, this area is more open than most, with no one company really dominating the market and numerous firms producing a hybrid of their own for the market’, see the SMS Golf Intelligence Report, page 45, URN A280051.

⁶³ The SMS Golf Intelligence Report, page 49, URN A280051.

⁶⁴ The SMS Golf Intelligence Report, page 57, URN A280051.

⁶⁵ The CMA notes that in some cases the rankings of golf clubs presented in the SMS Golf Intelligence Report differ from the data provided in the Golf Datatech Market Share Report. This is likely due to the different sources of information used by these two reports, ie the findings in the SMS Golf Intelligence Report are based on a mix of consumer, Tour, retail and comments from golf pros (see SMS Golf Intelligence Report, page 30, URN A280051), whereas the Golf Datatech Market Share Report is based on point of sale data from UK retailers (<http://www.golfdatatech.com/research-products/retail-market-reports/overview/>).

⁶⁶ Table 3.3 depicting 10 Year Datatech UK Market Shares by Value provided by Ping at the State of Play Meeting held on 17 December 2015, URN A0824. Ping submitted Golf Datatech Market Share Data (by value) in November 2016 which indicates that Ping had a market share of [20-30]% for the complete calendar year of 2015, URN A0931.4.

⁶⁷ Ping’s Custom Fit Clubs include the following specifications: loft, lie angle (irons), shaft type, shaft length, grip type and grip thickness: <http://www.ping.com/fitting/process.aspx#>; Titleist’s Custom Fit Clubs include the following specifications: shaft type, shaft length, grip type, grip thickness and tip trim (http://media.titleist.com/images/titleist/files/UK/2015-16%20Titleist%20Custom%20Options%20Booklet.pdf?_ga=1.91740508.711861601.1461876519-), URN A280040; Mizuno’s Custom Fit Clubs include the following specifications: shaft type, shaft length, grip type, grip thickness, clubface lie angle and swing weight (<http://golf.mizunoeurope.com/custom-fit/custom-specs/>), URN A280036; Callaway’s Custom Fit Clubs include the following specifications: loft, lie angle, shaft and grip

Custom Fit Clubs with pre-determined custom fit variables (to be sold off the shelf without further customisation), as well as offering clubs which are custom built following an order.

- 3.17. The Managing Director told the CMA that there are generally no physical differences between Ping golf clubs and its competitors' golf clubs but noted that *'irons specifically there is a big difference because we are able to adjust the lie of our iron heads by plus or minus 5 or 6 degrees'*.⁶⁸ [Account Holder 1] indicated that, of all categories of clubs, consumers are most likely to have a Custom Fitting for irons and that this preference applies across all manufacturers.⁶⁹ Of the different types of clubs for which consumers have a Custom Fitting, in the US, irons are the most popular, followed by drivers, fairway woods, hybrids, wedges and putters.⁷⁰
- 3.18. The SMS Golf Intelligence Report notes that *'custom-fit options are increasing their share of total spend, with the added benefit of providing a more engaging, personal approach to golf equipment – 2016 promises further developments.'*⁷¹
- 3.19. In terms of reputation, the US Golf Datatech Study described Ping as the perceived brand leader most often used for the Custom Fitting of golf clubs in the US.⁷² However, the US Golf Datatech Study also indicates that this is not consistent across every type of golf club: Ping is the most popular brand

(<http://uk.callawaygolf.com/custom-fitting/>), URN A280018; and TaylorMade's Custom Fit Clubs include the following specifications: shaft type, shaft length, lie angle and grip size (http://demandware.edgesuite.net/aais_prd/on/demandware.static/-/Sites-TMaG-EU-Library/en_GB/v1460967587344/images/customs/FW15CustomShaftandGripOptions_091015_EMEA.pdf), URN A280039.

⁶⁸ Transcript of interview with the Managing Director dated 10 March 2016, page 86, URN A0863.

⁶⁹ [Account Holder 1] response to section 26 notice dated 30 March 2016, URN A20038.2.

⁷⁰ As described in the US Golf Datatech Study, page 40, URN A0921.3e. There is no equivalent data available in relation to UK sales but see paragraph 3.31 on UK golfers' views on the importance of custom fitting by club type.

⁷¹ SMS Golf Intelligence Report, page 32, URN A280051. An article published in the Independent on 21 March 2017 tested seven Custom Fit drivers (including Callaway, Ping, TaylorMade, Cobra and Wilson branded clubs) and concluded: *'You need to test all drivers in your price range, disregarding any brand loyalty. Test them at the range and out on the course with the help of an accredited fitter or PGA professional to help you customise. Getting the correct shaft and loft are crucial steps to making you a better player off the tees. These are all top-draw clubs, but the Callaway Big Bertha Fusion was the most universally popular among our testers.'*, URN A280059.

⁷² US Golf Datatech Study, page 8, URN A0921.3e: *'As the perceived leader in custom club fitting, Ping far outdistances all other brands, with 38% of [US Serious Golfers surveyed] saying the brand is their first choice as leader. This leadership percentage has trended lower from its peak of 52% in 2006, but still remains well ahead of second place [X] and [X] ([10 – 20]% each)'. As far as the CMA is aware, no surveys have been conducted regarding the perception of which golf club brand is the leader in custom fitting in the UK. It therefore refers to the US data, submitted by Ping, as a proxy only.*

for the Custom Fitting of irons⁷³ but other brands are more popular in relation to drivers⁷⁴ and putters⁷⁵.

III. Retail of golf clubs

Retailers

3.20. In the UK, sales of golf clubs are made to consumers through three types of retailers:

- **Bricks and mortar only retailers:**
 - **on course retailers** (or green grass retailers) with bricks and mortar stores located on, or close to, golf courses or driving ranges. Ping's customer base includes a large number of on course retailers (most often pro golf shops) and a significant proportion of its sales are made by such retailers.⁷⁶
 - **off course retailers** with bricks and mortar stores located away from golf courses (on the high street or in retail parks).
- **Brick and mortar retailers also selling online:** Some bricks and mortar retailers also sell golf clubs through online sales channels ie their own transactional websites and third party platforms such as eBay. In addition, there are specialist e-retailers such as onlinegolf (wholly-owned by American Golf) and clubhousegolf.⁷⁷
- **Online only retailers:** Some retailers of golf equipment are internet only retailers. None of Ping's Account Holders are internet only retailers; all are required to have bricks and mortar premises.

3.21. The SMS Survey Results Extract indicates that, in relation to the UK golfers surveyed, in 2015 the four most popular categories (which differed by type of club purchased) were:⁷⁸

⁷³ 'Ping (31%, slightly higher than last wave) remains the brand of irons custom-fit most often, with [X] ([20-30]%) in second, [Y] ([20-30]%) in third and [Z] ([20-30]%) and [W] ([20-30]%) tied in fourth', US Golf Datatech Study, page 20, URN A0921.3e.

⁷⁴ '[X] once again dominates among drivers fit ([40-50]%, slightly up from [40-50]%) with [Y], Ping and [Z] rounding out the top four tied at 30%, all three increasing from three years ago ([20-30]%, 25% and [20-30]%) respectively.' US Golf Datatech Study, page 22, URN A0921.3e.

⁷⁵ 'Among those who have been fitted for a putter, [X] ([30-40]%, up from [20-30]%) is the brand most frequently used for a fitting, with Ping (28% up from 27%) edging [Y]([20-30]%, slightly down from last wave [20-30]%) for second, and [Z] the only other brand in double digits ([10-20]%, down from [10-20]%)', US Golf Datatech Study, page 23, URN A0921.3e.

⁷⁶ The Managing Director stated that in relation to Ping sales 'In the UK market it turns out it's about [X] [on course; off course]. If you look at the volumes done in both', transcript of interview with the Managing Director dated 10 March 2016 page 20, URN A0863.

⁷⁷ Market Line Industry Profile Sports Equipment in the UK, April 2015, page 17, paragraph 1, URN A280001.

⁷⁸ The SMS Survey Results Extract includes up to 14 different options from which UK golfers surveyed could choose in response to the question, 'Where did you buy a [type of club] from?', pages 24 to 29 inclusive, URN A0949.4. The 14 different options in the responses include: Pro shop on course; American Golf; Golf shop off

- a. Pro-shops on course, which accounted for [30-40]% – [40-50]% of sales;
- b. American Golf, which accounted for [10-20]% of sales;⁷⁹
- c. Golf shops off course, which accounted for [10-20]% of sales; and
- d. Online retailers (incorporating both non-golf specialists (eg sports retailers selling equipment for a variety of sports) and internet golf retailers), which accounted for 9-14% of sales⁸⁰.

Custom Fitting

(i) The Custom Fitting process

- 3.22. In a bricks and mortar store, a consumer may choose to have a Custom Fitting to assist him/her in deciding which club best suits his/her individual requirements. As described in paragraph 3.16 above, the main manufacturers all offer Custom Fit Clubs. They have invested in national fitting centres.⁸¹ As described below, many retailers promote the benefits of Custom Fitting and invest in Custom Fitting technology and equipment.
- 3.23. Although the main manufacturers may recommend a particular, brand-specific Custom Fitting process,⁸² in practice the same fitting process and equipment (such as a launch monitor) is used regardless of the brand being fitted, and a consumer may try several brands of golf club simultaneously to ascertain which suits them best.⁸³ [Account Holder 1] uses the same form to

course; Other; Internet –Non golf specialist; Internet golf retailer; Don't know; Driving range; Gift; Sports shop; Abroad; Direct from manufacturer; Mail order; and Prize. As a result of the different options it is possible that American Golf may be represented within the 'Golf shops off course' and 'Online retailer' categories.

⁷⁹ Sales attributed to American Golf include online and in-store purchases, as confirmed by Ping in its response dated 13 January 2017, paragraph 27, URN A0953.1.

⁸⁰ SMS Survey Results Extract, pages 3 and 23 to 29, URN A0949.4.

⁸¹ The main manufacturers offer Custom Fitting at their own fitting centres. Ping has a fitting centre in Gainsborough (<http://www.gainsboroughgc.co.uk/pingfittings/>), URN A280026; Callaway performance centres (<http://uk.callawaygolf.com/custom-fitting/>), URN A280018; Titleist National Fitting Centres (<http://www.titleist.co.uk/golf-club-fitting/>), URN A280021; and the TaylorMade Performance Lab (<http://www.wentworthclub.com/golf/taylormade-lab/>), URN A280029.

⁸² Ping's recommended club fitting process consists of five key steps: Pre-fitting interview, Static Measurements, Dynamic Swing Test, Ball Flight Analysis and Monitoring Performance:

<http://www.gainsboroughgc.co.uk/pingfittings/>, URN A280026; Titleist's approach to fitting includes using the most advanced tools to help players optimize driver performance, make iron play more precise, dial in their wedges and fine-tune set compositions: <http://www.titleist.co.uk/golf-club-fitting> URN A280021. Mizuno uses a Shaft Optimizer and Swing DNA system to measure all data <http://golf.mizuno-europe.com/custom-fit/>, URN A280019.

⁸³ [X] allows consumers to test equipment from multiple brands during the fitting- see [X]. Note of telephone call with [X] dated 10 February 2016, URN A230015. Note of telephone call with the Complainant dated 26 January 2016, paragraph 16, URN A270029.1. See also: URN A280023 [X]. This was the case team's experience when visiting [X] on 28 April 2016.

record the results of Custom Fitting sessions across all brands.⁸⁴ At the Oral Hearing, Ping's Managing Director confirmed that a retailer would be likely to make recommendations in relation to other brands of golf clubs when undertaking a Custom Fitting.⁸⁵

3.24. Custom Fitting (which takes between 30-90 minutes⁸⁶) generally involves the following steps:⁸⁷

- *initial interview* - a fitter will discuss the golfer's current game, equipment needs and what they want to achieve;
- *static fitting* - basic measurements are taken, including the golfer's wrist to floor measurement and height;
- *fitter identifies potential shafts and specifications for golfer* – based on information provided at initial interview and the static fitting measurements;⁸⁸
- *dynamic fitting* - a swing test assessment of how the golfer is hitting the ball with the use of (a) impact tape on the bottom of the club and an impact board on the floor which indicates whether the player is striking the ball in the optimum position; or (b) more technical analysis equipment (such as a Flightscope launch monitor) to collect a golfer's swing data (club head speed, ball's launch angle and ball spin);
- *purchasing advice* - the fitter advises the golfer on the brand and specifications which would best suit his/her play. Where applicable, the fitter might also advise on the make up of a full set of golf clubs; and
- *grip fitting* – player's hand size may be measured so that an appropriate grip can be fitted.

3.25. The process for carrying out a Custom Fitting (as outlined above) will depend on a retailer's facilities. Bricks and mortar retailers (whether on course or off course) may carry out a Custom Fitting using interchangeable

⁸⁴ See [Account Holder 1] custom-fit sheet, URN A20038.19 and A20038.19a.

⁸⁵ See URN A0952.1, page 46, lines 3 to 10.

⁸⁶ Ping's Custom Fitting sessions are for 60 minutes (for a single club) or 90 minutes (for multiple clubs): <http://www.gainsboroughgc.co.uk/pingfittings/>, URN A280026. [3<] Custom Fitting sessions are for 60 minutes for drivers and woods or 90 minutes for irons: Note of telephone call with [3<] dated 10 February 2016, paragraph 5, URN A230015. <http://www.americangolf.co.uk/content/personal-fitting.html>, URN A280023.

⁸⁷ http://news.bbc.co.uk/sport1/hi/golf/rules_and_equipment/4229050.stm, URN A280027; <http://www.americangolf.co.uk/content/personal-fitting.html>, URN A280023; Note of telephone call with [3<] dated 10 February 2016, paragraphs 5 and 6, URN A230015; Note of telephone call with the Complainant dated 26 January 2016, paragraph 8, URN A270029.1. As explained by Ping in its Written Representations, paragraphs 17 and 18, URN A0921.2.

⁸⁸ In a Ping Custom Fitting, following the static fitting, the fitter would plot the customer's measurements onto the Ping Colour Code Chart which relates to irons, wedges and putters which provides a starting point for identifying the proper length and lie angle for the club, Written Representations, paragraph 17 c. See also Ping Fitting Manual, exhibit referred to in the Statement of [3<] marked PW1.2, pages 6-9 in relation to an iron fitting, URN A0921.3b.

shafts and club heads provided by manufacturers.⁸⁹ In terms of facilities where a consumer can test golf clubs, on course retailers may have access to a driving range or practice grounds⁹⁰ and off course retailers may have practice nets.⁹¹ Data provided by Ping suggests that the type of Custom Fitting facilities offered differ by Account Holder. [60–70]% of Ping's Account Holders reported having a launch monitor (GC2 HMT, FlightScope, Trackman and SkyTrak), [30–40]% have a bespoke fitting studio, [10–20]% have an indoor net area and [50–60]% reported having access to a driving range or a practice ground.⁹²

3.26. Ping uses the following definition of a custom fitting in its Written Representations: *'The process of custom fitting described in Ping's Fitting Manual, including a face to face swing test'*.⁹³ Although Ping's definition indicates that a custom fitting process always includes a dynamic face to face swing test, there is no contractual obligation on Ping's Account Holders to sell to customers only after having undertaken a custom fitting which includes a dynamic face to face custom fitting.

3.27. In terms of the difference in how a Custom Fitting is conducted in practice, the following observations were made in the US Golf Datatech Study:⁹⁴

'It is worth noting that a golf consumer's definition of being 'fit' and a manufacturer or retailers' definition are often significantly different. To a consumer, hitting a potential club or clubs into a net or out to the driving range, and trying multiple brands/models can be perceived as a 'fit'. To a serious club-fitting retailer, only the use of advanced technologies such as Flight Scope or TrackMan to complete the fitting would be considered an actual or accurate fitting. And [Original Equipment Manufacturers], many of the golfers being fit may well end up buying 'stock/in inventory sets' because

⁸⁹ Ping provides its retailers with fitting carts and bags of demonstration equipment: <http://www.ping.com/fitting/cartprog.aspx>, URN A280028. For other examples of how retailers undertake Custom Fitting using demonstration equipment provided by a large number of golf clubs manufacturers see: <https://www.silvermere-golf.co.uk/shop/custom-fitting/>, URN A280024; http://www.tonyvalentine.com/acatalog/BRAND_NEW_GC2_Launch_Monitor.html, URN A280044; and <http://www.expressgolf.co.uk/custom-fit-studio/>, URN A280046.

⁹⁰ Transcript of interview with the Managing Director dated 10 March 2016, page 28, URN A0863.

⁹¹ Transcript of interview with the Managing Director dated 10 March 2016, page 40, URN A0863.

⁹² Among the Account Holders which reported having a launch monitor, the most popular launch monitors were GC2 ([40-50]%), FlightScope ([30-40]%), TrackMan ([10-20]%) and SkyTrak ([10-20]%). CMA analysis based on the data submitted by Ping (see amended annex 1 to Ping's response to the CMA section 26 notice dated 21 December 2016, URN A0953.2). Excludes accounts which do no or very little custom fitting (eg those that only sell Soft Goods or which are close to Ping's Gainsborough fitting studio), accounts that did not respond or are internal accounts belonging to Ping employees.

⁹³ See URN A0921.2, page 4.

⁹⁴ US Golf Datatech Study, page 3, URN A0921.3e.

the golfer is fit into a 'standard' configuration, which is already in the retailer's inventory, and no actual custom order is ever generated.'

(ii) *Increasing popularity*

- 3.28. Custom Fitting is increasingly popular across golf club brands. The US Golf Datatech Study indicates: *'Golf club fitting continues to expand, albeit slowly, as more major brands place emphasis on fitting clubs prior to purchase in an attempt to improve customer satisfaction by tailoring the clubs to their swing/game. Once the province of 'perceived' niche brands and heavily slanted towards irons, custom fitting expanded into various other club types [...] and today virtually every brand offers some version of fitting on some, if not all, of their new product offerings.'*⁹⁵
- 3.29. Notwithstanding that Ping was a pioneer in developing and promoting Custom Fitting,⁹⁶ Ping acknowledges that over the past decade its competitors have increasingly adopted this commercial approach by promoting Custom Fitting of their Custom Fit Clubs. Ping's Managing Director told the CMA that *'everybody custom fits...If you've been into a retail shop, you'll see that we're not the only custom fit company ... all of our competitors custom fit and I would say over the last ten years their investments in custom fitting have grown significantly as well.'*⁹⁷ The European Sales Director told the CMA that: *'Custom fitting in the marketplace [...] is gaining momentum and [...] it is being seen out in the marketplace now, as the big thing.'*⁹⁸
- 3.30. The number of golfers who have a Custom Fitting for Custom Fit Clubs has been increasing over recent years (eg the US Golf Datatech Study shows that in 2015 65% of surveyed golfers had a Custom Fitting, compared to 51% in 2001)⁹⁹ which would indicate an increased understanding amongst consumers of the benefits of Custom Fitting.

(iii) *Benefits of Custom Fitting*

- 3.31. The evidence shows that golfers, golf club manufacturers and retailers believe that Custom Fitting of golf clubs in general is beneficial for golfers across brands. The CMA has had regard to recent evidence which

⁹⁵ US Golf Datatech Study, page 3, URN A0921.3e. Golf Datatech has been conducting surveys, every two or three years, on Custom Fitting for golf equipment in the United States since 2001 (see page 2, URN A0921.3e).

⁹⁶ <http://www.ping.com/fitting/default.aspx>, URN A280020. See also Written Representations paragraph 181, URN A0921.2.

⁹⁷ Transcript of interview with the Managing Director dated 10 March 2016, page 19, URN A0863.

⁹⁸ Transcript of interview with the European Sales Director dated 9 March 2016, page 26, URN A0864.

⁹⁹ US Golf Datatech Study, page 36, URN A0921.3e

demonstrates that UK golfers surveyed (across all categories of skill¹⁰⁰) consider that they benefit from having a Custom Fitting. In particular, the SMS Survey Results Extract indicates that [70-80]% of surveyed UK golfers consider Custom Fitting for irons to be important or very important. Similarly, Custom Fitting for drivers was considered to be important or very important by [60-70]% of UK golfers surveyed, specifically [50-60]% for fairway woods, [50-60]% for wedges, [50-60]% for hybrids and [40-50]% for putters.¹⁰¹

- 3.32. Similarly, the US Golf Datatech Study shows that in 2015 93% of respondents in the US who had undertaken a Custom Fitting were very satisfied or satisfied with their experience.¹⁰² 72% of respondents who were charged for a Custom Fitting considered that the cost was worth it.¹⁰³
- 3.33. Custom Fitting is considered to be important or very important by some of the UK golfers surveyed in the SMS Survey Results Extract. According to this report, [30-40]%¹⁰⁴ of UK golfers surveyed had never had a Custom Fitting. When asked whether the golfer '*had ever been custom fitted*' for each different type of golf club (across brands), the results indicate that: overall [30-40]% had been custom fitted for drivers; [20-30]% for fairway woods; [10-20]% for hybrids; [50-60]% for irons; [20-30]% for wedges; and [10-20]% for putters.¹⁰⁵
- 3.34. Leading golf club manufacturers operating in the UK and a number of retailers promote the benefits of Custom Fitting on their websites. For example:

Manufacturers

- Callaway: '*Custom Fitting is one of the most important aspects of improving your golf. By working with you, our experienced team of Custom Fit Specialists are dedicated to finding you the right head model and then optimise it for loft, lie, shaft and grip, to get every inch out of your game. By matching the best equipment to your current swing, we can help deliver greater accuracy, increased distance and improved ball flight, all with the aim of lowering your scores and*

¹⁰⁰ SMS Survey Results Extract, page 15, URN A0949.4. Categories 1 to 4, where Category 1 includes golfers with the lowest handicap and Category 4 have the highest.

¹⁰¹ SMS Survey Results Extract, page 14, URN A0949.4.

¹⁰² US Golf Datatech Study, page 43, URN A0921.3e.

¹⁰³ US Golf Datatech Study, page 56, URN A0921.3e.

¹⁰⁴ SMS Survey Results Extract, page 22, URN A0949.4.

¹⁰⁵ SMS Survey Results Extract, pages 16-21, URN A0949.4.

*enhancing your enjoyment of the game. You'll leave the fitting feeling confident with equipment that's totally customised to you, for you.*¹⁰⁶

- Mizuno: *'The Mizuno Shaft Optimizer and Swing DNA system has been the industry's leading fitting system at local golf club level since its introduction in 2009.'*¹⁰⁷
- Ping: *'As the custom-fitting pioneer and leader, PING embraces the responsibility of elevating the fitting experience beyond the golfer's expectations. In creating nFlight, the company's team of software developers, scientists and fitting experts combined years of product knowledge, scientific data and fitting research into a tool that ensures fitting results never before available in both the indoor and outdoor environments. They developed the industry's first virtual fitting software to precisely model, digitally analyze and scientifically compare every aspect of every shot it captures. [...] In the end, you walk away with complete confidence in the PING Custom Fitting process knowing you've been properly fit for the latest advancements in equipment technology.'*¹⁰⁸
- Titleist: *'[...] Titleist designs the highest performing equipment and offers the most precise club fitting experience in the game. [...] Our highly skilled team of fitters utilizes the most advanced tools to help players optimize driver performance, make iron play more precise, dial in their wedges and fine-tune set compositions. The best way to truly appreciate the high performance value of Titleist golf clubs, achieve total confidence on every shot and shoot lower scores, is to experience Titleist club fitting for yourself.'*¹⁰⁹
- TaylorMade has a Performance Lab at Wentworth Golf club which is promoted as follows: *'This is a state-of-the-art facility, which is fully enclosed and houses a testing suite and workshop where specialized custom-fitting of clubs is done on a one-to-one basis with a Wentworth Professional. The workshop is of Tour standard and is kitted out with club customizing equipment including a loft and lie machine; putter loft and lie machine and a unique gripping station. The 'testing suite' has a custom fitting system- the Motion Analysis Technology (MAT-T) that creates real-time animations of your golfers swing enabling the fitter to fully understand your swing and launch conditions to optimise the recommendation for a full set of TaylorMade clubs. [...] This is the only facility of its kind in England and gives the member the ultimate*

¹⁰⁶ <http://uk.callawaygolf.com/custom-fitting/>, URN A280018.

¹⁰⁷ <http://golf.mizunoeurope.com/custom-fit/>, URN A280019.

¹⁰⁸ <http://www.ping.com/fitting/default.aspx>, URN A280020.

¹⁰⁹ <http://www.titleist.co.uk/golf-club-fitting>, URN A280021.

*opportunity to invest some time in their clubs and their game. It gives them the same custom fit experience that Tour players receive and golfers of all abilities, from a professional to a recreational player will benefit from this facility. This is the 'Savile Row' of club fitting facilities.'*¹¹⁰

- 3.35. Ping provided further submissions and evidence regarding the benefits of Custom Fitting in its Written Representations¹¹¹ and oral representations at the Oral Hearing.¹¹²
- 3.36. Ping submitted that the benefits of Custom Fitting have also been recognised externally by national golfing magazines with reference to seven amateur golfers who had undertaken Custom Fittings with Ping clubs and provided feedback on improvements to their game.¹¹³ Ping also referred to articles published online by MyGolfSpy.com, in collaboration with Ping, regarding an Iron Fitting Study, a Driver Fitting Study and a Fitted v Non-Fitted Putter Study¹¹⁴. However, the data in the MyGolfSpy studies regarding the benefits of Custom Fitting applies in relation to each type of club and is not Ping-specific, as explained by the editor in relation to the Driver Study: *'There's absolutely nothing that in this article says, or even hints, that this data only applies if you're buying a PING driver. It's great info, it applies to any driver fitting.'*¹¹⁵

Retailers

- 3.37. As described below, many UK golf club retailers carry out Custom Fitting and promote the benefits of this. For example:¹¹⁶
- American Golf: *'We are dedicated to helping you improve your game. Matching you with the right equipment from the widest range in the UK needs the latest swing and ball analysis technology. Every one of our hundred stores is ready to help you hit longer and truer. We advise lots of customers in-store and every one of them has a different style to their play. This is why we believe that getting to grips with latest*

¹¹⁰ <http://www.wentworthclub.com/golf/taylormade-lab/>, URN A280029.

¹¹¹ See Written Representations paragraphs 21-29 and the evidence referred to therein, URN A0921.2, Witness Statement of Ping Inc's Vice President of Engineering and annexes to the statement, URN A0921.3.

¹¹² Ping's presentations at the Oral Hearing (URN A0942.1) and the Oral Hearing transcript, page 65, lines 23-25, page 66, lines 1-9 and 22 – 25 and page 67, lines 1 – 2, URN A0952.1.

¹¹³ Written Representations, paragraph 24, URN A0921.2.

¹¹⁴ See respectively, Annex 3, URN A0921.4c; Annex 4, URN A0921.4d; and Annex 5, URN A0921.4e.

¹¹⁵ At page 12, URN A0921.4d.

¹¹⁶ See further examples of retailers' websites: http://www.clubhousegolf.co.uk/acatalog/Custom_Fit.html, URN A280022; <http://www.clarkesgolf.co.uk/clarkes-golf-centre/custom-fitting-bay/>, URN A280048; http://www.tonyvalentine.com/acatalog/BRAND_NEW_GC2_Launch_Monitor.html, URN A280044.

*technologies is the best way to advance your game and find the right golf equipment for you.*¹¹⁷

- Silvermere: *'Our professional PGA trained fitters have the most advanced tools and technologies available to analyse your swing and give a full assessment of your player profile to determine the clubs that will help you improve. Whether you are a relative beginner or an accomplished player, selecting a set of clubs is one of the most important decisions you'll make towards improving and enjoying your game. [...] Hit a wide range of brands, models and customisations and clearly see which works best for you.'*¹¹⁸
- Snainton: *'Custom Fitting can be used to achieve many different aims; adapting to a players physical dimensions (taller / shorter / large hands etc), reducing the impact of a consistent swing fault, to encourage the correct technique, to eliminate a specific shot. At its more technical level Custom Fitting can build low handicap golfers and professionals a more efficient swing with shafts fitted to their swing speeds and tempo. Higher handicap players can use adjustments in lie angles and shafts to overcome repetitive swing faults. Improvers and beginners need well fitted equipment to encourage the correct set up - the foundation for a solid game. We offer in store fitting for brands such as Ping, Titleist, Mizuno, Cobra, Callaway, TaylorMade, Yonex, Cleveland, Bridgestone, Wilson, Srixon and Nike.'*¹¹⁹

3.38. [X]¹²⁰

3.39. Furthermore, [Account Holder 1] told the CMA that: *'[...] we do believe that virtually all customers would benefit from the custom fitting process which we do not think can be satisfactorily delivered through a website alone.'*¹²¹

(iv) *Retailers' charging practices for providing Custom Fitting*

3.40. Some golf club retailers charge for Custom Fitting (which may be deducted from a final purchase) and some provide all Custom Fitting for free. As described more fully in Section 4F, the CMA's analysis shows a link between Account Holder investment and charging for Custom Fitting services:

¹¹⁷ <http://www.americangolf.co.uk/content/personal-fitting.html>, URN A280023.

¹¹⁸ <https://www.silvermere-golf.co.uk/shop/custom-fitting/>, URN A280024.

¹¹⁹ <http://www.snaintongolf.co.uk/page/custom-fit-centre>, URN A280049.

¹²⁰ [X].

¹²¹ [Account Holder 1] response dated 19 September 2016, URN A20064.

Account Holders which provide a wider range of Custom Fitting tools/services tend to charge more often for Custom Fitting.

- 3.41. Approximately [30-40]% of Ping's Account Holders charge for Custom Fitting and of the proportion who charge, [3<]% fully or partially refund the cost of the fitting if a club is purchased. Ping estimates that the average charge for Custom Fitting is approximately £[20-30]-[30-40].¹²²
- 3.42. [3<].¹²³ Other retailers have told the CMA that they charge a fee for providing a Custom Fitting which may be refunded, in part or fully, if the consumer subsequently purchases recommended clubs.¹²⁴
- 3.43. According to the US Golf Datatech Study,¹²⁵ in the US the average cost paid by golfers for a Custom Fitting had increased by 21% from \$64 in 2012 to \$79 in 2015. The cost also depended to a great extent on the type of facility, with fitting specialists charging more than on course or off course retailers.

(v) *Consumers' purchasing practice*

- 3.44. Consumers can choose whether to purchase Custom Fit Clubs with or without a Custom Fitting. The consumer needs to provide a number of measurements prior to making a purchase depending on the type of Custom Fit Club¹²⁶ which can be sold off the shelf if held in stock or built to order.
- 3.45. Consumers typically have the following options:
- **Bricks and mortar store purchase:** Consumers can buy a Custom Fit Club with or without a Custom Fitting. Depending on whether the retailer

¹²² Ping letter dated 7 December 2016, response to question 3, URN A0949.2. Ping had previously submitted in its Written Representations that the fitting services offered by Ping and its retailers are typically provided free of charge, either completely or by way of a full deduction when a purchase is made (Written Representations, paragraph 86, URN A0921.2. Ping charges consumers for Custom Fitting at its Gainsborough headquarters (see footnote 124).

¹²³ [3<]

¹²⁴ [Account Holder 2] used to charge £30 for a lifetime fitting service and £3 for individual clubs whether in store or online. This fee was non-refundable. [Account Holder 2] does not currently provide a club fitting service, [Account Holder 2] response to the notice dated 9 February 2016, page 2, URN [3<]. [Account Holder] charges £40 for a woods custom fitting (£20 of which is refunded following placement of an order), £60 for an irons custom fitting (£40 of which is refunded following placement of an order) and £120 for a full-bag fitting, (£100 of which is refunded following placement of an order for 11 clubs or more) – see [Account Holder], URN A280024, [Account Holder] charges £25 for a face to face fitting and this is refunded if the customer places an order, [Account Holder] response dated 11 February 2016 to section 26 notice dated 9 February 2016, (URN A190012); Ping charges £20 for an individual club custom fitting or £30 for a complete 14 club custom fitting at the Ping fitting centre in Gainsborough (<http://www.gainsboroughgqc.co.uk/pingfittings/>), URN A280026.

¹²⁵ There is no equivalent UK study.

¹²⁶ For woods, wedges and irons standard variables include: left/right hand; loft; shaft type; and shaft flex and additional custom fit variables include lie angle, shaft length, grip size and grip thickness. For putters standard variables are left/right hand and length and custom fit variables may include weight of shaft and grips. See further evidence in relation to each manufacturers' custom fit options in footnote 67.

has it in stock, a consumer may purchase a Custom Fit Club ‘off the shelf’ (which already meets his personal specifications) or place an order for a Custom Fit Club to be built to individual specifications.

- **Telephone order:** Consumers provide their basic measurements or their Custom Fit specifications.¹²⁷ Depending on whether the retailer has the chosen Custom Fit Club in stock, a retailer may be able to supply it from its inventory, or if not, place an order for it to be built to an individual’s specifications.
- **Online purchase:** Consumers access a retailer’s website, click on ‘Add to Basket’ in relation to the Custom Fit Club and then choose the relevant variables listed in drop down boxes.¹²⁸ Some manufacturers have online fitting tools to assist consumers in choosing Custom Fit Clubs.¹²⁹ Online retailers may provide advice in real time (for example, with ‘Live Chat’ technology).¹³⁰ With the exception of Ping, all other brands (including Callaway, Titleist and TaylorMade) allow their Custom Fit Clubs to be sold online.¹³¹¹³²

3.46. Evidence provided by two of Ping’s retailers [redacted] indicates that:¹³³

- A significant proportion of clubs are sold to consumers after a Custom Fitting has been undertaken in store, and the proportions do not vary significantly between Ping and the other manufacturers (who all permit online sales of golf clubs).

¹²⁷ Ping permits its retailers to sell golf clubs following a telephone call. See paragraph 3.118 for further details.

¹²⁸ The number of drop down boxes and Custom Fit options available on retailers’ websites varies. For example [Account Holder] and [Account Holder] have five or more customisable options available on their websites, in addition to the consumer’s choice of left or right handed club and the set make-up. [Account Holder 1] supplies Custom Fit Clubs online with only two customisable options (shaft type and flex) and [Account Holder 2] supplies Custom Fit Clubs with no custom fit variables. A reason for limited availability of custom fit options online may be because those are the only variables that the retailer has in stock in its warehouse, response to the Letter of Facts, paragraph 20, URN A0992.1.

¹²⁹ Ping has an online fitting tool to assist a consumer in deciding which Ping golf clubs would best suit their requirements – see, <http://www.ping.com/fitting/nflightweb.aspx>, URN A280031. Callaway has the following online fitting tools: Driver Selection Tool; Iron & Hybrid Selection tool; Fairway Woods Selection Tool; and a Wedge Selection Tools – see <http://cmp.callawaygolf.com/custom-fitting/>, URN A280018.

¹³⁰ Online Golf: <http://www.onlinegolf.co.uk/uk-based-call-centre/UK-based-call-centre.html>, URN A280032; Golf Online: <https://www.golfonline.co.uk/help/custom-fitting>, URN A280033; Snainton: <http://www.snaintongolf.co.uk/page/custom-fit-centre>, URN A280049.

¹³¹ [Account Holder 2] response to section 26 notice dated 9 February 2016, URN A90011.2; [Account Holder] response to section 26 notice dated 9 February 2016, URN A190012; and [Account Holder] response to section 26 notice dated 9 February 2016, URN A230013.

¹³² For example, see; [redacted], URN A280034 [redacted], URN A280035; [redacted] URN A280037; [redacted], URN A280038; [redacted] URN A280025.

¹³³ Data provided by [Account Holder 2] URN A90011.2 and [Account Holder] URN A230013. Data provided by two retailers only may not be fully representative of the whole market. In addition, there may be differences between retailers in relation to their approach to custom-fitting – whether they encourage consumers to have a dynamic fitting and which brands the individual fitters recommend for a consumer to purchase. [redacted].

- Conversely, a not insignificant proportion of Custom Fit Clubs, across all manufacturers including Ping, are sold to consumers without the consumers having had a Custom Fitting in relation to that club.
- 3.47. As described above, the leading manufacturers across all four categories of clubs (Callaway, Ping, TaylorMade and Titleist) supply their respective retailers with Custom Fit Clubs with pre-determined Custom Fit variables (to be sold off the shelf without further customisation), as well as offering clubs which are custom built following an order.
- 3.48. In order to be able to supply customers with Custom Fit Clubs ‘off the shelf’, retailers told the CMA that they purchase Custom Fit Clubs (which these retailers describe as classic, standard or regular custom fit variables) from Ping in order to have stock which suits a proportion of consumers (whether or not the consumer has had a Custom Fitting).¹³⁴
- [Account Holder 2] explained that it stocked a ‘*range of classic models of Ping golf clubs [X] which could be purchased in its physical outlets. In addition, [Account Holder 2] provided individual customers with Ping’s custom fit golf club service.*’¹³⁵
 - [Account Holder 1] explained that ‘*We can take a customer through a dynamic fitting process and conclude that they need a regular fit set of irons which is available off the shelf.*’¹³⁶
 - [Account Holder] explained that ‘*at least 10% if not more customers following a [custom] fit take irons or more often a wood from stock because we hold ALL the above options [four lofts, four flexes and up to seven different shafts] for many drivers, fairways, hybrids and putters in stock.*’¹³⁷
 - The Complainant explained that when ordering a club from Ping he would specify it in standard length, flexibility, grip and loft which would often be displayed in his bricks and mortar store: ‘*[...] a retailer would be most likely to sell this set, as it would be suitable for the largest proportion of customers.*’¹³⁸

¹³⁴ Ping submitted in its Written Representations that: ‘*Whilst there is a ‘bell-curve’ within which most customers are fitted – for example, [X] of customers are fitted with regular or stiff flex shafts- the point is that whether or not a particular customer lies within that curve or outside it is unknowable ex ante without a Custom Fitting.*’ Written Representations, paragraph 18, URN A0921.2.

¹³⁵ [Account Holder 2] response to section 26 notice dated 17 November 2015, URN A90006.5.

¹³⁶ [Account Holder 1] response to section 26 notice dated 30 March 2016, URN A20038.11.

¹³⁷ [Account Holder] response to section 26 notice dated 26 February 2016, page 13, URN A230013.

¹³⁸ Note of telephone call with the Complainant dated 26 January 2016, paragraph 10, URN A270029.1.

3.49. Ping assembles clubs in its factory in Gainsborough,¹³⁹ including clubs which are built on a made to order basis and clubs which are supplied to retailers as Initial Season Orders (ISOs) and to replenish depleted stock.¹⁴⁰ Ping sells ISOs to almost all of its Account Holders with the purpose of ensuring the brand achieves appropriate visibility in retailer stores.¹⁴¹ Ping submitted that: *'some ISO clubs will occasionally correspond with the specifications recommended by the fitter, and may therefore be sold to the consumer without further customisation by PING [...]. Moreover, where further customisation is required PING will carry this out.'*¹⁴² Ping told the CMA that only a very small proportion of clubs sold as ISOs are returned to Ping for customisation.¹⁴³

IV. Importance of the internet as a retail channel for the sale of golf clubs

3.50. As described in paragraph 3.21 above, according to evidence submitted by Ping, in 2015 online retailers (incorporating both non-golf specialists and internet golf retailers) accounted for 9-14% of sales depending on club type.¹⁴⁴

3.51. For the following UK retailers operating both bricks and mortar stores and a transactional website, a significant proportion of their golf club sales (across other brands) are made online. For these retailers, the internet therefore represents an important sales channel for golf clubs, with a demand from customers to purchase golf clubs online. [Account Holder 1] indicated that in financial years 2013/14 and 2014/15 approximately [X%] of its total golf club sales were made online.¹⁴⁵ Other UK retailers also indicated that online sales of golf clubs represent a significant proportion of their business:

¹³⁹ Note of the State of Play Meeting held on 17 December 2015 paragraph 31, URN A0827. Ping further submitted that: *'The Ping Factory at Gainsborough is also geared up for receiving, assembling and shipping within 48 hours to the customer, orders for custom fitted golf clubs following fittings carried out by our account holders. No other manufacturer offers such swift customisation turnaround – 10-14 days is the norm for other manufacturers/websites'*, paragraph 158, URN A0921.2

¹⁴⁰ See Ping Europe 2016 Sales Support Manual, URN A0210.1.

¹⁴¹ Ping's response to request 8 of the section 26 notice dated 5 February 2016, URN A0198.1. Ping further submits in its Written Representations, URN A0921.2, at paragraph 53 that *'The primary purpose of the ISOs is to (i) ensure that the retailer has a set of clubs in stock; and (ii) provides clubs to be displayed on the shop floor. They are not intended for general sale. If they happen to be sold, PING's policy is that they, too, should be custom-fitted and PING understands that this is the case in practice.'*

¹⁴² See Written Representations, paragraph 55, URN A0921.2.

¹⁴³ Ping's response to request 5(b) of the section 26 notice dated 24 March 2016, URN A0794. Ping also stated in this response that *'[...] the proportion of the ISO compared to the total annual sales of a retailer is small. We encourage the retailers to keep their inventory of Ping clubs low and then order on an at once basis following a fitting. [...] Also the products we supply in the ISO are mostly from the combinations at the top of the bell curve of ordered specifications.'*

¹⁴⁴ SMS Survey Results Extract, pages 3 and 23 to 29, URN A0949.4. The CMA has not verified the accuracy of these figures – other categories (eg American Golf) may also capture online sales made by respondents to the survey.

¹⁴⁵ [Account Holder 1] response to section 26 notice dated 17 November 2015, URN A20006.3. [X%] ([X%]) accounts for [X%] of [Account Holder 1] total group sales, URN A20038.11.

approximately [35-45]% of [Account Holder] total sales of all golf clubs (by value) were made online in 2014;¹⁴⁶ [15-25]% of [Account Holder] total golf club sales (by value) were made online in 2014;¹⁴⁷ [Account Holder] indicated that [20-30]% of its total sales of golf clubs (by value) were made online in 2014;¹⁴⁸ and [45-55]% of [Account Holder] sales of all golf clubs were made online in 2014.¹⁴⁹ Other UK retailers indicated that online sales of all golf equipment represents a significant proportion of their business: [Account Holder] indicated that [5-15]% of its total sales (by value) were made online in 2014;¹⁵⁰ and [Account Holder] expects that in 2015/16 online sales will be around [45-55]% of its total business.¹⁵¹

- 3.52. The CMA considers that the following evidence indicates that Ping has considered the impact of online trading by Account Holders (particularly those based in the UK).¹⁵²
- 3.53. Ping is aware that some UK Account Holders which operate online were 'targeting' consumers in other EU Member States through their websites.¹⁵³ Ping's Managing Director told the CMA that some of its UK Account Holders which operated online (including [Account Holder]) had established non-British website domains (for example ending in .de, .fr and .se) to advertise products and target consumers in other EU Member States.¹⁵⁴
- 3.54. As shown by the internal Ping documents described below, Ping viewed its consumers as 'very *Internet-savvy*'¹⁵⁵ and considered the impact of online trading by Account Holders on its pan-European sales.
- 3.55. Internal Ping documents demonstrate that Ping was aware of the effect of the internet on pricing and, in some cases, concerned by the possibility of

¹⁴⁶ [Account Holder] response to section 26 notice dated 18 November 2016, URN A30003.

¹⁴⁷ [Account Holder] response to section 26 notice dated 2 December 2015, URN A50004.1.

¹⁴⁸ [Account Holder] response to section 26 notice dated 18 November 2015, URN A240005.2.

¹⁴⁹ [Account Holder] response to section 26 notice dated 20 November 2015, URN A60007.1.

¹⁵⁰ [Account Holder] response to section 26 notice dated 1 December 2015, URN A80006.1.

¹⁵¹ [Account Holder] response to section 26 notice dated 17 November 2015, URN A160010.

¹⁵² Ping submitted that the '*alleged link between the Internet Policy and parallel trade should be rejected [...]*', Written Representations, paragraphs 92 to 100, URN A0921.2. The CMA has not relied on this evidence to establish that the Online Sales Ban was created in order to prevent parallel trade but demonstrates that Ping is aware that online selling allows consumers to shop outside of their local area, potentially across national borders.

¹⁵³ Ping Business Review Phoenix April 1, 2014, Slide 49 'Impact of the Internet', URN A0088.1.

¹⁵⁴ '[...] *what some of the websites started to do as a way of trying to grow their businesses obviously was to start opening up, making visual ... actually having websites that were for Sweden, France, Germany and in their own language and in their local currency ...and so as part of their desire to try and grow their business they started to cast their net but they, they started to look for consumers from mainland Europe.*' Transcript of interview with the Managing Director dated 10 March 2016, page 79, URN A0863.

¹⁵⁵ '*We believe the fitting communication project through the website will be very beneficial to the brand in Europe. Generally, our consumers are very Internet- savvy.*' Ping 2008 Business Plan and Budget, page 6, URN A0420.

UK Account Holders operating online selling golf clubs at lower prices than Account Holders established in other EU Member States. In particular:

- Ping 2013 Business Strategy and Budget, a slide titled 2013 'Business Threats' stated: '[3<]'¹⁵⁶
- Ping Business Review 1 April 2014, contained two slides titled 'Impact of the Internet'.

The first slide sets out the following bullet-points in relation to Ping's policy and how it might address UK Account Holders targeting the European markets:¹⁵⁷

- *'Our policy continues to not allow account holders to click basket on Hard Goods.*
- *Soft goods can be sold but only if Account is authorised.*
- *PEL and PCL¹⁵⁸ will have common Internet Policies.*
- *UK internet retailers are targeting the European markets.*
- [3<]'

The second slide contained a worked example in relation to UK 'street' prices of Ping's i25 Driver (also converted to Euros for internet prices) compared with MSRPs¹⁵⁹ for Ping's biggest retailer in Germany ([Account Holder]) and in France ([Account Holder]) (replicated below):¹⁶⁰

i25 Driver:

	Pro Price	MSRP	Street	Euro	Internet
UK	£192.30	£355	£279	@1.25	€349
				@1.15	€319
Euro	€231.15	€420			
		[Account Holder]		€420	-17.2%
		[Account Holder]		€369	-5.4%

¹⁵⁶ Ping 2013 Business Strategy and Budget URN A0042.1 sent from Ping's Managing Director to Ping Inc. by email on 7 December 2012 indicating that this was presented to Ping Inc., URN A0042.

¹⁵⁷ Ping Europe Limited Business Review, April 1, 2014, slide 49, URN A0088.1.

¹⁵⁸ The CMA considers that 'PEL' means Ping and 'PCL' means Ping Collections Limited.

¹⁵⁹ The CMA considers that 'MSRP' means Manufacturer's Suggested Retail Price.

¹⁶⁰ Ping Europe Limited Business Review, April 1, 2014, slide 50, URN A0088.1.

3.56. Email correspondence between Ping and its European Account Holders show Account Holders complaining about Ping's UK Account Holders' online advertising strategies:

- *'Please see email newsletter below from the internet-dealer, [Account Holder]! As you can see, they are extremely aggressive and dumping prices on all products, even on new products not yet available in store or online! They communicate that they beat the price of any golf retailer in Sweden. Is this in line with your Internet Policy, as they do not have any "brick and mortar" store/s in Sweden?'*¹⁶¹
- *'For me it's impossible to compete with those [UK online retailers'] offers: 454.00 € in attachment ([X]) and 469.00 £ = 548.00 € from [Account Holder]. The suggested retail in our countries as you know would be 774.00 €. To hit the web competition I should sell at 30% off in one case and at 40% off in the other. The quotation of [Account Holder] is lower than the € WHLS + VAT. The one of [Account Holder] would leave a margin of 10%'. The Managing Director responded to this email: 'It is very clear that there is a different Retailer to Consumer dynamic in the UK compared to most countries in mainland Europe. [...] Obviously, the Internet is making our market smaller in terms ease of communication and this is obviously creating awareness in one country of what is happening in another.'*¹⁶²

3.57. Ping was aware of its UK Account Holders operating websites seeking to sell to consumers in other EU Member States:

- *'The retail price differential between the UK and Europe has been significant for some time. A number of UK websites are now exploiting this.'*¹⁶³
- The Managing Director further explained to the Chairman of Ping that: *'Now that the UK websites have their sights set on Europe, I agree, there is a good reason for us to consider [X] [...]. [...] the volume of product being sold to European consumers via UK Internet retailer is [X]. This is*

¹⁶¹ Email from a Swedish Account Holder dated 15 November 2012 to Ping. The Managing Director responded to this email on 4 December 2012 and noted that '[...] we believe that EU law does not require a retailer to have a brick and mortar location in a country in order to be able to sell in that country. So long as it has a brick and mortar site in the EU it is entitled to sell anywhere in the EU. Our Internet Policy prohibits any Ping Authorised Account from selling Hard Goods directly via 'click to basket'. However, we cannot stop an authorised retailer from using the internet for advertising and marketing purposes.' URN A0063.

¹⁶² Email from an Italian Account Holder dated 19 March 2013 to the European Sales Director and the Managing Director, URN A0076

¹⁶³ Email from the Managing Director to [X] dated 23 November 2013, URN A0100.

*more about principle and influence. The European retailers, in general, sell for close to recommended retail, the UK customers have discounted for many years.'*¹⁶⁴

3.58. Two retailers (one of which was the Complainant) explained to the CMA that a restriction on their ability to sell online limits the potential to grow their sales:

- *'We are losing sales from consumers who would otherwise purchase the [...] Ping [...] clubs online. [...] our catchment area is significantly narrowed to the local area around the [retailer's store]'. 'The Complainant is unable to sell online to consumers, in the UK and other EU Member States, who would otherwise purchase the relevant clubs from it. Without these high volume sales, the Complainant's operational costs are higher than they would otherwise be, which translates into higher retail prices overall.'*¹⁶⁵
- Another retailer explained that *'In a small town there is only so much bricks and mortar retail a company can do'* and that Ping's and other manufacturers' restrictions on internet selling *'impose a barrier to growing business.'*¹⁶⁶
- Furthermore, online retailers cannot advertise on Google shopping products which cannot be purchased directly online. One retailer told the CMA that as a result of the Online Sales Ban he believed that he was losing *'internet visibility for existing and, most importantly, new clients.'*¹⁶⁷

C. Ping's commercial policies and the Online Sales Ban

3.59. This section describes:

- I. Ping's commercial distribution of golf clubs (including Ping's selective distribution network and its incentives for retailers);
- II. The origin and aims of the Online Sales Ban; and
- III. Implementation of the Online Sales Ban.

I. Ping's commercial distribution of golf clubs

¹⁶⁴ Email from the Managing Director to [S<] dated 25 November 2013, URN A0100.

¹⁶⁵ Complainant's witness statement paragraph 60.1, URN A270022 and Complaint, paragraph 77, URN A270024.

¹⁶⁶ Note of telephone call with [Account Holder] dated 23 November 2015, URN A160003.

¹⁶⁷ Complainant's witness statement paragraph 60.5, URN A270022.

(i) *Ping's selective distribution network*

3.60. Ping operates a selective distribution network¹⁶⁸ and supplies only authorised retailers (referred to by Ping as 'Account Holders') which meet the following qualitative criteria:¹⁶⁹

- a. [REDACTED];
- b. [REDACTED];
- c. [REDACTED];
- d. [REDACTED];
- e. [REDACTED];
- f. [REDACTED];
- g. [REDACTED];
- h. [REDACTED];
- i. [REDACTED];
- j. [REDACTED].

3.61. Retailers wanting to sell Ping golf clubs must complete a New Account Application Form to begin the approval process.¹⁷⁰ Since at least 1 August 2012, when Ping updated its application forms and process, the application form contains a number of questions which applicants must answer (by indicating 'Yes' or 'No'), including: '[REDACTED]'¹⁷¹ Ping submitted that *'Retailers are required to indicate that they agree to comply with the policies when they complete these application forms.'*¹⁷²

¹⁶⁸ Written Representations paragraphs 101-5, URN A0921.2 and Oral Hearing Transcript 41 lines 5-19, URN A0952.1, Ping queried whether the CMA had alleged a separate infringement in relation to the criteria or operation of Ping's selective distribution network in the SO. The CMA's investigation relates to the Online Sales Ban only. However, where the CMA has assessed the Online Sales Ban in the context of Ping's selective distribution network, for the purposes of that assessment, its analysis proceeds on the basis that Ping golf clubs are the type of high-quality product which could in principle necessitate the adoption of an appropriate selective distribution system, see section 4. The CMA has not assessed appropriateness of the terms or operation of that selective distribution system save as it relates to the Online Sales Ban.

¹⁶⁹ Ping's current selective distribution criteria have not changed substantially since 2012, as noted in Ping's response to a section 26 notice dated 13 January 2017, paragraph 7, URN A0953.1.

¹⁷⁰ Account Holders must fill in separate forms every time they open a store at a new location or if the business changes ownership. Transcript of interview with the UK Sales Manager dated 9 March 2016 page 32, URN A0864, and transcript of interview with the Managing Director dated 10 March 2016 page 41, URN A0863.

¹⁷¹ New Account Application Form, URN A0411. See below paragraphs 3.78 to 3.87 which describe the Internet Policy and paragraphs 3.88 to 3.96 which describe Ping's Dynamic Face to Face Custom Fitting Policy.

¹⁷² Written Representations, paragraph 34, URN A0921.2.

- 3.62. In deciding whether a retailer meets the criteria for Ping's selective distribution network, Ping first considers the application forms and then Area Sales Managers carry out a suitability assessment (by visiting premises, taking photographs of each location and meeting with the applicant) and prepare a short report regarding the applicant's suitability.¹⁷³ All Ping account applications are subject to final approval by the Managing Director of Ping. Credit Control also check the financial strength of the applicant prior to an account being opened.¹⁷⁴
- 3.63. Where Account Holders apply to become an approved internet seller (to sell Soft Goods only), they must complete a separate application form and a Ping employee carries out a website audit to assess the suitability of the retailer's website.¹⁷⁵ The employee records whether the website carries a note regarding 'Ping Hardware Related Features; Ping's Internet Policy on Hardware Products; the Benefits of Custom Fitting on Hardware Products; and Offers Option to Go to the Retail Outlet for Custom Fitting'.¹⁷⁶

(ii) *Ping's retailer incentives*

- 3.64. Ping classifies its Account Holders as 'Fitting Accounts' and 'Static Fitting Accounts'.¹⁷⁷ Ping's Managing Director explained that Ping internally categorises [X], [X] and [X] as 'Fitting Accounts' based on the amount of Ping demonstration equipment at the retailers' premises.¹⁷⁸ 'Static Fitting Accounts' may have less demonstration equipment than 'Fitting Accounts' and typically purchase less than [X] worth of Ping products per year.¹⁷⁹ Ping further submits that all types of accounts carry out Custom Fitting and that the essential difference between the different types of fitting account is the number of fitting clubs provided by Ping to the retailer [X].¹⁸⁰

¹⁷³ In the short reports prepared by the Area Sales Managers there is a question regarding the distance to the nearest golf stores to the applicant's location, URN A0412. However, Ping has explained that this is a 'clerical or informational point' and that it 'does not instruct the [ASM] to refuse the application if there are a certain number of existing outlets in the area', Written Representations, paragraph 103, URN A0921.2.

¹⁷⁴ New Account Application Process Guidelines, URN A0468.

¹⁷⁵ Internet Account Application Form, URN A0410. Internal Ping email between the Managing Director, the Internet Monitor and others dated 26 July 2012 explains that under the new Internet Policy bags and goods will be sold online and that 'Part of the approval process will be for us to do an audit of the quality of the website.' URN A0240.

¹⁷⁶ For example, Ping Website Audit Form for [Account Holder 2] URN A0081 and for [Account Holder 1] URN A0577.

¹⁷⁷ See, for example, Ping 2016 Sales Support Manual, URN A0210.1.

¹⁷⁸ Transcript of interview with the Managing Director dated 10 March 2016, pages 24 to 28, URN A0863.

¹⁷⁹ Transcript of interview with the Managing Director dated 10 March 2016, pages 25 to 26, URN A0863.

¹⁸⁰ See Written Representations, paragraph 20, A0921.2.

- 3.65. According to Ping's 2016 Sales Manual,¹⁸¹ in order to qualify as a Fitting Account, the retailer must [X].¹⁸² Ping has around [X] Fitting Accounts.¹⁸³
- 3.66. Fitting Accounts may be rewarded with benefits including:¹⁸⁴
- Fitting equipment based on meeting targets: Ping will provide [X] when new products are introduced, provided the accounts reach minimum turnover targets per outlet each year ([X] for Cart Accounts and [X] for Stand Accounts);
 - Settlement Discounts on ISO orders of [X] or [X]% (as opposed to [X]% for Static Fitting Accounts); and
 - Other financial rewards: [X]
- 3.67. Ping also internally classifies some of its Fitting Accounts as [X].¹⁸⁵ [X].¹⁸⁶ [X] qualify for certain benefits in terms of support and service from Ping [X].¹⁸⁷
- 3.68. Evidence regarding Ping's commercial terms for [Account Holder 1] and [Account Holder 2] indicates that Ping provided financial support based on the volume of annual sales made by these Account Holders and growth targets.¹⁸⁸ Although the commercial terms do not refer to Ping measuring the Account Holders' commitment to Custom Fitting, Ping submitted that [X].¹⁸⁹
- 3.69. The Managing Director told the CMA that, '[X]'.¹⁹⁰ However, Ping does not monitor which of its Account Holders are carrying out Custom Fitting¹⁹¹ and explained to the CMA that '*Ping has not set up any form of measurement to*

¹⁸¹ Ping Europe 2016 Sales Support Manual, URN A0210.1.

¹⁸² See paragraph 3.49 which describes how Ping supplies ISOs to its retailers.

¹⁸³ Ping's response to Question 2 of section 26 notice dated 24 March 2016, URN A0776.

¹⁸⁴ As described in Ping Europe 2016 Sales Support Manual URN A0210.1 and transcript of interview with Managing Director dated 10 March page 38, URN A0863.

¹⁸⁵ Ping's response to Question 5 of section 26 notice dated 5 February 2016, URN A0196.5.

¹⁸⁶ Ping's response to Question 5 of section 26 notice dated 5 February 2016, URN A0196.5. [X], URN A0434.

¹⁸⁷ [X], URN A0435.

¹⁸⁸ For [Account Holder 1] 2015 Trading Terms including Financial Support (URN A20006.2) and for [Account Holder 2] Trading Terms 2015 including Financial Support (URN A90006.4).

¹⁸⁹ Written Representations, paragraph 56, URN A0921.2.

¹⁹⁰ Transcript of interview with the Managing Director dated 10 March page 37, URN A0863

¹⁹¹ Ping's response to Question 7 of section 26 notice dated 5 February 2016: '*I don't recall and cannot find any reports or statistics that evaluate the proportion or percentage of customers who undertake a Dynamic Face to Face Custom Fit or a Static Fit. We do not routinely record or request this information*', URN A0195.1.

*quantify which retailers are carrying out face to face custom fitting, or how often.*¹⁹²

3.70. Ping considers that the vast majority of Account Holders are Custom Fitting their customers face to face based on:¹⁹³

- the variety of orders it receives (in 2014 and 2015: [X] different iron combinations, [X] different wood combinations, [X] different fairway and hybrid options and [X] different putter combinations);
- [X] retailers visit Gainsborough for product and fitting training;
- [X] product fitting demonstration days at retailers' locations (usually seeing at least 10 consumers per visit); and
- more than [X] visits made to Account Holders' locations by Ping's sales force.

(iii) *Account Holder's and Ping's investments in promoting Custom Fitting*

3.71. Ping submitted that its Account Holders make significant investments in the promotion of Custom Fitting.¹⁹⁴ In summary, this includes:

- (i) time spent on the Custom Fitting process: Ping submitted that an average Ping Custom Fitting takes approximately 40 minutes for a set of irons, 20 minutes for a wood, and 15 minutes for a putter.
- (ii) the allocation of new or existing space for carrying out the Custom Fitting process: Ping submitted that [30-40]% of its Account Holders (which responded to its survey) have a dedicated fitting studio. The financial investment in creating a Custom Fitting studio might range from a few thousand pounds to convert an existing area to more than £100,000 for a new building/extension.
- (iii) Custom Fitting technology: Ping submitted that [60-70]% of Account Holders (which responded to its survey) have invested in a launch monitor which costs in the range of £5,000 for a basic GC2 monitor to £17,500 for a standard Trackman monitor. Ping found that [X] of its Account Holders had GC2 Monitors and [X] had Trackman monitors.

¹⁹² Ping's response to Question 2, part 1, of section 26 notice dated 24 March 2016, URN A0776. The Managing Director also explained that this a question of judgment based on Ping's knowledge of its retailers' businesses, transcript of interview with the Managing Director dated 10 March 2016, pages 36 and 37, URN A0863.

¹⁹³ Ping's response to Question 2, part 1, of section 26 notice dated 24 March 2016, URN A0776.

¹⁹⁴ Ping's submission dated 7 December 2016, response to Question 1, URN A0949.2.

3.72. Furthermore, Ping submitted that it makes substantial investments in Custom Fitting which include:¹⁹⁵

- (i) The provision of fitting equipment including:
 - a. [X] fitting clubs to Account Holders, supplied solely for the purpose of Custom Fitting. In 2014 and 2015 the cost to Ping of providing these clubs was [X] and [X], respectively.¹⁹⁶
 - b. [X] of Ping's accounts are provided with either a Ping Fitting Cart or a Ping Fitting Stand at a cost of [X] and [X] respectively. Static accounts which buy [X] demo clubs would add to this percentage.
- (ii) Ping provides its Account Holders' employees with the opportunity to attend a Fitting Education Programme [X]. In 2015, Ping's Fitting Education Programme represented an investment of approximately [X].
- (iii) In 2015 Ping invested [X] in fitting demo days, and [X] in operating its own fitting centre at Gainsborough.

(iv) *Ping's monitoring of Account Holders' promotion of Custom Fitting*

3.73. In [X] Ping undertook a Mystery Shopping exercise (whereby Ping employees visited [X] stores and [X] stores located in the UK and [X] stores located in the Republic of Ireland) with the objective, amongst other things, of assessing the Account Holders' '*commitment to fitting*' and the '*knowledge of the fitter*'.¹⁹⁷ The employee carrying out the Mystery Shop completed a scoresheet after the visit which included a section on the fitting process, the store's commitment to fitting (this included a question regarding whether the retailer was '*interested in selling clubs straight from the shelf and not custom fitting you*') and the tools/facility.¹⁹⁸

3.74. Ping explained: '*One of the purposes of the mystery shopping exercise was to validate the quality of fitting at two retailers [X] and [X] [X]. The other*

¹⁹⁵ Ping submits that: 'Ping invests heavily in training, marketing and infrastructure to promote custom fitting' paragraph 76, Written Representations, URN A0921.2 and provided more detail in its submission dated 7 December 2016, response to Question 1, URN A0949.2. This is broadly consistent with Ping's estimations of its average annual costs provided in paragraphs 175-176 of its Written Representations, URN A0921.2.

¹⁹⁶ Ping submits that other brands charge retailers for their fitting equipment. Some brands may refund the cost of the equipment if the retailer achieves minimum sales volumes, response to Question 1, URN A0949.2.

¹⁹⁷ Email from the Managing Director to the European Sales Director, the UK Sales Manager and another Ping employee dated [X], '*Let's move forward on thi8s [sic] basis*' URN A0075 and Mystery Shopping Project Objectives, Process and Iron Mystery Shopping Brief, Driver Mystery Shopping Brief URN A0075.1.

¹⁹⁸ Ping Mystery Custom Fit Scoresheet, [X], URN A0075.2.

*purpose was a general audit exercise to see what Ping could learn about the way in which its retailers sell its clubs and what lessons could be incorporated into its Account Holder Training programme. This process is necessarily labour- and resource-intensive and could not be practically replicated across Ping's circa [X] individual accounts. This is an important consideration when considering practical alternatives to Ping's Internet Policy.'*¹⁹⁹

3.75. The results of the mystery shopping visits to [X] stores in [X], in every case to purchase woods, included:²⁰⁰

- Did they promote the importance of Fitting: In the [X] store, *'there was no discussion about fitting, it was purely here are 2 drivers off the shelf and lets [sic] see which you think feels better.'*
- Commitment to Fitting: In the [X] store, *'No mention of getting custom fit. Just try before you buy.'*
- Were they interested in selling clubs straight from the shelf and not Custom Fitting you?: In all [X] stores, the score sheets indicated that the retailer was only interested in selling straight off the shelf, rather than ordering in clubs.
- Overall comments: In the [X] store, *'No commitment to fitting for Drivers. Purely try before you buy philosophy' and 'Did not use the fitting tools at all. They were sat redundantly at the side of my playing mat.'*

3.76. At the time of the mystery shopping visits to [X]²⁰¹, [X]. The scoresheets indicate that [X].²⁰²

3.77. Furthermore, in response to a consumer complaint that he had bought a Ping golf club from a [X] store without being offered a Custom Fitting, a Ping employee explained:²⁰³ *'We agree, there is no point in having a policy that recommends a custom fitting prior to purchase, in order to establish the most suitable specification for the individual, if the retailers are not carrying it out [...] Unfortunately from our perspective it is very difficult to police every*

¹⁹⁹ Ping's response to a section 26 notice dated 13 January 2017, paragraph 30, URN A0953.1.

²⁰⁰ Ping Mystery Custom Fit Scoresheet, [X], URN A0075.2; Ping Mystery Custom Fit Scoresheet, [X], URN A0953.4b; and Ping Mystery Custom Fit Scoresheet, [X], URN A0953.4c.

²⁰¹ Ping Mystery Custom Fit Scoresheet, [X], URN A9053.4d; Ping Mystery Custom Fit Scoresheet, [X], URN A9053.4e; Ping Mystery Custom Fit Scoresheet, [X], URN A9053.4f; and Ping Mystery Custom Fit Scoresheet, [X], URN A9053.4g.

²⁰² Ping's response to the Letter of Facts, at paragraph 16, URN A0992.1.

²⁰³ Email from ASM to European Sales Manager dated 28 November 2014, titled [X], contains the following customer complaint: *'I visited [X] earlier today and purchased a new G30 3-wood. When I enquired as to why I had not been custom fitted prior to purchase, I was told 'that's just a PING thing, we don't bother with that'. What is the point of your custom fit policy if authorised dealers simply ignore it?'*, URN A0168.

representative, of every retailer, ensuring they are following our preference for custom fitting.'

II. Origins and aims of the Online Sales Ban

3.78. This section explains the development of the Online Sales Ban and how it has been communicated to Account Holders.

(i) Ping communicates the Online Sales Ban to Account Holders in 2000

3.79. Ping first communicated to Account Holders a policy banning the sale of any Ping product online in 2000.²⁰⁴ The Managing Director told the CMA that this was the first communication sent to Account Holders regarding online sales and that prior to this, there was no policy banning online sales.²⁰⁵ The letter of 19 May 2000 explained that: *'Recently, we have had some concerns with the representation of our PING brand on the Internet: PING product is being depicted in a manner not consistent with our brand image and in some instances with prices that can only be explained as loss leaders.²⁰⁶ [...] conducting transactions over the Internet will not enhance PING brand value, as far as consumers are concerned, because it is inconsistent with our policy of individual custom-fitting.'*

(ii) Online Sales Ban is re-communicated to Account Holders in 2005

3.80. On 12 January 2005 Ping's Managing Director wrote to all Account Holders informing them that Ping had carried out *'a review of internet selling and as a consequence in order to protect the brand and the consumer and to ensure that custom-fitting remains at the heart of the sale of Ping Golf Clubs we have decided to issue a new policy which will not allow account holders to execute sales transactions with consumers on the Internet.'*²⁰⁷

3.81. Ping further explained the rationale for the introduction of the Internet Policy as: *'We believe it is fundamental to the process of selling Ping Golf Clubs that the consumer is custom-fitted to ensure they receive clubs that are custom-built to their own specifications. We want to ensure that a personal conversation takes place between the account holder and the consumer so*

²⁰⁴ The Chairman of Ping sent letters to Account Holders on 19 May 2000, URN A0496. The letter stated that: *'No transaction involving PING product with a consumer should be executed on an Internet site.'*

²⁰⁵ Transcript of interview with the Managing Director dated 10 March 2016, page 50, URN A0863.

²⁰⁶ This indicates that Ping golf clubs were being sold online at this time ie in 2000.

²⁰⁷ Letter from the Managing Director to Account Holders dated 12 January 2005, URN A0414 and URN A0463. A subsequent letter sent to Account Holders on 26 June 2006 refers to this letter having been *'communicated to [Ping's] entire account base'* on 12 January 2005 URN A0456. The Managing Director confirmed it was sent, Transcript of interview with the Managing Director dated 10 March 2016, pages 57, URN A0863.

*that the account holder can fully explain the benefits of Ping custom-fitting and make appropriate arrangements to arrange an appointment to fit the customer. This process cannot take place during an Internet transaction and it is for this reason we believe that Ping Golf Clubs should not be sold on the Internet.*²⁰⁸

- 3.82. Account Holders operating transactional websites were given until 15 February 2005 to cease selling Ping products via these sites and were warned that, from that date, if they breached the Internet Policy by selling online (on their own website or on any third party internet sites), Ping would close their account.

(iii) *Ping further clarifies the Online Sales Ban and incorporates it into its Terms and Conditions in 2006*

- 3.83. On 26 June 2006, Ping's Managing Director wrote to Account Holders to further clarify the Online Sales Ban: *'Following the closure of a number of accounts for breach of our Internet Policy I want to ensure that there is no doubt as to the meaning of our existing policy. [...] We are determined to keep custom-fitting a necessary and integral part of the Ping selling process and your support of this Internet Policy ensures this and is much appreciated.'* The letter enclosed a copy of the Internet Policy.²⁰⁹
- 3.84. Ping launched new products in August/September 2006 and issued an updated version of its Trade Price List including Terms and Conditions effective from 1 September 2006.²¹⁰ This version of Ping's Terms and Conditions incorporated the Internet Policy which stated:²¹¹

'In order to protect the brand and the consumer and to ensure that custom-fitting remains at the heart of the sale of PING golf clubs, the internet policy does not allow account holders to execute sales transactions of PING products with consumers on the Internet. Custom fitting is a very important part of the process of selling PING golf clubs in order to ensure that the consumers receive clubs that are custom-built to their own specifications. We want to promote the opportunity for a personal conversation to take place between the account holder and the consumer so that the account holder can explain the benefits of PING custom fitting and strongly recommend that a custom fitting appointment be arranged. Internet transactions do not fulfil this philosophy. It is important for PING products to

²⁰⁸ Letter from the Managing Director to all Account Holders dated 12 January 2005, URN A0414, URN A0463 not final.

²⁰⁹ Letter dated 26 June 2006, URN A0456, attaching the Internet Policy, URN A0415.

²¹⁰ As described in Ping's response to request 11 in section 26 notice dated 5 February 2016, URN A0190.1.

²¹¹ Clause 18 of the Terms and Conditions, URN A0569.

be sold in a manner consistent with the status of the PING brand and for this reason PING Europe has decided that PING products should not be sold on the Internet.

For these reasons, any account holder who executes sales transactions of PING Products directly on the Internet will be in breach of our Internet Policy, risking closure of its account facility with the company. As well as account holders' own sites this requirement prevents sales of PING products using any third party Internet sites (including, but not limited to, Internet auction sites). This policy is necessary and in the best interest of PING, our account holders and not least the consumer.

This policy is incorporated as a contractual term of our agreement with account holders.'

- 3.85. Subject to minor amendments to the text, this is the same 'Internet Policy' clause which remains in Ping's Terms and Conditions to date, although re-numbered.

(iv) *Ping reminds Account Holders of the Internet Policy and introduces the Dynamic Face to Face Custom-Fitting Policy campaign in 2007*

- 3.86. Ping's Managing Director wrote to all Account Holders on 17 January 2007 reminding them of Ping's Terms and Conditions and specifically highlighting its Internet Policy:²¹² *'Ping Europe is entitled by law to operate a controlled distribution policy and that is a right we have exercised over many years. [...] we have implemented an Internet Policy geared to ensuring that dynamic custom-fitting is at the core of every sale of Ping products.'*

- 3.87. The letter further stated that: *'Over the past 12 months we have had to make many painful decisions to stop doing business with long-standing customers, including some doing considerable business with Ping Europe, who did not accept or respect our right to control how and where our brand is sold. I want you to know that we will continue to aggressively uphold our policies. We have seen an increasing number of customers breach our policies, and in particular, via the use of Internet auction sites. I would like to communicate in clear terms that we do not want Ping products to be sold in this manner, or via the Internet, and any customer who does not respect our position is in*

²¹² Letter dated 17 January 2007, URN A0618 and Internet Policy set out in accompanying letter dated 17 January 2007, URN A0619.

*breach of our Internet Policy and putting their account facility with Ping Europe at risk.*²¹³

(v) *Ping adopts a Dynamic Face to Face Custom Fitting Policy in 2009*

3.88. In May 2009 Ping's Managing Director sent two letters to Account Holders²¹⁴ informing them that Ping was now applying a Dynamic Face to Face Custom Fitting Policy in order to incentivise Account Holders to Custom Fit a large proportion of consumers and *'we will remove support and terms from account holders that achieve an unacceptable proportion of their sales through non face-to-face customer interactions.'*²¹⁵ The first letter of this date states:

'[...] enclosed in this communication is a letter which explains our determination to keep custom-fitting at the heart of every sale of Ping golf clubs. We would like every Ping club to be sold through a face-to-face dynamic fitting interaction between you and the consumer. That is why we have invested heavily in customer fitting training and also why we have implemented our Internet Policy. The attached letter gives you details of our Face-to-Face Dynamic Custom-Fitting Policy, which is designed to ensure that our support goes to those that fully support our fitting ethos and achieve the vast proportion of your sales through your use of face-to-face dynamic custom-fitting.'

3.89. In particular, the second letter of this date says:²¹⁶

'To some of you this may sound restrictive in these difficult times and will result in fewer sales for Ping. However, it emphasises our commitment to our core philosophies and demonstrates that the quality of what we do is more important than the quantity. It is a commitment for the long-term strength of the brand and we believe that the vast majority of our customers understand and support these policies, and we thank you for this support.'

3.90. Ping explained in a written response to the CMA's section 26 Notice of 5 February 2016 that *'The dynamic face to face custom fitting policy is a financial incentivisation scheme which was first applied in 2009. It has*

²¹³ Letter dated 17 January 2007, URN A0618 and Internet Policy set out in accompanying letter dated 17 January 2007, URN A0619.

²¹⁴ Letter from Ping to Account Holders, May 2009, URN A0466.

²¹⁵ The European Sales Director, confirmed the link between the Internet Policy and the Face to Face Dynamic Custom Fitting Policy to the CMA. See transcript of interview with the European Sales Director dated 9 March 2016, page 47, URN A0864.

²¹⁶ Letter from Ping to Account Holders, May 2009, URN A0466.

*always been the company's policy that consumers should be dynamically face to face custom fitted.*²¹⁷

- (vi) *The Dynamic Face to Face Custom Fitting Policy is incorporated into Ping's Terms and Conditions in 2011*

3.91. In summer 2011 Ping informed its Account Holders that from 1 August 2011 its Terms and Conditions would include a Dynamic Face to Face Custom Fitting Policy.²¹⁸

3.92. The Dynamic Face to Face Custom Fitting Policy stated:²¹⁹

[✂]

Amended Internet Policy to permit Account Holders to sell Soft Goods online in 2012

3.93. During the course of 2011 and 2012 Ping reviewed the Internet Policy and considered various commercial options.²²⁰

3.94. Ping's Managing Director wrote to Account Holders in August 2012 informing them that it had '*conducted a full review over the last 12 months and commencing August 1st 2012, [Ping has] made the decision to allow Bags and Accessories to be sold directly on the Internet.*'²²¹ Ping stated that any existing Account Holders wishing to sell Soft Goods online would need to apply for authorisation.

3.95. In the same letter, Ping referred its Account Holders to its new Terms and Conditions. In particular, Ping had amended its Dynamic Face to Face Custom Fitting Policy, providing additional explanations for this policy in relation to the sale of Ping golf clubs:²²²

'[The Dynamic Face to Face Custom Fitting Policy] ensures that the consumer has the opportunity both to understand and go through PING's custom-fitting process and it enables the Ping Europe Account Holder to measure, with

²¹⁷ Ping's response to Question 3 of section 26 notice dated 5 February 2016, URN A0389.4. The CMA notes that Ping's Terms and Conditions have since 2004 contained an obligation that the Account Holder '*shall offer custom fitting to their customers [...]*', Trade Price List 2004, URN A0567.

²¹⁸ Letter from Ping to Account Holders, 2011, URN A0389.2. As confirmed in Ping's response to Question 3 of section 26 notice dated 5 February 2016, URN A0389.4.

²¹⁹ Clause 19 of Ping's Terms and Conditions, URN A0560.

²²⁰ A Commercial Foundations PowerPoint presentation, undated, states in relation to the Internet Policy: '12 Months of research and review', URN A0438.

²²¹ Letter from the Managing Director dated August 2012, URN A0653.

²²² Terms and Conditions effective 1st August 2012, URN A0571.

precision, the exact club setup required on the model the consumer is considering purchasing. This is part of the Ping ethos.

[...]

It should be noted that for the same consumer, the fitting specifications may change from model to model and therefore the benefits of being dynamically custom-fitted for each new model should always be explained to the consumer. Furthermore, Ping Europe requires its Authorised Account Holders to do everything reasonable to educate the consumer of the benefits of having a Dynamic Face-to-Face Custom Fit. We expect our account holders to be proactive in this respect, not passive.'

- 3.96. Ping submitted that *'There are two major planks of Ping's Custom Fitting Policy: (i) the requirement that Ping clubs should be sold after a face-to-face fitting ('the Dynamic Face to Face Custom Fitting Policy') and (ii) the concomitant ban on internet sales for hardware ('the Internet Policy'). The two policies are complementary in the sense that a face-to-face fitting simply cannot be carried out over the Internet.'*²²³

(vii) *The aims of the Online Sales Ban*

- 3.97. As described in paragraphs 3.83 to 3.96 above, Ping explained to Account Holders its reasons for introducing and maintaining an Internet Policy, specifically including (emphasis added):

- To protect the *'Ping brand'*;²²⁴
- ***'to ensure that a personal conversation takes place between the account holder and the consumer so that the account holder can fully explain the benefits of Ping custom-fitting and make appropriate arrangements to arrange an appointment to fit the customer. This process cannot take place during an Internet transaction and it is for this reason we believe that Ping Golf Clubs should not be sold on the Internet.'***²²⁵
- ***'in order to protect the brand and the consumer and to ensure that custom-fitting remains at the heart of the sale of Ping Golf Clubs we***

²²³ Written Representations, paragraph 31, URN A0921.2.

²²⁴ The Chairman of Ping sent letters to all Account Holders on 19 May 2000, URN A0496.

²²⁵ Letter sent from the Managing Director to all Account Holders on 12 January 2005, URN A0414 and URN A0463.

*have decided to issue a new policy which will not allow account holders to execute sales transactions with consumers on the Internet’.*²²⁶

- *‘[...] We are determined to keep custom-fitting a necessary and integral part of the Ping selling process and **your support of this Internet Policy ensures this.**’*²²⁷
- *‘[...] we have implemented an Internet Policy **geared to ensuring that dynamic custom-fitting** is at the core of every sale of Ping products.’*²²⁸
- *‘we want Ping products to be sold through face-to-face dynamic fitting interactions between you and your customer. **This is why we introduced our Internet Policy** [...]. This is in keeping with our total commitment to custom-fitting and it is the right policy for our brand in our market. We also believe **it is the right policy to support your own face-to-face custom fitting efforts.**’*²²⁹

3.98. Ping has also told the CMA (emphasis added):

- *‘Ping is certain that not allowing Ping Clubs to be sold directly on the internet **sends out the strongest possible message to the consumer that everyone should be face-to face dynamically custom-fitted** before they purchase.’*²³⁰
- *‘Our Internet Policy is consistent with the principle of **encouraging custom fitting in brick and mortar sites.**’*²³¹
- The Internet Policy is part of Ping’s custom fitting policy and the custom fitting policy came first: *‘I would say that the Internet policy is part of our custom fit policy... what came first is our custom fit policy or our custom fit philosophy in policies. What came after was the Internet policy **to support custom fittings** so it came about in that sequence not the other way round.’*²³²

²²⁶ Letter sent from the Managing Director to all Account Holders on 12 January 2005, URN A0414 and A0463.

²²⁷ Letter dated 26 June 2006 URN A0456.

²²⁸ Letter dated 17 January 2007, URN A0618.

²²⁹ Letter dated May 2009, URN A0466.

²³⁰ Presentation by Ping at the State of Play Meeting held on 17 December 2015, slide 5 URN A0826.

²³¹ Presentation by Ping at the State of Play Meeting held on 17 December 2015, slide 5 URN A0826.

²³² Transcript of interview with the Managing Director dated 10 March 2016, page 87, URN A0863.

- Ping submitted in its Written Representations that the Internet Policy is a 'product of'²³³ or 'corollary'²³⁴ of Ping's Custom Fitting policy. Ping submitted that the *'Internet Policy was not pursued in isolation or for some nefarious competition purpose but was always part of the Custom Fitting policy. The point was simply that in a (then) new world of e-commerce there was a need to adapt Internet sales to reflect the Custom Fitting policy.'*²³⁵

- 3.99. Ping's Managing Director summarised these submissions at the Oral Hearing:²³⁶ *'Our Internet policy, in our view, sends the strongest possible message to the consumer that they should be custom fit before they buy. If we weaken this message more consumers will not be fitted, they will not play their best golf, they will not be happy with their clubs or with Ping [...]*
- 3.100. In response to a question at the Oral Hearing, regarding what Ping expects its Account Holders to do Ping's Counsel described the face to face custom fitting process as a 'de-facto' requirement²³⁷ and that *'it may well be that there are retailers who are not following the clear contractual expectation, and Ping is not able to micro-monitor these people, but I hope our position is very clear. Certainly, in terms of the direction of travel, it is very much in the direction of custom-fitting'*²³⁸ and it is *'the clear expectation on Ping's side is that they [Account Holders] will engage only in custom-fitting'*.²³⁹
- 3.101. When asked if Ping had considered going beyond the current policy in terms of Custom Fitting to require retailers only to sell after a Custom Fitting, Ping's Managing Director submitted:

*'That is our position right now. We believe we are on this journey and that we are moving forwards. If for any reason we believed that progression wasn't happening or was going backwards, then we would need to look at ways of working with our retailers in order to move that forward again, but we have never had that feedback, really, from the retailers suggesting that that is actually the case; quite the opposite'.*²⁴⁰

III. Implementation of the Online Sales Ban

²³³ Written Representations, paragraphs 65 to 71, A0921.2.

²³⁴ See Written Representations at paragraphs 3.b.i, 64, 106 and 136 – *'for the reasons set out at paragraphs 63-84 above [...] the Internet Policy is simply a corollary of the Custom Fitting Policy'*.

²³⁵ Written Representations, paragraph 73, URN A0921.2.

²³⁶ Oral Hearing Transcript, page 7, lines 16 to 20, URN A0952.1.

²³⁷ Oral Hearing Transcript, page 45, lines 12 to 14, URN A0952.1.

²³⁸ Oral Hearing Transcript, page 52, lines 8 to 12, URN A0952.1.

²³⁹ Oral Hearing Transcript, page 62, lines 3 and 4, URN A0952.1.

²⁴⁰ Oral Hearing Transcript, page 62, lines 7 to 12, URN A0952.1.

- 3.102. From 1 September 2006 the Online Sales Ban has been included as a clause of Ping's Terms and Conditions which was communicated to Account Holders in Trade Price Lists, annually from 2006 to 2010 inclusive and twice per year from 2011 to date.²⁴¹ In addition to the Trade Price Lists, as described above, the Managing Director wrote letters to Account Holders on at least five occasions between May 2000 and 2015, specifically referring to the Internet Policy²⁴² warning them about the consequences of breaching the Internet Policy ie the risk of account closure.²⁴³
- 3.103. According to the Terms and Conditions, where an Account Holder continued to trade with Ping, that was deemed to be acceptance by the Account Holder of Ping's conditions. As an illustrative example, the 2006 Terms and Conditions provide:

- [✂]
- [✂]

(i) *Account Holder adherence to the Online Sales Ban*

- 3.104. Account Holders were aware of the Internet Policy and the consequences of not adhering to it. [Account Holder 1], amongst other Account Holders contacted by the CMA, confirmed that it generally adhered to it in practice: *'[...] we have always abided by their policy towards internet sales and this has never been a contentious point for [Account Holder 1]. We believe the terms and conditions for the various years [...] have always been accepted and there has never been any discussion on the matter.'*²⁴⁴
- 3.105. The European Sales Director told the CMA that whilst there had been some cases in the past of Account Holders not adhering to the Internet Policy, particularly when the policy was incorporated into Ping's Terms and Conditions in 2006/2007, generally Account Holders adhere to the Internet Policy. He stated that *'some people [...] wanted to have a look at it and see, see if they could push the boat a little bit [...] but ultimately, right now everyone adheres to our policy. Everybody supports it, everybody*

²⁴¹ Ping's response to question number 11 of section 26 notice dated 5 February 2016 stated: *'In years 2005-2010 we launched product once annually and this was in August/September so there was only once [sic] price list for each of those years.'* URN A0190.1.

²⁴² See URN A0496, URN A0414, URN A0463, URN A0456, URN A0618 and URN A0466.

²⁴³ See URN A0463, URN A0456, URN A0618, and URN A0466.

²⁴⁴ [Account Holder 1] response to section 26 notice dated 9 February 2016, URN A20013.

*understands it. [...] I can't remember the last time I had a conversation with anybody where that policy wasn't being supported.'*²⁴⁵

3.106. As described above, since 1 August 2012, Account Holders accepted into Ping's selective distribution network have signed a New Account Application Form which contains a Yes/No question: *'Do you accept and will you adhere to Ping Europe's Internet Policy?'*. [Account Holder 2], amongst other Account Holders, completed and signed such an agreement containing an explicit statement regarding adherence to the Internet Policy.²⁴⁶

3.107. In its Written Representations, Ping submitted that: *'There is no real disagreement about the contracts between PING and its retailers. This is unsurprising because PING has always been wholly transparent and consistent about the fact that its business model is based on selling Custom Fit clubs, and that it requires its retailers to comply with this policy, including by not selling golf clubs online.'*²⁴⁷

(ii) *Ping's monitoring activities*

3.108. Since 2006 Ping has monitored its Account Holders for compliance with its Internet Policy, including to ensure that Account Holders do not sell Ping golf clubs on their transactional websites. Ping's monitoring processes are described below.

3.109. Since 2006, an employee has been responsible for monitoring Account Holders' transactional websites and third party platforms, specifically reviewing sites for adherence with the Internet Policy (the 'Internet Monitor').²⁴⁸ The Internet Monitor undertook various actions including emailing Area Sales Managers and the European Sales Director if he found 'UK Accounts' selling Ping golf clubs online in breach of the Internet Policy.²⁴⁹ The Internet Monitor also prepares Brand Protection Reports and updates to the Managing Director and senior managers which describe work undertaken in the preceding months or year regarding a number of issues including, amongst other matters, Account Holders' own websites.²⁵⁰

²⁴⁵ Transcript of interview with the European Sales Director dated 9 March 2016, pages 38 and 39, URN A0864.

²⁴⁶ New Account Application Form, URN A0649.

²⁴⁷ Written Representations, paragraph 30, URN A0921.2.

²⁴⁸ A note (undated) and entitled 'Brand Protection and Internet Monitoring Procedure 2010' indicated that this employee should 'Check When Opportunity – (UK) List of Accounts with Internet Outlets', URN A0520. The employee is often referred to as 'our internet monitor' by Ping employees (see for example email dated 5 June 2015, URN A0668).

²⁴⁹ 'Internet Monitoring Procedure' (undated) PowerPoint, URN A0617.

²⁵⁰ See for example, Brand Protection Report 2007, URN A0524, Brand Protection Report 2009 URN A0550, circulated by email from the Internet Monitor to the Managing Director and others on 4 January 2010, URN A0615; and email from the Internet Monitor to the Managing Director and others dated 31 October 2014 URN A0005.

3.110. The Internet Policy explicitly bans Account Holders from executing sales transactions of Ping golf clubs with consumers online. In practice, Account Holders which operate transactional websites and list Ping golf clubs on their websites (with pictures, description and price), must ensure that the 'Add to Cart' (or similar) button is de-activated in respect of each Ping product. The evidence demonstrates that Ping employees (Area Sales Managers, Sales Managers and the Internet Monitor) regularly checked Account Holders' transactional websites to ensure that they were adhering to the Internet Policy. In particular:

- A Ping Sales Goals and Objectives 2007 (undated) document lists the first objective as *'To police the Brand'* and stated: *'A list to be drawn up of any account that operates or is part of a website and the internet policy to be strictly enforced'* and *'Reps to advise of any breach or violation of any Ping policy.'*²⁵¹
- An email from a Sales Manager to Area Sales Managers dated 15 January 2010 stated:²⁵² *'[...] please make sure that [the Internet Monitor] and myself are made aware of **new customer owned Internet sites** that are started. [...]. I have come across **2 new sites in the past 2 days** which I was unaware of which are operated by 2 of our customers. We need to keep our lists updated so we can monitor them.'* (Emphasis in original)

3.111. The Area Sales Managers also reminded the Account Holders of their obligations regarding the Internet Policy.²⁵³ Account Holders reported breaches of the Online Sales Ban to Ping and requested that such breaches are addressed by Ping (in particular, requesting that Ping ensures that other Account Holders do not sell Ping golf clubs via their transactional websites).²⁵⁴ One retailer told the CMA that it had been *'advised that if we*

²⁵¹ Sales Goals and Objectives URN A0418 (see also Ping 2007 Business Plan and Budget, URN A0416).

²⁵² Email from the European Sales Director to Area Sales Managers on 15 January 2010 titled 'eBay and various internet issues', URN A0613.

²⁵³ For example, in response to an email request from an Account Holder dated 15 November 2013 at 10:57, *'What rules do I need to adhere to retail Ping Equipment online?'*, the ASM responded later that day: *'If you have a web site as a ping account holder you can show ping products on there but you must ensure that there is no 'click to buy' facility in any of the ping products [sic] We ask that you place a message somewhere on the ping page stating that to correspond with ping Europe Ltd internet policy please call to discuss products further, [...]'*, URN A0715. See further examples URN A0669 and URN A0682.

²⁵⁴ The CMA has been provided with examples of Account Holders contacting Ping about other Account Holders' breaches of the Internet Policy. See for example: email from [Account Holder] to the Internet Monitor (Ping) dated 11 May 2015 *'[...] I was of the understanding that Ping hardware cannot be purchased online as all major retailers stick to due to Ping being built on Custom Fitting. We have come across the site below – [Account Holder] which appears to be selling ping hardware online with all the fitting options on tabs which goes through to basket which I am sure will be making a nice little business from it.'* URN A0667; and email from the Internet Monitor to other Ping employees dated 1 October 2015, *'We have had on [Account Holder] Stores telling us that*

*see or hear through our customer network that stores have been actively selling golf clubs online that we must notify PING and leave it to them.*²⁵⁵

- 3.112. Ping employees (normally the Area Sales Managers) contacted Account Holders if they discovered that an Account Holder had activated the 'Add to Basket' (or similar) button allowing consumers to purchase direct from websites (either as a result of Ping employee monitoring or a complaint by an Account Holder).²⁵⁶ An Account Holder told the CMA that normally this contact regarding breaches of the Internet Policy was verbal ie by telephone calls from Ping employees.²⁵⁷
- 3.113. Where Account Holders breached the Online Sales Ban, particularly after having been given warnings regarding this, Ping would use the ultimate sanction of account closure. For example, the Managing Director wrote to Account Holders on 26 June 2006 and 19 January 2007 informing them that it had closed down accounts because they had breached the Online Sales Ban since it had been introduced in 2005.²⁵⁸
- 3.114. The European Sales Director told the CMA that Ping had closed down a number of accounts for selling online.²⁵⁹ The Managing Director explained to the CMA that it would be an untenable position for the brand not to police infringements: *'if we're going to have a policy we need to police it.'*²⁶⁰
- 3.115. Ping submitted that, rather than having an anti-competitive object, *'It is important for PING to enforce its policy uniformly to ensure that retailers are able to compete on a level playing field. If anything, the fact that PING*

a consumer has been in quoting items that you can take to Basket and Checkout on [Account Holder] website.' URN A0220. See other examples: URN A0239; URN A0678; URN A0704.7.

²⁵⁵ [Account Holder] response to section 26 notice dated 17 November 2015, page 1, URN A150009.

²⁵⁶ For example: email from the Internet Monitor to Ping ASM dated 18 September 2012, *'You can put G15 Irons into a Basket and Checkout on [Account Holder] Website at [Account Holder website]. It is probably one they have just missed but please ask them to correct this and check they do not have any other PING Hard Goods going to Basket and Checkout.'* The ASM responded to the Internet Monitor dated 18 September 2012, *'I have called them and will check the site tonight.'* (URN A0276); and email from ASM to [Account Holder] on 30 June 2015: *'Could you look at your web site regarding ladies rhapsody as it appears that a click to buy option is available on some items and so to comply with our internet policy you will need the click to buy removed please.'* A [Account Holder] employee responded: *'All done, [Ping Area Sales Manager] if you see any more like this let me know and I'll action immediately.'* (URN A0710). See further examples: URN A0288; URN A0237; URN A0292; URN A0716; URN A0216; URN A0671; and URN A0704.9.

²⁵⁷ [X] response to section 26 notice dated 17 November 2015, page 5, URN A230006. *'[...] At certain times items have been incorrectly put online that have allowed a consumer to go to the basket [...] Any errors noticed by Ping or by our Ping agent have normally be [sic] notified to us verbally requesting us to either remove the item or amend its basket compliance.'* The European Sales Director confirmed that the sales reps or he would talk to the customer if there was a breach of the Internet Policy, transcript of interview with the European Sales Director dated 9 March 2016, page 49, URN A0864.

²⁵⁸ URN A0456 (The Managing Director confirmed it was sent, Transcript of interview with the Managing Director dated 10 March 2016, pages 57, URN A0863) and URN A0618.

²⁵⁹ Transcript of interview with the European Sales Director dated 9 March 2016, pages 39 to 42 and 48 to 50, URN A0864.

²⁶⁰ Transcript of interview with the Managing Director dated 10 March 2016, page 63, URN A0863.

*polices its Internet Policy robustly proves that (i) the Policy is a genuine one (rather than a mere front for restricting competition); and (ii) PING takes its commitment to Custom Fitting very seriously.*²⁶¹

(iii) *Operation of the Online Sales Ban and Account Holders' practices*

3.116. As described above, pursuant to the Internet Policy, Ping's Account Holders are prohibited from selling its golf clubs online.

3.117. Two UK Account Holders which sell in bricks and mortar stores and also operate transactional websites explained to the CMA that they considered that the Online Sales Ban removes the specific benefits of purchasing online:

- *'We have held meetings [with Ping] asking for consideration to changes to the [Internet] policy that would be beneficial and more in line with other brands providing an easier experience of shopping giving our customers a better convenient purchasing facility rather than having to phone us when we are only open.'*²⁶²
- *'[...] once the customer knows his specification, there is no justification for preventing him from exercising free choice as to where (or when) he/she should make their next purchase. The Online Sales Ban means that well informed customers cannot purchase [...] all Ping golf clubs over the internet. Those customers thus lose the benefits of shopping over the internet, where prices may be more competitive [...] They cannot purchase those clubs after hours or on weekends when brick and mortar shops are closed. [...] Without the internet, it is also harder for traditional bricks and mortar stores to monitor prices in other pro-shops and react quickly to any promotions. The use of the internet intensifies price competition between retailers.'*²⁶³
- *'[...] we have considerable business with customers in other Member States [...] who use the internet to order products precisely because it avoids the need for a face to face conversation, where there might be language barriers or time differences. Those advantages are being denied to consumers abroad.'*²⁶⁴

3.118. Ping permits its Account Holders to sell golf clubs following a telephone call. For this reason Account Holders which list Ping golf clubs on their websites

²⁶¹ Written Representations, paragraph 42, URN A0921.2.

²⁶² [Account Holder] response to section 26 notice dated 17 November 2015, URN A70003.1.

²⁶³ Witness Statement, Complaint, paragraphs 55 and 57, URN A270022.

²⁶⁴ Witness Statement, Complaint, paragraph 59, URN A270022.

carry messages stating 'Call to Order' or similar.²⁶⁵ In terms of how this process works in practice, some Account Holders provided the following explanations to the CMA:

- *'A customer would be required to measure their hand size, height and distance between their wrist and the floor. [...] it was common for customers to ring and state their Ping specifications when placing an order. These customers were not interested in undertaking a dynamic custom-fitting and knew their requirements.'*²⁶⁶
- *'[Ping] insist we have a conversation with the customer prior to taking their order to ensure that we have given professional advice or that the consumer has been professionally fitted elsewhere before ordering. The process is pretty simple. The customer rings us. We discuss their requirements and then either take their order over the telephone or create a personalised/custom basket link to the customer which allows them to checkout securely without exposing their payment card details.'*²⁶⁷
- One retailer explained that he sells Ping golf clubs to consumers living outside of his local area or abroad and that the only practical way that he could sell to them, after they have initially telephoned, *'was to open the checkout on the website and then let them order then close the checkout again.'*²⁶⁸
- *'The need to make a telephone call means that customers cannot fully benefit from online retailing. [...] I note that the majority of online shopping takes place either during the lunch break, at weekends or after hours i.e. when the consumer gets home from work. In other words online shopping takes place when the Company employees are not working and are therefore unavailable to handle telephone calls. Overall, only about 1% of our orders are taken over the telephone which shows that it is a marginal sales channel for us by comparison with purely remote internet sales.'*²⁶⁹

3.119. Ping submitted that telephone orders involve an interview with the customer but do not include a swing test.²⁷⁰ When asked about this process at the Oral

²⁶⁵ For example, see [Account Holder 1] screenshots, URN A280011, and [Account Holder 2] screenshots, URN A280012 (both screenshots were taken on 21 October 2015).

²⁶⁶ Note of telephone call with the Complainant dated 26 January 2016, paragraph 9, URN A270029.1.

²⁶⁷ [Account Holder] response to section 26 notice dated 20 November 2016, URN A60009.

²⁶⁸ [Account Holder] response to point 1 of section 26 notice dated 9 February 2016, URN A190011.

²⁶⁹ Witness Statement, Complaint, paragraph 58, URN A270022.

²⁷⁰ Written Representations, paragraph 57, URN A0921.2.

Hearing, Ping's Managing Director stated that during a telephone call Account Holders are expected to *'persuade the customer to come into the shop to be custom-fitted face to face and dynamically put through the fitting process and express to them that that is the best thing for them to do if they are intending to purchase a club.'*²⁷¹ Furthermore, *'telephone orders are – probably - an extremely minuscule amount of business.'*²⁷²

- 3.120. The Managing Director explained that Ping acknowledges that not every customer has a Custom Fitting:²⁷³

'[...] we're on a journey and our goal is one hundred percent to be custom fitted [...] the proportion of people who aren't face to face fit is [...] getting smaller. And that's the general direction in the market as well as PING.'

- 3.121. As described above, although Ping considers that the vast majority of its Account Holders are carrying out Custom Fitting, Ping does not monitor or report whether its Account Holders are doing so. As described above two of Ping's largest retailers have provided evidence to the CMA which indicates that a not insignificant proportion of consumers purchasing Ping golf clubs are doing so without having a Custom Fitting. The UK Sales Manager explained that:

*'We want every golfer to be custom fit. What we can't stop is if a consumer is absolutely adamant 'I want to buy that set of clubs today' then [...] we can't necessarily stop that.'*²⁷⁴

- 3.122. Ping submitted that it has [3<] retailer accounts in the EU, and over [3<] in the UK alone, *'Given this scale, PING obviously cannot micromonitor whether all of its retailers make every single sale through Custom Fitting. Any suggestion that it could, or should, do so in the real world would be absurd.'*²⁷⁵

(iv) *Ping Custom Fit Clubs sold online in the US*

²⁷¹ Oral Hearing Transcript, page 50, lines 17 to 19, URN A0952.1.

²⁷² Oral Hearing Transcript, page 50, lines 22 to 23, URN A0952.1.

²⁷³ Transcript of interview with the Managing Director dated 10 March 2016, page 33, URN A0863. The Managing Director reiterated this point at the Oral Hearing when he explained that *'Our journey is to have 100 per cent of golfers custom fitted before they buy.'*, Oral Hearing transcript page 7, lines 9 to 10, URN A0952.1. The Managing Director further explained that *'All of that anecdotal evidence suggests to us that the demand from consumers to be custom-fitted is something that is increasing. Do I have a measurement of that? No.'*, Oral Hearing Transcript, page 51, lines 21 to 23, URN A0952.1.

²⁷⁴ Transcript of interview with the Sales Manager dated 9 March 2016, page 36, URN A0865.

²⁷⁵ Written Representations, paragraph 46, URN A0921.2

- 3.123. Although Ping prohibits all of its UK Account Holders from selling any golf clubs online, Ping Inc. does not operate an online sales ban in the USA. Consequently Ping clubs, manufactured and distributed by Ping Inc.,²⁷⁶ can be purchased by UK consumers from authorised online retailers based in the USA.²⁷⁷
- 3.124. Ping Inc. explained to the CMA that approximately 14 years ago it began to observe a ‘free-rider problem’ whereby discounter retailers were encouraging golfers to have a Custom Fitting in bricks and mortar stores and then take their specifications to buy clubs from discounters. Ping Inc.’s concern was that, if this problem was left unchecked, its retailers would lose the incentive to invest in Custom Fitting tools to offer Ping Custom Fit Clubs in the marketplace. Ping Inc. therefore adopted a policy [REDACTED] *‘to ensure that its retailers have the resources and incentives necessary to service and custom fit consumers who choose to purchase PING’s golf products.’*²⁷⁸ Ping Inc. further explained that given the effectiveness of this policy to *‘prevent the devastating effects [of] a free rider problem among its United States accounts’* it does not need an online sale ban to address the same free riding concerns.
- 3.125. Ping Inc. also explained to the CMA that it is [REDACTED]. Ping Inc. permits [REDACTED] Authorised Internet Retailers (referred to by Ping Inc. as AIRs), who meet strict criteria on quality, training and service to sell Ping Custom Fit Clubs online.²⁷⁹ At least three of the AIRs have a large bricks and mortar footprint across the US: [REDACTED] which has over 500 stores; [REDACTED] with 45 stores; and [REDACTED] with 26 stores.²⁸⁰
- 3.126. [REDACTED]. These AIRs can sell to consumers located in all areas of the US and, as explained above, some also ship overseas to countries including the UK. [REDACTED].

²⁷⁶ The Managing Director told the CMA that the same products are assembled in the US and in the UK, Note of State of Play meeting 17 December 2015, paragraph 24, page 5, URN A0827.

²⁷⁷ US golf equipment online retailers including [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] allow UK customers to purchase Ping golf clubs online, URN A280081.

²⁷⁸ Letter from Ping Inc dated 6 December 2016, page 2 to 3, URN P1004.1.

²⁷⁹ A memo from Ping Inc dated 16 February 2016, describes the criteria as including: *‘a lengthy history of providing exceptional customer service ... a passion for fitting at one or more brick and mortar retail locations over a significant period of time. Each must also have the resources and programmes in place to effectively address each internet customers potential and actual needs regarding fitting questions on returns and other “after sales issues” that often arise when purchasing premium golf clubs. Finally, each must also meet and exceed any regulatory and/or premium brand expectations regarding the treatment of information (financial or otherwise) provided by the internet consumer.’* URN A0754.1.

²⁸⁰ However, not all retailers have large bricks and mortar footprints, there are currently at least five AIRs operating only one or two brick and mortar stores including [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED], URN A280080.

- 3.127. Ping Inc. told the CMA that determining whether sales of its Custom Fit Clubs have been bought in-store or online is challenging for the following reasons: *'[...] For example, a PING brick and mortar account that is also a PING A.I.R. can fit a customer at its store, and then place the order with the custom fitting specifications using its A.I.R. account- a convenient step for some since many of the resulting custom specifications are typically not available in an account's store inventory. That 'internet sale' is also of a 'custom fit' club. Additionally since PING marks nearly every club it sells with a unique serial number, and stores the custom specifications of each club in its data base, internet sales of such clubs are also 'custom fit' replacement clubs, or even 'fill in custom clubs' (for example when a custom fit customer later chooses to add a '3 iron' to her/his previous purchase).'*²⁸¹
- 3.128. Notwithstanding that Ping Inc. permits some retailers to sell online, Ping Inc. also promotes Custom Fitting in the US and, as reported in the US Golf Datatech Study, Ping is the perceived brand leader for Custom Fitting in the US and has maintained its lead over its closest competitors in the past 15 years.²⁸²

D. Market definition

- 3.129. 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.²⁸³
- 3.130. 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.²⁸⁴

²⁸¹ Letter from Ping Inc dated 6 December 2016, pages 4 to 5, URN P1004.1

²⁸² US Golf Datatech Study on Custom Fitting in the US reports that 38% of respondents viewed Ping as the leader in custom fitting in 2015, which is significantly above other brands (eg [X] and [Y] were each viewed as a leader in custom fitting by [10-20]% of the respondents and [X] accounted for [10-20]%). Although this represents a decrease by [10-20] points from [40-50]% in 2001, it appears that this reduction is more likely to be caused by other brands expanding their range of Custom Fit Clubs than an absence of an online sales ban. For instance, the brand image of the majority of other larger brands as a leader in custom fitting has, in fact, improved since 2001, which is inconsistent with Ping's arguments that online sales can negatively affect brand image. See US Golf Datatech Study, page 94, URN A0921.3e.

²⁸³ 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.

²⁸⁴ 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.'

3.131. Nonetheless, the CMA has formed a view of the relevant market in order to calculate Ping's 'relevant turnover' in the market affected by the Infringements, for the purposes of establishing the level of financial penalty.

I. Relevant product market

3.132. The CMA considers that the supply of golf clubs constitutes a separate product market from the supply of Soft Goods for the following reasons:

- a. Golf clubs and Soft Goods are not substitutable from a demand side perspective, owing to their dissimilar product characteristics and functions.
- b. Industry reports refer to separate markets for golf clubs and Soft Goods.²⁸⁵ Ping's internal documents (including annual business reports assessing the popularity of products against Ping's closest competitors) generally analyse the supply and demand of golf clubs and Soft Goods separately.²⁸⁶
- c. The Online Sales Ban covers only golf clubs and not Soft Goods.²⁸⁷
- d. Whilst the leading manufacturers (Callaway, Ping, TaylorMade and Titleist) manufacture both golf clubs and Soft Goods, a number of smaller manufacturers produce only Soft Goods (for example, Footjoy produces shoes, gloves and apparel only and Pinnacle produces golf balls only) or only golf clubs (for example, Adams and Yes Golf), not both.

3.133. The CMA has considered factors for determining whether different categories of golf clubs (woods, irons, wedges or putters) are likely to be in separate product markets. Ping's internal documents refer to an 'All clubs' market, albeit with some further segmentation by category of club.²⁸⁸ Manufacturers and retailers typically offer portfolios of different types of golf

²⁸⁵ Golf Datatech Market Data reports for 2014 and 2015, respectively URN A280004 and A280005.

²⁸⁶ UK Sales Meeting Gainsborough December 2012 separates products into 'Golf Clubs' and 'Bags', URN A0425; Ping 2013 Business Strategy and Budget separates 'Bags' and 'Other Soft Goods' from golf clubs products, page 5, URN A0194.8; and Ping Business Review, Phoenix April 1, 2014 refers to 'Soft Goods and 'Hard Goods', slide 49, URN A0088.1.

²⁸⁷ The Managing Director told the CMA that the reason for not having the online sales ban on Soft Goods (since 2012) is that Soft Goods cannot be customised, transcript of interview with the Managing Director dated 10 March 2016, page 43, URN A0863. The European Sales Director also stated that Ping had decided that the Online Sales Ban should not apply to products '*that are really non-customisable*', Transcript of interview with the European Sales Director dated 9 March 2016, page 34, URN A0864.

²⁸⁸ URN A0827. See also Ping 2010 business plan and budget, page 8 refers to Ping's 'All Clubs' market share as well as market shares in the four categories of clubs, URN A0423, and Ping 2013 Business Strategy and Budget refers to Ping's 'All Clubs' market share as well as market shares in the four categories of clubs, slide 6, URN A0042.1.

clubs.²⁸⁹ See paragraph 3.7 which describes the different characteristics of the categories of club. The CMA is of the view that different categories of club are generally unlikely to be substitutable on the demand side due to their different characteristics. However, as the Online Sales Ban covers all Ping golf clubs the CMA considers that it is appropriate to aggregate categories of club for the purposes of this investigation based on supply side factors (similarity of manufacturing process, structure of supply to retailers is similar for the various clubs, broadly the same manufacturing firms compete to supply the different types of clubs).²⁹⁰ As noted above the CMA considers that it is not necessary to reach a definitive view on this point – in particular as the Online Sales Ban covers all Ping golf clubs.

- 3.134. For the reasons set out above, the CMA finds that the relevant product market is the supply of golf clubs.
- 3.135. Ping has not submitted detailed representations to the CMA regarding market definition and has not contested the CMA's provisional findings set out in the SO regarding the relevant product market. In its submissions Ping refers to '*customised golf clubs*'²⁹¹ and '*non-custom fitted golf clubs*.'²⁹² However, the CMA has not concluded on whether Custom Fit Clubs and non-Custom Fit Clubs form separate markets. Defining the relevant product market more narrowly would make no difference to the calculation of Ping's turnover for the purpose of penalty setting.

II. Relevant geographic market

- 3.136. For the reasons set out below, the CMA finds that the relevant geographic market is the UK.
- 3.137. The CMA considers that the market is not narrower than national because, for example:
- a. Manufacturers of golf clubs tend to supply their products across the UK and most retailers purchase golf clubs from the manufacturers who are multinational companies;
 - b. The Internet Policy effectively covers the sale of golf clubs across the whole of the UK and beyond; and

²⁸⁹ CMA guidance on Market Definition notes that, '*In some cases the relevant product market may consist of 'bundles' of what are otherwise distinct products.*' OFT403, paragraph 5.11.

²⁹⁰ See paragraph 3.16 and manufacturers' websites as set out in footnote 67.

²⁹¹ Written Representations, paragraph 88, URN A0921.2.

²⁹² Draft Penalty Statement Written Representations, paragraph 7, URN A0963.2.

- c. Manufacturers typically have UK-based distribution or sales operations to deal with UK retailers.²⁹³
- 3.138. The CMA considers that there are a number of factors which indicate that it is reasonable to use a UK frame of reference for the purposes of this definition:
 - a. Ping's internal documents indicate that it analyses each national market separately.²⁹⁴ In particular, a 2013 Business Plan stated that Europe '*is a collection of very different markets*';²⁹⁵ and
 - b. Market reports analyse national markets separately.²⁹⁶
- 3.139. Although there are also factors indicating manufacturers compete to supply golf clubs across borders within the EU,²⁹⁷ the CMA considers that the available evidence is not sufficiently comprehensive or compelling to define a market wider than the UK.

III. Conclusion on market definition

- 3.140. In view of the foregoing, the CMA finds that the relevant market in this case is the supply of golf clubs in the UK.

²⁹³ Callaway is established in the USA but has its European customer services based in the UK; Cobra Puma Golf UK distributes Cobra golf clubs in the UK; Mizuno Corporation (UK) distributes and custom builds Mizuno golf clubs across the UK and other European territories; Ping manufactures and distributes of Ping golf clubs in the UK and the Republic of Ireland; and Acushnet Europe Ltd is Titleist's European headquarters and its UK and Republic of Ireland distributor.

²⁹⁴ For example, Ping Business Review, March 30, 2011 URN A0194.13; 2013 Ping Business Plan, page 1 URN A0045.1; and 2013 Ping Business Review April 1, 2014; A0088.1.

²⁹⁵ 2013 Ping Business Plan, page 1, paragraph 4 URN A0045.1.

²⁹⁶ Golf Datatech produces retail market share reports in relation to two national EU markets only: United Kingdom and Sweden: <http://www.golfdatatech.com/research-products/retail-market-reports/overview/>.

²⁹⁷ See paragraphs 3.53 to 3.57 which describe UK Account Holders with transactional websites supplying consumers in other EU countries.

4. LEGAL ASSESSMENT

- 4.1. For the reasons set out below, the CMA finds that Ping has infringed and, in the case of its Agreement with [Account Holder 1], continues to infringe the Chapter I prohibition and Article 101 TFEU through an agreement with each of [Account Holder 1] and [Account Holder 2] to prohibit the sale of golf clubs online.
- 4.2. 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 agreements between undertakings which may affect trade within the UK and have as their object the prevention, restriction or distortion of competition within the United Kingdom, 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.²⁹⁸ The prohibition imposed by section 2 of the Act is referred to as 'the Chapter I prohibition'.
 - Article 101(1) of the TFEU prohibits agreements 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.

A. Undertakings

- 4.3. The CMA finds that each of Ping, [Account Holder 1] and [Account Holder 2] constitutes an undertaking for the purposes of the Chapter I prohibition and Article 101 TFEU.
- 4.4. For the purposes of the Chapter I prohibition and Article 101 TFEU, the term 'undertaking' covers every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.²⁹⁹
- 4.5. 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 ...*'.³⁰⁰

²⁹⁸ Section 2(1) and (7) of the Act.

²⁹⁹ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, paragraph 21.

³⁰⁰ Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

- 4.6. The term ‘undertaking’ also designates an economic unit, even if in law that unit consists of several natural or legal persons.³⁰¹
- 4.7. The CMA finds that each of Ping, [Account Holder 1] and [Account Holder 2] is an entity engaged in economic activity for the following reasons:
- Throughout the Relevant Period, Ping was and continues to be engaged in the manufacture and supply of golf clubs.³⁰²
 - Throughout the duration of its Agreement with Ping, [Account Holder 1] was and continues to be engaged in the retail sale of golf clubs.³⁰³
 - Throughout the duration of its Agreement with Ping, [Account Holder 2] was engaged in the retail sale of golf clubs.³⁰⁴

B. Agreement

- 4.8. For the reasons set out below, the CMA finds that Ping entered into an agreement with each of [Account Holder 1] and [Account Holder 2] that prevented these Account Holders from selling Ping golf clubs online. For the purposes of the Chapter I prohibition and Article 101 TFEU, the duration of each such agreement is as stated below in respect of each of [Account Holder 1] and [Account Holder 2].

I. Key legal principles

- 4.9. The Chapter I prohibition and Article 101 TFEU catch a wide range of agreements.³⁰⁵ 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.*’³⁰⁶
- 4.10. 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 (...).*’³⁰⁷ However, it is not necessary to

³⁰¹ Case C-97/08 P *Akzo Nobel NV v Commission*, EU:C:2009:536, paragraph 55.

³⁰² Ping Europe Limited, company number 01129505, is owned by the [3<], [3<] and [3<]. See the detailed description of Ping at paragraphs 3.1 to 3.2 above.

³⁰³ [3<].

³⁰⁴ [3<].

³⁰⁵ Case C-41/69 *ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular, paragraphs 106 to 114.

³⁰⁶ 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 to 97).

³⁰⁷ Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

establish a joint intention to pursue an anti-competitive aim.³⁰⁸ 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.³⁰⁹

II. Ping's implementation of the Online Sales Ban in relation to all Account Holders

- 4.11. Ping's standard terms and conditions have contained the Internet Policy since 2006, as explained at paragraph 3.84 and all Account Holders are expected to agree with and accept Ping's standard terms and conditions, as explained at paragraphs 3.60 to 3.61. As described in paragraph 4.14 below the Internet Policy, containing the Online Sales Ban, is a contractual term of Ping's agreement with all Account Holders. The CMA has reasonable grounds for suspecting that all Ping Account Holders agree to adhere to the Online Sales Ban. However, for reasons of administrative efficiency the CMA has chosen to focus its assessment on two Account Holders, namely [Account Holder 1] and [Account Holder 2]. Therefore, the CMA makes no findings in respect of Account Holders of Ping golf clubs other than [Account Holder 1] and [Account Holder 2].

III. Agreement - [Account Holder 1]

- 4.12. The CMA finds that from at least 30 July 2012 there was and continues to be an agreement, for the purposes of the Chapter I prohibition and Article 101 TFEU, between Ping and [Account Holder 1] that [Account Holder 1] will not sell Ping golf clubs online.³¹⁰
- 4.13. [Account Holder 1] has been a Ping Account Holder since [X].³¹¹ It sells Ping golf clubs in its bricks and mortar stores and, since August 2012, sells Ping Soft Goods online via its transactional website, [X].³¹²

³⁰⁸ 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).

³⁰⁹ *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 to 80.

³¹⁰ Although the evidence indicates that [Account Holder 1] had agreed not to sell Ping's golf clubs online prior to 30 July 2012, for the purpose of delineating the duration of the infringement in the present case, the CMA's finds the duration of the agreement is from 30 July 2012 (at the latest) and continues as at the date of this Decision.

³¹¹ Ping Website Audit Form: 'Period Account has been Open: [X]', URN A0577.

³¹² [Account Holder 1] response to section 26 notice dated 30 March 2016, identified volumes of Ping Hard Goods sold 'In Store' and 'Online', URN A20038.24.

- 4.14. As described in paragraphs 3.83 to 3.85 above, the Internet Policy was introduced as a clause in Ping's Terms and Conditions effective 1 September 2006³¹³ and provided that '*Ping Europe's Internet policy does not allow the Account Holder to execute sales transactions of Ping Hardware products with consumers on the Internet*' and included the provision that '*This policy is incorporated as a contractual term of Ping's agreement with the Account Holder.*' As an Account Holder, [Account Holder 1] received Trade Price Lists which Ping sent to its Account Holders.³¹⁴
- 4.15. As described in paragraph 3.94 Ping amended its Internet Policy in 2012 to allow Account Holders to commence selling Ping Soft Goods online, provided that they separately applied to become Authorised Internet Account Holders and were subsequently approved by Ping.
- 4.16. [Account Holder 1] completed and signed Ping's New Internet Account Application Form on 30 July 2012.³¹⁵ Ping subsequently accepted [Account Holder 1's] application.³¹⁶
- 4.17. The New Internet Account Application Form, which [Account Holder 1] completed and signed, provided: '***Please Note: This application for approval to sell on the Internet only applies to Ping Bags and Accessories. Under no circumstances can Ping Golf Clubs be sold directly on the Internet.***' (emphasis as in the original)
- 4.18. In view of the foregoing, the CMA finds that by completing and submitting this application form, [Account Holder 1], being already an Account Holder authorised to sell Ping golf clubs from approved bricks and mortar locations, had agreed to continue to comply with the Internet Policy and not to sell Ping golf clubs online.
- 4.19. [Account Holder 1] explained to the CMA: '*As we have sold Ping equipment for many years we have always abided by their policy towards internet sales and this has never been a contentious point for [Account Holder 1]. We believe the terms and conditions for the various years which are [sic]*

³¹³ Terms and Conditions effective 1 September 2006, URN A0569.

³¹⁴ Ping told the CMA that the Internet Policy was communicated to Account Holders in the Terms and Conditions in the Trade Price List, URN A0653.1. [Account Holder 1] told the CMA that it received Ping's Trade Price Lists, URN A20038.1.

³¹⁵ [Account Holder 1] New Internet Account Application Form and Ping Website Audit Form, URN A0577.

³¹⁶ [Account Holder 1] appears in Ping's list of approved soft-goods internet sellers. This records [Account Holder 1] was approved as a soft goods internet seller on 20/08/2012, URN A0254.

*attached have always been accepted and there has never been any discussion on the matter.*³¹⁷

- 4.20. Ping has confirmed that there was an agreement between itself and [Account Holder 1] that it would not sell Ping golf clubs online: '[Account Holder 1] *has always (to the best of PING's knowledge) complied with the Internet Policy and Dynamic Face to Face Custom Fitting Policy.*'³¹⁸
- 4.21. Ping golf clubs are listed on [Account Holder 1's] website, but there is no 'click to buy' functionality in respect of Ping golf clubs. In contrast, the option to 'click to buy' is available for the golf clubs of other manufacturers on [Account Holder 1's] website. In respect of Ping golf clubs, consumers can either: (i) click on a link to book a custom fitting; or (ii) call a telephone number to purchase a golf club.³¹⁹
- 4.22. [Account Holder 1's] website displays the following message on each page of its website listing individual Ping golf clubs, and the CMA infers from Ping's website audit³²⁰ that a similar message has been displayed on [Account Holder 1's] website since at least 7 August 2012:³²¹

[✂]

IV. Agreement - [Account Holder 2]

- 4.23. The CMA finds that between [Account Holder 2] there was a contractual agreement, for the purposes of the Chapter I prohibition and Article 101 TFEU, between Ping and [Account Holder 2] that [Account Holder 2] would not sell Ping golf clubs online.³²² The CMA relies upon the following evidence of an agreement between Ping and [Account Holder 2]:

³¹⁷ [Account Holder 1] response to section 26 notice dated 9 February 2016, URN A20013. Although no Terms and Conditions were attached to the specific email, earlier in the email chain [Account Holder 1] had attached what was the then most recent Trade Price List of 1 July 2015 and the CMA infers that was what was meant by 'are attached', URN A20006.2. [Account Holder 1] further confirmed it had an agreement with Ping that it would not sell golf clubs online, [Account Holder 1] response dated 19 September 2016, URN A20064.

³¹⁸ Written Representations, paragraph 38, URN A0921.2.

³¹⁹ See by way of example, [Account Holder 1] website screenshot of 21 October 2015, URN A280011.

³²⁰ The Audit Form, dated 7 August 2012, noted that [Account Holder 1] website: '*Has Note of Ping Internet Policy on Hardware Products.*' [Account Holder 1] New Internet Account Application Form and Ping Website Audit Form, URN A0577.

³²¹ See screenshots in relation to Ping golf clubs listed on [Account Holder 1] website, captured on 21 October 2015, URN A280011 and in June 2017, URN A280066

³²² Ping has confirmed that there was an agreement between itself and [Account Holder 2]; '*there is also evidence that [Account Holder 2] also complied with PING'S Internet Policy and Dynamic Face to Face Custom Fitting Policy [✂].*' Written Representations, paragraph 39, URN A0921.2.

- [Account Holder 2] applied to become an Account Holder in [X].³²³ Ping approved [Account Holder 2's] application to become an Account Holder on [X].³²⁴
 - [X].³²⁵
- 4.24. During the period in which [Account Holder 2] was an Account Holder, it sold Ping golf clubs in its bricks and mortar stores.³²⁶ [Account Holder 2] operated a website, [X], on which it offered for sale golf clubs of several manufacturers.³²⁷ Ping golf clubs were listed on [Account Holder 2's] website, but they were not available for customers to 'click-to-buy' online. Instead, online customers could either: (i) click on a link to 'Try before you Buy' in one of [Account Holder 2's] custom fitting centres [X]; or (ii) call a telephone number to place an order.³²⁸
- 4.25. [Account Holder 2's] website displayed the following message on each page of its website listing individual Ping golf clubs on 21 October 2015,³²⁹ and the CMA infers from Ping's internet audit that a similar message was displayed on [Account Holder 2's] website since at least [X].³³⁰

[X]

C. Object of preventing, restricting or distorting competition

- 4.26. For the reasons set out below, the CMA finds that the Online Sales Ban contained within the Agreements, which is not objectively justified, had and continues to have as its object the prevention, restriction or distortion of competition.

I. Key legal principles

³²³ [Account Holder 2] completed and signed a New Account Application Form on [Account Holder 2] and submitted it to Ping, New Account Application Form, URN A0649. The application form, to become an Account Holder, contained the question '*Do you accept and will you adhere to Ping Europe's Internet Policy?*'. [Account Holder 2] circled the 'Yes' box next to this question. [Account Holder 2] also signed a copy of Ping's Terms and Conditions, which included the Internet Policy effective as of 1 August 2012.

³²⁴ Internal Ping emails requesting a change to the system to reflect setting up [Account Holder 2] as an Internet Account ie approved to sell Ping Soft Goods online, URN A0594 and URN A0601.

³²⁵ [Account Holder 2] response to section 26 notice dated 17 November 2015, URN A90006.6. [Account Holder 2] is no longer an Account Holder.

³²⁶ Table indicating [Account Holder 2's] sales of Ping golf clubs, and other manufacturers, [Account Holder 2] response to section 26 notice dated 9 February 2016, URN A90011.2.

³²⁷ A list of golf club brands [Account Holder 2] sold online between 2014 and 2015, [Account Holder 2] response to request 2.ii in section 26 notice dated 9 February 2016, URN A90011.2.

³²⁸ See screenshots of Ping golf clubs listed on [Account Holder 2's] website on 21 October 2015, URN A280012.

³²⁹ See screenshots of Ping golf clubs listed on [Account Holder 2's] website on 21 October 2015, URN A280012.

³³⁰ Ping Website Audit form completed on [X], noted that [Account Holder 2] '*Has Note of Ping Internet Policy on Hardware Products*', URN A0081.1

General

- 4.27. The Chapter I prohibition and Article 101 TFEU prohibit agreements between undertakings which have as their object the prevention, restriction or distortion of competition.
- 4.28. The term ‘object’ in both prohibitions refers to the sense of ‘aim’, ‘purpose’, or ‘objective’, of the coordination between undertakings in question.³³¹
- 4.29. 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.³³²
- 4.30. The Court of Justice of the European Union (Court of Justice) has held that object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.³³³ 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.³³⁴
- 4.31. 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.³³⁵

³³¹ See, for example, respectively: Case 56/64 *Consten & Grundig v Commission*, EU:C:1966:41, (Consten & Grundig), paragraph 343 (‘...Since the agreement thus aims at isolating the French market... it is therefore such as to distort competition...’); Case 96/82 *NZ 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 to 33.

³³² See, for example, C-8/08 *T-Mobile Netherlands BV v NMa*, EU:C:2009:343, paragraphs 28 to 30 and the case law cited therein, and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, at 269.

³³³ 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.

³³⁴ *Cartes Bancaires*, paragraphs 49 and 57. See also *Toshiba*, paragraph 26.

³³⁵ *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.

- 4.32. 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.³³⁶
- 4.33. 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.³³⁷

Online sale prohibitions

- 4.34. In *Pierre Fabre*³³⁸ the Court of Justice considered questions referred to it from a national court concerning the application of Article 101(1) TFEU to a *de facto*³³⁹ online sales prohibition. The Court of Justice concluded that, in the context of a selective distribution system, a contractual clause resulting in a ban on the use of the internet for sales amounted to an object restriction, where it was not objectively justified:

*'Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.'*³⁴⁰

- 4.35. The CMA has considered the case law of the Court of Justice, opinions of Advocates General and decisional practice of national competition

³³⁶ *Cartes Bancaires*, paragraph 54; affirmed in *C-286/13 P Dole v Commission*, EU:C:2015:184, paragraph 118.

³³⁷ *BIDS*, paragraph 21 'even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that provision. Indeed, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives'; see also *C 96/82, NV IAZ International Belgium and others v Commission*, EU:C:1983:310 (IAZ Belgium), paragraph 25 '... restrict[s] competition ... notwithstanding the fact that it also pursues the objective of protecting public health and reducing the cost of conformity checks. That finding is not invalidated by the fact that it has not been established that it was the intention of all the parties to the agreement to restrict competition' and *Cartes Bancaires*, paragraph 70, 'fact that the measures at issue pursue the legitimate objective of combatting free-riding does not preclude their being regarded as having an object restrictive of competition'.

³³⁸ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v ADLC*, EU:C:2011:649 (*Pierre Fabre*).

³³⁹ In that case, the conditions of distribution required, among other matters, that the products (cosmetics and health beauty products) had to be dispensed only at a marked, specially allocated outlet and that a trained person, with a degree in pharmacy, had to be physically present at that outlet at all times (see *Pierre Fabre*, paragraphs 13 to 14).

³⁴⁰ *Pierre Fabre*, paragraph 47.

authorities with a view to establishing how online sale prohibitions should be regarded from a competition law perspective. National competition authorities have considered restrictions on online sales and in the cases in question have found that they restrict competition by object in vertical cases (that is, arrangements between undertakings operating at different levels of the supply chain).³⁴¹

- 4.36. In *Pierre Fabre* the Court of Justice referred to its judgments in *Metro SB-Großmärkte*,³⁴² *AEG-Telefunken*³⁴³ and *L'Oréal*³⁴⁴ and held that:

'39. As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market. Such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'.

40. However, it has always been recognised in the case-law of the Court that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 101(1) TFEU (AEG-Telefunken v Commission, paragraph 33).

41. In that regard, the Court has already pointed out that the organisation of such a network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary (Case 26/76 Metro SB-Großmärkte v Commission [1977] ECR 1875, paragraph 20, and Case 31/80 L'Oréal [1980] ECR 3775, paragraphs 15 and 16).

42. Although it is for the referring court to examine whether the contractual clause at issue prohibiting de facto all forms of internet selling can be

³⁴¹ See for example the decision of the Office of Fair Trading in CE/9578-12 *Roma*, decision of 5 August 2013, Decision No. 12-D-23 du 12 December 2012 of the French competition authority relating to the practices of Bang & Olufsen in the hi-fi and home cinema sector, and Decision No. zu 25 Kt 6/16v of 14 November 2016, of the Austrian Competition Authority relating to practices of De'Longhi in the coffee machine sector.

³⁴² Case 26/76 *Metro SB-Großmärkte v Commission* [1977] ECR 1875, paragraph 20.

³⁴³ Case 31/80 *L'Oréal* [1980] ECR 3775, paragraphs 15 and 16.

³⁴⁴ Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, paragraph 33.

justified by a legitimate aim, it is for the Court of Justice to provide it for this purpose with the points of interpretation of European Union law which enable it to reach a decision (see L'Oréal, paragraph 14).

*43. It is undisputed that, under Pierre Fabre Dermo-Cosmétique's selective distribution system, resellers are chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers. However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41 of the present judgment.'*³⁴⁵

- 4.37. The Court of Justice rejected Pierre Fabre's arguments seeking to justify its ban on internet sales.³⁴⁶ In light of the foregoing considerations, the Court of Justice held that having had regard to the properties of the product at issue, an online sales ban could not be justified.
- 4.38. In light of the judgment in *Pierre Fabre*, it follows that even if distributors within a selective distribution system are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential retailers, for a product the characteristics of which necessitate such a network, it must be determined whether an individual contractual restraint pursues legitimate aims in a proportionate manner. In accordance with paragraph 41 of the judgment, a competition authority must assess whether *'the criteria laid down do not go beyond what is necessary'*.³⁴⁷
- 4.39. In *Coty Germany* Advocate General Wahl advised the Court of Justice that selective distribution systems relating to the distribution of luxury and prestige products and mainly intended to preserve the 'luxury image' of those products are an aspect of competition that is compatible with Article 101(1) TFEU provided that resellers are chosen on the basis of the same criteria as set out in paragraph 41 of the judgment in *Pierre Fabre*, above.³⁴⁸
- 4.40. The Advocate General also considered that a contractual clause prohibiting authorised distributors from making use in a discernible manner of third-party platforms for online sales is compatible with Article 101(1) if it is applied in a non-discriminatory fashion and is objectively justified by the nature of the contract products.³⁴⁹

³⁴⁵ *Pierre Fabre*, paragraphs 39–43.

³⁴⁶ *Pierre Fabre*, paragraphs 44–46.

³⁴⁷ *Pierre Fabre*, paragraph 41.

³⁴⁸ Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* EU:C:2017:603 (*Coty Germany*), paragraph 93.

³⁴⁹ *Coty Germany*, paragraph 115; see also paragraph 122.

- 4.41. The Advocate General distinguished the facts of *Coty Germany* from the situation that gave rise to the preliminary ruling in the case of *Pierre Fabre*. In his view, the prohibition imposed on Coty's authorised retailers from making discernible use of e-commerce third-party platforms could not be compared with the outright ban on internet sales at issue in *Pierre Fabre*.³⁵⁰

Proportionality

- 4.42. Proportionality is a general principle of EU law. The principle has been developed by the Court of Justice in its jurisprudence in respect of legislative and administrative measures adopted by EU institutions. For example, a summary of the principle of proportionality under EU law is set out in the judgment of the Court of Justice in *R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa*:³⁵¹

'By virtue of that principle [proportionality], the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.'

- 4.43. It is well established that the CMA bears the burden of proving an infringement of the Chapter I prohibition and Article 101 TFEU, but that an undertaking has the burden of demonstrating that an alleged restriction of competition is 'justified'. This is an application of the maxim: '*he who asserts must prove*'.³⁵² Ping therefore bears the burden of establishing the Online

³⁵⁰ *Coty Germany*, paragraphs 78-80, 107-110, 117, 146, 149 and 155.

³⁵¹ C-331/88 *R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa*, (Fedesa), EU:C:1990:391, paragraph 13. See also *Tesco Plc v Competition Commission* [2009] CAT 6, (Tesco), paragraph 137 for a consideration of the principle by the CAT in the context of a market investigation. The different ways in which the principle of proportionality is applied in different contexts has recently been considered by the Supreme Court, in *R (Lumsdon) v Legal Services Board* [2015] UKSC 41, paragraphs 23-82.

³⁵² See the decision of the Competition Appeal Tribunal in *Racecourse Association v OFT*, [2005] CAT 29, at [132] to [133], '*It cannot be for the OFT to set up and disprove a case founded on the 'necessity' argument. If, as the appellants claimed, any apparently anticompetitive effect of the collective dealing between the Courses and ATR was justified by the necessity of such dealing, it was for them to demonstrate it by evidence. Once that evidence was before the OFT, the overall legal burden still remained on the OFT to prove the infringement of the Chapter I prohibition that it was asserting. But unless the appellants first made out a necessity case on the facts, no such case would arise for consideration.*' See also by analogy *ASDA (and others) v MasterCard (and others)* [2017] EWHC 93 (Comm), paragraph 45, '*It was common ground that the burden of proof lies on MasterCard to bring itself within the ancillary restraint doctrine. This is, however, an evidential burden rather than a legal one; the burden is on the Claimants to establish a restriction of competition which infringes Article 101(1): see Racecourse Association v Office of Fair Trading [2005] CAT 29 at paragraphs 131-133.*'

Sales Ban is ‘objectively justified’. It is for Ping to prove that the Online Sales Ban is necessary to achieve a legitimate aim and is not disproportionate.³⁵³

II. Legal Assessment of the Online Sales Ban as an object infringement

4.44. For the reasons set out below following an individual and specific examination of the content and objectives of the Online Sales Ban and the legal and economic context of which it forms a part, the CMA finds that the Online Sales Ban reveals by its nature a sufficient degree of harm to competition, and that accordingly it had and continues to have as its object the prevention, restriction or distortion of competition within the UK and between EU Member States.

a. Content of the Online Sales Ban

4.45. The content of the Online Sales Ban is a contractual agreement between Ping and its Account Holders not to sell Ping golf clubs online. Ping told the CMA there is no real disagreement that the Terms and Conditions in its Trade Price Lists require its Account Holders not to sell Ping golf clubs online.³⁵⁴

4.46. The precise wording has varied over time, but the content reflects Ping’s most recent Trade Price List of 1 January 2017,³⁵⁵ which provides:

‘... Ping Europe’s Internet policy *does not allow the Account Holder to execute sales transactions of PING Hardware products with consumers on the Internet...*

... It is important for PING Hardware to be sold in a manner consistent with the ethos of the PING brand and for this reason Ping Europe has decided that PING Hardware should not be sold in breach of this Internet Policy. For these reasons, any Account Holder who executes sales transactions of any PING Hardware, or offers the facility to execute sales transactions of

³⁵³ The Guidelines on Vertical Restraints in paragraph 60, provide that ‘Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature and therefore fall outside Article 101(1). For example, a hardcore restriction may be objectively necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of health and safety is respected’. See also paragraph 18 of the Article 101(3) Guidelines, which provides ‘certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature. Such exclusion of the application of Article 81(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether given the nature of the agreement and the characteristics of the market a less restrictive agreement would not have been concluded by undertakings in a similar setting’.

³⁵⁴ Written Representations, paragraph 30, and 38 and 39, URN A0921.2 in respect of [Account Holder 1] and [Account Holder 2].

³⁵⁵ Trade Price List of 1 January 2017 provided by Ping on 24 May 2017 in response to a s.26 Notice of 18 May 2017, URN A0981.3.

any PING Hardware prior to any conversation with the consumer, is in breach of Ping Europe's Internet Policy and **risks closure of its account facility** with Ping Europe...

For the avoidance of any doubt...This **policy is incorporated as a contractual term of Ping Europe's agreement with the Account Holder**. This policy is necessary and in the best interests of Ping Europe, the Account Holder and not least, the consumer...' (emphasis added)

b. Objectives of the Online Sales Ban

4.47. The CMA finds that, the clear written expression of the Online Sales Ban (the 'content') establishes that its objective is to prohibit any sales on the internet of Ping golf clubs by UK Account Holders. The CMA finds prohibiting online sales, by its very nature, 'is ... *liable to restrict competition*'³⁵⁶ between Account Holders through an important sales channel (namely, online) both within the UK and across the EU more generally.³⁵⁷

4.48. In *Pierre Fabre* the Court of Justice held that by excluding one method of distance selling the ban was liable to restrict competition:³⁵⁸

'As the Commission points out, by excluding de facto a method of marketing products that does not require the physical movement of the customer, the contractual clause considerably reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It is therefore liable to restrict competition in that sector.'

4.49. The Advocate General Mazak's Opinion in *Pierre Fabre*, described the way in which an online sales ban restricts or distorts competition, as follows:

*'a general and absolute ban on internet sales eliminates a modern means of distribution which would allow customers to shop for those products outside the normal catchment area of those outlets thereby potentially further enhancing intra-mark competition.'*³⁵⁹

³⁵⁶ *Pierre Fabre*, paragraph 38.

³⁵⁷ See Section 3, Importance of the internet as a retail channel for the sale of golf clubs, paragraphs 3.50 to 3.58.

³⁵⁸ *Pierre Fabre*, paragraph 38.

³⁵⁹ *Pierre Fabre*, paragraph 56. See also paragraph 52 of the Guidelines on Vertical Restraints [2010] OJ C130/1) (Guidelines on Vertical Restraints) is to similar effect: *'In principle, every distributor must be allowed to use the internet to sell products. In general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor.'*

- 4.50. In *Coty Germany* Advocate General Wahl contrasted the contractual clause at issue in that case (which prohibited members of a selective distribution system from selling luxury products on third-party e-commerce platforms) with the *'particularly serious restrictions, such as the outright ban on internet sales that resulted from the clause at issue in the judgment in Pierre Fabre Dermo-Cosmétique.'*³⁶⁰
- 4.51. The Commission's Guidelines on Vertical Restraints, set out a number of ways in which restrictions of internet sales may restrict competition. Paragraph 52 states, *'The internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, which explains why certain restrictions on the use of the internet are dealt with as (re)sales restrictions. In principle, every distributor must be allowed to use the internet to sell products. [...] The Commission thus regards the following as examples of hardcore restrictions of passive selling'*³⁶¹ *given the capability of these restrictions to limit the distributor's access to a greater number and variety of customers: [...] (c) an agreement that the distributor shall limit its proportion of overall sales made over the internet.'*³⁶²
- 4.52. Ping acknowledged at the Oral Hearing that the nature of an online sales ban restricts competition, submitting this could be justified where such a restriction pursued a legitimate aim:³⁶³
- 'So, to be clear, we do say - we do not shy from this - that if there is a legitimate aim there may well be in that context some restrictions on intra- and inter-brand competition, there may well be in that context if it is an internet sales restriction, some restriction on passive selling, but if there is a legitimate aim it essentially trumps all of that and there cannot be an object [infringement] if overall seen in context there is a legitimate aim.'*³⁶⁴

³⁶⁰ Case C-230/16 EU:C:2017:603, paragraph 84.

³⁶¹ *Guidelines on Vertical Restraints*, above, defines passive sales at paragraph 51: *'responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.'*

³⁶² *Guidelines on Vertical Restraints*, paragraph 52(c) continues, *'This does not exclude the supplier requiring, without limiting the online sales of the distributor, that the buyer sells at least a certain absolute amount (in value or volume) of the products offline to ensure an efficient operation of its brick and mortar shop (physical point of sales), nor does it preclude the supplier from making sure that the online activity of the distributor remains consistent with the supplier's distribution model (see paragraphs (54) and (56)). This absolute amount of required offline sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location.'*

³⁶³ This submission is considered in the subsequent section.

³⁶⁴ Oral Hearing Transcript, page 34, lines 10 to 14, URN A0952.1.

- 4.53. The CMA finds the fact that consumers cannot click-to-basket and complete the transaction online reduces, by its very nature, the ability and incentives of retailers to attract and win consumers' business using the internet. In particular, retailers cannot attract consumers located outside their catchment areas³⁶⁵ to buy Ping golf clubs online by offering better prices or a quality online service.^{366,367} This was the basis which led the Court of Justice to reject the possibility of a block exemption for the online sales ban:³⁶⁸

'[a] contractual clause such as the one at issue in the main proceedings, prohibiting de facto the internet as a method of marketing, at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant members of the selective distribution system'.

- 4.54. The Online Sales Ban is liable to restrict competition because it reduces the ability of Account Holders to sell Ping golf clubs to customers outside their local geographic areas and restricts consumers from accessing a greater number of Ping golf club retailers. The inability to complete a sales transaction online also limits a consumer's ability to make use of comparison tools in order to find the best available Ping deals (see paragraph 4.76 where this is considered in the context of this case). The CMA finds that restricting such passive sales to those consumers therefore inherently reduces the ability/incentive to compete for consumers who want to buy Ping golf clubs.
- 4.55. Ping submitted that its subjective intent, to promote Custom Fitting, is a factor which should be taken into account in its favour in this case.³⁶⁹ [Account Holder 1] also submitted that its agreement with Ping did not have as its objective the restriction of competition.³⁷⁰
- 4.56. The CMA rejects this submission for two reasons. First, the parties' intention is not a necessary factor in determining whether an agreement is

³⁶⁵ Ping Account Holders do not have formal catchment areas (ie any restriction on the consumers to whom they can sell based on location). This is a natural catchment in the sense that consumers are unlikely to travel far from their home or work location to purchase goods.

³⁶⁶ See paragraph 3.21, 9-14% of purchases of golf clubs were through online retailers.

³⁶⁷ See also paragraph 52 of the Guidelines on Vertical Restraints. The Commission regards an agreement that the distributor shall limit its proportion of overall sales made over the internet as an example of a hardcore restrictions. Hardcore restrictions are presumed to have as their object the restriction of competition, see paragraph 47 of the Guidelines on Vertical Restraints.

³⁶⁸ *Pierre Fabre*, paragraph 54.

³⁶⁹ Written Representations, paragraph 108, URN A0921.2 'If that intent is not related to an intent to restrict competition, that is a relevant point in that undertaking's favour.' See also Written Representations, paragraph 64.

³⁷⁰ [3<] Email submission from [Account Holder 1] to the CMA responding to the SO, URN A20064.

restrictive.³⁷¹ Second, the Court of Justice has had occasion to hold agreements contrary to Article 101 TFEU because they had a restrictive object, even though at the same time they envisaged pursuing objectives that were perfectly legitimate.³⁷² Here, the immediate aim of the Online Sales Ban is to prevent retailers from selling golf clubs online and it is this aim which is inherently anti-competitive. Furthermore, in accordance with the *Pierre Fabre* judgment, the CMA has assessed whether promoting Custom Fitting is a legitimate aim for the purposes of Ping's objective justification submissions.

c. Legal and economic context of the Infringements

- 4.57. Following an individual and specific examination of the legal and economic context of the Infringements, the CMA finds that by its nature the Online Sales Ban contained in the Agreements reveals a sufficient degree of harm to competition such that there is no need to examine its effects.
- 4.58. Section 3 of the Decision provides an overview of the golf sector, with key points that are relevant to the legal and economic context for the purposes of the 'object' assessment set out below.³⁷³

(i) Nature of Ping's distribution arrangements

- 4.59. The CMA finds that Ping's distribution arrangements constitute a system of selective distribution³⁷⁴ and that such a system limits intra-brand competition for Ping golf clubs between those retailers who are authorised to sell Ping's golf clubs and those who are not. This is in the context of other golf club manufacturers also operating distribution systems in the UK whereby retailers are 'authorised' to sell that manufacturer's clubs in bricks and mortar premises and online.³⁷⁵

(ii) Context of the Infringements – the Online Sales Ban is one of Ping's Standard Terms

- 4.60. The CMA finds that Ping first communicated to its Account Holders that they may not sell Ping's golf clubs online in May 2000 (see paragraph 3.79). The

³⁷¹ Case C-67/13 P *Cartes Bancaires v Commission* EU:C:2014:2204, paragraph 54.

³⁷² See *BIDS*, paragraph 21 and case law cited.

³⁷³ The test the CMA is applying to assess whether the Online Sales Ban is an object infringement is set out in paragraphs 4.27 to 4.33. Footnote 335 records that in applying the test 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.

³⁷⁴ As to the scope of Ping's selective distribution arrangements, see paragraphs 3.60 to 3.63. Ping has informed the CMA that it does not select its Account Holders on the basis of quantitative selection. As to selective distribution agreements generally, see *Pierre Fabre*, paragraph 39, citing Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293.

³⁷⁵ See, for example, screenshot of Callaway's website at A280060.

Online Sales Ban became a standard term in 2006. The Online Sales Ban is therefore a long standing contractual requirement and is clearly designed to prevent online sales of Ping golf clubs.

- 4.61. Ping told the CMA that acceptance of the Internet Policy (containing the Online Sales Ban) was a condition of being an Account Holder. Indeed, it closed accounts that breached the Online Sales Ban (as described in paragraphs 3.113 to 3.114). Ping told the CMA that: '*There is no real disagreement about the contracts between Ping and its retailers. This is unsurprising because PING has always been wholly transparent and consistent about the fact that its business model is based on selling Custom Fit clubs, and that it requires its retailers to comply with this policy, including by not selling golf clubs online.*'³⁷⁶
- 4.62. When assessing the economic context of which the Agreements form a part, it is necessary to take into consideration the real conditions of the functioning (and structure) of the market in question.³⁷⁷ For this reason the CMA has had regard to the fact that the Online Sales Ban is one of Ping's standard terms and conditions, which applies to all Account Holders, and necessarily affects the way that Ping's golf clubs are sold in the UK.

(iii) *The structure of the market*

- 4.63. The Golf Datatech Market Share Report indicated that in 2015 Ping was the leading manufacturer of irons and woods in the UK.³⁷⁸ Its total market share in the UK in the 9 years between 2006 and 2015 was between [10-20]-[20-30]%.³⁷⁹ The evidence, specifically Ping's significant market shares in relation to each category of golf club, indicates to the CMA that some consumers prefer Ping brand golf clubs, and therefore that the ability to sell Ping golf clubs is important for a large number of retailers.

(iv) *Nature of the product*

- 4.64. Ping and other manufacturers, such as Callaway, Mizuno, TaylorMade and Titleist supply Custom Fit Clubs.³⁸⁰ Ping submitted that consumers value both the process of Custom Fitting and the number of customisable options offered for each Ping club and that Ping offers the largest number of

³⁷⁶ Written Representations, paragraph 30, URN A0921.2.

³⁷⁷ Case C-67/13 P *Cartes Bancaires v Commission* EU:C:2014:2204, paragraph 53 and case law cited.

³⁷⁸ See Table 3.1 and paragraph 3.13.

³⁷⁹ See paragraph 3.15, and Table 3.3, URN A0824.

³⁸⁰ See paragraph 3.16.

variables of any manufacturer.³⁸¹ However, the CMA finds that the Custom Fitting of Ping's clubs does not provide greater benefits to consumers than Custom Fitting provided for clubs of other manufacturers for the following reasons:

- Golf clubs must be designed and manufactured to specifications which conform with the Royal & Ancient rules of golf equipment. This sets boundaries for manufacturers in terms of changes to clubs and the technology which can be utilised.³⁸²
- The evidence on the benefits of Custom Fitting is not brand specific. For example, the SMS Survey Results Extract, provided by Ping, deals with general benefits of Custom Fitting by type of club, and does not distinguish between different benefits associated with Custom Fitting for different brands.
- Ping Custom Fit Clubs are not so different from other brands of Custom Fit Clubs that a different Custom Fitting is required. As explained in paragraph 3.23, when conducting a Custom Fitting, retailers use the same process and fit across brands simultaneously.
- Ping customers may not need to undergo a Custom Fitting in order to purchase a Custom Fit Club (see paragraphs 3.120 to 3.121). Customers falling within the 'bell curve' of the most popular variables may be able to purchase Ping Custom Fit Clubs off the shelf (ie which have been supplied to the Account Holder as an ISO) (see paragraph 3.48).

4.65. As described in Section 3, the CMA finds that, across all brands manufacturing Custom Fit Clubs, manufacturers, retailers and golfers believe that consumers benefit from a Custom Fitting before buying a golf club.

4.66. Ping Custom Fit Clubs can be sold online³⁸³ and there is nothing about their intrinsic properties that means that they can be sold only immediately following a Custom Fitting in a bricks and mortar store. In particular, Ping Custom Fit Clubs are sold:

³⁸¹ Ping's response to the Letter of Facts, paragraph 7, URN A0992.1 which refers to Written Representations at paragraph 18. Also see paragraph 3.17 where Ping's Managing Director told the CMA that there are generally no physical differences between Ping golf clubs and its competitors but Ping is able to adjust the lie angles of its irons by plus or minus 5 or 6 degrees.

³⁸² See paragraph 3.9.

³⁸³ Ping submitted in its response to the Letter of Facts that it offers '*an enormous number of variables for each of its clubs*' and [×], at paragraph 23, URN A0992.1. The CMA considers that Ping could require its Account Holders to provide a range of drop down boxes on their transactional websites which indicate the different customisable variables in relation to the relevant clubs.

- a. without a Custom Fitting in a bricks and mortar store – there is no contractual requirement for Account Holders to sell only after a Custom Fitting. Account Holders are contractually required to offer and promote Custom Fitting. Therefore, consumers visiting a bricks and mortar store may potentially buy stock ‘off the shelf’ if an Account Holder holds stock (eg from its ISOs) or the Account Holder may place an order with Ping for the bespoke manufacture of clubs for a consumer. In each case such sales may be made without the retailer having first provided a Custom Fitting;³⁸⁴
- b. by telephone – Ping Account Holders must recommend that potential consumers visit a store for a Custom Fitting but if consumers do not wish to do so, they may place an order without a Custom Fitting; and
- c. by USA online retailers – several US Ping authorised retailers sell online without requiring prior Custom Fitting and have the ability to ship to the UK.³⁸⁵ The number of customisable options does not prevent Ping Custom Fit Clubs being sold online in the US and Ping could require retailers to add extra customisable drop down boxes on their websites.

4.67. Therefore, Custom Fit Clubs in general, and in particular Ping Custom Fit Clubs, are a product which can be, and are, sold online and can be and are sold without a Custom Fitting.

(v) *Pre-sales Custom Fitting service*

4.68. Custom Fitting is a practice which is prevalent across the industry. Other leading manufacturers including Callaway, Mizuno, TaylorMade and Titleist, offer Custom Fit clubs and promote the benefits of Custom Fitting.³⁸⁶ Many retailers promote the benefits of Custom Fitting and invest in a range of facilities such as driving range bays and launch monitors to carry out Custom Fittings across a number of brands.³⁸⁷ Ping’s Managing Director told the CMA, ‘*everybody custom fits...If you’ve been into a retail shop, you’ll see that we’re not the only custom fit company ... all of our competitors custom*

³⁸⁴ Indeed Ping estimates that around [§<] % of customers have a custom fitting before purchasing a Ping golf club and therefore logically around [§<] % of customers buy Ping golf clubs without having a custom fitting, Ping’s response to question 4 of the CMA’s section 26 notice dated 21 December 2016, paragraph 12, URN A0953.1.

³⁸⁵ See paragraph 3.126.

³⁸⁶ See paragraph 3.34.

³⁸⁷ See paragraph 3.37 and 3.25.

*fit and I would say over the last ten years their investments in custom fitting have grown significantly as well.*³⁸⁸

(vi) *Consumer demand for buying Custom Fit Clubs online*

- 4.69. The CMA finds there is significant consumer demand to buy Custom Fit Clubs online. The SMS Survey Results Extract indicates that on average over 10% of the surveyed golfers reported purchasing golf clubs online,³⁸⁹ with the proportion of golfers who have had a Custom Fitting purchasing online being even bigger, at around 15% on average.³⁹⁰
- 4.70. Online sales are an important and established channel for golf equipment generally.³⁹¹ Some Account Holders told the CMA there was consumer demand for purchasing Ping golf clubs online and that consumers value having a *'convenient purchasing facility rather than having to phone us when we are only open'*.³⁹² Consumers can benefit from being able to order golf clubs from a range of competing Account Holders online. For example, there may be consumers who wish to (i) shop around; (ii) purchase a replacement Custom Fit Club; (iii) already know their specifications from a previous Custom Fitting; or (iv) the bricks and mortar retailer may not have the product in stock.
- 4.71. Ping submitted that: *'Ping does not deny this [that there is demand for purchasing golf clubs online]; that is why it had to consider the position on its Internet policy. To the extent that there is such demand, customers are able to choose from a wide variety of non-Ping clubs to purchase online, [...]. In relation to Ping golf clubs, Ping's consistent and clear policy has been that the optimisation of this equipment to maximise its benefits to the consumer is to have clubs custom fitted following a face-to-face interaction'*.³⁹³ The key point is that Ping golf clubs are a product for which there is demand from consumers to purchase online. Ping admits that the product could be sold online but that it chooses to prevent the sale in order to protect its commercial policy of promoting Custom Fitting.

³⁸⁸ Transcript of interview with the Managing Director dated 10 March 2016, page 19, URN A0863.

³⁸⁹ The proportions of online purchases vary by club type, for instance [10-20]% of surveyed golfers reported buying a fairway wood and hybrid online, drivers were bought online by [10-20]% of golfers, wedges and putters were bought online by [10-20]% and irons were bought online by [1-10]% of surveyed golfers, SMS Survey Results Extract, pages 24 – 29, URN A0949.4. This figure may well not reflect actual volumes of golf clubs sold (ie only the fact that the proportion of surveyed golfers have bought a golf club online in the past) and it is used as a proxy only.

³⁹⁰ The proportion of online purchases by surveyed golfers might be even larger, given that some of those sales might be captured by other categories, eg American Golf. On the other hand, the SMS survey was conducted online only, therefore possibly overestimating the proportion of customers who would purchase golf clubs online.

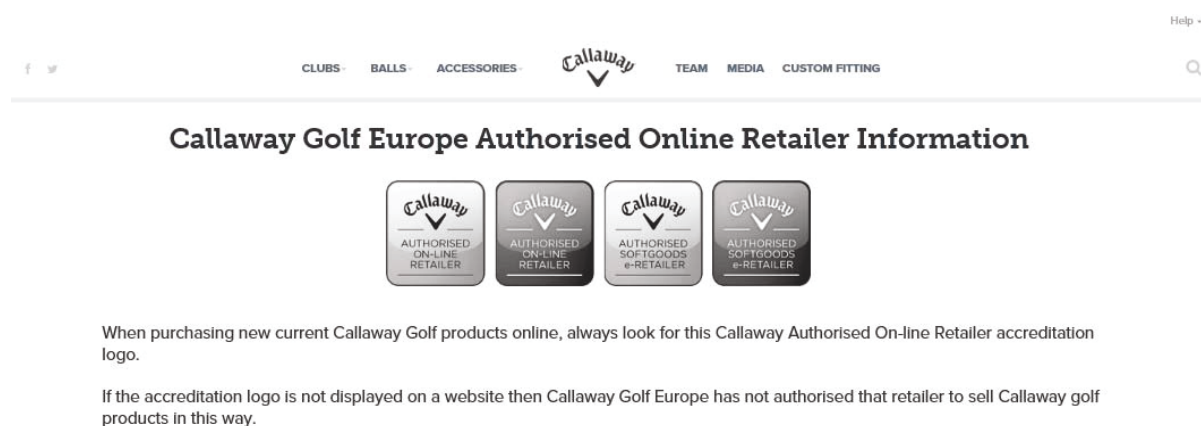
³⁹¹ See paragraphs 3.50 to 3.51.

³⁹² See paragraph 3.117.

³⁹³ See paragraph 12 of Ping's Response to the Letter of Facts, URN A0992.1.

(vii) *Golf club sale channels and the importance of the internet for retailers*

- 4.72. For a number of retailers online sales of golf clubs make up a significant proportion of their total sales and represent an important retail channel.³⁹⁴
- 4.73. A number of UK Account Holders operating online sell Ping golf clubs to consumers in other EU Members States, demonstrating that there is a demand to purchase Ping golf clubs cross-border by such consumers.³⁹⁵
- 4.74. Other manufacturers promote the existence of their authorised online retailers. For example, Callaway has an 'Authorised Online Retailer Information' webpage linking to its authorised retailers and provides them with an accreditation logo to display on their websites.³⁹⁶



- 4.75. To facilitate online sales a number of Account Holders, offer a range of options for consumers (ie a selection of choices above the standard options of right/left hand, flex and loft angle) to enable them to purchase Custom Fit Clubs online. These options assist consumers wishing to purchase online, including those consumers who have had a Custom Fitting. See, for example, TaylorMade being sold on [Account Holder's] website³⁹⁷ and a screen shot of [X] (a US based authorised internet retailer) selling Ping golf clubs online.³⁹⁸ The latter provides an example of how Ping golf clubs could be sold online by its Account Holders.

³⁹⁴ See paragraph 3.51.

³⁹⁵ See Section 3, part IV.

³⁹⁶ See screen shot of Callaway's website at A280060. Ping Inc. provides its US retailers with such a logo indicating that the company is an AIR, for use on their transactional websites, for example: [X] website (URN A280070) and [X] (URN A280075).

³⁹⁷ [Account Holder], an Account Holder, offering TaylorMade Custom Fit golf clubs for sale online – [Account Holder] also lists Ping golf clubs on its website and could also supply Ping Custom Fit Clubs were the 'Add-to-Basket' button activated, A280068 [Account Holder] screen shot.

³⁹⁸ Screen shot of US Ping Retailer [X], offering a Ping golf club with a range of options for consumers to enable them to purchase Custom Fit Clubs online, URN A280072.


[X]

Home / Shop By Sport / Golf / Clubs / Iron Sets / PING G30 Black Dot Irons - (Steel)

PING G30 Black Dot Irons - (Steel)

★★★★★ 4.8 (4) [Write A Review](#)

NOW: \$599.00 (25% off)
WAS: \$799.00*



HAND:
Right Hand

FLEX:
Regular Flex

INCLUDES:
4-PW, UW
one option available

SHAFT:
CFS Distance Steel
one option available

QUANTITY 1


ADD TO CART

[Check Store Availability](#)


ORDER IN TIME FOR FATHER'S DAY [Details](#)

Available to ship. ©
Standard Ground Service Available ©


You May Also Like



PING G30 Driver
★★★★★ (59)
\$249.00



PING G30 Fairway Wood
★★★★★ (11)
\$169.00



PING G30 Hybrid
★★★★★ (11)
\$149.00

- 4.76. The CMA finds that the Online Sales Ban contained within the Agreements restricts competition for passive sales for Ping golf clubs,³⁹⁹ notwithstanding that advertising the availability of Ping golf clubs and their prices and telephone sales are not prohibited. Consumers cannot click-to-basket and complete the transaction and this reduces, by its very nature, the ability and incentives of retailers to attract and win consumers' business using the internet. In particular, retailers cannot attract consumers to buy Ping golf clubs online by offering better prices or a quality online service, as the absence of click-to-basket functionality removes the possibility for the goods to appear on digital comparison tools. The CMA finds that the internet is an important sales channel for distance sales of golf clubs and the Online Sales

³⁹⁹ *Guidelines on Vertical Restraints* defines passive sales at paragraph 51: 'responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups.'

Ban removes the advantages for consumers of online retail, for the following reasons:

- Consumers cannot complete a purchase online, making it more difficult for consumers to access a greater number of product offerings than may be available in their local geographic area.⁴⁰⁰ Although consumers have the option of call to order (to complete a sale over the telephone), the evidence indicates that this is not a popular alternative and consumers are less likely to complete a sale if they need to ‘Call to Order’ rather than placing an order by click-to-basket due to the reduced convenience (eg having to complete the sale during store opening hours). Ping told the CMA that it considers: *‘telephone orders are – probably - an extremely minuscule amount of business.’*⁴⁰¹ This is consistent with what the Complainant told the CMA, that *‘[o]verall, only about 1% of our orders are taken over the telephone which shows that it is a marginal sales channel for us by comparison with purely remote internet sales.’*⁴⁰²
- Consumers cannot compare the prices of Ping golf clubs via digital comparison tools (eg price comparison websites) because Ping’s Account Holders are not listed on comparison shopping websites (eg Google shopping, Shopzilla and pricerunner.co.uk).⁴⁰³ Whilst Account Holders can advertise the price of Ping golf clubs online, consumers cannot use Google shopping or other online comparison tools to compare prices between Account Holders, thus restricting comparison options available to consumers.⁴⁰⁴ The consequence of this is that in order to compare prices across Account Holders offering Ping products, consumers must rely on search engine searches for Ping golf clubs to generate website listings for Ping Account Holders with a website. Where they find websites, they must search each one and note down prices before deciding whether they wish to visit one (potentially limited by location) or telephone to place an order.

⁴⁰⁰ See AG Mazak Opinion set out in paragraph 4.49 above.

⁴⁰¹ Oral Hearing Transcript, page 50, lines 22-23, URN A0952.1.

⁴⁰² Complainant Witness Statement, URN A270022, paragraph 58. In contrast, approximately [%] of the Complainant’s overall sales are online, Complainant Witness Statement, URN A270022, paragraph 7. See also record of telephone call with [Account Holder], URN A230015, paragraph 9 (*‘[An Account Holder] explained that he got very few telephone orders ... [he] could not recall any PING irons being sold over the phone.’*).

⁴⁰³ See Complainant’s Witness Statement, paragraph 60.5, URN A270022: *‘[...] we cannot advertise on Google shopping. To advertise on Google shopping, it is necessary to be able to purchase the product entirely online. Given that consumers cannot do this for [...] Ping clubs, Google shopping prevents us from promoting those clubs [...]. This means that the Complainant loses wider internet visibility for existing and, more importantly, new clients.’*

⁴⁰⁴ See paragraph 3.58.

- Online retailers' sites are accessible 24 hours a day unlike bricks and mortar retailers which will not be open 24 hours a day, nor have sufficient resources to answer multiple simultaneous calls from customers or to answer calls from overseas customers in other languages.
- For sales from consumers outside of the UK, online retailers' ability to compete for sales will be reduced because consumers may be less likely to call/do not speak the language of the retailer.
- The ability to have websites with a choice of multiple languages in which content can be displayed (or with country appropriate domain names) facilitates passive sales to consumers in other EU member states.

The Online Sales Ban restricts competition irrespective of whether Account Holders may advertise online

- 4.77. Ping submitted that a distinguishing feature of the Online Sales Ban is that *'retailers are permitted to advertise (i) the fact that they sell PING Hardware; and (ii) the price of PING Hardware products on their websites'*⁴⁰⁵ as is the fact that *'Retailers are allowed to sell all PING Soft Goods online (subject to obtaining authorisation from PING)'*.^{406,407} Ping submitted that what is restricted is the 'click-to-buy' functionality. The Court of Justice in *Pierre Fabre* identified the restriction in issue was a requirement that *'de facto prohibits the authorised distributors from any form of internet selling'*.⁴⁰⁸
- 4.78. As set out above it is the restriction on internet selling which *'reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity'* and *'is therefore liable to restrict competition in that sector'*.⁴⁰⁹ As such, a restriction of online sales *'at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system'*.⁴¹⁰ The fact that the Online Sales Ban could have had more restrictive features

⁴⁰⁵ Written Representations, paragraphs 35 and 137, URN A0921.2.

⁴⁰⁶ Written Representations, paragraph 35, URN A280005.

⁴⁰⁷ Ping submitted the Online Sales Ban should be distinguished from the OFT's decision in CE/9578-12 *Roma* (5 August 2013) because the 'outright ban on internet sales *including a ban on advertising prices on the internet* (paragraph 2.100)' Written Representations, paragraph 122 and fn.143, URN A0921.2.

⁴⁰⁸ *Pierre Fabre*, paragraph 37.

⁴⁰⁹ *Pierre Fabre*, paragraph 38.

⁴¹⁰ *Pierre Fabre*, paragraph 54.

does not change the CMA's assessment that a prohibition of online sales restricts competition for sales on that channel.⁴¹¹

Impact on inter-brand competition

- 4.79. Ping submitted that *'it is also difficult to see in what respects the Internet Policy restricts competition when looked at in its economic context.'*⁴¹² Ping submitted that this is because *'when one looks at the high levels of inter-brand competition on the market' ... 'the market is highly competitive and relatively fragmented: there is no suggestion in the SO that PING or any other manufacturer has market power.'*⁴¹³ Ping suggests the context of other manufacturers offering golf clubs without a Custom Fitting means that *'if a consumer does not wish to purchase a Custom Fitted club, he or she may simply purchase a club from a different manufacturer (either online or from a bricks and mortar store).'*⁴¹⁴
- 4.80. In that context Ping submitted its commitment to promoting Custom Fitting, reflected in its Online Sales Ban, means *'the effect of PING's customisation policy is therefore to increase, not reduce, consumer choice, and it is difficult to see in what "obvious" respect competition has been materially hindered (as would be required to support an object case).'*⁴¹⁵ Ping submitted *'In truth, the extent of the SO's case on an alleged restriction of competition sufficient to rise to the level of an object infringement is that not allowing Internet sales affects the ability of retailers to sell PING clubs out of hours or out of territory.'*⁴¹⁶ In light of this, Ping submitted that *'for the reasons set out at paragraphs 63-84 [of its Written Representations], [the Online Sales Ban] ... can therefore be objectively justified as promoting inter-brand competition and increasing quality and choice in golf club hardware and fitting.'*⁴¹⁷
- 4.81. The CMA disagrees and finds that the nature of the Online Sales Ban contained within the Agreements, assessed in its legal and economic context (as described in paragraphs 4.57 to 4.76 above), is to restrict the ability of

⁴¹¹ Had the Agreements also included a ban on advertising prices of golf clubs online or continued to apply to Soft Goods as well, that would have been likely to have been reflected in the CMA's approach to setting the level of the penalty.

⁴¹² Written Representations paragraph 86, URN A0921.2. Ping makes a similar summary of its submission in 3.b.i of its Written Representations.

⁴¹³ Written Representations paragraph 87, URN A0921.2.

⁴¹⁴ Written Representations paragraph 88, URN A0921.2.

⁴¹⁵ Written Representations paragraph 88, URN A0921.2.

⁴¹⁶ Written Representations paragraph 89, URN A0921.2.

⁴¹⁷ Written Representations paragraph 136, URN A0921.2. In its response on the Letter of Facts, Ping affirmed its contention that its *'Internet Policy has no adverse effect on competition or consumer choice. If consumers do not wish to have the full benefits of Ping's customisation, they have a large number of inter-brand alternatives, often at the same retail premises or website and 'Ping's Internet Policy therefore does not adversely affect inter-brand competition or consumer choice', at paragraph 2(c) and 10 of the response to the Letter of Facts, URN A0992.1*

Account Holders to compete for ‘out of territory’ sales or to make passive sales via the Internet which, in the absence of an objective justification, constitutes a restriction of competition by object.

- 4.82. The CMA rejects Ping’s contention that the restriction of intra-brand competition for Ping golf clubs resulting from the Online Sales Ban can be justified by virtue of an alleged increase in inter-brand competition. For this to be the case, it would have to be demonstrated as part of the assessment of objective justification that the particular restriction of intra-brand competition was objectively necessary for the attainment of a legitimate goal capable of improving inter-brand competition (see section III below).⁴¹⁸ If that were not the case, such ‘trading off’ may be assessed under Article 101(3). In any event, as Ping did not provide evidence to support its submissions, the CMA is unable to give any weight to these claims.⁴¹⁹

III. Objective justification

- 4.83. Following its specific examination of the context of the Online Sales Ban, and having regard to the properties of the products at issue, the CMA finds that the Online Sales Ban contained within the Agreements is not objectively justified.

a. Ping’s submissions on objective justification

(i) Promotion of Custom Fitting

- 4.84. In its Written Representations and at the Oral Hearing, Ping told the CMA that its Internet Policy, and its Online Sales Ban, are objectively justified as a ‘product of’⁴²⁰ or ‘corollary’ of Ping’s ‘overall policy on customisation, and is therefore a fundamental part of the goods that PING sells’⁴²¹ and can therefore ‘be objectively justified as promoting inter-brand competition and increasing quality and choice in golf club hardware and fitting’.⁴²² In its Draft

⁴¹⁸ This is consistent with paragraph 38 of AG Wahl’s opinion in *Coty Germany*, which, having identified the Court of Justice’s case law on selective distribution, noted this applied only where the measures were ‘essential’.

⁴¹⁹ *Guidelines on Vertical Restraints* paragraph 154.

⁴²⁰ Written Representations, paragraphs 65 to 71, URN A0921.2.

⁴²¹ Written Representations, paragraph 62, URN A0921.2.

⁴²² Written Representations, paragraph 136, URN A0921.2, Ping also submitted that the CMA ‘should have considered the Internet Policy in the context of PING’s Custom Fitting Policy. If it had done so, it would have found for the reasons set out at paragraphs 63-84 [of Written Representations] above that the Internet Policy is simply a corollary of the Custom Fitting Policy’. See also Written Representations paragraphs 3.b.i, 64 and 106. Furthermore, Ping submits that the ‘Internet Policy was not pursued in isolation or for some nefarious competition purpose but was always part of the Custom Fitting policy. The point was simply that in a (then) new world of e-commerce there was a need to adapt Internet sales to reflect the Custom Fitting policy.’ Written Representations, paragraph 73, URN A0921.2.

At one stage during the Oral Hearing, Ping’s representative framed the objective as being one of ensuring custom fitting. Oral Hearing Transcript, page 62, lines 3 and 4, URN A0952.1. Oral Hearing Transcript, page 52,

Penalty Statement Written Representations, Ping stated that the aim of the Online Sales Ban is the '*legitimate aim of maximising custom fitting of its clubs*'.⁴²³

- 4.85. Ping acknowledged at the Oral Hearing that its Online Sales Ban may restrict competition, but submitted that where such a restriction pursued a legitimate aim this could be justified. Ping's Counsel told the CMA:⁴²⁴

'So, to be clear, we do say - we do not shy from this - that if there is a legitimate aim there may well be in that context some restrictions on intra- and inter-brand competition, there may well be in that context if it is an internet sales restriction, some restriction on passive selling, but if there is a legitimate aim it essentially trumps all of that and there cannot be an object [infringement] if overall seen in context there is a legitimate aim'.

- 4.86. In particular, Ping submitted that '*the object of the Internet Policy is to promote face-to-face individual Custom Fitting, which is pro-competitive because it increases club quality and consumer choice, all of which foster inter-brand competition*'.⁴²⁵ To support that submission Ping submitted evidence that a Custom Fitting produces an improved product for consumers, in that a consumer who has a golf club tailored to their individual specifications will play better golf.⁴²⁶ Ping submitted that the long-standing '*Custom Fitting policy predates the Internet Policy*',⁴²⁷ and that this was

lines 8 to 12, URN A0952.1. However, this goes further than the remainder of its submissions which refer to promoting or maximising the use of customs fitting. Moreover, the CMA finds that Ping's Internet Policy is incapable of ensuring that Customs Fitting takes place: as described in paragraph 3.26, there is no contractual requirement that Ping golf clubs are sold only after a face to face Custom Fitting.

⁴²³ Paragraph 16, page 5, Draft Penalty Statement Written Representations, URN A0963.2. See also paragraph 5, 6, 22 and 44 of the same document.

⁴²⁴ Oral Hearing Transcript, page 34, lines 10 to 15, URN A0952.1.

⁴²⁵ Written Representations, paragraph 3.b.i., URN A0921.2. Ping submitted that the Online Sales Ban operates to achieve that promotion by requiring a consumer to purchase Ping golf clubs from an Account Holder either in-store, or by telephone, where the Account Holder has agreed to offer a Custom Fitting service and had agreed to '*strongly recommend*', '*be proactive*' and '*do everything reasonable to persuade the consumer of the benefits of Dynamic face-to-face Custom fit*'. (Clause 12 Internet Policy and Clause 13 Dynamic Face-to-face Custom Fitting Policy as reproduced in paragraph 32 and 33 of Written Representations.)

⁴²⁶ Written Representations, paragraph 138, URN A0921.2 '*PING's Internet Policy (as part of its overall Custom Fitting Policy) promotes competition by allowing it to offer technically superior clubs to those of its competitors, thereby increasing consumer choice*'. See also Written Representations, paragraphs 25 and 26, [3<], Oral Hearing Transcript, page 65 lines 23-25, page 66 lines 1-9 and 22 – 25 and page 67 lines 1 – 2, and [3<] statement, paragraphs 11, 18 – 20 and 30 and [3<], Oral Hearing Transcript, page 28 lines 11 - 12 and 17, and page 29 lines 2 – 3. These points are broadly supported by available evidence of customers' views, which agreed that Custom Fitting could significantly improve their game, eg US Golf Datatech Study, p 92 or SMS' report submitted by Ping shows that [70-80]% of surveyed UK golfers consider custom fitting for irons as important or very important (November 2016, p.14).

⁴²⁷ Oral Hearing Transcript, page 35, lines 16 to 18, URN A0952.1.

reflected in the contemporaneous documents and *'has been a consistent, clear and unambiguous communication at all times'*.⁴²⁸

- 4.87. Ping submitted that the Internet Policy was *'tightly tailored'* to achieving its objective of selling Custom Fit Clubs, and did not prohibit the sale of Ping Soft Goods, nor the advertising of golf clubs and their respective prices online.⁴²⁹ Ping further submitted that *'the internet ban is one of the strongest messages that we can send to the consumer that they should be custom-fitted, and if that in any way is weakened and fewer people are custom-fitted, that cannot be a good thing for the consumer.'*⁴³⁰ Ping acknowledged that despite the benefits to consumers of being fitted, and the promotion efforts of its Account Holders, some consumers choose not to undertake a Custom Fitting before purchasing Ping golf clubs; and that Account Holders were able to sell Ping golf clubs to those consumers.⁴³¹

(ii) *Brand image*

- 4.88. Ping also submits that it *'has built its brand image as a manufacturer which sells customised clubs'*⁴³² which *'adds to the prestige of PING's brand in the UK/EU'*⁴³³ and that a legitimate aim⁴³⁴ of the Online Sales Ban, was as reflected in the Terms and Conditions of Sale *'to protect the PING brand'*. Ping submitted that the risk of a consumer buying incorrectly fitted clubs from an internet purchase is high, stating:

⁴²⁸ Oral Hearing Transcript, page 36, line 17 to 18, URN A0952.1. This is consistent with the explanation Ping's Managing Director gave to the CMA, that the Internet Policy is part of Ping's Custom Fitting policy and the Custom Fitting policy came first: *'I would say that the Internet policy is part of our custom fit policy... what came first is our custom fit policy or our custom fit philosophy in policies. What came after was the Internet policy to support custom fittings so it came about in that sequence not the other way round'*, Transcript of interview with the Managing Director dated 10 March 2016, page 87, URN A0863.

⁴²⁹ Written Representations, paragraph 35, URN A0921.2.

⁴³⁰ Oral Hearing Transcript, paragraph 63 lines 14 to 17. See also, Oral Hearing Transcript, page 7, lines 16 to 21. See, also Presentation by Ping at the State of Play Meeting held on 17 December 2015, slide 5 URN A0826 which states: *'Ping is certain that not allowing Ping Clubs to be sold directly on the internet sends out the strongest possible message to the consumer that everyone should be face-to face dynamically custom-fitted before they purchase.'*

⁴³¹ Ping told the CMA it was on a 'journey': *'In an ideal world, we would like everybody to be 100 per cent custom-fitted. So, it is part of the process of educating all of the consumers to think like that, because it is in their best interests... All of that anecdotal evidence suggests to us that the demand from the consumer to be custom-fitted is something that is increasing'*, Oral Hearing Transcript, paragraph 51, lines 11 to 22, URN A0952.1.

⁴³² Written Representations, paragraph 146, URN A0921.2

⁴³³ Written Representations, paragraph 86, URN A0921.2. See also paragraph 3.a *'Custom fitting is at the core of what the company offers: it combines world-class hardware with the expertise of an individual, face-to-face fitting process conducted at the retail level. PING simply does not wish to sell non-customised clubs (ie hardware without a fitting process) because to do so would result in an inferior product being placed in consumers' hands, which in turn would adversely affect PING's reputation and brand.'*

⁴³⁴ Ping submit *'there can be no serious doubt that (i) PING has a genuine and long-standing commitment to Custom Fitting; and (ii) customisation is central to PING's brand and the golf clubs it sells'*, (Written Representations, paragraph 13) suggesting *'it is a long-term investment in reputation and a form of branding that has borne clear dividends'* (Oral Hearing Transcript, page 57, line 12, URN A0952.1).

*'the purchase of incorrectly fitted clubs would also be detrimental to PING as the consumer would be unhappy with the brand and unlikely to purchase PING again in the future. PING's reputation and brand image, as the leading manufacturer of custom fit clubs, would be irreparably damaged. PING only wants to sell custom fit clubs'.*⁴³⁵

(iii) *Free riding*

4.89. Ping submitted that the Online Sales Ban enables it to resolve a 'free rider' problem in terms of ensuring that its Account Holders have appropriate incentives to invest in Custom Fitting and that it would not be commercially sustainable for Account Holders to make investments in equipment and facilities if a potential customer could obtain a Custom Fitting in a bricks and mortar store and then order the same clubs online. Ping submitted *'the system would very quickly collapse without some incentivisation for the retailers who make the effort to try to secure the sale'*.⁴³⁶

4.90. Ping submitted that it, and its Account Holders, make substantial investments in Custom Fitting which would not take place without the Online Sales Ban:⁴³⁷

'the reason why there needs to be integrity of custom-fitting and the Internet Policy is that you can very well see the free-rider issue, because if I have invested in all of this equipment, if I have given up an hour of my time to fit that consumer, then he or she can take away the specifications and get them from a retailer who has done nothing, very quickly the whole thing collapses.'

4.91. Ping submitted that it makes significant investment in supporting the provision of Custom Fitting services by Account Holders.⁴³⁸

⁴³⁵ Written Representations, paragraph 173, URN A0921.2. Ping told the CMA this was supported by evidence from Account Holders, and identified the following evidence as referred to in the SO: *'It is very important for the customer to be able to purchase the right club for their needs and they would be able to do this with a custom fitting, if a customer did not do this they may purchase a club which was not suitable for their needs and believe that the PING brand was rubbish but actually the club was not suitable for their needs.'* Note of CMA call with [Account Holder] (18 November 2015), document A190003, and transcript of interview with the Managing Director dated 10 March 2016, (A0863, p.85 (lines 9-22); *'... the ban on internet trading has an impact ... that more and more customers are face to face custom fitted than would be otherwise and so it's a positive thing to PING. I think we've said that probably in the short term if we didn't have the ban there may be an increase in sales to PING but in the long term there'd probably be a decrease in sales to PING and be detrimental to the brand because more consumers wouldn't be custom fitted therefore more consumers would have the risk of having clubs that are not right for them. Therefore, the consumer's game would be impacted. Therefore, their satisfaction in their clubs and the PING brand would be impacted.'*

⁴³⁶ Oral Hearing Transcript, page 47, lines 16 and 17, URN A0952.1.

⁴³⁷ Oral Hearing Transcript, page 47, lines 8-12, URN A0952.1.

⁴³⁸ Oral Hearing Transcript, page 68, lines 23-25 and page 69, lines 1-2, URN A0952.1, see also paragraphs 175 and 176 of Written Representations where it lists the investments it makes in its Fitting Centre, demo days, training courses for consumers, Advanced Fitting System clubs and training for Account Holders.

4.92. Ping has identified the following types of investment by Account Holders in Custom Fitting (see paragraph 3.71 for more detail):

- Custom Fitting might take from 30 to 90 minutes and Account Holders will need to employ staff, including assistant golf professionals, and invest in time (including training time for staff) to provide these services.⁴³⁹
- Investments in Custom Fitting facilities, eg special studios or fitting academies with golf simulators.⁴⁴⁰ Ping estimates that such investments might range from a few thousand pounds to convert an existing area to £100,000 or more for a new building or extension.⁴⁴¹
- Investments in Custom Fitting equipment, such as TrackMan and launch monitors.⁴⁴² Ping estimates that these investments can range from around £5,000 for a basic CG2 monitor to around £17,500 for a standard Trackman monitor.⁴⁴³

b. Assessment of Ping's submissions on objective justification

4.93. For the reasons set out below the CMA finds that the Online Sales Ban contained within the Agreements is not objectively justified in the context of its selective distribution network.⁴⁴⁴

4.94. The Court of Justice in *Pierre Fabre* held that the online sales ban in that case amounted to a restriction by object unless it was objectively justified. However, the Court of Justice's '*points of interpretation*' for the referring court are set out only in very brief terms, stating at paragraph 43 that the test was whether the restrictions of competition resulting from the ban '*pursue legitimate aims in a proportionate manner.*'

4.95. The CMA has applied the principle of proportionality, using the framework laid down by the Court of Justice in *Fedesa* quoted in paragraph 4.42 above. In a competition law context Roth J has observed that '*proportionality is*

⁴³⁹ Oral Hearing Transcript, page 70, lines 8 – 15, URN A0952.1.

⁴⁴⁰ Oral Hearing Transcript, page 70, lines 15 – 17, URN A0952.1.

⁴⁴¹ Ping's response to the letter from CMA dated 3 November 2016, page 4, URN A0949.2.

⁴⁴² Oral Hearing Transcript, page 70, lines 17 – 19, URN A0952.1.

⁴⁴³ Ping's response to the letter from CMA dated 3 November 2016, pages 4 – 5, URN A0949.2.

⁴⁴⁴ The CMA has not prioritised an investigation into Ping's selective distribution system. In assessing Ping's representations, the CMA is therefore proceeding on the basis that Ping Custom Fit Clubs are the type of high-quality product which could in principle necessitate the adoption of a selective distribution network, and that the criteria Ping has adopted could in principle be objective and qualitative and applied without discrimination uniformly for all potential resellers (see *Pierre Fabre*, paragraph 43). The CMA's analysis focuses on whether the Online Sales Ban is a necessary and proportionate restriction in the context of such a system of selective distribution.

*inherently a matter of fact and degree.*⁴⁴⁵ More generally, in *R (Lumsdon) v Legal Services Board*⁴⁴⁶ Lord Reed and Lord Toulson (with whom Lord Neuberger, Lady Hale and Lord Clarke agreed) explained that:⁴⁴⁷

‘Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa (Case C-331/88) [1990] ECR I-4023.’

4.96. In light of the jurisprudence of the Court of Justice and domestic courts,⁴⁴⁸ the CMA has assessed the following four questions:

- i. does the Online Sales Ban pursue a legitimate aim;⁴⁴⁹
- ii. is the Online Sales Ban suitable or appropriate to pursue any such legitimate aim;⁴⁵⁰
- iii. is the Online Sales Ban necessary to pursue that aim?⁴⁵¹ In particular:
 - are there realistic alternatives and, if so, are they suitable or appropriate to meet the legitimate aim in question?
 - are those alternatives less restrictive than the Online Sales Ban?

⁴⁴⁵ *Streetmap.EU v Google Inc* [2016] EWHC 253 (Ch), paragraph 149.

⁴⁴⁶ [2015] UKSC 41, paragraph 32.

⁴⁴⁷ *Lumsdon*, paragraph 33.

⁴⁴⁸ *Lumsdon*, paragraph 34.

⁴⁴⁹ See eg *R (British American Tobacco) v Secretary of State for Health* [2016] EWHC 1169 (Admin), paragraph 428.

⁴⁵⁰ This is consistent with the explanation in *Lumsdon*, albeit as set out above, the CMA considers it is helpful to split the ‘first question’ into two parts for transparency of its assessment.

⁴⁵¹ The exercise of assessing ‘whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method’ is sometimes carried out by reference to whether or not there are ‘equally effective’ alternatives, by which is meant ‘whether a less intrusive measure could have been used without unacceptably compromising the objective’: *Lumsdon*, paragraph 105.

- iv. is the Online Sales Ban proportionate *stricto sensu*, by which is meant whether the burden imposed by the Online Sales Ban is disproportionate to the benefits secured?⁴⁵²

4.97. The CMA has assessed Ping's submissions on objective justification based on: (i) promoting Custom Fitting/protecting Ping's brand image (at paragraphs 4.98 to 4.149 below) and (ii) addressing a free rider problem (at paragraphs 4.150 to 4.155 below) in turn below.

CMA's assessment of whether promoting Custom Fitting/protecting Ping's brand image, objectively justifies an Online Sales Ban

(i) Does the Online Sales Ban pursue a legitimate aim?

4.98. The CMA's findings are set out below in relation to the legitimate aims of promoting Custom Fitting and protecting Ping's brand image advanced by Ping in its submissions.

4.99. The CMA finds that Ping's aim to promote Custom Fitting is a genuinely held commercial concern, reflected in its contemporaneous documents and that Ping adopted the Internet Policy containing the Online Sales Ban to support its Custom Fitting Policy. The CMA's conclusion is that promoting a Custom Fitting service in the distribution of a high-quality or high-technology product, such as a Custom Fit Club, in principle, constitutes a legitimate aim.⁴⁵³ Moreover, the distribution of Ping Custom Fit Clubs could necessitate adopting an appropriate system of selective distribution.⁴⁵⁴ Systems of selective distribution, which require retailers to meet specified service and quality standards, are commonly adopted to achieve such an aim, including in the sale of Custom Fit Clubs and other sports equipment.

4.100. In *Pierre Fabre* the Court of Justice, when considering the adoption of a 'contractual clause ... prohibiting de facto all forms of internet selling',⁴⁵⁵ held, at paragraph 46, that '*the aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.*' In *Coty Germany*⁴⁵⁶ Advocate General Wahl

⁴⁵² See *Fedesa*, paragraph 13; *Tesco*, paragraph 143; *Lumsdon*, paragraph 55.

⁴⁵³ *Pierre Fabre*, paragraph 40, see also C-107/82, *AEG Telefunken v Commission*, EU:C:1983:293, paragraph 33, '*legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products*'.

⁴⁵⁴ The CMA has not in this investigation prioritised investigating whether all of the actual terms of the Ping system are necessary terms based on qualitative criteria, laid down uniformly for all potential resellers and not applied in a discriminatory fashion.

⁴⁵⁵ *Pierre Fabre*, paragraph 42.

⁴⁵⁶ *Coty Germany*, paragraphs 75-93.

considered paragraph 46 did not mean that selective distribution systems designed to preserve the brand image of the products must necessarily be caught by Article 101(1) TFEU. According to the Advocate General, the Court's conclusion that the aim of maintaining a prestigious image is not a legitimate aim for restricting competition should be understood in the context of a review of the proportionality of the clause at issue in *Pierre Fabre*.⁴⁵⁷ That is also the context in which the issue arises in the present case.

4.101. On the facts of the present case, Ping's representation that it has '*built its brand image as a manufacturer which sells customised clubs*' is inextricably linked with its aim of Account Holders promoting the Custom Fitting to consumers. The objective of preserving brand image is not said to be separable from Custom Fitting. Consequently, the question as to whether or not the aim of protecting Ping's brand image, as distinct from promoting Custom Fitting, is legitimate does not arise in this case.

(ii) *Is the Online Sales Ban suitable or appropriate to pursue any such legitimate aim of promoting Custom Fitting?*

4.102. The Online Sales Ban ensures that consumers can only buy in store or over the phone. This provides Account Holders with an opportunity to promote Custom Fitting in line with their contractual obligation to do so. However, the CMA finds that the Online Sales Ban is likely to have only a limited effect in increasing the proportion of customers having a face to face Custom Fitting, for the reasons set out below.

4.103. Ping submitted that the Online Sales Ban leads to more customers having a Custom Fitting than would be the case without the Online Sales Ban.⁴⁵⁸ Ping estimated that around [X]% of Ping's customers have a Custom Fitting before they purchase,⁴⁵⁹ and argued that this figure is '*appreciably higher than the corresponding figure for custom fitting for all brands set out in the SMS survey*', and that '*Ping Europe's levels of custom-fitting far exceed those of other manufacturers*'.⁴⁶⁰

⁴⁵⁷ *Coty Germany*, paragraph 83.

⁴⁵⁸ Written Representations, paragraphs 81 – 82, URN A0921.2.

⁴⁵⁹ Ping's response to question 4 of the CMA's section 26 notice dated 21 December 2016, paragraph 12, URN A0953.1.

⁴⁶⁰ Ping's response to the letter from CMA dated 3 November 2016, page 8, URN A0949.2.

- 4.104. Ping contrasted this [X]<] % figure with the [70-80] % of respondents to the SMS Survey Results Extract who consider Custom Fitting of any brand of club to be 'important' or 'very important'.⁴⁶¹ It noted that:⁴⁶²

'Ping infers [...] that such customers are likely to be custom-fitted. [...] Given that Ping considers itself to be the market leader in custom-fitting it is unsurprising that there is a difference between the general rate of custom fitting for all clubs (extrapolated from the responses provided to the SMS survey) and the fitting rate for Ping clubs. This shows that Ping's commitment to custom-fitting materially exceeds that of any other manufacturer. This in turn shows why its Internet Policy is justified.'

- 4.105. The CMA considers that there is considerable uncertainty about the reliability of these estimates, and whether the [X]<] % estimate for Ping's customers is comparable with the [70-80] % estimate for all other brands. The factors discussed below indicate that it is difficult to quantify accurately the magnitude of any increase in the number of Ping's customers who undergo a Custom Fitting as a result of the Online Sales Ban.
- 4.106. Ping's estimate that [X]<] % of its customers have had a face to face Custom Fitting before purchase is based on its Account Holders' estimates. The accuracy of these estimates have not been verified by Ping. The evidence the CMA has received directly from Account Holders is that not all of them maintain detailed records on the proportion of their customers that have a Custom Fitting before purchase.⁴⁶³ Of the two Account Holders which had kept contemporaneous records and provided data for 2015 to the CMA, the records showed that 43% of Ping clubs were sold by [Account Holder] with a Custom Fitting and 33% by [Account Holder 2].⁴⁶⁴ This casts doubt on the

⁴⁶¹ Ping's response to question 11 of the CMA's section 26 notice dated 21 December 2016, paragraph 28, URN A0953.1.

⁴⁶² Ping's response to question 11 of the CMA's section 26 notice dated 21 December 2016, paragraph 28, URN A0953.1.

⁴⁶³ Ping submits that [Account Holder 1] estimates that [X]<] % of their customers have a Custom Fitting (see Amended annex 1 to Ping's response to the CMA section 26 notice dated 21 December 2016, URN A0953.2). However, in response to a CMA section 26 notice dated 9 February 2016, to Ping's top four Account Holders (by volume) seeking data the total sales of golf clubs (by value and by volume) in relation to (i) standard fit (clubs where no static fit – ie over the phone or website - or dynamic fit – ie face to face fitting is undertaken), (ii) static fit, and (iii) dynamic face to face fit for 2012- 2015, two provided this data (see [Account Holder] response to section 26 notice dated 9 February 2016, URN [X]<] and [Account Holder] response section 26 notice dated 9 February 2016, URN [X]<]) and two indicated that they did not keep records of whether golf clubs had been Custom Fitted before a sale was made ([Account Holder 1] and [Account Holder]). This was also confirmed by [Account Holder 1] who told the CMA that it does not hold records recording whether customers have a Custom Fitting (see note of call with [Account Holder 1] on 18 May 2016, paragraph 9), URN [X]<]. [Account Holder] informed the CMA that its till system does not allow it to record avenues of sales (ie specifically whether the club was sold after a Custom Fitting), call note of 10 February 2016, URN [X]<].

⁴⁶⁴ See also paragraph 3.46 and data referred to in that paragraph.

robustness of the [30-40]% estimate which Ping submitted was provided to it by its Account Holders in good faith.⁴⁶⁵

4.107. The reliability of the ‘corresponding’ [70–80]% figure for other brands submitted by Ping is also questionable:

- The figure refers to respondents’ views about the importance of the Custom Fitting of irons.⁴⁶⁶ Respondents’ views about the importance of Custom Fitting may not be a good proxy for the proportion of customers who have a Custom Fitting prior to purchasing. The respondents who said that Custom Fitting was important may not have been through a Custom Fitting process for each purchase of golf clubs they make. Similarly, the respondents’ views that Custom Fitting is less important do not automatically mean that they have not undergone a Custom Fitting.
- The SMS Survey Results Extract cited by Ping does not distinguish between brands or whether customisable options are offered in relation to some or all of their golf clubs.⁴⁶⁷ It is therefore likely to include some golf clubs which cannot be customised, thus, influencing the overall proportion of customers who had undertaken a Custom Fitting downwards.
- Other parts of the same SMS Survey Results Extract suggest different figures for the rate of Custom Fitting of other brands. For example, the SMS survey asked whether golfers had ever undergone a Custom Fitting for different types of golf clubs and provided an overall figure which indicated that [30-40]% of surveyed golfers had not. This suggests that [60-70]% of the surveyed golfers would have had a Custom Fitting at some point.⁴⁶⁸

4.108. Therefore, the magnitude of any difference in the proportion of customers who undergo a Custom Fitting between Ping and other Custom Fit golf club

⁴⁶⁵ See paragraph 27, Ping’s response to the Letter of Facts, URN A0992.1.

⁴⁶⁶ As referred to in paragraph 3.31.

⁴⁶⁷ For instance, the SMS Survey asked ‘*For which, if any of the following clubs have you been custom fitted?*’ with the following options to choose from: ‘Driver’, ‘Fairway wood(s)’, ‘Hybrid(s)’, ‘Irons’, ‘Wedge(s)’, ‘Putter’, and ‘None of these’; and ‘How important do you think it is to be custom fitted for the following clubs? (Please use a scale of 1-5 where 1 = not at all important and 5 = very important)’ with the following choice options: ‘Driver’, ‘Fairway wood(s)’, ‘Hybrid(s)’, ‘Irons’, ‘Wedge(s)’ and ‘Putter’, see Annex 2. ‘SMS INC 2015 End of Year Syndicated UK Questionnaire’ to the CMA’s section 26 notice dated 21 December 2016, pages 7 – 8, URN A0953.3.

⁴⁶⁸ SMS Survey Results Extract page 22, URN A0949.4. The proportion of golfers who have had a Custom Fitting differs by the type of golf club: of those surveyed [50-60]% had been custom fitted for irons, [30-40]% for a driver, [20-30]% for fairway woods, [20-30]% for wedges, [10-20% for hybrids and [10-20]% for a putter, SMS Survey Results Extract, pages 16 – 21, URN A0949.4.

brands cannot be quantified with any accuracy on the basis of the evidence provided.

- 4.109. Furthermore, even if Ping could establish that a higher number of its customers undergo a face to face Custom Fitting than other Custom Fit Club brands, Ping has not shown that this is a result of the Online Sales Ban. Ping has not provided evidence to substantiate what additional proportion of its consumers who have a Custom Fitting have been led to do so as a result of the Online Sales Ban.⁴⁶⁹
- 4.110. Aside from the Online Sales Ban, several factors are likely to influence a customer's decision to undergo a Custom Fitting, including the quality of Ping's Custom Fit Clubs, the investments that it makes in advertising, the benefits of Custom Fitting, its reputation for Custom Fitting and the information provided to consumers.⁴⁷⁰ These factors would continue to exist in the absence of the Online Sales Ban.
- 4.111. The Online Sales Ban does not require that a Custom Fitting takes place prior to a sale being completed; at most it provides an opportunity for a conversation⁴⁷¹ during which Account Holders can promote the benefits of Custom Fitting and seek to persuade consumers to have a Custom Fitting.
- 4.112. The CMA finds that there are factors other than the Online Sales Ban which lead consumers to undergo a Custom Fitting. This is indicated by the following:
- A significant proportion of Ping's golf clubs are purchased without a Custom Fitting despite the Online Sales Ban (paragraph 4.103).^{472,473}

⁴⁶⁹ Written Representations, paragraph 81, URN A0921.2. Ping submitted '*more Customers are face to face fitted than would be otherwise*'. The CMA notes Ping submitted evidence that in the USA, where Ping Inc. allows online sales, the Ping brand is considered the market leader in custom fitting (Written Representations, paragraph 159, page 8 of the 2015 US Golf Datatech Report.

⁴⁷⁰ Transcript of interview with the European Sales Director dated 9 March 2016, URN A0864, page 8, Transcript of interview with the Managing Director dated 10 March 2016, URN A0863, page 11, lines 9 to 17, '*So primarily I would say the biggest use of the Internet for us is for us to... we use it as an informative tool for our consumers. I would say that's the biggest use, so they, consumers can go on and find out what the latest products are. You'll find all kinds of things on there about PING's tour players; world-wide tour programme, you'll find huge amounts of time and videos spent on explaining custom fitting and why people should be custom fit; and all of the new - describing in detail all of the new- products and everything. So I would say first and foremost, it is an informative tool for the consumer.*'

⁴⁷¹ As set out in the Internet Policy, see paragraph 4.46. See also paragraphs 3.118 to 3.119 regarding Ping's reasons for permitting telephone sales.

⁴⁷² See also paragraph 3.46 based on the data provided by two of Ping's largest, [Account Holder] and [Account Holder] and may not be fully representative of the whole market. Data supplied for 2015 indicated that 57% of Ping clubs sold by [Account Holder] were done so without a Custom Fitting and 67% of Ping golf clubs sold by [Account Holder] were sold with no Custom Fitting.

⁴⁷³ This is consistent with Ping's statement that it is still '*on a journey*' to have 100% of its customers custom fitted before they buy, see Oral Hearing Transcript, page, 7 lines 9 – 10, URN A0952.1.

Ping acknowledges that not all consumers will choose to take up the service when it is promoted to them;⁴⁷⁴

- A significant proportion of other manufacturers' clubs are purchased after a Custom Fitting despite being available online (paragraphs 3.33 and 4.104);⁴⁷⁵
- The take-up of Custom Fitting is actively promoted by other manufacturers, without them having an online sales ban.⁴⁷⁶

4.113. Overall, whilst the CMA accepts that the Online Sales Ban is a suitable means to promote Custom Fitting, it is likely to have only a limited effect in increasing the rate of Custom Fitting by Ping's Account Holders. However, the Online Sales Ban may also lead to an increase in consumers visiting a bricks and mortar store where they do not wish or need to do so (see paragraph 4.70).

(iii) Is the Online Sales Ban necessary to pursue the aim of promoting Custom Fitting?

Are there realistic alternatives to the Online Sales Ban, and if so, are they suitable or appropriate to meet the legitimate aim of promoting Custom Fitting?

4.114. In the context of Ping's selective distribution system, the CMA finds that the Online Sales Ban is not necessary to achieve its aims, as Ping has realistic alternatives which, in the absence of any evidence to the contrary from Ping, are suitable and appropriate to achieve its aim of promoting Custom Fitting, whilst being less restrictive because customers may purchase Custom Fit Clubs online.⁴⁷⁷

4.115. As set out in paragraph 4.43 the evidential burden of demonstrating the Online Sales Ban is justified rests on Ping. Ping had not made out such a case when submitting its Online Sales Ban was objectively justified in its Written Representations and did not provide evidence that less restrictive

⁴⁷⁴ The CMA considers that there may be a variety of reasons why a consumer may choose not to have a Custom Fitting by an Account Holder - they may have been previously fitted for their Ping clubs or as part of a multi-brand fitting; they may be purchasing a replacement club; or the customer may be filling in gaps in a set of irons for which they were previously fitted; or the consumer may simply not wish to commit the time to a Custom Fitting prior to purchase.

⁴⁷⁵ See also paragraph 3.46. However, this is only based on the data provided by [X], [Account Holder] and [Account Holder], and may not, therefore, be fully representative of the whole market.

⁴⁷⁶ See paragraph 3.34.

⁴⁷⁷ As set out in paragraphs 2.10 to 2.19, Ping was given an opportunity to make written and oral representations on whether there were alternative measures available to it to pursue its aims. Ping declined to respond.

alternative measures to promote Custom Fitting were not available to it, despite being specifically invited to do so.⁴⁷⁸

- 4.116. Nevertheless, in the absence of evidence from Ping, the CMA has considered whether there are realistic alternative measures available to enable Ping to promote Custom Fitting without prohibiting online sales.
- 4.117. The CMA considers that the main alternative to the Online Sales Ban is to permit Account Holders to sell online if an Account Holder can demonstrate its ability to promote Custom Fitting in the online sales channel. Permitting certain Account Holders to sell online would be an amendment to Ping's current selective distribution criteria ie it is assumed that Ping would continue to require all Account Holders to offer Custom Fitting and facilities from bricks and mortar premises.
- 4.118. Ping Inc. explained to the CMA that it only allows certain US online retailers to sell online if they can demonstrate that they meet certain additional requirements which demonstrate that they are committed to promoting Custom Fitting (see paragraph 3.125). Furthermore, Ping already operates a similar system in relation to the sale of Soft Goods in the UK, ie Account Holders apply to become Internet Account Holders and Ping's Internet Monitor conducts a review of their websites including an assessment of the quality of the website. A similar process could be adopted to ensure that Account Holders have a suitable website to supply consumers with the full range of Custom Fit options available in relation to each type of Ping golf club.
- 4.119. In the following paragraphs we describe additional conditions which Ping could include in its selective distribution criteria to authorise its Account Holders to sell online.⁴⁷⁹
- 4.120. **Additional condition (i) - promotion of Custom Fitting online:** Ping could require Account Holders which it permits to sell online to promote Custom Fitting in much the same way as Ping requires them to do so when selling in bricks and mortar stores or by telephone. In order to be accepted as an internet retailer to sell Custom Fit Clubs online, Ping could include a contractual requirement that such Account Holders must promote Custom Fitting services online by displaying a prominent and clear advisory notice

⁴⁷⁸ Ping explained: 'It bears emphasis in this connection that Ping Europe Limited has operated its business, and the custom-fitting and internet policies, for decades now. It genuinely does not see any equally effective and proportionate alternative that would reconcile the various objectives; if it did, it would have implemented it.' Letter from Ping to the CMA dated 7 December 2016, URN A0950.1.

⁴⁷⁹ This is not an exhaustive list; these are illustrative examples of the way in which Ping could promote Custom Fitting without the Online Sales Ban.

strongly recommending (promoting) that consumers take advantage of a Custom Fitting service to achieve the potential benefits of Ping Custom Fit Clubs before each purchase.

- 4.121. A number of Ping's Account Holders who sell other manufacturers' golf clubs online, already take steps to promote Custom Fitting, eg offering a link to book a free Custom Fitting session alongside their online offering. See for example, [Account Holder 1] interactive button to click to [X] before purchasing.⁴⁸⁰

[X]

- 4.122. Furthermore, some Account Holders already pro-actively promote the benefits of Custom Fitting to consumers online on their websites. In the below example [Account Holder] promotes its Custom Fitting services, describes the advantages of Custom Fitting to all golfers, sets out the packages and costs, and promotes the brands for which it is an approved custom fitter, identifying the competing brands a consumer could be fit for and select from in a session.⁴⁸¹

[X]

[X]

- 4.123. As the examples of [Account Holder 1] and [Account Holder] websites demonstrate, Account Holders that sell other brands of Custom Fit Clubs online already have websites which promote Custom Fitting. Ping could require Account Holders which it approves to sell its golf clubs online to promote Custom Fitting on their websites and particularly on each page listing Ping golf clubs for sale online. These examples demonstrate that such an additional condition is realistic, would not be too onerous, and could be implemented in practice.
- 4.124. In considering whether this approach would be effective in promoting Custom Fitting, the CMA has had regard to Ping's evidence that Custom Fitting is increasingly popular across all brands in the market and is something consumers increasingly want and are receptive to.⁴⁸² Ping has identified the golfing press has recognised the benefits of Custom Fitting

⁴⁸⁰ Screen shot of [Account Holder 1] website, URN A280066.

⁴⁸¹ [Account Holder], on its transactional website promotes the benefits of the Custom Fitting service it offers, URN A280024. See URN A280068 for a screenshot taken in June 2017 which is consistent. See also paragraph 3.37 above which contains examples of the online statements made by retailers selling Custom Fit Clubs online.

⁴⁸² See paragraphs 3.16 to 3.17 and paragraphs 3.28 to 3.39 regarding Custom Fit golf club manufacturers' and retailers' public statements regarding the benefits of custom fitting.

before purchasing a golf club and promote that message to consumers.⁴⁸³ This option would build upon Ping's and the retailers' existing efforts to promote Custom Fitting, specifically on Account Holders' websites.

- 4.125. **Additional condition (ii) that approved internet retailers' websites provide customers with all available Custom Fit options:** Ping submitted to the CMA that certain of its Account Holders (specifically [Account Holder 1]) do not have transactional websites which would provide consumers with all of the potential Ping Custom Fit options.⁴⁸⁴ However, Ping could determine that only Account Holders with an appropriate website with drop-down boxes providing a certain range of relevant Ping Custom Fit options would meet its quality standards. It would then be for Account Holders to assess whether this was an investment that they wished to make in order to be able to sell Ping Custom Fit Clubs online, see for example, [Account Holder] website in relation to Callaway Apex Pro 16 set of irons:⁴⁸⁵

[REDACTED]

- 4.126. Ping submitted that [REDACTED].⁴⁸⁶ The CMA refutes this submission and notes that a retailer with a transactional website could potentially list different Ping customisation variables with six or more 'Product Options' with drop down boxes.
- 4.127. The CMA notes that Ping Inc. allows its AIRs to sell online in the US and that, for example, [REDACTED] (see paragraph 4.75) offers customisation in relation to flex only. By way of further example, see:⁴⁸⁷

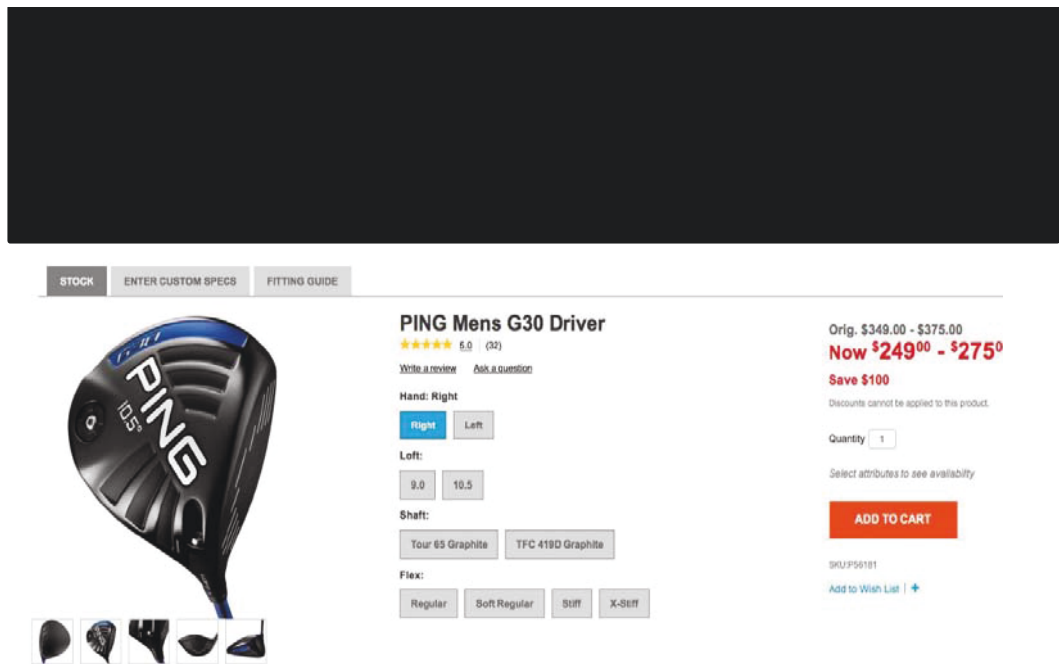
⁴⁸³ See Section 3 *Benefits of Custom Fitting*, in particular what Ping told the CMA in paragraph 3.36.

⁴⁸⁴ Ping's response to the Letter of Facts, paragraphs 18 to 21, URN A0992.1.

⁴⁸⁵ [Account Holder] screenshot, URN A280068. Ping states that there are '*only six custom-fitting variables*' in relation to this club in its response to the Letter of Facts, paragraph 22, URN A0992.1. However, these options, as available at the time on [Account Holder's] website, generate some 178,560 different variables for this one type of club.

⁴⁸⁶ See response to the Letter of Facts, paragraphs 18 to 23, URN A0992.1.

⁴⁸⁷ Screenshot of [Account Holder], Ping G30 Driver for sale online with consumer selectable options, URN A280079; see also screenshots of other US AIR's URN A280070, A280071, A280072, A280073, A280074, A280075, and A280080.



- 4.128. As explained in paragraphs 3.48 to 3.49, in order to be able to supply customers with Custom Fit Clubs ‘off the shelf’, retailers told the CMA that they purchase Custom Fit Clubs (which these retailers describe as classic, standard or regular custom fit variables) from Ping in order to have stock which suits a proportion of consumers. The retailer may be able to fulfil the online order immediately from such stock where the options selected by the customer fall within that range. Where this is not possible and the retailer needs to place an order directly with Ping, it could include an explanation on its website that such Custom Fit options might affect delivery times. [Account Holder] website carries such a message on its website in relation to other Custom Fit brands its supplies.⁴⁸⁸
- 4.129. **Additional condition (iii) that approved internet retailers’ websites must have online interactive features which provide an opportunity for personal advice:** An Account Holder approved to sell online could be contractually required to incorporate specified pre-purchase promotion of Custom Fitting. This could include, in the words of the Court of Justice, a requirement that the promotion/advice be provided by means of ‘*on-line interactive features*’. Such features might include the provision of ‘live-chat’ technology to promote Custom Fitting – requiring Account Holders to sell online only if they can offer consumers an opportunity for a personal conversation to take place online before completing an online transaction.

⁴⁸⁸ See [Account Holder] screenshots, URN A280068 (after paragraph 4.125 above).

- 4.130. The provision of ‘live-chat’ technology is already adopted by some Account Holders who sell Custom Fit Clubs supplied by Ping’s competitors. See, for example, [Account Holder] transactional website which has the ‘*Chat with us now*’ live chat option:⁴⁸⁹

[✂]

- 4.131. This option would reflect the contractual requirement Ping already has with its Account Holders to promote Custom Fitting in-store and in transactions by telephone.⁴⁹⁰ Ping considers that requiring a consumer to ‘Call to order’ provides an opportunity for a personal conversation to take place whereby a retailer can explain the benefits of Custom Fitting. A live chat option would promote Custom Fitting online as it provides an opportunity for a consumer to choose to have a personal conversation during which the benefits of Custom Fitting can be promoted, notwithstanding that the consumer may not choose to follow the advice given.
- 4.132. **Additional condition (iv) that approved internet retailers’ websites must have a mandatory tick-box for consumers to confirm that they understand the importance of Custom Fitting:** Ping could contractually require that to allow an Account Holders to sell online it should incorporate a tick-box feature to confirm that the consumer understands the benefits of Custom Fitting and the ‘risks’ of purchasing without having a Custom Fitting before being able to purchase Ping golf clubs.⁴⁹¹ Whilst the CMA is not aware of this approach having been adopted by retailers of other brands of Custom Fit Clubs which sell online, these mechanisms are frequently used in other online contexts.⁴⁹² That Ping may wish to do more to require its Account Holders to ‘promote’ Custom Fitting than other golf club manufacturers would reflect the special value Ping places on Custom Fitting.
- 4.133. The Court of Justice in *Pierre Fabre* identified that in previous judgments it had not ‘*accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales the issues which arose in choosing the correct*

⁴⁸⁹ [Account Holder] website screenshot, URN A280078.

⁴⁹⁰ The Internet Policy contains the following statement: ‘*Ping Europe wants to promote the opportunity for a personal conversation to take place between the Account Holder and the consumer before the purchasing decision, so that the Account Holder can explain the benefits of PING custom fitting and strongly recommend that a dynamic face-to-face custom fitting appointment be arranged.*’

⁴⁹¹ The risks might also include pointing out the consumers’ limited rights to return a personalised or custom-made product.

⁴⁹² See paragraph 4.134 below.

medicine or the risks in having the wrong contact lens.' In those cases the Court of Justice gave hypothetical examples of alternatives:⁴⁹³

- In *Ker-Optika*⁴⁹⁴: *'customers can be advised, in the same way [as in store], before the supply of contact lenses, as part of the process of selling the lenses via the Internet, by means of the interactive features on the Internet site concerned, the use of which by the customer must be mandatory before he can proceed to purchase the lenses.'*
- In *Apothekerverband*⁴⁹⁵ identifying that *'the risk thereof [choosing an incorrect non-prescription medicine] can be reduced through an increase in the number of on-line interactive features, which the customer must use before being able to proceed to a purchase.'*

4.134. By way of an illustrative example, adopting the CJEU's example of eyewear, the CMA is aware that some online spectacle retailers require a consumer to choose from customisable options, use interactive features, including the provision of information through hyperlinks or support through the telephone or email, and have a 'tick-box' feature before a consumer can complete a purchase, in order to emphasise the importance of a recent fitting/prescription.⁴⁹⁶

⁴⁹³ At the Oral Hearing members of the CDG asked Ping whether adopting a similar 'prescription' approach would achieve Ping's aims (Oral Hearing Transcript, 48-49 and 63, URN A0952.1). In such a case, like the optician case referred to by the CJEU, a consumer could receive a face to face Custom Fitting and receive their recommendation or 'prescription' from the Ping/PGA fitter of their choice. Having been fitted, the consumer could take that 'prescription' to any of Ping's Account Holders approved retailers, either in person or online, to make a purchase. At the Oral hearing, Ping's Counsel said such an approach would require micro-management, lead to free-riding, and that to disaggregate in this way would be practically unworkable (Oral Hearing Transcript, page 48 and 65, URN A0952.1).

⁴⁹⁴ Case -108/09, *Ker-Optika*, EU:C:2010:725, paragraph 69.

⁴⁹⁵ Case C-322/01 *Deutscher Apothekerverband* EU:C:2003:664, paragraph 114.

⁴⁹⁶ Example of a 'virtual dispenser' on [an online spectacle retailer's] website, URN A280067.

Virtual Dispenser

Summary & Progress

1. Your Vision
Distance (Single Vision)
[Change](#)

2. Prescription

3. Lenses & Tints

2. Your prescription details

Sub-Total: £256.90

Add Your Prescription

Use Saved Prescription

Send Prescription Later

2.1 Add your prescription

Add your prescription to receive a recommendation for the best lens for your needs.

	Sphere (SPH)	Cylinder (CYL)	Axis
OD - Right Eye	NONE	NONE	NONE
OS - Left Eye	NONE	NONE	NONE

Please ensure correct entry of '+' or '-' values on SPH & CYL powers. [More information about prescriptions](#)

☐ Add a prism

Want us to verify your prescription? [Attach prescription](#) or send it to us later (select tab above).

2.2 Additional Information

What's your Pupillary Distance? [What's this?](#) [I have a dual PD \(ie 32/32\)](#)

Prescription name (optional) [What's this?](#)

Need to add some additional information? [Click here](#)

☐ I confirm that my prescription is correct with the correct '+' and '-' SPH and CYL values, my prescription is not over 2 years old, I am over 16 years old, and that I'm neither registered blind or partially blind. I have read and I agree to the [Terms of Sale](#).

Next step - choose your lenses »

4.135. Ping submitted that this example, ‘takes its case against Ping nowhere’ because ‘The website offers a very limited number of variables and therefore cannot be seen as remotely comparable to a website selling a Ping golf club.’⁴⁹⁷ The CMA notes that even with a pair of single vision glasses there are three prescription options for each eye leading to a huge number of

⁴⁹⁷ Ping’s response to the Letter of Facts, paragraph 25, URN A0992.1.

different options: Sphere has 130 drop down box options; Cylinder has 52 drop down box options and Axis has 181 drop down boxes). Varifocal and bi-focal lenses would have additional prescription options. The CMA also considers that the comparison with the online sale of spectacles is pertinent because this is a product which requires a fitting to be conducted by a qualified professional and a customer to have an up to date prescription before purchasing. Notwithstanding the risks which a consumer would face if spectacles are not fitted perfectly (ie that a customer cannot see properly), it is still possible for the product to be sold online.

Conclusions on whether the Online Sales Ban is necessary to pursue the promotion of Custom Fitting

- 4.136. Ping submitted that examples of retailers providing alternative features on retailer websites such as allowing a Custom Fitting service to be booked on the website or offering a 'live chat' service do *'not prove that these features would be as effective as Ping's Internet Policy in maximising custom-fitting rates, nor that it would be feasible to require all online retailers to offer these services.'*⁴⁹⁸ The CMA notes that such an empirical exercise would be impossible since Ping has never permitted online sales of its clubs in the UK. Ping has not provided any evidence to support its argument that it would not be feasible to require all Account Holders that wish to sell Ping golf clubs online to offer these services.
- 4.137. Having considered the sorts of options available to Ping by which to modify its Internet Policy to allow Account Holders which meet additional criteria to sell golf clubs online, the CMA finds that there are alternative measures available to meet the legitimate aim of promoting Custom Fitting which are less restrictive than the Online Sales Ban.⁴⁹⁹
- 4.138. In summary, for the reasons set out more fully above the CMA finds that any or all of the additional conditions are technically feasible, commercially viable and appropriate to promote Custom Fitting.
- 4.139. The additional conditions described above are **technically achievable**. For those Account Holders operating transactional websites, some already have these features on their websites (eg Live Chat features, buttons to link to

⁴⁹⁸ Ping's response to the Letter of Facts, paragraph 24, URN A0992.1.

⁴⁹⁹ As described in paragraph 4.101, the CMA has not separately assessed Ping's claim that the Online Sales Ban is required to protect its brand image. However, such modifications to Ping's selective distribution system to promote Custom Fitting, would also address Ping's aims to protect its brand image as a manufacturer of Custom Fit Clubs.

book custom fitting) and therefore these retailers have the ability to adopt one or more of these features.

- 4.140. The additional conditions are also **realistic and commercially viable**. In that regard, the CMA notes that Ping Inc. allows authorised distributors to sell Custom Fit golf clubs online in the US. Internet sales have not undermined Ping Inc. maintaining its status as the 'brand' leader for Custom Fit Clubs in the US. In the UK Ping allows online sales of Soft Goods and therefore already has mechanisms in place to approve internet sales. The realistic nature and commercial viability of online sales is supported by the practice of competing golf club manufacturers and retailers in the UK. Callaway, Cobra, Mizuno, TaylorMade and Titleist all promote Custom Fitting and permit their authorised distributors to sell their Custom Fit Clubs online.⁵⁰⁰ As for the behaviour of retailers, the evidence before the CMA shows that a significant proportion of golf club sales (across brands other than Ping) are made online.⁵⁰¹ In light of the foregoing, it is clear that Ping could modify its standard terms and conditions and create a process for approval of Account Holders as online retailers of Ping clubs. It would then be for the Account Holder to decide whether or not to sell, actively or passively, Ping Custom Fit Clubs online. Ping would not need to monitor or micro-manage approved internet retailers to any greater extent than it already does in enforcing the Online Sales Ban.
- 4.141. Finally, the additional conditions are **suitable and appropriate to achieve the aim of promoting Custom Fitting**. Ping has told the CMA that it is on a journey for all customers to undergo a Custom Fitting before they purchase a Ping golf club in a shop or over the telephone. Ping contractually requires Account Holders to promote Custom Fitting. The alternatives described above could be used without compromising Ping's objective of promoting Custom Fitting.

Are those alternatives less restrictive than the Online Sales Ban?

- 4.142. The alternatives described above are all less restrictive of competition than the Online Sales Ban. Each alternative allows online sales, whereas the Online Sales Ban, by its nature, eliminates all competition via the Internet. The alternatives would give consumers an option that they currently do not have, namely the ability to purchase Ping golf clubs online. At the same time, the alternatives would maintain the role of the Account Holder in promoting Custom Fitting to the consumer.

⁵⁰⁰ See eg the second bullet point of paragraph 4.112.

⁵⁰¹ See eg paragraph 3.51.

(iv) Is the Online Sales Ban disproportionate stricto sensu?

- 4.143. The CMA finds that the restrictive nature of the Online Sales Ban (described at paragraph 4.54) is disproportionate to the promotion of Custom Fitting.
- 4.144. Ping's aim of promoting Custom Fitting is a legitimate commercial objective. Ping submitted that more consumers will have a Custom Fitting as a result of such promotion, will get a better product more suited to their needs and as a result will consider Ping to be a high quality brand. While suitable and appropriate measures may be adopted to provide a bespoke commercial service, the CMA observes that it is more difficult to justify a severe restriction of competition based on an incremental improvement in quality or distribution of a luxury product as opposed to pursuing a public interest such as health and safety.⁵⁰²
- 4.145. Ping has not claimed that the Online Sales Ban is the sort of restriction that is 'objectively necessary' for the product or service to exist; Custom Fit Clubs, including Ping golf clubs in the USA, can be (and are) sold online.⁵⁰³ Rather, Ping submitted that the Online Sales Ban operates to promote Custom Fitting.
- 4.146. For the reasons set out in paragraphs 4.105 to 4.113, the CMA finds that the magnitude of the impact of the Online Sales Ban on levels of Custom Fitting cannot be quantified robustly on the basis of the evidence provided, and that the effect is likely to be limited. Any such increase can be achieved in alternative, less restrictive, ways.⁵⁰⁴
- 4.147. The CMA finds that this type and level of benefit cannot justify the serious restriction of competition resulting from the Online Sales Ban.⁵⁰⁵ As mentioned in paragraphs 3.31 to 3.32 and 4.104, a significant proportion of customers value Custom Fitting and, therefore, would have had a Custom

⁵⁰² The *Guidelines on Vertical Restraints* in paragraph 60, provide that '*Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature and therefore fall outside Article 101(1)*'. For example, a hard core restriction may be objectively necessary to ensure that a public ban on selling dangerous substances to certain customers for reasons of health and safety is respected. See also paragraph 18 of the Article 81(3) *Guidelines*, provides '*certain restraints may in certain cases not be caught by Article 81(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature. Such exclusion of the application of Article 81(1) can only be made on the basis of objective factors external to the parties themselves and not the subjective views and characteristics of the parties. The question is not whether the parties in their particular situation would not have accepted to conclude a less restrictive agreement, but whether given the nature of the agreement and the characteristics of the market a less restrictive agreement would not have been concluded by undertakings in a similar setting*'.

⁵⁰³ In light of the availability of suitable quality and service requirements adopted in a selective distribution system, the CMA finds that the online sales ban is not a proportionate requirement to address a perceived free rider issue.

⁵⁰⁴ See paragraphs 4.117 to 4.141 above.

⁵⁰⁵ The CMA's conclusion would be the same even if Ping's assessment were correct.

Fitting with or without the Online Sales Ban. The Online Sales Ban eliminates the ability and incentives for Account Holders to compete for those consumers who wish to purchase their Ping golf clubs online.⁵⁰⁶ Therefore, this marginal increase in the number of Ping's customers who have a Custom Fitting as a result of the Online Sales Ban comes at the expense of those customers who wish to purchase Ping's clubs online (in particular those who already know their Ping Custom Fit specifications), negatively affecting their options, for example through denying them the ability and convenience to purchase golf clubs online. For these reasons the CMA finds that the Online Sales Ban is disproportionate *stricto sensu*, since it entails a sufficient degree of harm to competition that is disproportionate to the promotion of Custom Fitting. For this additional reason, the Online Sales Ban is not objectively justified.

- 4.148. The existence of realistic, less restrictive alternatives (described above) is not a necessary element of the conclusion in the previous paragraph. They do, however, suggest that the Online Sales Ban is disproportionate because they provide a suitable and appropriate means of promoting Custom Fitting, while avoiding the restrictive nature of the Online Sales Ban.
- 4.149. This would be the case even if those alternatives are less effective in achieving any incremental improvement (contrary to the CMA's finding in paragraph 4.142).⁵⁰⁷

CMA's assessment of whether addressing free riding objectively justifies an Online Sales Ban

- 4.150. The CMA's findings are set out below in relation to Ping's submissions that the Online Sales Ban is objectively justified to address a free riding problem.
- 4.151. The CMA considers that, as a matter of principle, it is legitimate for manufacturers of high-quality and high-technology products to establish a selective distribution system, which lays down appropriate and proportionate criteria designed to address the problem of free riding. Such criteria might include specifying quality and service standards for all retailers, such as trained staff or an appropriate bricks and mortar location to provide the Custom Fitting service. If Ping's Account Holders were making significant investments in the provision of Ping's Custom Fitting services which customers could use without charge and then purchase golf clubs from an online retailer which had not been required to invest in providing Custom

⁵⁰⁶ A significant number of Ping's customers are not Custom Fit despite the Online Sales Ban, see paragraph 4.103 above.

⁵⁰⁷ The Online Sales Ban has no temporal limitation, ie it is not time limited in any way to the introduction of a new product or new approach to distribution but is an indefinite restraint.

Fitting (for example an online only retailer), then preventing free riding could constitute a legitimate aim.

4.152. However, the evidence before the CMA does not support Ping's claim that there are significant free riding concerns in this case for the reasons set out in paragraphs 4.232 to 4.249.⁵⁰⁸ In summary:

- Ping already applies strict criteria to its Account Holders as part of its selective distribution system. In particular, all Account Holders must have a bricks and mortar store and commitment to Custom Fitting.⁵⁰⁹
- Ping makes substantial investments in its Account Holders to support Custom Fitting, but these investments are not subject to a free riding problem because Ping would earn a return on sales whether these occur at a bricks and mortar retailer or online.
- Ping's Account Holders also make investments in Custom Fitting. However, in the clear majority of cases these investments are in facilities which can be, and are, used for Custom Fitting across a number of golf club brands, not just Ping. These other brands can already be purchased online. Therefore, the marginal impact on retailers' incentives to invest in multi-brand Custom Fitting facilities resulting from allowing online sales of Ping clubs is likely to be small.
- The CMA observes that retailers including Ping Account Holders which sell Custom Fit Clubs from other manufacturers online, have not been deterred from offering Custom Fitting in store by the risks of a free rider issue. Account Holders are often multi-branded and incentives to invest in Custom Fitting equipment, space and training, are driven by several factors (sales of lessons, Custom Fitting and sales of multiple brands), the ability to recoup the investments through increased sales of golf clubs being only one of them.

4.153. To the extent that Account Holders are required to make investments to support Custom Fitting of Ping Custom Fit Clubs, they are in any case able to recoup these investments by charging for Custom Fitting. As noted in paragraphs 4.244 to 4.246, many Account Holders already charge for Custom Fitting, indicating that this is a realistic option.

⁵⁰⁸ Although unlike Ping's objective of the Internet Policy to promote Custom Fitting, which is reflected in the contemporaneous documents on the CMA file, there is not similar evidence of a wide-spread concern regarding free riding being the objective or reason for the adoption of the Internet Policy.

⁵⁰⁹ The Commission identifies that for 'a real free-rider issue' to exist it 'must not be practical for the supplier to impose on all buyers, by contract, effective promotion or service requirements', paragraph 107(a), *Guidelines on Vertical Restraints*.

- 4.154. Charging for Custom Fitting would be effective at addressing any such free rider problem because it could cover the costs of the investment in Ping Custom Fitting facilities directly, rather than the retailer needing to recoup the costs through the sale of Ping golf clubs. It would be less restrictive of competition than imposing an online sales ban because it would not lead to the elimination of a significant sales channel.
- 4.155. Accordingly, the CMA finds that on the facts in this case, the Online Sales Ban cannot be objectively justified on the grounds of preventing a free rider problem.

CMA finding in relation to Ping's objective justification claims

- 4.156. In light of the foregoing, the CMA concludes that the Online Sales Ban is not objectively justified and amounts to a restriction of competition by object within the meaning of Article 101(1). The separate question as to whether the Online Sales Ban is a more efficient way of achieving the aims of promoting Custom Fitting or preventing free riding will be assessed under Article 101(3), below.

c. Ancillary restraints doctrine

- 4.157. Ping's primary submission is that its Online Sales Ban is 'objectively justified' within the framework for assessing restrictions adopted in the context of selective distribution. However, Ping also submits that the Online Sales Ban is an 'ancillary restraint' for its Custom Fitting Policy.⁵¹⁰

Key legal principles

- 4.158. The CMA finds that in the context of a selective distribution system, the appropriate framework for assessing the Online Sales Ban is that adopted by the Court of Justice in *Pierre Fabre* and this is assessed in paragraph 4.45 onwards. However, in order to address Ping's alternative submission, the CMA has also separately assessed whether the Online Sales Ban is an

⁵¹⁰ Written Representations, paragraph 114, 'an agreement will not be deemed to have an anticompetitive object where it merely produces "ancillary restrictive effects" in pursuit of another main (legitimate) objective (see paragraph 117 below) [which quoted AG Wahl in his opinion in *Cartes Bancaires* p.56, object infringements do not include those 'which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition']. See also paragraph 120, 'if a restriction of the commercial autonomy of one or more of the participants in an agreement is objectively necessary to the implementation of a legitimate operation or activity, then it may be objectively justified, or objectively necessary. If [a] restriction is objectively necessary and proportionate to the main (legitimate) operation, then it falls to be examined under Article 101(1)' – in fn.142 of this paragraph, Ping refers to the case law cited in paragraph 89 of *MasterCard*, a recent decision of the Court of Justice addressing the test for assessing 'ancillary restraints'.

‘ancillary restraint’ and thereby falls outside the scope of the Chapter I prohibition and Article 101(1).

- 4.159. The framework for considering ancillary restraint claims has recently been restated by the Court of Justice in *MasterCard*:

[89] It is apparent from the case-law of the Court of Justice that if a given operation or activity is not covered by the prohibition rule laid down in Article 81(1) EC, owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives of one or the other (see to that effect, in particular, judgments in Remia and Others v Commission, 42/84, EU:C:1985:327, paragraphs 19 and 20; Pronuptia de Paris, 161/84, EU:C:1986:41, paragraphs 15 to 17; DLG, C-250/92, EU:C:1994:413, paragraph 35, and Oude Luttikhuis and Others, C-399/93, EU:C:1995:434, paragraphs 12 to 15).

[90] Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with Article 81 EC in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 81(1) EC.

[91] Where it is a matter of determining whether an anti-competitive restriction can escape the prohibition laid down in Article 81(1) EC because it is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. Contrary to what the appellants claim, the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the ‘objective necessity’ required in order for it to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in Article 81(1) EC.’

4.160. The Competition Appeal Tribunal (**CAT**), following the Court of Justice in *MasterCard*, suggested the following four step approach for analysing whether a claimed ancillary restraint is objectively necessary:⁵¹¹

Step 1: identify the neutral ‘activity’/‘operation’;

Step 2: identify what is the restriction of commercial activity which is asserted to be ancillary to that operation;

Step 3: determine whether the operation is impossible without the ancillary restraint; and if so;

Step 4: determine whether the restriction is proportionate to the underlying objectives.

Ancillary restraint assessment

4.161. For the reasons set out below, the CMA finds, in the alternative, that the Online Sales Ban is not ancillary to the promotion of Custom Fitting.

4.162. The CMA has considered, to the extent that the assessment differs, Ping’s submission that the Online Sales Ban should be considered as an ancillary restraint of the main legitimate objective of the Custom Fitting Policy, and *‘that if a restriction of the commercial autonomy of one or more of the participants in an agreement is objectively necessary to the implementation of a legitimate operation or activity, then it may be objectively justified, or objectively necessary’*.⁵¹²

4.163. The CMA has applied the test restated by the Court of Justice in *MasterCard*⁵¹³ to assess whether the Online Sales Ban is:

(a) objectively necessary to an operation or activity with a neutrality or positive effect in terms of competition, and is

(b) proportionate.

4.164. For the reasons set out in paragraph 4.99, the CMA finds that promoting Custom Fitting to consumers is in principle a positive or neutral activity

⁵¹¹ [2016] CAT 11 *Sainsbury’s v MasterCard*, paragraph 273.

⁵¹² Written Representations, paragraph 120, URN A0921.2 citing the case law of the CJEU cited in paragraph 89 of *MasterCard*, *Remia and Others v Commission*, Case 42/84, EU:C:1985:327, [19] and [20]; *Pronuptia de Paris*, Case 161/84, EU:C:1986:41, [15] to [17]; *DLG*, Case C-250/92, EU:C:1994:413, [35], and *Oude Luttikhuis and Others*, Case C-399/93, EU:C:1995:434, [12] to [15]’. In a domestic context, the CAT, in its recent standalone decision in *Mastercard v Sainsbury’s*, [2016] CAT 11, [273], set out an analytical framework to test whether the objective necessity exception to Article 101(1) is met in a particular case.

⁵¹³ *MasterCard*, paragraphs 89 to 93. Paragraphs 89 to 91 set out in paragraph 4.159.

improving product quality and distribution. However, the adoption of the Online Sales Ban is not objectively necessary, as it is possible to promote Custom Fitting without the Online Sales Ban. There are realistic alternatives such as those set out in paragraphs 4.117 to 4.141 above, which would be commercially viable, to require that Account Holders promote the benefits of undertaking a Custom Fitting before completing a transaction on all sales channels, including online.⁵¹⁴ In any event, in light of the available alternatives which could be adopted in the context of Ping's selective distribution system, adopting an indefinite Online Sales Ban on the sale of Ping golf clubs is disproportionate to the objective of promoting Custom Fitting.

- 4.165. Similarly, for the reasons set out in paragraphs 4.136 to 4.137 the adoption of the Online Sales Ban is not objectively necessary, as it is possible to promote Custom Fitting effectively and so promote the Ping brand without it. For the reasons given, such an approach is disproportionate to achieve such an aim. In turn, for the reasons given in paragraphs 4.151 to 4.155, the CMA finds that the Online Sales Ban is not objectively necessary to address a free rider issue, as it is not impossible to do so without the Online Sales Ban. Even if such a problem existed there are realistic alternatives set out in paragraphs 4.117 to 4.141, which would be commercially viable and allow the system of distribution of Ping golf clubs to operate. In light of that, adopting the Online Sales Ban is not proportionate to the aim it seeks to achieve.

IV. Conclusion on the object of preventing, restricting or distorting competition

- 4.166. For the reasons set out above, following an individual and specific examination of the content and objective of the Online Sales Ban contained in the Agreements and the relevant context, it is apparent, having regard to the properties of Ping's golf clubs, the Online Sales Ban is liable to restrict competition and is not objectively justified.
- 4.167. The nature of the Online Sales Ban clearly restricts competition between retailers through a sales channel that is important both for consumers and retailers. It also inherently restricts the ability of retailers to make passive sales to consumers outside their catchment areas, to consumers seeking to

⁵¹⁴ As the Court of Justice made clear in paragraph 93 of *MasterCard*, even were this approach somewhat less effective (and done well there may be no reason to suppose it would be) it would not make the promotion of the benefits of Custom Fitting to increase the proportion of consumers who choose to undertake a Custom Fit impossible; *'the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary. Such an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in Article 81(1) EC.'*

buy outside normal shop opening hours, and to consumers in other EU countries. Accordingly, the CMA finds that the Online Sales Ban reveals, by its nature, a sufficient degree of harm to competition such that there is no need to examine its effects.

- 4.168. Accordingly, the Online Sales Ban contained in each of the Agreements amounts to a restriction of competition by object.

D. Appreciable restriction of competition

- 4.169. For the reasons set out below, the CMA finds that each of the Agreements appreciably prevented, restricted or distorted competition (and the Agreement between Ping and [Account Holder 1] continues to do so) for the supply of golf clubs within the EU (for the purposes of Article 101 TFEU) and the UK (for the purposes of the Chapter I prohibition).

Key legal principles

- 4.170. 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.⁵¹⁵
- 4.171. The Court of Justice has clarified in *Expedia* that an agreement (whether between competing or non-competing undertakings) 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.⁵¹⁶
- 4.172. In accordance with section 60(2) of the Act,⁵¹⁷ the principle established in *Expedia* also applies *mutatis mutandis* in respect of its analysis of appreciable effect under 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.

⁵¹⁵ 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.

⁵¹⁶ 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.

⁵¹⁷ 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.

Assessment

4.173. The CMA has found that each of the Agreements had (and the Agreement between Ping and [Account Holder 1] continues to have) the object of preventing, restricting or distorting competition (see paragraph 4.166 – 4.168). Given that the effect on trade test is satisfied (see paragraph 4.182), the CMA therefore also finds that the Agreements constitute, by their very nature, an appreciable restriction of competition in the supply of golf clubs for the purposes of the Chapter I prohibition and Article 101 TFEU.

4.174. In any event, and in the alternative, the CMA finds that the Agreements had (and the Agreement between Ping and [Account Holder 1] continues to have) an appreciable impact on competition for the supply of golf clubs 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:

- The geographic scope of each of the Agreements was not limited in any way – effectively it covered the whole of the UK, as well as the rest of the EU.⁵¹⁸
- Ping's share of supply in relation to all golf clubs within the UK varied between [10-20]% to [20-30]% and approximately [20-30]% in 2015. It also has a [10-20]% share in France, [10-20]% in Sweden and [10-20]% in Germany.⁵¹⁹
- Ping had turnover of £[<] million in 2016 and £[<] million⁵²⁰ in 2015.⁵²¹

E. Effect on trade

4.175. For the reasons set out below, the CMA finds that each of the Agreements satisfy the requisite test for an effect on trade between Member States (for the purpose of Article 101(1) TFEU) and on trade within the UK (for the purpose of the Chapter I prohibition).

I. Effect on trade between EU Member States

Key legal principles

⁵¹⁸ See paragraph 4.186.

⁵¹⁹ 2013 Ping Europe Business Plan v2, page 1, URN A0045.1.

⁵²⁰ Ping Group of companies' accounts made up to 31 December 2016, URN A0981.1.

⁵²¹ 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.

- 4.176. Article 101 TFEU applies where an agreement or concerted practice may⁵²² affect trade between EU Member States to an appreciable extent.⁵²³
- 4.177. 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, direct or indirect, actual or potential, on the pattern of trade between Member States*'.⁵²⁴
- 4.178. 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.⁵²⁵
- 4.179. 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.⁵²⁶ 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.⁵²⁷
- 4.180. 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.⁵²⁸ 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.⁵²⁹
- 4.181. 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.⁵³⁰ However, market share alone is not always the decisive factor. In particular, it is necessary

⁵²² 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.

⁵²³ Case 22/71 *Béguelin Import Co. v S.A.G.L. Import Export*, EU:C:1971:113, paragraph 16.

⁵²⁴ Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38, page 249.

⁵²⁵ *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 Articles 81 and 82 of the Treaty* [2004] OJ C101/07 (Effect on Trade Guidelines).

⁵²⁶ Effect on Trade Guidelines, paragraph 28, citing Case C-250/92 *Gøttrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovvarereselskab AmbA*, EU:C:1994:413, paragraph 54.

⁵²⁷ Effect on Trade Guidelines, paragraphs 28 and 32.

⁵²⁸ Effect on Trade Guidelines, paragraph 45.

⁵²⁹ Effect on Trade Guidelines, paragraph 45.

⁵³⁰ Effect on Trade Guidelines, paragraph 46, citing Case 19/77 *Miller International Schallplatten GmbH v Commission*, EU:C:1978:19, paragraphs 9 and 10 and Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 58.

also to take into account the turnover of the undertakings in the products concerned.⁵³¹

Assessment

4.182. The CMA finds that the Online Sales Ban, which is included in each of the Agreements had (and the Agreement between Ping and [X] continues to have) the potential to affect trade between EU Member States to an appreciable extent. The CMA has based its finding on the following:

- Ping was aware that some of its Account Holders operating transactional websites were targeting consumers in other EU Member States: '*UK websites have their sights set on Europe*'.⁵³²
- The Online Sales Ban, contained in the Agreements involves online commerce which, by its nature, is likely to reach consumers in other EU Member States. The geographic scope of the ban covers the whole of the UK, as well as the rest of the EU.⁵³³
- The products that are the subject of the Online Sales Ban (ie golf clubs) can be traded across borders as there are no significant cross-border barriers, other than any additional transport costs.
- Ping in 2013 had a [10-20]% share in France, [10-20]% in Sweden and [10-20]% in Germany⁵³⁴ in relation to golf clubs. Ping had a turnover of £[X] million in 2016 and £[X] million in 2015.⁵³⁵

II. Effect on trade within the UK

Key legal principles

4.183. The Chapter I prohibition applies to agreements which may affect trade within the UK.⁵³⁶

⁵³¹ Effect on Trade Guidelines, paragraph 46, citing joined cases 100/80 *SA Music Diffusion Francaise 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.

⁵³² See paragraph 3.57.

⁵³³ See paragraph 4.174.

⁵³⁴ Ping Europe Business Plan v2, page 1, URN A0045.1.

⁵³⁵ Ping Group of companies' accounts made up to 31 December 2016, URN A0981.1.

⁵³⁶ 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.

4.184. 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 respectively.⁵³⁷ In a subsequent case, the CAT held that it was not necessary to reach a conclusion on that question.⁵³⁸

Assessment

4.185. Ping golf clubs, which are the subject of the Online Sales Ban contained in each of the Agreements, are supplied throughout the UK.⁵³⁹ [3<]. The Agreements were implemented within the UK.⁵⁴⁰ Accordingly, the CMA finds that each of the Agreements may have affected (and the Agreement between Ping and [Account Holder 1] may affect) trade within the UK.

4.186. In any event, and in the alternative, if the appreciability requirement extends to the effect on trade within the UK, the CMA finds that the Online Sales Ban contained in each of the Agreements may have appreciably affected (and the Agreement between Ping and [Account Holder 1] may appreciably affect) trade within the UK given the following:

- The geographic scope of the ban in each of the Agreements was not limited in any way – effectively it covered the whole of the UK; in addition its very subject was the prohibition of sales over the internet, so by its very nature it was liable to affect trade.⁵⁴¹
- Ping’s share of supply in relation to golf clubs within the UK varied across the four categories as follows based on sales by value in 2015: [10-20]% for wedges; [10-20]% for putters; [20-30]% for woods; and [20-30]% for irons.⁵⁴²

⁵³⁷ *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11 at 459 to 461.

⁵³⁸ *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 at 48 to 51 and 62. The CAT stated that it was not necessary to reach a conclusion on the question whether the appreciability requirement extends to the effect on UK trade test as, at least in that case, there was a close nexus between appreciable effect on competition and appreciable effect on trade within the UK, in that if one was satisfied, the other was likely to be so.

⁵³⁹ See paragraph 3.12 to 3.16.

⁵⁴⁰ See paragraphs 4.11 to 4.25.

⁵⁴¹ See paragraph 4.47.

⁵⁴² See paragraph 3.13 and Table 3.1.

- Ping had a turnover of £[<] million in 2016 and £[<] million in 2015, of which £[<] million in 2016 and £[<] million in 2015 was in the UK.⁵⁴³⁵⁴⁴

F. Exclusion or exemption

Exclusion

4.187. 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.⁵⁴⁵

4.188. The CMA finds that none of the relevant exclusions applies to the Agreements.

Exemption

Block Exemption

4.189. 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.

4.190. Similarly, pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it does not affect trade between EU Member States but otherwise falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation.

4.191. It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.⁵⁴⁶

4.192. Vertical agreements that restrict competition may be exempt from the Chapter I prohibition/Article 101(1) TFEU if they fall within the Vertical Agreements Block Exemption Regulation (**VABER**).⁵⁴⁷ The VABER exempts such agreements where the relevant market shares of the supplier 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.⁵⁴⁸

⁵⁴³ Ping audited accounts for the year ended 31 December 2016, URN A0981.1. Ping audited accounts for the year ended 31 December 2015, URN A0931.1

⁵⁴⁴ 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.

⁵⁴⁵ 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.

⁵⁴⁶ See by analogy section 9(2) of the Act.

⁵⁴⁷ 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.

⁵⁴⁸ See Articles 2 to 4 of the VABER.

- 4.193. Article 4(c) of the VABER provides that the exemption under the VABER does not apply to those agreements ‘... *which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object ... (c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment*’.
- 4.194. The Court of Justice in *Pierre Fabre* held ‘... *that Article 4(c) of Regulation No 2790/1999⁵⁴⁹ must be interpreted as meaning that the block exemption provided for in Article 2 of that regulation does not apply to a selective distribution contract which contains a clause prohibiting de facto the internet as a method of marketing the contractual products*’.⁵⁵⁰ The Guidelines on Vertical Restraints⁵⁵¹ provide guidance on the types of restrictions likely to fall within the hardcore restriction set out in Article 4(c). Paragraph 52 of the Guidelines on Vertical Restraints states that ‘*the internet is a powerful tool to reach more and different customers than will be reached when only more traditional sales methods are used and why certain restrictions on the use of the internet are dealt with as (re)sales restrictions*.’ Paragraph 56 of the Guidelines on Vertical Restraints notes as follows: ‘*Within a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet. Therefore, the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction*.’
- 4.195. Ping has not sought to argue before the CMA that the Agreements fall within the VABER exemption.
- 4.196. The Agreements prevented or, in the case of [Account Holder 1], prevents the Account Holder from selling Ping golf clubs online. The CMA finds that Article 4(c) of the VABER is engaged in the present case as the object of the Online Sales Ban is to restrict active or passive sales to end users by Account Holders such that the block exemption under the VABER does not apply to any of the Agreements. It follows that neither of the Agreements are

⁵⁴⁹ Regulation No 2790/1999 was the vertical block exemption applicable at the time of the judgment in *Pierre Fabre*; the provision in Article 4(c) of Regulation No 330/2010, the current vertical block exemption, is the same.

⁵⁵⁰ *Pierre Fabre*, paragraph 59.

⁵⁵¹ *Guidelines on Vertical Restraints*.

exempt from the application of the Chapter I prohibition (by virtue of section 10 of the Act) or Article 101 TFEU.

Exemption under section 9 of the Act and Article 101(3) TFEU

Key legal principles

- 4.197. Agreements which satisfy the criteria set out in section 9 of the Act and Article 101(3) TFEU are exempt from the Chapter I prohibition and Article 101(1) TFEU.
- 4.198. For an agreement to be an exempted agreement, four cumulative criteria must be satisfied:
- (a) the agreement contributes to improving production or distribution, or promoting technical or economic progress,
 - (b) while allowing consumers a fair share of the resulting benefit,
 - (c) the agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, and
 - (d) the agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- 4.199. In considering whether an agreement satisfies the criteria set out in section 9 of the Act and Article 101(3) TFEU, the CMA will have regard to the Commission's Article 101(3) Guidelines.⁵⁵²
- 4.200. It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.⁵⁵³ In *GlaxoSmithKline v Commission* the Court of Justice held that the Commission's approach appropriately may entail ascertaining whether *'it seems more likely either that the agreement in*

⁵⁵² 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.

⁵⁵³ See section 9(2) of the Act which provides that the party claiming the benefit of exemption bears the burden of proof. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 85 of the Treaty [2006] OJ L1/2003, Article 2; Article 101(3) Guidelines, paragraphs 41, 51 to 58; *Guidelines on Vertical Restraints* [2010] OJ C130/1, paragraph 47: *Where a hardcore restriction is included in an agreement, that agreement is presumed to fall within Article [101(1)]. It is also presumed that the agreement is unlikely to fulfil the conditions of Article [101(3)].*

question must make it possible to obtain appreciable advantages or that it will not.⁵⁵⁴

- 4.201. According to the established case law,⁵⁵⁵ the four exemption criteria identified above are cumulative and it is, therefore, unnecessary for the CMA to examine any remaining conditions once it is found that one of the conditions is not fulfilled. In individual cases it may therefore be appropriate to consider the four conditions in different order.⁵⁵⁶ With this in mind, the CMA has considered the third condition (indispensability) before the second condition (pass-on to consumers), since only indispensable restrictions should be included in any balancing exercise under the second condition.⁵⁵⁷
- 4.202. With respect to the first exemption condition, ie the existence of an efficiency gain, the Article 101(3) Guidelines state that the party claiming the efficiency needs to substantiate each claim so that the following can be verified:⁵⁵⁸
- The nature of the claimed efficiencies;
 - The link between the agreement and the efficiencies;
 - The likelihood and magnitude of each claimed efficiency; and
 - How and when each claimed efficiency would be achieved.⁵⁵⁹
- 4.203. The second point above requires that the efficiencies result from the economic activity that forms the object of the infringement (ie the Online Sales Ban) and that there is a direct causal link between the agreement and the claimed efficiencies.⁵⁶⁰
- 4.204. Where the party claims non-cost based efficiencies, it must describe and explain in detail the nature of the efficiencies and how and why they constitute an objective economic benefit.⁵⁶¹
- 4.205. With respect to the third exemption condition, ie indispensability of restrictions, the Article 101(3) Guidelines provide that the party claiming the efficiency needs to substantiate that the restrictions imposed by the

⁵⁵⁴ C-501/06 *GlaxoSmithKline v Commission*, EU:C:2009:610.

⁵⁵⁵ Cases 43/82 and 63/82, *VBVB and VVVB v Commission*, EU:C:1984:9, paragraph 61.

⁵⁵⁶ Article 101(3) Guidelines, paragraph 38.

⁵⁵⁷ Article 101(3) Guidelines, paragraph 39.

⁵⁵⁸ Article 101(3) Guidelines, paragraph 51.

⁵⁵⁹ The last point applies to cases where the agreement has yet to be fully implemented, see Article 101(3) Guidelines, paragraph 58.

⁵⁶⁰ Article 101(3) Guidelines, paragraphs 53–54.

⁵⁶¹ Article 101(3) guidelines, paragraph 57.

agreement in question are indispensable to the attainment of the efficiencies created by it. This requires showing that both the restrictive agreement and the individual restrictions of competition that flow from the agreement are reasonably necessary for the attainment of claimed efficiencies.⁵⁶² The restrictive agreement is considered indispensable if there are no other economically practicable and less restrictive means of achieving the efficiencies.⁵⁶³ A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise.⁵⁶⁴

- 4.206. The assessment of alternatives must take into account the actual and potential improvement in the field of competition by the elimination of a particular restriction or the application of a less restrictive alternative.⁵⁶⁵
- 4.207. The more restrictive the restraint itself, the stricter is the test under the third condition. Restrictions, such as an online sales ban, which are black listed in block exemption regulations or identified as hardcore restrictions of competition are unlikely to be considered indispensable.⁵⁶⁶

Application of the exemption criteria to the Agreements containing the Online Sales Ban

Summary

- 4.208. For the reasons set out below, the CMA finds that the Agreements containing the Online Sales Ban do not meet the exemption criteria.
- 4.209. The CMA finds that Ping has established a limited causal relationship between the Online Sales Ban and the benefits associated with Custom Fitting to satisfy the first exemption condition. The CMA finds that Ping has failed to establish a causal relationship between the Online Sales Ban and protecting Ping's brand image to satisfy the first exemption condition. The CMA finds that Ping has not established the likelihood and magnitude of these claimed efficiencies.
- 4.210. Furthermore, the CMA finds that the Online Sales Ban is not indispensable for achieving these claimed efficiencies and does not meet the third exemption condition.

⁵⁶² Article 101(3) Guidelines, paragraphs 73.

⁵⁶³ Article 101(3) Guidelines, paragraph 75.

⁵⁶⁴ Article 101(3) Guidelines, paragraph 79.

⁵⁶⁵ Article 101(3) Guidelines, paragraph 79.

⁵⁶⁶ Article 101(3) Guidelines, paragraph 79.

4.211. The CMA also finds that Ping has failed to establish that there is a sufficient direct causal link between the Online Sales Ban and Ping's and its Account Holders' investments into Custom Fitting to satisfy the first exemption condition. The CMA also finds that the Online Sales Ban is not indispensable for achieving the claimed efficiencies and does not meet the third exemption condition.

Assessment

4.212. The CMA has assessed whether the Online Sales Ban contained within the Agreements generates efficiencies which are not delivered by the selective distribution system. The CMA's assessment is based on a counterfactual in which Ping continues to apply its current selective distribution system, requiring Account Holders to have bricks and mortar retail stores and Custom Fitting facilities. Online-only retailers would not be admitted to Ping's selective distribution system under this counterfactual.

4.213. The CMA has assessed Ping's efficiency claims under two main headings:

- Efficiency claim 1: promotion and benefits of Custom Fitting (and the consequent impact on Ping's brand image)⁵⁶⁷; and
- Efficiency claim 2: addressing Account Holder free riding issues.

4.214. The first claim relates to promoting Custom Fitting so that more individual consumers obtain correctly fitted clubs, while the second relates to the economic sustainability of providing Custom Fitting in a situation where consumers can purchase Ping golf clubs online.

Efficiency claim 1: Promotion and benefits of Custom Fitting

4.215. As set out in paragraph 4.86 above, Ping submitted that Custom Fitting produces an improved product for consumers, in that a consumer who has a golf club tailored to their individual specifications will play better golf. Ping claims that the benefits of Custom Fitting are independent of a golfer's level of skill or whether they are being fitted for the first time or on subsequent occasions.⁵⁶⁸ Ping further submits that it offers a greater level of customisation and adjustments for its iron golf clubs than any other

⁵⁶⁷ See also Ping's submissions described in paragraph 4.80 above.

⁵⁶⁸ The CMA notes that there is some anecdotal evidence, which indicates that the actual magnitude of the benefits associated with custom fitting might differ by customer type and their level of skill. However, the importance of custom fitting is perceived similarly by golfers in different skill categories (see paragraph 3.31 and footnote 593).

manufacturer.⁵⁶⁹ However, it has not provided any evidence to establish that this leads to greater consumer benefits than those obtained from customisable golf clubs made by other manufacturers.^{570,571}

- 4.216. The benefits of Custom Fitting are recognised not only by Ping, but also by other brands and retailers, as well as consumers who say that they value Custom Fitting (see paragraphs 3.31 to 3.39). The CMA accepts that in general customers are likely to benefit from undergoing a Custom Fitting before purchasing golf clubs. This is particularly the case for those who have a computer-generated fitting, which records a golfer's ball flight data.⁵⁷²
- 4.217. Ping also submits that it *'has built its brand image as a manufacturer which sells customised clubs'*⁵⁷³ which *'adds to the prestige of PING's brand in the UK/EU'*,⁵⁷⁴ and *'in the longer term, improvements in the consumers' golf game by virtue of a PING Custom Fitting also enhance PING's reputation and brand.'*⁵⁷⁵ Ping submitted that it considers its brand image as a leader in the Custom Fitting of golf clubs to be extremely important⁵⁷⁶ and it claimed that it *'is possibly even willing to sacrifice sales in the short-term in order to protect the quality and brand in the long-term'*.⁵⁷⁷ It further argued that it can be difficult for consumers to arrive at the correct measurements themselves,⁵⁷⁸ which increases the likelihood that they will select a club specification that does not actually match their swing and ability and could therefore negatively affect their performance. This could be detrimental to both the consumer and to Ping's reputation and brand image as the leading manufacturer of Custom Fit clubs.⁵⁷⁹ Ping also submits that established

⁵⁶⁹ Written Representations, paragraph 158, URN A0921.2 and paragraph 7 of the response to the Letter of Facts, URN A0992.1.

⁵⁷⁰ The evidence on the CMAs file relates to the benefits of Custom Fitting in general and does not provide information on a 'by brand' basis, see paragraphs 3.31 to 3.36.

⁵⁷¹ Ping's incentives to invest in Custom Fitting are further examined in paragraphs 4.234 to 4.236.

⁵⁷² Statement of the Vice President of Engineering at Ping Inc, paragraph 26, URN A0921.3, also see Oral Hearing transcript URN A0952.1 page 17, lines 16 to 23, *'...in an indoor environment there are very similar fitting tools but the difference now might be having a simulator rather than hitting outside on the range.....Then I would say the ideal scenario is to go to a fitting centre where you can hit from an indoor environment out on to the range and have the benefit of seeing the ball flight married alongside having the equipment and consistency of being able to hit the ball.'*

⁵⁷³ Written Representations, paragraph 146, URN A0921.2.

⁵⁷⁴ Written Representations, paragraph 86, URN A0921.2.

⁵⁷⁵ Written Representations, paragraph 162, URN A0921.2.

⁵⁷⁶ See eg witness interview with the Managing Director of Ping Europe Ltd, page 17, lines 23 -24, URN A0863, confirming that *'Probably the biggest thing is the long term protection of the brand'*.

⁵⁷⁷ Written Representations, paragraph 81, URN A0921.2.

⁵⁷⁸ Oral Hearing Transcript, page 24, lines 8 – 18, URN A0952.1, Statement of the Vice President of Engineering at Ping Inc, paragraph 26, URN A0921.3 and Written Representations, paragraph 173, URN A0921.2.

⁵⁷⁹ Oral Hearing Transcript, p 74 lines 1 – 7, page 74, lines 14 – 21 URN A0952.1, and Written Representations, paragraph 173, URN A0921.2

brand image strengthens inter-brand competition by spurring competitive responses from rival manufacturers.⁵⁸⁰

- 4.218. For the first exemption condition to be met, Ping needs to show that there is a '*sufficiently close link*'⁵⁸¹ between the Online Sales Ban in the Agreements and the achievement of the claimed improvements.
- 4.219. For the reasons set out in paragraphs 4.105 to 4.113 above the CMA finds that the Online Sales Ban is likely to lead to only a small increase in the number of customers having a Custom Fitting before purchasing Ping golf clubs, and less than has been claimed by Ping. In summary:
- Ping estimates that around [X]% of its customers have a Custom Fitting compared with [70-80]% of customers of all brands. However, the comparability of these figures is questionable. In particular, the estimate for other brands is likely to include customers who purchase golf clubs which are not capable of being customised (paragraph 4.107).
 - Even if the difference in rates of Custom Fitting were in line with Ping's estimate, as set out above in paragraph 4.110, there are several factors apart from the Online Sales Ban which are likely to be driving this difference, such as the quality of Ping Custom Fit Clubs and its reputation for Custom Fitting.
- 4.220. With respect to customer satisfaction and Ping's brand image, the CMA recognises that brand image is a relevant aspect of non-price competition. Ping submitted that the risk of a consumer buying incorrectly fitted clubs from an online purchase is high,⁵⁸² but has not provided evidence to substantiate this point. Ping further argues that the Online Sales Ban reduces the risk of potential mistakes associated with online purchases. Ping has not provided evidence of the magnitude of any such impact, and the CMA notes that clubs can be returned to Ping after purchase to change some customisation settings.⁵⁸³
- 4.221. In the US, the Ping brand continues to be perceived as the leader in Custom Fitting, notwithstanding that certain Account Holders are allowed to make online sales of Ping golf clubs.⁵⁸⁴ Evidence provided by Ping Inc. does not

⁵⁸⁰ Written Representations, paragraph 180, URN A0921.2.

⁵⁸¹ Case T-111/08 *Mastercard v European Commission*, EU:T:2012:260, paragraph 226.

⁵⁸² See Written Representations, paragraph 173, URN A0921.2.

⁵⁸³ Transcript of interview with the UK Sales Manager dated 9 March 2016, page 58, lines 15 to 16 and 26 to 27 and page 59, lines 1 to 8. URN A0865.

⁵⁸⁴ See US Golf Datatech Study, page 94, URN A0921.3e and paragraph 3.128 above.

indicate that it is concerned that online sales of Ping golf clubs could have a negative impact on Ping's brand image.⁵⁸⁵

- 4.222. Given the above, the CMA finds that there is likely to be a direct causal relationship between the Online Sales Ban and the benefits associated with Custom Fitting. The CMA, therefore, finds that the first exemption condition is satisfied, but that the impact of the Online Sales Ban on the take-up of Custom Fitting is likely to be small. The CMA finds that Ping has not established a direct causal relationship between the Online Sales Ban and the protection of its brand image to satisfy the first exemption condition.

Is the restriction indispensable to the attainment of the efficiencies?

- 4.223. In order to demonstrate that the third exemption condition has been met, Ping needs to show that the Online Sales Ban is indispensable to the attainment of the above mentioned claimed efficiencies. The CMA finds that the Online Sales Ban is not indispensable because:

- Some consumers can and do choose to buy clubs without a Custom Fitting.
- There are less restrictive alternatives to promote Custom Fitting.

- 4.224. The analysis of Ping's Custom Fitting policy demonstrates that Ping aims to promote dynamic face to face Custom Fitting so that more of its customers are dynamically face to face Custom Fitted. This is achieved through promoting *'the opportunity for a personal conversation to take place between the account holder and the consumer so that the account holder can explain the benefits of PING custom fitting and strongly recommend that a custom fitting appointment be arranged'*.⁵⁸⁶

- 4.225. Ping argued that the personal and dynamic aspect of face to face dynamic Custom Fitting cannot occur over the internet.⁵⁸⁷ In order to arrive at the best result, each player's swing and ball flight data needs to be observed in real time.⁵⁸⁸ Therefore even the most advanced online Custom Fitting tools cannot be used to replicate all the steps in face to face dynamic Custom Fitting.⁵⁸⁹ Ping considers that *'the internet ban is one of the strongest*

⁵⁸⁵ Ping Inc. is primarily concerned with Account Holder free riding issues. See Ping Inc's response dated 6 December 2016, URN PI004.1.

⁵⁸⁶ See paragraph 3.84.

⁵⁸⁷ Written Representations, paragraph 167, URN A0921.2, Oral Hearing Transcript, page, 78 lines 5 – 9, URN A0952.1.

⁵⁸⁸ Statement of the Vice President of Engineering at Ping Inc, paragraph 26, URN A0921.3 and Written Representations, paragraph 26, URN A0921.2.

⁵⁸⁹ Oral Hearing Transcript, p 78 lines 5 – 9, URN A0952.1.

*messages that we can send to the consumer that they should be custom-fitted*⁵⁹⁰ and, therefore, has not considered alternative ways of trying to promote Custom Fitting.⁵⁹¹

- 4.226. The CMA does not dispute that a dynamic Custom Fitting cannot currently be achieved online, and requires a personal interaction. However, the evidence on the CMA's file shows that, despite the Online Sales Ban, a significant proportion of Ping's golf clubs are purchased without a Custom Fitting (see paragraph 4.112). This is a result of a combination of different factors, such as individual customer's preferences when it comes to Custom Fitting,⁵⁹² variation in Account Holders' effort to convince customers to undergo Custom Fitting,⁵⁹³ and some of Ping's own policies.⁵⁹⁴
- 4.227. Ping has not substantiated why alternative methods of promoting Custom Fitting (see paragraphs 2.10 to 2.19), such as a message, displayed prominently online, and emphasising the benefits of Custom Fitting, would significantly reduce the claimed benefits arising from the Online Sales Ban or make it significantly less likely that those benefits will materialise.
- 4.228. As set out earlier in paragraphs 4.114 to 4.149, there are viable less restrictive alternatives to the Online Sales Ban in promoting Custom Fitting. Under any of these potential scenarios identified by the CMA, individual customers would be informed of the benefits of Custom Fitting and could still choose to be Custom Fitted, whether they complete their purchase in-store or online.⁵⁹⁵
- 4.229. The Online Sales Ban arguably provides an opportunity for a conversation on the benefits of Custom Fitting and provides a mechanism for driving in-store visits and purchases, and, if consumers decide to have a Custom

⁵⁹⁰ Oral Hearing Transcript, page 63, lines 14 – 15, URN A0952.1.

⁵⁹¹ Oral Hearing Transcript, page 78, lines 16 – 19, URN A0952.1.

⁵⁹² For instance, US Golf Datatech Study shows that despite the increasing numbers of golfers who are custom fitted, a significant proportion (eg 38% in 2015) of the surveyed golfers have never been custom-fitted. Those who have never been custom-fitted before were most likely to say that they '*just never felt the need for custom fit clubs*' or that they '*do not want to pay extra for custom fit clubs*', (US Golf Datatech Study, pages 36 – 37, URN A0921.3e. Similarly, the SMS Survey Results Extract indicates that [30-40]% of surveyed golfers in the UK have never been custom fitted. Despite having similar views about the importance of custom fitting, the proportion of golfers who have not been custom fitted differs significantly across different skill categories, eg only [10-20]% of Category 1 golfers have never been custom fitted compared to [50-60]% of Category 4 golfers. (SMS Survey Results Extract, pages 15 – 22, URN A0949.4).

⁵⁹³ Ping's Custom Fitting audit reports show that not all of its Account Holders actively promote Custom Fitting, see Annex 3. Fitting Audit Report Files to Ping's response to the CMA's section 26 notice dated 21 December 2016, URN A0953.4a to k.

⁵⁹⁴ For instance, Ping has confirmed that [3<], see eg Oral Hearing Transcript, page 52, lines 8 – 10, URN A0952.1.

⁵⁹⁵ [Account Holder 1] told the CMA that given the price of golf clubs, very few customers would ignore the advice to have a Custom Fitting, see call note with [Account Holder 1] on 18 May 2016, paragraphs 6 and 9, URN A20054. The CMA considers this to be another indication that an online message explaining benefits of Custom Fitting could be as effective as a personal advice.

Fitting, preventing online purchase errors (whether arising from genuine mistakes or from a lack of a Custom Fitting). However, customers would still be able to choose to have a Custom Fitting if they wanted one with or without an Online Sales Ban. Ping Inc. does not prohibit online sales in the US and the response from Ping Inc. does not indicate any significant concerns associated with allowing online sales and any negative impact on its brand image.

- 4.230. The CMA, therefore, finds that the Online Sales Ban is not indispensable for achieving the claimed efficiencies and does not meet the third exemption condition.

Efficiency claim 2: Addressing Account Holder free riding issues

- 4.231. A genuine free riding problem arises when a retailer is able to take advantage of its competitor's investments in pre-sales services and other promotional activities without actually having to make these investments itself. This can lead to diminished incentives for retailers to invest in pre-sales services, and might even threaten the economic viability of providing pre-sales services altogether. For instance, a free riding problem could arise where a customer visits a retailer that offers high pre-sales services (which are costly for the retailer to provide) to learn more about different products, and then purchases the product from another retailer which offers a lower price but no pre-sales services, eg online only retailer.
- 4.232. As set out in paragraph 4.89 above, Ping claims that the Online Sales Ban enables it to resolve a free rider problem by ensuring that Ping and its Account Holders have appropriate incentives to invest in Custom Fitting.
- 4.233. The CMA has split the assessment of whether there is a sufficient causal link between the Online Sales Ban and the investments into the provision of Custom Fitting services into two parts. First, the CMA has considered whether Ping's own investments in its Account Holders are likely to be linked to the Online Sales Ban. Second, the CMA has examined the link between the Online Sales Ban and Account Holders' investments.

Ping's investments in Account Holders

- 4.234. Ping submitted that it makes significant investment in supporting the provision of Custom Fitting services by its Account Holders.⁵⁹⁶ The CMA recognises that Ping's investments into Custom Fitting can have a positive effect on Account Holders' incentives to stock and promote the Ping brand,

⁵⁹⁶ Oral Hearing Transcript, page 68, lines 23 – 25 and page 69, lines 1 – 2, URN A0952.1.

and on consumers' propensity to try out and buy Ping golf clubs. These aspects represent elements of Ping's inter-brand competitive strategy.

- 4.235. However, free riding by online retailers on Ping Account Holders' pre-sale retail services would not directly impact on Ping's own sales volumes or wholesale revenues, which would still be earned on the related online sales.⁵⁹⁷ Although it may be argued that reduced Account Holders' incentives to invest into the provision of Custom Fitting may adversely affect Ping's own incentives to invest into Custom Fitting, the CMA finds that this argument does not hold in this case. This is due to Ping's claims that Custom Fitting is an integral part of its business model, that it aims to have 100% of its customers Custom Fitted⁵⁹⁸ and that it is able to require the availability of Custom Fitting facilities at its Account Holders as part of its selective distribution system.
- 4.236. Accordingly, the CMA finds that Ping has failed to substantiate how the absence of its Online Sales Ban would negatively affect Ping's own incentives to invest in supporting the provision of Custom Fitting.⁵⁹⁹

Investments by Account Holders

- 4.237. In relation to Account Holder investments, Ping submitted that a free riding problem would arise if a potential customer could obtain a (free) Custom Fitting in a bricks and mortar store and then order the equivalent club(s) online from a retailer who had made no, or less, investment in Custom Fitting (and who presumably reflected these lower costs in lower prices).⁶⁰⁰ The Online Sales Ban prevents such sales being made online, thus maintaining incentives for Account Holders to invest in the provision of Custom Fitting services.
- 4.238. Ping has not adduced any case specific evidence to substantiate this claim. Instead it relied on a theoretical example provided in the US public submissions to the OECD policy roundtable on Vertical Restraints for online sales (2013).⁶⁰¹ It also claims that, in the absence of the Online Sales Ban, fewer retailers would be willing to sell Ping Custom Fit Clubs and that the

⁵⁹⁷ It is also relevant that Ping does not allow online only retailers in its selective distribution network – all its authorised Account Holders must have a bricks and mortar store and offer custom fitting facilities, see paragraph 3.60.

⁵⁹⁸ Written Representations, paragraph 78, URN A0921.2 and Oral Hearing Transcript, page 7, lines 7 – 10, URN A0952.1.

⁵⁹⁹ Separately, Ping has not submitted that other brands are able to free ride on its investments.

⁶⁰⁰ Written Representations, paragraph 178, URN A0921.2.

⁶⁰¹ Written Representations, paragraph 178, URN A0921.2 and Oral Hearing Transcript, page 63, lines 24 – 25 and page 64, lines 1 – 13, URN A0952.1.

reduced number of Account Holders that continued to fit would be forced to charge for Custom Fitting in order to avoid free riding.⁶⁰²

- 4.239. The CMA considers that Ping has not established a sufficient causal link between the Online Sales Ban and the provision of face to face dynamic Custom Fitting to avoid free rider problems, for the following reasons.
- 4.240. First, the existing provisions of Ping's selective distribution system require that all of its Account Holders provide Custom Fitting facilities (see paragraph 3.60).⁶⁰³ Ping has confirmed⁶⁰⁴ that it would expect all of its Account Holders to be purchasing the necessary clubs (those not provided⁶⁰⁵) in order to carry out Custom Fitting. Therefore the degree of discretionary Ping-specific retailer investment is limited.
- 4.241. Second, most of the identified investments made by Account Holders in their Custom Fitting facilities, such as driving range bays and launch monitors, relate to facilities are not specific to the Custom Fitting of Ping golf clubs. Ping confirmed in the Oral Hearings that '*generally speaking most retailers are multi-branded*'.⁶⁰⁶ Custom Fitting facilities are provided to allow Custom Fitting for other golf club brands, notwithstanding the fact that other manufacturers do not impose an online sales ban. Ping has not evidenced its claim that fewer Account Holders would be willing to sell Ping Custom Fit Clubs if they were available online, nor explained its claim that this would reduce consumer choice.⁶⁰⁷
- 4.242. Third, Ping indicated that its Account Holders usually sell a number of different products and services, and their investments will not necessarily be specific to a particular product or service. '*There is a triangle between lessons, custom fitting and purchase. Wherever you come on the triangle, a good retailer is able to end up around all three points of the triangle. So, they will invest in facilities, launch monitors and all kinds of visual tools that can help in terms of fitting and lessons.*'⁶⁰⁸ This indicates that Account Holders' incentives to invest are, in fact, driven by several factors, the ability to recoup the investments through increased product sales being only one of them.

⁶⁰² Ping's response to the letter from CMA dated 3 November 2016, page 6, URN A0949.2.

⁶⁰³ '*The retailer must have facilities to carry out dynamic face-to-face fittings*'.

⁶⁰⁴ Oral Hearing Transcript page 72, line 18, URN A0952.1.

⁶⁰⁵ Drivers, fairway woods, hybrids and putters.

⁶⁰⁶ Oral Hearing Transcript page 71, lines 10 – 11, URN A0952.1.

⁶⁰⁷ For example, would Ping Account Holders substitute to another brand not currently carried (and so increase availability of that other brand)?

⁶⁰⁸ Oral Hearing Transcript, page 70 line 25 and page 71, lines 1 – 3, URN A0952.1.

- 4.243. Finally, a significant proportion of Ping's Account Holders charge for Custom Fitting, which may or may not be offset against the price of clubs subsequently purchased from that Account Holder.⁶⁰⁹ Although Ping submitted that only [30-40]%⁶¹⁰ of its Account Holders charge for face to face dynamic Custom Fitting,⁶¹¹ the CMA's analysis of Ping's data on the investments by its Account Holders shows a clear association between the level of Account Holder investment and the prevalence of charging for Custom Fitting services.
- 4.244. Table 4.1 below shows the proportion of Account Holders charging for a service where they provide specific Custom Fitting tools: launch monitor, bespoke fitting studio, driving range and Ping-trained fitters. The data suggests that Account Holders which provide a wider range of specific Custom Fitting tools tend to charge more often for Custom Fitting. For example, 66% of the Account Holders which provide both bespoke fitting studios and launch monitors charge for Custom Fitting. 83% of those studios and launch monitors charge for Custom Fitting. 83% of those Account Holders which provide all four services charge for Custom Fitting.

Table 4.1: Relationship between Account Holders' investment and charging for Custom Fitting

	<i>Launch monitor</i>	<i>Bespoke fitting studio</i>	<i>Range</i>	<i>1 or more Ping trained fitters</i>
Proportion of Account Holders that charge for custom fitting, (%)	[<]%	[<]%	[<]%	[<]%
Combined	[<]%			
	[<]			
	[<]%			

Source: CMA analysis based on the data submitted by Ping (see amended annex 1 to Ping's response to the CMA section 26 notice dated 21 December 2016, URN A0953.2).

Notes: (1) Results are weighted using the value of golf club sales in 2015; (2) Consistent with Ping's interpretation, missing values are included in the analysis; (3) Excludes accounts which do no or very little custom fitting (eg those that only sell Soft Goods or which are close to Ping's Gainsborough fitting studio), accounts that did not respond or are internal accounts belonging to Ping employees.

- 4.245. Figure 4.2 also shows that there is a significant positive relationship between the size of Account Holder and its investments into Custom Fitting.⁶¹² Larger Account Holders are more likely to charge for Custom Fitting services⁶¹³ and

⁶⁰⁹ Contrary to Ping's claims (see paragraph 4.89), the free rider issue is concerned with whether the removal of the Online Sales Ban would disincentivise the Account Holders from investing into the provision of Custom Fitting so that face to face dynamic Custom Fitting is no longer provided. Having to charge for these services does not automatically mean that those incentives no longer exist. On the contrary – charging for Custom Fitting services can be an alternative way to recover those investments.

⁶¹⁰ [<]% of those Account Holders that charge, fully or partially refund the cost of Custom Fitting upon purchase, Ping's response to the letter from CMA dated 3 November 2016, page 8, URN A0949.2.

⁶¹¹ Ping's response to the letter from CMA dated 3 November 2016, page 8, URN A0949.2.

⁶¹² Although a substantial proportion of smaller Account Holders also provide Custom Fitting services.

⁶¹³ This is also likely to be due to the fact that they make larger investments into Custom Fitting and provide better Custom Fitting services, see Figure 4.2.

also undertake a dynamic Custom Fitting for a larger proportion of their customers. These services are valued by customers, as is evident from the higher proportions of Account Holders that provide better quality fitting services charging for their services.

Figure 4.2: Custom Fitting by Account Holders (by value of golf club sales)

[X]

Source: CMA analysis based on the data submitted by Ping (see amended Annex 1 to Ping's response to the CMA section 26 notice dated 21 December 2016, URN A0953.2).

Notes: (1) Results are weighted using the value of golf club sales in 2015; (2) Account holders are distributed based on their golf club sales value. The 1st quartile includes Account Holders with the lowest value and the 4th – the highest; (3) Consistent with Ping's interpretation, missing values are included in the analysis; (4) Excludes accounts which do no or very little Custom Fitting (eg those that only sell Soft Goods or which are close to Ping's Gainsborough fitting studio), accounts that did not respond or are internal accounts belonging to Ping employees and accounts where the value of golf club sales was not provided; (5) Excludes [Account Holder 1], which did not provide shop level data.

- 4.246. These trends show that Account Holders which make significant investments into the provision of Custom Fitting are more likely to charge for their services, indicating that they are able to recoup their investments through charging for the services they provide. This suggests that the removal of the Online Sales Ban would not significantly affect Account Holder incentives to invest in Custom Fitting, given that the evidence indicates that they would be able to recover their investments through various charges.
- 4.247. Given the above, the CMA finds that Ping has failed to substantiate that there is a causal link between the Online Sales Ban and Ping's and its Account Holders' investments into the provision of face to face dynamic Custom Fitting services.

Is the restriction indispensable to the attainment of the efficiencies?

- 4.248. Even if there were some efficiencies of limiting the risk of free riding resulting from the Online Sales Ban, the CMA finds that the Online Sales Ban would not be indispensable to maintaining Account Holders' incentives to provide face to face dynamic Custom Fitting for the following reasons:
- (a) Ping's selective distribution system requires each Account Holder to provide face to face dynamic Custom Fitting services (ie there are no online-only Ping authorised retailers) (paragraph 3.60).
 - (b) Account Holders would be able to charge customers for Custom Fitting services as a way of overcoming the free rider problem – a

significant number of Account Holders already do this (paragraphs 4.243 to 4.246).⁶¹⁴

- (c) As set out in paragraph 4.242, Account Holders can recoup some of their investments not only through increased product sales, but also through the provision of other services, such as offering golf lessons.

Conclusion on the applicability of section 9 of the Act and Article 101(3) TFEU

- 4.249. Based on the above, the CMA finds that Ping has failed to substantiate to the required standard that the first and third exemption criteria have been met. Given their cumulative nature the CMA has not assessed the remaining criteria. Accordingly, the CMA finds that the agreement in question is not exempt under Section 9 of the Act and Article 101(3) TFEU.

G. Attribution of liability

- 4.250. The legal entity within the Ping undertaking that was directly involved in the Infringements during the Relevant Period was Ping Europe Limited. Accordingly, the CMA finds Ping liable for the Infringements.
- 4.251. The CMA has considered whether liability for the Infringements should be attributed, on a joint and several basis, to any other legal entities which comprise the Ping undertaking. The CMA has not identified another entity to which it considers liability should be attributed on a joint and several basis.

H. Ping's Fundamental Charter Rights

- 4.252. Ping submitted that the effect of the Decision and Directions breaches Ping's fundamental rights under the Charter of Fundamental Rights of the European Union.⁶¹⁵ The rights which Ping claims are violated by the Decision and Directions are the freedom to conduct a business (Article 16)⁶¹⁶ and the right to property (Article 17).⁶¹⁷

⁶¹⁴ Similarly, the US Golf Datatech Study shows that in the US the proportion of surveyed customers who were charged for their fitting has been increasing and now stands at 47%, page 53, URN A0921.3e.

⁶¹⁵ (2000/C 364/01)

⁶¹⁶ Article 16 - Freedom to conduct a business provides: '*The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.*'

⁶¹⁷ Article 17 - Right to property provides: '(1) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. (2) Intellectual property shall be protected.'

4.253. Ping submitted that the Decision and Directions:

- limit Ping's contractual freedom and require that it '*must offer an unbundled product that includes only the non-customised hardware [sic] component, to be sold online*';⁶¹⁸ and
- deprive Ping of its property, constituted by '*the very considerable goodwill that it has acquired over more than fifty years as a result of its investment in Custom Fitting and its policy of selling Custom Fit clubs*'.⁶¹⁹

4.254. At the Oral Hearing Ping submitted that, '*if it is the case that there is an object restriction on Article 101 [...] the charter rights, particularly Article 16 Freedom to Conduct a Business and [Article] 17 Right to Property, in this case goodwill [...] trump Article 101 in this particular context*'.⁶²⁰ In effect Ping submitted such a breach of its fundamental rights occurs even where, after a fact specific inquiry, the CMA has decided that the Online Sales Ban contained in the Agreements is an object infringement which is neither objectively justified, nor fulfils the exemption conditions of Article 101(3) and issues Directions requiring that the Infringement ceases.

4.255. The CMA finds that these rights are qualified, not absolute, rights under the Charter, and that they must be exercised in accordance with EU law.

4.256. In relation to Article 16, the CMA finds that a limit of Ping's freedom to conduct a business, in this case - a business supplying Custom Fit Clubs to UK retailers - is the point at which the law is breached. This is apparent from the language of Article 16 itself, which states that the freedom to conduct business is one to be exercised '*in accordance with Community law and national laws and practices*', and is also reflected in paragraph 231 of AG Kokott's Opinion in *Alrosa*,⁶²¹ where it is stated that '*the limit of (positive) contractual freedom of undertakings lies where a contract with an anti-competitive object or an anti-competitive effect within the meaning of Article 81 EC (Article 53 EEA) is concluded*'.

⁶¹⁸ Written Representations, paragraph 139, URN A0921.2. This point is put a number of ways, see also Written Representations, paragraph 146 '*Ping would be required to allow its retailers to sell non-customised clubs over the internet*', or Written Representations, paragraph 147 '*the SO's analysis would force Ping to sell all of its Hardware in a way that it does not wish to and to conduct its entire business in a way which tolerates non-Custom Fitting*'.

⁶¹⁹ Written Representations, paragraph 139, URN A0921.2.

⁶²⁰ Oral Hearing Transcript, page 42, lines 15 to 18, URN A0952.1

⁶²¹ Case C-441/07 P *Commission v Alrosa Co Ltd* EU:C:2009:555

- 4.257. In any event, the CMA notes that the factual effect of the Decision and Directions is not to require the sale of non-custom fit Ping clubs. The effect of the Directions is simply that Ping is not permitted to promote Custom Fitting through an online sales ban which is not objectively justified. Therefore, none of the concurrent effects Ping alleges, such as damage to a ‘*core element of Ping’s brand*’⁶²², are brought about by the Decision and Directions.
- 4.258. In relation to Article 17, the CMA finds that, while Ping’s commitment to Custom Fitting has led it to possess ‘*goodwill*,’ which can constitute property for the purposes of the Article⁶²³, Ping will not be deprived of this goodwill by the Decision or Directions. Ping’s position as the perceived market leader in Custom Fitting in the US,⁶²⁴ where it does not operate an online sales ban, demonstrates that an online sales ban is not necessary to maintain a reputation for commitment to Custom Fitting.
- 4.259. The Decision and Directions prevent Ping using an unlawful online sales ban to pursue its objectives (ie ‘*the use of property may be regulated by law*’⁶²⁵). Insofar as this affects Ping’s goodwill, it is through controlling how Ping utilises the goodwill accrued from its commitment to Custom Fitting. Such control would be proportionate under Article 52 of the Charter given the need to achieve the TFEU’s stated aim of guaranteeing fair competition, and ensure Ping complies with its obligations under EU competition law.⁶²⁶

⁶²² Written Representations, paragraph 146, URN A0921.2.

⁶²³ *R (Nicholds) v Security Industry Authority* [2007] 1 WLR 2067, paragraphs 71-73

⁶²⁴ See paragraph 3.128 above.

⁶²⁵ Article 17, Charter.

⁶²⁶ See the General Court’s judgment in Case T-65/98, *Van den Bergh v Commission*, EU:T:2003:281, p.170-172.

5. THE CMA'S ACTION

A. The CMA's decision

- 5.1. On the basis of the evidence set out in this Decision, the CMA has decided that Ping infringed and continues to infringe the Chapter I prohibition and Article 101 TFEU by entering into an agreement with [Account Holder 1] which bans the online sale of Ping golf clubs and with [Account Holder 2] which banned the online sale of Ping golf clubs. Each of the Agreements has or had as its object the prevention, restriction or distortion of competition within the UK and between EU Member States and which may affect or may have affected trade within the UK and between EU Member States.
- 5.2. Specifically, the CMA finds on the basis of the evidence set out in this Decision that:
- a. the duration of the Infringement in respect of the agreement between Ping and [Account Holder 1] was from at least 30 July 2012 and is continuing as at the date of issue of this Decision.
 - b. the duration of the Infringement in respect of the agreement between Ping and [Account Holder 2] was from [X] until [X].

B. Directions

- 5.3. Section 32(1) of the Competition Act provides that the CMA may give to such person, or persons, as it considers appropriate such directions as it considers appropriate to bring the infringement of Article 101(1) TFEU and/or the Chapter I prohibition to an end.
- 5.4. In *Genzyme v OFT (remedy)*⁶²⁷ the CAT held that the power to make a direction under section 33 of the Act (in relation to conduct that contravenes Article 102 TFEU and/or the Chapter II prohibition) includes the power to ensure that an infringement is not repeated.⁶²⁸ The CAT further held that the power ‘to bring the infringement to an end’ covers conduct closely linked to, or to the like effect as, the infringement found, otherwise section 33 would be ineffective.⁶²⁹

⁶²⁷ *Genzyme Limited v the Office of Fair Trading* [2005] CAT 32 (*Genzyme*).

⁶²⁸ *Genzyme*, paragraph 233.

⁶²⁹ *Ibid.* As the CAT pointed out in *Genzyme*, were it otherwise, a kind of “catch as catch can” situation could arise in which an undertaking could, by constantly changing its arrangements, keep the competition authorities at bay indefinitely.

- 5.5. Whilst *Genzyme* was a case on the Chapter II prohibition, the CMA considers that the same principles apply in the case of the Chapter I prohibition.
- 5.6. As at the date of this Decision, Ping has not taken steps to bring the Infringements to an end. Ping has continued to publish and communicate to its Account Holders an updated Trade Price List, incorporating its Terms and Conditions, which provide at clause 12, '**Internet Policy** .. *Ping Europe's Internet policy does not allow the Account Holder to execute sales transactions of PING Hardware products with consumers on the Internet*' (emphasis in original).⁶³⁰
- 5.7. The CMA finds that the continuing agreement with [Account Holder 1] demonstrates that the Infringements are ongoing at the date of this Decision. In order to terminate the implementation of the Online Sales Ban through the agreement with [Account Holder 1], the CMA therefore gives directions to Ping Europe Limited, pursuant to section 32 of the Act, to bring the ongoing aspects of the Infringements to an end. The CMA further directs Ping Europe Limited to refrain from adopting measures having the same or equivalent restriction of competition (which the CMA considers would require it to remove the Online Sales Ban from its Internet Policy). This is a measure that is supplementary to the statutory prohibitions.⁶³¹
- 5.8. The CMA gives Ping the following directions:
- (a) Ping must bring the ongoing aspects of the Infringements to an end.
 - (b) Ping must refrain from repeating the Infringements and refrain from adopting any measures having the same or equivalent restriction of competition as the Infringements.
 - (c) Without prejudice to the generality of paragraphs (a) and (b) of these directions Ping must within three calendar months of the date of this Decision:
 - i. modify and reissue its Terms and Conditions to bring the Infringements to an end;
 - ii. reissue the modified Terms and Conditions to Ping's Account Holders;

⁶³⁰ Trade Price List: Effective 1st January 2017, provided by Ping on 24 May 2017 in response to a section 26 Notice of 18 May 2017, URN A0981.3.

⁶³¹ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraph 553.

- iii. explain in writing to each Account Holder who receives the modified Terms and Conditions the action that Ping has taken and/or will take to comply with the direction at paragraphs (a) and (b); and
 - iv. provide a copy of the communications referred to in paragraphs (c) i-iii above to the CMA within seven days from the date of any such communications.
- (d) The CMA may, by written notice given to Ping, vary, supersede or withdraw these directions if, by reason of any change of circumstances, it considers that they are no longer appropriate. Before doing so, the CMA must give Ping a reasonable opportunity to make representations.
- (e) Ping must promptly provide to the CMA such information as the CMA may from time to time require for the purpose of ascertaining whether these directions are being or will be complied with or for the purpose of ascertaining whether they should be varied, superseded or withdrawn.
- (f) For the purposes of these directions definitions have the same meaning as in the Act or the Decision unless the contrary intention appears.
- (g) The Interpretation Act 1978 applies to these directions as it applies to Acts of Parliament.

5.9. The Directions do not specify how Ping Europe Limited must modify its Terms and Conditions because it is for an undertaking to self-assess its own compliance with competition law.

5.10. Ping submitted that the CMA should defer any direction that Ping alters its current terms and conditions until the determination of an appeal against the CMA's decision.⁶³² Having made an infringement decision the CMA intends to direct that the Infringements are brought to an end, consistent with section 46(4) of the Act which provides '*the making of an appeal under this section does not suspend the effect of the decision to which the appeal relates*'.⁶³³

⁶³² Cover letter attaching Draft Penalty Statement Written Representations dated 25 April 2017, final paragraph, URN A0963.1.

⁶³³ The CMA does not intend to depart from the approach of the statutory scheme in these directions. However, should Ping apply to the CAT for the Directions to be suspended for the duration of an appeal, the CMA would consider its position in relation to such an application at that time.

- 5.11. The CMA therefore decides that it is appropriate to issue Directions in this case.

C. Financial penalty

1. The CMA's powers to impose penalties

- 5.12. For the reasons given below, the CMA finds that each of the Infringements has been committed intentionally or negligently because Ping must have been aware, or could not have been unaware, or at least ought to have known, that its Agreements were restrictive of competition.

a. Key legal principles

- 5.13. Section 36(1) of the Act provides that on making a decision that an agreement has infringed the Chapter I prohibition or Article 101 TFEU, the CMA may require an undertaking that is a party to the agreement concerned to pay the CMA a penalty in respect of the infringement.
- 5.14. Any such penalty is calculated in accordance with the CMA's published guidance⁶³⁴ and relevant legislation.⁶³⁵ No penalty fixed by the CMA may exceed 10 per cent of the worldwide turnover of the undertaking calculated in accordance with the provisions of the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).⁶³⁶
- 5.15. The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition and Article 101 TFEU if it is satisfied that the infringement has been committed intentionally or negligently.⁶³⁷ However, the CMA is not obliged to specify whether it finds the infringement to be intentional or merely negligent.⁶³⁸
- 5.16. 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

⁶³⁴ *Guidance as to the appropriate amount of a Penalty* (OFT 423, September 2012), adopted by the CMA Board (**Penalty Guidance**).

⁶³⁵ The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) and the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

⁶³⁶ Section 36(8) of the Act.

⁶³⁷ Section 36(3) of the Act.

⁶³⁸ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs 453 to 457; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221.

*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’.*⁶³⁹

- 5.17. 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.’*⁶⁴⁰

- 5.18. The circumstances in which the CMA might find that an infringement has been committed intentionally include the following:

- a. the conduct has as its object the restriction or distortion of competition;
- b. the undertaking in question is aware that its actions will be, or are reasonably likely to restrict or distort competition but still wants, or is prepared, to carry them out; or
- c. the undertaking could not have been unaware that its conduct would have the effect of restricting or distorting competition, even if it did not know that it would infringe Article 101 TFEU and the Chapter I prohibition.⁶⁴¹

- 5.19. 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.⁶⁴²

b. Ping acted intentionally or negligently

- 5.20. As described above in paragraph 5.18, 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.⁶⁴³ For the reasons given at paragraphs 4.93 to 4.155 above, the CMA finds that the Infringements were not objectively

⁶³⁹ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221.

⁶⁴⁰ Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 124.

⁶⁴¹ See OFT407 *Enforcement* (December 2004, adopted by the CMA Board), at paragraph 5.9.

⁶⁴² 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.

⁶⁴³ See *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.9.

justified and accordingly, had as their object the prevention, restriction or distortion of competition.

- 5.21. Ping would have been aware, or could not have been unaware, that the consequence of the Infringements was that Account Holders,⁶⁴⁴ and in particular [Account Holder 1] and [Account Holder 2], would be unable to compete online. This awareness is reflected in the Managing Director's letter to all Ping Account Holders in May 2009 which observed, '*To some of you [Account Holders] this may sound restrictive in these difficult times and will result in fewer sales for Ping.*'⁶⁴⁵
- 5.22. Furthermore, the CMA relies on the following facts, in summary:
- a. On 13 October 2011 the Court of Justice ruled in *Pierre Fabre* that an online sales ban in the context of a selective distribution network was a 'by object' restriction of competition, if not objectively justified.⁶⁴⁶
 - b. During 2011 and 2012 Ping reviewed the Internet Policy,⁶⁴⁷ containing the Online Sales Ban, and considered various commercial options. The Managing Director wrote to Account Holders in August 2012 informing them that it had '*conducted a full review over the last 12 months and commencing August 1st 2012, [Ping has] made the decision to allow Bags and Accessories to be sold directly on the Internet.*'⁶⁴⁸ During its 2011/2012 review period Ping therefore considered the Internet Policy and concluded that the Online Sales Ban should be retained in relation to its agreements to supply golf clubs.
 - c. Since 17 November 2015 Ping has been aware of the CMA's Investigation – ie it has known since at least that date that its agreements with Account Holders prohibiting the sale of golf clubs online were, at the very least, a possible infringement of competition law. Since 9 June 2016, when the CMA issued the SO, Ping has been aware that its Agreements with [Account Holder 1] and [Account Holder 2]

⁶⁴⁴ See paragraphs 4.60 to 4.62, the CMA has assessed the Infringements in the context of the Online Sales Ban being a standard term of Ping's terms and conditions with its Account Holders.

⁶⁴⁵ Letter from Ping to Account Holders May 2009, URN A0466.

⁶⁴⁶ See *Pierre Fabre*. See also paragraph 4.156. The CJEU in *Pierre Fabre* identified that in previous judgments it had not 'accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales the issues which arose in choosing the correct medicine or the risks in having the wrong contact lens.'

⁶⁴⁷ A Commercial Foundations PowerPoint presentation, undated, states in relation to the Internet Policy: '12 Months of research and review', URN A0438.

⁶⁴⁸ Letter from the Managing Director dated August 2012, URN A0653.

prohibiting the sale of golf clubs online were, at the very least, a possible infringement of competition law.

- 5.23. Accordingly, on the basis of the evidence set out in section 3 above, including the specific example mentioned in paragraph 5.21 above, the CMA finds that Ping must have been aware, or could not have been unaware of the anti-competitive nature of its conduct. At the very least, the CMA finds that Ping ought to have known that the Agreements containing the Online Sales Ban would result in a restriction or distortion of competition.⁶⁴⁹
- 5.24. Ping submitted that the CMA is wrong to find that the Infringements have been committed either intentionally or negligently. In particular, Ping submitted that:
- (a) It would be impossible for the CMA to make a case that the infringement was intentional because it accepts that Ping's aim to promote Custom Fitting is genuine. Ping did not negligently infringe competition law since there is nothing objectionable about applying distribution criteria which aim to promote Custom Fitting. The CMA cites no evidence that Ping ever considered the alternative measures proposed by the CMA and rejected them.⁶⁵⁰
 - (b) The CMA's Decision rests on legal principles which are '*highly controversial and uncertain*'. Ping claims that the CMA has '*misstated the law*' which in its view demonstrates that the principles are neither straightforward nor well established, and that the CMA's novel and controversial approach is not something that Ping could fairly be said to have intentionally disregarded. In support of this submission, Ping cites the reference of legal questions to the CJEU from a German national court in *Coty Germany* as reflecting the '*fact that the law in this area is in need of clarification, as does the Commission's ongoing investigation into competition in the e-commerce sector*'.⁶⁵¹
 - (c) The CMA's case is based on whether Ping could have achieved its objectives using less restrictive measures to promote Custom Fitting which is (in Ping's view) a '*novel, hypothetical and highly speculative question*'.⁶⁵²

5.25. The CMA rejects these submissions for the reasons set out below.

⁶⁴⁹ See *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.12.

⁶⁵⁰ Draft Penalty Statement Written Representations, paragraphs 15-17, URN A0963.2.

⁶⁵¹ Draft Penalty Statement Written Representations, paragraphs 18-20, URN A0963.2.

⁶⁵² Draft Penalty Statement Written Representations, paragraph 22, URN A0963.2.

- 5.26. As set out in paragraph 4.33, although a restriction may have a legitimate aim or aims, this does not obviate the application of competition law. The test for establishing whether a restriction is objectively justified involves an assessment of both the aims of the restriction and its proportionality. Therefore, the fact that Ping has a genuine commercial aim of promoting Custom Fitting, does not mean that the Agreements fall outside of the application of Article 101(1).
- 5.27. Ping's submission that the CMA's decision rests on highly controversial and uncertain legal principles and which Ping could not '*fairly be said to have intentionally disregarded*' is incorrect. Ping is a well-resourced company with experienced external legal advisers. The legal principles of this case are not novel:
- a. the CMA may infer that an infringement has been committed intentionally where consequences giving rise to an infringement are plainly foreseeable from the pursuit of a particular policy by an undertaking.⁶⁵³
 - b. the Court of Justice decision in *Pierre Fabre* established in 2011, nearly six years ago, and almost a year prior to Ping deciding to maintain its Agreement with [Account Holder 1] containing the Online Sales Ban, that online sales bans are object restrictions unless objectively justified.
- 5.28. Ping knew, or ought to have known following the *Pierre Fabre* judgment, that an online sales ban is an object infringement unless objectively justified.⁶⁵⁴ Ping has not submitted any evidence to demonstrate that it conducted an assessment to consider whether the Online Sales Ban is objectively justified or would meet the exemption criteria (each of which would have required consideration of whether there were less restrictive means of achieving its aims) following the *Pierre Fabre* judgment, notwithstanding that it reviewed its Internet Policy in 2011 and 2012. Ping would have been aware, or could not have been unaware, that banning online sales was neither necessary nor proportionate to achieving Ping's aims.

⁶⁵³ *Enforcement* (OFT407, December 2004), adopted by the CMA, paragraph 5.11. See also *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, at [456].

⁶⁵⁴ The *Pierre Fabre* judgment was issued by the Court of Justice on 13 October 2011, some nine months prior to the commencement of the Infringements.

- 5.29. The fact that a German national court has referred questions to the Court of Justice (which are not directly relevant to this case⁶⁵⁵) does not have any impact on the application of *Pierre Fabre* and the case law cited in that case. Furthermore, the Commission's investigation into the e-commerce sector does not indicate that this area of law is in need of clarification.⁶⁵⁶
- 5.30. At the time of the Infringements it was well established that adopting restrictions on competition between retailers in a selective distribution system which were neither necessary nor proportionate to achieve a legitimate aim, infringed competition law.⁶⁵⁷ This was particularly the case in relation to 'hardcore' restrictions on active or passive sales.
- 5.31. Ping also submitted the following arguments regarding the facts set out in the Draft Penalty Statement:⁶⁵⁸
- The CMA's reliance on *Pierre Fabre* as a by object restriction is misplaced because the objective in *Pierre Fabre* was found to be 'bogus' whereas Ping's objective has been found to be genuine. The fact that an agreement is classified as a by object restriction does not automatically mean that the Infringements are intentional or negligent.
 - The fact that Ping reviewed its Internet Policy in 2011 and 2012 does not show that the Infringements were intentional or negligent.
 - Ping's awareness of the CMA's investigation since November 2015 and decision not to reverse its Internet Policy is a 'bad' point because Ping maintains that its Internet Policy is lawful and its belief that the Online Sales Ban is the '*right thing to do for the brand and consumers*'.
- 5.32. The CMA does not accept these submissions for the following reasons.

⁶⁵⁵ The *Coty Germany* reference relates to third party platform bans and whether banning the sale of luxury perfume on such sites to protect their brand image constitutes a legitimate aim. The opinion of Advocate General Wahl in that case was published shortly before this Decision was issued, EU:C:2017:603. The CMA finds that the opinion advises the adoption of an analytical framework to assessing restrictions in selective distribution systems which is consistent with that the CMA has adopted, and distinguishes a third party platform ban from an online sales ban which is the restriction in issue in this case.

⁶⁵⁶ See the Commission's Final Report on the e-commerce sector inquiry http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html#findings and Staff Working Document: http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf.

⁶⁵⁷ See the CJEU cases on selective distribution in *Metro*, *L'Oréal*, *AEG-Telefunken*. Further as the CJEU made clear in *Pierre Fabre* it had not accepted justifications to ban online sales in relation to the need to provide individual advice to the customer or to ensure protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, in *Deutscher Apothekerverband* nor *Ker-Optika*.

⁶⁵⁸ Draft Penalty Statement Written Representations, paragraph 23 (a), (b) and (c), URN A0963.2

- 5.33. As described above in paragraph 5.18, 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. The CMA notes that a ‘by object’ finding might be taken into consideration in its assessment and considers that, particularly in light of the evidence on the CMA’s file (as set out in paragraph 5.21) it is appropriate to consider that Ping intentionally maintained the Online Sales Ban in relation to all Ping golf clubs knowing that this would restrict competition between its Account Holders, and specifically [Account Holder 1] and [Account Holder 2].⁶⁵⁹
- 5.34. Ping’s Managing Director told the CMA in interview Ping’s reasons for permitting the sale of Soft Goods from August 2012: ‘*we realised that really there was a big inconsistency because we were banning sales of soft goods for custom-fit reasons which makes no sense [...] we decided to, make sure that our arguments were only being applied to the clubs*’.⁶⁶⁰ As Ping was reviewing its Internet Policy, it should have checked whether the Online Sales Ban (as amended) complied with competition law: Ping has provided no evidence to indicate that it faced genuine uncertainty at the time.
- 5.35. In Ping’s response to the Letter of Facts, Ping submitted that: ‘*its continued Online Sales Ban does comply with competition law. But in any event, the fact that Ping actively reviewed the scope of its Internet Policy in order to ensure that it was as closely tailored to its objective of maximising custom-fitting as possible (ie by limiting it to hard goods) renders any infringement by Ping less, not more, culpable. It shows Ping conscientiously considering the issues of proportionality and necessity*’.⁶⁶¹ For the reasons given in paragraphs 5.21 to 5.22 the CMA finds Ping must have been aware, or could not have been unaware of the anti-competitive nature of its conduct and that for the reasons given in paragraph 5.28 Ping would have been aware, or could not have been unaware, that banning online sales was neither necessary nor proportionate to achieving Ping’s aims. The CMA notes notwithstanding that submission, Ping has not produced contemporaneous evidence of it ‘*conscientiously considering the issues of proportionality and necessity*’, and that to conclude the Online Sales Ban was a necessary and proportionate measure, alternatives must have been assessed and rejected.

⁶⁵⁹ *Enforcement* (OFT407, December 2004), adopted by the CMA, paragraph 5.11. See also *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, at [456] and *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221.

⁶⁶⁰ See full response in CMA interview with Ping’s Managing Director on 10 March 2016, page 43, lines 16-23, URN A0863.

⁶⁶¹ Ping’s response to the Letter of Facts, paragraph 28a, URN A0992.1.

Ping has provided no evidence of that consideration.⁶⁶² However, the CMA has given due regard to this submission on relative culpability and intention in its assessment of starting point (see paragraph 5.52 onwards).

- 5.36. Ping's Managing Director explained to a Swedish Account Holder in December 2012 that: '[...] *we believe that EU law does not require a retailer to have a brick and mortar location in a country in order to be able to sell in that country. So long as it has a brick and mortar site in the EU it is entitled to sell anywhere in the EU. Our Internet Policy prohibits any Ping Authorised Account from selling Hard Goods directly via "click to basket". However, we cannot stop an authorised retailer from using the internet for advertising and marketing purposes.*'⁶⁶³
- 5.37. The December 2012 email demonstrates that Ping was aware of the key principles of European competition law and that its policies should be compliant. The CMA considers that this awareness of the relevant legal framework and its failure to provide any evidence that it had considered alternative ways of achieving its aim without an Online Sales Ban,⁶⁶⁴ indicates at least negligence in terms of Ping's assessment that its Online Sales Ban could be objectively justified.⁶⁶⁵
- 5.38. The CMA notes that Ping considers that its Online Sales Ban is '*lawful*'. However, since November 2015 Ping has been aware of the CMA's investigation and the potential risk that its Online Sales Ban contained in the Agreements may be found to breach competition law.
- 5.39. The CMA therefore finds that Ping Europe Limited committed the Infringements intentionally or, at the very least, negligently.

II The CMA's decision to impose a penalty

- 5.40. The CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act, provided the penalties it imposes in a

⁶⁶² See also paragraphs 4.225 and 5.24(c).

⁶⁶³ Email from the Managing Director dated 4 December 2012, URN A0063.

⁶⁶⁴ Ping's positive case was that it had not considered whether there were less restrictive alternatives to the Online Sales Ban '*if the question is have we put down a list and ticked off things that could not work, the answer is no*' Oral Hearing Transcript, page 78, lines 16-17, URN A0952.1.

⁶⁶⁵ In relation to this evidence, Ping submitted '*the fact that Ping was aware of the basic principles of competition law does not mean that it could reasonably have foreseen that its Internet Policy breached Article 101/the Chapter I prohibition. As set out in Ping's response to the DPS, the Decision raises highly novel questions of law which have only just begun to be tested in a number of recent cases. It is impossible on this basis to sustain a conclusion that Ping intentionally infringed competition law. Indeed, the CMA's case now is a highly nuanced one: that alternative measures which remain entirely untried and untested would be as effective as the Internet Policy. This represents a significant shift in the CMA's case – it now accepts that the Internet Policy is based on a genuine and strong narrative or objective – and it is impossible therefore to see on what reasonable basis Ping could be said to have intended or foreseen an infringement of competition law*', paragraph 28b, URN A0992.1.

particular case are: (i) within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (**2000 Order**),⁶⁶⁶ and (ii) the CMA has had regard to the Penalty Guidance in accordance with section 38(8) of the Act.⁶⁶⁷

- 5.41. The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.⁶⁶⁸ Rather, the CMA makes its assessment on a case-by-case basis⁶⁶⁹ having regard to all relevant circumstances and the objectives of its policy on financial penalties.
- 5.42. Ping has submitted that even if the Infringements are, technically, intentional or negligent then because the CMA's case is (in Ping's view) 'novel' Ping should receive zero or a nominal penalty '*by way of mitigation or as an overall appreciation of proportionality.*' Ping refers to the European Commission's past decisional practice in support of this submission.⁶⁷⁰
- 5.43. The CMA rejects this submission.
- 5.44. The appropriate penalty for each case is to be judged on its own facts. As set out above, the CMA's findings are not '*novel*'. In this case prior to the commencement of the Infringements, there was already a Court of Justice precedent finding that an online sales ban which is not objectively justified is an object infringement.⁶⁷¹
- 5.45. The CMA has found that Ping must have been aware, or could not have been unaware, or at least ought to have known, that it was restricting competition as a result of the Online Sales Ban. The CMA's view is that the anti-competitive consequences of the Online Sales Ban implemented through the Agreements were plainly foreseeable⁶⁷² and that the Online Sales Ban had the objective purpose of preventing online sales by its

⁶⁶⁶ SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

⁶⁶⁷ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

⁶⁶⁸ See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 (*Eden Brown*), at [78].

⁶⁶⁹ See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [116] where the CAT noted that '*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*'. See also *Eden Brown*, at [97] where the CAT observed that '*[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case*'.

⁶⁷⁰ Paragraph 21 and European Commission decisions and General Court judgment cited in footnote 16, Ping's Draft Penalty Statement Written Representations, URN A0963.2.

⁶⁷¹ See *Pierre Fabre*.

⁶⁷² *Enforcement* (OFT407, December 2004), adopted by the CMA, paragraph 5.11. See also *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, at [456] and *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221.

Account Holders, specifically both [Account Holder 1] and [Account Holder 2], thereby restricting competition.

- 5.46. Accordingly, the CMA considers that the circumstances of the case do not justify it exercising its discretion not to impose a penalty in this case.
- 5.47. The Commission's Guidelines on the method of setting fines⁶⁷³ provides that: '*The Commission may, in certain cases, impose a symbolic fine. The justification for imposing such a fine should be given in its decision.*' The Penalty Guidance does not contain an equivalent provision. In contrast to the circumstances of this case, the Commission has chosen to exercise its discretion to impose symbolic fines in relatively limited circumstances including where there was genuine novelty and involvement of a regulatory regime in the conduct of the undertakings concerned.
- 5.48. For the reasons set out above, the CMA finds that there was not such novelty or uncertainty in this case that would justify the CMA adopting an approach to setting the penalty that is not in accordance with its Penalty Guidance and instead imposing a nominal penalty. The CMA has followed the approach set out in the Penalty Guidance, having regard to the particular circumstances of this case.

III The CMA's penalty calculation

Single penalty

- 5.49. The CMA has discretion over whether to impose a single penalty or multiple penalties for infringing behaviour that could in principle be characterised as more than one infringement.⁶⁷⁴
- 5.50. In the present case, the CMA finds it appropriate to impose a single penalty on Ping for the Infringements in view of the fact that:
- (i) the Infringements involved the same Online Sales Ban;
 - (ii) the Infringements were part of a larger collection of similar agreements between Ping and its Account Holders selling Ping golf clubs in the UK, and
 - (iii) the CMA's decision to pursue two such agreements as infringements was a matter of discretion.

⁶⁷³ Paragraph 36, *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* (2006/C 210/02) (*Guidelines on setting fines*).

⁶⁷⁴ See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [179].

Table 5.1 below sets out a summary of the CMA's penalty calculation for Ping. The remainder of this section then explains the reasoning underpinning the penalty calculations. The CMA's calculations follow the six 'step' process outlined in the Penalty Guidance.

Table 5.1: Summary of the CMA's penalty calculations in respect of Ping

Step	Description		Adjustment
	Relevant turnover		[X]
1	Starting point		12%
	Penalty after Step 1		[X]
2	Adjustment for duration		5
	Penalty after Step 2		[X]
3	Adjustment for aggravating and mitigating factors	Director involvement	+10%
	Penalty after Step 3		[X]
4	Adjustment for specific deterrence and proportionality		[X]
	Penalty after Step 4		£1,477,789
5	Adjustment to ensure statutory cap is not exceeded and to avoid double jeopardy		N/A
6	Adjustment for leniency or settlement discounts		N/A
	Penalty payable		£1,450,000⁶⁷⁵

5.51. As noted above, when setting the amount of a penalty the CMA must have regard to the guidance on penalties in force at that time. The Penalty Guidance sets out a six-step approach for calculating the penalty. The six steps are set out below.

Step 1 – starting point

⁶⁷⁵ The CMA considers it appropriate to round the penalty to £1,450,000 in the circumstances of this case.

- 5.52. The starting point for determining the level of a financial penalty is calculated having regard to the seriousness of the infringement and is applied to the undertaking's relevant turnover.⁶⁷⁶
- 5.53. As set out in the following section, the Infringements are ongoing at the date of this Decision (through the continuing agreement with [Account Holder 1]). Accordingly, the CMA has used Ping's turnover in the relevant market in the financial year ended 31 December 2016, which is the last complete financial year for which the CMA has such data.
- 5.54. As set out in Section 3 of this Decision, the CMA finds that the relevant product and geographic market affected by the Infringements is no wider than the supply of golf clubs in the UK. Accordingly, based on the financial data provided to the CMA in this case, the CMA has used a figure of [X] as Ping's relevant turnover.⁶⁷⁷
- 5.55. The starting point (expressed as a percentage rate applied to the relevant turnover) depends in particular upon the nature of the infringement: the more serious and widespread the infringement, the higher the starting point is likely to be.⁶⁷⁸
- 5.56. The CMA will apply a rate of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement and, in so doing, to deter the infringing undertaking and other undertakings generally from engaging in that particular practice or type of practice in the future. A starting point towards the upper end of the range will be used for the most serious infringements of competition law, including hardcore cartel activity and the most serious abuses of a dominant position.⁶⁷⁹
- 5.57. When making this assessment, the CMA will consider a number of factors, including the nature of the product, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties. The seriousness assessment will also take into account the need to deter other undertakings from engaging in

⁶⁷⁶ The Penalty Guidance, paragraph 2.7, 2.8 and footnote 19: 'Relevant turnover' is the turnover of an undertaking in the relevant product market and geographic market affected by the infringement in the undertaking's last business year, which for the purposes of determining the penalty starting point is the financial year preceding the date when the infringement ended. Relevant turnover is calculated after the deduction of sales rebates, value added tax and other taxes directly related to turnover. Generally, the CMA will base relevant turnover on figures from an undertaking's audited accounts. However, in exceptional circumstances it may be appropriate to use a different figure as reflecting the true scale of an undertaking's activities in the relevant market.

⁶⁷⁷ Letter from Ping dated 24 May 2017 responding to a section 26 notice of 18 May 2017, URN A0981, attaching Ping's audited accounts for 2016, URN A0981.1.

⁶⁷⁸ The Penalty Guidance, paragraph 2.4.

⁶⁷⁹ The Penalty Guidance, paragraph 2.5.

such infringements in the future. The damage caused to consumers whether directly or indirectly will also be an important consideration. The assessment will be made on a case-by-case basis for all types of infringement, taking account of all the circumstances of the case.⁶⁸⁰

Application in this case

5.58. The CMA has applied a starting point of 12% of relevant turnover based on the seriousness of the Infringements. In doing so it has had regard to Ping's submissions.

5.59. Ping's submissions in relation the starting point at Step 1 were:⁶⁸¹

- (a) The CMA has '*pigeon-holed*' this case into the object box but provided no evidence as to how the Internet Policy '*has (materially) affected competition*'.
- (b) The fact that an online sales ban was found to be an object restriction in *Pierre Fabre* says nothing about the appropriate starting point. Ping considers that its case is different in significant respects (submitting that '*whilst Pierre Fabre concerned an objective which the CJEU essentially found to be bogus, Ping's objective has been found to be genuine*').⁶⁸²
- (c) The Online Sales Ban was not secret in nature, as established by the fact that Ping includes this in its Terms and Conditions and refers to it in circulars sent to all of its Account Holders.
- (d) The CMA has provided no evidence as to why the impact of its Account Holders not being able to sell online is adverse for competition and does not attempt to quantify the alleged seriousness of this impact. Ping also submits that the CMA has ignored that Ping's Account Holders are able to advertise Ping clubs and their prices online.⁶⁸³
- (e) Ping's policy has '*dramatically increased consumer choice via Ping's market leading range of club options*'.
- (f) The CMA is wrong to seek to deter other golf club manufacturers and, more generally, manufacturers and wholesalers in all sectors because Ping is in a special position. Its Custom Fit Clubs are highly technical products which are superior to those manufactured by its competitors and

⁶⁸⁰ The Penalty Guidance, paragraph 2.6.

⁶⁸¹ Draft Penalty Statement Written Representations, paragraphs 26 to 41, URN A0963.2.

⁶⁸² Draft Penalty Statement Written Representation, paragraph 23(a).

⁶⁸³ Draft Penalty Statement Written Representations, paragraph 35, URN A0963.2

the Internet Policy is genuinely aimed at promoting the Custom Fit characteristics of its clubs.

5.60. In determining the starting point, the CMA has assessed the seriousness of the Infringements. The following factors indicate that these Infringements are serious:

- (a) The CMA finds that the Infringements are by 'object'.⁶⁸⁴ The nature of an online sales ban is an agreement between a manufacturer and its retailers not to compete on the online sales channel and in particular for passive sales (and so is harmful to the proper functioning of normal competition⁶⁸⁵). The Court of Justice *Pierre Fabre* judgment and the line of cases concerning restrictions on passive selling, partitioning markets and territorial restraints⁶⁸⁶ treat such agreements as by object infringements, unless they are objectively justified. This is also a hard-core restriction under Article 4(c) of the VABER.
- (b) The Online Sales Ban has a clear impact on Ping's Account Holders which operate transactional websites specifically [Account Holder 1] and [Account Holder 2], in relation to whom Ping has sought to prevent their ability to sell Ping golf clubs online.⁶⁸⁷
- (c) The Online Sales Ban makes it more difficult for consumers to access a greater number of product offerings than may otherwise be available in their local geographic area. As a result of the Online Sales Ban (which prevents Account Holders with a transactional website being listed on comparison websites) consumers are significantly restricted from: (i) identifying and better obtaining discounted prices, by shopping around, and (ii) buying products that are not available from bricks and mortar retailers in their particular local area.⁶⁸⁸

⁶⁸⁴ See *Pierre Fabre*.

⁶⁸⁵ *Carte Bancaire v Commission*, EU:C:2014:2204, paragraph 50.

⁶⁸⁶ From *Consten & Grundig*, agreements which that have been determined to limit or discourage parallel trade, *GSK, Miller, BMW Belgium*, up to *Pierre Fabre* have been condemned.

⁶⁸⁷ The Advocate General in *Pierre Fabre*, stated at paragraph 56 of his Opinion: 'Moreover, while it would appear from the file before the Court that intra-mark competition is already strong given the sales of the products in a very large number of physical outlets in France, a general and absolute ban on internet sales eliminates a modern means of distribution which would allow customers to shop for those products outside the normal catchment area of those outlets thereby potentially further enhancing intra-mark competition. Internet sales may also enhance intra-mark competition as such sales may increase price transparency thereby permitting price comparison of the products in question.'

⁶⁸⁸ This reflects the OFT's findings in the Mobility Scooters: Roma decision of 5 August 2013 at paragraph 1.16. It also reflects the point made by the Advocate General in paragraph 56 of his Opinion in *Pierre Fabre*: 'Internet sales may also enhance intra-mark competition as such sales may increase price transparency thereby permitting price comparison of the products in question'.

5.61. On the other hand, the following factors indicate that these Infringements are less serious:

- (a) The conduct is not the most serious form of object restriction in a vertical agreement⁶⁸⁹ and it was not secret in nature.
- (b) In this case Ping has demonstrated that it has a genuinely held intention to promote Custom Fitting.⁶⁹⁰ In relation to the OFT's Construction bid-rigging infringement decisions, the CAT considered that '*motivations [...] have a bearing on the seriousness of the infringements in question.*'⁶⁹¹
- (c) Sports equipment is required only for an individual's leisure activities. Golf clubs are a luxury item of sports equipment which are not purchased (or replaced) frequently as opposed to a product which is either essential for all or some consumers. In general, there are benefits for a golfer having a face to face Custom Fitting and indeed many retailers and manufacturers promote Custom Fitting.⁶⁹² In terms of whether Custom Fit Clubs are a product which can be sold online, as explained at paragraph 3.47, with the exception of Ping, all other brands manufacturing Custom Fit Clubs allow their products to be sold online.
- (d) In terms of the likely impact on consumers, the SMS Survey Results Extract indicates that on average over [10]% of the surveyed golfers reported purchasing their golf clubs online,⁶⁹³ the proportion of golfers who have received a Custom Fitting purchasing online being even bigger, at around [15]% on average.⁶⁹⁴ These figures indicate, notwithstanding that the Online Sales Ban applies to all Ping Account Holders, currently the Online Sales Ban has an impact on a small proportion of all golf club

⁶⁸⁹ See for example the CMA's infringement decisions in Bathroom Fitting and in Commercial Catering concerning Resale Price Maintenance.

⁶⁹⁰ This factor has also been taken into account as part of the adjustment for specific deterrence and proportionality under Step 4, see paragraph 5.89(b).

⁶⁹¹ *Kier Group plc and others v Office of Fair Trading*, [2011] CAT 3, at [103 to [107]. In that case, the CAT took into consideration that cover pricing was widely regarded by the industry as legitimate, and that the practice was long-standing, widespread and endemic throughout the industry and textbooks gave the impression that cover-pricing was normal and acceptable practice.

⁶⁹² See paragraphs 3.31, 3.34 and 3.37.

⁶⁹³ The proportions of online purchases vary by club type, for instance [10–20]% of surveyed golfers reported buying a fairway wood and hybrid online, drivers were bought online by [10–20]% of surveyed golfers, wedges and putters were bought online by [10–20]% and irons were bought online by [1–10]% of surveyed golfers, SMS Survey Results Extract, pages 24 – 29, URN A0949.4. This figure may well not reflect actual volumes of golf clubs sold (ie only the fact that the proportion of surveyed golfers have bought a golf club online in the past) and it is used as a proxy only.

⁶⁹⁴ The proportion of online purchases by surveyed golfers might be even larger, given that some of those sales might be captured by other categories, eg American Golf. On the other hand, the SMS survey was conducted online only, therefore possibly overestimating the proportion of customers who would purchase golf clubs online.

retail sales in the UK and not widespread which is reflected in the starting point.⁶⁹⁵

- (e) The potential impact of this restriction has been taken into consideration at both Steps 1 and 4 (see paragraphs 5.60(c) and 5.89(b)). In circumstances in which an online sales ban affected a greater proportion of potential sales or it included additional restrictions such as online advertising restrictions, the starting point may have been higher.

5.62. The CMA has considered whether Ping's market share, the structure of the market or the entry or effect on competitors point towards a higher or lower starting point. The CMA considers that these factors do not have material impact on the seriousness of the Infringements and are not relied upon to determine the starting point. As explained in paragraph 4.82, the CMA rejects Ping's contention that the restriction of intra-brand competition for Ping golf clubs resulting from the Online Sales Ban can be justified by virtue of an alleged increase in inter-brand competition. As Ping did not provide evidence to support its submissions, the CMA is unable to give any weight to these claims.

5.63. Finally, the CMA has considered the need to deter Ping and other undertakings from engaging in such infringements.⁶⁹⁶ The CMA wishes to deter manufacturers in the golf equipment sector from entering into agreements with their retailers not to sell online.⁶⁹⁷ More generally the CMA wants to deter manufacturers and wholesalers in all retail sectors in the UK from imposing online sales bans, which are not objectively justified or do not meet the exemption criteria.⁶⁹⁸

⁶⁹⁵ This factor has also been taken into account as part of the adjustment for proportionality under Step 4, see paragraph 5.89(b).

⁶⁹⁶ The need for such deterrence is recognised as a legitimate consideration in the Penalty Guidance (see paragraphs 2.5); and in the amendments made by Parliament to the Competition Act 1998 in the Enterprise and Regulatory Reform Act 2013, which require the CMA to have regard to desirability of deterring both the undertaking on whom the penalty is imposed and others from entering into agreements which infringe the Chapter I prohibition or the prohibition in Article 81(1), see section 7A of the Act.

⁶⁹⁷ The CMA is aware of other instances in recent years of golf club manufacturers imposing and withdrawing online sales bans on authorised retailers operating in the UK. For example, *Professional Golf Services and others v. Acushnet Europe Ltd* [2011] EWHC 2996, URN A280050.

⁶⁹⁸ Indeed Ping referred to the CAT's judgment in *Kier* in its Draft Penalty Statement Written Representations, paragraph 2, (URN A0963.2) and submitted that the CMA must: '*take a step back and ask itself **whether in all the circumstances a penalty at the proposed level is necessary and proportionate in order both to punish the particular undertaking for the specific infringement and to deter it and other companies from further breaches of that kind.***' [emphasis added]. See also the Penalty Guidance, paragraph 2.6 and section 36(7A) of the Act, '*In fixing a penalty under this section the CMA must have regard to – (a) the seriousness of the infringement concerned, and (b) **the desirability of deterring both the undertaking on whom the penalty is imposed and others from – (i) entering into agreements which infringe the Chapter I prohibition or the prohibition in Article 81(1)...***' [emphasis added]

- 5.64. Although the CMA has found that the Online Sales Ban is disproportionate, in assessing the seriousness in the round, the CMA has taken account of Ping's submissions that its genuine intention is to promote Custom Fitting. In cases where the CMA does not find a genuine legitimate aim then the starting point for such an online sales ban is likely to be higher.
- 5.65. The CMA therefore calculates, using 12% of the relevant turnover set out above that at the end of step 1, Ping's penalty is [X].

Step 2 – adjustment for duration

- 5.66. The CMA may adjust the penalty reached at the end of step 1 to take into account the duration of the infringement. Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional cases decide to round up the part year to a full year.⁶⁹⁹
- 5.67. The CMA has found that the Infringements lasted from [X] (at the latest) to [X] ([X]) in relation to the agreement with [Account Holder 2] and from 30 July 2012 (at the latest) and is ongoing at the date of this Decision (five years) in relation to the agreement with [Account Holder 1].⁷⁰⁰
- 5.68. Accordingly, applying the relevant principles of the Penalty Guidance (summarised above), and in relation to the duration of the ongoing element of the Infringements, the CMA has increased the penalty at the end of step 1 by a multiplier of 5, such that at the end of step 2, it is [X].
- 5.69. Ping submitted that the methodology of multiplying a proportion of relevant turnover with the duration of the Infringements is 'inapposite' in a case such as this since it increases the size of the fine very substantially without justification.⁷⁰¹ The CMA does not consider that Ping has provided any evidence to demonstrate that it would be appropriate to depart from Step 2 in its Penalty Guidance in this case. An overall assessment of the proportionality of the penalty will instead be carried out under Step 4 as set out in the Penalty Guidance.

Step 3 – adjustment for aggravating and mitigating factors

- 5.70. The CMA may, at step 3, increase a penalty where there are aggravating factors, or decrease it where there are mitigating factors. A non-exhaustive

⁶⁹⁹ Penalty Guidance, paragraph 2.12.

⁷⁰⁰ See paragraph 5.2.

⁷⁰¹ Draft Penalty Statement Written Representations, paragraph 50, URN A0963.2.

list of aggravating and mitigating factors is set out in the Penalty Guidance.⁷⁰²

- 5.71. For example, the CMA may decrease a penalty at step 3 for cooperation which enables the enforcement process to be concluded more effectively or speedily. For these purposes, respecting time limits specified by the CMA is a necessary but not sufficient criterion at this step, and cooperation over and above this will be expected in order to merit a reduction.⁷⁰³

Aggravating factor – director involvement

- 5.72. The CMA considers that the involvement of Ping's Managing Director should be taken into account as an aggravating factor at step 3. Specifically:
- The Managing Director told the CMA that Ping's senior management team considers its Terms and Conditions (including the Internet Policy) at least annually and in 2007 the management team specifically considered whether the Online Sales Ban should be retained.⁷⁰⁴
 - The Managing Director prior to and throughout the period of the Infringements was involved in planning and implementing the Internet Policy, containing the Online Sales Ban.⁷⁰⁵
 - Ping carried out a review of the Internet Policy (containing the Online Sales Ban) in 2011/12 and decided that it should be retained in relation to golf clubs. In August 2012 Ping permitted its account holders to apply to sell Soft Goods online.⁷⁰⁶
- 5.73. Consequently, the CMA considers that the Managing Director of Ping played a major role in creating, implementing and enforcing the Online Sales Ban, contained in the Agreements.
- 5.74. Ping does not dispute that certain of its senior management was aware of, and regularly reviewed, the Internet Policy.⁷⁰⁷ However, Ping submitted that the involvement of Ping's directors should not have any material impact on the penalty because Ping is a '*relatively small company*' and it would be '*unreal*' to suggest that the Infringement could have taken place without management involvement. On this basis, Ping submitted that for the CMA to

⁷⁰² The Penalty Guidance, paragraphs 2.14 and 2.15.

⁷⁰³ The Penalty Guidance, paragraph 2.15 and footnote 28.

⁷⁰⁴ Transcript of CMA interview with the Managing Director held on 10 March 2016, pages 64-65, URN A0863.

⁷⁰⁵ As described at paragraphs 3.79 to 3.103, the Managing Director communicated any amendments to the Internet Policy to Account Holders prior to and during the period of the Infringements.

⁷⁰⁶ As described at paragraphs 3.93 to 3.94.

⁷⁰⁷ Draft Penalty Statement Written Representations, paragraph 43, URN A0963.2.

impose an increase in penalty would ‘*unfairly discriminate against smaller companies with fewer resources who depend on senior managers being “hands on”*’.

- 5.75. The CMA finds, however, that company directors have an additional responsibility, beyond that of other employees, not to infringe the law. The CMA considers that this applies equally, regardless of the size of the company and the ‘*hands on*’ role of senior management.
- 5.76. Ping also submits that the fact that Ping’s management carried out a review in 2011/12 is a ‘*point in Ping’s favour because it demonstrates that the policy was closely tailored to Ping’s objective of maximising custom-fitting rates*’. Ping has not substantiated evidence to support this submission. Notwithstanding that the review was conducted after the *Pierre Fabre* judgment’s finding that an online sales ban is an object restriction unless objectively justified, Ping’s management did not consider whether there were any less restrictive means of achieving its aims.⁷⁰⁸
- 5.77. The CMA considers that an increase of 10% for the involvement of Ping’s Managing Director is appropriate and proportionate in the circumstances of the Infringements.

Mitigating factors

- 5.78. The CMA finds that there are no relevant mitigating factors to be taken into account at step 3.
- 5.79. Ping submitted that there should be a reduction for genuine uncertainty in this area of law, which is recognised as a mitigating factor in paragraph 2.15 of the Penalty Guidance. Ping relies on its submissions⁷⁰⁹ (summarised above in 5.24(b)) that the CMA’s case rests on highly controversial and uncertain legal principles.
- 5.80. As described more fully in paragraphs 5.27 to 5.28 above, the CMA does not consider that there was genuine uncertainty regarding the law because *Pierre Fabre* established that online sales bans are object restrictions unless objectively justified and this judgment was issued almost a year prior to Ping deciding to maintain the Online Sales Ban.

⁷⁰⁸ Ping’s told the CMA that it had not considered whether there were less restrictive alternatives to the Online Sales Ban ‘*if the question is have we put down a list and ticked off things that could not work, the answer is no*’ Oral Hearing Transcript, page 78 lines 16-17, URN A0952.1.

⁷⁰⁹ Draft Penalty Statement Written Representations, paragraphs 18-20, URN A0963.2.

- 5.81. The CMA may decrease the penalty at step 3 for cooperation which enables the enforcement process to be concluded more effectively or speedily.
- 5.82. Ping agreed to three voluntary interviews which took place in March 2016. The interviews allowed the case team to clarify the market background and the history of the Online Sales Ban more effectively than requesting information by statutory notice. However, as a result of Ping's refusal to comply with the 28 March 2017 deadline to respond to the Alternatives Paper,⁷¹⁰ the CMA considers that in accordance with the Penalty Guidance,⁷¹¹ it would not be appropriate to provide any reduction for cooperation as respecting [CMA] time limits is a necessary, but not sufficient, criterion to merit any reduction.
- 5.83. Ping has submitted that the CMA's implied criticism regarding Ping's failure to comply with a six week deadline to respond to the Alternatives Paper should not be characterised as akin to a lack of cooperation on Ping's part that would preclude a reduction on grounds of cooperation. Ping submitted that such an approach by the CMA might lead to a situation whereby an unreasonably-set CMA deadline would preclude a party under investigation from ever obtaining a cooperation reduction.
- 5.84. The CMA does not accept these submissions. The CMA seeks to set deadlines which are appropriate in the circumstances of a particular case and considers that in this specific case Ping requested the opportunity to consider the CMA's provisional views on Objective Justification arguments and the CMA subsequently provided an extended deadline of six weeks for Ping to do so.⁷¹² Ping informed the CMA that it would not be able to respond until 28 April (some ten weeks after the paper in question had been provided to Ping).⁷¹³ Notwithstanding that Ping had been informed of its right to apply to the Procedural Officer if it had concerns about the deadline set, Ping did not make any such application. Ping subsequently decided not to submit any response.⁷¹⁴ Particularly in light of Ping's conduct concerning its response to the Alternatives Paper, Ping cannot be said to have cooperated with the CMA to the extent that would warrant a discount at step 3. The CMA therefore continues to consider that it would not be appropriate to provide a reduction for cooperation to Ping.

⁷¹⁰ See paragraphs 2.10 to 2.19 for a description of the correspondence between Ping and the CMA in relation to this matter.

⁷¹¹ OFT 423, page 13, footnote 28 provides: '*Respecting OFT time limits specified or otherwise agreed will be a necessary but not sufficient criterion to merit a reduction at this step, that is to say, cooperation over and above this will be expected*'.

⁷¹² Ping letter dated 7 December 2016, URN A0950.1.

⁷¹³ Ping email dated 14 February 2017, URN A0956.

⁷¹⁴ Ping letter dated 25 April 2017, URN A0963.1. See more detailed description at paragraph 2.16 to 2.17.

Adjustments at Step 3

- 5.85. The CMA considers that an uplift of 10% or [X] is appropriate at step 3 taking into account the involvement of Ping's Managing Director and the lack of mitigating factors.
- 5.86. The CMA therefore calculates that at the end of step 3 Ping's penalty is [X].

Step 4 – adjustment for specific deterrence and proportionality

- 5.87. The CMA may adjust any penalty at step 4 for specific deterrence (that is, to ensure that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future) or proportionality, having regard to appropriate indicators of the size and financial position of the relevant undertaking, as well as any other relevant circumstances of the case.⁷¹⁵ At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustments at step 4 may result in either an increase or a decrease to the penalty.⁷¹⁶
- 5.88. Where necessary, the CMA may decrease the penalty at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.⁷¹⁷

Application in this case

- 5.89. Ping's penalty after step 3 would be [X]. The CMA considers that this figure should be decreased to ensure that the level of penalty is not disproportionate or excessive. In reaching this view, the CMA has had regard to the following factors:
- (a) *Ping's size and financial position:* Having had regard to a range of financial indicators, the CMA considers that Ping's penalty should be decreased to ensure that its penalty is not disproportionate or excessive. For example, the CMA notes that the unadjusted penalty would be:

⁷¹⁵ The Penalty Guidance, paragraph 2.16.

⁷¹⁶ The Penalty Guidance, paragraphs 2.16 to 2.20. The CMA has taken into account a range of financial indicators in this regard, based on accounting information publicly available or provided by Ping to the CMA. Those financial indicators are set out in this section of this Decision.

⁷¹⁷ The Penalty Guidance, paragraph 2.20.

- in excess of Ping's profit after tax (**PAT**):
 - [X] for the year ended 31 December 2016 ([X]);
 - [X] of Ping's average PAT for the last three financial years ([X]);⁷¹⁸
- [X] of Ping's adjusted net assets (2016 net assets plus three years of dividends; no dividends were paid during 2014-16)

Notwithstanding that Ping's PAT were [X] for financial year ended 31 December 2016, the CMA notes that Ping's gross profits were over [X] during this period. One of the reasons for the difference between Ping's gross profits and PAT is that Ping makes significant financial contributions by way of commission and royalties to two US companies (Karsten Worldwide Corporation and its wholly owned subsidiary Ping Inc.) which are both ultimately owned by the Solheim family.⁷¹⁹ [X].⁷²⁰

- (b) *Other relevant circumstances of the case:* The CMA has also had regard to the impact of the Online Sales Ban ie the fact that only a relatively small percentage of sales of other brands of golf clubs are currently made online.⁷²¹ The CMA has also had regard to Ping's genuinely held aim to promote Custom Fitting.⁷²²

5.90. In view of the foregoing, to ensure that the level of penalty is not disproportionate or excessive, the CMA considers that Ping's penalty after step 3 should be decreased by [X]. The CMA notes that the adjusted penalty would be equivalent to:

- [X] of Ping's average PAT for the last three financial years ([X]);
- [X] of Ping's PAT for the year ended 31 December 2016 ([X]);
- [X] of average worldwide turnover (three years) or [X] of Ping's relevant turnover in 2016;
- [X] as average gross profit (three years); and

⁷¹⁸ The CMA has calculated three year averages on the basis of PAT figures reported in Ping's Annual Report for financial years ended 31 December 2016 (URN A0981.1), 31 December 2015 (URN A280054) and 31 December 2014 (URN A280055).

⁷¹⁹ See Ping's Annual Reports for financial year ended 31 December 2016 (URN A0981.1), 31 December 2015 (URN A280054) and 31 December 2014 (URN A280055).

⁷²⁰ Email of 2 November 2016 from Ping's Managing Director responding to a section 26 notice of 20 October 2016, URN A0931.

⁷²¹ See paragraph 5.61 (d) above.

⁷²² See paragraph 5.61(b) above.

- [X] of Ping's adjusted net assets (2016 net assets plus three years of dividends).
- 5.91. Ping submitted that a reduction of [X] is not a genuine reduction but simply serves to highlight how disproportionate the CMA's approach is and, furthermore, that the reduction should in any event be much greater to avoid the penalty being disproportionate. Ping submitted that the '*slavish application of the steps*' under the Penalty Guidance would lead to an unjust and disproportionate outcome in an individual case and that it considers that there are '*clear indications*' of this problem in this case.
- 5.92. In this regard, the CMA notes that the proportionality adjustment envisaged in Step 4 recognises that the mechanistic nature of steps 1 to 3 for setting a penalty, may in some circumstances produce results that are not proportionate. That, however, does not indicate that the CMA is wrong to follow the approach set out in the Penalty Guidance in relation to those first three steps.
- 5.93. Ping submitted the following arguments in relation to the relative size of Ping's fine:
- Ping relies on the CAT's judgment in *Eden Brown* which held that any penalty imposed must be proportionate, having regard not only to the undertaking's turnover but also other aspects of its financial position. Ping submitted that when compared with Ping's PAT, the proposed penalty (as set out in the Draft Penalty Statement) was '*plainly disproportionate in light of the factors set out in relation to Step 1 [...], especially the fact that the CMA has admitted that Ping's internet policy pursues a genuine objective of promoting custom fitting*'.⁷²³
 - Ping considers that payments made to Ping Inc and Karsten Worldwide Corporation are irrelevant as a matter of principle to the proportionality of the fine imposed by the CMA and should be disregarded.
- 5.94. The CMA continues to consider that a [X] reduction is proportionate in the circumstances of the case. In particular the CMA notes that, as the duration covers five financial years, the penalty equates to £295,558 per year (which is significantly lower than Ping's PAT in each year of the Infringements except for 2015).
- 5.95. In terms of Ping's argument that comparing the proposed penalty with Ping's PAT figure indicates a disproportionate penalty, Step 4 is an 'in the round'

⁷²³ Draft Penalty Statement Written Representations, paragraph 51, URN A0963.2.

assessment, which includes consideration of all relevant financial indicators, ie the decision is not taken on the basis of one indicator alone. The CMA notes that the penalty has been reduced by [X], reflecting a significant proportionality adjustment. In relation to Ping's arguments regarding the penalty being disproportionate when compared with Ping's PAT in 2015, the CMA notes:

- The increase in reported profit in 2016 means that the penalty at Step 4 is a lower proportion of profit after tax in the latest year reported ([X] compared with [X] in the Draft Penalty Statement) and, compared with the average profit after tax over three years, [X] compared with [X]).
- The Annual Report for 2016 states that this profit has been restated to comply with FRS 102, including amounts not previously recognised relating to fair movements on foreign exchange forward contracts. The effect of this in 2016 reduced profit from [X] (Annual accounts page 8) and when the proposed penalty is compared with this unadjusted figure, the penalty would be [X] of PAT.

5.96. In relation to Ping's arguments on the payments to US based companies, the CMA notes that it may take such payments into consideration without needing to establish any illegality or wrong doing. Importantly, no decision on penalty is made on a single element, and these payments have merely been considered in the round.

5.97. The CMA therefore calculates that at the end of step 4 Ping's penalty would be £1,477,789.

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

Adjustments to prevent maximum penalty from being exceeded

5.98. The final amount of the penalty calculated according to the method set out above may not in any event exceed 10% of the worldwide turnover of the undertaking in its last business year.⁷²⁴ The relevant business year for these purposes will be the one preceding the date on which the decision of the

⁷²⁴ Calculated in accordance with The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, SI 2000/309 (the 2000 Turnover Order), as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259 (the Amended 2000 Turnover Order); see the Penalty Guidance, paragraph 2.21.

CMA is taken or, if figures are not available for that business year, the one immediately preceding it.

- 5.99. Based on worldwide turnover in Ping's latest accounts for the financial year ended 31 December 2016, no adjustment is required at this step as the penalty does not exceed 10% of Ping's applicable turnover.⁷²⁵

Adjustments to avoid double jeopardy

- 5.100. 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.⁷²⁶
- 5.101. The CMA is not aware that any adjustment needs to be made to the level of the penalty figure reached at the end of step 4 in order to avoid double jeopardy.

Adjustments made at this step

- 5.102. The CMA does not propose any adjustments at this step, so the penalty figure reached at the end of step 5 remains the same as at the end of step 4.

Step 6 – Application of reductions for leniency and settlement

- 5.103. The CMA will reduce an undertaking's penalty at step 6 where the undertaking has a leniency agreement with the CMA or agrees to settle with the CMA.⁷²⁷ Reductions for leniency or settlement agreement are not applicable to Ping.

Conclusion on penalty

- 5.104. In light of the above, the CMA considers a penalty of £1,450,000 to be appropriate in the circumstances of this case. Over the course of five years, this figure amounts to £290,000 in each year of the Infringement.
- 5.105. The penalty will become due to the CMA on 25 October 2017⁷²⁸ and must be paid to the CMA by close of banking business on that date.⁷²⁹

⁷²⁵ Ping's worldwide turnover was [X] for financial year ended 31 December 2016 according to its Annual Accounts dated 31 December 2016, URN A0981.1.

⁷²⁶ The Penalty Guidance, paragraph 2.24.

⁷²⁷ The Penalty Guidance, paragraphs 2.25 to 2.26.

⁷²⁸ The next working day two calendar months from the expected date of receipt of the Decision.

⁷²⁹ Details of how to pay are set out in the letter accompanying this decision.

Simon Polito (Chair), John Wotton and Kate Collyer
for and on behalf of the Competition and Markets Authority

[✂]

[✂]

[✂]

24 August 2017