

Decision of the Competition and Markets Authority

Online resale price maintenance in the
guitar sector

Case 50565-3

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

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 Names have been replaced by a general descriptor of the individual's role.

Contents

1. Introduction and Executive Summary	5
A. Glossary	7
2. Investigation	11
3. Facts.....	17
A. Addressees	17
I. Fender Europe	17
II. Fender US	17
B. Guitar sector overview	18
I. UK guitar sector	18
II. Fender Europe’s involvement in the UK guitar sector	19
III. Other UK guitar suppliers.....	20
IV. UK MI resellers	20
V. Fender Europe’s sales and distribution network	22
VI. Importance of internet sales as a retail channel to the MI sector	24
C. Fender Pricing Policy	25
I. Introduction	25
II. Origins, scope, content and duration	29
III. Monitoring and enforcement of the Fender Pricing Policy.....	41
IV. Illustrative examples of Fender Europe’s monitoring and enforcement....	51
V. Consequences for MI resellers of non-compliance with the Fender Pricing Policy	63
VI. Fender Europe’s awareness about illegality of implementing and enforcing the Fender Pricing Policy	71
D. Market Definition	78
I. Purpose of and framework for assessing the relevant market	78
II. Relevant product market.....	79
III. Sales to different distribution channels	80
IV. Relevant geographic market	83
V. Conclusion on market definition	84
4. Legal Assessment	84
A. Introduction	84
B. Undertakings	86
I. Key legal principles	86
II. Conclusion on undertakings.....	86
C. Agreement and/or Concerted Practice	86
I. Key legal principles	87
II. Agreement	87
III. Concerted Practice	90
IV. Agreement and/or concerted practice between Fender Europe and [Reseller 1].....	91

D.	Object of Preventing, Restricting or Distorting Competition	127
I.	Key legal principles	127
II.	Legal Assessment of the Agreement	135
E.	Appreciable Restriction of Competition	138
I.	Key legal principles	139
II.	Legal assessment	139
F.	Effect on Trade between EU Member States	139
I.	Key legal principles	140
II.	Legal assessment	141
G.	Effect on Trade within the UK.....	144
I.	Key legal principles	144
II.	Legal assessment	145
H.	Exclusion or Exemption.....	145
I.	Exclusion	145
II.	Block exemption / Parallel exemption	145
III.	Individual exemption	146
I.	Attribution of liability	147
I.	Key legal principles	147
II.	Liability for Infringement.....	150
III.	Conclusion on joint and several liability	150
J.	Burden and standard of proof.....	151
I.	Burden of proof	151
II.	Standard of proof	151
5.	The CMA's Action.....	153
A.	The CMA's Decision.....	153
B.	Directions	153
C.	Financial Penalties	154
I.	General	154
II.	Intention/negligence.....	155
III.	Calculation of Penalties	157
IV.	Payment of penalty	166

1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 This Decision is addressed to Fender Musical Instruments Europe Limited (Fender Europe) and to its indirect parent company, Fender Musical Instruments Corporation (Fender US) (together, Fender).

1.2 By this Decision,¹ the Competition and Markets Authority (the CMA) has concluded that:

- Fender Europe infringed the prohibition in section 2(1) of the Competition Act 1998 (the Act) (the Chapter I prohibition) and/or Article 101 of the Treaty on the Functioning of the European Union (the TFEU) by entering into an agreement and/or participating in a concerted practice with [Reseller 1] ([Reseller 1]), one of Fender Europe's UK resellers:
 - That [Reseller 1] would not advertise or sell online electric guitars, electric basses and acoustic guitars supplied to it by Fender Europe (the Relevant Products) below a price specified by Fender Europe from time to time (the Minimum Price);
 - which amounted to resale price maintenance (RPM) in respect of online sales of the Relevant Products by [Reseller 1]; and
- the agreement and/or concerted practice:
 - had as its object the prevention, restriction or distortion of competition within the UK and/or between EU Member States;
 - may have affected trade within the UK and/or between EU Member States; and
 - lasted from 12 January 2013 at the latest to 17 April 2018 (the Relevant Period)

(together referred to below as the Infringement).

1.3 The CMA has decided to attribute liability for Fender Europe's Infringement also to its indirect parent company, Fender US, making Fender Europe and Fender US jointly and severally liable for the Infringement.

1.4 The CMA has applied Rule 10(2) of the CMA Rules in this case and has addressed this Decision only to the undertakings identified in paragraph 1.1 above and not to [Reseller 1].

¹ The CMA hereby gives notice of its decision subject to Rule 10(1) of The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/458).

1.5 The CMA has decided to impose a financial penalty on Fender pursuant to section 36(1) of the Act.

A. Glossary

Term	Definition
[Reseller 1]	[REDACTED]
[Reseller]	[REDACTED]
[Reseller]	[REDACTED]
[Reseller]	[REDACTED]
[Reseller]	[REDACTED]
[Reseller]	[REDACTED]
[Reseller]	[REDACTED]
[Reseller]	[REDACTED]
[Reseller]	[REDACTED]
[Reseller]	[REDACTED]
[Reseller]	[REDACTED]
[Reseller]	[REDACTED]
[Reseller]	[REDACTED]
Act	Competition Act 1998
ADA	Authorised Dealer Agreement
Addressees	Fender Musical Instruments Europe Limited and Fender Musical Instruments Corporation
Agreement	The agreement and/or concerted practice between Fender Europe and [Reseller 1] that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price
Amps	Amplifiers
April 2018 [Reseller 1] RFI	The s.26 notice issued to [Reseller 1] by the CMA on 17 April 2018 with URN C_FEN00083
Article 101 TFEU	Article 101 of the Treaty of the Functioning of the European Union
CAT	The Competition Appeal Tribunal
Chapter I Prohibition	The prohibition imposed by section 2(1) of the Act
CMA	The Competition and Markets Authority
CMA Rules	The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/58)
Commission	The European Commission
Court of Justice	The Court of Justice of the European Union (formerly the European Court of Justice)

Term	Definition
D2C	Direct to consumer. Sales to end consumers via Fender's own website (fender.com). This was first made available to UK consumers in 2016.
Decision	This decision dated 22 January 2020
DSM	District Sales Manager, a sales role within Fender Europe
EA02	The Enterprise Act 2002
Effect on Trade Guidelines	Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)
EU	The European Union
February 2019 RFI	The RFI issued to Fender Europe by the CMA on 14 February 2019 with URN C_FEN01466
Fender	Fender Europe and Fender US together
Fender Europe	Fender Musical Instruments Europe Limited (company number 03127180), a UK registered company
Fender Pricing Policy	The arrangements between Fender Europe and its UK MI resellers according to which MI resellers would not advertise or sell the Relevant Products online below the Minimum Price
Fender US	Fender Musical Instruments Corporation (Company Registration No. 2053985), a company incorporated in Delaware, USA
General Court	The General Court of the European Union (formerly the Court of First Instance)
IBISWorld Report	IBISWorld Industry Report G47.591 <i>Musical Instrument Retailers in the UK</i> (published in December 2017, July 2018 and March 2019)
Infringement	The infringement of the Chapter I Prohibition and/or Article 101 TFEU regarding the Relevant Products, as specified in paragraph 1.2 above
July 2019 RFI	The request for information sent to Fender by the CMA on 2 July 2019 with URN C_FEN01764
MAP	Minimum advertised price
Mass resellers	Mass merchants: these are resellers who sell a wider range of products than just musical instruments and indeed sell a large variety of products outside of the musical instruments sector. These resellers usually have a very specific selection of products they purchase from Fender.
May 2019 RFI	The request for information sent to Fender Europe by the CMA on 16 May 2019 with URN C_FEN01645.
MI	Musical instruments and music making equipment, that is, instruments and equipment not used solely for the playback of recorded music but used in the creation and/or live playing of music by musicians
MI resellers	Resellers who sell principally MI, including the Relevant Products and other products sold by Fender Europe. MI resellers have a store with showroom and many have an online e-commerce website. These resellers usually stock and sell a broad selection of MI.

Term	Definition
Minimum Price	The minimum price(s) specified by Fender Europe from time to time in connection with the Fender Pricing Policy
MSRP	'Manufacturer Suggested Retail Price', a price set by Fender Europe
OFT	The Office of Fair Trading, one of the CMA's predecessor organisations
Penalties Guidance	<i>CMA's Guidance as to the appropriate amount of a penalty</i> (CMA73, April 2018)
Proffer 1	The oral proffer made by Fender US and its subsidiaries, including Fender Europe, on 25 July 2018
Proffer 2	The oral proffer made by Fender US and its subsidiaries, including Fender Europe, on 19 June 2019
Relevant Period	12 January 2013 at the latest to 17 April 2018
Relevant Products	All electric guitars, electric basses and acoustic guitars supplied by Fender Europe to its UK resellers during the Relevant Period, excluding associated accessories, such as guitar amplifiers, adapters, or effects pedals. Whenever this term is used, it may also refer to any subset of the products described above.
RFI	A request for information
RPM	Resale price maintenance
RRP	Recommended retail price, used by Fender Europe as being synonymous with MSRP
s.26 Notice	A notice issued under section 26 of the Act
SDA	Selective Distribution Agreement
19 April 2018 RFI	The s.26 notice issued to Fender Europe by the CMA on 19 April 2018 with URN E_FEN003326
September 2019 RFI	The request for information sent to Fender Europe by the CMA on 27 September 2019 with URN C_FEN01934
SKU	A stock keeping unit (or SKU) is a number assigned to a product by a retail store to identify the price, product options and manufacturer of the merchandise
SO	The Statement of Objections dated 8 October 2019 addressed to Fender Europe and Fender US
SPA	Strings, parts and accessories: a collective term for various small consumable parts and accessories for the Relevant Products
SRP	Suggested retail price, synonymous with MSRP
SSP	Suggested sale price, synonymous with MSRP
TFEU	The Treaty on the Functioning of the European Union
The 12 Resellers	Resellers of the Relevant Products to whom the CMA sent s.26 Notices on 17 April 2018
The s.27 Notice	The s.27 Notice issued to Fender Europe by the CMA on 17 April 2018 with

Term	Definition
	URN E_FEN003324
VABER	The Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010), known as the Vertical Agreements Block Exemption Regulation
Vertical Guidelines	The Commission Guidelines on Vertical Restraints [2010] OJ C130/01
2000 Order	The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000

References to legislation in the above Glossary refer equally to any amendments to that legislation.

2. INVESTIGATION

2.1 On 17 April 2018, the CMA opened a formal investigation under section 25 of the Act into a suspected competition law infringement by Fender Europe. The CMA did so having determined that it had reasonable grounds for suspecting that:

- Fender Europe had infringed the Chapter I prohibition and/or Article 101 TFEU by being involved in anti-competitive agreements and/or concerted practices ('arrangements' where the context permits) with at least one UK reseller;
- these arrangements restricted the price at which MI supplied by Fender Europe were advertised online by its UK resellers; and
- this, in turn, restricted the price at which MI were sold by its UK reseller/s – making the arrangements a form of resale price maintenance (RPM).

2.2 At the same time, the CMA made an administrative decision to focus the evidence-gathering in this investigation on:

- the period from January 2013; and
- the Relevant Products (all electric and acoustic guitars and basses supplied by Fender UK to its UK resellers, excluding accessories).

2.3 On 17 April 2018, the CMA entered Fender Europe's business premises under section 27 of the Act and required documents relevant to its investigation to be produced and information relevant to its investigation to be provided (the s.27 Notice).² On the same date, the CMA also issued Fender Europe with a notice under section 26 of the Act (s.26 Notice) requiring further documents and information to be produced.³

2.4 Also, on 17 April 2018, the CMA issued s.26 Notices to the following 12 resellers (the 12 Resellers), requiring production of information and documents:

- [Reseller 1] ([Reseller 1]);⁴
- [Reseller];⁵
- [Reseller];⁶

² URN E_FEN003324 (s.27 Notice).

³ URN E_FEN003325 (s.26 Notice to Fender Europe).

⁴ URN C_FEN00083 (s.26 Notice to [Reseller 1]) and URN C_FEN00085 (Annex 2 to s.26 Notice to [Reseller 1]).

⁵ URN C_FEN00065 (s.26 Notice to [Reseller]) and URN C_FEN00069 (Annex 2 to s.26 Notice to [Reseller]).

⁶ URN C_FEN00071 (s.26 Notice to [Reseller]) and URN C_FEN00073 (Annex 2 to s.26 Notice to [Reseller]).

- [Reseller];⁷
- [Reseller];⁸
- [Reseller];⁹
- [Reseller];¹⁰
- [Reseller];¹¹
- [Reseller];¹²
- [Reseller];¹³
- [Reseller];¹⁴
- [Reseller].¹⁵

2.5 Between 18 April 2018 and 24 April 2018, the CMA conducted voluntary first-account interviews with three Fender Europe employees: [Former Senior Employee 1], [REDACTED];¹⁶ [Employee 14], [REDACTED];¹⁷ and [Senior Employee 1], [REDACTED].¹⁸

2.6 On 19 April 2018, the CMA issued Fender Europe with a further s.26 Notice requiring further documents and information to be produced (19 April 2018 s.26 Notice).¹⁹

2.7 On 11 July 2018, Fender Europe enquired about the availability of a leniency marker in this case. On 12 July 2018, the CMA verbally granted a provisional Type B/C leniency marker to Fender.

2.8 As part of its application for leniency, Fender Europe provided:

⁷ URN C_FEN00077 (s.26 Notice to [Reseller]) and URN C_FEN00078 (Annex 2 to s.26 Notice to [Reseller]).

⁸ URN C_FEN00096 (s.26 Notice to [Reseller]) and URN C_FEN00098 (Annex 2 to s.26 Notice to [Reseller]).

⁹ URN C_FEN00028 (s.26 Notice to [Reseller]) and URN C_FEN00030 (Annex 2 to s.26 Notice to [Reseller]).

¹⁰ URN C_FEN00089 (s.26 Notice to [Reseller]) and URN C_FEN00091 (Annex 2 to s.26 Notice to [Reseller]).

¹¹ URN C_FEN00059 (s.26 Notice to [Reseller]) and URN C_FEN00061 (Annex 2 to s.26 Notice to [Reseller]).

¹² URN C_FEN00047 (s.26 Notice to [Reseller]) and URN C_FEN00049 (Annex 2 to s.26 Notice to [Reseller]).

¹³ URN C_FEN00034 (s.26 Notice to [Reseller]) and URN C_FEN00036 (Annex 2 to s.26 Notice to [Reseller]).

¹⁴ URN C_FEN00053 (s.26 Notice to [Reseller]) and URN C_FEN00055 (Annex 2 to s.26 Notice to [Reseller]).

¹⁵ URN C_FEN00045 (s.26 Notice to [Reseller]) and URN C_FEN00042 (Annex 2 to s.26 Notice to [Reseller]).

¹⁶ URN C_FEN00776 (Transcript of interview with [Fender Europe Former Senior Employee 1] dated 18 April 2018).

Note: [Fender Europe Former Senior Employee 1] [REDACTED].

¹⁷ URN C_FEN00777 (Transcript of interview with [Fender Europe Employee 14] dated 18 April 2018).

¹⁸ URN C_FEN00778 (Transcript of interview with [Fender Europe Senior Employee 1] dated 24 April 2018).

¹⁹ URN E_FEN003326 (19 April 2018 RFI).

- on 25 July 2018, an oral proffer (Proffer 1);²⁰
- on 25 July 2018, witness statements of seven employees of Fender Europe: [Employee 2],²¹ [Employee 1],²² [Employee 9],²³ [Employee 3],²⁴ [Employee 4],²⁵ [Employee 5],²⁶ and [Employee 7];²⁷
- on 27 July 2018, additional documentary evidence to support the application; and
- on 16 August 2018, the witness statement of [Fender Europe Senior Employee 1].²⁸

- 2.9 The CMA confirmed the grant of a provisional Type B/C leniency marker for Fender Europe in writing on 14 November 2018.²⁹
- 2.10 On 6 December 2018, Fender submitted a cooperation letter (on behalf of both Fender Europe and Fender US) to the CMA, confirming its understanding of the conditions for the grant of leniency.³⁰
- 2.11 Between May 2018 and February 2019, the CMA reviewed approximately 140,000 documents provided by Fender Europe in response to the s.27 Notice. Of these, approximately 650 were deemed to be responsive to the s.27 Notice and were taken onto the CMA's case file.
- 2.12 On 17 January 2019, the CMA conducted a voluntary interview with [Senior Employee 1], [X] of Fender Europe.³¹
- 2.13 On 14 February 2019, the CMA issued Fender Europe with a request for further information (February 2019 RFI).³²

²⁰ URN E_FEN003323 (Transcript of Proffer 1 dated 25 July 2018).

²¹ URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018).

²² URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018).

²³ URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018).

²⁴ URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018).

²⁵ URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018).

²⁶ URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018).

²⁷ URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018).

²⁸ URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018).

²⁹ URN C_FEN01263 (Letter confirming leniency marker dated 14 November 2018).

³⁰ URN C_FEN01604 (Cooperation letter from Fender dated 6 December 2018)

³¹ URN C_FEN01484 (Transcript of interview with [Fender Europe Senior Employee 1] dated 17 January 2019).

³² URN C_FEN01466 (February 2019 RFI).

- 2.14 On 20 March 2019, the CMA imposed a penalty on Fender Europe under s.40A of the Act for failing to comply with a production requirement imposed on it pursuant to section 27(5)(b) of the Act.³³
- 2.15 On 2 May 2019, the CMA provided an update to Fender Europe on the current status of the investigation by way of a state of play letter.³⁴
- 2.16 On 7 May 2019, the CMA sent a letter to Fender US informing it of the CMA's decision to expand the scope of the investigation to include Fender US as the indirect parent company of Fender Europe.³⁵ Fender US was provided with a copy of the 2 May 2019 state of play letter referred to at paragraph 2.15 above.
- 2.17 On 9 May 2019, the CMA sent a letter to [Reseller 1] informing it of the CMA's decision to scope it into the investigation, and its provisional decision to apply Rule 5(3) of the CMA Rules in the investigation.³⁶
- 2.18 On 16 May 2019, the CMA issued Fender Europe with a request for further information (May 2019 RFI).³⁷
- 2.19 On 21 May 2019, the CMA held a state of play meeting with Fender Europe.³⁸
- 2.20 On 29 May 2019, pursuant to its powers under section 26A of the Act, the CMA conducted a compulsory interview with [Senior Employee 4], [X] of [Reseller 1].³⁹
- 2.21 On 11 June 2019, the CMA conducted a voluntary interview with [Employee 2], [X] of Fender Europe.⁴⁰
- 2.22 On 19 June 2019, Fender Europe provided the CMA with a second oral proffer (Proffer 2).⁴¹
- 2.23 On 2 July 2019, the CMA issued Fender Europe with a request for further information (July 2019 RFI).⁴²

³³ [Penalty notice under section 40A of the Competition Act 1998 – Musical instruments and equipment: suspected anti-competitive agreements – Case: 50565-3 – Addressed to: Fender Musical Instruments Europe Limited \(March 2019\)](#).

³⁴ URN C_FEN01606 (State of play letter to Fender Europe dated 2 May 2019).

³⁵ URN C_FEN01613 (Letter to Fender US dated 7 May 2019).

³⁶ URN C_FEN01620 (Letter to [Reseller 1] dated 9 May 2019).

³⁷ URN C_FEN01645 (May 2019 RFI).

³⁸ URN C_FEN01677 (Note of State of Play Meeting dated 21 May 2019).

³⁹ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019).

⁴⁰ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019). Note: when provided with the opportunity to review his responses after the interview, [Fender Europe Employee 2] provided clarifications to some of his responses. URN C_FEN01868 (Response to Request for Clarification from [Fender Europe Employee 2], dated 31 July 2019) and URN C_FEN01867 (Additional transcript comments by [Fender Europe Employee 2], dated 31 July 2019).

⁴¹ URN C_FEN01872 (Transcript of Proffer 2 dated 19 June 2019).

⁴² URN C_FEN01764 (July 2019 RFI).

- 2.24 On 19 July 2019, the CMA issued [Fender Europe Employee 2] with a request for clarification in respect of his interview transcript (July 2019 Request for Clarification).⁴³
- 2.25 On 28 August 2019, the CMA issued [Fender Europe Senior Employee 1] with a request for further information (August 2019 RFI).⁴⁴
- 2.26 On 5 and 9 September 2019, Fender wrote to the CMA to express an interest in entering into discussions to explore settlement.⁴⁵
- 2.27 On 18 September 2019, the CMA issued Fender Europe with a request for further information (September 2019 RFI).⁴⁶
- 2.28 On 23 September 2019, the CMA wrote to Fender to advise them of the decision to grant leniency and the level of the discount available.⁴⁷
- 2.29 On 26 September 2019, the CMA wrote to Fender to advise them of the settlement timetable and draft Terms of Settlement.⁴⁸
- 2.30 On 3 October 2019, the CMA and Fender signed a Leniency Agreement confirming its acceptance of the type of leniency and the level of discount set out by the CMA in its letter of 23 September 2019.⁴⁹
- 2.31 On 4 October 2019, Fender agreed in principle to the settlement of the matter.⁵⁰
- 2.32 On 8 October 2019, the CMA issued a Statement of Objections (the SO) to Fender Europe and Fender US, in which it made a provisional decision that Fender Europe had infringed the Chapter I prohibition of the Act and/or Article 101 TFEU. The SO also set out the CMA's intention to hold Fender US jointly and severally liable for Fender Europe's Infringement on the basis that it had been the latter's indirect parent company throughout the period of the Infringement. In the circumstances of this case, the CMA applied Rule 5(3) of the CMA Rules and

⁴³ URN C_FEN01838 (July 2019 Request for Clarification).

⁴⁴ URN C_FEN01881 (August 2019 RFI).

⁴⁵ URN C_FEN01896 (Letter from [redacted] to the CMA dated 5 September 2019) and URN C_FEN01899 (Email from [redacted] to [CMA Employee] of the CMA dated 9 September 2019).

⁴⁶ URN C_FEN01910 (September 2019 RFI).

⁴⁷ URN C_FEN01918 (Draft leniency agreement letter to Fender Europe and Fender US dated 23 September 2019).

⁴⁸ URN C_FEN01932 (Settlement timetable letter to Fender Europe and Fender US dated 26 September 2019).

⁴⁹ URN C_FEN01952 (Leniency agreement between Fender Europe, Fender US and the CMA signed by the CMA on 3 October 2019).

⁵⁰ URN C_FEN01953 (Pre-SO settlement email between Fender Europe, Fender US and the CMA dated 4 October 2019).

addressed the SO only to Fender Europe and Fender US and not to the reseller counterparty to the alleged agreement/s and/or concerted practice/s.⁵¹

- 2.33 On 8 October 2019, the CMA informed [Reseller 1] that it had issued the SO to Fender Europe and Fender US and alerted [Reseller 1] to the opportunity for [Reseller 1] to provide representations on the SO.
- 2.34 Following a request on 8 October 2019 from [Reseller 1] to see the SO, the CMA on 16 October 2019 provided [Reseller 1] with a copy of the SO. On 29 October 2019, having seen the SO, [Reseller 1] confirmed that it did not want to make any representations.
- 2.35 On 23 October 2019, following receipt of the SO, Fender Europe and Fender US reconfirmed their agreement in principle to the settlement of the matter.
- 2.36 On 4 and 8 November 2019, Fender submitted representations to the CMA in relation to manifest factual inaccuracies set out in the SO.
- 2.37 Between 11 October and 20 December 2019 Fender submitted representations and information in relation to mitigating factors (including in relation to its proposed new competition law compliance programme) to be taken into account in the calculation of any financial penalty.
- 2.38 On 23 December 2019, following settlement discussions, Fender offered to settle the case. Fender voluntarily, clearly and unequivocally admitted the facts and allegations of the infringement as set out in the SO,⁵² which are now reflected in the Decision, and agreed to co-operate in expediting the process for concluding the case.
- 2.39 On 6 January 2020, the CMA confirmed that it would settle the case with Fender and that it intended to proceed to issue an infringement decision.

⁵¹ Likewise, the CMA has applied Rule 10(2) of the CMA Rules and addressed this Decision to Fender Europe and Fender US only.

⁵² Subject to representations in relation to manifest factual inaccuracies communicated to and agreed by the CMA, see paragraphs 14.8 and 14.14 of the [Guidance on the CMA's investigations procedures in Competition Act 1998 cases: CMA8](#), January 2019.

3. FACTS

A. Addressees

I. Fender Europe

3.1 Fender Europe is a UK-based business active in the supply in the United Kingdom (the UK) and Republic of Ireland (Ireland) of MI manufactured by or on behalf of Fender.⁵³

3.2 Fender Europe is a private limited company registered at Companies House under company number 03127180.⁵⁴

3.3 Fender Europe had a UK turnover of £35.8 million in 2017.⁵⁵

II. Fender US

3.4 Throughout the Relevant Period, Fender Europe has been a wholly-owned indirect subsidiary of Fender US,⁵⁶ which is the indirect parent of and controlling entity in relation to Fender Europe.⁵⁷ Fender Europe is wholly owned by an intermediary holding company, Fender International Corporation,⁵⁸ which, in turn is wholly owned by Fender US.

3.5 Amongst other things, Fender US is responsible for research and development, procurement, manufacturing, administration, and distribution in connection with the Relevant Products.

⁵³ Fender brands include Fender, Squier, Gretsch, Jackson, Charvel and EVH. URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), pp.9-10.

⁵⁴ See <https://beta.companieshouse.gov.uk/company/03127180>.

⁵⁵ URN E_FEN003322 (Annual Report and Financial Statements of Fender Europe dated 31 December 2017), p.8. Fender Europe published its 2018 accounts on Companies House on 31 October 2019 and reported a UK turnover of £35.9 million in 2018. URN E_FEN003341 (Annual Report and Financial Statements of Fender Europe dated 30 December 2018), p.10.

⁵⁶ Fender Europe is wholly owned by Fender US via the intermediary subsidiary Fender International Corporation. Fender International Corporation holds all European inventory and distributes products via its local subsidiaries, including Fender Europe.

⁵⁷ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.1.

⁵⁸ Fender International Corporation is incorporated under File Number 2920426 at the State of Delaware Division of Corporations. See <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>

3.6 Fender US is a global corporation, incorporated in Delaware, United States of America (USA),⁵⁹ with company number 2053985.⁶⁰ The company is headquartered in Hollywood, California, USA.⁶¹ During the Relevant Period, [REDACTED].⁶²

3.7 [REDACTED]⁶³ [REDACTED].⁶⁴

3.8 Figure 3.1 below shows the corporate structure of Fender US in simplified form focussing on the chain of ownership between Fender US and Fender Europe, within which the addressees of this Decision are depicted in red font. [REDACTED].⁶⁵

Figure 3.1: Simplified Fender US corporate structure showing ownership of Fender Europe (unchanged throughout the Relevant Period)

[REDACTED]

Source: Fender US company structure charts.⁶⁶

B. Guitar sector overview

3.9 This section provides an overview of those aspects of the guitar sector that are relevant to this investigation.

I. UK guitar sector

3.10 The market research company, IBISWorld Ltd (IBISWorld), estimates the MI sector in the UK was worth £440.6 million in 2018/19,⁶⁷ and that guitars and ukuleles made up [10 – 20]% of the MI sector in 2018/19.⁶⁸

3.11 The UK guitar sector broadly consists of the supply of the following:

- electric guitars;
- electric basses; and

⁵⁹ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.1.

⁶⁰ Fender Musical Instruments Corporation is incorporated under File Number 2053985 at the State of Delaware Division of Corporations. See <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>

⁶¹ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.1.

⁶² URN C_FEN00581 (Response dated 3 May 2018 to 19 April 2018 RFI), p.2, paragraph 1.5.

⁶³ [REDACTED]. Fender Musical Instruments Corporation announced a change of ownership on 27 January 2020: <https://spotlight.fender.com/newsroom/news/741>.

⁶⁴ URN C_FEN00581 (Response dated 3 May 2018 to 19 April 2018 RFI), p.2, paragraph 1.6.

⁶⁵ The CMA requested corporate structure charts illustrating Fender's group structure on 19 April 2018 and throughout the Relevant Period. URN E_FEN003326 (19 April 2018 RFI), pp.7-8.

⁶⁶ URN C_FEN00581 (Response dated 3 May 2018 to 19 April 2018 RFI), Annex 1, pp.1-3.

⁶⁷ URN E_FEN003334 (IBISWorld Report, March 2019), p.30.

⁶⁸ URN E_FEN003334 (IBISWorld Report, March 2019), p.3.

- acoustic guitars.

II. Fender Europe's involvement in the UK guitar sector

3.12 Fender Europe currently sells the following MI and MI-related products, mainly to UK resellers and, to a very limited extent, direct to consumers:

- electric guitars;
- electric basses;
- acoustic guitars;
- amplifiers (amps) and effects pedals for electric guitars and basses; and
- accessories for these instruments (including amp covers, cables, capos & slides, care & cleaning, cases, digital tuners, gig bags, harmonicas, mini amps, miscellaneous products, picks, pickups, stands, straps and strings).⁶⁹

3.13 Electric guitars are solid or semi-hollow wooden stringed instruments with six or more strings and magnetic pickups. They are designed for use almost exclusively with a guitar amplifier (therefore typically requiring an external power source).⁷⁰ Electric guitars are often used in two musical roles: as a rhythm guitar, which plays chord sequences or progressions and/or as a lead guitar which provides instrumental melody lines, melodic instrumental fill passages, and solos.⁷¹

3.14 Electric basses have similar physical features to electric guitars. However, electric basses typically have fewer strings (four, not six). They require a different technique to play and have a different musical role to an electric guitar, in that the electric bass guitar supports the groove with the drummer.⁷² Different skill sets are required to play an electric guitar and an electric bass guitar, and so a person who is competent in playing the electric guitar will not necessarily be competent in playing the electric bass guitar.⁷³

3.15 Acoustic guitars are wooden stringed instruments designed to transmit sound acoustically, rather than through electric amplification. The string vibration resonates through the instrument itself to create the sound. An acoustic guitar produces a different type of sound to an electric guitar, and therefore is typically used for different types of music. An acoustic guitar requires no external power

⁶⁹ URN E_FEN003337 (Screenshot of accessories sold on Fender Europe's website).

⁷⁰ URN C_FEN01505 (Response dated 5 March 2019 to February 2019 RFI), p.1.

⁷¹ See https://en.wikipedia.org/wiki/Electric_guitar

⁷² URN C_FEN01505 (Response dated 5 March 2019 to February 2019 RFI), pp.1 and 3.

⁷³ URN C_FEN01505 (Response dated 5 March 2019 to February 2019 RFI), p.1.

source. It may have four or six strings depending on whether it is an acoustic guitar or an acoustic bass guitar. From a technical perspective, a ‘guitarist’ can play both electric and acoustic guitars, however, the sound of the instruments and their musical roles are very different.⁷⁴

3.16 Figure 3.2 below sets out details of Fender Europe’s Relevant Products by product segment and range, together with the associated approximate estimated retail price points for each range.⁷⁵

Figure 3.2: Fender Europe Relevant Products MI product segments

Product Segments	Ranges	Estimated retail prices
Electric Guitar	Beginner	[X]
	Intermediate	[X]
	Advanced	[X]
	Custom Shop	[X]
Electric Bass	Beginner	[X]
	Intermediate	[X]
	Advanced	[X]
	Custom Shop	[X]
Acoustic Guitar	Beginner	[X]
	Intermediate	[X]
	Advanced	[X]
	Custom Shop	[X]

Source: Fender Europe’s response dated 5 March 2019 to the February 2019 RFI, pp.1-2.

III. Other UK guitar suppliers

3.17 Other suppliers of electric guitars, electric basses and acoustic guitars in the UK include Gibson, Epiphone, Ibanez, Yamaha, Music Man, ESP, G&L, PRS and private label brands.⁷⁶

IV. UK MI resellers

3.18 There is a large number of small MI resellers in the UK, most of which only operate from one physical location. These are typically referred to in the industry as ‘Independent’ resellers.

3.19 The CMA does not have detailed information on guitar resellers specifically. However, IBISWorld reports that there were [X] enterprises in the MI sector as a

⁷⁴ URN C_FEN01505 (Response dated 5 March 2019 to February 2019 RFI), pp.1 and 3.

⁷⁵ Fender Europe stated that, ‘[p]rice points across the segments vary and are usually in the region of the following estimated retail price ranges’. URN C_FEN01505 (Response dated 5 March 2019 to February 2019 RFI), pp.1-2.

⁷⁶ URN C_FEN01505 (Response dated 5 March 2019 to February 2019 RFI), p.2.

whole in the 2018/19 period.⁷⁷ Despite four resellers having been estimated to have contributed over [40-50]% of the total estimated MI retail industry revenue in 2018/19,⁷⁸ the industry does not currently have ‘a dominant nationwide chain of musical instrument stores’.⁷⁹ By 2020, IBISWorld estimates that the number of enterprises in the sector will drop to [8<],⁸⁰ with this number estimated to decline at a compound annual rate of [less than 1]% over the five years following 2018/19.⁸¹

- 3.20 In addition to being sold through specialised MI resellers, MI are also sold by larger retail chains that do not specialise solely in MI. These include large national retailers, as well as catalogue companies. Fender Europe calls these ‘Mass Merchants’.⁸² In this Decision, they are referred to as ‘Mass resellers’.
- 3.21 IBISWorld notes that the internet and online retailing are increasingly important in the MI sector with online-only resellers posing a competitive threat to traditional bricks-and-mortar musical instrument retailers.⁸³
- 3.22 Resellers compete on several aspects including price, range, service and location.⁸⁴ Sales are made both through the internet and traditional bricks-and-mortar stores, many of which also sell online. Lower overheads have allowed online-only resellers to offer wider product ranges at lower prices.⁸⁵
- 3.23 That said, the IBISWorld Report notes that, for the consumer, there are several advantages that bricks-and-mortar resellers have over internet-only resellers. These include: the opportunity to test products before buying; more personalised advice; and speed of delivery.⁸⁶
- 3.24 However, the IBISWorld Report also states that ‘consumers are relatively price conscious, especially when purchasing more expensive products, and will compare prices in different shops to find the lowest price possible’ and that consumers may use bricks-and-mortar stores to try out instruments ‘before shopping around online to get the best price’.⁸⁷

⁷⁷ URN E_FEN003334 (IBISWorld Report, March 2019), p.30.

⁷⁸ URN E_FEN003334 (IBISWorld Report, March 2019), p.19.

⁷⁹ The top four are listed as Gear4music (Holdings) plc, S&T Audio Ltd, Dawsons Music Ltd and J & A Beare Ltd. URN E_FEN003334 (IBISWorld Report, March 2019), pp.19 and 23-26.

⁸⁰ URN E_FEN003334 (IBISWorld Report, March 2019), p.30.

⁸¹ URN E_FEN003334 (IBISWorld Report, March 2019), p.6.

⁸² URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.8.

⁸³ URN E_FEN003334 (IBISWorld Report, March 2019), pp.6-7.

⁸⁴ URN E_FEN003334 (IBISWorld Report, March 2019), p.21.

⁸⁵ URN E_FEN003334 (IBISWorld Report, March 2019), p.6.

⁸⁶ URN E_FEN003334 (IBISWorld Report, March 2019), p.8.

⁸⁷ URN E_FEN003334 (IBISWorld Report, March 2019), p.21.

V. Fender Europe's sales and distribution network

3.25 Fender Europe sells primarily via a network of resellers in the UK. It uses the following retail distribution channels:

- Musical instruments retailers⁸⁸ (MI resellers);
- Mass merchants⁸⁹ (Mass resellers); and
- Direct to Consumer (D2C).⁹⁰

MI resellers

3.26 MI resellers are resellers which sell principally MI, including the Relevant Products and other products sold by Fender Europe. These resellers usually stock and sell a broad selection of products supplied by Fender Europe.

Authorised Dealer Agreements

3.27 Each MI reseller in the UK who stocks and sells products supplied by Fender Europe has entered into an Authorised Dealer Agreement (ADA) with Fender Europe. Fender Europe first introduced ADAs in [REDACTED]. Prior to that, from [REDACTED], Fender Europe's contract with these MI resellers was entitled '[REDACTED]'.⁹¹

3.28 Fender Europe distinguishes between its authorised resellers based on "dealership levels". [REDACTED].⁹² Each dealership level provides access to a range of products sold by Fender Europe, including the Relevant Products. A reseller must fulfil a series of dealership level requirements in order to stock the range of products contained within that particular dealership level.⁹³

3.29 The ADA permits resellers to [REDACTED].⁹⁴ [REDACTED]:

- [REDACTED];⁹⁵
- [REDACTED];⁹⁶

⁸⁸ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.8.

⁸⁹ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.8.

⁹⁰ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.9.

⁹¹ URN C_FEN00581 (Response dated 3 May 2018 to 19 April 2018 RFI), p.4, paragraph 3.2.

⁹² URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), pp.9-10.

⁹³ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.9.

⁹⁴ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.9.

⁹⁵ URN E_FEN002629 (ADA between Fender Europe and [Reseller 1] dated 14 January 2015), clause 8.1.1 (and by reference Schedule 1).

⁹⁶ URN E_FEN002629 (ADA between Fender Europe and [Reseller 1] dated 14 January 2015), clause 8.1.1 (and by reference Schedule 1), clause 8.1.2 (and by reference Schedule 2) and clause 8.1.3 (and by reference Schedule 3).

- [REDACTED];⁹⁷
- [REDACTED];⁹⁸ and
- [REDACTED].⁹⁹

3.30 Once a reseller enters into an ADA with Fender Europe, the agreement is for an initial period of [REDACTED], and thereafter continues without limit of period until terminated by either Fender Europe or the reseller on not less than [REDACTED] written notice.¹⁰⁰ Under the ADA, Fender Europe may terminate the reseller's appointment as an authorised dealer (in full or in part) and may terminate the ADA itself in a number of circumstances.¹⁰¹

Mass resellers

3.31 Mass resellers are not MI specialists. They are national retail chains, catalogue companies and online retailers (e.g. [Mass Reseller] and [Mass Reseller]) and they sell many more products besides MI.¹⁰² These Mass resellers typically stock a reduced portfolio of Fender products, and the product ranges that are offered by Fender Europe to a Mass reseller are negotiated on a case-by-case basis, depending on the Mass reseller's size and Fender Europe's desire to expand the Fender consumer base. [REDACTED].¹⁰³ Fender Europe's sales of the Relevant Products through the Mass reseller channel account for [0-5%] overall during the Relevant Period, and less than [0-5%] of its annual sales in the UK in any individual year within the Relevant Period.¹⁰⁴

D2C

3.32 Fender Europe describes the D2C channel as comprising sales to consumers made via Fender's own website (fender.com). The prices at which Fender Europe's products are offered to consumers are listed on the fender.com website and determined by Fender Europe.¹⁰⁵ This service was first made available to UK consumers in 2016. Resellers have no role in sales from the fender.com

⁹⁷ URN E_FEN002629 (ADA between Fender Europe and [Reseller 1] dated 14 January 2015), clause 8.1.6.

⁹⁸ URN E_FEN002629 (ADA between Fender Europe and [Reseller 1] dated 14 January 2015), clause 2.2.

⁹⁹ URN E_FEN002629 (ADA between Fender Europe and [Reseller 1] dated 14 January 2015), clause 2.2.

¹⁰⁰ URN E_FEN002629 (ADA between Fender Europe and [Reseller 1] dated 14 January 2015), clause 11.1.

¹⁰¹ URN E_FEN002629 (ADA between Fender Europe and [Reseller 1] dated 14 January 2015), clause 11.2.

¹⁰² URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.8.

¹⁰³ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.11.

¹⁰⁴ During the Relevant Period, 2012 was the high point of Mass reseller channel's share at [0-5%]. Later years were lower – dropping to [0-5%] in 2016 and 2017, and then back up to [0-5%] in 2018.

¹⁰⁵ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.11.

website.¹⁰⁶ D2C sales of the Relevant Products through fender.com account for [0-5%] of sales in any year from 2016-2018.¹⁰⁷

VI. Importance of internet sales as a retail channel to the MI sector

- 3.33 In the MI sector specifically, IBISWorld estimates that online spending is likely to increase at a compound annual rate of [less than 1]% over the five years to 2023/24.¹⁰⁸
- 3.34 In response to the CMA's s.26 Notice dated 17 April 2018,¹⁰⁹ the 12 Resellers each reported the proportion of their annual revenue accounted for by online sales. The average proportion of online sales by the 12 Resellers at the beginning of the Relevant Period was 36% (with a range of around 10% to around 80%) while the proportion reported five years later, towards the end of the Relevant Period was 39% (with a range of around 10% to around 80%).¹¹⁰
- 3.35 Consumers seeking to purchase MI may be attracted to online shopping due to a number of factors including a wider range of products, lower prices and the convenience of shopping from their homes.¹¹¹
- 3.36 The CMA considers that the ability to sell or advertise MI at discounted prices on the internet can intensify price competition – not only between online resellers but also between online and bricks-and-mortar resellers – due to the increased transparency and reduced search costs associated with internet shopping. Greater price competition increases resellers' incentives to act efficiently and pass on cost savings to consumers in the form of lower retail prices.
- 3.37 Therefore, preventing or restricting resellers' ability to determine their own online resale prices is likely to:
- reduce price competition from online sales of the Relevant Products;

¹⁰⁶ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.9.

¹⁰⁷ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), response to question 15, p.9.

¹⁰⁸ URN E_FEN003334 (IBISWorld Report, March 2019), p.8.

¹⁰⁹ URN C_FEN00552 ([Reseller 1] Section C of response to s.26 Notice); URN C_FEN00549 ([Reseller] Section C of response to s.26 Notice); URN C_FEN00539 ([Reseller] Section C of response to s.26 Notice); URN C_FEN00560 ([Reseller] Section C of response to s.26 Notice); URN C_FEN00558 ([Reseller] Section C of response to s.26 Notice); URN C_FEN00555 ([Reseller] Section C of response to s.26 Notice); URN C_FEN00447 ([Reseller] Section C of response to s.26 Notice); URN C_FEN00584 ([Reseller] Section C of response to s.26 Notice); URN C_FEN00316 ([Reseller] Section C of response to s.26 notice); URN C_FEN00466 ([Reseller] Section C of response to s.26 Notice); URN C_FEN00519 ([Reseller] Section C of response to s.26 Notice); URN C_FEN00373 ([Reseller] Section C of response to s.26 Notice).

¹¹⁰ The proportion of online sales by one reseller may not be representative of a wider industry trend and may be influenced by several factors including, for example, product type/brand, and a reseller's own commercial preferences.

¹¹¹ URN E_FEN003334 (IBISWorld Report, March 2019), pp.21-22.

- reduce downward pressure on the retail price of the Relevant Products; and
- thereby potentially result in higher prices for consumers.

C. Fender Pricing Policy

I. Introduction

3.38 For a period of time, including during the Relevant Period, Fender Europe operated and enforced a pricing policy (the Fender Pricing Policy), the purpose of which was to ensure that MI resellers would not advertise or sell the Relevant Products¹¹² online below a certain minimum price specified by Fender Europe from time to time (the Minimum Price).

3.39 Based on the evidence, Fender Europe intended that this pricing policy should apply to the UK sales of its entire MI reseller network, including to [Reseller 1]. Further details of the Fender Pricing Policy are set out in paragraphs 3.47 to 3.76 below.

Nature of evidence

3.40 The CMA's findings in this case are made in the context of certain Fender Europe staff seeking to conceal potentially anticompetitive conduct which is likely to have reduced the number of contemporaneous documents available to the CMA and, therefore, to some degree, fragmented the evidence base. The CMA has based its findings regarding the Fender Pricing Policy principally on information obtained through Fender's leniency application¹¹³ and the witness and contemporaneous documentary evidence¹¹⁴ obtained by the CMA independently using its formal powers including:

- Contemporaneous correspondence internal to Fender Europe relating to the operation and/or enforcement of the Fender Pricing Policy (including email, SMS, and iMessage);
- Contemporaneous minutes/agendas of internal sales meetings;
- Contemporaneous correspondence between Fender Europe and MI resellers;

¹¹² See paragraph 3.16 above for a list of the product segments and the ranges within those segments comprising the Relevant Products, with their associated approximate resale price ranges.

¹¹³ URN E_FEN003323 (Transcript of Proffer 1 dated 25 July 2018) and the witness statements described in paragraph 2.8 above.

¹¹⁴ See URN C_FEN00778 (Transcript of interview with [Fender Europe Senior Employee 1] dated 24 April 2018), URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019) and URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019).

- Contemporaneous correspondence between Fender Europe and other external parties;
- Contemporaneous correspondence between Fender Europe and Fender US;
- Transcripts of voluntary interviews with the following Fender Europe staff:
 - [Former Senior Employee 1], [REDACTED] on 18 April 2018;
 - [Employee 14], [REDACTED] on 18 April 2018;
 - [Senior Employee 1], [REDACTED] on 24 April 2018 and 17 January 2019; and
 - [Employee 2], [REDACTED] on 11 June 2019; and
- A transcript of a compulsory interview under s26A of the Act with [Senior Employee 4], [REDACTED] of [Reseller 1] on 29 May 2019.

- 3.41 The evidence that the CMA has obtained through witness statements and interviews given by or conducted with Fender staff indicates that their individual recollections of the operation and enforcement of the Fender Pricing Policy and the Alleged Infringement were not identical. The CMA notes that Fender Europe's staff may not have always taken a uniform approach to the operation and enforcement of the Fender Pricing Policy, including in relation to the Infringement.
- 3.42 In the case of Fender's staff, some of the differences in their individual recollections may be explained by the passage of time, their personal interactions with other Fender staff including but not limited to with [Fender Europe Former Senior Employee 1], and their individual experiences of and commercial relationships with different MI resellers.
- 3.43 Therefore, the CMA has taken into account the fact that there may be variations in MI resellers' experiences, interactions and perceptions of threats, reflecting their different circumstances, including differing interactions with different Fender Europe staff.
- 3.44 Notwithstanding the above, save for the evidence of [Fender Europe Former Senior Employee 1] who denies any conduct amounting to RPM,¹¹⁵ the witness evidence and the contemporaneous documentary evidence supports the CMA's findings in this case.

¹¹⁵ 'Q: CMA: With regard to the resale value, do you have control of that? A: [Fender Europe Former Senior Employee 1]: We have got no control over that.' URN C_FEN00776 (Transcript of interview with [Fender Europe Former Senior Employee 1] dated 18 April 2018), p.19, lines 1-2.

People involved and their roles

3.45 Figure 3.3 below lists the names and roles of key Fender Europe and [Reseller 1] employees referred to in this Decision to make it easier to understand the context to the evidence set out in the following sections.¹¹⁶

Figure 3.3: Relevant Fender Europe and [Reseller 1] employees

Employee	Area of Responsibility and Dates
Fender Europe Employees (as at 26 February 2019)	
[Fender Europe Former Senior Employee 1]	[REDACTED] ¹¹⁷ [REDACTED] ¹¹⁸
[Fender Europe Employee 1]	[REDACTED]
[Fender Europe Senior Employee 1]	[REDACTED]
[Fender Europe Employee 2]	[REDACTED]
[Fender Europe Employee 3]	[REDACTED]
[Fender Europe Employee 4]	[REDACTED]
[Fender Europe Employee 5]	[REDACTED]
[Fender Europe Employee 6]	[REDACTED]
[Fender Europe Employee 7]	[REDACTED]
[Fender Europe Employee 8]	[REDACTED]
[Fender Europe Employee 9]	[REDACTED]
[Fender Europe Employee 10]	[REDACTED]
[Fender Europe Employee 11]	[REDACTED]
[Fender Europe Employee 12]	[REDACTED]
[Fender Europe Employee 13]	[REDACTED]
[Fender Europe Former Senior Employee 3]	[REDACTED]

¹¹⁶ For the avoidance of doubt, by the mere listing of an individual in Figure 3.3, the CMA is not indicating that the individual in question was necessarily aware of, and/or participated in the Fender Pricing Policy.

¹¹⁷ Fender GBI is the business unit within Fender Europe which deals specifically with the UK and ROI [REDACTED]. See Figure 3.1 at paragraph 3.8 above for the Fender US corporate structure showing ownership of Fender Europe.

¹¹⁸ URN E_FEN003321 ([REDACTED]).

Employee	Area of Responsibility and Dates
[Fender Europe Former Senior Employee 2]	[REDACTED]
[Fender Europe Senior Employee 2]	[REDACTED]
[Fender Group Employee 1]	[REDACTED] ¹¹⁹
[Fender Europe Employee 14]	[REDACTED]

[Reseller 1] Employees (as at 23 April 2018)

[Reseller 1 Senior Employee 1]	[REDACTED]
[Reseller 1 Senior Employee 2]	[REDACTED]
[Reseller 1 Senior Employee 3]	[REDACTED]
[Reseller 1 Senior Employee 4]	[REDACTED]
[Reseller 1 Employee 1]	[REDACTED] ¹²⁰

Sources: URN C_FEN01498 (Table of relevant employees provided in response dated 26 February 2019 to February 2019 RFI), response to question 3; URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019); Witness statements of Fender Europe employees;¹²¹ Company Organogram provided by [Reseller 1] in response to 17 April 2018 s.26 Notice;¹²² URN C_FEN00777 (Transcript of interview with [Fender Europe Employee 14] dated 18 April 2018); URN C_FEN01513 (Chat 809: iMessage conversation between [Fender Europe Former Senior Employee 1] and [Fender Europe Senior Employee 1] – 27-28 July 2016), p.5.

Structure of the rest of Section 3.C.

3.46 The remainder of this Section sets out the relevant factual background to the Fender Pricing Policy as indicated by the evidence, including:

- its origins, scope, content and duration;
- its monitoring and enforcement;
- illustrative examples of Fender Europe’s monitoring and enforcement of the Fender Pricing Policy; these underline the broad application of and adherence to the Fender Pricing Policy in relation to all Relevant Products across Fender Europe’s UK network of MI resellers throughout the Relevant Period);

¹¹⁹ [REDACTED]. URN C_FEN01915 (Response to September 2019 RFI).

¹²⁰ [REDACTED]

¹²¹ See paragraph 2.8 above.

¹²² URN C_FEN00347 ([Reseller 1] Organogram provided in response to 17 April 2018 s.26 notice to [Reseller 1]).

- the consequences for MI resellers of non-compliance; and
- Fender Europe’s awareness of the illegality of its enforcement activities.

II. Origins, scope, content and duration

Origins

- 3.47 The evidence indicates that Fender Europe’s introduction of the Fender Pricing Policy was driven by complaints from Fender Europe’s MI resellers who wanted to improve their margins through the maintenance of high and stable retail pricing. This increased the attractiveness of the Fender brand and encouraged resellers to stock and sell the Relevant Products.^{123, 124, 125}
- 3.48 This was also important to Fender Europe because it helped secure, maintain and/or improve its UK market position in the Relevant Products relative to its competitors, especially [X] and to a lesser extent [X].¹²⁶

Scope, content and communication of the Fender Pricing Policy

- 3.49 The following paragraphs set out the scope of the Fender Pricing Policy, its content and the way in which it was communicated to MI resellers. As set out below,¹²⁷ whilst different Fender Europe sales staff may have had slightly different views and experiences, the weight of the evidence (witness and documentary) shows that the Fender Pricing Policy:

¹²³ [X]. URN E_FEN003323 (Transcript of Proffer 1 dated 25 July 2018), p.12, lines 24-26 [Text in square brackets added by the CMA].

¹²⁴ [X]. URN E_FEN003323 (Transcript of Proffer 1 dated 25 July 2018), p.13.

¹²⁵ [X]. URN E_FEN003323 (Transcript of Proffer 1 dated 25 July 2018), p.13, lines 20-21. In interview, when asked about the Fender Pricing Policy, [Employee 2] of Fender Europe stated ‘[u]m, this formula to sort of -- to, to, get the best margin out of the product and keep people happy, as a guideline, was devised.’ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.88, lines 20-22. In interview, [Senior Employee 4] of [Reseller 1] said that ‘my understanding of it was that they [...] wanted to put more value back into [...] the brand. What they were worried about was that [...] the continual discounting of [...] online pricing was actually damaging [...] their [Fender Europe’s] offer.’ He later said Fender’s ‘brand value was being diminished’ by discounting, and he considered Fender Europe had introduced the Fender Pricing Policy because it was concerned about the potential for bricks and mortar retailers to stop stocking Fender’s products: ‘if retailers stopped and said, “Well, you know what, I don’t make any money on that any more. I’m going to stop stocking it”, it would affect their overall – their overall business [...] what Fender were genuinely worried about was their marketing – market shrinking...’ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.81, lines 7-10, p.115, line 8, p.115, lines 18-21 and p.116, lines 3-4 [Text in square brackets added by the CMA].

¹²⁶ In interview, [Senior Employee 4], [Reseller 1], stated that ‘Fender GBI, er, [X]; they’re probably our four biggest suppliers for guitar products’. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.24, lines 4-6.

¹²⁷ See paragraphs 3.50 to 3.96 below.

- was intended to extend to all online sales of Fender Europe's UK MI resellers made within or to the UK and all of the Relevant Products;
- was based on a formula from which MI resellers could calculate the Minimum Price;
- prohibited online discount codes;
- was communicated internally within Fender Europe by [Fender Europe Former Senior Employee 1], who also played a key role in its implementation, and communicated externally to MI resellers by his team of Fender Europe sales staff;
- was typically explained verbally to MI resellers when they became a Fender Europe reseller and/or when the Fender Pricing Policy took effect, whichever was the later; and
- was disseminated by Fender Europe through the sending of price lists and follow up calls to MI resellers from time to time.

Scope: Fender Pricing Policy was intended to apply to all online sales of Fender Europe's UK MI resellers and all of the Relevant Products

Scope: applied to UK MI resellers but not Mass resellers

3.50 The evidence shows that Fender Europe expected all [redacted] or so of Fender Europe's UK MI resellers to adhere to the Fender Pricing Policy.¹²⁸

3.51 It appears that the Fender Pricing Policy did not apply to Mass resellers. Fender Europe did not have the same bargaining power in contract discussions with companies such as [a Mass reseller], [a Mass reseller] and [a Mass reseller] as it did with MI resellers. Fender Europe stated that it [redacted].¹²⁹

¹²⁸ In interview, [Employee 2] of Fender Europe confirmed that the pricing policy applied to '*all dealers*'. URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.101, lines 19-20; URN C_FEN00581 (Response dated 3 May 2018 to 19 April 2018 RFI), Annex 2, pp.1-10.

¹²⁹ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), p.11.

Scope: applied to all Relevant Products

3.52 The evidence shows that the Fender Pricing Policy covered all Relevant Products.^{130,131} An implied condition of being part of Fender Europe's network of MI resellers was to 'respect the brand' by adhering to the Fender Pricing Policy.¹³² An integral part of the Fender Pricing Policy was Fender Europe's provision of periodic pricing updates to its MI resellers by means of set price lists. These price lists generally comprised various details for each Relevant Product including the product description, the MSRP and the trade price,¹³³ for each of:

- 'Red line', covering all Fender and Squier branded Relevant Products; and
- 'Blue line' covering all speciality brand Relevant Products, for example Gretsch, Jackson, Charvel, EVH and Takamine.¹³⁴

¹³⁰ See paragraphs 3.104 to 3.142 below. In his witness statement, [Employee 5] of Fender Europe stated '*[t]he expectation was that UK Resellers would adhere to the MSRP minus 4% pricing across the entire spectrum of products we sold, although the focus was on Fender and Squire branded guitars and amplifiers.*' URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), p.2, paragraph 10. [Employee 9] of Fender Europe said in his witness statement '*I understood that [the Fender Pricing policy] applied to Fender and Squier products, as well as Specialty products, although the focus was on Fender and Squier.*' URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), p.3, paragraph 21 [Text in square brackets added by the CMA]. [Senior Employee 1] of Fender Europe said '*[t]he practice applied across all major product lines, with the exception of SPA (that is strings, parts and accessories).*' URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), p.3, paragraph 17. In his witness statement, [Employee 7] of Fender Europe said '*I believe that the practice applies across all product lines (not just guitars).*' URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), p.2, paragraph 13.

¹³¹ There is some evidence which indicates that Fender Europe prioritised its enforcement on models which sold in greater volumes including Fender and Squier branded Relevant Products. See footnote 130 above. In addition, for example, in interview, [Employee 2] of Fender Europe said that the Fender Pricing Policy focussed on the most popular products: '*[n]o, no, absolutely not the most expensive ones. It was the most popular ones.*' URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.101, lines 6-7. When the CMA sent [Fender Europe Employee 2] a Request for Clarification of his interview transcript, he stated '*I only have specific knowledge of the MSRP pricing being applied to red line products and have no specific recollection of any calls about blue line products. However, I can't exclude the possibility that I had conversations about blue line but think it's unlikely because blue line products are much less popular than red.*' URN C_FEN01868 (Response to Request for Clarification from [Fender Europe Employee 2], dated 31 July 2019), p.3.

¹³² As set out in paragraph 3.66 below, witness evidence states that resellers were made aware of Fender Europe's expectations on resale pricing either when the Fender Pricing Policy began to apply or when they joined Fender Europe's reseller network, whichever was the later. Further, [Fender Europe Former Senior Employee 1] links the phrase '*respect the brands [sic] value*' with '*dealer profit*'. URN E_FEN003327 (Excerpt from [Fender Europe Former Senior Employee 1]'s notebook dated July 2015).

¹³³ See for example: URN E_FEN000076 (Fender Acoustic BW Pricelist - ALL Pricing 15 Feb 2016); URN E_FEN002750 (Squier BW Pricelist - ALL Pricing 15 Feb 2016); URN E_FEN003062 (CHARVEL_UK_GBP pricelist).

¹³⁴ Fender Europe also issued price lists for its strings parts and accessories (SPA) at or around the same time. Amplifiers and SPA are outside the scope of this SO and the CMA makes no findings in respect of them.

Scope: applied to online pricing

3.53 While some MI resellers may have adhered to the Minimum Prices set under the Fender Pricing Policy in-store as well as online,¹³⁵ Fender Europe focussed the enforcement of the Fender Pricing Policy on online pricing.¹³⁶ Interview evidence indicates that this was because in-store prices are more difficult to track and compare both for:

- consumers (in-store prices are harder for consumers to compare and so did not have as much of an immediate effect on other MI resellers' resale pricing),¹³⁷ and
- Fender Europe's staff (making them more difficult to enforce).¹³⁸

¹³⁵ When asked by the CMA interviewer whether [Reseller 1]'s prices differed online and in-store, [Reseller 1 Senior Employee 4] of [Reseller 1] said that they were *'[e]xactly the same, yeah.'* He also confirmed that [Reseller 1]'s prices were not cheaper online. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.40, line 26 to p.41, line 4. There is evidence that [Reseller] adhered to the Fender Pricing Policy with respect to its in-store as well as online prices: [Employee] of [Reseller] sent an internal company email with the subject heading *'Fender Redline price changes'* and said *'Fender wanted all the 2014 price changes sorted today, so I've done it & the attached spreadsheet is all the stock (...) (only display stock needs changing). There are a lot, so it might take 2-3 days to sort. If a customer wants to buy something & the ticket is the old price, just honour the old price. I'll be doing blue line next.'* URN E_FEN000023 (Internal [Reseller] email exchange dated 17 January 2014) [Text in brackets added by the CMA]. On 27 May 2017, [Reseller] sent an email to Fender complaining about the fact that a customer had bought a guitar from them the day before and then *'walked into [Reseller] today and saw it with a £999 price tag in the store.'* [Reseller] also asked Fender *'Not sure how [Reseller] can sell at this price but maybe something can be done somewhere'*. URN E_FEN003003 (Email exchange between [Employee 3] of Fender Europe and [Reseller] dated 27 May to 2 June 2017), p.2.

¹³⁶ In interview, [Senior Employee 4] of [Reseller 1] explained that the Fender Pricing Policy applied to online prices: *'[s]o, so [Fender] were, basically, saying that 4%, "Less than that is as low as we want to see an advertisement" – well, at an online price.'* [Reseller 1 Senior Employee 4] also explained that in relation to *'minimum advertised pricing'*, *'...Fender drove it from an online perspective'*. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.76, lines 12-13 and p.111, line 11 [Text in square brackets added by the CMA]. In interview, [Employee 2] of Fender Europe explained that *'although [the Fender Pricing policy] covered both instore and, and online, it was really focused on the online business.'* URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.111, lines 25-26 [Text in square brackets added by the CMA]. In his witness statement, [Senior Employee 1] of Fender Europe stated *'[m]y understanding is that the practice only applied to online prices and that dealers were free to price as they wished in their physical stores. This is because online prices are instantly visible, whereas a physical in-store price is harder to find.'* URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), p.3, paragraph 18.

¹³⁷ In interview, when [Senior Employee 4], [Reseller 1], was asked whether the Fender Pricing Policy applied to in-store prices, he replied *'[i]n-store, I don't think – being honest with you, I don't think [Fender] could care less. (...) I don't even think it would be on their radar at all.'* URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.76, lines 18-24 [Text in square brackets added by the CMA]. In interview, [Employee 2] of Fender Europe stated that *'instore prices have never been that much of a big deal'* and he also confirmed that the Fender Pricing Policy was focussed on the online business: *'[y]eah, because I think that's where most end-users look first for every product on the planet these days.'* URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.111, lines 22-23 and p.112, lines 2-3.

¹³⁸ [Employee 4] of Fender Europe stated that *'MSRP minus 4% would apply to online prices only. There was no way we could police prices in-store.'* URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), p.3, paragraph 16.

Content of the Fender Pricing Policy

Content: the Minimum Price

Terms used to mean Minimum Price

- 3.54 The evidence indicates that Fender Europe and its MI resellers used a number of terms to refer to the Minimum Price. While often this was 'MSRP-4%',¹³⁹ at various times throughout the Relevant Period, the Minimum Price was referred to as 'street',¹⁴⁰ 'street price',¹⁴¹ 'map',¹⁴² 'MSRP Inc VAT',¹⁴³ and '4% less than suggested retail'.¹⁴⁴ There were also a variety of terms which were used as synonymous with MSRP: 'MSRP GBP',¹⁴⁵ the recommended retail price ('RRP'),¹⁴⁶ and recommended selling price ('RSP').¹⁴⁷

Minimum Price formulae: trade price -5% x 1.333 x 1.2, then (MSRP-4%)

- 3.55 Interview evidence,¹⁴⁸ witness statements¹⁴⁹ and documentary evidence¹⁵⁰ show that the Fender Pricing Policy required MI resellers to advertise and so sell the Relevant Products online at or above the Minimum Price.
- 3.56 During the Relevant Period:

¹³⁹ See paragraph 3.58 below and paragraphs 3.182, 4.52, 4.116, 4.119 and 4.123 below.

¹⁴⁰ URN E_FEN002557 (Email from [Employee] of [Reseller] to [Employee 3] of Fender Europe dated 17 October 2013).

¹⁴¹ URN E_FEN002949 (Email from [Employee 4] of Fender Europe to [Employee] of [Reseller] dated 10 January 2017).

¹⁴² URN E_FEN002496 (Email from [Reseller] to [Employee 17] of Fender Europe dated 25 April 2013).

¹⁴³ URN E_FEN002949 (Email from [Employee 4] of Fender Europe to [Employee] of [Reseller] dated 10 January 2017).

¹⁴⁴ URN E_FEN002420 (Internal [Reseller] email exchange dated 12 January 2018), p.2.

¹⁴⁵ URN E_FEN002744 (Fender price list showing old and new MSRP prices for a range of Gretsch guitars dated 2 February 2016).

¹⁴⁶ In interview, [Employee 2] of Fender Europe said '*I noticed [RRP] changed over the years and became S[RP] – even I get confused with the terminology now but RRP just was recommended retail price. And MSRP is manufacturer's suggested retail price. It's the same thing.*' URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.116, lines 2-5 [Text in square brackets added by the CMA].

¹⁴⁷ In interview, [Employee 2] of Fender Europe said '*RSP? Er, well again that's just recommended selling price.*' He went on to explain '*So, it's just different acronyms for the same thing.*' URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.117, lines 9 and 18.

¹⁴⁸ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.87, lines 23-25; URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.76, lines 3-4 and lines 12-14; URN C_FEN01484 (Transcript of interview with [Fender Europe Senior Employee 1] dated 17 January 2019), p.50, lines 18-20. See footnote 136 above.

¹⁴⁹ URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), p.3, paragraph 17; URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), p.2, paragraphs 10 and 11; URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), p.2, paragraph 10. See footnote 136 above.

¹⁵⁰ See paragraph 3.71 below.

- the Minimum Price for each Relevant Product was determined by applying a particular formula, initially by reference to Fender Europe's trade price and later to MSRP;¹⁵¹
- Fender Europe sent price lists to MI resellers periodically which provided the trade prices and MSRP;¹⁵² and
- Fender Europe instructed MI resellers verbally at various times to apply the formula in use at the time to work out the Minimum Price for each Relevant Product.¹⁵³

3.57 The evidence shows that either before or in the early part of the Relevant Period, Fender Europe told its MI resellers to use the formula 'trade price - 5% x 1.333 x 1.2'¹⁵⁴ to calculate the Minimum Price. This gave MI resellers a 25% margin.¹⁵⁵

3.58 The evidence shows that for at least part, if not all of the Relevant Period, the Minimum Price was determined by deducting 4% from MSRP and adding VAT.¹⁵⁶ In the light of Fender Europe's efforts to conceal the implementation of the Fender Pricing Policy, it is unclear when exactly the new 'MSRP-4%' formula was applied. Further, witnesses' recollections as to when this formula applied vary. This formula could have been in force from 2011¹⁵⁷ or potentially from 2015.¹⁵⁸ It was then used until the Fender Pricing Policy came to an end.¹⁵⁹

¹⁵¹ See paragraphs 3.57 to 3.58 below.

¹⁵² URN E_FEN000076 (Fender Acoustic BW Pricelist - ALL Pricing 15 Feb 2016); URN E_FEN002750 (Squier BW Pricelist - ALL Pricing 15 Feb 2016); URN E_FEN003062 (CHARVEL_UK_GBP pricelist).

¹⁵³ See paragraph 3.66 below.

¹⁵⁴ URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), pp.2-3, paragraph 14.

¹⁵⁵ URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), p.2, paragraph 12.

¹⁵⁶ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.87, line 23 to p.88, line 1 and p.89, lines 3-10 ; URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.75, line 26 to p.76, line 4 and p.232, lines 14-15; URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), p.2, paragraph 11; URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), p.2, paragraph 9; URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), p.2, paragraph 10; URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), p.3, paragraph 20; URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), p.2, paragraph 12; URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), p.3, paragraph 17; URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), p.3, paragraphs 19 and 20.

¹⁵⁷ 'I do not recall the exact date but around 2011 or 2012 a practice was introduced where all dealers were expected to set their prices no lower than MSRP - 4%'. URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018) p.2, paragraph 12.

¹⁵⁸ 'The formula then changed on 15 April 2015 to MSRP minus 4%, as the price list was amended to not show as big a distance from trade to MSRP.' URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), p.2, paragraph 12.

¹⁵⁹ For more information on the duration of the Fender Pricing Policy see paragraphs 3.74 to 3.76 below.

No online discount codes permitted

- 3.59 There is some evidence which shows that as part of the Fender Pricing Policy and in order to preserve the Minimum Price, Fender Europe prohibited online discounts or across-the-board online sales¹⁶⁰ save for discounts on discontinued stock.¹⁶¹

Communication of the Fender Pricing Policy

Fender Europe internal communications

[Fender Europe Former Senior Employee 1] explained the Fender Pricing Policy to Fender Europe colleagues and took an active part in its operation

- 3.60 Witness evidence shows that [Former Senior Employee 1] of Fender Europe explained and took an active part in implementing the Fender Pricing Policy.¹⁶²
- 3.61 The evidence shows that [Fender Europe Former Senior Employee 1] told Fender Europe staff about the introduction of the Fender Pricing Policy. This was

¹⁶⁰ On 22 April 2017, [Former Senior Employee 2] of Fender Europe sent an SMS to [Employee 7] of Fender Europe stating: '*[h]ello [Fender Europe Employee 7], one [sic] of your customers has a special offer this weekend and [sic] it's 10% off all. the customer is called [Reseller]. Can you please give them a call or so to get fender off.*' [Fender Europe Former Senior Employee 2] sent a further SMS the same day to [Fender Europe Employee 7] stating: '*[s]orry I was dictating it while I was driving. Looks a bit off but I hope you understood what I meant. Thank you again.*' URN C_FEN01513 (SMS 2572-2573: [Fender Europe Former Senior Employee 2] to [Fender Europe Employee 7] dated 22 April 2017), p.3.

¹⁶¹ URN E_FEN002866 (Email exchange between [Reseller] and [Fender Europe Employee 3] of Fender Europe dated 13 October 2016).

¹⁶² As DSMs we were expected by [Fender Europe Former Senior Employee 1] to take steps to get the UK Resellers we were responsible for to keep their online prices within MSRP minus 4%. URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018) p.3, paragraph 19 [Text in square brackets added by the CMA]; '*[w]e were always told by [Fender Europe Former Senior Employee 1] that we should not discuss prices with UK Resellers and could not enforce minimum pricing. However, he also told us that he expected Resellers not to sell below MSRP minus 4%.*' URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018) p.2, paragraph 9; '*I recall that in sales meetings [Fender Europe Former Senior Employee 1] would say to the DSMs that they needed to ensure that their Resellers adhered to the new prices that were coming out.*' URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018) p.3, paragraph 15; '*[s]ometimes I got follow-up calls from [Fender Europe Former Senior Employee 1] or [Fender Europe Former Senior Employee 2] ([Fender Europe Former Senior Employee 2] would also text requests from time to time) in which they would ask me to call resellers in my area who they thought were not pricing according to the MSRP minus 4% formula*' URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018) p.3, paragraph 20; '*[Fender Europe Former Senior Employee 1] made it clear that our Resellers were expected to reflect new prices within a specified period of time after a new price list was sent out. [Fender Europe Former Senior Employee 1] told us to ring our Resellers and make sure they were aware that we expected their online prices to reflect the new price list by the relevant date.*' URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018) p.2, paragraph 10.

communicated verbally to Fender Europe sales staff, either in sales meetings/calls¹⁶³ or on an individual basis.¹⁶⁴

- 3.62 [Fender Europe Former Senior Employee 1] then directed Fender Europe sales staff to speak to their respective MI resellers about it.¹⁶⁵ It is not clear from the evidence whether [Fender Europe Former Senior Employee 1] instigated the Fender Pricing Policy.
- 3.63 [Fender Europe Former Senior Employee 1] would regularly receive complaints about low margins and price instability because of his long standing in the MI industry and relationships with MI resellers.¹⁶⁶
- 3.64 Witness evidence shows that a significant proportion, and potentially most, of internal Fender Europe communication about the implementation of the Fender Pricing Policy was channelled directly through [Fender Europe Former Senior Employee 1].¹⁶⁷
- 3.65 [Fender Europe Former Senior Employee 1] directed Fender Europe staff to avoid committing anything to writing in connection with the Fender Pricing Policy.¹⁶⁸

¹⁶³ URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), p.3, paragraph 17; URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), p.2, paragraph 10; URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), p.3, paragraph 14; URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), p.3, paragraph 20.

¹⁶⁴ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.89, lines 24-26.

¹⁶⁵ See footnote 162 above.

¹⁶⁶ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.88, lines 16-22.

¹⁶⁷ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.118, lines 24-26 and p.120, lines 12-17; URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), p.3, paragraph 19.

¹⁶⁸ *'I never asked UK Resellers to raise their prices in writing. It was always done over the phone or face to face' and 'In meetings, [Fender Europe Former Senior Employee 1] would say that we could not control pricing. On the other hand, he would tell us to call a particular UK Reseller and ask them to raise their prices.'* URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018) p.2, paragraphs 9 and 11; *'[[Fender Europe Former Senior Employee 1]] would tell us that we should not be speaking about prices and that we should never put anything in an email that could be misconstrued as asking a Reseller to raise their prices. Behind the scenes however, conversations about prices were still taking place.'* and *'[f]ollowing the [Reseller] Incident, [Fender Europe Former Senior Employee 1] was clear that nothing should be put in writing that could be misconstrued as seeking to force a customer to sell at a certain price'*. URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018) p.4, paragraph 23 and paragraph 28 [Text in square brackets added by the CMA]. *'We were told by [Fender Europe Former Senior Employee 1] not to put anything in writing'* URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018) paragraph 18; *'I have no records of this meeting as [Fender Europe Former Senior Employee 1] was aggressive about nothing being put in writing.'* URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018) p.3, paragraph 14; *'[w]e were always told by [Fender Europe Former Senior Employee 1] that we should not discuss prices with UK Resellers and could not enforce minimum pricing. However, he also told us that he expected Resellers not to sell below MSRP minus 4%. He expected us to relay this message face to face. He told us not to put anything in writing.'* URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018) p.2, paragraph 9; *'[t]he policy was not recorded anywhere. We were told by [Fender Europe Former Senior Employee 1] that we should never put anything relating to it in writing. We would make calls or discuss it with dealers face to face.'* URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August

External communications with MI resellers

Verbal instructions given to MI resellers

- 3.66 According to [Employee 2] of Fender Europe, MI resellers would be told (verbally) that Fender Europe expected them to sell the Relevant Products at or above the Minimum Price calculated using a particular formula with reference to its price lists, for example MSRP-4% +VAT.¹⁶⁹ This happened either when the Fender Pricing Policy was introduced (for existing MI resellers) or when they agreed to become Fender Europe MI resellers (for new MI resellers who joined the network after January 2013).¹⁷⁰ This expectation was perpetuated from time to time through the issuance of price lists in similar form, and on occasion confirmed verbally, so that MI resellers understood what the Fender Pricing Policy required of them.¹⁷¹

Communication of the Minimum Price through price lists and follow-up calls

- 3.67 Even though the Fender Pricing Policy was not written down,¹⁷² its contents could be easily determined from the price lists Fender Europe sent to its MI resellers from time to time.¹⁷³ Fender Europe's price lists:

2018), p.3, paragraph 16; *[p]art of the reason it is difficult to recall the exact start date is because we were told by [Fender Europe Former Senior Employee 1] never to put anything in writing. It was made very clear to us that we should not write anything down, or email or send texts regarding prices.* URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), p.3, paragraph 23. See also footnote 335 below.

¹⁶⁹ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.92, line 11. See paragraphs 3.67 to 3.68 below.

¹⁷⁰ In interview, [Senior Employee 4] of [Reseller 1] explained that at the time the ADA was being formalised, Fender Europe told [Reseller 1] that they were going to issue a price list which they expected [Reseller 1] to comply with: *'[t]hey talked about it and, and around it for quite a while, um, and then they said, "Well, we are going to introduce this agreement". Um, and that, that -- you know, once they issued the agreement, they then said, "Well, by -- we're going to issue a price list on X. We expect you to comply in a matter of -- matter of days".'* [Reseller 1 Senior Employee 4] also confirmed that this was communicated to [Reseller 1] verbally and not put in writing: *'we were told verbally that we had, er, this.'* URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.117, lines 7-11 and p.118, line 4.

¹⁷¹ See paragraphs 3.67 to 3.70 below.

¹⁷² URN E_FEN003323 (Transcript of Proffer 1 dated 25 July 2018), p.10, lines 2-5; URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.92, lines 11-12; URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.269, lines 6-7; URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), p.3, paragraph 23.

¹⁷³ In interview, when asked about Fender Europe's price lists, [Senior Employee 4] of [Reseller 1] noted *'they issue price lists regularly, dealership price lists'*. He also later stated that price lists were issued *'once or twice or a year, I would say.'* URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.74, lines 4-5 and p.168, lines 23-24. In interview, [Employee 2] of Fender Europe said that Fender Europe has an *'annual price rise'* URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.26, lines 13-14. In his witness statement, [Employee 3] of Fender Europe stated *'[a]s DSMs, we would be sent a new price list about a week before it would be due to come into effect. I would then send it on to the Resellers I am responsible for. Prices would not always change at the same time each year.'* URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), p.2, paragraph 8; *[p]rice changes typically occur in January, although recently there has been more*

- provided the MSRP (or trade price) from which MI resellers could calculate the Minimum Price at or above which they were expected to advertise and sell the Relevant Products online;¹⁷⁴
- specified the trade price (the price at which MI resellers could buy products from Fender Europe) and the ‘settled price’ (a trade price which included a discount for prompt settlement), at which MI resellers could expect to purchase the Relevant Products from Fender Europe; and
- so revealed the margin the MI reseller could expect to make if it followed the Fender Pricing Policy.¹⁷⁵

3.68 The evidence shows that when sending price lists to MI resellers, Fender Europe’s expectation was that MI resellers would change the prices of the Relevant Products on their websites to at least the Minimum Price by no later than the date specified by Fender Europe (usually in an email sent by that MI reseller’s DSM).¹⁷⁶ DSMs were instructed to ‘*follow-up*’ with larger, influential MI resellers to prompt them to change their online prices by the specified date.¹⁷⁷ They were not expected to call each and every MI reseller because smaller MI resellers tended to follow the market in any event.¹⁷⁸

3.69 In interview, [Employee 2] of Fender Europe stated that when he called his MI resellers to speak about pricing, he was confident that they understood the purpose of the call was to ask them to move their prices to at least the Minimum

than one price list issued in a year. This is mainly due to foreign exchange rate fluctuations.’ URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), p.2, paragraph 8.

¹⁷⁴ See paragraph 3.58 above.

¹⁷⁵ See paragraph 3.72 to 3.73 below.

¹⁷⁶ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.261, line 19 to p.262, line 3.

¹⁷⁷ ‘*We would be expected to call or meet with our key dealers and explain that the new price list was coming into effect and that they had to adhere to it*’ URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), p.3, paragraph 15; ‘*[a]fter we emailed the price list we would be expected to call or meet with our top five to ten UK Resellers to ask them to make sure they amended their prices by the relevant date.*’ URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), p.2, paragraph 11.

¹⁷⁸ ‘*When new price lists were issued, I was not expected to call all 30 of my UK Resellers. I was expected to call or have meetings with larger UK Resellers with an online presence. This included [Reseller]. Smaller UK Resellers would typically move their prices in line with the larger UK Resellers.*’ URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), p.2, paragraph 13; ‘*I would typically email the new price list to my Resellers and then follow up with a call, or in-person meeting, with my biggest Resellers and ask them to raise their prices (...) If they increased price the smaller UK Resellers would typically follow suit. This is why we would not be expected to speak to every UK Reseller we were responsible for and ask them to raise their prices.*’ URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), p.2, paragraph 10 [Text in brackets inserted by the CMA]; ‘*I was not expected to make calls to all of the UK Resellers in my area. [Fender Europe Former Senior Employee 1] would expect me to approach the large UK Resellers with a significant online presence*’ URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), p.3, paragraph 19.

Price, even if it was not directly stated.¹⁷⁹ MI resellers' understanding as to what was meant was also confirmed by [Senior Employee 1] of Fender Europe.¹⁸⁰

3.70 At least some MI resellers generally complied with the Fender Pricing Policy in respect of increasing their resale prices to at least the Minimum Price when new price lists were issued. This would have obviated the need for frequent communication to encourage compliance.¹⁸¹

3.71 MI resellers generally understood that they were required to advertise at or above the Minimum Price, even if they did not always understand or remember how to calculate the Minimum Price.¹⁸² For example, in an iMessage chat between [Employee] (a [X] at [Reseller]) and [Fender Europe Senior Employee 1], [Employee of Reseller] sent a message to query the pricing formula used by Fender Europe:

'Morning mate, just doing the new prices. Is there a formula for street prices like there used to be or is it just 4% off then rounded up to nearest pound?'¹⁸³

Trade price, settled price and MI resellers' margin

3.72 Fender Europe set the margin available to MI resellers in two broad tiers:

- around [X]% for Relevant Products in the Intermediate, Advanced and Custom Shop ranges, which tended to be more expensive and so MI resellers were satisfied with a smaller margin because they made as much if not more money in absolute terms, and
- around [X]% or more for Relevant Products in the Beginner range (and SPA), where MI resellers generally wanted to achieve a higher margin as a

¹⁷⁹ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.94, lines 5-12.

¹⁸⁰ URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), p.3, paragraph 15.

¹⁸¹ [Fender Europe Employee 2] was responsible for several of Fender Europe's major accounts, including [Reseller 1], [Reseller], [Reseller], [Reseller] and [Reseller]. URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), pp.1-2, paragraph 5. In interview, [Fender Europe Employee 2] explained that 'his' MI resellers 'always did' comply with the Fender Pricing Policy by adjusting their resale prices to at least the Minimum Price after the issue of new price lists. He said that this was 'because these are professional people I deal with and they're really big accounts.' When asked about escalation for non-compliance, he said 'it was never an issue, to be honest.' URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.287, lines 1-3.

¹⁸² URN E_FEN002694 (Email from [Reseller] to [Fender Europe Employee 3] of Fender Europe dated 24 September 2015); URN E_FEN002537 (Email from [Employee] of [Reseller] to [Fender Europe Employee 17] of Fender Europe, dated 24 September 2013).

¹⁸³ URN C_FEN01513 (Chat 810: iMessage from [Employee] of [Reseller] to [Senior Employee 1] of Fender Europe dated 25 July 2016), p.5.

proportion of the total price, given the Relevant Products in this category were less expensive.¹⁸⁴

- 3.73 MI resellers could calculate the margin for each product range that they would gain through adherence to the Fender Pricing Policy from the relevant price lists by calculating the difference between the Minimum Price and the trade or settled price.

Duration

The Fender Pricing Policy was introduced before the start of the Relevant Period and ceased at or shortly after the end of the Relevant Period

- 3.74 The Fender Pricing Policy was introduced before the start of the Relevant Period. Fender Europe's staff did not identify an exact date when they were first told to implement the Fender Pricing Policy. However, the consensus was largely that it was in place by 2012 at the latest.¹⁸⁵ [Employee 9], a Fender Europe DSM, attributed this ambiguity to the fact that staff were consistently reminded by [Former Senior Employee 1] of Fender Europe not to put anything relating to the policy in writing.¹⁸⁶

¹⁸⁴ See Figure 3.1. [Former Senior Employee 1] of Fender Europe stated that MI resellers may not stock items on which they do not consider they are making sufficient margin: '*[w]hen it comes to what we call commodity products, when it comes to cables, if you are in a marketplace where the average dealer is making [x<] per cent margin on a 20-foot cable and we go in and say, "Make it [x<] per cent", we would not sell any. That is where the difference is in pricing.*' URN C_FEN00776 (Transcript of interview with [Fender Europe Former Senior Employee 1] dated 18 April 2018), p.63, lines 14-17.

¹⁸⁵ See paragraph 3.173 below. [Fender Europe Employee 7] stated '*I do not recall specifically when I first came [sic] aware of this practice. It may have been as early as 2012, but most likely in 2013.*' URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018) p.3, paragraph 14 [Text in square brackets added by the CMA]; '*[l]ater on it became MSRP-4%. This may have been introduced in 2012 or 2013.*' URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018) p.3, paragraph 17; '*[f]rom approximately 2011, I began to receive calls from DSMs who said that they had a complaint from one of their Resellers than another reseller was too cheap. (...) The complaints related to the general practice of requiring Resellers to advertise at no less than MSRP minus 4%.*' URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018) p.3, paragraph 19; '*I cannot recall when this specifically began. (...) I believe it may have started in 2011 or 2012.*' URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018) p.3, paragraph 20; '*[t]his may have started approximately six years ago, in 2012, although I cannot be certain. I do not recall it being in place when I joined in 2008.*' URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018) p.2, paragraph 11; '*I do not recall when MSRP-4% was introduced, although it may have been five or six years ago. I believe I first heard about it on a conference call about four or five years ago.*' URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018) p.2, paragraph 14; '*I do not recall the exact date but around 2011 or 2012 a practice was introduced where all dealers were expected to set their prices no lower than MSRP – 4%.*' URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018) p.2, paragraph 12; '*[f]rom at least 2014, we expected UK resellers' prices to be not less than MSRP minus 4%. Prior to 2014 there may have been another formula in place.*' URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), p.2, paragraph 11.

¹⁸⁶ URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), p.3, paragraph 23.

3.75 Interview¹⁸⁷ and further documentary evidence,¹⁸⁸ of communications between Fender Europe and certain of its MI resellers show that in early 2013:

- the Fender Pricing Policy existed;
- a number of MI resellers were supporting and/or adhering to it; and
- it was being monitored and enforced.

3.76 The interview and witness statement evidence indicate that Fender Europe's enforcement of the Fender Pricing Policy ceased in April 2018.¹⁸⁹ The CMA considers that this was as a result of the launch of the CMA's investigation on 17 April 2018.¹⁹⁰

III. Monitoring and enforcement of the Fender Pricing Policy

Overview

3.77 Fender Europe sought to monitor and enforce the Fender Pricing Policy periodically and on a case-by-case basis during the Relevant Period by:

¹⁸⁷ In response to the CMA interviewer's question, [Senior Employee 4] of [Reseller 1] stated that he believed Fender Europe first introduced MAP in 2011 or 2012. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.114, line 25 to p.115, line 1. In interview, [Employee 2] of Fender Europe stated that it was his understanding that the Fender Pricing policy was in place in 2012. URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.91, lines 22-24.

¹⁸⁸ As set out and referred to in paragraph 3.104 below.

¹⁸⁹ Some Fender Europe staff recalled a drop in prices around Black Friday in 2017. They reported a spike in calls from MI resellers complaining about prices being below the Minimum Price, and that [Fender Europe Former Senior Employee 1] stopped asking them to follow up with the resellers who had reduced their prices. URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), p.4, paragraph 26 and URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), p.4, paragraphs 27 and 28. One DSM reported not making any follow-up calls (to ask MI resellers to increase their prices to at least the Minimum Price) during the first quarter of 2018. However, another stated that '[w]hen a new price list was issued in January 2018 calls started again. They stopped when we became aware of the [CMA's] investigation.' URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), p.4, paragraph 29 [Text in square brackets added by the CMA].

¹⁹⁰ [Senior Employee 4] of [Reseller 1] confirmed that Fender Europe stopped contacting [Reseller 1] around April 2018: 'I think it was from (...) your period of investigation, if you like. I mean, I think it, it was from the issuing of an SDA to, you know – to, to, to April last year, you know. They were ... You know, I think even a couple of days afterwards, we got an email from [Fender Europe Employee 2] asking about why are we still at retail on this, or something like that. You know, it was – it was almost like, "You are kidding, [Fender Europe Employee 2], aren't you?"' URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.97, lines 17-23. Fender Europe employees also confirmed that the Fender Pricing Policy was no longer enforced after the CMA commenced its investigation – see URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), p.4, paragraph 27; URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), p.4, paragraph 23; URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), p.5, paragraph 39.

- issuing new price lists and DSMs then contacting larger, more influential MI resellers to ask them to increase their prices in line with the new price lists by a specified date;¹⁹¹
- following the issue of new price lists, DSMs ‘*following-up*’ with MI resellers that had not changed their online prices by the specified date;¹⁹²
- reactively following-up on non-compliant resale prices, through MI resellers reporting where other MI resellers were not adhering to the Fender Pricing Policy, and in some cases urging Fender Europe to rectify this;¹⁹³
- contacting MI resellers directly, who were found or suspected not to be adhering to the Fender Pricing Policy by pricing below the Minimum Price and encouraging them to increase their prices to at least the Minimum Price;¹⁹⁴ and
- threatening and imposing sanctions on resellers for not adhering to the Fender Pricing Policy on a few occasions.¹⁹⁵

3.78 When monitoring and enforcing the Fender Pricing Policy, Fender Europe’s staff were under strict instructions from [Fender Europe Former Senior Employee 1] not to create a documentary evidence trail by putting anything in writing (see paragraphs 3.184 to 3.191 below).

3.79 Notwithstanding [Fender Europe Former Senior Employee 1]’s instructions, the CMA has obtained documentary evidence illustrating the approach Fender Europe took to monitoring and enforcing the Fender Pricing Policy. This documentary evidence is supported by interview and witness evidence.

¹⁹¹ URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraph 19; URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraphs 10 and 17; URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), paragraph 15; URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 17; URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), paragraph 10; URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), paragraph 9; URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 12; URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), paragraph 11.

¹⁹² These follow-ups focussed on but were not exclusive to the larger, more influential MI resellers. See paragraphs 3.80 to 3.84 below.

¹⁹³ See paragraphs 3.86 to 3.89 below.

¹⁹⁴ See paragraphs 3.91 to 3.95 below.

¹⁹⁵ See paragraphs 3.143 to 3.171 below.

Fender Europe staff contacted MI resellers after issuing new price lists

Fender Europe staff 'called round' larger, influential MI resellers to ask them to comply with the Fender Pricing Policy when it set new Minimum Prices

3.80 The witness evidence shows that the role of Fender Europe sales staff included contacting MI resellers to draw their attention to the new lists of prices issued by Fender Europe from time to time.¹⁹⁶ During some of these calls DSMs asked MI resellers to increase their resale prices in line with the Fender Pricing Policy by a specified date.¹⁹⁷ In a witness statement provided to the CMA, [Employee 7] of Fender Europe advised that the date was usually two weeks from the date the price list was distributed,¹⁹⁸ while [Employee 1] of Fender Europe indicated in his witness statement to the CMA that the implementation period could be up to a month.^{199, 200}

3.81 For example, on 2 February 2016, [Fender Europe Employee 2] emailed [Reseller 1], with five attached price lists. [Fender Europe Employee 2] stated:

'Please see attached the NEW Fender / Squier / SPA and Clothing & Collectables Price Lists effective as of 1st February 2016. (...)

¹⁹⁶ URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraphs 16 and 17. Fender Europe staff who provided witness statements to the CMA stated that it was the role of DSMs to distribute the price lists to MI resellers with a date by which the MSRP had to be advertised; [Employee 9] of Fender Europe indicated that this was generally by way of email: URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraph 17. When asked in interview, [Senior Employee 4] of [Reseller 1] confirmed that Fender Europe would follow up every time it issued a price list. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.142, line 24 to p.143, line 12.

¹⁹⁷ Seven of the eight Fender sales employees who provided the CMA with witness statements also stated that [Former Senior Employee 1] of Fender Europe had expected DSMs to call their respective resellers after new price lists were issued to remind those resellers to keep their prices above 4% less than MSRP. URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), paragraph 10; URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 20; URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), paragraph 9; URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), paragraph 11; URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 17; URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), paragraph 15; URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraph 19.

¹⁹⁸ URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 18.

¹⁹⁹ URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 16.

²⁰⁰ [Employee 1] of Fender Europe explained that price lists are now distributed electronically via Fender Europe's cloud server [X]. URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 14.

I will be sending through all of the Blue line price lists following this mail. We would ask that all price adjustments on websites and at retail be in place for the week of the 15th of February.²⁰¹

3.82 On 12 February 2016, [Fender Europe Employee 2] sent a further email to [Reseller 1], with the subject: '*NEW SQUIER AND FENDER ACOUSTIC PRICE LISTS*'. The email attached the new Squier and Fender Acoustic price lists and stated:

'The new lists attached have been designed to put much needed extra margin into both of these product lines. Please be aware these price changes are effective from Monday, and we would ask you to alter your pricing accordingly.'²⁰²

3.83 In a further example, on 4 October 2017, [Employee 10] of Fender Europe sent an email to [Reseller 1], including [Reseller 1 Senior Employee 1] and [Reseller 1 Senior Employee 4], with the subject '*Latest Speciality Price Lists*', enclosing updated price lists for all Speciality brands. In the body of the email, [Fender Europe Employee 10] stated: '*[p]lease update your advertised information*'.²⁰³ The CMA considers that this email also indicates that Fender Europe was asking [Reseller 1] to change its prices in compliance with the Fender Pricing Policy.

3.84 The evidence indicates that DSMs did not routinely contact all MI resellers. This was because smaller MI resellers tended to 'fall into line' once larger MI resellers with a material online presence had complied with the Fender Pricing Policy in respect of a particular newly-issued price list.²⁰⁴

Following up with MI resellers who had not complied by the specified date

3.85 DSMs were instructed to '*follow-up*' with MI resellers who had not changed their online prices by the specified date. It is not clear from the evidence whether DSMs were expected to check MI resellers' resale prices directly themselves, or whether they instead reacted to any reports from MI resellers about other MI resellers not having updated their resale pricing in line with the new price lists.²⁰⁵

²⁰¹ URN E_FEN002739 (Email from [Employee 2] of Fender Europe to [Employee 1], [Employee 4], [Senior Employee 1], [Senior Employee 2], [Senior Employee 6], [Senior Employee 4], [Senior Employee 3], [Employee 2] of [Reseller 1], and [Senior Employee 1] of Fender Europe dated 2 February 2016).

²⁰² URN E_FEN000074 (Email from [Employee 2] of Fender Europe to [Senior Employee 1], [Senior Employee 6], [Senior Employee 4], [Senior Employee 3], [Employee 2], [Senior Employee 2], [Employee 4], [Employee 1], [Employee 7] of [Reseller 1] and [Senior Employee 1] of Fender Europe dated 12 February 2016).

²⁰³ URN E_FEN000157 (Email from [Employee 10] of Fender Europe to [Employee 5], [Senior Employee 1], [Senior Employee 4] and [Employee 1] of [Reseller 1], dated 4 October 2017).

²⁰⁴ See paragraph 3.68 and footnote 178 above.

²⁰⁵ URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraph 19; URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraphs 10 and 17; URN

Fender Europe reactively followed-up on MI reseller-reported non-compliance

3.86 In the periods between Fender Europe issuing new price lists, its monitoring of MI reseller resale pricing was primarily reactive.^{206, 207} In interview, [Fender Europe Employee 2] stated that, to his knowledge, Fender Europe did not conduct systematic monitoring of MI resellers' prices.^{208, 209} [Fender Europe Employee 2]

E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), paragraph 15; URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 17; URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), paragraph 10; URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), paragraph 9; URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 12; URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), paragraph 11. See footnote 192 above.

²⁰⁶ 'I would also receive calls from Resellers, such as [Reseller], [Reseller 1] and [Reseller], who would complain about each other's prices.' URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 12; 'I recall receiving complaints from Resellers about others undercutting their prices. Throughout my interactions with them. Resellers have always complained about margin and the difficulty they face in trying to make money.' URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 12; 'I recall instances where my Resellers called me and pointed out that the prices of resellers in other regions were too low. Some Resellers would call me to complain that they put their prices up but others had not.' URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), paragraph 16; '[i]n the past I have received emails and texts from Resellers complaining about pricing.' URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), paragraph 19; 'DSMs regularly received complaints from UK Resellers. I would hear general moans every day. Every UK Reseller would complain about prices every time I met with them.' URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), paragraph 17.

²⁰⁷ There is some limited evidence which indicates that during their dealings with MI resellers, Fender Europe staff would be informed of the fact that certain other MI resellers were pricing below the Minimum Price and they would relay this to relevant colleagues. For example, on 22 April 2017, [Former Senior Employee 2] of Fender Europe sent SMS messages to [Employee 7] of Fender Europe stating '[h]ello [Fender Europe Employee 7].one [sic] of your customers has a special offer this weekend.and [sic] it's 10% off all. the customer is called [Reseller]. Can you please give them a call or so to get fender off' and: '[s]orry I was dictating it while I was driving. Looks a bit off but I hope you understood what I meant. Thank you again.' URN C_FEN01513 (SMS 2572-2573: [Fender Europe Former Senior Employee 2] to [Fender Europe Employee 7] dated 22 April 2017), p.3. These texts indicate that: (i) for this time period at least, Fender Europe was internally monitoring the prices of this reseller, and (ii) [Fender Europe Former Senior Employee 2] had asked [Fender Europe Employee 7] to speak to the reseller to ask it to refrain from selling Relevant Products at a discounted rate.

²⁰⁸ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.74, line 24 to p.75 line 2.

²⁰⁹ The evidence indicates that in late 2016 to early 2017, Fender Europe considered purchasing automated price monitoring software in order to more effectively and systematically monitor its resellers' resale pricing. URN E_FEN002855 (Internal Fender Europe email exchange dated 22 September 2016). On its website, Price2Spy states that its services provide the capability to '[a]nalyze which retailer (and exactly when) started pricing chain-reaction (that was followed by other sites)' See Price2Spy company website - Brands Manufacturers Page - <http://www.price2spy.com/en/solutions/brands-manufacturers.html> (accessed on 11 September 2019).The evidence further indicates that Fender Europe was interested in using the software to support it in 'monitoring the presentation' of its brands. Another goal of using the service was said to be 'separate dealers doing good for us and vice versa'. URN E_FEN003255 (Email from [Fender Europe Former Senior Employee 3] to [Employee 14], [Employee 15], [Employee 16] and [Employee 12] of Fender Europe dated 31 January 2017). The evidence indicates that [Fender Europe Former Senior Employee 1] was aware of and encouraged the set up of the trial: URN E_FEN003262 (Internal Fender Europe email exchange dated 20 February 2017). However, it appears that Fender Europe's engagement with Price2Spy was limited to a free trial of the service and not purchased for the purposes of future monitoring of its resellers' pricing. URN E_FEN003255 (Email from [Fender Europe Former Senior Employee 3] to [Employee 14], [Employee 15], [Employee 16] and [Employee 12] of Fender Europe dated 31 January 2017). Instead Fender Europe reacted periodically to complaints

did, however, state that on more than one occasion he had been asked by [Fender Europe Former Senior Employee 1] to 'look' at an MI reseller's prices.²¹⁰

- 3.87 Instead, the evidence shows that Fender Europe relied predominantly on periodic complaints from its MI resellers to monitor compliance with the Fender Pricing Policy. In the witness statements provided by Fender Europe, all eight employees reported that they had received emails from their respective MI resellers reporting one or more other MI resellers' competitors for advertising the Relevant Products below the Minimum Price.²¹¹
- 3.88 On 14 May 2013, [Fender Europe Former Senior Employee 1] forwarded another email to [Fender Europe Employee 2] from [Reseller], which attached links to various MI resellers, with the subject heading 'take another look'.²¹²
- 3.89 On 18 August 2015, [Fender Europe Former Senior Employee 1] forwarded an email from [Reseller 1] to [Employee 1] of Fender Europe, comparing its prices against [Reseller]. The email from [Reseller 1] stated '*[a]fternoon gents, We've just come across the following and thought you should be aware.*' It attached a link to the Fender Stratocaster sold on [Reseller]'s website.²¹³

MI resellers proactively and systematically monitored each other's resale pricing and periodically used the information gathered to report non-compliance to Fender Europe

- 3.90 MI resellers proactively policed each other's pricing, regularly emailing links²¹⁴ and/or automated price monitoring software reports²¹⁵ to Fender Europe in order

on a case-by-case basis from its MI reseller network where individual MI resellers monitored each other's compliance with the Fender Pricing Policy. In interview, [Former Senior Employee 1] of Fender Europe confirmed that Fender had for a period of time used a web rat but that "*[i]t never got used. This was probably about two years ago, I would think.*" URN C_FEN00776 (Transcript of interview with [Fender Europe Former Senior Employee 1] dated 18 April 2018), p.60, lines 15-16.

²¹⁰ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.75, lines 1-20.

²¹¹ URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraph 24; URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 14; URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), paragraph 10; URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 12; URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), paragraph 17-18; URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), paragraph 19; URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 21; URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), paragraph 16.

²¹² URN E_FEN003170 (Email from [Fender Europe Former Senior Employee 1] to [Employee 2] of Fender Europe, forwarding an email from [Reseller] dated 14 May 2013).

²¹³ URN E_FEN003219 (Email from [Fender Europe Former Senior Employee 1] to [Fender Europe Employee 1] of Fender Europe, forwarding an email from [Reseller 1] dated 18 August 2015).

²¹⁴ For example, see below Sections 3.C.IV: Illustrative examples of Fender Europe's monitoring and enforcement and 4.C.IV: Agreement and/or concerted practice between Fender Europe and [Reseller 1].

²¹⁵ The evidence indicated that at least two resellers, [Reseller 1] and [Reseller], were using a third-party company called Competitor Monitor to monitor other resellers' prices, the reports of which each forwarded to Fender Europe on at least one occasion. See URN E_FEN000239 (email from [Reseller] to Fender Europe dated 5 April 2018) and URN

to alert Fender Europe to other MI resellers whose prices were below the Minimum Price and to urge Fender Europe to rectify this.

Fender Europe staff followed up reported non-compliance with the Fender Pricing Policy

- 3.91 Fender DSMs stated that from time to time they would receive complaints from MI resellers about their competitors advertising below the Minimum Price, and that they would often either follow up the complaint personally²¹⁶ or forward it to another DSM.²¹⁷ [Employee 1] of Fender Europe indicated that between 2011 and 2016 his role was to act as a 'middle man' between the DSMs.²¹⁸ Typically this meant he would, following contact from one DSM, contact another DSM (about whose MI reseller(s) a complaint had been received) and tell them to 'have a word' with the MI reseller/s in question.²¹⁹
- 3.92 Seven of the eight Fender Europe employees who provided witness statements stated that [Fender Europe Former Senior Employee 1] expressly told them to call their respective MI resellers (or the relevant DSM, as was the case) to speak about advertised prices that were too low.²²⁰

E_FEN002801 (Email from [Reseller 1] to Fender Europe dated 7 June 2016). In relation to the latter email, [Reseller 1]'s email was forwarded internally by [Fender Europe Senior Employee 1] to [Fender Europe Employee 2] of Fender Europe. In the email [Fender Europe Senior Employee 1] instructed [Fender Europe Employee 2] to look at the email from [Reseller 1].

²¹⁶ URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), paragraph 16; URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), paragraph 19; URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), paragraph 20; URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 27; URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), paragraph 11; URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 20; URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraph 28. When asked at interview if Fender Europe encouraged MI resellers to report their competitors that were selling below the Minimum Price, [Employee 2] of Fender Europe stated, '*i can say that comfortably [Fender Europe] absolutely didn't encourage this at all*'. However, [Fender Europe Employee 2] went on to state that when he would receive a complaint from a reseller, he or another Fender Europe employee would follow up on that complaint. URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.151, lines 20-21 and p.152, lines 21-25 and p.163, lines 10-19 [Text in square brackets added by the CMA].

²¹⁷ URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 21; URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), paragraph 18; URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), paragraph 16; URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), paragraphs 19-20; URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 19; URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), paragraph 21; URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 13; URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraph 25.

²¹⁸ URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018) paragraphs 19 and 26.

²¹⁹ URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 22.

²²⁰ URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), paragraph 13; URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 20; URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), paragraphs 12 and 14; URN

3.93 For example, [Employee 2] of Fender Europe stated in interview that he would be asked by [Fender Europe Former Senior Employee 1] to ‘look at’ the resale prices advertised by the MI resellers for which he was responsible. [Fender Europe Employee 2] indicated this may have been because [Fender Europe Former Senior Employee 1] had been alerted to potential low prices by other MI resellers. This would prompt [Fender Europe Employee 2] to check the pricing of the particular MI reseller/s, of which he would ‘pick half a dozen core products’ to ‘look and see what they were doing.’ Upon finding a price that was below the Minimum Price, his first action would be to call the MI reseller concerned to investigate the situation.²²¹

3.94 In his witness statement, [Employee 4] of Fender Europe explained that he would make calls to MI resellers in the following three cases:

‘a. When I received a call from [Fender Europe Former Senior Employee 1], which would happen if he received a complaint about one of the Resellers in my region. He would say for example “call John at X”

b. When I received a call from another DSM, which would happen if they received a complaint about one of my UK Resellers from another UK Reseller

c. When I received a direct complaint from one of my resellers about another of my resellers.’²²²

3.95 Examples of the documentary evidence illustrating this include:

- On 22 April 2013, [Former Senior Employee 1] of Fender Europe forwarded to [Fender Europe Employee 2] an email that [Fender Europe Former Senior Employee 1] had received on 18 April 2013 from [Employee], of [Reseller], with the subject heading ‘take a look’. [Employee] had attached links to Fender Cabronita Precision Bass guitars sold by three other resellers, stating ‘*[b]rand new product and £100.00 out on prices, all colours*’.²²³

[Fender Europe Employee 2] stated in interview that [Fender Europe Former Senior Employee 1] would have expected him to check the MI resellers’ resale

E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), paragraph 22; URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), paragraph 21; URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 12; URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraph 27. Whereas [Fender Europe Employee 1] stated ‘I do not recall a specific incidence of [Fender Europe Former Senior Employee 1] asking me to call a DSM to pass on a complaint. I only remember instances in which one DSM asked me to call another DSM.’ URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 24.

²²¹ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.75, lines 14-20.

²²² URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), paragraph 12.

²²³ URN E_FEN003165 (Email from [Employee] of [Reseller] to [Former Senior Employee 1] of Fender Europe dated 18 April 2013 forwarded by [Fender Europe Former Senior Employee 1] to [Employee 2] of Fender Europe on 22 April 2013).

pricing.²²⁴ As noted in paragraph 3.93 above, [Fender Europe Employee 2] stated (separately) that his first action upon identifying a price being advertised below the Minimum Price would be to call the MI reseller concerned. The CMA concludes from these documents and [Fender Europe Employee 2]’s witness statement,²²⁵ that if he had found any non-compliant pricing, he would have usually contacted the MI resellers concerned to investigate why their prices were below the Minimum Prices and to try to get them to raise them to at least the Minimum Prices.

- On 22 February 2018, [Former Senior Employee 1] of Fender Europe sent [Senior Employee 2] of Fender Europe an internal iMessage, forwarding on a message that [Fender Europe Former Senior Employee 1] had received from [Reseller] stating:

‘Drastic measures needed mate. (...) [Reseller] (...) are advertising gear at vastly reduced prices (...). Still [Reseller] [Reseller] massively undercutting is [sic] on everything! [Reseller] on most[.] THIS FROM [Reseller]’.²²⁶

This evidence indicates that [Reseller] was monitoring the prices of a competitor, [Reseller] and complaining about it to Fender Europe. [Fender Europe Former Senior Employee 1] had forwarded it to [Fender Europe Senior Employee 2] [✕]. The CMA concludes from this iMessage and [Fender Europe Employee 2]’s and [Fender Europe Employee 3]’s witness statements²²⁷ that it is likely that [Fender Europe Former Senior Employee 1] intended for [Fender Europe Senior Employee 2] to instruct:

- [Fender Europe Employee 2], who was responsible for [Reseller], to contact [Reseller]; and
- [Fender Europe Employee 3] who was responsible for [Reseller], to contact [Reseller];

to ask each MI reseller respectively to increase its prices to at least the Minimum Price.

²²⁴ [Fender Europe Employee 2] was speaking generally about what had been expected of him. See paragraph 3.93 above. When asked about this particular email, however, [Fender Europe Employee 2] stated that he could not recall this particular email. URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.207, line 26.

²²⁵ See paragraph 3.92 above.

²²⁶ URN C_FEN01513 (Chat 58: iMessage from [Fender Europe Former Senior Employee 1] to [Senior Employee 2] of Fender Europe dated 22 February 2018), p.1.

²²⁷ See paragraphs 3.91 to 3.92 above.

Conclusions on Fender Europe’s monitoring and enforcement of the Fender Pricing Policy

3.96 Based on the evidence set out above, the CMA concludes that Fender Europe, through a combination of:

- its own periodic checks of some larger MI resellers’ pricing which may have been in connection with new price lists;²²⁸
- MI resellers monitoring each other’s resale prices and periodically reporting non-compliance with the Fender Pricing Policy to Fender Europe;
- mainly verbal communication between DSMs and senior Fender Europe employees highlighting non-compliance with the Fender Pricing Policy; and
- mainly verbal communication with its MI resellers about their resale pricing;

was able periodically to monitor MI resellers not complying with the Fender Pricing Policy and enforce the Fender Pricing Policy by contacting those advertising below the Minimum Price in order to bring their prices into line.²²⁹

3.97 The following section highlights examples of documentary evidence of this practice happening periodically during the Relevant Period.

²²⁸ See paragraph 3.85 above. [Fender Europe Employee 12] sent an internal Fender email on 2 June stating ‘2) *New Pricing structure. UK dealers are “playing ball” and advertising at MSRP. (...) Attached is a chart which shows our top selling models and a selection of our largest dealers. Green shows who is advertising at MSRP, and red shows who is advertising at under MSRP.*’ [Fender Europe Employee 12] also stated in the body of the same email that ‘*Issue number 2 above is the hardest to deal with, as no matter how strongly we suggest what they advertise at, we cannot tell them, by law.*’ URN E_FEN002678 (Email from [Employee 12] of Fender Europe, to [Fender US Employee 1] and [Fender US Employee 2] of Fender US dated 2 June to 13 July 2015), p.4. [Text in brackets added by the CMA]. In interview, when [Employee 2] of Fender Europe was asked what he would do after the deadline passed if an MI reseller had not priced in line with the price list, he stated ‘*Er, I’d just remind them but I’d probably have reminded them with a couple of days to go, “Guys, listen”. Everyone else has already moved and, you know, I’d have just reminded them and just, sort of, said, “Look, you know, make sure you don’t forget. Er, you know, don’t get left behind”. Of course they will have forgotten because that means they’re going to be more competitive over a weekend or over a week or whatever. And there would be people that will always drag their heels. In fairness, those big accounts are run very professionally, very, very well and have got great IT systems. It was never an issue really, to be honest with you.*’ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.263, lines 12-21.

²²⁹ In interview, [Senior Employee 4] of [Reseller 1] stated when [Reseller 1] “followed” other resellers down to lower prices, Fender Europe would ‘*be on to [[Reseller 1]] within days*’. See URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.188, lines 16-23 [Text in square brackets added by the CMA].

IV. Illustrative examples of Fender Europe's monitoring and enforcement

3.98 The Fender Pricing Policy was operated mainly on a verbal basis and so generated a limited amount of documentary evidence. The primary reasons for this were that:

- as noted in paragraphs 3.184 to 3.191 below, Fender Europe staff were instructed to conceal the Fender Pricing Policy. [Fender Europe Former Senior Employee 1] required his staff only to communicate about it verbally. Fender Europe staff generally followed these instructions, and typically deleted any written communications received;
- Fender Europe staff strongly encouraged the MI resellers for whose accounts they were responsible not to communicate in writing in relation to the Fender Pricing Policy;²³⁰ and
- MI resellers were able to implement the Fender Pricing Policy without needing routinely to communicate with Fender Europe about it.

3.99 Notwithstanding these efforts to conceal the conduct, some documents were generated, so the CMA has obtained documentary evidence which shows Fender Europe's monitoring and enforcement of the Fender Pricing Policy.

3.100 Below are some illustrative examples of communications involving Fender Europe and certain of its MI resellers. These examples show the widespread application of and adherence to the Fender Pricing Policy in relation to all Relevant Products across Fender Europe's UK network of MI resellers during the Relevant Period.

3.101 More specifically, these communications show that:

- the Fender Pricing Policy was intended to apply to all MI resellers of the Relevant Products, who comprised the vast majority of Fender Europe's UK resellers and accounted for the vast majority of Fender Europe's sales revenue in respect of Relevant Products;²³¹

²³⁰ When asked at interview about whether Fender Europe encouraged emails from resellers reporting other resellers who were not complying with the Fender Pricing Policy, [Employee 2] of Fender Europe replied, '*they're discouraged*'. [Fender Europe Employee 2] went on to explain that he preferred resellers ringing him if they had complaints '*I've always tried very hard to, to -- if people are unhappy about anything give me a ring. You know, that's fine then I can talk about things and that's fine.*' URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.150, lines 23-25. In his witness statement, [Employee 1] of Fender Europe stated, '*[Fender Europe Former Senior Employee 1] told us if we received emails from resellers regarding prices that we were to call the relevant DSM to ask them to tell the reseller that they should stop sending them.*' URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 29.

²³¹ See paragraph 3.205 below.

- the Fender Pricing Policy was intended to apply to all Relevant Products: acoustic guitars, electric basses and electric guitars;²³²
- Fender Europe reacted periodically to complaints on a case-by-case basis from its MI resellers²³³ where individual MI resellers monitored each other's compliance with the Fender Pricing Policy²³⁴ and it also relied on its own occasional checks of some larger MI resellers in order to enforce the Fender Pricing Policy during the Relevant Period; and
- Fender Europe enforced the Fender Pricing Policy by contacting MI resellers directly who were found or suspected not to be adhering to the Fender Pricing Policy with a view to ensuring that they would increase their prices to at least the Minimum Price.

3.102 Based on the evidence from the Relevant Period including that set out below:

- the CMA has reasonable grounds for suspecting that more than 25 MI resellers selling the Relevant Products were subject to the Fender Pricing Policy,^{235, 236} and
- that MI resellers:
 - generally adhered to Fender Europe's requests to revert to the Minimum Price; and
 - did themselves take an active part in monitoring other MI resellers' adherence to the Fender Pricing Policy.

3.103 Furthermore, in interview, [Employee 2] of Fender Europe stated that the Fender

²³² See Figure 3.2 and paragraph 3.16 above.

²³³ See paragraphs 3.86 to 3.95 above and paragraphs 3.104 to 3.142 below.

²³⁴ For the whole of the period for which the CMA has gathered documentary evidence (January 2013 to April 2018): starting from before and until at or after the end of the Relevant Period.

²³⁵ URN C_FEN01513 (SMS 2707), p.2. ([Reseller]); URN E_FEN000172 ([Reseller]); URN E_FEN002838 ([Reseller]); URN E_FEN003202 ([Reseller]); URN E_FEN002462 ([Reseller]); URN E_FEN002643 ([Reseller]); URN E_FEN003003 ([Reseller]*); URN E_FEN002604 ([Reseller]); URN C_FEN01513 (Chat 810), p.5 ([Reseller]); URN E_FEN000024 ([Reseller]); URN E_FEN002984 ([Reseller]); URN E_FEN002669 ([Reseller]); URN E_FEN002955 ([Reseller]); URN E_FEN003021 ([Reseller]); URN C_FEN01513 (SMS 944), p.4. ([Reseller]); URN E_FEN002757 ([Reseller]); URN E_FEN003167 ([Reseller]); URN E_FEN003216 ([Reseller]); URN C_FEN01513 (Chat 518), p.8. ([Reseller]); URN E_FEN003223 ([Reseller]); URN E_FEN002648 ([Reseller]); URN E_FEN002700 ([Reseller]); URN E_FEN003232 ([Reseller]); URN E_FEN002530 ([Reseller]); URN E_FEN003161 ([Reseller]); URN E_FEN003165 ([Reseller]*); URN E_FEN002722 ([Reseller]); URN C_FEN01513 (SMS 3329-3331), p.2. ([Reseller]); *denotes entities that are no longer trading as at the date of issue of this SO.

²³⁶ The MI resellers listed in footnote 235 above and [Reseller 1] taken together accounted for around [a large majority] of Fender Europe's sales of Relevant Products in 2017-18 (the most recent 12-month period for which the CMA has been provided with this breakdown of revenue information). This calculation is based on the revenue figures provided by Fender Europe on 31 May 2019. URN C_FEN01671 (Response dated 31 May 2019 to May 2019 RFI).

Pricing Policy ‘covered everybody’.²³⁷ This was also confirmed by [Senior Employee 4], [Reseller 1].^{238, 239} However, the CMA makes no findings in respect of any MI resellers of the Relevant Products other than [Reseller 1].

2013 examples of monitoring and enforcement of the Fender Pricing Policy

March 2013: Squier Classic Vibe 50’s Stratocaster Electric Guitar – [Reseller]

3.104 On 4 March 2013, [Reseller] sent an email to [Former Senior Employee 1] of Fender Europe with the subject, ‘[Reseller] and Squier’. In the email, [Reseller] stated, ‘[h]i [Fender Europe Former Senior Employee 1] are you aware that [Reseller] are still coming up for a number of searches on guitars in Google, and at the wrong prices?’. This was followed by a link to a Squier Stratocaster Electric Guitar on the [Reseller] website and a screenshot showing the same. The following day, [Fender Europe Former Senior Employee 1] replied, ‘[w]e are still supplying them with Squier because of educational contracts. I’ll sort it.’²⁴⁰ The CMA concludes that the term ‘*sorting it*’ referred to the pricing of the relevant Squier product by [Reseller] and therefore that [Fender Europe Former Senior Employee 1] was indicating to [Reseller] that he intended to contact [Reseller] in relation to the listing for this product in order to ask it to increase its price to at least the Minimum Price.

April 2013: Fender Cabronita precision bass guitar – [Reseller]

3.105 On 18 April 2013, [Reseller] sent an email to [Former Senior Employee 1] of Fender Europe with the subject line ‘take a look’, and noted, ‘[b]rand new product and £100.00 out on price, all colours’. The email included three links to the Fender Cabronita bass guitar sold on [Reseller 1]’s, [Reseller]’s and [Reseller]’s²⁴¹ websites. [Fender Europe Former Senior Employee 1] forwarded the email to [Employee 2] of Fender Europe on 22 April 2013.²⁴²

²³⁷ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.110, line 14.

²³⁸ [Senior Employee 4] of [Reseller 1] stated though that Fender Europe were likely only enforcing the Fender Pricing Policy against ‘the big boys’ (the top 80% of the market) as that would ‘keep the little boys in line’. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.120, lines 17-24.

²³⁹ The focus of [Reseller 1 Senior Employee 4]’s interview evidence is on the relationship between Fender Europe and [Reseller 1], on which he is well placed to comment, given his [redacted] years in the role of [Reseller 1] [redacted].

²⁴⁰ URN E_FEN002453 (Email exchange between [Employee] of [Reseller] and [Former Senior Employee 1] of Fender Europe dated 4-5 March 2013).

²⁴¹ [Reseller] was an MI reseller bought by [Reseller] in [redacted].

²⁴² URN E_FEN003165 (Email from [Employee] of [Reseller] to [Former Senior Employee 1] of Fender Europe dated 18 April 2013 forwarded by [Fender Europe Former Senior Employee 1] to [Employee 2] of Fender Europe on 22 April 2013).

3.106 This indicates that [Reseller] was actively monitoring other MI resellers' compliance with the Fender Pricing Policy and reporting to Fender Europe. This indicates that [Reseller] was actively supporting the Fender Pricing Policy.²⁴³

August 2013: Charvel 2013 Pro Mod San Dimas HS Hard Tail Guitar – [Reseller]

3.107 On 28 August 2013, [Reseller] sent an email to [Employee 3] of Fender Europe which attached an email from a consumer asking [Reseller] to price match [Reseller] on a particular Charvel model of electric guitar. [Reseller] stated in its email, *'can you let me know who is correct and put us all right!'*. [Fender Europe Employee 3] forwarded the email to his Fender Europe colleagues, [Fender Europe Employee 23] and [Fender Europe Employee 4], and stated *'who's at the right price here?'*²⁴⁴

3.108 This email indicates that [Reseller] was adhering to the Fender Pricing Policy by reporting to Fender Europe another MI reseller whose pricing was not in line with the Fender Pricing Policy and asking Fender Europe to: (i) confirm what the Minimum Price was for that Relevant Product; and (ii) if the other MI reseller was not selling at the Minimum Price, to ensure it increased its resale price to at least the Minimum Price.

October 2013: Ovation Applause Deluxe AE147 Electro Acoustic guitar – [Reseller]

3.109 On 5 October 2013, [Reseller] sent an email to [Employee 3] of Fender Europe attaching an email from a consumer comparing [Reseller]'s price of an acoustic guitar to a price advertised by [Reseller]. In the email [Reseller] stated, *'can you read the below and get the rep for [Reseller] to make sure they are clearing enough margin via [online marketplace]?' [Fender Europe Employee 3] replied to this email and stated, 'I'll find out whether its [Fender Europe Employee 4]'s or [Fender Europe Employee 14]'s & have a word on Monday.'*²⁴⁵

3.110 This email complaint again indicates that [Reseller] was likely adhering to the Fender Pricing Policy as it is difficult to see why it would otherwise approach Fender Europe on this point. The email from [Fender Europe Employee 3] indicates to [Reseller] that he intended to follow up the complaint by contacting his

²⁴³ As noted above at paragraph 3.92, [Fender Europe Former Senior Employee 1] had, at least on some occasions, instructed the DSMs to speak to MI resellers who were not adhering to the Fender Pricing Policy. In this case, [Fender Europe Employee 2] was responsible for the accounts of two of the three MI resellers listed, [Reseller 1] and [Reseller]. The CMA concludes that [Fender Europe Former Senior Employee 1] had forwarded this email to [Fender Europe Employee 2] by way of an instruction to [Fender Europe Employee 2] that he should verbally contact each of [Reseller 1] and [Reseller] to ask them to raise their prices to at least the Minimum Price.

²⁴⁴ URN E_FEN002530 (Email exchange between Fender Europe and [Reseller] dated 28 August 2013).

²⁴⁵ URN E_FEN002544 (Email exchange between Fender Europe and [Reseller] dated 5 October 2013) [Text in square brackets added by the CMA].

Fender Europe sales colleagues so that one of them would speak to [Reseller] about its prices.

2014 examples of monitoring and enforcement of the Fender Pricing Policy

January 2014: All Relevant Products - [Reseller]

3.111 On 17 January 2014, [Employee] of [Reseller] sent an email to his [Reseller] colleagues entitled '*Fender Redline 2014 Price changes.xlsx*' stating:

'Fender wanted all the 2014 price changes sorted today, so I've done it & the attached spreadsheet is all the stock (...) (only display stock needs changing). There are a lot, so it might take 2-3 days to sort. If a customer wants to buy something & the ticket is the old price, just honour the old price. I'll be doing blue line next.

[Employee] - please wait til [sic] blue line is done & then update the easy ask feed straight away.'²⁴⁶

3.112 The CMA concludes from [Employee]'s statements '*I've done it*' and '*only display stock needs changing*' that he had changed the online prices of the products for the Fender and Squier branded Relevant Products, and that he was asking his staff to update in-store prices too. The CMA concludes that [Employee]'s statement that he would be '*doing blue line next*' meant that he was going to update the online pricing of Fender speciality brands such as Gretsch, Jackson, Charvel and EVH. This shows that [Reseller] adhered to the Fender Pricing Policy by raising its resale prices across all of the Relevant Products, in line with the new Minimum Prices.

January 2014: Relevant Products - [Reseller]

3.113 On 17 January 2014, [Employee] of [Reseller] sent an email stating, '*[h]iya – as predicted just got the threatening phone call from [Fender Europe Employee 2]! Will move prices now*'. [Employee] of [Reseller] promptly replied to his email: '*[w]e've done nearly £6k today when we might not have, hes [sic] not normally on it that fast*'.²⁴⁷

²⁴⁶ URN E_FEN000023 (Internal [Reseller] email exchange dated 17 January 2014).

²⁴⁷ URN E_FEN000024 (Email exchange between [Employee] and [Employee], of [Reseller] dated 17 January 2014)

[Text in square brackets added by the CMA].

3.114 The CMA concludes from this email that [Reseller] adhered to the Fender Pricing Policy by agreeing to raise the price of the Relevant Products to the January 2014 Minimum Prices, following a phone call from [Employee 2] of Fender Europe.²⁴⁸

July 2014: Squier Affinity Jazz Bass Brown Sunburst electric bass – [Reseller]

3.115 On 17 July 2014, [Reseller] sent an email to [Former Senior Employee 1] of Fender Europe attaching details of a request to beat another MI reseller's price from a consumer in relation to a Fender bass guitar. The email contained links to listings for this Relevant Product on the [Reseller] website. In a follow up email sent on 18 July 2014, [Reseller] stated that the listings on [Reseller]'s website had since been removed. [Fender Europe Former Senior Employee 1] replied to the email, 'OK'.²⁴⁹

3.116 It is not clear whether [Reseller] agreed to sell at a lower price to the consumer in question. However, this email chain indicates that [Reseller] was likely adhering to the Fender Pricing Policy because it is difficult to see why [Reseller] was otherwise reporting [Reseller]'s pricing to Fender Europe.

November 2014: Fender FR50 Resonator acoustic guitar - [Reseller]

3.117 On 18 Nov 2014, [Employee] of [Reseller] sent an internal email to [Employee], [Reseller] stating, '*[i]f you're in the mood for shopping [reporting] any competitors, this lot are undercutting on Fender...*' and attached a link to the Fender FR50 acoustic guitar being sold on [Reseller]'s website. [Employee] replied, '*[c]heers duly shopped*'.²⁵⁰

3.118 The CMA concludes from [Employee]'s reply that he had contacted Fender Europe to inform it of [Reseller]'s pricing. The CMA considers that this correspondence therefore indicates that [Reseller] was supporting the Fender Pricing Policy, because it is difficult to see why it would otherwise 'shop' other MI resellers by reporting their pricing to Fender Europe. Further, the use of the word '*undercutting*' could indicate that [Reseller] had been adhering to the Fender Pricing Policy by pricing at the Minimum Price in respect of this Relevant Product.

²⁴⁸ In interview, [Employee 2] of Fender Europe confirmed that [Reseller] was one of the accounts for which he was responsible. He also said that as a mild-mannered person he would have made a call like this professionally: '*if I came across as intimidating or threatening, then I'm sorry it did but I'm just very straight. I'd just say, you know – I cut the niceties and said, "Look, you know, it's not profitable if – if you can't sort it out, you know. I just want [Fender Europe Former Senior Employee 1] and [Employee] of Reseller] to chat to each other". It's not a threat; it's a reality.*' URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.219, lines 2-13 [Text in square brackets added by the CMA].

²⁴⁹ URN E_FEN002597 (Email exchange between [Reseller] and [Former Senior Employee 1] of Fender Europe dated 18 July 2014).

²⁵⁰ URN E_FEN000039 (Email exchange between [Employee] and [Employee] of [Reseller], dated 18 November 2014) [Text in square brackets added by the CMA].

2015 examples of monitoring and enforcement of the Fender Pricing Policy

April 2015: Relevant Products – ([Reseller])

3.119 On 2 April 2015, [Employee 2] of Fender Europe sent an email to [Reseller] stating:

‘We will be introducing new UK and ROI price lists next week (...)
The new pricing structure has a deadline of Wednesday the 15th of April to be implemented and live.’

[Employee 2] then followed this up with an email to [Employee] at [Reseller] on 14 April 2015 stating:

‘Good to speak to you, as discussed please see attached all of the UK Pricing for FMIC [Fender Europe²⁵¹] products. If you have any questions or need help in any way, please contact myself or [Fender Europe Employee 18] at Head Office (...).’²⁵²

3.120 [Employee of Reseller] replied on 15 April 2015 stating:

‘All done on [Reseller]. [Reseller]²⁵³ will follow suit, unfortunately it takes a little longer for them to sort price changes.’²⁵⁴

3.121 This email exchange indicates that [Reseller] was adhering to the Fender Pricing Policy by changing its resale pricing in accordance with the new price lists within Fender Europe’s deadline (at least for its main website) across all Relevant Products.

November 2015: Gretsch New Yorker – [Reseller]

3.122 On 23 November 2015, [Reseller] sent an email to [Employee 4] of Fender Europe with the subject ‘FW: Gretsch New Yorker w/pickup’ attaching a series of emails from a consumer asking it to match the price of [Reseller]. In the email [Reseller] stated, ‘I need to discuss this with you on Thursday because it’s becoming a real issue. I’m doing what you ask me to do and others aren’t.’ This statement indicates that [Reseller] was adhering to the Fender Pricing Policy. [Reseller] also asked

²⁵¹ While the abbreviation [Fender Europe Employee 2] uses ‘FMIC’ appears to be Fender US, the CMA considers that [Employee 2] of Fender Europe was referring here to a price list for products supplied to [Reseller] by Fender Europe, as opposed to [Reseller] dealing directly with Fender US.

²⁵² URN E_FEN002648 (Email exchange between [Employee 2] of Fender Europe, [Reseller] and [Former Senior Employee 1] of Fender Europe dated 2-16 April 2015) p.2 [Text in square brackets added by the CMA].

²⁵³ As noted in footnote 241 above, [Reseller] was an MI reseller that was bought by [Reseller] in [×].

²⁵⁴ See footnote 252 above.

what ‘Fender are doing to stop dealers selling online for ridiculous prices’, and ‘how many strikes a dealer will get before [Fender Europe] decide not to renew their selective distribution agreement.’ This complaint about other MI resellers’ pricing and the request to Fender Europe to act to stop MI resellers selling below the Minimum Price further indicates [Reseller]’s support for and adherence to the Fender Pricing Policy. [Employee 4] of Fender Europe then forwarded the email to his manager, [Fender Europe Senior Employee 1].²⁵⁵

2016 examples of monitoring and enforcement of the Fender Pricing Policy

February 2016: [Reseller]

3.123 On 17 February 2016, [Employee]²⁵⁶ of [Reseller] sent an email to [Former Senior Employee 1] of Fender Europe complaining about a competitor, [Reseller], who had been advertising all Fender products despite not being a Fender showcase²⁵⁷ dealer. In his email, [Employee] stated:

‘Having signed up to the dealership, all was fine, stock came in and stock was reordered, maintaining a steady sell through rate and keeping prices on track with Fender’s suggested pricing policy and ‘don’t advertise what you don’t have in stock’ robustly adhered to.

However, over the 2015 financial period, [Reseller], our nearest competition (geographically), decided to advertise every Fender model in the catalogue, despite not being a [X] dealer, and at prices less than any on-line store, including [Reseller].

(...)

We have honoured all aspects of pricing, advertising and stocking of the Fender dealership agreement and have protected the brand at all opportunities; our social media staff have constantly posted the Fender brand, our staff all play, use and adore the product; only to be let down in such a miserable fashion.’

3.124 [Fender Europe Former Senior Employee 1] responded the same day and stated ‘[h]i [Employee], I’m just in the office with [Fender Europe Senior Employee 1] [X]. I’ll talk with him first.’²⁵⁸

²⁵⁵ URN E_FEN002722 (Email exchange between [Reseller] and Fender Europe dated 23 November 2015). The CMA considers that this was done so that [Senior Employee 1] of Fender Europe could relay to the DSM responsible for the [Reseller] account with a view to contacting [Reseller] to ask it to raise its prices to at least the Minimum Price. URN E_FEN003220 (Email exchange between [Senior Employee 1] of [Reseller 1], [Fender Europe Former Senior Employee 1], [Reseller 1 Senior Employee 4], [Fender Europe Employee 2] and [Fender Group Employee 1] of Fender dated 10 September 2015).

²⁵⁶ [Employee] was an employee of [Reseller] as referenced in its Facebook page. URN E_FEN003340 ([Reseller]’s Facebook page).

²⁵⁷ [X] is a tier of Fender Europe MI resellers. See paragraph 3.28.

²⁵⁸ URN E_FEN002757 (Email exchange between [Reseller] and [Former Senior Employee 1] of Fender Europe dated 17 February 2016).

3.125 This correspondence shows that [Reseller] was adhering to the Fender Pricing Policy. The email from [Employee] also shows that [Reseller] was monitoring the prices of its competitors and complaining to Fender Europe where other MI resellers' prices fell below the Minimum Price. It appears to have done so with the expectation of Fender Europe taking action against [Reseller], including to ensure that [Reseller] also adhered to the Fender Pricing Policy.

May 2016: American Fender guitars - [Reseller]

3.126 On 27 May 2016, [Reseller] received a marketing email from [Reseller], which was subsequently forwarded internally. [Reseller] discussed internally whether the [Reseller] prices should be matched, and it was suggested that [Employee 2] of Fender Europe be informed that [Reseller] planned to match [Reseller]. In a subsequent reply, [Employee], [Reseller] stated, '*[s]poke to [Fender Europe Employee 2], he said [Fender Europe Senior Employee 1] is onto them [Reseller] now and he'd let me know what is happening.*' [Employee] at [Reseller] later replied saying '*I'm just going to match*'.²⁵⁹

3.127 Notwithstanding [Reseller] having decided to match [Reseller] prices in this instance, reporting [Reseller]'s discounting to Fender Europe and considering informing them of [Reseller]'s intention to price-match, indicates that [Reseller] was supporting the Fender Pricing Policy. It is difficult to see why [Reseller] would otherwise decide to report another MI reseller's and potentially its own pricing to Fender Europe. The conversation that [Employee] of [Reseller] reported having had with [Senior Employee 1] of Fender Europe indicates that Fender Europe intended to follow up with [Reseller] to request that it increase its price to at least the Minimum Price.

July 2016: Relevant Products - [Reseller 1]

3.128 On 28 July 2016, there was an iMessage conversation between [Former Senior Employee 1] and [Senior Employee 1] of Fender Europe which read:

Message 2486: [Fender Europe Former Senior Employee 1] to [Fender Europe Senior Employee 1]: '[Reseller] still out! (...) [Reseller] are not adhering to any price lists!! From [✂]. [[Senior Employee 1], [Reseller 1]] Ask [[Employee 7] of Fender Europe] to speak to them?'²⁶⁰

Message 2487: [Fender Europe Senior Employee 1] to [Fender Europe Former Senior Employee 1]: 'Will do'

²⁵⁹ URN E_FEN000085 (Internal [Reseller] email dated 27 May 2016) [Text in square brackets added by the CMA].

²⁶⁰ URN C_FEN01513 (Chat 809: SMS from [Fender Europe Former Senior Employee 1] to [Senior Employee 1] of Fender Europe dated 28 July 2016), p.5. [✂] is [Senior Employee 1], [Reseller 1]. URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.153, lines 6-13 [Text in square brackets added by the CMA].

Message 2488: [Fender Europe Senior Employee 1] to [Fender Europe Former Senior Employee 1]: '[Reseller] are Dutch'

Message 2489: [Fender Europe Former Senior Employee 1] to [Fender Europe Senior Employee 1]: 'Tell [Fender Group Employee 1]'.

- 3.129 This communication indicates that [Reseller 1] was supporting the Fender Pricing Policy as it is difficult to see why it would otherwise report other MI resellers' pricing to Fender Europe. The CMA concludes that there was an expectation on [Reseller 1]'s part that Fender Europe would follow up by contacting [Reseller] and [Reseller] to ask them to raise their prices to at least the Minimum Price when selling within or into the UK. The fact that [Fender Europe Former Senior Employee 1] forwarded the text message to [Fender Europe Senior Employee 1], and the subsequent text messages, indicate a genuine intention on Fender Europe's part to do so.²⁶¹

October 2016: Fender American Standard guitars – [Reseller]

- 3.130 On 13 October 2016, [Employee], of [Reseller], forwarded a marketing email from [Reseller 1] to [Employee 3] of Fender Europe. The email advertised '*Fender American Standard Sale FROM ONLY £999 - Limited Stock*'. [Employee] asked, '*What's going on mate?*' [Fender Europe Employee 3] replied:

'Just spoke to [Employee], [Employee], I only just saw this about 25 minutes ago myself. They haven't had a deal but there is a deal coming. [Fender Europe Former Senior Employee 1] has just announced the American Standard has just been discontinued. As soon as I know more I will let you know.'²⁶²

- 3.131 This email chain indicates that [Reseller] was monitoring other MI resellers' prices and reporting to Fender Europe discounting by its competitors. The CMA concludes that this correspondence indicates that [Reseller] was supporting the Fender Pricing Policy. It is difficult to see why it would otherwise report other MI resellers' pricing to Fender Europe.

²⁶¹ URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), paragraphs 21 and 24.

²⁶² URN E_FEN002866 (Email exchange between [Reseller] and [Employee 3] of Fender Europe dated 13 October 2016) [Text in square brackets added by the CMA].

2017 examples of monitoring and enforcement of the Fender Pricing Policy

March 2017: Relevant Products – [Reseller]

- 3.132 On 22 March 2017, [Employee 7] of Fender Europe received an SMS from [Reseller] stating *'Pricing has gone to [X] on 0146200533. Looks like [Reseller] are leading the charge'*.²⁶³
- 3.133 This SMS indicates that [Reseller] was monitoring and reporting the prices of other MI resellers, including [Reseller]. This correspondence indicates that [Reseller] was supporting the Fender Pricing Policy. It is difficult to see why it would otherwise report other MI resellers' pricing to Fender Europe.

May 2017: Fender American Professional Stratocaster electric guitar – [Reseller]

- 3.134 On 29 May 2017 [Reseller] emailed [Employee 3] of Fender Europe with a complaint regarding a consumer who had purchased a particular Fender electric guitar from [Reseller], but then had seen the same guitar at over £300 cheaper at [Reseller] shortly afterwards: *'[w]e've had a situation where a customer bought an American Professional Strat in Sonic Grey from us yesterday on Finance for the normal price of £1343 (same as **everyone** online) but he then walked into [Reseller] today and saw it with a £999 price tag in the store.'* [Fender Europe Employee 3] replied and stated, *'I will have a look into it once I'm back at work'*.²⁶⁴
- 3.135 This indicates that [Reseller] was reporting to Fender Europe the fact that another MI reseller was not pricing at the Minimum Price, in this case in-store. It also indicates that [Reseller] itself was adhering to the Fender Pricing Policy, together with *'everyone'* else online.

July 2017: Squier mini Stratocaster – [Reseller]

- 3.136 On 20 July 2017, [Reseller] sent an email to [Employee 7] of Fender Europe stating:
- 'Hi [Fender Europe Employee 7] How's things? A customer has come in wanting to purchase a Squier mini strat in black, as you know we internet price match our stock. However, [Reseller] and [Reseller] have two totally different retail prices, are they not meant to be the same? Can you confirm with the websites and us what the definite price is so we can provide an accurate price on our instruments.'*²⁶⁵

²⁶³ URN C_FEN01513 (SMS 2707: SMS from [Reseller] to [Employee 7] of Fender Europe dated 22 March 2017), p.2.

²⁶⁴ URN E_FEN003003 (Email exchange between [Employee 3] of Fender Europe and [Reseller] dated 27 May to 2 June 2017). [Fender Europe Employee 3] also stated, *'I don't want to get in a situation where we are talking about other dealers prices etc but I really can't see the guys at [Reseller] selling a brand new guitar for that price.'*

²⁶⁵ URN E_FEN003021 (Email from [Reseller] to [Employee 7] of Fender Europe dated 20 July 2017).

3.137 This correspondence indicates that [Reseller] was adhering to the Fender Pricing Policy. It is difficult to see why it would otherwise: (i) ask Fender Europe what the correct resale price was; or (ii) report other MI resellers' pricing to Fender Europe.

October 2017: Jackson guitars - [Reseller 1]

3.138 On 5 October 2017 [Senior Employee 3] of [Reseller 1] sent an internal email reporting on competitor pricing to colleagues (as part of his role as [Reseller 1]'s 'Competitor Monitor'). He mentioned that [Reseller] was having a '70% off sale' which included several Fender products including Jackson guitars. He stated that he would speak to [Senior Employee 1] of Fender Europe. [Senior Employee 4] of [Reseller 1] replied to the email and stated, '*[i]ronically we were jumped on by Fender when we reduced these SKU's previously.*'²⁶⁶

3.139 The CMA interprets the statement that [Senior Employee 3] of [Reseller 1] would speak to [Senior Employee 1] of Fender Europe as meaning he would alert Fender Europe to the [Reseller] sale on the Relevant Products, including Jackson guitars.²⁶⁷

3.140 This correspondence indicates that [Reseller 1] was supporting the Fender Pricing Policy. It is difficult to see why it would otherwise report other MI resellers' pricing to Fender Europe.

2018 examples of monitoring and enforcement of the Fender Pricing Policy

March 2018: Gretsch guitar – [Reseller]

3.141 On 10 March 2018, [Reseller] sent an email to [Employee 11] of Fender Europe and complained that it had to price match [Reseller] on the sale of a Gretsch electric guitar. It also referred to Gretsch prices on the [Reseller] website generally. [Fender Europe Employee 11] replied and stated, '*[t]hanks for the info, we are aware and trying to sort it out...*' [Reseller] responded, '*[i]f you could press [Reseller] to sort their pricing, it would be much appreciated.*'²⁶⁸

3.142 This email exchange indicates [Reseller]'s expectation that Fender Europe would contact other MI resellers that were not adhering to the Fender Pricing Policy in

²⁶⁶ URN E_FEN000163 (Internal [Reseller 1] email between [Senior Employee 3], [Senior Employee 4], and Purchasing and Marketing teams at [Reseller 1] dated 5 October 2017). A stock keeping unit (or SKU) is a number assigned to a product by a retail store to identify the price, product options and manufacturer of the merchandise.

²⁶⁷ In interview, when [Senior Employee 4] of [Reseller 1] was asked to explain his comment about being 'jumped on', he said that when [Reseller 1] had previously dropped the price of these models he was told by Fender Europe "*[w]hat are you doing? Put your price back up now on these SKUs*". URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.284, line 23. The CMA interprets the phrase 'jumped on' to mean that Fender Europe reacted to [Reseller 1] lowering its prices by contacting it to ask for the prices to be raised back to (or above) the Minimum Prices.

²⁶⁸ URN E_FEN003128 (Email exchange between [Reseller] and Fender Europe dated 10-12 March 2018).

order to ensure they raise their prices to the Minimum Price. It also indicates that [Reseller] was itself supporting the Fender Pricing Policy.

V. Consequences for MI resellers of non-compliance with the Fender Pricing Policy

3.143 The available evidence indicates that Fender Europe sought to encourage compliance with its Fender Pricing Policy by means of threatening (directly or indirectly) and in a small number of cases imposing sanctions against MI resellers who did not comply.

3.144 As set out below, the sanctions threatened and, in a small number of cases, imposed took various forms, including:

- MI resellers' orders being delayed or potentially unfulfilled by Fender Europe (known as being put 'on hold' or 'on stop'); and/or
- MI resellers having their credit limit cut by Fender Europe.

Delaying the delivery of MI resellers' orders

3.145 A senior sales employee at Fender Europe, [Senior Employee 1], explained that being put 'on hold' meant that *'the dealer's orders would not be picked for delivery while the hold is in place, which would result in a delay in delivery of any products they had ordered.'*²⁶⁹

Sanctions imposed

3.146 As set out immediately below, the evidence shows that on at least two occasions, Fender Europe delayed deliveries to MI resellers who were not complying with the Fender Pricing Policy.

3.147 One Fender Europe DSM [Employee 2] recalled an instance where an MI reseller had been put 'on hold' for not complying with the Fender Pricing Policy:

'I do not have the power to put anyone on hold myself. I recall only one instance where one of my UK Resellers was put on hold: this was [Reseller]. It may have only been for a day.'²⁷⁰

²⁶⁹ URN C_FEN01892 (Clarification by [Fender Europe Senior Employee 1] dated 3 September 2019 further to his witness statement dated 16 August 2018), response to question 1.

²⁷⁰ URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 16. This statement was preceded by the following explanation: *'I do not recall [Fender Europe Former Senior Employee 1] expressly saying that there would be consequences if a UK Reseller did not raise their prices in line with Fender's expectation. But I believe that the UK Reseller may have understood that this might be the case. There were times when*

3.148 The CMA concludes that the imposition of this sanction would have shown to [Reseller] that Fender Europe was prepared to disrupt [Reseller]’s supply if it did not comply with the Fender Pricing Policy. The CMA concludes that Fender Europe would not have imposed this sanction on [Reseller] without making [Reseller] aware of the sanction, as its imposition would otherwise not have persuaded [Reseller] to comply. The CMA concludes that this is likely to have incentivised [Reseller] to comply both in this instance (this could potentially have been the reason why the sanction only needed to be applied for such a short time) and in the future.²⁷¹

3.149 Another Fender Europe employee, [Employee 1], recalled having been asked to restrict deliveries to an MI reseller because it had ‘*taken issue*’ with having been asked to comply with the Fender Pricing Policy:

‘I do recall one instance in which [Fender Europe Former Senior Employee 1] asked me to reduce the number of days that a Reseller’s product would be released. We have a system that allows us to specify how many days per week [X] stock will be released. It could be daily or it could be only one day a week. In this particular instance I recall [Fender Europe Former Senior Employee 1] asking me to put [Reseller] down to one day a week.

I believe this was because [Reseller] took issue with the price they were being told to sell at. I believe that this was done because it looked like less of an attack than putting an account on hold. This would have been when we were in our new office: so sometime between 2009 and 2015.’²⁷²

3.150 The CMA concludes that this reduction in the frequency of deliveries to [Reseller] ‘*down to one day a week*’ would have delayed the delivery of any orders that would otherwise have been despatched on the days during which deliveries had

I might have told a dealer that [Fender Europe Former Senior Employee 1] was threatening to cut off supply if they did not increase their prices by a particular date.’ URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), pp.2-3, paragraph 15 [Text in square brackets added by the CMA].

²⁷¹ ‘*There are some brands that have a high profile for customers, they have heritage and as such are usually in high demand. Although the different brands will hold different levels of status in different product categories (...) Although there is nothing that has 100% ‘must stock’ status, the following brands are very popular with customers: Fender (...) and Squier.*’ URN C_FEN00555 ([Reseller] Section C of response to s.26 Notice), response to question 8.

²⁷² URN E_FEN003291.1 (Witness Statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 18 [Text in square brackets added by the CMA]. The CMA notes that [Employee 1] of Fender Europe had drawn a distinction between MI resellers being put ‘on hold’ (i.e. deliveries suspended) and reducing the frequencies of deliveries. At paragraphs 15-16 of his witness statement, [Fender Europe Employee 1] states: ‘*I recall that in sales meetings [Fender Europe Former Senior Employee 1] would say to the DSMS that they needed to ensure that their Resellers adhered to the new prices that were coming out. I do not recall specifics but I also recall the inference that if the Resellers did not revise their prices in line with the new list that their accounts could be put on hold. I generally considered this to be an empty threat and I am not aware of Resellers having their accounts put on hold for not putting their prices up.*’

been suspended. The CMA therefore concludes that this constitutes a short-term instance of [Reseller] having been put ‘on hold’.²⁷³

Sanctions threatened

3.151 As set out immediately below, in addition to the sanctions Fender Europe imposed, on a small number of occasions, Fender Europe also made actual threats to delay the deliveries of its MI resellers where they were not complying with the Fender Pricing Policy.

3.152 To this end, [Senior Employee 1] of Fender Europe, recalled having been asked to tell an MI reseller in 2017 or 2018, that it would be put ‘on hold’ if it did not raise its prices to at least the Minimum Price.²⁷⁴

‘I recall [Fender Europe Former Senior Employee 1] asking me to call [Reseller]. I am fairly confident that I would have made the call to [Employee] at [Reseller].’²⁷⁵

3.153 When the CMA asked why this MI reseller would have received this warning, [Fender Europe Senior Employee 1] explained:

‘[Fender Europe Former Senior Employee 1] (...) is likely to have told me that there is an issue with [Reseller]’s pricing and that I needed to call them to pass on the message. [Fender Europe Former Senior Employee 1] may have (although I cannot be certain) received a number of complaints about this dealer and got fed up with them, which is why he would have asked me to make the call.’²⁷⁶

3.154 [Employee 5] of Fender Europe also recalled having been told by [Fender Europe Former Senior Employee 1] that MI resellers may be put ‘on hold’ for non-compliance with the Fender Pricing Policy. He recalled that he may also have threatened [Reseller] with being put on hold:

‘I recall [Fender Europe Former Senior Employee 1] saying that Resellers might be put on hold if they did not raise their prices. I do not recall him saying

²⁷³ In his witness statement, [Employee 1] of Fender Europe stated ‘We have a system that allows us to specify how many days per week [Reseller] stock will be released. It could be daily or it could be only one day a week. In this particular instance I recall [Fender Europe Former Senior Employee 1] asking me to put [Reseller] down to one day a week.’ URN E_FEN003291.1 (Witness Statement of [Fender Europe Employee 1] dated 25 July 2018), p.3, paragraph 18.

²⁷⁴ ‘I recall only one instance in which [Fender Europe Former Senior Employee 1] told me that if a dealer did not raise his prices his account would be put on hold. I passed this message on to the dealer. I believe that this was in 2017 or 2018. I do not recall if the dealer was put on hold, but I may not have been told if this happened.’ URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), paragraph 25.

²⁷⁵ URN C_FEN01892 (Clarification by [Fender Europe Senior Employee 1] dated 3 September 2019 further to his witness statement dated 16 August 2018), response to question 2.

²⁷⁶ URN C_FEN01892 (Clarification by [Fender Europe Senior Employee 1] dated 3 September 2019 further to his witness statement dated 16 August 2018), response to question 3.

that about my Resellers in particular.²⁷⁷ It was a general comment. **I may have passed that message on in the past, including to [Reseller].** I did not have the ability to put someone on hold. I do not believe that [Fender Europe Former Senior Employee 1] ever put [Reseller] on hold, although I believe he may have put [Reseller] on hold once in the past.²⁷⁸

3.155 Similarly, in his witness statement to the CMA, [Employee 9] of Fender Europe stated:

'I do recall that [Fender Europe Former Senior Employee 1] said that if the UK Reseller did not change their prices by a particular date that their account would be put on stop²⁷⁹ ("If your mate is not in line by Monday, he is on stop"). In such cases, **I may have told the UK Reseller that they may be on stop if they did not raise their prices, although I am not aware of it ever actually happening.**²⁸⁰

3.156 The evidence shows that MI resellers who were threatened with such sanctions considered the threat to be credible such that they agreed to change their prices.²⁸¹

Sanctions implied

3.157 Furthermore, witness evidence of other Fender Europe DSMs also shows that Fender Europe indirectly threatened to stop or interrupt supply to MI resellers who did not comply with the Fender Pricing Policy.²⁸²

²⁷⁷ [Employee 5] of Fender Europe was responsible for [§<], including [Reseller] ([§<]). URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), paragraph 5.

²⁷⁸ URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), paragraph 16. [Emphasis added by the CMA]

²⁷⁹ URN E_FEN000228 (Internal [Reseller] email from [Employee] to [Employee] and [Employee] dated 29 March 2018).

²⁸⁰ URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraph 32. [Emphasis added by the CMA] [Text in square brackets added by the CMA].

²⁸¹ In his witness statement to the CMA, [Senior Employee 1] of Fender Europe stated, '*[w]hen I made calls to dealers to ask them about prices that were too low, I do not recall an instance in which a dealer ever refused to raise their prices.*'

URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), para. 24.

[Employee 4] of Fender Europe, in his witness statement to the CMA, stated '*[m]ost resellers would readily agree to look at their prices. Most would agree to do so because we have a close relationship with them. They do not want to create ill-will with me or with Fender.*' URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), para. 23. See also URN E_FEN000173 (Email from [Senior Employee 1] of [Reseller 1] to [Reseller 1 Senior Employee 3], [Reseller 1 Senior Employee 4], [Reseller 1 Employee 1], [Reseller 1 Employee 9] and others of [Reseller 1] dated 22 November 2017) for examples of general compliance by resellers and paragraph 4.48 below.

²⁸² In his witness statement to the CMA, [Employee 7] of Fender Europe explained that [Fender Europe Former Senior Employee 1] indirectly threatened sanctions against a UK reseller if they did not comply with the Fender Pricing Policy. He stated that: '*[Fender Europe Former Senior Employee 1] could make life difficult for a UK Reseller, for example he could cause problems with shipping. I do not recall [Fender Europe Former Senior Employee 1] ever expressly stating that there would be consequences for UK Resellers if they did not raise prices in response to a request, but I felt that it was inferred.*' URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), para. 27.

3.158 It also appears from documentary evidence that some MI resellers understood that being put ‘on hold’ was a potential consequence for non-compliance with the Fender Pricing Policy. For example, [Employee], [Reseller], emailed [Fender Europe Former Senior Employee 1] in January 2014 providing the links to the Fender standard Stratocaster electric guitar being sold on a number of MI resellers’ websites and asking, ‘*can you please confirm back to me that these dealers are all now on stop?*’.²⁸³

Poorer trading terms: Fender Europe potentially reducing MI resellers’ credit limits and/or removing marketing support

Sanctions threatened

3.159 [Reseller 1 Senior Employee 4], in his interview evidence indicates that Fender Europe actually threatened additional, alternative sanctions from time to time, and that, in his opinion, at least [Reseller 1] and potentially other MI resellers considered the threat of such sanctions to be credible (see immediately below and paragraphs 4.43ff below for details).

3.160 [Senior Employee 4] of [Reseller 1] stated that Fender Europe would threaten to remove its benefits if it failed to comply with the Fender Pricing Policy:

‘It was threatened that we would lose benefits like marketing support or they would cut our credit limit, you know. They would just make it more difficult for us to do business.’²⁸⁴

‘the threat was always credit limit reduced, maybe marketing spend. (...) we did command a decent amount of marketing – marketing spend, when we opened at [X], we ran a (...) campaign (...) if we weren’t toeing the line with them [Fender Europe], they could quite easily have turned round [sic] and go [sic] “(...) we’re not going to do that”.

(...) that would probably have cost us £30,000 on our own to do.’²⁸⁵

In his witness statement to the CMA, [Employee 2] of Fender Europe explained: ‘*I do not recall [Fender Europe Former Senior Employee 1] expressly saying that there would be consequences if a UK Reseller did not raise their prices in line with Fender’s expectations. But I believe that the UK Reseller may have understood that this might be the case. There were times when I might have told a dealer that [Fender Europe Former Senior Employee 1] was threatening to cut off supply if they did not increase their prices by a particular date.*’ URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 15.

²⁸³ URN E_FEN002568 (Email from [Employee] of [Reseller] to [Former Senior Employee 1] of Fender Europe, forwarded on to [Employee 1] of Fender Europe, dated 17 January 2014).

²⁸⁴ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.77, lines 13-15.

²⁸⁵ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.322, line 17 to p.323, line 4.

3.161 [Reseller 1 Senior Employee 4] explained that a reduced credit limit would restrict a resellers' ability to buy stock (because stock is generally paid for after it is ordered),²⁸⁶ and that [Reseller 1] benefitted from discounts available for prompt settlement.²⁸⁷ The CMA concludes that the effect of reducing an MI reseller's credit limit would likely be to make it more difficult for that MI reseller to buy stock, due to cashflow difficulties and thereby ultimately reduce its ability to generate profits.

3.162 [Reseller 1 Senior Employee 4] said that requests to adjust prices to comply with the Fender Pricing Policy were usually communicated verbally and if [Reseller 1] failed to comply, it would be telephoned about it:

'If we didn't ... we'd get called and asked why. And, you know, it's -- very important account for us. We, we just, kind of, had -- kind of, felt we had to toe the line.'^{288,}
289

3.163 [Reseller 1 Senior Employee 4] stated that [Reseller 1] was not, to his knowledge, actually sanctioned by Fender Europe. He, as one of its [X], nevertheless felt there was a credible threat to the success of [Reseller 1]'s business if it did not adhere to the Fender Pricing Policy:

'But we were just given it and told, you know, "These are your benefits. If you don't follow the line on the -- on the price side of it, we will -- we will take your benefits away", you know.

And the biggest worry for us would have been to actually get the credit limit cut right back because then you're just -- you can't replenish your stock --'.²⁹⁰

²⁸⁶ In interview, [Senior Employee 4] of [Reseller 1] stated '*And the biggest worry for us would have been to actually get the credit limit cut right back because then you're just -- you can't replenish your stock --*'. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.81 lines 21-23.

²⁸⁷ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.165, lines 3-11.

²⁸⁸ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.78, lines 2-4.

²⁸⁹ In interview, [Reseller 1 Senior Employee 4] explained that Fender Europe would also follow-up on prices with [Reseller 1] by text, if [Reseller 1] was not keeping to the agreed approach to pricing: '*[i]t would sometimes be a text, I would -- I would imagine. Um, I would say maybe [Reseller 1 Senior Employee 1] would have got a text. I don't think [Reseller 1 Employee 1] would have. I don't think he had a, kind of, texting relationship, shall we speak. But, um, [Reseller 1 Senior Employee 1] did contact -- used to text [Fender Europe Employee 2] or [Fender Europe Former Senior Employee 1], as I would occasionally.*' URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.98, lines 8-12 [Text in square brackets added by the CMA].

²⁹⁰ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.81, lines 17-23.

Escalation of non-compliance to [Former Senior Employee 1] of Fender Europe, [X]

- 3.164 In interview, [Employee 2] of Fender Europe said that if an MI reseller refused to change its price to at least the Minimum Price after being asked to do so, he would escalate the issue to [Fender Europe Former Senior Employee 1].²⁹¹
- 3.165 There is some evidence which shows that the potential involvement of [Fender Europe Former Senior Employee 1] in conversations with MI resellers about compliance with the Fender Pricing Policy constituted enough of a threat in and of itself.
- 3.166 [Fender Europe Employee 2] explained that he sometimes called MI resellers to tell them that '*[Fender Europe Former Senior Employee 1] was threatening to cut off supply if they did not increase their prices by a particular date.*' He further explained '*[t]he UK Reseller might have thanked me for passing on the message as they did not want to get a call from [Fender Europe Former Senior Employee 1].*'²⁹² [Employee 7] of Fender Europe explained in his witness statement to the CMA that '*[Fender Europe Former Senior Employee 1] was not someone to argue with.*'²⁹³

Credible threat of sanctions

- 3.167 The evidence shows that MI resellers were aware that they might face sanctions if they failed to adhere to the Fender Pricing Policy and considered the threat of such sanctions to be credible, such that they changed their prices as requested and generally adhered to the Fender Pricing Policy.
- 3.168 For example, on Friday 17 January 2014, [Employee], of [Reseller] sent an email at 4:12pm stating, '*[h]iya – as predicted just got the threatening phone call from [Fender Europe Employee 2]! Will move prices now..*' [Employee], of [Reseller], replied to his email at 4:15pm '*[w]e've done nearly £6k today when we might not have, hes [sic] not normally on it that fast.*'²⁹⁴
- 3.169 In interview with the CMA, when [Employee 2] of Fender Europe was questioned about this email exchange, and asked how often he made that kind of perceived threat to resellers, and whether it was his fall-back position, he replied:

²⁹¹ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.94, lines 24-26 and p.95, lines 1-3.

²⁹² URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 15 [Text in square brackets added by the CMA].

²⁹³ URN E_FEN003289.1 (Witness Statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 16. [X]. URN E_FEN003323 (Transcript of Proffer 1 dated 25 July 2018), p.16, lines 23-26. [Text in square brackets added by CMA]

²⁹⁴ URN E_FEN000024 (Email exchange between [Employee] and [Employee], of [Reseller] dated 17 January 2014).

'no, it wasn't my fallback position. (...) I didn't like (...) [making these calls] actually at all but I was able to do it quite easily and professionally. And if I came across to [Employee], [Reseller] as -- as quite a mild-mannered chap -- if I came across as intimidating or threatening, then I'm sorry it did but I'm just very straight. I'd just say, you know -- I cut the niceties and said, "Look, you know, it's not profitable if -- if you can't sort it out, you know. I just want [Fender Europe Former Senior Employee 1] and [Employee] [Reseller] to chat to each other". It's not a threat; it's a reality.'²⁹⁵

3.170 In another example, on 12 January 2018, [Employee] of [Reseller] sent an internal email to other [Reseller] employees with the subject heading '*Fender/Gretsch*', stating:

'There is supposed to be a complete price reset on Monday on the above to 4% less than full retail.

There will supposedly be "repercussions" for those not following this!

I suggest we reset the system and website and watch like hawks !!??'.²⁹⁶

Conclusions on the consequences for MI resellers of non-compliance with the Fender Pricing Policy

3.171 Based on the evidence above, the CMA concludes that:

- in at least two instances, Fender Europe imposed sanctions on an MI reseller ([Reseller] and Reseller) for non-compliance with the Fender Pricing Policy, albeit only temporarily;²⁹⁷
- irrespective of whether sanctions were imposed, they were credible and were actually threatened by Fender Europe, directly or indirectly (including in relation to [Reseller 1]);²⁹⁸ and
- the fear of being sanctioned played an important part in encouraging MI resellers, including [Reseller 1], to adhere to the Fender Pricing Policy.²⁹⁹

²⁹⁵ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.219, lines 2-13.

²⁹⁶ URN E_FEN002419 (Email from [Employee] to [Employee], [Employee], [Employee] and [Employee] of [Reseller] dated 12 January 2018. [Emphasis added by the CMA]

²⁹⁷ See paragraphs 3.146 to 3.150 above.

²⁹⁸ See paragraphs 3.151 to 3.156 above.

²⁹⁹ See paragraphs 3.167 to 3.170 above and paragraphs 4.43 to 4.51 below.

VI. Fender Europe's awareness about illegality of implementing and enforcing the Fender Pricing Policy

3.172 Fender Europe understood that its communications and interactions with its network of UK MI resellers pertaining to the Fender Pricing Policy were not legal. The CMA sets out below some examples of the evidence which show:

- that MI resellers alerted Fender Europe's staff to the possibility that the implementation and enforcement of the Fender Pricing Policy was illegal;³⁰⁰
- that Fender Europe's staff knew that the implementation and enforcement of the Fender Pricing Policy was illegal;³⁰¹ and
- that Fender Europe's staff, in the light of their knowledge of the illegality of their conduct and upon instruction from [Former Senior Employee 1] of Fender Europe, operated under a culture of concealment whereby they:
 - tried to avoid creating written records of communications relating to the Fender Pricing Policy; and
 - at least at times, deleted written communications from MI resellers relating to the Fender Pricing Policy.³⁰²

³⁰⁰ See paragraphs 3.173 to 3.177 below.

³⁰¹ URN E_FEN002638 (Email from [Fender Europe Former Senior Employee 3] to [Fender Group Employee 2], [Fender Group Employee 3], [Fender Europe Former Senior Employee 1], [Fender Group Employee 1], [Fender Group Employee 4] and [Fender Europe Former Senior Employee 2] of Fender on 25 March 2015); URN E_FEN003124 (Email from [Fender Group Employee 5] to [Fender Europe Employee 9], [Fender Group Employee 6] and [Fender Group Employee 7] of Fender dated 21 February 2018); URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), paragraph 16; URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraphs 23 and 28; URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), paragraph 18; URN E_FEN003296.1 (Witness statement of [Fender Europe Employee 4] dated 24 July 2018), paragraph 13; URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 14; URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraphs 9 and 20; URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraphs 22-23; URN E_FEN003297.1 (Witness statement of [Fender Europe Employee 5] dated 24 July 2018), paragraph 9.

³⁰² *'We would receive emails from Resellers with links to their competitors' prices. (...) saying "hey, look at these" or similar. (...) I would delete such emails. [[Fender Europe Former Senior Employee 1]] would also call me and I would tell him that I was not looking into his queries. Following the [Reseller] Incident, [Fender Europe Former Senior Employee 1] was clear that nothing should be put in writing that could be misconstrued as seeking to force a customer to sell at a certain price. [Fender Europe Former Senior Employee 1] told us that if we received emails from resellers regarding prices that we were to call the relevant DSM to ask them to tell the reseller that they should stop sending them. We were subsequently told by [Fender Europe Former Senior Employee 1] that we should stop deleting emails from Resellers.'* URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraphs 27-30.

MI resellers alerting Fender Europe to possible illegality

- 3.173 On 13 October 2013, [Reseller] wrote, in a complaint to Fender Europe about another MI reseller's scheme to operate contrary to the Fender Pricing Policy: *'(the cartel laws of the EU mean that you cannot of course officially impose a selling price on them so you cannot use price as evidence).'*' This was received by [Fender Europe Employee 3] and forwarded on to [Fender Europe Former Senior Employee 1] and [Fender Europe Employee 1] on 15 October 2013. [Fender Europe Former Senior Employee 1] responded saying he would *'look into it'*, adding that *"if they are sub-distributing our stuff it's not allowed"*.³⁰³
- 3.174 A year later, on 20 October 2014, solicitors to [Reseller] wrote to Fender Europe to allege that Fender Europe had operated a policy of imposing upon retailers, including [Reseller], a minimum advertised price for online sales and marketing in respect of Fender Europe's products since 2009.³⁰⁴
- 3.175 The correspondence was addressed to [Fender Europe Former Senior Employee 1]. It stated that Fender had *'since 2009 been operating a policy of imposing upon retailers, including our client [Reseller], a minimum advertised price (MAP) for online sales and marketing in respect of Fender products'* and highlighted that the MAP policy was a form of RPM *'which is in breach of Article 101(1) TFEU and the Chapter I prohibition in the Competition Act 1998'*.³⁰⁵
- 3.176 [Fender Europe Former Senior Employee 1] sent an initial response to [Reseller]'s solicitors on 26 November 2014 objecting to the claims and stating that MAP was not imposed in Europe where Fender Europe understood that the imposition and enforcement of any MAP policy was illegal. [Fender Europe Former Senior Employee 1] also stated that Fender Europe's *'employees are trained and are aware of their responsibilities under the competition rules'*.³⁰⁶
- 3.177 [X],³⁰⁷ previous solicitors to Fender Europe, also responded to the allegations made by [Reseller] on behalf of Fender Europe in February 2015. It stated that an internal investigation of Fender Europe had uncovered no evidence of a MAP policy. [X] also indicated that it had worked with Fender Europe for many years

³⁰³ URN E_FEN002551 (Correspondence between [Employee] of [Reseller] and [Fender Europe Employee 3] and [Former Senior Employee 1] of Fender Europe between 13-15 October 2013).

³⁰⁴ URN C_FEN00589 (Correspondence between legal representatives of [Reseller] and Fender Europe between October 2014 and March 2015), pp.2-4.

³⁰⁵ URN C_FEN00589 (Correspondence between legal representatives of [Reseller] and Fender Europe between October 2014 and March 2015), pp.2-3.

³⁰⁶ URN C_FEN00589 (Correspondence between legal representatives of [Reseller] and Fender Europe between October 2014 and March 2015), p.11.

³⁰⁷ [X].

on its competition compliance programme and Fender Europe's commercial teams were well aware of their obligations under European competition laws.³⁰⁸

Fender Europe's staff's direct knowledge of illegality

- 3.178 In interview, [Former Senior Employee 1] of Fender Europe stated that he had received competition law training from [X], previous solicitors to Fender Europe, on what he could do when a reseller complained about the price of another reseller. [Fender Europe Former Senior Employee 1] explained that he understood that he could query the price at which a reseller was advertising a product where it seemed incorrect. By way of example, [Fender Europe Former Senior Employee 1] stated *'when it comes to price it is really simple. If there is a product out there at £1,000 that should retail at £1,000 and a dealer has it at £500 or £100, you can ring up and say, "Are you aware of this? Is it a mistake?"* [Fender Europe Former Senior Employee 1] also explained that he understood that if the reseller wanted to sell at that price then Fender Europe could not do anything about it.³⁰⁹ He further stated that he did not engage with resellers on their complaints about other resellers' pricing: *"[t]here is actually nothing we can do." -- because not only is it illegal, (...) You would not have time to do any business'*. This shows that [Fender Europe Former Senior Employee 1] understood that restricting resellers' pricing was illegal.³¹⁰
- 3.179 [Fender Europe Former Senior Employee 1] also indicated in interview that he had previously sent emails to all Fender Europe's DSMs to explain what they could and could not do with regard to resellers' pricing. [Fender Europe Former Senior Employee 1] also stated: *'I reiterated that on Monday before the meeting.'*³¹¹
- 3.180 The documentary evidence included a two-page competition law guide entitled *'[r]especting dealers' pricing freedom'* which details conduct which could amount to unlawful RPM.³¹² On 14 May 2014, [Fender Europe Former Senior Employee 1] emailed this guidance document to [Employee 1], [Employee 18] of Fender Europe and a 'ukdsms' mailing list which the CMA concludes comprised the UK DSMs and other Fender sales staff such as [Fender Europe Senior Employee 1] and [Fender Europe Employee 2] who were in post at that time. In this email [Fender Europe

³⁰⁸ URN C_FEN00589 (Correspondence between legal representatives of [Reseller] and Fender Europe between October 2014 and March 2015), pp.17-18.

³⁰⁹ URN C_FEN00776 (Transcript of interview with [Fender Europe Former Senior Employee 1] dated 18 April 2018), p.59, lines 14-21.

³¹⁰ URN C_FEN00776 (Transcript of interview with [Fender Europe Former Senior Employee 1] dated 18 April 2018), p.61, lines 11-13.

³¹¹ URN C_FEN00776 (Transcript of interview with [Fender Europe Former Senior Employee 1] dated 18 April 2018) p.59, line 14.

³¹² URN E_FEN002585 (Fender dealer pricing guidelines-664977-v1-BRUDOCs.DOC dated 14 May 2014).

Former Senior Employee 1] stated '[s]ee attached a set of guidelines to be adhered to when discussing pricing amongst dealers. More on it later.'³¹³ This shows that from early in the Relevant Period, all of the sales staff at Fender Europe dealing with UK resellers at the time must have been aware that certain conduct and pricing discussions with MI resellers could amount to illegal RPM.

3.181 After receiving the correspondence from [Reseller]'s solicitors set out above at paragraph 3.174 and 3.175, Fender Europe took further active steps to identify potential competition law risk within its business. To this end, it undertook an internal audit in October 2014,³¹⁴ explaining to staff that the audit was intended to identify such risks and to ensure that the company was compliant with UK and European competition law.³¹⁵ Details of the audit process were circulated among Fender Europe staff, and the documentary evidence shows they were expressly acknowledged by [Former Senior Employee 1] and [Employee 1] of Fender Europe.³¹⁶ The CMA considers that this activity and correspondence forms part of the wider picture which shows that Fender Europe staff were generally aware of competition law.

3.182 In addition, witness evidence clearly shows certain Fender Europe staff including the DSMs had a general awareness of what was illegal under competition law and the fact that some of their conduct was not legal.

- [Employee 1], of Fender Europe stated that:

'I recall that in the open [Fender Europe Former Senior Employee 1] would tell us that we should not have conversations with Resellers about their prices. After the [Reseller] incident, which involved the owner of [Reseller], a guitar store based in [§<], threatening to report Fender to the authorities for forcing him to sell at agreed prices (the "[Reseller] Incident"), he would tell us that we should not be speaking about prices and that we should never put anything in an email that could be misconstrued as asking a Reseller to raise their prices. Behind the scenes however, conversations about prices were still taking place.'³¹⁷

³¹³ URN E_FEN002584 (Email from [Fender Europe Former Senior Employee 1] to UK DSMs, [Employee 1], [Employee 18], [Employee 19], [Employee 20], [Employee 21] and [Employee 22] of Fender Europe dated 14 May 2014).

³¹⁴ The CMA understands that this internal audit is the same exercise referred to by [§<], previous solicitors to Fender Europe, in its February 2015 letter to [Reseller] as a "*thorough internal investigation*".

³¹⁵ URN E_FEN002612 (Email from [Employee 1] to [Employee 13] of Fender Europe dated 28 October 2014).

³¹⁶ URN E_FEN002616 (Email from [Former Senior Employee 1] to [Employee 13] of Fender Europe dated 29 October 2014); URN E_FEN002612 (Email from [Employee 1] to [Employee 13] of Fender Europe dated 28 October 2014).

³¹⁷ URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018), paragraph 23. The CMA considers that [Fender Europe Employee 1] was referring to conversations that [Fender Europe Former Senior Employee 1] had with Fender Europe staff who did have conversations with resellers. The CMA considers 'us' to include

- [Employee 9] of Fender Europe stated that:

'[T]he message from [Fender Europe Former Senior Employee 1] was a confusing one. He would say on the one hand that it is breaking the law to fix prices. On the other hand he would say that we should speak to the UK Resellers and ask them not to advertise at lower than MSRP minus 4%.'³¹⁸

- [Employee 2] of Fender Europe:

- stated in interview that he would contact resellers by telephone instead of text or email '*[b]ecause intrinsically underneath it all, I knew it was wrong*'.³¹⁹ [Fender Europe Employee 2] later stated that pricing was not a subject that he was '*comfortable discussing on an email*';³²⁰
- stated in his witness statement that: '*Part of my job is also to encourage Resellers to maintain their margin, so that they make a return on the products that they are selling. I would have conversations with them, over the phone or face to face. I never asked UK Resellers to raise their prices in writing. It was always done over the phone or face to face. (...)*';³²¹
- in relation to an email from [Senior Employee 4] of [Reseller 1] reporting another MI reseller who was not complying with the Fender Pricing Policy, commented that '*[Reseller 1 Senior Employee 4]'s just putting himself at risk here*'.³²² When asked for clarification on this comment, [Fender Europe Employee 2] stated, '*he was doing something that felt wrong and could get him into legal trouble for no obvious benefit and recording that on paper*'.³²³ [Fender Europe Employee 2] said that when he received this kind of email from [Reseller 1] he would contact [Senior Employee 1], [Reseller 1] and insist '*“[y]ou’ve got to stop your people sending emails”, (...)* it’s just stupid’.³²⁴

either all Fender Europe staff, which includes DSMs, or all staff who communicated with resellers, directly or indirectly, which includes DSMs.

³¹⁸ URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraph 22 [Text in square brackets added by the CMA].

³¹⁹ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.97, lines 26 [Text in square brackets added by the CMA].

³²⁰ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.177, line 15.

³²¹ URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 9. [Text in brackets added by the CMA]

³²² URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.150, line 26.

³²³ [Fender Europe Employee 2] felt there was no obvious benefit to [Senior Employee 4] of [Reseller 1] as [Reseller 1 Senior Employee 4]'s email referred to prices advertised by dealers based in other EU Member States. URN C_FEN01868 (Response to Request for Clarification from [Fender Europe Employee 2], dated 31 July 2019), response to question 2.

³²⁴ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.151, lines 7-8.

- In relation to internal communications, stated that if he received an internal Fender Europe email from another DSM which related to price, he would have replied to that DSMs over the phone. When asked why that was, he stated, *'because it's just bad'*.³²⁵
- [Employee 12] of Fender Europe described getting MI resellers to advertise at MSRP as *'the hardest to deal with, as no matter how strongly we suggest what they advertise at, we cannot tell them, by law'*.³²⁶

3.183 These statements by members of Fender Europe's staff show that they had a very good understanding of competition law and how it applied to their interactions with MI resellers.³²⁷ That understanding was sufficiently strong to be aware that Fender Europe's conduct was illegal.

[Former Senior Employee 1] of Fender Europe created a culture of concealment in relation to the Fender Pricing Policy within Fender Europe in order to avoid detection by prohibiting the generation of a documentary evidence trail

3.184 As set out above in paragraphs 3.173 to 3.183 and paragraphs 3.184 to 3.192 below, the evidence shows that [Fender Europe Former Senior Employee 1] was acutely aware of the illegality of operating and enforcing the Fender Pricing Policy and the potential consequences of it being discovered. He created a culture of concealment which served to protect Fender Europe, and his own position by prohibiting the generation of a documentary evidence trail.³²⁸

3.185 One Fender Europe DSM, [Fender Europe Employee 7], stated in his witness statement to the CMA that:

³²⁵ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.213, line 24.

³²⁶ URN E_FEN002678 (Email from [Employee 12], Fender Europe, to [Employee 1] and [Employee 2] of Fender US dated 2 June 2015), p.4. [Emphasis added by [Fender Europe Employee 12]]

³²⁷ Fender Europe's knowledge of competition law was also sufficiently detailed for it to be able to use it to its legitimate commercial advantage. To this end, from November 2016, for some major product range launches, it started asking explicitly in the launch material for MI resellers to sell that subset of newly launched products at MSRP for 3 months from the launch date. Fender Europe advised resellers that the *'policy is in compliance with the competition rules'*. There were two such launches in respect of Relevant Products during the Relevant Period. The first related to Fender American Pro electric guitars launched on 1 December 2016, with a three-month MAP period from 1 December 2016 to 1 March 2017. URN E_FEN002885 (Email from [Employee 4] of Fender Europe dated 10 November 2016). The second related to Fender American Original electric guitars launched on 16 January 2018, with a three-month MAP period from 16 January 2018 to 16 April 2018. URN E_FEN003086 (Email from [Fender Europe Employee 7] to [Employee 4], [Employee 5], [Employee 3], [Senior Employee 1], [Employee 2] and [Employee 6] of Fender Europe dated 29 December 2017). The CMA makes no findings in relation to the Fender Pricing Policy in respect of these Relevant Products during these periods pursuant to this investigation.

³²⁸ The CMA considers that this shows that [Employee 7] of Fender Europe was aware that Fender Europe's conduct was illegal. URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 15.

'I do recall him [[Fender Europe Former Senior Employee 1]] saying that he would not take the fall for this. I took this to mean that he would not be [held] responsible if this conduct was identified.'³²⁹

3.186 In his witness statement, [Employee 1] of Fender Europe recalled:

'Following the [Reseller] Incident, [Fender Europe Former Senior Employee 1] was clear that nothing should be put in writing that could be misconstrued as seeking to force a customer to sell at a certain price.

[Fender Europe Former Senior Employee 1] told us that if we received emails from resellers regarding prices that we were to call the relevant DSM to ask them to tell the reseller that they should stop sending them.'³³⁰

3.187 In his witness statement, [Employee 3] of Fender Europe stated:

'We would only have communications about this practice over the phone or face to face. We were told by [Fender Europe Former Senior Employee 1] not to put anything in writing. When we received emails from Resellers we were told not to respond in writing.'³³¹

3.188 [Employee 7] of Fender Europe went so far as to describe [Fender Europe Former Senior Employee 1]'s insistence that nothing should be put in writing as '*aggressive*',³³² adding that he could not recall anyone objecting to the practice as, '*[Fender Europe Former Senior Employee 1] was not someone to argue with.*'³³³

3.189 In interview, [Employee 2] of Fender Europe stated that Fender Europe '*discouraged*' emails from resellers reporting other resellers who were not complying with the Fender Pricing Policy.³³⁴

3.190 [Fender Europe Former Senior Employee 1] created an additional layer of concealment within Fender Europe. In open conversation with the DSMs he would warn against influencing resellers' prices. However, in private individual

³²⁹ URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 15 [Text in square brackets added by the CMA].

³³⁰ URN E_FEN003291.1 (Witness statement of [Fender Europe Employee 1] dated 25 July 2018) paragraphs 28 and 29 [Text in square brackets added by the CMA].

³³¹ URN E_FEN003293.1 (Witness statement of [Fender Europe Employee 3] dated 24 July 2018), paragraph 18 [Text in square brackets added by the CMA].

³³² URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 14.

³³³ URN E_FEN003289.1 (Witness statement of [Fender Europe Employee 7] dated 25 July 2018), paragraph 16 [Text in square brackets added by the CMA].

³³⁴ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.150, line 16.

conversations with DSMs he would encourage the implementation and enforcement of the Fender Pricing Policy.³³⁵

- 3.191 In his witness statement to the CMA, [Employee 2] of Fender Europe indicated that there were often ‘*two conversations*’ that took place with respect to MI resellers’ pricing of the Relevant Products. Outwardly, [Fender Europe Former Senior Employee 1] would inform the DSMs that they should not do anything to influence resellers’ pricing. However, [Fender Europe Employee 2] also confirmed that [Fender Europe Former Senior Employee 1] would specifically tell individual DSMs to telephone a particular MI reseller and ask them to raise their prices if they were too low.³³⁶

Conclusions on awareness of illegality

- 3.192 In the light of the evidence set out above, the CMA concludes that Fender Europe, through the unchecked agency of [Fender Europe Former Senior Employee 1], allowed a situation to exist in its business whereby its salesforce:
- had a clear understanding of competition law as it related to Fender Europe’s communications with its MI resellers about pricing and despite this carried out the Infringement in the knowledge that it constituted illegal RPM; and
 - collectively felt authorised and indeed pressured to conceal the evidence of its wrongdoing in order to avoid detection.

D. Market Definition

- 3.193 As set out below, the CMA finds that the relevant market for the purposes of this case is the supply through the MI reseller and D2C channels of electric guitars, electric basses and acoustic guitars in the UK.

I. Purpose of and framework for assessing the relevant market

- 3.194 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.³³⁷

³³⁵ URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraphs 11-12; URN E_FEN003294 (Witness statement of [Fender Europe Senior Employee 1] dated 16 August 2018), paragraph 16.

³³⁶ URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraphs 11-12.

³³⁷ 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.

3.195 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.³³⁸

3.196 Nonetheless, the CMA has formed a view of the relevant market as a conclusion on this is required in order to calculate Fender Europe's 'relevant turnover' in the market affected by the Infringement, for the purposes of establishing an effect on trade between Member States and the level of the financial penalty that the CMA has decided to impose on Fender.

II. Relevant product market

3.197 The CMA's starting point for assessing the relevant product market was the focal products which are subject to the Infringement. The CMA then assessed whether the product market should be broadened based on demand-side and supply-side substitutability with other products.

3.198 Fender Europe supplies electric guitars, electric basses and acoustic guitars.³³⁹ Within each of these three product types, Fender categorises its products further by product segments - Custom Shop (Collectors and Professionals), Advanced, Intermediate and Beginners (entry level) – and then further by ranges and by individual models within each range as set out in Figure 3.2 above.

3.199 For each of the 12 product segments in total, there are differences identified by Fender based on [redacted].³⁴⁰ [redacted] identified by Fender, as set out in Figure 3.2 above.

³³⁸ 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'.

³³⁹ Electric guitars have six or more strings and are designed for use almost exclusively with a guitar amplifier. Electric basses typically have four strings and fulfil a different role within the musical spectrum. The electric guitar is often used in two musical roles: as a rhythm guitar, which plays chord sequences or progressions and as a lead guitar which provides instrumental melody lines, melodic instrumental fill passages, and solos. Electric basses have similar physical features to electric guitars. However, electric basses typically have fewer strings (four, not six), require a different technique to play and have a different musical function to an electric guitar, in that the electric bass guitar supports the groove with the drummer. Acoustic guitars are designed to transmit sound acoustically with string vibration resonating through the instrument itself to create the sound. Acoustic guitars are wooden stringed instruments designed to transmit sound acoustically, rather than through electric amplification. The string vibration resonates through the instrument itself to create the sound. An acoustic guitar produces a different type of sound to an electric guitar, and therefore is typically used for different types of music. An acoustic guitar requires no external power source. It may have 4 or 6 strings depending on whether it is an acoustic guitar or an acoustic bass guitar. A guitarist can technically play both electric and acoustic guitars, however, the sound of the instruments and their application are very different. See paragraphs 3.13, 3.14 and 3.15 above for details. URN C_FEN01505 (Response dated 5 March 2019 to February 2019 RFI), response to question 5.

³⁴⁰ URN C_FEN01505 (Response dated 5 March 2019 to February 2019 RFI), response to question 5.

- 3.200 The evidence shows that the Fender Pricing Policy in general and the Infringement more specifically applied to the full range of electric guitars, electric basses and acoustic guitars supplied by Fender, shown in each of the segments identified by Fender and listed above.³⁴¹
- 3.201 Given that the Infringement, and the Fender Pricing Policy more generally applied to each of the product segments, all electric guitars, electric basses and acoustic guitars are focal products. It makes no difference for the calculation of relevant turnover if the CMA separates out different segments/ranges within these three product types into multiple separate product markets or aggregates the turnover of all the products into a single market.
- 3.202 Therefore, for the purposes of this Decision, the CMA has not made any finding as to the existence of any narrower product markets and has instead aggregated all of the ranges within electric guitars, all of the ranges within electric basses, and all of the ranges within acoustic guitars in a single market.³⁴²
- 3.203 For the reasons set out above, it is not necessary for the CMA to evaluate demand-side and supply-side substitutability between the product segments (and ranges within each product segment) identified by Fender Europe.
- 3.204 The CMA finds that the relevant product market for the purpose of this case is the supply of electric guitars, electric basses and acoustic guitars.³⁴³

III. Sales to different distribution channels

- 3.205 Fender Europe supplies its electric guitars, electric basses and acoustic guitars through different distribution channels. The vast majority (over [90-100%] in all years within the Relevant Period and [90-100%] in 2018)³⁴⁴ of sales of the Relevant Products is through MI resellers. Direct to consumers (D2C) sales of the Relevant Products through Fender Europe's own website (fender.com) account for

³⁴¹ See Figure 3.2 and paragraph 3.16 above. Throughout the Relevant Period, Fender Europe has been active [×]. URN C_FEN01505 (Response dated 5 March 2019 to February 2019 RFI), response to question 13.

³⁴² Fender submitted evidence to support supply-side substitutability across all Relevant Products. Fender told the CMA that manufacturers are able to enter into any of the segments they choose and Fender believes that there are few obstacles to doing so. It also stated that the wide availability of product knowledge in the market and the wide range of manufacturing expertise/capacity make this straightforward. URN C_FEN01505 (Response dated 5 March 2019 to February 2019 RFI), response to question 13.

³⁴³ The CMA notes *Yamaha* and the Commission's approach to the market definition as regards guitars outlined at paragraph 25 of that decision. For the reasons outlined at paragraphs 3.197 to 3.204 below, however, the CMA has decided to aggregate all of the ranges within electric guitars, all of the ranges within electric basses, and all of the ranges within acoustic guitars in a single market and has not made any finding as to the existence of any narrower product markets.

³⁴⁴ URN C_FEN01505 (Response dated 5 March 2019 to February 2019 RFI), response to question 17; URN C_FEN01507 (Response dated 5 March 2019 to February 2019 RFI), response to question 17.

[0-5%] of sales in any year in the Relevant Period, D2C sales having only been introduced to the UK in 2016.³⁴⁵ Fender Europe's sales of the Relevant Products through the Mass reseller channel account for [0-5%] overall during the Relevant Period, and less than [0-5%] of its annual sales in the UK in any individual year within the Relevant Period.³⁴⁶

- 3.206 The CMA has considered whether the market for electric guitars, electric basses and acoustic guitars should be further subdivided by distribution channel.
- 3.207 Fender Europe considers the MI resellers channel and the D2C channel to be part of the same market because the same product ranges are marketed and sold via those channels to the same type of consumer.³⁴⁷ Fender Europe has explained to the CMA that many consumers still prefer to test the look and feel of a guitar and therefore will visit a local store which stocks Fender products to do so. Nonetheless they will still be likely to look online to compare prices.³⁴⁸
- 3.208 In relation to D2C pricing, Fender Europe explained that prices are advertised on its website across Europe (GBP in the UK, EUR in countries that use the Euro, etc). However, only consumers in the UK, France and Germany are able to buy directly from Fender Europe's website. The prices marketed on Fender Europe's website are the MSRP prices that Fender Europe sets, i.e. the same MSRP prices that are in the MI reseller price lists. [redacted].³⁴⁹
- 3.209 Fender Europe has stated that it is likely that the Mass reseller channel³⁵⁰ is not part of the same market as the MI reseller channel and D2C channel. [redacted].³⁵¹ [redacted].
- 3.210 Fender Europe believes that [redacted].³⁵² Fender Europe does not adduce any evidence to support these assertions.
- 3.211 In assessing whether the Mass channel is within the same market as the MI reseller and D2C channels, there is some evidence pointing towards a single market covering all three distribution channels.

³⁴⁵ Fender told the CMA that resellers have no role in sales from the fender.com website. URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), response to question 15.

³⁴⁶ During the Relevant Period, 2012 was the high point of Mass share at [0-5%]. Later years were lower – dropping to [0-5%] in 2016 and 2017, and then back up to [0-5%] in 2018.

³⁴⁷ URN C_FEN01833 (Response dated 12 July 2019 to 2 July 2019 RFI), p.1.

³⁴⁸ URN C_FEN01833 (Response dated 12 July 2019 to 2 July 2019 RFI), p.1.

³⁴⁹ URN C_FEN01833 (Response dated 12 July 2019 to 2 July 2019 RFI), p.1.

³⁵⁰ Fender indicated that, since 2015, the number of resellers involved in the Mass Market Channel has reduced. URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), response to questions 15 and 16.

³⁵¹ [redacted]. URN C_FEN01506 (Spreadsheet, Response dated 5 March 2019 to February 2019 RFI), response to question 14. [redacted].

³⁵² URN C_FEN01833 (Response dated 12 July 2019 to 2 July 2019 RFI), p.1 [Text in square brackets added by the CMA].

- 3.212 First, while Fender Europe has argued (above) that *‘the vast majority of products sold on the Mass channel’* are not sold via the MI reseller or D2C channels, it did not submit any evidence to support this. The evidence on product availability that Fender Europe did submit showed a number of models that were available to both Mass and MI resellers during the Relevant Period.³⁵³
- 3.213 Second, Fender products sold via these channels are likely to be seen as demand-side substitutes for (identical or similar) products sold through MI resellers by consumers purchasing these musical instruments.³⁵⁴
- 3.214 Third, there is evidence that some MI resellers monitored the availability and pricing of Fender products sold by some Mass resellers.³⁵⁵ As such, while the CMA has found no evidence that Fender Europe intended for the Fender Pricing Policy to apply to Mass resellers,³⁵⁶ it has considered the wider effect of the Infringement on pricing across the market for electric guitars, electric basses and acoustic guitars sold through all resellers in the UK, taking account of this scope for competition between distribution channels selling substitutable products.
- 3.215 The evidence currently available to the CMA in this case relating to competition between the Mass market and MI channels is very limited. While there is some

³⁵³ See footnote 351 above.

³⁵⁴ As seen from the 25 November 2015 and 7 June 2016 emails in footnote 355 below, Independent market resellers including [Reseller 1] and [Reseller] viewed [a Mass reseller] and most likely other online Mass market resellers as a competitive threat.

³⁵⁵ For example, on 25 November 2015, [Reseller] emailed Fender expressing concern that it would be competing with the Mass channel distributor [a Mass reseller] on direct sales to customers: *‘[j]ust seen something a little worrying. It appears Fender are now supplying [a Mass reseller]?!’*. URN E_FEN002723 (Email from [Employee] of [Reseller] to [Fender Europe Employee 3], copying [Senior Employee 1] of Fender Europe, dated 25 November 2015). Also, a [Reseller 1] price comparison report compared [Reseller 1]’s pricing to 10 competitors – including [a Mass reseller] – across a range of Fender products. It was attached to an email from [Senior Employee 4] of [Reseller 1] to [Senior Employee 1] of Fender Europe dated 7 June 2016, stating *‘[o]ur price is column E. You can see it. If you need to call me [x]. Do we go there? Or do you sort it.’* [Fender Europe Senior Employee 1] forwarded the email to [Employee 2] of Fender Europe, stating *‘Can you have a look at [Reseller 1 Senior Employee 4]’s email please.’* URN E_FEN002801 (Email from [Reseller 1 Senior Employee 4] to [Fender Europe Senior Employee 1], copied to [Reseller 1 Senior Employee 1], dated 7 June 2016) and attachment URN E_FEN002802 (Price comparison report prepared by Competitor Monitor on 7 June 2016). Also, on 30 November 2016, [Fender Europe Employee 2] emailed [Reseller 1], stating *‘[f]rom December dealers can do the following (using only Fender provided assets) (...) List the American Professional series on approved marketplaces, i.e. [an online marketplace], [an online marketplace] and [an online marketplace].’* URN E_FEN000119 (Email from [Fender Europe Employee 2] to [Reseller 1 Senior Employee 3], [Reseller 1 Senior Employee 1], [Reseller 1 Senior Employee 4], [Reseller 1 Employee 7] and others of [Reseller 1] dated 30 November 2016, forwarded internally to [Reseller 1]). [Text in brackets added by the CMA]

³⁵⁶ When a reseller ([Reseller]) complained to [Former Senior Employee 1] of Fender Europe in an email dated 13 March 2013 about *‘extremely suspect’* advertised pricing in relation to two products advertised on [a Mass reseller]’s website, [Fender Europe Former Senior Employee 1] replied: *‘[w]e’ve been dealing directly with [a Mass reseller] for years. The products have been at this price online for the last 18 months? The prices are going up in the next increase next week and the models are usually not ones we sell in MI.’* URN E_FEN002460 (Email exchange between [Fender Europe Former Senior Employee 1] and [Employee] ([Reseller]) dated 13 March 2013) [Text in square brackets added by the CMA].

evidence which points towards a single market, on balance, it does not appear sufficient to conclude on whether the Mass market channel should be included in the relevant market.

3.216 In light of the above and taking a cautious approach, the CMA concludes that for the purposes of this case, the relevant distribution market for electric guitars, electric basses and acoustic guitars includes the MI reseller and D2C channels, but not the Mass reseller channel.

IV. Relevant geographic market

3.217 The CMA has considered whether the market is likely to be narrower or wider than the whole of the United Kingdom (UK).

3.218 In the MI reseller channel, Fender Europe divides Great Britain and Ireland into sales regions: North England, Midlands, Southwest, South Central, Southeast and Ireland.³⁵⁷ Nothing in the evidence indicates that geographic areas are categorised for any reason other than for administrative efficiency. There is nothing in the documentary evidence which indicates that pricing and product availability differed across different regions of the UK (or the Republic of Ireland).³⁵⁸ Based on the fact that the Fender Pricing Policy, discussed further below, applied to the whole of the UK – and, in particular, applied to online sales of UK resellers, which could be made to any UK location – the CMA concludes that for the purposes of this case the relevant geographical market is not narrower than the UK.

3.219 The CMA has also considered whether the relevant geographic market may be wider than the UK. [REDACTED].³⁵⁹ The evidence indicates that from 2013, [REDACTED].³⁶⁰ [REDACTED]. This could indicate that the market may have been wider than the UK. Fender

³⁵⁷ Fender's list of employees shows several employees' job titles and/or job descriptions as covering 'GBI', presumably referring to 'Great Britain and Ireland': employees include [Fender Europe Employee 1], [Fender Europe Former Senior Employee 1], [Fender Europe Senior Employee 1], [Fender Europe Employee 9], [Fender Europe Employee 5], [Fender Europe Employee 6] and [Fender Europe Employee 4]. URN C_FEN01498 (Table of relevant employees provided in response dated 26 February 2019 to February 2019 RFI), response to question 3.

³⁵⁸ Fender Europe's list of employees refers to [Fender Europe Employee 10] as [REDACTED], which indicates that there is an overlap with UK and Republic of Ireland sales personnel. There may be some common policies or sales team overlap across Great Britain (or Northern Ireland) and the Republic of Ireland but this does not change the CMA's conclusion. URN C_FEN01498 (Table of relevant employees provided in response dated 26 February 2019 to February 2019 RFI), response to question 3.

³⁵⁹ [REDACTED]. URN C_FEN00777 (Transcript of interview with [Fender Europe Employee 14] dated 18 April 2018) p.13, line 10.

³⁶⁰ [Fender Europe Employee 14], [REDACTED] of Fender Europe, explained to the CMA in an interview that [REDACTED]; URN C_FEN00777 (Transcript of interview with [Fender Europe Employee 14] dated 18 April 2018), p.14, lines 2-13. [Fender Europe Employee 14] also explained that [REDACTED]. URN C_FEN00777 (Transcript of interview with [Fender Europe Employee 14] dated 18 April 2018), p.13, lines 6-13; URN E_FEN002678 (Email exchange between [Employee 12] of Fender Europe, [Employee 1] and [Employee 2] of Fender US and [Fender Group Employee 2] dated 2 June to 13 July 2015).

Europe, however, stated that its Product Managers in the UK are responsible for setting trade prices and manufacturer's suggested resale prices (MSRP) in GBP, which they set with input from others in Finance, Sales and Marketing.³⁶¹

3.220 While the evidence on Fender Europe's approach to setting different prices in the UK, relative to other countries, is mixed, there is some evidence that UK prices were set by Fender Europe's Product Managers in the UK. In light of this, the CMA concludes for the purpose of this case that the geographic market is no wider than the UK.³⁶²

V. Conclusion on market definition

3.221 The CMA finds that the relevant market for the purposes of this case is the supply through the MI reseller and D2C channels, of electric guitars, electric basses and acoustic guitars, in the UK.

4. LEGAL ASSESSMENT

A. Introduction

4.1 This Section sets out the CMA's legal assessment of Fender Europe's agreement and/or concerted practice with [Reseller 1], one of its MI resellers, that [Reseller 1] would not advertise or sell online electric guitars, electric basses and acoustic guitars supplied to it by Fender Europe (the Relevant Products) below a certain Minimum Price specified by Fender Europe from time to time, in accordance with the Fender Pricing Policy.

4.2 As set out above, the CMA has reasonable grounds for suspecting that more than 25 UK resellers of the Relevant Products³⁶³ were subject to the Fender Pricing Policy, and that MI resellers generally complied with Fender Europe's requests to adhere to the Minimum Price.

4.3 However, for reasons of administrative efficiency, in accordance with its Prioritisation Principles,³⁶⁴ the CMA has decided to focus its findings on [Reseller 1] as one of the numerous MI resellers of the Relevant Products in order to show the existence of an agreement and/or concerted practice with Fender Europe.

³⁶¹ URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), response to question 1.

³⁶² URN C_FEN01497 (Response dated 26 February 2019 to February 2019 RFI), responses to questions 1 and 3.

³⁶³ See paragraph 3.102.

³⁶⁴ Available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf

- 4.4 While the CMA has concluded that [Reseller 1] is a party to an infringing agreement and/or concerted practice with Fender Europe, the CMA has decided not to address this Decision to [Reseller 1].³⁶⁵ The evidence shows that the Fender Pricing Policy was operated as a standard policy applicable to all or at least the vast majority of Fender Europe's MI resellers. The CMA therefore considers it reasonable and proportionate to apply Rule 10(2) of the CMA Rules in this case and address this Decision only to Fender Europe and its indirect parent company, Fender US, identified in paragraph 3.4 above. This does not preclude the CMA from taking enforcement action against [Reseller 1] or other resellers in any future cases.
- 4.5 For present purposes, the CMA's findings are made by reference to the following provisions of the UK and EU competition rules:
- Section 2 of the Act prohibits (among other matters) agreements and concerted practices between undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are excluded or 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.³⁶⁶ The prohibition imposed by section 2 of the Act is referred to as 'the Chapter I Prohibition'.
 - Article 101(1) TFEU prohibits (among other matters) agreements and concerted practices between undertakings which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the EU, unless they are exempt in accordance with Article 101(3) TFEU.
- 4.6 Section 60 of the Act sets out the principle that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law.
- 4.7 Section 60 of the Act also provides that the CMA must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing that there is no inconsistency with the principles laid down by the TFEU and the

³⁶⁵ Under Rule 10(2) of the CMA Rules, where the CMA considers that an agreement infringes the Chapter I Prohibition and/or the prohibition in Article 101(1) TFEU, the CMA may address its infringement decision to fewer than all the persons who are or were a party to that agreement.

³⁶⁶ Section 2(1) and (7) of the Act.

European Courts, and any relevant decision of the European Courts.³⁶⁷ The CMA must, in addition, have regard to any relevant decision or statement of the European Commission (the Commission).³⁶⁸

B. Undertakings

I. Key legal principles

4.8 For the purposes of the Chapter I Prohibition and Article 101 TFEU, the focus is on the activities of an ‘undertaking’. The concept of an ‘undertaking’ covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.³⁶⁹

4.9 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’.³⁷⁰

4.10 The term ‘undertaking’ also designates an economic unit, even if in law that unit consists of several natural or legal persons.³⁷¹

II. Conclusion on undertakings

4.11 Fender Europe was (and still is) engaged in the marketing and sale of electric guitars, electric basses and acoustic guitars. [Reseller 1] was (and still is) engaged in the retail sale of MI and accessories.

4.12 The CMA therefore concludes that both Fender Europe and [Reseller 1] were, and still are, engaged in an economic activity and constitute/d undertakings for the purposes of the Chapter I Prohibition and Article 101 TFEU during the Relevant Period and beyond.

C. Agreement and/or Concerted Practice

4.13 For the reasons set out below, the CMA finds that Fender Europe and [Reseller 1] entered into an agreement and/or concerted practice that [Reseller 1] would not

³⁶⁷ The Act, section 60(2) and (4). The ‘European Courts’ means the Court of Justice (formerly the European Court of Justice) and the General Court (GC) (formerly the Court of First Instance). See the Act, section 59(1).

³⁶⁸ The Act, section 60(3). The Court of Justice recently held that national competition authorities ‘may take into account’ guidance contained in non-legally binding Commission Notices (specifically the *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)* [2014] OJ C291/01, but such authorities are not required to do so. See Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraphs 29 and 31.

³⁶⁹ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, paragraph 21.

³⁷⁰ Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

³⁷¹ Case C-97/08 P *Akzo Nobel NV v Commission*, EU:C:2009:536, paragraph 55.

advertise or sell the Relevant Products online below the Minimum Price in accordance with the Fender Pricing Policy.

I. Key legal principles

4.14 The Chapter I Prohibition and Article 101 TFEU apply both to ‘agreements’ and ‘concerted practices’. It is not necessary, for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice.³⁷² The aim of the Chapter I Prohibition and Article 101 TFEU is to catch different forms of coordination between undertakings and thereby to prevent undertakings from being able to evade the competition rules simply on account of the form in which they coordinate their conduct.³⁷³

II. Agreement

4.15 The Chapter I Prohibition and Article 101 TFEU catch a wide range of agreements, including oral agreements and ‘gentlemen's agreements’.³⁷⁴ An agreement may be express or implied by the parties, and there is no requirement for it to be formal or legally binding, nor for it to contain any enforcement mechanisms.³⁷⁵ An agreement may also consist of either an isolated act, or a series of acts, or a course of conduct.³⁷⁶

4.16 The key question in establishing an agreement is whether there has been ‘a concurrence of wills between at least two parties, the form in which it is manifested

³⁷² Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, EU:C:2009:343, paragraph 23 (citing Case C-49/92P *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 131). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, [206(ii)].

³⁷³ Case C-382/12 P *MasterCard Inc. v. European Commission*, EU:C:2014:2201, paragraph 63 and the case law cited. The unlawful co-ordination between undertakings may, for example, be characterised as a ‘concerted practice’ during the first phase of an infringement but may subsequently have solidified into an ‘agreement’, and then been further affirmed, or furthered or implemented by, a ‘decision of an association’. This does not prevent the competition authority from characterising the co-ordination as a single continuous infringement. See Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission*, EU:T:2002:70, paragraphs 186–188; Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, EU:C:2006:734, paragraph 32. See also Case T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission*, EU:T:1999:80, paragraph 696: ‘[I]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty.’

³⁷⁴ Case C-41/69 *ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular, paragraphs 106–114.

³⁷⁵ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 at [658]. See also Commission Decision 2003/675/EC *Video Games, Nintendo Distribution and Omega-Nintendo* [2003] OJ L255/33, paragraph 247.

³⁷⁶ Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 81.

being unimportant, so long as it constitutes the faithful expression of the parties' intention.³⁷⁷

- 4.17 The General Court has held that: '[...] it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way [...].'³⁷⁸
- 4.18 However, it is not necessary to establish a joint intention to pursue an anti-competitive aim.³⁷⁹ 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.³⁸⁰
- 4.19 In the absence of an explicit agreement (for example, written down or based on a contract) between the parties to conduct themselves on the market in a specific way, tacit acquiescence by a party to conduct itself in the manner proposed by the other party is sufficient to give rise to an agreement for the purpose of the Chapter I Prohibition and Article 101 TFEU.³⁸¹
- 4.20 The Commission's Vertical Guidelines, summarising the relevant case law and citing the judgments of the Court of Justice of the European Union (Court of Justice), describe how to establish tacit acquiescence to a unilateral policy:
- '[...] in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice.'³⁸²

³⁷⁷ Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, paragraph 69 (upheld on appeal in Joined Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, EU:C:2004:2, paragraphs 96–97).

³⁷⁸ Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

³⁷⁹ 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).

³⁸⁰ *Agreements and Concerted Practices (OFT401)*, December 2004 (adopted by the CMA Board), paragraph 2.8. See also Case T-25/95 *Cimenteries CBR and Others v Commission*, EU:T:2000:77, paragraphs 1389 and 2557 (this judgment was upheld on liability by the Court of Justice in Joined Cases C-204/00 P etc *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, although the fine was reduced); and Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraphs 79–80.

³⁸¹ Case C-74/04 P *Commission v Volkswagen AG* EU:C:2006:460, paragraph 39; Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, and European Commission, *Guidelines on Vertical Restraints* [2010] OJ C130/01 (Vertical Guidelines), paragraph 25(a).

³⁸² Vertical Guidelines, paragraph 25(a).

- 4.21 The Vertical Guidelines provide examples of when tacit acquiescence may be deduced. Evidence of coercive behaviour or compulsion may point towards tacit acquiescence and is a relevant factor to consider. For instance:
- '[...] for vertical agreements, tacit acquiescence may be deduced from the level of coercion exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement in practice its policy.'³⁸³
- 4.22 However, a system of monitoring and penalties may not be necessary in all cases for there to be a concurrence of wills based on tacit acquiescence.³⁸⁴
- 4.23 The Chapter I Prohibition and Article 101 TFEU apply to agreements irrespective of whether they were ever implemented.³⁸⁵ The fact that a party does not act on or subsequently implement, the agreement at all times does not preclude the finding that an agreement existed.³⁸⁶ In addition, the fact that a party does not respect the agreement at all times or comes to recognise that it can 'cheat' on the agreement at certain times does not preclude the finding that an agreement existed.³⁸⁷
- 4.24 Likewise, the fact that a party may have played only a limited part in the setting up of the 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.³⁸⁸

³⁸³ Vertical Guidelines, paragraph 25(a).

³⁸⁴ Case C-260/09 P *Activision Blizzard Germany GmbH v Commission*, EU:C:2011:62, paragraph 77.

³⁸⁵ COMP/C.37.750/B2, i.e. Commission decision of 29 September 2004 *French Beer* (Case COMP/C.37.750/B2), paragraph 64.

³⁸⁶ Case 86/82 *Hasselblad v Commission*, EU:C:1984:65, paragraph 46; and Case C-277/87 *Sandoz v Commission*, EU:C:1990:6, paragraph 3.

³⁸⁷ Case T-141/89 *Tréfileurope v Commission*, EU:T:1995:62, paragraph 85; and Case C-246/86 *Belasco v Commission*, EU:C:1989:95, paragraphs 10 to 16.

³⁸⁸ OFT Competition law guideline on Agreements and Concerted Practices (OFT401), at paragraph 2.8. See also, for example, Case C-49/92P *Commission v Anic Partecipazioni* EU:C:1999:356, paragraph 80; Cases T-25/95 *Cimenteries CBR SA v Commission* EU:T:2000:77, paragraphs 1389 and 2557; and Case T-28/99 *Sigma Technologie di Rivestimento Srl v Commission*, EU:T:2002:76, paragraph 40.

4.25 In particular, where an agreement has the object of restricting competition (as described below), parties cannot avoid liability for the resulting infringement by arguing that the agreement was never put into effect.³⁸⁹

III. Concerted Practice

4.26 The prohibition on concerted practices prohibits, amongst other things, coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.³⁹⁰

4.27 Although the nature and extent of a concerted practice is addressed in the case law primarily in the context of so-called horizontal relationships (that is, between actual or potential competitors), it is also applicable to vertical relationships (that is, between undertakings at different levels of the supply chain).³⁹¹ The Court of Appeal has observed that:

‘The Chapter I Prohibition catches agreements and concerted practices whether between undertakings at different levels or between those at the same level of commercial operation. An agreement between a supplier and a commercial customer, which may be called a vertical agreement, may breach the same prohibition as much as an agreement between competing suppliers of the same product or same type of product, which can be referred to as a horizontal agreement.’³⁹²

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

³⁸⁹ See, for example, Case 19/77 *Miller v Commission* EU:C:1978:19, paragraphs 7 to 10; *French Beer* [2006] 4 CMLR 577; Case C-277/87 *Sandoz v Commission*, EU:C:1990:6; and Commission Decision 78/921/EEC *WANO Schwarzpulver* OJ [1978] L232/26.

³⁹⁰ Cases 48/69 etc *ICI Ltd v Commission*, EU:C:1972:70, paragraph 64. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 26; *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, [151]–[153]; and Commission Decision 82/367/EEC *Hasselblad (IV/25.757)* [1982] OJ L161/18, in which the Commission stated at paragraph 47 (in a vertical context) that: ‘[f]or a concerted practice to exist it is sufficient for an independent undertaking knowingly and of its own accord to adjust its behaviour in line with the wishes of another undertaking.’

³⁹¹ See, for example, Case T-43/92 *Dunlop Slazenger International Ltd v Commission*, EU:T:1994:259, paragraph 101ff (concerted practice between Dunlop Slazenger and certain of its exclusive distributors in respect of various measures to enforce an export ban). See also the Commission Decision 2003/675/EC *Video Games, Nintendo Distribution and Omega-Nintendo* (COMP/35.587 etc) [2003] OJ L255/33, paragraphs 323–324 (agreements and/or concerted practices between Nintendo and its independent distributors to restrict parallel trade). Other examples include: Commission Decision 72/403/CEE *Pittsburgh Corning Europe (IV/26894)* [1972] L272/35 (where a concerted practice was found between a supplier and a distributor); and Commission Decision 88/172/EEC *Konica (IV/31.503)* [1988] OJ L78/34, paragraph 36 (where there was a concerted practice between a supplier and a distributor).

³⁹² *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, [28].

'It is [...] plain that an undertaking may be passively party to an infringement of the Chapter I Prohibition. That is so, in particular, where it had taken part in a meeting or other contacts, and has done nothing to distance itself from the matters discussed. In those circumstances the undertaking is taken to have tacitly approved of the unlawful initiative, unless it has publicly distanced itself or informed the OFT.'³⁹³

IV. Agreement and/or concerted practice between Fender Europe and [Reseller 1]

Fender Europe's communication of the Fender Pricing Policy

4.29 As set out in section 3.C above, the CMA has found that as part of the Fender Pricing Policy, throughout the Relevant Period, Fender Europe:

- instructed its MI resellers, including [Reseller 1], not to advertise or sell the Relevant Products online below the Minimum Price which it adjusted from time to time;³⁹⁴
- contacted MI resellers, including [Reseller 1], that offered the Relevant Products for sale online at a price below the Minimum Price from time to time and required that any price below the Minimum Price was amended to comply with the Fender Pricing Policy;³⁹⁵ and
- on occasions, threatened sanctions or took enforcement action against MI resellers who did not comply with the Fender Pricing Policy, including [Reseller 1].³⁹⁶

MI Resellers' adherence to the Fender Pricing Policy

4.30 The CMA has reasonable grounds for suspecting that more than 25 MI resellers were subject to, and generally agreed to adhere to the Fender Pricing Policy. However, for reasons of administrative efficiency, the CMA has chosen to focus its assessment of whether there was an agreement and/or concerted practice with Fender Europe which infringed competition law on one MI reseller only, namely [Reseller 1].

4.31 Nonetheless the CMA considers that the Fender Pricing Policy could only be effective in its aim of protecting MI resellers' margins³⁹⁷ if there was general

³⁹³ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [1043].

³⁹⁴ See paragraph 3.66 above.

³⁹⁵ See paragraphs 3.68 and 3.69 above.

³⁹⁶ See paragraph 3.143 above.

³⁹⁷ See paragraph 3.47 above.

adherence to it by all or at least the vast majority of MI resellers making online sales of the Relevant Products.

- 4.32 While some MI resellers occasionally sold the Relevant Products online below the Minimum Price specified by the Fender Pricing Policy, the evidence indicates that overall, adherence to the Fender Pricing Policy by MI resellers was high.³⁹⁸
- 4.33 Based on this evidence, the CMA considers that many MI resellers were willing to comply with the Fender Pricing Policy and other MI resellers who may have wanted to discount online to remain competitive on price, had little choice but to comply.³⁹⁹ However, the CMA makes no findings in respect of MI resellers of the Relevant Products other than [Reseller 1].

Background: [Reseller 1]’s relationship with Fender Europe

- 4.34 [Reseller 1] started advertising and selling Fender Europe’s products online in [X].⁴⁰⁰ It sells the Relevant Products online via its website, [X].^{401, 402}
- 4.35 [Reseller 1] considers Fender is one of two guitar brands that has ‘must-stock’ status.⁴⁰³ As a [X], [Reseller 1] told the CMA that it needs to stock and sell such an ‘iconic’ guitar brand because, as a ‘multi-channel retailer’,⁴⁰⁴ consumers would

³⁹⁸ See paragraph 3.70 above.

³⁹⁹ See paragraph 3.102 above.

⁴⁰⁰ URN C_FEN00552 ([Reseller 1] Section C of response to s.26 Notice), response to question 3(a)(i).

⁴⁰¹ In [X], [Reseller 1] also sold Relevant Products through a second company website, [X]. [Reseller 1] closed this down when the [Reseller 1] business in [X], was closed. URN C_FEN00552 ([Reseller 1] Section C of response to s.26 Notice), response to question 3(a)(ii).

⁴⁰² [Reseller 1 Senior Employee 4] stated in interview that Fender Europe prohibited MI resellers from advertising and selling on third-party websites (e.g., [online marketplace] and/or [online marketplace]) as part of their dealership agreement. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.61, lines 3-11.

⁴⁰³ URN C_FEN00552 ([Reseller 1] Section C of response to s.26 Notice), response to question 8. In interview, [Reseller 1 Senior Employee 4] stated: ‘*I don’t think we would have grown our business without stocking Fender from the start (...) it’s almost a must-have brand; it’s as simple as that.*’ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.31, lines 23-26.

⁴⁰⁴ In this response, [Reseller 1] stated: ‘*[a]s a multi-channel retailer, our online sales strategy is about differentiating ourselves through [X] and through the strength of our customer’s experience. We use our website to make sales and encourage customers to visit our stores. Over the last 5 years there has been a growing demand for 24/7 browsing/shopping and our strategy is to support that. Customers have significantly increased their usage of online resources to research their purchases and search for the best price.*’ URN C_FEN00552 ([Reseller 1] Section C of response to s.26 Notice), in response to question 6 [Text in square brackets added by the CMA]. In interview, [Reseller 1 Senior Employee 4] preferred the term ‘omnichannel’ to refer to [Reseller 1]’s business strategy of having ‘*two channels*’ (...) ‘*online and instore*’ and [Reseller 1] also does ‘*some click and collect business from the website that is fulfilled in store*’. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.53, lines 7-8 and 24-25.

expect [Reseller 1] to have the Fender guitar range available for sale on its website and in its stores.⁴⁰⁵

4.36 [Reseller 1]'s relationship with Fender Europe during most of the Relevant Period was (and still is) based on an ADA dated 1 March 2013 for all of the Relevant Products.⁴⁰⁶ However, neither the ADA nor any other written contractual agreement between Fender Europe and [Reseller 1] in the CMA's possession (including the contract terms which predate the 1 March 2013 ADA) mention the restrictions which formed the basis of the Fender Pricing Policy.

[Reseller 1]'s agreement with the Fender Pricing Policy

4.37 The CMA concludes that Fender Europe entered into an agreement and/or concerted practice with [Reseller 1] that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price.

4.38 This was based on the joint understanding that the Fender Pricing Policy applied to all or at least the vast majority of Fender Europe's UK MI resellers, and that Fender Europe would take steps to ensure that other MI resellers of the Relevant Products also maintained their prices at or above the Minimum Price.

4.39 The agreement and/or concerted practice between Fender Europe and [Reseller 1] lasted from 12 January 2013 at the latest to 17 April 2018 (the Relevant Period).

Fender Europe's requests to [Reseller 1] to raise its prices in accordance with the Fender Pricing Policy and [Reseller 1]'s general compliance with these requests throughout the Relevant Period

4.40 Notwithstanding Fender Europe's efforts to conceal its communications concerning the Fender Pricing Policy,⁴⁰⁷ the evidence (set out in further detail below)⁴⁰⁸ shows that on numerous occasions throughout the Relevant Period, Fender Europe instructed [Reseller 1] verbally or via email to increase its online prices to the Minimum Price and that [Reseller 1] generally complied with these instructions, though not always straight away.

⁴⁰⁵ URN C_FEN00552 ([Reseller 1] Section C of response to s.26 Notice), in response to question 8.

⁴⁰⁶ The ADA appears to have included all of the Relevant Products. For completeness, the CMA notes that Schedule 3 of the ADA dated 1 March 2013 shows the agreed stocking plans for [Reseller 1] which did not include the Jackson Pro (JPR), Jackson JS (JJS), Charvel Desolation (DES), Guild Electric Guitars (GEL), Takamine G Series (TK1), Takamine Pro (TK2) and Ovation Pro (OV2). However, the CMA does not take this as an indication that the models in question were not covered by the ADA. URN E_FEN002451 (ADA 2013 between Fender Musical Instruments Europe Ltd and [Reseller 1] dated 1 March 2013).

⁴⁰⁷ See paragraphs 3.184 through 3.191 above.

⁴⁰⁸ See paragraphs 4.41, 4.70, 4.115, 4.116, 4.118, 4.119, 4.132, 4.134, 4.146, 4.147, 4.148, 4.151 and 4.152 below.

- 4.41 A senior employee of [Reseller 1], [Senior Employee 4] explained in interview that [Reseller 1] was regularly contacted by Fender Europe, and that communications tended to be oral⁴⁰⁹ (mostly by telephone)⁴¹⁰ and only occasionally by email.⁴¹¹
- 4.42 When asked in interview to describe how Fender Europe communicated the Fender Pricing Policy to him, [Reseller 1 Senior Employee 4] stated, '[Fender Europe was verbally] asking us to adjust our prices accordingly. If we didn't, then (...) we get called and asked why. And, you know, its—very important account for us. We (...) felt we had to toe the line.'⁴¹²

The importance of stocking the Relevant Products to [Reseller 1] and the general fear of sanctions in case of non-compliance with the Fender Pricing Policy on [Reseller 1]'s part throughout the Relevant Period

- 4.43 [Reseller 1 Senior Employee 4] described in interview that Fender Europe was its 'biggest supplier' and 'it would have been very difficult for [[Reseller 1]] to exist without them (...) [because Fender Europe was] responsible for delivering a larger part of our profit (...) I don't think we would have grown our business without stocking Fender from the start (...) it's almost a must-have brand; it's as simple as that.' [Reseller 1 Senior Employee 4] also said, 'we could deal without [Fender] but you wouldn't want to.'⁴¹³
- 4.44 [Reseller 1 Senior Employee 4] confirmed in interview that [Reseller 1] usually changed its online prices in response to Fender Europe's instructions for fear of sanctions, though not always straight away.⁴¹⁴ He also stated in interview that

⁴⁰⁹ [Reseller 1 Senior Employee 4] stated in interview that Fender Europe communicated to him [mainly] 'verbally'. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.77, line 26 [Text in square brackets added by the CMA].

⁴¹⁰ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.98, lines 13-15.

⁴¹¹ On 16 April 2015 [Fender Europe Employee 2] forwarded an email exchange with [Reseller] to [Fender Europe Former Senior Employee 1] stating: '[s]poke with [Reseller 1 Senior Employee 1] last night and [Reseller 1]'s list will appear today.' The CMA concludes that the reference in [Fender Europe Employee 2]'s email to '[Reseller 1 Senior Employee 1]' was in relation to [Senior Employee 1] of [Reseller 1], and the reference to '[Reseller 1]' to [Reseller 1]. This was in response to Fender Europe's introduction and implementation of the new pricing structure the previous day, 15 April 2015. URN E_FEN002648 (Email exchange between [Employee 2] of Fender Europe, [Reseller] and [Former Senior Employee 1] of Fender Europe dated 2-16 April 2015). The date of 15 April 2015 for the introduction and implementation of the new pricing structure is cited in URN E_FEN002650 (Email from [Fender Europe Employee 2] to [Reseller] dated 2 April 2015).

⁴¹² URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.78, lines 1-4 [Text in square brackets added by the CMA].

⁴¹³ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.31, lines 6-7, 17-18, 23-26 and page 83, lines 8-9 [Text in square brackets added by the CMA].

⁴¹⁴ When [Reseller 1 Senior Employee 4] was asked in interview what his thoughts were if [Reseller 1] had not changed its prices by Fender Europe's deadline, he stated: '[t]hey would've been onto us saying, Why haven't you changed your pricing?'. Later in the interview, in relation to specific email evidence, [Reseller 1 Senior Employee 4] described how [Fender Europe Employee 2] was again requesting [Reseller 1] to raise its prices, stating: [Fender Europe Employee 2]

although he could not recall Fender Europe ever having imposed any actual sanctions on [Reseller 1] for non-compliance with the Fender Pricing Policy,⁴¹⁵ [Reseller 1] had always been concerned about the general prospect of sanctions.

- 4.45 This concern partly stemmed from a discussion [Reseller 1 Senior Employee 4] had had with [Fender Europe Former Senior Employee 1]. [Reseller 1 Senior Employee 4] described how [Fender Europe Former Senior Employee 1] had told him that there was a *'certain retailer that we [Fender Europe] are going to make an example of'*.⁴¹⁶ [Reseller 1 Senior Employee 4] said that *'no names were named'* but that he *'could have a guess but I don't know who it was.'*⁴¹⁷
- 4.46 [Reseller 1 Senior Employee 4] went on to say in this connection that *'there was a retailer in [X] who ended up getting their credit limit cut back to £1,000 or something like that. (...) that was a company called [Reseller], um, who (...) – [X]. (...) I'm saying, "I think" as in I'm fairly, fairly certain that they got the – their credit limit cut right back to the point where they couldn't do any business with them [Fender Europe]'*.⁴¹⁸
- 4.47 This evidence shows that [Reseller 1] was concerned that Fender Europe had imposed sanctions on [Reseller] for non-compliance with the Fender Pricing Policy.⁴¹⁹ [Reseller 1]'s suspicion that Fender Europe had actually imposed

was *'asking the same thing. "These new prices are [to be] reflected on web pages as soon as possible." So, it's really haphazard you know; put your prices up now. I don't know how quickly we would have done that by the way.'* [Reseller 1 Senior Employee 4] also stated that Fender Europe would have *'probably checked after a week and said – (...) – I don't think they would have expected us to change it that day but – (...) – when they say a price increase, (...) – if you were looking at every retailer, I don't think anybody would really want to be the first to put their prices up.'* [Reseller 1 Senior Employee 4] also referred to *'how much pressure they [Fender Europe] would have put on us [[Reseller 1]]'* and *'a top tier of dealers'* to comply with Fender Europe's requests as this would make it *'much easier to get everyone to – to follow. "Look, they've done it, so why haven't you done it?'* URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), page 225, lines 2-3, page 261, lines 11-14, page 262, lines 7-12 and 25-26, and page 263, lines 8-9 [Text in square brackets added by the CMA].

⁴¹⁵ The CMA notes that [Reseller 1 Senior Employee 4] described in further detail that Fender Europe threatened [Reseller 1] with sanctions. (See paragraph 4.52 below).

⁴¹⁶ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.96, lines 16-17 [Text in square brackets added by the CMA].

⁴¹⁷ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.96, lines 14 and 18.

⁴¹⁸ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.97, lines 1-8 [Text in square brackets added by the CMA].

⁴¹⁹ The evidence available to the CMA indicates that [Reseller] was not complying with the Fender Pricing Policy. For example, on 20 October 2014, [Reseller 1 Senior Employee 1] emailed [Reseller 1 Senior Employee 4]: *'[Reseller] causing chaos dropped all pricing inc Fender and [X]! Fender got a Lawyers letter demanding money for loss of business and threatened the trade with OFT!'* [Reseller 1 Senior Employee 4] replied: *'[g]oing out of business sale?'* [Reseller 1 Senior Employee 1] responded: *'[t]his is a strategy to stop any SSPs'*. URN E_FEN000542 (Email exchange between [Reseller 1 Senior Employee 4] to [Reseller 1 Senior Employee 1] dated 20 October 2014). [Reseller 1 Senior Employee 4] told the CMA in interview (in relation to different email evidence) that *'SSP' meant 'our till price, if you like, our sale price'*. When asked whether this would have been MRSP minus 4%, he replied affirmatively and stated

sanctions on [Reseller] was likely to increase [Reseller 1]'s concern that it may also face sanctions from Fender Europe if it did not adhere to the Fender Pricing Policy, irrespective of whether such sanctions had indeed been imposed.

- 4.48 As noted above, the credible threat of sanctions was an extremely serious matter for [Reseller 1], as they would have had the potential to have a considerable adverse impact on [Reseller 1]'s business.⁴²⁰ When [Reseller 1 Senior Employee 4] was asked in interview what would have been the result if a reseller had not complied with the Fender Pricing Policy, he stated that, in his view, *'they [Fender Europe] would have gone through with their perceived threats of, of cutting credit limits, cutting availability of stock or allocation of stock at, at launch, marketing activities, um, and then I think, ultimately, closing your account.'*⁴²¹ Because Fender Europe was [Reseller 1]'s [X], [Reseller 1 Senior Employee 4] stated that *'it would be a big struggle'* to exist without them⁴²² and therefore it was *'kind of easier not to rock the boat'* than risk losing this business. To this end, he stated: *'why would you poke a bear, you know?'*⁴²³
- 4.49 When [Fender Europe Employee 2] was asked in interview whether Fender Europe would impose sanctions against resellers who did not comply with Fender Europe's request to change its pricing, he said *'that's where [Fender Europe Former Senior Employee 1] would come in'* - it was *'way above'* his own pay grade.⁴²⁴ He stated that non-compliance with Fender Europe's requests to change prices was *'never an issue'* for his resellers, which included [Reseller 1],⁴²⁵

that 'SSP', 'RRP' and 'MSRP' meant the same thing. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.137, lines 4-5 and 9, and p.203, lines 1-3 and 13-15 [Emphasis added by the CMA]. The CMA concludes from [Reseller 1 Senior Employee 1]'s statement, *'[t]his is a strategy to stop any SSPs'*, that [Reseller] was acting in defiance of Fender Pricing Policy which appears to have led to Fender Europe applying at least one sanction against the non-compliant MI reseller (i.e. reduction of its credit limit).

⁴²⁰ See paragraph 4.43 above.

⁴²¹ By way of example, [Reseller 1 Senior Employee 4] stated, *'[t]he threat was always credit limit reduced, maybe marketing spend. (...) I think because we were a big retailer, we did command a decent amount of marketing -- marketing spend, when we opened at [X], we ran (...) a campaign on the buses with Fender and some [X] station advertising and such like, which was important to us at the time and if we weren't toeing the line with them, they would quite easily have turned round and go, "I'm sorry, we're not going to -- we're not going to do that". (...) You know, and that would probably have cost us £30,000 on our own to do.'* URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.140, lines 23-26, p.322 lines 17-25 and p.323 lines 3-4.

⁴²² URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.31, lines 17-20.

⁴²³ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.95, lines 14 and 26 and p.96, line 1.

⁴²⁴ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.286, lines 5 and 9.

⁴²⁵ In interview, [Fender Europe Employee 2] stated that the accounts he managed included *'[Reseller], [Reseller], [Reseller], [Reseller], and (...) a couple of [MI resellers] with singular accounts because I'd known them for a few years or they were local to me'*. URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.17, lines 20-23 [Text in square brackets added by the CMA]. In interview, [Reseller 1 Senior Employee 4] said

'although it could be frustrating and tough sometimes', since 'of course 'they're going to try [and not comply with the Minimum Price] because they just want to carry on (...) but invariably, the buck would always stop with [Fender Europe Former Senior Employee 1], if need be.'^{426, 427}

4.50 [Fender Europe Employee 2] explained further:

'I do not recall [Fender Europe Former Senior Employee 1] expressly saying that there would be consequences if a UK Reseller did not raise their prices in line with Fender Europe's expectation. But I believe that the UK Reseller may have understood that this might be the case. There were times when I might have told a dealer that [Fender Europe Former Senior Employee 1] was threatening [sic] to cut off supply if they did not increase their prices by a particular date. The UK Reseller might have thanked me for passing the message on as they did not want to get a call from [Fender Europe Former Senior Employee 1]. I would not have passed on the name of the complaining resellers.'⁴²⁸

4.51 The CMA concludes from this that MI resellers, including [Reseller 1], did generally comply with Fender Europe's requests and would raise their prices of the Relevant Products to the Minimum Price indicated on the Fender Europe price lists, for fear of what would happen otherwise (e.g. sanctions imposed by [Fender Europe Former Senior Employee 1]).

Threats of sanctions (direct, indirect and/or implied) made by Fender Europe to [Reseller 1] during the Relevant Period

4.52 [Reseller 1 Senior Employee 4] confirmed in interview that Fender Europe had actually threatened [Reseller 1] directly with certain sanctions for non-adherence to the Fender Pricing Policy, stating:

'Fender leaned into us really heavily to say that, you know, they didn't want to see less than 4% [an advertised price which was lower than the MSRP minus 4%] (...) It was threatened that we would lose benefits like marketing support or they would

the Fender Europe's requests about the MAP pricing was communicated verbally as, *"[t]his is what it is" (...) we [[Reseller 1]] just had to, kind of swallow it.'* URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.119, lines 13-15 [Text in square brackets added by the CMA].

⁴²⁶ In an interview with the CMA, [Fender Europe Former Senior Employee 1] stated: *'We do not really have sanctions as such. If you look at our dealer base you will see very clearly that we have not closed anybody down for a long while. We tend to let the market adjust.'* URN C_FEN00776 (Transcript of interview with [Fender Europe Former Senior Employee 1] dated 18 April 2018), p.31, lines 8-10. The CMA notes that in this instance, [Fender Europe Former Senior Employee 1] was not referring to sanctions relating to non-adherence with the Fender Pricing Policy, but more broadly about contraventions of Fender Europe's ADA.

⁴²⁷ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.287, lines 3-6 [Text in square brackets added by the CMA].

⁴²⁸ URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 15.

cut our credit limit, you know. They would just make it more difficult for us to do business.⁴²⁹

4.53 While other threats of sanctions had not necessarily been expressed in direct terms by Fender Europe, [Reseller 1 Senior Employee 4] stated that [Reseller 1] *'were always really mindful of (...) veiled threats'* and that [Reseller 1]'s approach was that it was *'kind of easier [for [Reseller 1]] not to rock the boat'* because *'we saw it as too important a part of our business to actually threaten ourselves.'*⁴³⁰

4.54 The CMA notes that there was, therefore, a clear understanding on the part of [Reseller 1] that sanctions would be applied if it did not comply with the Fender Pricing Policy, based on at least one instance of a direct threat of such sanctions by Fender Europe to [Reseller 1].

Occasional pricing below the Minimum Price by [Reseller 1] during the Relevant Period is no impediment to a finding of an agreement and/or concerted practice with Fender Europe

4.55 There is some evidence which shows that [Reseller 1] did not price the Relevant Products in accordance with the Fender Pricing Policy at all times. On occasion, throughout the Relevant Period, [Reseller 1] lowered its price for certain of the Relevant Products to below the Minimum Price, sometimes to 'match' its competitors lower prices, having first informed Fender Europe of its intention to do so.⁴³¹ However, [Reseller 1] tended to revert to the Minimum Price when 'caught' for fear of sanctions.⁴³² This shows that it did consider there to be an agreement

⁴²⁹ [Reseller 1 Senior Employee 4] also stated that this threat was communicated 'verbally'. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.77, lines 7-8, 13-15 and 26 [Text in square brackets added by the CMA].

⁴³⁰ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.309, lines 25-26 and p.95, lines 8-14.

⁴³¹ For example, see paragraph 4.147 below. In interview, when asked about an internal [Reseller 1] email dated 5 October 2017, [Reseller 1 Senior Employee 4] confirmed that Fender Europe had given [Reseller 1] permission (*'the green light'*) to discount the prices of Jackson guitars. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.292, line 22 and p.293, line 21. See also the evidence from 23 November 2017 where [Fender Europe Employee 8] sent an internal Fender email to [Fender Europe Senior Employee 1] stating: *'Just FYI and between us – I think [Reseller 1] are trying to match the price on a [Reseller] custom order to nick the sale – trouble is it's now 25% more expensive...'*. [Fender Europe Senior Employee 1] replied: *'On Tuesday [Reseller 1 Senior Employee 1] was stating that sales of £2k+ instruments for them had died right back.'* URN E_FEN003073 (Email exchange between [Fender Europe Employee 8] and [Fender Europe Senior Employee 1], copying [Fender Europe Employee 14], dated 23 November 2017). See also the internal [Reseller] email where [Employee] emailed [Employee] under the subject line *'[Reseller] + [Reseller] + [Reseller 1]... We are the ONE one's [sic] at MAP in the UK'*. [Employee] included screenshots and links to websites of [Reseller] and other resellers, including [Reseller 1], showing that [Reseller 1] was cheating on the Fender Pricing Policy. URN E_FEN000223 (Email from [Employee] to [Employee of Reseller] dated 29 March 2018). Attachments: URN E_FEN000224, URN E_FEN000225, URN E_FEN000226 and URN E_FEN000227.

⁴³² For an example of inference evidence indicating that [Reseller 1] most likely reverted to the Minimum Prices when 'caught', rather than risk [Reseller 1] put on stop by Fender - see footnote 414 above.

and/or concerted practice between it and Fender Europe that it would generally implement the Fender Pricing Policy. In any event, based on the totality of the evidence, incidents of [Reseller 1] pricing below the Minimum Price temporarily were normally limited to a small subset of the Relevant Products and focussed on different products over time.⁴³³

4.56 Furthermore, [Reseller 1]’s temporary non-compliance with the agreement and/or concerted practice for certain Relevant Products at certain times (in the form of temporary ‘price-matching’ and/or other temporary ‘cheating’) does not preclude the finding that an agreement and/or concerted practice existed.⁴³⁴

[Reseller 1] monitoring and reporting other MI resellers who did not comply with the Fender Pricing Policy during the Relevant Period

4.57 As set out below,⁴³⁵ the evidence shows that [Reseller 1] was actively monitoring its competitors’ online pricing. On numerous occasions during the Relevant Period, [Reseller 1] reported other MI resellers to Fender Europe for advertising or selling the Relevant Products online below the Minimum Price. This, too, confirms that [Reseller 1] understood there to be an agreement and/or concerted practice with Fender Europe in relation to the Fender Pricing Policy which meant that it (and other MI resellers) would not advertise or sell the Relevant Products below the Minimum Price.

Detailed evidence by year supporting a finding of agreement and/or concerted practice between [Reseller 1] and Fender Europe throughout the Relevant Period

4.58 The CMA notes that, based on the evidence, [Fender Europe Former Senior Employee 1] directed Fender Europe staff never to write anything down in connection with the Fender Pricing Policy. Notwithstanding this, the CMA sets out below documentary and other evidence (set out separately for each year during the Relevant Period) which shows that there was an agreement and/or concerted

⁴³³ For example, on 21 November 2017, [Employee] ([Reseller]) forwarded a [Reseller 1] email under the subject line ‘Black Friday Deals - £280 off Fender Pink Paisley Telecasters’ to [Fender Europe Employee 5]. In it, [Employee] complained: ‘[t]his deal from [Reseller 1] is below our cost. Can we have the same deal? We will not be able to take the three we have on order if not I’m afraid as our cost is £805.00 inc VAT on each one.’ URN E_FEN003069 (Email from [Employee] ([Reseller]) to [Employee 5] of Fender Europe dated 21 November 2017). In a separate example of temporary non-compliance, two days later [Fender Europe Employee 8] sent an internal Fender Europe email to [Fender Europe Senior Employee 1], stating: ‘Just FYI and between us – I think [Reseller 1] are trying to match the price on a [Reseller] custom order to nick the sale (...)’ URN E_FEN003073 (Email exchange between [Fender Europe Employee 8] and [Fender Europe Senior Employee 1], copying [Fender Europe Employee 14], dated 23 November 2017).

⁴³⁴ See paragraph 4.55 above.

⁴³⁵ See the detailed evidence of [Reseller 1] actively monitoring its competitors’ online pricing starting with evidence dating from 2013 (at paragraph 4.77) and continuing up to the end of the Relevant Period (at paragraph 4.159), below.

practice between Fender Europe and [Reseller 1] that [Reseller 1] would adhere to the Fender Pricing Policy.

4.59 In addition to the documentary and other evidence set out below for each year of the Relevant Period, witness evidence also confirms the CMA's finding that there was an agreement and/or concerted practice between Fender Europe and [Reseller 1] that [Reseller 1] would adhere to the Fender Pricing Policy throughout the Relevant Period.⁴³⁶

4.60 In interview, [Reseller 1 Senior Employee 4] confirmed that the Fender Pricing Policy was introduced in '2011 or 2012'.⁴³⁷ He stated that to the best of his knowledge, it was communicated to [Reseller 1] verbally only, at around the time when the SDAs were being formalised.⁴³⁸

4.61 When asked how [Reseller 1] had become aware of the Fender Pricing Policy, [Reseller 1 Senior Employee 4] explained that Fender was '*almost telling us that it [the Fender Pricing Policy] was going to happen before it happened and that they [Fender] would be going to police pricing.*'⁴³⁹

'They [Fender Europe] talked about it and, and around it for quite a while, (...) and then they said, "Well, we are going to introduce this agreement" [the 1 March 2013 ADA]. (...) and that, that -- you know, once they issued the agreement, they then said, "Well, by -- we're going to issue a price list on X. We expect you to comply in a (...) matter of days"'.⁴⁴⁰

4.62 [Reseller 1 Senior Employee 4] further explained that, '*what they [Fender Europe] impressed on us pretty heavily (...) from the first part of issuing an SDA was that they wanted to see us, (...) not advertise -- this was never in an SDA but it's to the best of my knowledge, that they wanted to see us at not less than 4% off MSRP. That was communicated to us very strongly.*'⁴⁴¹

⁴³⁶ See paragraphs 4.60 to 4.67 below.

⁴³⁷ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.115, line 1.

⁴³⁸ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.118, lines 1-25.

⁴³⁹ [Reseller 1 Senior Employee 4] also described how Fender Europe went around to the bigger resellers [ahead of implementation] saying: '*[a]re you going to do it? Because if you don't, there'll be consequences*'. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.119, lines 4-6 and p.121, lines 12-13. [Emphasis added by the CMA] [Text in square brackets added by the CMA].

⁴⁴⁰ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.117, lines 7-11 [Text in square brackets added by the CMA].

⁴⁴¹ [Reseller 1 Senior Employee 4] continued to explain that, '*they were, basically, saying that 4%, "Less than that is as low as we want to see an advertisement" -- well, at an online price. So, I think that's what it related to.*' URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.75, line 26 to p.76, line 4 and p.76, lines 12-14 [Text in square brackets added by the CMA].

- 4.63 When asked whether there had been any discussions between Fender Europe and [Reseller 1] about the content of the Fender Pricing Policy, [Reseller 1 Senior Employee 4] stated, '*[i]t was, kind of, "This is what it is". (...) we just had to, kind of, swallow it.'*
- 4.64 [Reseller 1 Senior Employee 4] further explained that Fender Europe was regularly asking [Reseller 1] '*to adjust our prices accordingly. If we didn't, then (...) we'd get called and asked why. And, you know, it's -- very important account for us. We, we just, (...) kind of, felt we had to toe the line.*'⁴⁴²
- 4.65 In interview, [Fender Europe Employee 2] confirmed that [Reseller 1] tended to adhere to the Fender Pricing Policy. When asked who had issued the instructions to MI resellers, [Fender Europe Employee 2] explained that he would be told to contact his MI retailers [including [Reseller 1]] to ask them to implement the Fender Pricing Policy by a particular date by his line manager. He went on to explain, '*[m]ine always did so it was really hard for me to sort of surmise about this, because these are professional people I deal with and they're really big accounts, and it was never an issue, to be honest.*'⁴⁴³
- 4.66 The agreement and/or concerted practice between Fender Europe and [Reseller 1] continued until the date when the CMA launched its formal investigation on 17 April 2018. This is supported by an email exchange between [Reseller 1] and Fender Europe dated 5-6 April 2018⁴⁴⁴ which shows that [Reseller 1] was still implementing the Fender Pricing Policy at that point. It is also supported by [Reseller 1 Senior Employee 4] confirming in interview that the Fender Pricing Policy applied and was enforced throughout the Relevant Period:
- 'I think it was from (...) your period of investigation, if you like. I mean, I think it, it was from the issuing of an SDA to, you know (...) to April last year, you know.'⁴⁴⁵
- 4.67 Similarly, [Fender Europe Employee 2] stated in interview that '*it [the start of the CMA's formal investigation] plummeted the price*' and after 18 April 2018 '*people [MI resellers] could do what they want. (...) And a lot of people did do what they want and it decimated the industry for quite a while, if I'm honest with you.*'^{446, 447}

⁴⁴² URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.119, lines 13-15 and p.78, lines 1-4. [Text added by the CMA]

⁴⁴³ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.286, line 21 to p.287, line 3.

⁴⁴⁴ URN E_FEN003134 (Email exchange between [Reseller 1] and Fender Europe dated 5-6 April 2018).

⁴⁴⁵ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.97, lines 17-19.

⁴⁴⁶ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.107, lines 5-83 [Text in square brackets added by the CMA].

⁴⁴⁷ The CMA has not considered the implications of this phrase further as there is no need for the CMA to make a finding in relation to effect.

4.68 The evidence above is supplemented by additional evidence for each year which shows that the agreement and/or concerted practice between Fender Europe and [Reseller 1] that [Reseller 1] would adhere to the Fender Pricing Policy continued throughout the Relevant Period.

2013

4.69 In 2013, the additional supporting evidence comprises:

- internal [Reseller 1] communications showing that it complied with the Fender Pricing Policy by keeping prices for the Relevant Products at the Minimum price, and agreed to change its prices following instruction from Fender Europe;
- [Reseller 1] monitoring other MI resellers' prices and complaining to Fender Europe when they fell below the Minimum Price together with interview evidence from an employee of Fender Europe that it would take action on complaints from its MI resellers to ensure MI resellers whose prices were below the Minimum Price reverted to the Minimum Price; and
- internal Fender Europe correspondence showing that it considered [Reseller 1] was adhering to the Fender Pricing Policy.

4.70 Internal [Reseller 1] communications in 2013 show that [Reseller 1] complied with the Fender Pricing Policy by keeping prices for the Relevant Products at the Minimum Price, even on occasions when doing so was likely to be detrimental to its business. For example, on 12 January 2013, [Reseller 1 Senior Employee 4], in response to an email from his colleague [Reseller 1 Employee 1] alerting him to 'overstocks on' certain Fender guitar models stated:

'Under the terms of the new agreement we'll have to be very careful about reducing prices.'⁴⁴⁸

4.71 In interview, [Reseller 1 Senior Employee 4] explained that this statement was referring to the fact that '*Fender had told us [[Reseller 1]] that it was the price less 4%, and to clear them [the overstock] out, you would have to have knocked 10% off the price of those guitars*', which [Reseller 1] felt they could not do because of Fender's new SDA and '*MAP policy*'.⁴⁴⁹

⁴⁴⁸ URN E_FEN000002 (Email exchange between [Employee 1] and [Senior Employee 4] of [Reseller 1] on 12 January 2013).

⁴⁴⁹ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.150, lines 10-12 and p.149, lines 14-23 [Text in square brackets added by the CMA].

- 4.72 He explained that reducing online prices for the products in question (which would have been [Reseller 1]’s preferred option), ‘*would have immediately (...) put us [[Reseller 1]] (...) under the spotlight, basically*’.⁴⁵⁰ In order to avoid this, [Reseller 1] considered paying an incentive to its in-store sales people aimed at promoting the products concerned instead. This was despite acknowledging that by discounting the Relevant Products online, [Reseller 1] ‘*probably would sell through them much, much, quicker*’.⁴⁵¹
- 4.73 Similarly, an internal email from [Employee 1] of [Reseller 1] on 19 February 2013, shows that [Reseller 1] agreed to change its prices following Fender Europe’s request. The email with the subject line ‘*Gretsch Prices*’ to [Reseller 1 Employee 3] stated:
- ‘Could you do me a big favour and change some Gretsch prices on [X] please? I changed them a week or so ago but [X] appears not to have saved/broadcast the changes. Fender Europe are on our case about changing them but I’m not going to have the time today to get it done. Attached is the price list with everything filtered and SKU’s [sic] add with the RRP, Sell and Net prices.’⁴⁵²
- 4.74 Attached to this email was an Excel price list titled ‘*Blue Line All with SKUs Jan-13*’ showing GBP and EUR MSRP for Gretsch and other guitars.⁴⁵³
- 4.75 [Reseller 1 Senior Employee 4] confirmed in interview that this attachment showed ‘*Fender’s MSRP, a dealer cost, a net cost, which is [Fender’s] settled cost, and a sell price*’.⁴⁵⁴ When asked about his interpretation of [Reseller 1 Employee 1]’s request to [Reseller 1 Employee 3] to change some Gretsch prices because, ‘*Fender are on our case about changing them*’, [Reseller 1 Senior Employee 4] stated that it meant, “‘**[y]ou need to change those prices now**’”.⁴⁵⁵
- 4.76 Based on this evidence, the CMA concludes that [Reseller 1] agreed to increase its prices to the Minimum Price for these Relevant Products on request from Fender Europe.

⁴⁵⁰ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.149, lines 22-23 [Text in square brackets added by the CMA].

⁴⁵¹ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.150, line 14 to p.151, line 3.

⁴⁵² URN E_FEN000005 (Email from [Employee 1] to [Employee 3] of [Reseller 1] dated 19 February 2013).

⁴⁵³ URN E_FEN000006 (Excel spreadsheet entitled: ‘*Blue Line All with SKUs Jan-13*’, undated). The CMA notes that the email confirms that [Reseller 1] was familiar with the term ‘MSRP’ and actually referred to it in some of its communications with Fender.

⁴⁵⁴ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.159, lines 3-4.

⁴⁵⁵ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.161, line 12. [Emphasis added by the CMA]

- 4.77 From the start of the Relevant Period, [Reseller 1] monitored other MI resellers' prices of the Relevant Products and complained to Fender Europe about those prices (typically online) which were advertised below the relevant Minimum Price. Often, it did this by sending screenshots or links of other MI resellers' websites.⁴⁵⁶ While [Reseller 1] did not always provide any comment on or explanation for the links to Fender Europe, it was clear that [Reseller 1] wanted Fender Europe to intervene and ensure that the relevant MI reseller reverted to the Minimum Price.⁴⁵⁷ These communications confirm that [Reseller 1] understood there to be an agreement and/or concerted practice in relation to the Fender Pricing Policy which meant it would not sell or advertise the Relevant Products below the Minimum Price.
- 4.78 For example, on 24 April 2013, [Reseller 1 Employee 1] sent an email to [Fender Europe Employee 2], asking about the price of £419 for a LH Arctic White Standard Stratocaster. The email contained seven links from MI resellers' sites showing the advertised price for this Fender product.⁴⁵⁸ While [Reseller 1 Employee 1] did not explicitly ask Fender Europe to take action to increase these MI resellers' prices for the Relevant Products to the Minimum Price, the CMA concludes from this email that [Reseller 1] expected Fender Europe to take action to ensure that the MI resellers concerned raised their prices to at least the Minimum Price in accordance with the Fender Pricing Policy.⁴⁵⁹
- 4.79 The evidence from 2013 also shows that Fender Europe trusted [Reseller 1] to adhere to the Fender Pricing Policy by keeping to the Minimum Price, and even considered it appropriate to reward it for doing so by offering it six products at a lower trade price. On 20 September 2013, [Fender Europe Employee 24] sent an internal Fender Europe email under the subject line '*USA EVH – one off mega deal*' to [Fender Europe Former Senior Employee 1] and [Fender Europe Employee 4] that provided MSRP and DLR [meaning dealer] pricing information for six EVH Wolfgang and Wolfgang products. [Fender Europe Employee 24] stated:
- 'We've got a few skus of slow turning EVH that we'd like to get rid of – absolutely nothing wrong with it at all.'

⁴⁵⁶ See paragraph 3.90 above.

⁴⁵⁷ RPM systems which operated in a similar way (monitoring of resellers' prices by both the manufacturer and resellers themselves and 'complaints' by resellers if any of their competitors did not stick to the 'agreed' minimum prices) were described in the recent Commission decisions of 24 July 2018, e.g. Case AT.40465 *Asus*, paragraph 60; paragraph 78 and Case AT.40181 *Philips*, paragraph 38. See to this effect also *Commercial refrigeration*, paragraph 5.116.8.

⁴⁵⁸ URN E_FEN000009 (Email from [Employee 1] of [Reseller 1] to [Employee 2] of Fender Europe dated 24 April 2013). See footnote 433 above.

⁴⁵⁹ Commission Decisions of 24 July 2018 in Case AT.40465 *Asus* and Case AT.40181 *Philips*. *Infra*.

[Fender Europe Employee 13] and I are **keen for it to go to a [SIC] EVH dealer who “deserves” the deal and who in turn wont abuse this offer and keep in line with MSRP.**

The skus we would offer are below with current MSRP and dealer price.⁴⁶⁰

- 4.80 Less than a week later, a separate internal Fender Europe email exchange showed that [Reseller 1] was one of the MI resellers who Fender Europe considered deserved to be rewarded for its adherence to the Fender Pricing Policy.
- 4.81 On 25 September 2013, [Fender Europe Employee 24] emailed [Fender Europe Former Senior Employee 1] and [Fender Europe Employee 4] again – this time providing more detailed pricing information for these six Relevant Products, including a new column showing Fender Europe’s ‘*Promo Price*’. [Fender Europe Employee 24] stated: ‘*[p]lease see below the promo price.... It’s very important we agree with the dealer to respect MSRP. What do you think?*’. Later that day, [Fender Europe Former Senior Employee 1] responded to [Fender Europe Employee 24]’s email, addressing his instructions specifically to [Fender Europe Employee 4]: ‘*[o]ffer them out to [Reseller], [Reseller 1] [[Reseller 1]] etc and let them make a bit extra profit.*’⁴⁶¹
- 4.82 [Fender Europe Employee 24]’s recommendation to [Fender Europe Former Senior Employee 1] that the ‘*one off mega deal*’ should go to an EVH dealer who ‘*deserves the deal and who in turn wont [sic] abuse this offer and keep in line with MSRP*’ shows that Fender Europe monitored compliance with the Fender Pricing Policy (the Minimum Price is here referred to as MSRP) and formed views on which MI resellers showed the highest levels of adherence to it. [Fender Europe Former Senior Employee 1]’s subsequent instruction to let [Reseller 1] ‘*make a bit of extra profit*’ indicates that he wanted to reward [Reseller 1] for its continued agreement with and continued adherence to the Fender Pricing Policy.

2014

- 4.83 The additional evidence for 2014 continues to show that [Reseller 1] agreed with, and/or generally adhered to, the Fender Pricing Policy. In 2014, the supporting evidence comprises:

⁴⁶⁰ URN E_FEN002540 (Email exchange between [Fender Europe Employee 24], [Fender Europe Former Senior Employee 1] and [Employee 4] of Fender Europe dated 26 September 2013). [Emphasis added by the CMA]

⁴⁶¹ URN E_FEN002540 (Email exchange between [Fender Europe Employee 24], [Fender Europe Former Senior Employee 1] and [Employee 4] of Fender Europe dated 26 September 2013).

- [Reseller 1] monitoring other MI resellers' prices and complaining to Fender Europe when they fell below the Minimum Price.

- 4.84 For example, on 8 March 2014, [Employee 2] of [Reseller 1] sent an email to [Fender Europe Employee 2] with the subject line '*[d]eal on US EVH's?*' asking, '*[h]as there been a deal on these?*' Under the message were links to two product listings from the [Reseller] site: black and white versions of the EHV Wolfgang USA Custom Set Neck guitars.⁴⁶²
- 4.85 The CMA concludes that the term '*deal*' means that the MI reseller in question was advertising the Relevant Products concerned at a low price, and in all likelihood below the Minimum Price. [Reseller 1] was highlighting this to Fender Europe and questioning why this MI reseller was able to advertise at such a low price.
- 4.86 Then on 4 June 2014, [Reseller 1 Senior Employee 4] emailed [Fender Europe Former Senior Employee 1] and [Fender Europe Employee 2] complaining that [Reseller] [a MI reseller based in another EU Member State] was advertising and selling a Fender 60th Anniversary model of the Fender Standard Stratocaster, on an exclusive basis, at a lower price than the Minimum Price. [Reseller 1 Senior Employee 4] stated: '*[s]o wrong on so many levels... Selling a higher spec guitar and cutting your core product out by positioning it lower. [...] Is he even allowed to do that?*'.⁴⁶³
- 4.87 In interview, [Reseller 1 Senior Employee 4] explained that [Reseller] did '*a lot of business in the UK*'.⁴⁶⁴ This evidence shows that [Reseller 1] continued to monitor and complain to Fender Europe about MI resellers who sold Relevant Products in the UK below the Minimum Price (including MI resellers based in other EU Member States who also sold into the UK).⁴⁶⁵

2015

- 4.88 Evidence for 2015 continues to show that [Reseller 1] agreed with and adhered to the Fender Pricing Policy. In 2015, the additional supporting evidence comprises:

⁴⁶² URN E_FEN003204 (Email from [Employee 2] of [Reseller 1] to [Employee 2] of Fender Europe dated 8 March 2014).

⁴⁶³ URN E_FEN003211 (Email between [Senior Employee 4] of [Reseller 1]; [Senior Employee 1] of [Reseller 1]; [Fender Europe Former Senior Employee 1]; [Fender Europe Employee 2] and [Senior Employee 2] of [Reseller 1] dated 4 June 2014) [Text in square brackets added by the CMA] [Emphasis added by the CMA].

⁴⁶⁴ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.204, lines 10-11.

⁴⁶⁵ URN E_FEN000035 (Email exchange between [Employee], [Employee] and [Employee] of [Reseller] dated 11 July 2014) and attachment: URN E_FEN000034 (Spreadsheet titled '*Fender Price Check 04-07-14*') [Text in square brackets added by the CMA]. [Emphasis added by the CMA]. URN E_FEN000064 (Internal [Reseller] email from [Employee] to [Employee], copying [Employee] dated 14 October 2015) [Text in square brackets added by the CMA].

- internal Fender Europe correspondence showing that [Reseller 1] and other UK resellers complained that European resellers selling into the UK marketplace were not complying with the Fender Pricing Policy;
- [Reseller 1] monitoring other MI resellers' prices and complaining to Fender Europe when they fell below the Minimum Price;
- [Reseller 1] and Fender Europe communications showing that [Reseller 1] generally agreed with and adhered to the Fender Pricing Policy together with interview evidence from an employee of [Reseller 1] and an employee of Fender Europe confirming that [Reseller 1] was adhering to the Fender Pricing Policy; and
- [Reseller 1] declaring to Fender Europe its intention to match competitors' lower prices, albeit temporarily.

4.89 Internal Fender Europe emails from June/July 2015 show that [Reseller 1] was adhering to the Fender Pricing Policy. The emails highlight and discuss the discrepancies in the pricing of Relevant Products in the UK and Europe. In particular, they note that UK resellers, including [Reseller 1], were pricing at the Minimum Price whereas MI resellers based in other EU Member States were pricing below the Minimum Price. For example, on 2 June 2015, [Fender Europe Employee 12] emailed his colleagues at Fender Europe, under the subject line '*Urgent UK Pricing issues*', stating:

'UK dealers are "playing ball" and advertising at MSRP. However, German dealers (again, lead [sic] by [Reseller]) are not. (...) Attached is a chart which shows our top selling models and a selection of our largest dealers. Green shows who is advertising at MSRP, and red shows who is advertising at under MSRP. The percentage columns are how much under MSRP they are.'⁴⁶⁶

4.90 On 31 July 2015, [Reseller 1 Senior Employee 4] sent an email to [Fender Europe Employee 2] and [Fender Europe Former Senior Employee 1] with the subject line '*[r]eally?*'. At the top of his message, [Reseller 1 Senior Employee 4] included a link to the [Reseller] website that was advertising Charvel electric guitars. Underneath, he stated, '*[i]t's all over the show*', in reference to the second link that

⁴⁶⁶ [Fender Europe Employee 12] further stated that this issue '*is the hardest to deal with, as no matter how strongly we suggest what they advertise at, we cannot tell them, by law. Equally, with someone like [Reseller] (worth about \$[><]/year), it wouldn't behest [sic] us to withdraw dealership if they don't "play ball"(!)*.' URN E_FEN002678 (Email from [Employee 12], Fender Europe, to [Employee 1] and [Employee 2] of Fender US dated 2 June 2015) [Text in square brackets added by the CMA].

displayed a Google search result for the words, '*guthrie govan charvel*' [a guitar model].⁴⁶⁷

- 4.91 In interview, [Fender Europe Employee 2] told the CMA that if [Reseller 1 Senior Employee 4] was using the phrase, '*it's all over the show*', [Reseller 1 Senior Employee 4] '*might be talking about price*.'⁴⁶⁸ [Reseller 1 Senior Employee 4] stated in interview that this guitar had been very hard to obtain and that the [Reseller] price was '*probably really low on it*'.⁴⁶⁹ He stated: '*[a]s I remember it, they [[Reseller]] didn't have a guitar in stock even. So, they were just queering the market, basically. They were just putting (...) oil in the water. And then that was a link to the same guitar on a Google Shopping link and the prices were everywhere*'.⁴⁷⁰ Because [Reseller 1] '*had none available to sell*' and had been waiting months for its delivery, [Reseller 1 Senior Employee 4] said he was '*getting grief*' from his consumers who had pre-ordered the guitar and would expect [Reseller 1] to match [Reseller]'s price.⁴⁷¹
- 4.92 On 18 August 2015, [Reseller 1 Employee 9] sent an internal [Reseller 1] email to [Reseller 1 Senior Employee 1] and [Reseller 1 Employee 1] (copying [Reseller 1 Senior Employee 4]) with the subject line '*[Reseller] pricing*': '*We've just come across the following and thought you should be aware*.' Underneath were two links, [Reseller]'s product listing for the Fender Classic Series 60s Stratocaster Lacquer and [Reseller 1]'s product listing for the Fender Classic Series Lacquer 60s Stratocaster RW 3 Tone Sunburst.
- 4.93 [Reseller 1 Senior Employee 1] forwarded the message to [Fender Europe Former Senior Employee 1] and [Fender Europe Employee 2]; and [Fender Europe Former Senior Employee 1] forwarded it on to [Fender Europe Employee 1].^{472, 473}

⁴⁶⁷ URN E_FEN003217 (Email from [Senior Employee 4] of [Reseller 1] to [Fender Europe Employee 2] and [Former Senior Employee 1] of Fender Europe dated 31 July 2015).

⁴⁶⁸ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.160, lines 5-7.

⁴⁶⁹ The CMA notes that [Reseller 1 Senior Employee 4] stated specifically that this complaint was most likely not '*in relation to* [other retailers' prices being below] *MSRP, just, just really low*.' URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.180, lines 8 and 12 [Text in square brackets added by the CMA].

⁴⁷⁰ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.180, lines 13-17.

⁴⁷¹ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.181, lines 4, 8 and 9.

⁴⁷² URN E_FEN003218 (Internal [Reseller 1] email from [Reseller 1 Employee 9] to [Reseller 1 Senior Employee 1] and [Reseller 1 Employee 1] (copying [Reseller 1 Senior Employee 4]) dated 18 August 2015).

⁴⁷³ Similarly, on 21 September 2015, [Senior Employee 4] of [Reseller 1] sent an email to [Fender Europe Employee 2] and [Former Senior Employee 1] of Fender Europe that contained a link to the [Reseller] website product listing for the Fender Adam Clayton Jazz Bass and his complaint '*one of many*'. URN E_FEN000058 (Email from [Reseller 1 Senior Employee 4] to [Fender Europe Employee 2] and [Fender Europe Former Senior Employee 1] dated 21 September 2015). When asked to clarify his CMA interview evidence in relation to this email, [Fender Europe Employee 2] stated:

- 4.94 The above are two further examples of [Reseller 1] continuing to monitor the prices of other MI resellers to check whether they were advertising the Relevant Products at or above the Minimum Price. When the prices were below the Minimum Price, [Reseller 1] would report this fact to Fender Europe, usually with the expectation that Fender Europe would ensure that the MI resellers concerned would revert to the Minimum Price.
- 4.95 Further evidence in 2015 confirms that [Reseller 1] not only continued to monitor and complain to Fender Europe about the pricing of other MI resellers being below the Minimum Price, but also that [Reseller 1] itself continued to agree with and adhere to the Fender Pricing Policy.
- 4.96 For example, on 25 September 2015 at 5:03pm, [Reseller 1 Senior Employee 4] sent an email to [Fender Europe Employee 2] and [Fender Europe Former Senior Employee 1] (copying [Reseller 1 Senior Employee 1]) under the subject line '???? Stripes.....' that contained the listings for several EVH products. A minute later, [Fender Europe Former Senior Employee 1] replied: '?'. At 5:12pm, [Reseller 1 Senior Employee 4] emailed [Reseller 1 Senior Employee 1] directly with five links to product listings in order to complain about other MI resellers' prices. The first link was to [Reseller]'s website showing its listings of EVH guitars, followed by the comment, *'[n]ot the first time I've brought it up unfortunately'*. [Reseller 1 Senior Employee 4] then stated, *'I'm assuming we are toeing the line here as we seem to be in line with others'*, in reference to his second link, here showing [Reseller 1]'s own listing for EVH guitars.^{474, 475}
- 4.97 In interview, [Reseller 1 Senior Employee 4] explained that his email to [Fender Europe Former Senior Employee 1] (sent at 5:03pm) likely related to two guitars that were probably being advertised at the Minimum Price on [Reseller 1]'s website, and his email to [Reseller 1 Senior Employee 1] (sent at 5:12pm) showed

'the UK reseller [[Reseller 1]] was complaining about the prices of a European based online retailer that is selling guitars into the UK [[Reseller]].' He further stated: *'I didn't get very many complaints about the European online dealers. When I did get a complaint, I usually just ignored it. On the odd occasion I did respond I would palm off the complainant by telling them that the prices of such dealers must be lower than their counterparts in the UK due to exchange rates working in favour of the European online dealer.'* URN C_FEN01868 (Response to Request for Clarification from [Fender Europe Employee 2], dated 31 July 2019), response to question 3(a) and (c) [Text in square brackets added by the CMA].

⁴⁷⁴ URN E_FEN002695 (Email exchange between [Senior Employee 4] of [Reseller 1], [Fender Europe Former Senior Employee 1], [Employee 2] of Fender Europe and [Senior Employee 1] of [Reseller 1] dated 25 September 2015).

⁴⁷⁵ [Reseller 1 Senior Employee 4] later emailed another complaint to [Fender Europe Former Senior Employee 1] and [Fender Europe Employee 2] under the subject line '???? Stripes.....' complaining that [Reseller] was not adhering to the Fender Pricing Policy with respect to the EVH Stripe Series BYS Black/Yellow Stripes and the EVH Stripes Series BYS White/Black, *'and others of course'*. [Reseller 1 Senior Employee 4] queried *'[Reseller] at UK pricing? It seems not.'* URN E_FEN002695 (Email exchange between [Senior Employee 4] of [Reseller 1], [Fender Europe Former Senior Employee 1] and [Employee 2] of Fender Europe and [Senior Employee 1] of [Reseller 1] dated 25 September 2015).

the same product being advertised online by [Reseller 1]’s competitor, [Reseller] ‘*well, well below*’ the Minimum Price.⁴⁷⁶

- 4.98 When asked what [Reseller 1 Senior Employee 4] may have meant by his reference to [Reseller 1] ‘*toeing the line as we seem to be in line with the others*’ in interview, [Fender Europe Employee 2] stated that he understood [Reseller 1 Senior Employee 4]’s reference to mean that [Reseller 1] was ‘*acting on the 4% off pricing structure*’.^{477, 478}
- 4.99 Two weeks later, [Reseller 1] was again complaining to Fender Europe about other MI resellers not adhering to the Fender Pricing Policy.
- 4.100 On 6 October 2015, [Reseller 1 Employee 8] sent an internal [Reseller 1] email to [Reseller 1 Senior Employee 1] with the subject line ‘[Reseller]’ stating: ‘*Fender 5 string USA std p-bass bass had to do for £1075 their price is £1054! we lost £316 on that one. Squier Simon Neil have been asked to price match £335 - that guy is on the way in.*’ [Reseller 1 Senior Employee 1] forwarded this email to [Fender Europe Employee 2] and [Fender Europe Former Senior Employee 1] complaining: ‘*WE ARE LOSING MONEY!!!!!!!!!!*’.^{479, 480}
- 4.101 In interview, [Fender Europe Employee 2] described that this email chain was an example of [Reseller 1 Senior Employee 1] complaining to Fender Europe that [Reseller 1] was having to price match the price of [Reseller]⁴⁸¹ in the Netherlands.

⁴⁷⁶ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.193, lines 6-8 and 12.

⁴⁷⁷ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.243, line 16.

⁴⁷⁸ When [Reseller 1 Senior Employee 4] was asked in interview what he meant by ‘*I’m assuming we are toeing the line here as we seem to be in line with others*’, he stated that the action he ‘*was looking for was that [Fender] take some stock back*’ which he said that Fender occasionally did, ‘*through gritted teeth, because they don’t want to take stock back because they’ve got to issue a credit and then they’re not really selling us [[Reseller 1]] anything else.*’ He confirmed that this was an alternative strategy to reducing the price, stating: ‘*if we [[Reseller 1]] had reduced the price, we’d just be told [by Fender Europe] to put it straight back up again.*’ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.199, lines 17-18 and 22-24 and p.200, lines 9 and 13-14 [Text in square brackets added by the CMA].

⁴⁷⁹ URN E_FEN000061 (Email from [Reseller 1 Senior Employee 1] to [Fender Europe Employee 2] and [Fender Europe Former Senior Employee 1] dated 6 October 2015).

⁴⁸⁰ On 9 October 2015, [Reseller 1 Senior Employee 4] sent an internal [Reseller 1] email to [Reseller 1 Senior Employee 1], [Reseller 1 Employee 1] and [Reseller 1 Employee 4] under the subject line ‘*[ff]or [Fender Europe Senior Employee 1] and [Fender Europe Employee 2]*’ attaching two links for [Reseller 1] and [Reseller] product listings in relation to Stratocaster guitars. [Reseller 1 Senior Employee 4] complained: ‘*[a] 20 margin for us is £749... Their site is riddled with this as we know but below a 20 Margin???*’ URN E_FEN000062 (Email from [Reseller 1 Senior Employee 4] to [Reseller 1 Senior Employee 1], [Reseller 1 Employee 1] and [Reseller 1 Employee 4] dated 9 October 2015).

⁴⁸¹ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.253, lines 19-20. Witness evidence from [Fender Europe Employee 2] described how [Reseller] and [Reseller] were in a group of resellers who were the subject of complaints (for pricing being too low) and who themselves also regularly complained about others’ prices. URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 18. [Fender Europe Employee 2] later confirmed to the CMA that he was ‘*referring to the “co.uk” websites of [Reseller] and [Reseller], where Fender’s products are being sold to UK consumers and are listed for sale in Pounds*

He stated that generally, [Fender Europe Employee 2]’s response to complaints about European resellers with UK operations, was to say, ‘ring [Fender Europe Former Senior Employee 1].’⁴⁸² In this particular instance, [Fender Europe Employee 2] considered that [Reseller 1 Senior Employee 1] was ‘frustrated’⁴⁸³ and shouting in big capital letters, ‘WE ARE LOSING MONEY’⁴⁸⁴ because [Reseller 1]’s ‘expectation would have been the MSRP and I’m sure that that would have been what it [Fender 5 string USA std p-bass bass] would have been priced up at (...) and obviously [Reseller] is substantially cheaper.’⁴⁸⁵

- 4.102 The evidence in late 2015 also shows that [Reseller 1] continued to monitor and complain about other MI resellers’ prices being below the Minimum Price and, on at least one occasion, notified Fender Europe of its intention to match another competitor’s lower prices.
- 4.103 On 9 December 2015, [Reseller 1 Senior Employee 4] sent an email to [Fender Europe Senior Employee 1] and [Reseller 1 Senior Employee 1] (copying [Fender Europe Employee 2]) under the subject line ‘[t]he Products’, which contained a price list showing the prices for several Fender products as listed by various other MI resellers.⁴⁸⁶
- 4.104 Shortly afterwards, [Reseller 1 Senior Employee 4] emailed [Fender Europe Former Senior Employee 1] and [Fender Europe Senior Employee 1] (copying [Fender Europe Employee 2]) with a list of Gretsch products comparing prices across a number of resellers. In it, [Reseller 1 Senior Employee 4] stated: ‘[a]s you can see from both lists there is a lot of nonsense going on in the UK’.⁴⁸⁷ [Fender

Sterling.’ He further stated: ‘[n]either [Reseller] nor [Reseller] were dealers that I was responsible for, as they are based in Europe. As a result, I couldn’t do anything so I didn’t pay a lot of attention to complaints about the prices at which they were selling products into the UK.’ URN C_FEN01868 (Response to Request for Clarification from [Fender Europe Employee 2], dated 31 July 2019), response to question 5.

⁴⁸² URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.167, line 11. It is not clear from the interview with [Fender Europe Employee 2] whether he had told [Reseller 1 Senior Employee 1] to phone [Fender Europe Former Senior Employee 1]. It appears that [Fender Europe Employee 2] had the discretion to handle complaints in relation to European resellers based in other Member States despite his stating to the CMA that this was [Fender Europe Former Senior Employee 1]’s responsibility.

⁴⁸³ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.254, line 25.

⁴⁸⁴ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.253, line 21.

⁴⁸⁵ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.257, lines 14-16.

⁴⁸⁶ URN E_FEN003225 (Email from [Senior Employee 4] of [Reseller 1] to [Senior Employee 1] of Fender Europe and [Senior Employee 1] of [Reseller 1] (copying [Employee 2] of Fender Europe) dated 9 December 2015). The CMA considers that [Reseller 1] sending this price list to Fender Europe is also an example of how it monitored and complained about how ‘a number of resellers’ were not adhering to the Fender Pricing Policy.

⁴⁸⁷ [Reseller 1 Senior Employee 4]’s statement, ‘[a]s you see from both lists there is a lot of nonsense going on in the UK’, indicates that [Reseller 1] generally agreed with the Fender Pricing Policy. URN E_FEN002724 (Email from [Senior Employee 4] of [Reseller 1] to [Fender Europe Former Senior Employee 1] and [Fender Europe Senior Employee 1], copying [Employee 2] of Fender Europe, dated 9 December 2015).

Europe Senior Employee 1] thanked him for the update. [Reseller 1 Senior Employee 4] responded by asking [Fender Europe Senior Employee 1] for his telephone number, which was provided in the following email.⁴⁸⁸

- 4.105 A little while later, [Reseller 1 Senior Employee 4] sent a similar email under the subject line *'[c]ompare and Contrast'* to [Fender Europe Employee 2], [Fender Europe Former Senior Employee 1], [Fender Europe Senior Employee 1], copying [Reseller 1 Employee 1], [Reseller 1 Senior Employee 1] and [Reseller 1 Senior Employee 2] that provided links to compare [Reseller 1]'s pricing with [Reseller]'s pricing for two electric guitars: the Charvel Warren DeMartini Signature Snake Pro Mod and the Charvel Warren DeMartini Signature Blood And Skull.⁴⁸⁹ [Reseller 1 Senior Employee 4] stated: *'[t]o quote [Fender Europe Senior Employee 1] I do not know weather [sic] to laugh or cry!!!! One for our rebate?'*⁴⁹⁰
- 4.106 When asked about the disparities between the [Reseller 1] prices and [Reseller]'s prices in interview, [Reseller 1 Senior Employee 4] stated that they were *'massive'*. He indicated that since [Reseller 1] had achieved its rebate target for the year, it would match this competitor's lower prices on these Relevant Products because [Reseller 1] had *'some margin to play with'* and it was *'kind of "Stuff your MAP", basically, is what I was almost alluding to there'*.⁴⁹¹
- 4.107 This is an example of [Reseller 1] matching a competitor's lower prices temporarily and informing Fender Europe of its intention to do so.
- 4.108 A week later, the evidence shows again that [Reseller 1] continued to monitor the prices of other MI resellers in 2015 and would report pricing below the Minimum Price to Fender Europe.
- 4.109 On 17 December 2015, [Reseller 1 Senior Employee 4] sent an email under the subject line *'and while you're at it...'* to [Fender Europe Employee 2] and [Fender Europe Senior Employee 1] that provided two links with no accompanying

⁴⁸⁸ URN E_FEN002724 (Email exchange between [Senior Employee 4] of [Reseller 1], [Fender Europe Senior Employee 1] and [Former Senior Employee 1] of Fender Europe dated 9 December 2015).

⁴⁸⁹ This evidence showing [Reseller 1 Senior Employee 4] sending a competitor's links to advertised Relevant Products shows [Reseller 1] again monitoring and complaining to Fender Europe that another MI reseller was not adhering to the Minimum Price.

⁴⁹⁰ URN E_FEN000070 (Email from [Senior Employee 4], [Reseller 1] to [Fender Europe Employee 2], [Fender Europe Former Senior Employee 1], [Senior Employee 1] of Fender Europe copying [Reseller 1 Employee 1], [Reseller 1 Senior Employee 1] and [Senior Employee 2] of [Reseller 1], dated 17 December 2015) [Text in square brackets added by the CMA].

⁴⁹¹ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.209, lines 7 and 15-19. [Reseller 1 Senior Employee 4] stated in interview that the rebate he referred to was *'probably more of a bolt-on to the SDA'* and confirmed that it was the *'carrot to the MAP stick'*. [Reseller 1 Senior Employee 4] explained that Fender Europe would pick a product group, such as acoustic guitars or *'maybe Gretsch'* and would say *"[w]ell, there's a target for the year". And on something like that, it might be a 10% rebate'*. URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.207, lines 6-8, 10, 12 and 20-25.

message. The first link was to [Reseller]'s website that included Fender electric guitars; and the link specified the Charvel Guthrie Govan Signature Model (flame). The second link was to the [Reseller] listing for the Charvel Guthrie Govan Signature Model, Birds Eye Maple, Electric Guitar.⁴⁹²

4.110 When [Reseller 1 Senior Employee 4] was asked in interview whether there was any action that he expected Fender Europe to take in respect of the MI resellers who were not complying with the Minimum Price, he stated:

'[W]e were always told to – quite stringently, what they [Fender Europe] expected us to sell at, I think that our only expectation would be that [the other MI resellers] would do the same as what we're doing. (...) I wouldn't be saying, "Well you [Fender Europe] need to fire this dealer" (...) every time we moved, we go – we got – the, the spotlight was shone on us. And I think it would've been on other big players, by the way; I don't think we were the only ones. I'm just, like, kind of, saying, "Well, it's not a level playing field. You, you sold us this whole SDA⁴⁹³ and (...) set us stiffer targets based on everyone [being on] a much more level playing field.'⁴⁹⁴

4.111 The CMA concludes from this that [Reseller 1 Senior Employee 4] anticipated that if [Reseller 1] complained to Fender Europe about other MI resellers' prices being below the Minimum Price, Fender Europe would contact those MI resellers to ensure they reverted to the Minimum Price.

2016

4.112 The evidence for 2016 paints a similar picture in terms of an ongoing agreement and/or concerted practice between Fender Europe and [Reseller 1] whereby [Reseller 1] adhered to the Fender Pricing Policy. In 2016, the supporting evidence comprises:

- [Reseller 1] monitoring other MI resellers' prices and complaining to Fender Europe when they fell below the Minimum Price;
- [Reseller 1] and Fender Europe communications showing that [Reseller 1] generally agreed with and adhered to the Fender Pricing Policy together with interview evidence from an employee of Fender Europe and an employee of [Reseller 1] that [Reseller 1] was adhering to the Fender Pricing Policy;

⁴⁹² URN E_FEN003226 (Email from [Senior Employee 4] of [Reseller 1] to [Fender Europe Employee 2] and [Senior Employee 1] of Fender Europe dated 17 December 2015).

⁴⁹³ SDA refers to a Selective Distribution Agreement. The CMA notes that occasionally MI resellers referred to their ADA as a SDA. SDA is a generic term which in this context appears to have the same meaning.

⁴⁹⁴ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.218, lines 15-26, and p.219, line 1 [Text in square brackets added by the CMA].

- [Reseller 1] asking Fender Europe for permission to match competitors' lower prices, albeit temporarily, if Fender Europe did not 'sort it'; and
- [Reseller 1] and Fender Europe communications showing that [Reseller 1] agreed to raise its price/s to the Minimum Price on request from Fender Europe.

4.113 [Reseller 1] continued to monitor the prices of other MI resellers and complain to Fender Europe about them not adhering to the Fender Pricing Policy. For example, on 18 January 2016, [Reseller 1 Senior Employee 4] sent an email under the subject line '*[h]ere we go....*' to [Reseller 1 Employee 4] and [Reseller 1 Employee 1] (copying [Fender Europe Employee 2]) that included the Facebook link to a competitor ([Reseller]) featuring '*[b]rand new Gretsch Streamliner range*'. [Reseller 1 Senior Employee 4] stated: '*[p]riced down already!*'.⁴⁹⁵

4.114 As in the previous year (see paragraphs 4.89 and 4.96 above), the evidence for 2016 shows that Fender Europe expected [Reseller 1] to change its prices to match the current Minimum Price for the Relevant Products.

4.115 For example, on 2 February 2016, [Fender Europe Employee 2] emailed [Employee 1], [Employee 4], [Senior Employee 1], [Senior Employee 2], [Senior Employee 6], [Senior Employee 4], [Senior Employee 3] and [Employee 2], all of [Reseller 1], and copying in [Fender Europe Senior Employee 1], with five attached price lists.⁴⁹⁶ He stated:

'Please see attached the NEW Fender / Squier / SPA and Clothing & Collectables Price Lists effective as of 1st February 2016. (...)

I will be sending through all of the Blue line price lists following this mail. We would ask that all price adjustments on websites and at retail be in place for the week of the 15th of February.⁴⁹⁷

⁴⁹⁵ URN E_FEN000073 (Email from [Reseller 1 Senior Employee 4] to [Employee 4] and [Employee 1] of [Reseller 1], copying [Employee 2] of Fender Europe, dated 18 January 2016).

⁴⁹⁶ URN E_FEN002740 (Fender Feb 2016 price list dated 2 February 2016), URN E_FEN002741 (Squier price list dated 2 February 2016) and URN E_FEN002742 (Fender Acoustic price list dated 2 February 2016).

⁴⁹⁷ URN E_FEN002739 (Email from [Employee 2] of Fender Europe to [Reseller 1 Employee 1], [Reseller 1 Employee 4], [Reseller 1 Senior Employee 1], [Reseller 1 Senior Employee 2], [Reseller 1 Senior Employee 6], [Reseller 1 Senior Employee 4], [Reseller 1 Senior Employee 3], [Employee 2] of [Reseller 1] and [Fender Europe Senior Employee 1] of Fender Europe dated 2 February 2016).

- 4.116 In interview, [Fender Europe Employee 2] confirmed that he expected the MI resellers to change their prices to MSRP minus 4% by 15 February 2016. In his view, this expectation was in particular in relation to online pricing.⁴⁹⁸
- 4.117 [Fender Europe Employee 2] also explained how he would chase up the MI resellers who had not changed their prices by that date, stating:
- ‘I’d probably have reminded them with a couple of days to go, “Guys, listen”. Everyone else has already moved ... Of course, they will have forgotten because that means they’re going to be more competitive over a weekend or over a week or whatever. And there would be people that will always drag their heels.’⁴⁹⁹
- 4.118 On 12 February 2016, [Fender Europe Employee 2] sent an email under the subject heading ‘NEW SQUIER AND FENDER ACOUSTIC PRICE LISTS’ to [Reseller 1] employees [Senior Employee 1], [Senior Employee 6], [Senior Employee 4], [Senior Employee 3] and [Employee 2]. The email attached two price lists, one for the new Squier and one for Fender Acoustic. In this email, [Fender Europe Employee 2] stated:
- ‘The new lists attached have been designed to put much needed extra margin into both of these product lines. Please be aware these price changes are effective from Monday, and we would ask you to alter your pricing accordingly.’⁵⁰⁰

⁴⁹⁸ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.262, lines 5-24 and p.263, lines 4-8. In relation to another email, [Fender Europe Employee 2] clarified to the case team in writing: ‘*[i]n this reply I was trying to explain the way I typically discussed pricing with dealers: rather than force or push them I would try to gently nudge them. I would never be blunt or tell them to ‘change your prices’. Instead, I would try to talk around that topic and indirectly signal to them the reason for my call. For example I would say, “Is your price on product X right?” The dealers would understand that I was asking them to raise their prices to MSRP minus 4%.*’ URN C_FEN01868 (Response to Request for Clarification from [Fender Europe Employee 2], dated 31 July 2019), response to question 1.

⁴⁹⁹ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.263, lines 12-18.

⁵⁰⁰ URN E_FEN000074 (Email from [Employee 2] of Fender Europe to [Reseller 1 Senior Employee 1], [Reseller 1 Senior Employee 6], [Reseller 1 Senior Employee 4], [Reseller 1 Senior Employee 3], [Reseller 1 Employee 2], [Reseller 1 Senior Employee 2], [Reseller 1 Employee 4], [Reseller 1 Employee 1], [Employee 7] of [Reseller 1] and [Senior Employee 1] of Fender Europe dated 12 February 2016). Two weeks later, on 3 March 2016, [Fender Europe Employee 2] emailed [Reseller 1 Senior Employee 1], [Reseller 1 Senior Employee 2], [Reseller 1 Employee 6], [Reseller 1 Senior Employee 4] and [Reseller 1 Senior Employee 3], stating ‘*[p]lease see attached the NEW FMIC price lists for Fender & Squier, Gretsch, Jackson, Charvel (...) The new prices come into effect from MONDAY THE 14TH of March. FMIC requires all dealers to have all websites updated and aligned with the new pricing by this date*’. He also stated that the price rise is approximately 3.5%, but that back orders will be kept at the old price for up to 1 month. URN E_FEN000078 (Email from [Employee 2] of Fender Europe to [Reseller 1 Senior Employee 1], [Reseller 1 Senior Employee 2], [Reseller 1 Employee 6], [Reseller 1 Senior Employee 4] and [Reseller 1 Senior Employee 3], copying [Reseller 1 Employee 4], [Employee 1] of [Reseller 1] and [Senior Employee 1] of Fender Europe dated 3 March 2016). Attachments URN E_FEN000989, URN E_FEN000990, URN E_FEN000991 and URN E_FEN000992.

- 4.119 In interview, [Fender Europe Employee 2] confirmed that the new price lists included the MSRP and that he was requesting that [Reseller 1]'s prices reflected MSRP minus 4% as detailed in the new price list.⁵⁰¹
- 4.120 These emails show how Fender Europe communicated the new Minimum Prices to [Reseller 1], and [Reseller 1] understood that this was a request for it to comply with the Fender Pricing Policy. This is supported by [Reseller 1 Senior Employee 4]'s confirmation in interview that his understanding of [Fender Europe Employee 2]'s email was that the essence of Fender Europe's instruction was: *“[d]on't forget about this... there's the new dealer price. There's the new MSRP and that's what we expect you to follow on Monday. If you haven't already figured it out, you need to do it now”*.⁵⁰²
- 4.121 There were further instances in 2016 of [Reseller 1] continuing to monitor the prices of other MI resellers and complaining to Fender Europe about other MI resellers not adhering to the Fender Pricing Policy. In addition, the evidence continues to show that [Reseller 1] generally complied with the Fender Pricing Policy.
- 4.122 On 14 March 2016, [Reseller 1 Senior Employee 4] sent an internal email under the subject line *'[a]s usual we play the game...'* to [Fender Europe Employee 2], [Reseller 1 Senior Employee 3] and [Reseller 1 Employee 1] with a link to a competitor ([Reseller]): one was for the EVH Tribute Striped Guitar in Black & White with a Floyd Rose feature.⁵⁰³
- 4.123 In interview, [Fender Europe Employee 2] stated that, in his understanding, the game that [Reseller 1 Senior Employee 4] referred to when he wrote *'[a]s usual we play the game...'* was of [Reseller 1] being *'participants in the MSRP minus 4'* (the Fender Pricing Policy) to which he considered [Reseller 1] adhered.⁵⁰⁴ He later clarified, more generally, that:

'As far as I am aware, complaints may also have been made about [Reseller 1] pricing below MSRP minus 4%. However, I do not recall any specific instances

⁵⁰¹ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.273, lines 15-26 and p.278 lines 7-14.

⁵⁰² URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.246, line 26 and p.247, lines 1-4.

⁵⁰³ URN E_FEN000079 (Email from [Senior Employee 4], [Reseller 1] to [Employee 2] of Fender Europe, [Reseller 1 Senior Employee 3] and [Employee 1], [Reseller 1] dated 14 March 2016).

⁵⁰⁴ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.182, lines 11-12.

where this was brought to my attention or where I received a complaint regarding [Reseller 1].^{505, 506}

4.124 On 29 May 2016, [Reseller 1 Senior Employee 5] sent an internal email under the subject line *'Fender American 10% off at [Reseller] and [Reseller]'* to [Reseller 1 Employee 1] and [Reseller 1 Senior Employee 3], copying [Reseller 1 Senior Employee 4], [Reseller 1 Senior Employee 1] and [Reseller 1 Employee 7]. [Reseller 1 Senior Employee 5] included a link to a competitor ([Reseller]) showing products on sale, including the Fender FSR Limited Edition American Pro Pine Jazzmaster, Natural. [Reseller 1 Senior Employee 5] stated:

'I've been speaking to the web office today (re a different matter) and they highlighted that this has been an issue over the weekend, [Reseller] have taken 10% off all American made guitars. Obviously their focus would be on [X] but, it has included American Fenders as well. Might be worth asking [Fender Europe Employee 2] for a credit for our last margin [sic] ;)'⁵⁰⁷

4.125 The above statement that it might be worth [Reseller 1] *'asking [Fender Europe Employee 2] for a credit for our [lost] margin ;)'* shows that in light of its continued adherence to the Fender Pricing Policy, [Reseller 1] considered that Fender Europe would be open to giving [Reseller 1] a retrospective credit to compensate [Reseller 1] for losing business to another MI reseller who was not adhering to the Fender Pricing Policy. This view is supported by [Fender Europe Employee 2]'s interview evidence. In relation to another email, he described how *'[Reseller 1] would fight for every penny they can get'*. He stated: *'[w]hen something comes down in price (...) if they've bought it at a higher price, then they'll obviously*

⁵⁰⁵ URN C_FEN01868 (Response to Request for Clarification from [Fender Europe Employee 2], dated 31 July 2019), response to question 6(a).

⁵⁰⁶ URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), para. 18. This is supported by [Fender Europe Employee 2]'s (other) witness evidence where he described his list of resellers who were the subject of complaints (for pricing being too low), and [Reseller 1] was not on the list. When later asked by the CMA to clarify whether [Reseller 1] and other resellers who were not on this list received any special benefits from Fender Europe in return for generally complying with Fender's MSRP minus 4% pricing, [Fender Europe Employee 2] stated: *'To the best of my knowledge, no special benefits were offered by Fender to [Reseller 1] (...) in return for pricing products at MSRP minus 4%.'* URN C_FEN01868 (Response to Request for Clarification from [Fender Europe Employee 2], dated 31 July 2019), response to question 6(b).

⁵⁰⁷ In the CMA's view, [Senior Employee 5] of [Reseller 1] most likely meant 'lost margin' instead of 'last margin', and that 'last' was a typo. URN E_FEN000086 (Internal [Reseller 1] email from [Reseller 1 Senior Employee 5] to [Reseller 1 Employee 1] and [Reseller 1 Senior Employee 3], copying [Reseller 1 Senior Employee 4], [Reseller 1 Senior Employee 1] and [Reseller 1 Employee 7], dated 29 May 2016). On 29 May 2016, [Employee 7] of [Reseller 1] replied to [Reseller 1 Senior Employee 5]: *'[w]orth also being aware this is until Tuesday not just Monday'*. URN E_FEN000087 (Internal [Reseller 1] email from [Reseller 1 Employee 7] to [Reseller 1 Senior Employee 5], copying [Reseller 1 Senior Employee 1], [Reseller 1 Employee 1], [Reseller 1 Senior Employee 4] and [Reseller 1 Senior Employee 3] dated 29 May 2016).

*expect to be looked after and then – you know, they get a credit note for the balance.*⁵⁰⁸

- 4.126 The evidence below shows that [Reseller 1] continued to monitor other MI resellers' prices and complain to Fender Europe about other MI resellers who were pricing below the Minimum Price and, on at least one occasion, threatened Fender Europe with an ultimatum that [Reseller 1] would match the competitor's lower price if Fender Europe did not 'sort it'. The email below shows the first time, to the CMA's knowledge (based on the available evidence), that [Reseller 1] briefly used a commercial price monitoring service to monitor other MI resellers' online pricing.
- 4.127 On 7 June 2016, [Reseller 1 Senior Employee 4] sent [Fender Europe Senior Employee 1] an email, forwarding an attached price comparison spreadsheet⁵⁰⁹ prepared by reporting@competitormonitor.com and stating:
- 'Our price is column E.
You can see it. If you need to call me [X].
Do we go there? Or do you sort it.'⁵¹⁰
- 4.128 [Fender Europe Senior Employee 1] forwarded this report to [Fender Europe Employee 2], stating, '*[c]an you have a look at [Reseller 1 Senior Employee 4]'s email please.*⁵¹¹

⁵⁰⁸ URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.224, lines 8-11. The email that [Fender Europe Employee 2] was referring to in his CMA interview was URN E_FEN002627 (Internal Fender email from [Fender Europe Employee 2] to [Fender Europe Employee 18] dated 9 January 2015) In it, [Fender Europe Employee 2] stated: '*I spoke with [Fender Europe Former Senior Employee 1] [[Fender Europe Former Senior Employee 1]] on this yesterday and we both agree we need to sort [Reseller 1] out with regards to the recent price adjustments made. As you will send from [Reseller 1 Employee 1] [sic] mail (and attached) we need to raise a credit of £462.20.*' [Text in square brackets added by the CMA].

⁵⁰⁹ URN E_FEN002802 (Price comparison report prepared by Competitor Monitor on 7 June 2016). The spreadsheet shows [Reseller 1]'s prices for Fender products being compared to 10 competitors including [a Mass reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller] and [Reseller]. For each product listed, the following pricing details were shown: '*Price*', '*Lowest (%)*', '*Average (%)*' and '*Highest (%)*'. [Fender Europe Employee 2] was asked about this competitormonitor.com spreadsheet, attached to another email, in his CMA interview, and he stated that the prices probably reflected the price the resellers were selling at. When asked about the red and green coding, [Fender Europe Employee 2] was not sure and Fender's legal representative suggested that the '*Price*' column may be assumed as [Reseller 1]'s price and '*where it's red in the price column is where [Reseller 1] is highest*' (...) and '*[w]here it's green, I think it's suggesting it's either at the same price as another or below*' (...). The legal representative also suggested that '*[Reseller 1] seem to be pricing higher than others*', to which [Fender Europe Employee 2] answered affirmatively. URN E_FEN002816 (Email from [Senior Employee 1], [Reseller 1] to [Fender Europe Former Senior Employee 1], [Employee 2] of Fender Europe, [Reseller 1 Senior Employee 3], [Reseller 1 Employee 5], [Reseller 1 Employee 7], [Senior Employee 4] of [Reseller 1] and [Fender Group Employee 8] dated 1 July 2016) and attachment: URN E_FEN002817 (Spreadsheet dated 1 July 2016). URN C_FEN01845 (Transcript of interview with [Fender Europe Employee 2] dated 11 June 2019), p.293, lines 8-9, 13-14, 23 and 25 [Text in square brackets added by the CMA].

⁵¹⁰ URN E_FEN002801 (Email from [Reseller 1 Senior Employee 4] to [Fender Europe Senior Employee 1], copied to [Reseller 1 Senior Employee 1], dated 7 June 2016).

⁵¹¹ URN E_FEN002801 (Email from [Reseller 1 Senior Employee 4] to [Fender Europe Senior Employee 1], copied to [Reseller 1 Senior Employee 1], dated 7 June 2016).

- 4.129 Less than a month later, [Reseller 1] again sent Fender Europe a report that contained price comparison information provided to [Reseller 1] across a range of Gretsch products. On 1 July 2016, [Reseller 1 Senior Employee 1] sent an email under the subject line '*[p]roducts report*' to [Fender Europe Former Senior Employee 1], [Fender Europe Employee 2] and [Fender Group Employee 8] (with no message)⁵¹² that forwarded a Competition Monitor report sent to [Reseller 1 Senior Employee 1] two minutes earlier.⁵¹³
- 4.130 These emails attaching Competition Monitor reports show [Reseller 1] reporting to Fender Europe other MI resellers who were pricing Relevant Products below the Minimum Price. This confirms an understanding between Fender Europe and [Reseller 1] about the application of the Fender Pricing Policy. The CMA concludes that [Reseller 1] expected Fender Europe to contact those MI resellers who were pricing Relevant Products below the Minimum Price to ensure their prices reverted to at least the Minimum Price.⁵¹⁴
- 4.131 The evidence for 2016 also continues to show that [Reseller 1] agreed to raise its price/s to the Minimum Price on instruction from Fender Europe.
- 4.132 On 4 October 2016, [Fender Europe Employee 2] sent an email under the subject heading '*NEW SQUIER PRICEING [sic] EFFECT IMEDIATLY [sic]*' to [Senior Employee 3] and [Employee 5] of [Reseller 1], stating:
- 'We have had some internal issues with the pricing on SQUIER product. As you know there was a price rise that became effective as of August 1st. What we weren't told and has only just come to light is that there was a further increase on Squier in September which we were not made a where [sic] of. Please see attached the updated file on Squier pricing. We would ask that these new prices are reflected on web pages as soon as possible to avoid further confusion.'⁵¹⁵

⁵¹² URN E_FEN002816 (Email from [Senior Employee 1] of [Reseller 1] to [Fender Europe Former Senior Employee 1], [Employee 2] of Fender Europe, [Reseller 1 Senior Employee 3], [Reseller 1 Employee 5], [Reseller 1 Employee 7], [Senior Employee 4] of [Reseller 1] and [Fender Group Employee 8] dated 1 July 2016).

⁵¹³ URN E_FEN002817 (Spreadsheet dated 1 July 2016). The spreadsheet listed the following resellers: [Reseller], [a Mass reseller], [online marketplace], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller] and [Reseller].

⁵¹⁴ In interview, [Fender Europe Employee 2] stated: '*[w]hen I received a complaint about one of my Reseller [sic] I would often first look at their prices online. I would then call them up. Nine times out of ten they would comply with my request and change their prices. If they did not comply I may have called [Fender Europe Former Senior Employee 1].*' URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 14 [Text in square brackets added by the CMA].

⁵¹⁵ URN E_FEN000094 (Email from [Employee 2] of Fender Europe to [Reseller 1 Senior Employee 3] and [Employee 5] of [Reseller 1] copying [Reseller 1 Senior Employee 1], [Reseller 1 Senior Employee 4] and others of [Reseller 1] dated 4 October 2016). Attachments: URN E_FEN000095 and URN E_FEN000096.

- 4.133 One of the two attached new Squier price lists detailed the MSRP.
- 4.134 In interview, [Reseller 1 Senior Employee 4] explained that Fender Europe was issuing a new price list and expected [Reseller 1] to *'put [its] prices up now'*. He also stated, *'I don't know how quickly we would have done that'* and, in his view, [Fender Europe Employee 2] was asking for the changes reflected on the web pages *'[a]s soon as you can'*.⁵¹⁶
- 4.135 When [Fender Europe Employee 2] was asked by the CMA to clarify (in writing) evidence from his witness statement⁵¹⁷ as to whether he recalled [Reseller 1] generally complying with Fender's Pricing Policy, [Fender Europe Employee 2] stated: *'[a]s far as I am aware, complaints may also have been made about [Reseller 1] pricing below MSRP minus 4%. However, I do not recall any specific instances where this was brought to my attention or where I received a complaint regarding [Reseller 1].'*⁵¹⁸
- 4.136 This shows that [Reseller 1] did generally comply with Fender Europe's requests to raise its prices to at least the Minimum Price.

2017

- 4.137 The evidential picture for 2017 looks very similar and continues to support the CMA's finding of an ongoing agreement and/or concerted practice between Fender Europe and [Reseller 1] whereby [Reseller 1] adhered to the Fender Pricing Policy.^{519, 520} In 2017, the supporting evidence comprises:

⁵¹⁶ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.261, lines 13-14 and 23.

⁵¹⁷ URN E_FEN003290.1 (Witness statement of [Fender Europe Employee 2] dated 26 July 2018), paragraph 18.

⁵¹⁸ URN C_FEN01868 (Response to Request for Clarification from [Fender Europe Employee 2], dated 31 July 2019), response to question 6(a). [Fender Europe Employee 2] also stated: *'[t]o the best of my knowledge, no special benefits were offered by Fender to [Reseller 1] (...) in return for pricing products at MSRP minus 4%.'* (in response to question 6(b)).

⁵¹⁹ The CMA notes that in early January 2017, [Reseller 1 Senior Employee 1] sent a confidential report via email to Fender Europe lamenting the competitive landscape of the UK retail musical industry, stating: *'[t]he retail industry has sleep walked into a situation that makes no commercial sense and is inherently against the long term interests of consumers. A price war has flourished; this has been created and funded by manufacturers and distributors.'* URN E_FEN002946 (Report titled *'Rebate Thinking - A Thought Provoker'* dated 3 January 2017). In the CMA's view, the reference to a *'price war'* in this context does not easily reconcile with a manufacturer's Minimum Price Policy [e.g., the Fender Pricing Policy] whose aim is to preserve and improve distributors' [MI resellers'] margins. This has led the CMA to conclude that the report was chiefly critical of online-only resellers free-riding on more traditional resellers, which drives down prices for everyone. This is due to online-only resellers having lower overheads than bricks-and-mortar resellers or 'hybrid' resellers (who combine both a retail and on-line business).

⁵²⁰ [Fender Europe Former Senior Employee 1] forwarded the above report to [Fender Group Employee 2], [Fender Europe Former Senior Employee 2], [Fender Europe Senior Employee 1] and others, stating *'[s]ee the attached doc from [Reseller 1] which sums up their thinking on their model. Keep it to yourselves.'* URN E_FEN002945 ([Former Senior Employee 1] of Fender Europe forwarded the email from [Senior Employee 1] of [Reseller 1] which attached the above report, to [Fender Group Employee 2], [Fender Europe Former Senior Employee 2], [Fender Europe Senior Employee 1] and others of Fender Europe dated 3 January 2017).

- [Reseller 1] monitoring other MI resellers' prices and complaining to Fender Europe when they fell below the Minimum Price together with interview evidence from an employee of [Reseller 1];
- Internal [Reseller 1] correspondence showing that [Reseller 1] generally agreed with and adhered to the Fender Pricing Policy together with interview evidence from an employee of [Reseller 1] confirming this; and
- [Reseller 1] and Fender Europe communications showing Fender Europe giving [Reseller 1] permission to price below the Minimum Price temporarily in order to compete with a competitor's lower prices.

- 4.138 The evidence shows that [Reseller 1] continued to monitor other MI resellers' prices in 2017 and would report pricing below the Minimum Price to Fender Europe, which confirms the understanding between Fender Europe and [Reseller 1] that both [Reseller 1] and other MI resellers would be adhering to the Fender Pricing Policy.
- 4.139 For example, on 27 February 2017, [Reseller 1] sent an email under the subject line *'Fender Standard Jazz bass'* to [Fender Europe Employee 2] stating: *'[h]ad a couple of price match requests on these, seems [Reseller], [Reseller] and [Reseller] have taken £96 off the price.'*⁵²¹ In the CMA's view, this evidence can either be interpreted as [Reseller 1] reporting the three non-compliant MI resellers to Fender Europe or, alternatively, [Reseller 1] informing Fender Europe that it acted on the price match requests (i.e. lowered its own price temporarily in response to its competitors' lower prices).
- 4.140 On 17 May 2017, [Reseller 1 Senior Employee 4] sent an email to [Fender Europe Employee 2] under the subject line *'Slaughtered'* that provided a webpage showing [Reseller] prices compared to those of two other MI resellers ([Reseller] and [Reseller]) for Fender Electric Guitars Japan Classic 69 Telecaster Pink Paisley.⁵²²
- 4.141 In interview, [Reseller 1 Senior Employee 4] described that Fender Europe had claimed that this was a very limited edition (*'a handful', 'pretty exclusive'*) but it turned out that Fender Europe *'must have brought in a couple of thousands of them' (...)* so it was *'a bad buy for [[Reseller 1]] or an overextended buy'* which resulted in *'some discounting'*. [Reseller 1 Senior Employee 4] also explained that the meaning of *"Slaughtered"* is *just the price that had been slaughtered (...)* the

⁵²¹ URN E_FEN002971 (Email from [X] of [Reseller 1] to [Employee 2] of Fender Europe dated 27 February 2017).

⁵²² URN E_FEN000142 (Email from [Senior Employee 4] of [Reseller 1] to [Employee 2] of Fender Europe dated 17 May 2017).

*price is really, really cheap.*⁵²³ As to [Reseller 1]’s reaction to this discounting, [Reseller 1 Senior Employee 4] further explained, *‘what do I do, you know, because if I go down there, I’m just going to straight away be told, “What have you got down there?”’*.⁵²⁴

- 4.142 The CMA concludes from this that [Reseller 1]’s complaint to Fender Europe was a coded message complaining about [Reseller]’s heavily discounted prices when selling into the UK. The evidence also shows that even in light of [Reseller’s lack of adherence to the Fender Pricing Policy in the UK, [Reseller 1] continued to adhere to the Fender Pricing Policy for fear that any price decreases would be monitored by Fender Europe.
- 4.143 On 12 July 2017, [Employee 7] of [Reseller 1] sent an internal email to [Reseller 1 Senior Employee 3] and [Reseller 1 Senior Employee 4] stating: *‘[Reseller], [Reseller] and [Reseller]’s are all at £1132 for the EVH Stripe Series.’* [Reseller 1 Senior Employee 4] forwarded this email to [Fender Europe Employee 2] and [Fender Europe Senior Employee 1] stating: *‘[h]ere we go...’*.⁵²⁵
- 4.144 In the CMA’s view, this is another example of [Reseller 1 Senior Employee 4] complaining to Fender Europe that the three MI resellers named in [Reseller 1 Employee 7]’s email were undercutting the Minimum Price on the EVH Stripe Series. The CMA considers that the statement *‘[h]ere we go....’* can be interpreted as a coded way of drawing Fender Europe’s attention to MI resellers who were not complying with the Fender Pricing Policy.
- 4.145 The evidence for 2017 continues to show that [Reseller 1] adhered to the Fender Pricing Policy upon Fender Europe’s instruction. Based on the evidence, below, however, Fender Europe also agreed to [Reseller 1] holding a ‘one-off’ sale for certain Relevant Products in October 2017
- 4.146 On 5 October 2017, [Senior Employee 3] of [Reseller 1], sent an internal email stating:
- ‘As part of my role as Competitor monitor I’m going to fire out quick and short emails of things I notice, this is one of them [Reseller] have got an up to 70% off sale at the moment. Most of it doesn’t effect [sic] us directly product wise. However there are a few things in the Fender catalogue that do. Namely high end Jackson

⁵²³ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.267, lines 10, 16-17 and 21-22 and p.268, lines 15-17.

⁵²⁴ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.267, lines 22-24.

⁵²⁵ URN E_FEN003019 (Email exchange between [Reseller 1 Employee 7], [Reseller 1 Senior Employee 3], [Senior Employee 4] of [Reseller 1], [Fender Europe Employee 2] and [Senior Employee 1] of Fender Europe dated 12 July 2017).

guitars. I'll speak to [Fender Europe Senior Employee 1] at Fender (I've let [sic] a message for him to call me) and see if we can make some headlines in order to compete.'

4.147 In a later email that same afternoon, [Reseller 1 Senior Employee 4] replied stating: *'[i]ronically we were jumped on by Fender when we reduced these SKU's previously. Let us know what [Fender Europe Senior Employee 1] says.'*⁵²⁶ The next day, [Reseller 1 Senior Employee 3] replied:

'Fender have given us the green light to do a high end Jackson sale. I believe that we bought these guitars cheap with intention of doing a blow out but Fender put a stop to it a while back. We might have made banners already.'^{527, 528}

4.148 In interview, [Reseller 1 Senior Employee 4] explained that *'we [[Reseller 1]] were jumped on by Fender when we reduced these SKUs previously (...) looking at it, those SKUs were probably – we maybe had those guitars in stock for a year or so.'*⁵²⁹ He described how [Reseller 1] had purchased these high end Jackson guitars from Fender Europe *'at a huge discount from trade, (...) we dropped the price and we got told – this is one instance where Fender actually said "What are you doing? Put your price back up now on these SKUs"(...).'*⁵³⁰

4.149 [Reseller 1 Senior Employee 3]'s statement that *'Fender put a stop to it a while back'* indicates that when [Reseller 1] attempted to reduce the price of the Relevant Products in question, it was *'jumped on by Fender'* and so reverted to the Minimum Price and thereby continued to adhere to the Fender Pricing Policy.

4.150 The CMA also concludes from [Reseller 1 Senior Employee 3]'s statement, *'Fender has given us the green light to do a high end Jackson sale'* that, on this occasion, Fender Europe permitted [Reseller 1] to price below the Minimum Price temporarily in relation to a small number of specific Relevant Products in order to allow it to compete with [Reseller]'s lower prices.

⁵²⁶ URN E_FEN000163 (Internal [Reseller 1] email between [Reseller 1 Senior Employee 3], [Reseller 1 Senior Employee 4], Purchasing and Marketing teams at [Reseller 1] dated 5 October 2017). [Text in square brackets added by CMA]

⁵²⁷ URN E_FEN000167 (Email from [Reseller 1 Senior Employee 4] to [Reseller 1 Senior Employee 3], copying the Purchasing and Marketing teams of [Reseller 1] dated 6 October 2017).

⁵²⁸ Later that afternoon, [Employee 1] of [Reseller 1] emailed [Senior Employee 4] and [Senior Employee 3] of [Reseller 1] to reconfirm that he changed the prices on several Jackson products which he listed. This email supports the interpretation that [Reseller 1] deviated from the Minimum Price. URN E_FEN000168 (Email from [Reseller 1 Employee 1] to [Reseller 1 Senior Employee 4], copying [Reseller 1 Senior Employee 3], Purchasing Team and Marketing Team of [Reseller 1] dated 6 October 2017).

⁵²⁹ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.284, lines 13-14 and p.285, lines 3-4.

⁵³⁰ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.284, lines 21-23.

4.151 In late 2017, the evidence shows that [Reseller 1] again agreed to raise its online price/s to the Minimum Price on request from Fender Europe. On 22 November 2017, [Reseller 1 Senior Employee 1] sent an internal email to his [Reseller 1] colleagues under the subject line '*Fender Paisley Tele*' to [Reseller 1 Senior Employee 3], [Reseller 1 Senior Employee 4], [Reseller 1 Employee 1], [Reseller 1 Employee 9] and others and stated:

'Fender have asked us to remove [sic] the price of this from £799 back up to £999. Whilst we have agreed with their request online we can keep the price instore. The banner has come down but the instagram will remain for 4 hours and the price online will stay up till that is removed. You should get your sales staff to use this info to close sales.'⁵³¹

4.152 [Reseller 1 Employee 9] replied two days later with a screen shot of the [Reseller 1] Black Friday sales, stating: '*[[j]]ust noticed these are still £799 online and are part of the homepage banner. I've amended the price back £999, is that right?*'.⁵³²

4.153 This email exchange is evidence of [Reseller 1] agreeing to revert to the Minimum Price upon instruction from Fender Europe by raising its online price for the Relevant Product back to £999, in adherence with the Fender Pricing Policy.

2018

4.154 The evidential picture for 2018 looks very similar and continues to support the CMA's finding of an ongoing agreement and/or concerted practice between Fender Europe and [Reseller 1] whereby [Reseller 1] adhered to the Fender Pricing Policy. In 2018, the additional supporting evidence includes:

- [Reseller 1] monitoring other MI resellers' prices and complaining to Fender Europe when they fell below the Minimum Price; and
- [Reseller 1] reporting to Fender Europe temporary price matching by [Reseller 1] to enable it to compete with other MI retailers' lower prices.

4.155 In 2018, [Reseller 1] continued to monitor other MI resellers and would report pricing below the Minimum Price to Fender Europe, in accordance with the Fender Pricing Policy. The CMA concludes from this that it agreed to or, at least, tacitly acquiesced to, the Fender Pricing Policy.

⁵³¹ URN E_FEN000173 (Email from [Senior Employee 1] of [Reseller 1] to [Reseller 1 Senior Employee 3], [Reseller 1 Senior Employee 4], [Reseller 1 Employee 1], [Reseller 1 Employee 9] and others of [Reseller 1] dated 22 November 2017).

⁵³² URN E_FEN000174 (Email from [Employee 9] of [Reseller 1] to [Senior Employee 1] of [Reseller 1] dated 24 November 2017).

- 4.156 For example, on 15 January 2018, [Reseller 1 Employee 10] sent an internal [Reseller 1] email under the subject line '*[Reseller] selling new stock on [online marketplace]*' to [Reseller 1 Senior Employee 4] saying, '*[w]e had a customer on LiveChat mention this - they're selling it on their own website for £584 but seemingly selling the same item on [online marketplace] for £549*'. [Reseller 1 Employee 10] included the product listing on [online marketplace] for the Fender Standard Jazzmaster HH-Olympic White and added, '*[t]he customer also mentioned they had quoted him a deal price of £535. Both MPN match*.' [Reseller 1 Senior Employee 4] forwarded this email to [Fender Europe Senior Employee 1] and [Fender Europe Employee 2].⁵³³
- 4.157 Similarly, on 13 March 2018, [Employee 5] of [Reseller 1] sent an email under the subject line '*Arctic White Strat*' to [Fender Europe Employee 2], including a link to [Reseller]'s website listing for the Fender Standard Stratocaster (Arctic White Tinted) and gigbag.⁵³⁴
- 4.158 The CMA concludes from this that [Reseller 1] was continuing to complain to Fender Europe about other MI resellers not adhering to the Fender Pricing Policy. This in turn shows that [Reseller 1] was itself continuing to adhere to the Fender Pricing Policy by advertising the Relevant Products for sale on its website at or above the Minimum Price.
- 4.159 Finally, on 5 April 2018, [Employee 10] of [Reseller 1], sent an internal email with the subject line '*EVH Striped Series 5150 R/B/W Pricing*' to [Reseller 1 Employee 1], stating, '*[j]ust a quick heads up, [Reseller] and [Reseller] have stock and are selling this for £1069. We have done a price match to get the sale but as we have so many in stock [Reseller 1 Employee 9] has asked me to bring this to your attention*.'⁵³⁵ [Senior Employee 4] of [Reseller 1], forwarded this email to [Employee 10] of Fender Europe the same day. [Fender Europe Employee 10] replied on 6 April 2018, stating, '*[n]oted [Reseller 1 Senior Employee 4]*'.⁵³⁶
- 4.160 This email exchange shows that despite its temporary price matching to enable it to compete with other MI resellers, [Reseller 1] was still generally adhering to the Fender Pricing Policy. It is difficult to see why it would have otherwise reported the other MI retailers' lower prices and its own price-matching to Fender Europe.

⁵³³ URN E_FEN003111 (Email from [Employee 10] of [Reseller 1] to [Senior Employee 4] of [Reseller 1] dated 15 January 2018 forwarded by [Reseller 1 Senior Employee 4] to [Senior Employee 3] of [Reseller 1], [Fender Europe Senior Employee 1] and [Employee 2] of Fender Europe on 15 January 2018).

⁵³⁴ URN E_FEN000219 (Email from [Employee 5] of [Reseller 1] to [Employee 2] of Fender Europe dated 13 March 2018).

⁵³⁵ URN E_FEN000238 (Email from [Employee 10] of [Reseller 1] to [Employee 1] of [Reseller 1] dated 5 April 2018).

⁵³⁶ URN E_FEN003134 (Email exchange between [Senior Employee 4] of [Reseller 1] and [Employee 10] of Fender Europe dated 5-6 April 2018).

Conclusion on the agreement and/or concerted practice between Fender Europe and [Reseller 1]

- 4.161 Based on the evidence set out above, the CMA concludes that there was an agreement and/or concerted practice between Fender Europe and [Reseller 1] that [Reseller 1] would adhere to the Fender Pricing Policy throughout the Relevant Period.
- 4.162 Further, in view of the foregoing, the CMA concludes that, throughout the Relevant Period:
- Fender Europe instructed [Reseller 1] on numerous occasions to follow the Fender Pricing Policy with regard to the advertising and pricing of the Relevant Products online.
 - [Reseller 1] told Fender Europe on multiple occasions that it had been adhering to the Fender Pricing Policy as instructed and the evidence shows that it did generally raise its prices to at least the Minimum Price on Fender Europe's request, albeit not always immediately.
 - On numerous occasions throughout the Relevant Period, [Reseller 1] reported other MI resellers to Fender Europe for advertising and/or selling the Relevant Products online at a price below the Minimum Price. This further confirms that there was an understanding between [Reseller 1] and Fender Europe that the Fender Pricing Policy applied to all or at least the vast majority of MI resellers, including [Reseller 1].
- 4.163 The CMA has taken into account the context of the arrangements between Fender Europe and [Reseller 1], including the evidence that employees of Fender Europe were aware of the potential illegality of enforcing/agreeing the Fender Pricing Policy with MI resellers, including [Reseller 1], and were careful not to communicate pricing instructions in writing.
- 4.164 In addition, the nature of the Fender Pricing Policy was such that Fender Europe rarely needed to contact [Reseller 1] about it (in writing or otherwise) when [Reseller 1] was complying with it because it was based on a price list as far as pricing for individual Relevant Products was concerned. This limited the need for written or oral communication about the Fender Pricing Policy (and therefore the amount of written evidence relating to it).
- 4.165 In light of the above, the CMA finds a concurrence of wills between [Reseller 1] and Fender Europe that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price during the Relevant Period. In particular, the CMA finds that:

- Fender Europe instructed [Reseller 1] not to advertise or sell the Relevant Products online below the Minimum Price, with the credible threat (direct, indirect and/or implied) of repercussions if [Reseller 1] failed to comply;
- [Reseller 1] understood the instructions from Fender Europe and the potential consequences if it did not comply; and
- [Reseller 1], in practice, agreed to abide by and/or implemented Fender Europe's instructions not to advertise or sell the Relevant Products online below the Minimum Price, including making price adjustments when instructed to do so by Fender Europe.

4.166 The CMA concludes that this constitutes an agreement for the purposes of the Chapter I Prohibition and/or Article 101 TFEU.

4.167 In the alternative, the CMA finds that the arrangements identified above constituted at least a concerted practice between Fender Europe and [Reseller 1], on the basis that [Reseller 1] knew Fender Europe's wishes as regards the Fender Pricing Policy and adjusted its online advertising and pricing behaviour as a result, thereby knowingly substituting practical cooperation for the risks of price competition between it and other MI resellers.

4.168 In the remainder of this Decision, the agreement and/or concerted practice between Fender Europe and [Reseller 1] that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price will be referred to simply as the 'Agreement'.

4.169 The CMA finds that the duration of the Agreement was for the minimum period of 5 years, 3 months and 5 days (from 12 January 2013 at the latest to 17 April 2018).

D. Object of Preventing, Restricting or Distorting Competition

4.170 For the reasons set out below, the CMA finds that the Agreement had as its object the prevention, restriction or distortion of competition.

I. Key legal principles

General

4.171 The Chapter I Prohibition and Article 101 TFEU prohibit agreements between undertakings which have as their object the prevention, restriction or distortion of competition.

- 4.172 The term ‘object’ in both prohibitions refers to the sense of ‘aim’, ‘purpose’, or ‘objective’ of the coordination between undertakings in question.⁵³⁷
- 4.173 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.⁵³⁸
- 4.174 The 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.⁵³⁹ 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.⁵⁴⁰
- 4.175 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.⁵⁴¹
- 4.176 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.⁵⁴²

⁵³⁷ See, for example, respectively: Case 56/64 *Consten & Grundig v Commission*, EU:C:1966:41, paragraph 343 (‘...[s]ince the agreement thus aims at isolating the French market... it is therefore such as to distort competition...’); Case 96/82 *IAZ and Others v Commission*, EU:C:1983:310, paragraph 25; Case C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643, paragraphs 32–33.

⁵³⁸ See, for example, Case C-8/08 *T-Mobile Netherlands BV v NMa*, EU:C:2009:343, paragraphs 28–30 and the case law cited therein, and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, at 269.

⁵³⁹ Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 50; affirmed in Case C-373/14 P *Toshiba v Commission*, EU:C:2016:26, paragraph 26.

⁵⁴⁰ Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraphs 49 and 57. See also Case C-373/14 P *Toshiba v Commission*, EU:C:2016:26, paragraph 26.

⁵⁴¹ Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 53 and Case C-373/14 P *Toshiba v Commission*, EU:C:2016:26, 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.

⁵⁴² Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 54; affirmed in Case C-286/13 P *Dole v Commission*, EU:C:2015:184, paragraph 118.

4.177 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.⁵⁴³

Resale Price Maintenance

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

4.179 Resale price maintenance (RPM) is defined in the Vertical Guidelines as ‘agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer’.⁵⁴⁴ RPM has been found consistently in EU and national decisional practice (including in the UK) to constitute a restriction of competition by object.⁵⁴⁵ The Court of Justice has also held that the imposition of fixed or minimum resale prices on distributors is restrictive of competition by object.⁵⁴⁶

⁵⁴³ Case C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643, paragraph 21. See also *Ping Europe Limited v CMA* [2018] CAT 13, paragraphs 101-105, where the CAT recently confirmed that its approach follows that set out by the Court of Justice in, e.g., Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204. More specifically, the CAT stated that ‘the Tribunal approaches the issue of object infringement on the basis that an agreement revealing a sufficient degree of harm to competition may be deemed to be a restriction of competition “by object” irrespective of the actual, subjective aims of the parties involved, even if those aims are legitimate.’

⁵⁴⁴ Vertical Guidelines, paragraph 48.

⁵⁴⁵ See cases further below in this section, including cases such as: Commission Decision 73/322/EEC *Deutsche Phillips* (IV/27.010) [1973] OJ L293/40; Commission Decision 77/66/EEC *GERO-fabriek* (IV/24.510) [1977] OJ L16/8; Commission Decision 80/1333/EEC *Hennessy-Henkell* (IV/26.912) [1980] OJ L383/13; Commission Decision 97/123/EC *Novalliance/Systemform* (IV/35.679) [1997] OJ L47/11; Commission Decision 2001/135/EC *Nathan-Bricolux* (COMP.F.1/36.516) [2001] OJ L 54/1, paras 86–90; in *Volkswagen II*, Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4, annulled on appeal Case T-208/01 *Volkswagen AG v Commission* EU:T:2003:326 and Case C-74/04 P *Commission v Volkswagen AG*, EU:C:2006:460; *CD prices*, Commission Press Release IP/01/1212, 17 August 2001; *Yamaha*. See also *Commercial refrigeration; Bathrooms; HUSKY*, Czech NCA decision of 28 January 2011, upheld on appeal by Brno Regional Court judgment of 26 April 2012; *Young Digital Planet*, Polish NCA decision of 30 October 2012; *Hyundai Motor Vehicles*, Bulgarian NCA decision of 6 November 2012; *Vila*, Danish NCA settlement decision of 30 October 2013; *Pioneer v Bundeswettbewerbsbehörde*, Austrian Cartel Court rulings of March–June 2014; *Witt Hvidevarer*, Danish NCA settlement of 10 July 2014; decision by the Austrian Competition Authority against *Samsung Electronics Austria GmbH* of 4 November 2015 (BWB/K-396); and decision by the Polish Competition Authority against *Termet S.A.* of 19 December 2016 (RKT-08/2016). See to this effect also the Commission Staff Working document ‘Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice’, revised version of 03/06/2015, paragraph 3.4 (http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex_en.pdf).

⁵⁴⁶ See Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284, paragraph 44, where the Court of Justice held that ‘provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of [Article 101 (1)] which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty’. Vertical Guidelines, paragraphs 223–229. See also Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the

- 4.180 The European Courts have established that it is not unlawful for a supplier to impose a maximum resale price or to recommend a particular resale price.⁵⁴⁷ However, describing a price as a ‘recommended’ retail price does not prevent this from amounting to de facto RPM, if the reseller does not remain genuinely free to determine its resale price (for example, if there is pressure or coercion exerted by the supplier to adhere to the recommended price).⁵⁴⁸
- 4.181 The Court of Justice has confirmed that ‘it is necessary to ascertain whether such a retail price is not, in reality, fixed by indirect or concealed means, such as the fixing of the margin of the [reseller],⁵⁴⁹ threats, intimidation, warnings, penalties or incentives’.⁵⁵⁰ This would include, for example, threats to delay or suspend deliveries or to terminate supply in the event that the retailer does not observe a given price level.⁵⁵¹ Other measures include the withdrawal of credit facilities, prevailing on other dealers not to supply⁵⁵² and threatened legal action, pressuring telephone calls and letters.⁵⁵³
- 4.182 RPM can be achieved not only directly, for example, via a contractual provision that directly sets a fixed or minimum resale price,⁵⁵⁴ but also indirectly.⁵⁵⁵ As previously stated, whether or not there is indirect RPM in any particular case will

Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102/1 (VABER), recital 10.

⁵⁴⁷ See, for example, Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504, paragraph 4.

⁵⁴⁸ Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504; and Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485. See also VABER, Article 4(a); and Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41, paragraph 25.

⁵⁴⁹ Vertical Guidelines, paragraph 48.

⁵⁵⁰ Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485, paragraph 71. See also Case C-260/07 *Pedro IV Servicios SL v Total España SA*, EU:C:2009:215, paragraph 80; and Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4 (which includes warnings against deep discounting).

⁵⁵¹ Vertical Guidelines, paragraph 48. See also Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65; and Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4.

⁵⁵² Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65.

⁵⁵³ See Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4. In paragraphs 44-55 of its decision, the Commission noted various measures taken to enforce ‘price discipline’ among dealers, including threats of legal action against dealers offering discounts, dealers reporting discounts to Volkswagen and telephone calls and letters from Volkswagen demanding that discounts and promotions be ceased. The decision was overturned on appeal to the GC due to the Commission’s flawed assessment of whether or not there was an agreement between Volkswagen and its dealers. However, the Commission’s analysis of RPM remains relevant and this case confirms that recommended retail prices could involve unlawful RPM.

⁵⁵⁴ Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284; Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, EU:C:1987:418; Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, EU:C:1988:183; *Yamaha; Agreements between Lladro Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

⁵⁵⁵ See Vertical Guidelines, paragraph 48.

depend on whether the ability of resellers to determine their resale prices has genuinely been restricted.⁵⁵⁶

4.183 Lastly, RPM can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of an automated price-monitoring system or the obligation on resellers to report other members of the distribution network who deviate from the standard price level.⁵⁵⁷ However, the use of such measures does not, in itself, constitute RPM.⁵⁵⁸

Price advertising, advertising and other similar restrictions

4.184 Restrictions on advertising prices below a certain level have in the past been found to lead to de facto RPM. The Commission has considered the application of Article 101(1) TFEU to advertising restrictions imposed by manufacturers in supply agreements in a number of investigations. The OFT has also concluded that advertising restrictions can restrict retailers' ability to determine their own sale prices in a previous decision.⁵⁵⁹

4.185 The relevant restrictions have taken different forms in different cases, including:

- guidelines issued to retailer requiring them to use in shops or outside the supplier's recommended list prices;⁵⁶⁰
- a contractual requirement not to produce advertising material which includes prices different from the supplier's price list without the supplier's approval;⁵⁶¹
- a contractual requirement to withdraw and not to repeat advertisements to which the supplier objected in writing (where there was evidence that this was being used to exclude dealers who were offering low prices from the supplier's distribution network);⁵⁶²

⁵⁵⁶ Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504; and *VABER*, Article 4(a).

⁵⁵⁷ Vertical Guidelines, paragraph 48. See to this effect also Commission Decisions of 24 July 2018 Case AT.40181 *Philips*, paragraph 64: ('Price monitoring and adjustment software programmes multiply the impact of price interventions. Consequently, by closely monitoring the resale prices of its retailers and intervening with lowest-pricing retailers to get their prices increased, Philips France's Consumer Lifestyle business could avoid online price "erosion" across, potentially, its entire (online) retail network.') as well as Case AT.40182 *Pioneer*, paragraph 155; and Case AT.40469 *Denon & Marantz*, paragraph 95.

⁵⁵⁸ Vertical Guidelines, paragraph 48.

⁵⁵⁹ *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003. See also *Trade associations, professions and self-regulating bodies* (OFT 408, December 2004), adopted by the CMA Board, paragraph 3.14.

⁵⁶⁰ *Yamaha. Infra.*

⁵⁶¹ *Ibid.*

⁵⁶² *Hasselblad* upheld on appeal in Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65.

- a contractual requirement (agreed between members of a trade association) requiring them to display the supplier's list price and prohibiting any public announcement of rebates on those prices;⁵⁶³ and
- a prohibition on dealers mentioning discounts or price reductions in any advertising materials, advertisements or promotional campaigns.⁵⁶⁴

4.186 The *Hasselblad*⁵⁶⁵ and *Yamaha*⁵⁶⁶ decisions stress the importance of price advertising in terms of communicating with consumers and in encouraging price competition.

4.187 In *Yamaha*, the Commission objected to restrictions contained in selective distribution agreements on dealers' advertising prices which were different to Yamaha's list prices. In particular, the Commission was concerned by advertising restrictions which formed part of a wider policy by Yamaha to enforce RPM in a number of territories including the Netherlands and Italy. Yamaha placed restrictions on its dealers in the Netherlands and Italy preventing them from advertising prices below Yamaha's recommended retail prices.

4.188 The Dutch dealer contracts (described as 'guidelines') prohibited dealers from advertising prices which differed from Yamaha's list prices. The Commission stated that:

'[Yamaha's guidelines] clearly prevented the dealer from announcing either within or outside the shop a price other than the one established in the price list. Even if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the customer the price it fixed and that such discounts, if the dealer was still willing to offer them, could not be communicated in a way contrary to the guidelines. [...] [The circular sent to Dutch dealers] constitutes a restriction of the dealer's ability to determine its sales prices. This practice has the object of fixing the maximum level of discounts and, as a consequence, the minimum level of resale prices, thereby restricting or distorting price competition.'⁵⁶⁷

4.189 Meanwhile, the distribution agreement with dealers in Italy prohibited dealers from publishing '*in whichever form*' prices which differed from Yamaha's official price lists. The dealers were also prohibited from reproducing advertising material and

⁵⁶³ Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and others v Commission*, EU:C:1975:160.

⁵⁶⁴ *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

⁵⁶⁵ Commission Decision 82/367/EEC *Hasselblad* (IV/25.757) [1982] OJ L161/18 (*Hasselblad*).

⁵⁶⁶ Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975) (*Yamaha*).

⁵⁶⁷ *Ibid*, paragraphs 125-126.

price lists which were different to Yamaha's official price lists. The Commission found that:

'the dealers' freedom to set prices is strictly limited. Dealers cannot attract clients by advertising prices that differ from the "published prices" of [Yamaha], nor by indicating prices in their shops different from those indicated by [Yamaha].'⁵⁶⁸

- 4.190 The Commission concluded that Yamaha's agreements had the object of influencing resale prices, thereby restricting or distorting price competition.
- 4.191 In *Groupement des Fabricants de Papiers Peints de Belgique*, the Court of Justice equated a prohibition on announcing rebates with 'a system of fixing selling prices'.⁵⁶⁹
- 4.192 In both *Yamaha* and *Groupement des Fabricants de Papiers Peints de Belgique*, it was accepted that the possibility of resellers being able to grant discounts did not prevent the restriction from infringing Article 101(1) TFEU. In *Yamaha*, the Commission stated of the restrictions that '*[e]ven if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the customer the price it fixed and that such discounts, if the dealer was still willing to offer them, could not be communicated in a way contrary to the guidelines.*'⁵⁷⁰
- 4.193 In *Hasselblad*, the Commission condemned a selective distribution agreement which allowed the manufacturer to prohibit adverts by a dealer containing statements that it '*can match any other retailer's selling prices*'.⁵⁷¹ In addition to prohibiting particular adverts, *Hasselblad* had also threatened to withdraw credit facilities from dealers who did not treat prices in its retail price list as minimum selling prices and had terminated a UK dealership which had advertised its products at discounted prices. The Commission found that *Hasselblad's* contractual right to prohibit adverts restricted competition within the meaning of Article 101(1) for the following reason:

'This extensive right of intervention enables *Hasselblad* (GB) to prevent actively competing and price-cutting dealers [...] from advertising their activities, the more so as *Hasselblad* (GB) is not required to give any justification for its censorship measures.'⁵⁷²

⁵⁶⁸ *Ibid*, paragraphs 133-135.

⁵⁶⁹ Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and others v Commission*, EU:C:1975:160.

⁵⁷⁰ *Yamaha*, paragraph 125.

⁵⁷¹ *Hasselblad*, paragraph 38.

⁵⁷² *Ibid*, paragraph 60.

- 4.194 The Commission concluded that Hasselblad's distribution policy (including Hasselblad's right to prohibit adverts) '*interferes with the freedom of the authorised dealers to fix their prices, using the dealers' fear of termination of the Dealer Agreement as a means of hindering price competition between authorised dealers*'.⁵⁷³ The Commission considered that Hasselblad's use of its dealer agreements (including the advertising restrictions) '*as a means to influence retail prices*',⁵⁷⁴ amounted to a restriction of competition under Article 101(1) TFEU. On appeal,⁵⁷⁵ the Court of Justice found that the Commission had been right to conclude that the advertising restriction constituted an infringement of Article 101(1) TFEU.⁵⁷⁶
- 4.195 In *Lladró*,⁵⁷⁷ the OFT noted that the advertising of resale prices, including discounts, promotes price transparency between retailers and provides a significant incentive for retailers to compete on price. Provisions restricting a retailer's freedom to inform potential customers of discounts which are being offered removes a key incentive for, and constitute an obstacle to, price competition between retailers. The OFT concluded in *Lladró* that the '*obvious consequence*' of price advertising restrictions is to restrict retailers' ability to determine their own sale prices and that '*any such provision has as its object the prevention, restriction or distortion of competition*'.⁵⁷⁸
- 4.196 Further, in *Commercial refrigeration*⁵⁷⁹ the CMA found that a policy which prevented resellers from advertising the supplier's products below a minimum advertised price (MAP) set out in the supplier's MAP policy constituted de facto RPM as in the legal and economic context in which it operated, it genuinely restricted in practice the ability of the resellers to determine their online sales price for the relevant products at a price below the MAP.⁵⁸⁰

⁵⁷³ *Ibid*, paragraph 66.

⁵⁷⁴ *Ibid*.

⁵⁷⁵ Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65, paragraph 43.

⁵⁷⁶ On the assessment of advertising restrictions, more specifically 'MAP' (minimum advertised pricing), under EU competition law, please also see the European Parliament's '*Notice to Member States' regarding 'Petition No 2383/2014 by Norbert Perstinger (Austrian), on the introduction of the Minimum Advertised Price (MAP) in the European Union*', available at

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONGML%20COMPARL%20PE-572.975%2001%20DOC%20PDF%20V0%2F%2FEN>

⁵⁷⁷ *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, Case CP/0809-01, 31 March 2003.

⁵⁷⁸ *Ibid*, paragraph 70.

⁵⁷⁹ The CMA found that the MAP policy constituted RPM because, by restricting the price at which its goods were advertised online, the policy prevented dealers from deciding the resale price for those goods. The CMA found that there is a clear link between the advertised price and the resale price when goods are purchased online.

⁵⁸⁰ *Ibid.*, in particular, see paragraphs 6.43.2-3. In making this finding the CMA noted, in particular, that where customers buy the products online (i.e. '*click-to-buy*' sales), the advertised price is typically the price paid by the customer, that is,

II. Legal Assessment of the Agreement

4.197 For the reasons set out below, the CMA finds that the object of the Agreement was to prevent, restrict or distort competition through RPM and it was therefore, by its very nature, harmful to the proper functioning of normal competition. This finding is based on an assessment set out below of the Agreement's content and objectives as well as the legal and economic context in which it operated.

Content of the Agreement

4.198 As set out above:

- The Agreement between Fender Europe and [Reseller 1] stipulated that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price in accordance with the Fender Pricing Policy.⁵⁸¹
- [Reseller 1]'s commitment to adhere to the Fender Pricing Policy was reinforced by measures on the part of Fender Europe and that of other MI resellers to monitor the market and identify MI resellers who advertised or sold the Relevant Products online below the Minimum Price, including (in the case of some MI resellers) by way of using auto tracking software.⁵⁸²
- It was also reinforced by a credible threat of sanctions by Fender Europe against [Reseller 1].⁵⁸³ More specifically, Fender Europe actually threatened [Reseller 1] directly with certain sanctions for non-compliance with the Fender Pricing Policy on at least one occasion and, furthermore, [Reseller 1] believed that Fender Europe had actually imposed sanctions on at least one MI reseller.⁵⁸⁴ Such threats were significant to [Reseller 1]'s business; as [Reseller 1 Senior Employee 4] explained at interview, Fender Europe was its *'biggest supplier (...) it would have been very difficult for [[Reseller 1]] to exist without them (...) [because Fender was] responsible for delivering a larger part of our profit (...) I don't think we would have grown our business without stocking Fender from the start (...) it's almost a must-have brand; it's as simple as that.'*⁵⁸⁵

the sales price and, also, that the MAP policy was reinforced by measures to identify resellers who priced below the MAP combined with actual or threatened sanctions for advertising prices below the MAP.

⁵⁸¹ See paragraph 4.161 above.

⁵⁸² See paragraph 4.57 above.

⁵⁸³ See paragraph 4.44 above.

⁵⁸⁴ See paragraph 4.52 above.

⁵⁸⁵ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.31, lines 6-7, 17-18 and 23-26 [Text in square brackets added by the CMA].

- 4.199 The CMA concludes that even insofar as the Agreement related to the price at which [Reseller 1] could **advertise** the Relevant Products online (in terms of requiring adherence to a MAP), it restricted in practice the ability of [Reseller 1] to **sell** the Relevant Products online at a price below the Minimum Price. This is because where a consumer bought the Relevant Products from [Reseller 1] online (i.e. 'click-to-buy' sales), the advertised price was typically the price paid by the consumer for the Relevant Products, that is, the sales price.⁵⁸⁶
- 4.200 On the basis of the above, the CMA finds that the Agreement amounted to RPM in respect of online sales of the Relevant Products by [Reseller 1].
- 4.201 Both at the EU and the national level (including the UK), RPM has consistently been found to have the object of preventing, restricting or distorting competition.⁵⁸⁷

Objectives of the Agreement

- 4.202 The CMA concludes that the main objective of the Agreement (and the Fender Pricing Policy more generally) was to fix a Minimum Price at which [Reseller 1] (and other MI resellers adhering to the Fender Pricing Policy) would sell the Relevant Products. The totality of the evidence shows that the aim of this was to:
- reduce downward pressure on online prices of the Relevant Products,⁵⁸⁸
 - reduce price competition between [Reseller 1] and other MI resellers of the Relevant Products who adhered to the Fender Pricing Policy;⁵⁸⁹ and
 - stabilise prices both within the UK, and in respect of MI resellers based in other EU Member States when selling into the UK,⁵⁹⁰

⁵⁸⁶ [Reseller 1] confirmed that during the period from 1 June 2015 to the date of the response, only about [0-10%] of online purchases were not at the advertised price. URN C_FEN00552 ([Reseller 1] Section C of response to s.26 Notice), response to question 4(b) [Text in square brackets added by the CMA].

⁵⁸⁷ See paragraph 4.179 above. See also to this effect, for example, the recent Commission decisions of 24 July 2018 in Case AT. 40465 *Asus*, paragraph 107; Case AT. 40469 *Denon & Marantz*, paragraph 92; Case AT. 40181 *Philips*, paragraph 61 and Case AT. 40182 *Pioneer*, paragraph 152.

⁵⁸⁸ See paragraph 3.37 above.

⁵⁸⁹ See paragraph 3.37 above.

⁵⁹⁰ [Employee] of [Reseller] emailed [Former Senior Employee 1] of Fender Europe stating: '*[w]here UK customers are emailing asking us to price match [Reseller]'s prices in Google shopping Uk. Obviously I am not going to turn the business down, but the net result is that [Reseller] [sic] is now driving down the UK selling price?*' [Fender Europe Former Senior Employee 1] responded '*[p]rices all went up in Europe and not the UK on Jan 1st. This should be all reflected across Europe by 17th Jan.*' URN E_FEN002423 (Email exchange between [Reseller] and Fender Europe dated 4 January 2013), p.1 [Text in square brackets added by the CMA]. [Employee 12] of Fender Europe sent an email to [Employee 1] and [Employee 2], both of Fender US, on 2 June 2015 with the subject line '*Urgent UK Pricing issues*'. In his email he discussed '*Gretsch Pricing in the UK vs Europe*', and noted in particular: '*2) New Pricing structure. UK dealers are "playing ball" and advertising at MSRP. However German dealers (again, lead [sic] by [Reseller]) are not. Moreover, in some instances they're not even playing by the "Brand Value Maintenance" ball: by our calculations they*

thereby protecting or improving the margins of MI resellers of the Relevant Products who adhered to the Fender Pricing Policy, including [Reseller 1].⁵⁹¹

- 4.203 The CMA concludes that, in the absence of the Agreement, [Reseller 1] would have been able to determine independently its resale prices for the Relevant Products. In this way, it would have had the freedom to attract and win consumers (including by using the internet) by signalling to consumers the existence of a price advantage over its competitors. This would have greatly increased the scope for price competition between [Reseller 1] and its competitors.
- 4.204 As set out in paragraphs 3.47 and 3.48 above, Fender Europe's rationale for introducing the Fender Pricing Policy, which formed the basis for the Agreement with [Reseller 1], was at least twofold:
- it was designed to enable Fender Europe's MI resellers to achieve attractive margins through the maintenance of high and stable retail pricing, thus increasing the attractiveness of the Fender brand and encouraging resellers to stock and sell the Relevant Products; and
 - in doing so, it aimed to help Fender Europe secure, maintain and/or improve its UK market position in the Relevant Products relative to its competitors, especially [X] and to a lesser extent [Y].
- 4.205 Fender Europe was aware that the implementation of the Fender Pricing Policy (the basis for the Agreement) would lead to potentially illegal restrictions on price.⁵⁹² Various documents on the CMA's file show that wherever possible, upon direct instruction from [Former Senior Employee 1], Fender Europe assiduously

must be making as little as 16% margin on some models (G6136T is the prime example). (...) Issue number 2 above is the hardest to deal with, as no matter how strongly we suggest what they advertise at, we cannot tell them, by law. Equally, with someone like [Reseller] (worth about \$[X]/yr), it wouldn't be best [sic] us to withdraw dealership if they don't "play ball"(!).' URN E_FEN002678 (Email from [Employee 12], Fender Europe, to [Employee 1] and [Employee 2] of Fender US dated 2 June 2015), p.4-5 [Text in square brackets added by the CMA]. In July 2015, [Former Senior Employee 1] of Fender Europe announced internally a new pricing structure to address the fact that: '*[d]ealers have been complaining (quite rightly) about the discrepancy between Euro and Sterling prices due to the fall in the value of the Euro.*' URN E_FEN002679 (Internal Fender Europe email from [Fender Europe Former Senior Employee 1] dated 20 July 2015), p.1. Fender Europe rolled out the new prices by email to resellers in August 2015. The email(s) stated, '*it is the intention that ALL dealers Europe wide have the new price list implemented and in place by the end of August.*' URN E_FEN002682 (Email from [Employee 2] of Fender Europe to [Reseller] dated 11 August 2015) and URN E_FEN002685 (Email from [Employee 2] of Fender Europe to [Reseller] dated 11 August 2015). See paragraphs 3.128 to 3.129 and 3.138 to 3.139 above.

⁵⁹¹ See paragraph 3.47 above.

⁵⁹² For example, [Employee 9] of Fender Europe also stated that he '*never liked the MSRP minus 4% practice as I understood that it was against the law*'. URN E_FEN003292.1 (Witness statement of [Fender Europe Employee 9] dated 25 July 2018), paragraph 37.

avoided putting instructions to MI resellers (including [Reseller 1]) or threats regarding potential sanctions in writing.⁵⁹³

4.206 This 'subjective' awareness of the necessary consequences of the Fender Pricing Policy further supports the conclusion that the Agreement had the object of preventing, restricting or distorting competition through RPM in the supply of the Relevant Products in the UK.

Legal and economic context of the Agreement

4.207 Section 3.B above provides an overview of the UK guitar sector. In reaching its finding that the Agreement had the object of preventing, restricting or distorting competition, the CMA has had regard to the actual context in which the Agreement operated, including:

- the goods affected by it;⁵⁹⁴
- the conditions of the functioning and structure of the market;⁵⁹⁵ and
- the relevant legal and economic context.⁵⁹⁶

4.208 The CMA considers that the legal and economic context in which guitars are supplied means that a restriction on the price at which the Relevant Products can be advertised or sold online restricts competition by its very nature. This is based, among other factors, on the ever-increasing importance of the internet as a retail channel, and the fact that product pricing is one of the main factors on which resellers compete.

Conclusion on the object of the Agreement

4.209 For the reasons set out above, the CMA finds that the Agreement had as its object the prevention, restriction or distortion of competition (through RPM) in the supply of the Relevant Products within the UK.

E. Appreciable Restriction of Competition

4.210 For the reasons set out below, the CMA finds that the Agreement appreciably prevented, restricted or distorted competition for the supply of electric guitars, electric basses and acoustic guitars within the EU (for the purposes of Article 101 TFEU) and the UK (for the purposes of the Chapter I Prohibition).

⁵⁹³ See paragraphs 3.184 and 4.163 above.

⁵⁹⁴ See section 3.B.I above.

⁵⁹⁵ See sections 3.B.III and 3.B.V above.

⁵⁹⁶ See section 3.B above.

I. Key legal principles

- 4.211 An agreement that is restrictive of competition by ‘object’ will only fall within the Chapter I Prohibition or Article 101 TFEU if its effect on competition is appreciable.⁵⁹⁷
- 4.212 The Court of Justice has clarified that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.⁵⁹⁸ In accordance with section 60 of the Act, this principle applies equally in respect of the Chapter I Prohibition (taking account of the relevant differences between Art 101 TFEU and 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.⁵⁹⁹

II. Legal assessment

- 4.213 As set out above, the CMA has concluded that the Agreement had the object of preventing, restricting or distorting competition (see paragraph 4.209 above). The Agreement was also capable of affecting trade within the UK (see paragraph 4.231 below). Therefore, the CMA finds that the Agreement constituted, by its very nature, an appreciable restriction of competition in the retail sale of electric guitars, electric basses and acoustic guitars for the purposes of the Chapter I Prohibition and Article 101 TFEU.

F. Effect on Trade between EU Member States

- 4.214 For the reasons set out below, the CMA finds that the Agreement satisfies the requisite test for an effect on trade between EU Member States within the meaning of Art 101 TFEU.

⁵⁹⁷ 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.

⁵⁹⁸ 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.

⁵⁹⁹ See, for example, *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraphs 148ff.

I. Key legal principles

- 4.215 Article 101 TFEU applies where an agreement or concerted practice may affect trade between EU Member States appreciably.⁶⁰⁰
- 4.216 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*'.⁶⁰¹
- 4.217 When assessing whether an agreement may affect trade between Member States, the CMA will have regard to the approach set out in the Commission's *Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty* ('Effect on Trade Guidelines').⁶⁰²
- 4.218 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.⁶⁰³ 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.⁶⁰⁴
- 4.219 According to the Effect on Trade Guidelines, agreements relating to tradable products whereby undertakings engage in resale price maintenance (RPM) and which cover the whole of a Member State may have direct effects on trade between Member States by increasing imports from other Member States and by decreasing exports from the Member State in question.⁶⁰⁵
- 4.220 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.⁶⁰⁶ For example, the stronger the market position of

⁶⁰⁰ Case 22/71 *Béguélin Import Co. v S.A.G.L. Import Export*, EU:C:1971:113, paragraph 16.

⁶⁰¹ Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38, p.249.

⁶⁰² *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.23, and Commission Notice, *Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty* [2004] OJ C101/07 (Effect on Trade Guidelines).

⁶⁰³ Effect on Trade Guidelines, paragraph 28, citing Case C-250/92 *Gottrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvarereselskab AmbA*, EU:C:1994:413, paragraph 54.

⁶⁰⁴ Effect on Trade Guidelines, paragraphs 28 and 32.

⁶⁰⁵ Effect on Trade Guidelines, paragraph 88. Agreements involving RPM may also affect patterns of trade in much the same way as horizontal cartels. To the extent that the price resulting from RPM is higher than that prevailing in other Member States, this price level is only sustainable if imports from other Member States can be controlled.

⁶⁰⁶ Effect on Trade Guidelines, paragraph 45.

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.⁶⁰⁷

4.221 There are no general quantitative rules covering all categories of agreements indicating when trade between Member States is capable of being appreciably affected.⁶⁰⁸ However, the Commission holds the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions (the NAAT rule) are met:

- the aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5%; and
- in the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro.⁶⁰⁹

4.222 If an agreement does not fall within the criteria set out above, a case by case analysis is necessary.⁶¹⁰ This needs to take into account, for example, the market position of the undertakings concerned, the nature of the agreement and the nature of the products covered.⁶¹¹

II. Legal assessment

4.223 The CMA finds that the Agreement was capable of appreciably affecting trade between EU Member States. The CMA has based its finding on the following assessment.

Agreement capable of affecting trade between Member States

4.224 As set out above, the Agreement restricted the price at which [Reseller 1] could sell the Relevant Products (tradable products) online to consumers in the UK and

⁶⁰⁷ Effect on Trade Guidelines, paragraph 45.

⁶⁰⁸ Effect on Trade Guidelines, paragraph 46.

⁶⁰⁹ Effect on Trade Guidelines, paragraph 52. This turnover is to be calculated on the basis of total Community sales excluding tax during the previous financial year by the undertaking concerned, of the products covered by the agreement (the contract products) - Effect on Trade Guidelines, paragraph 54. This 'negative' rebuttable presumption even applies where during two successive calendar years this turnover threshold is not exceeded by more than 10% and this market threshold is not exceeded by more than two percentage points. Effect on Trade Guidelines, paragraph 52. According to the Effect on Trade Guidelines, the NAAT rule applies irrespective of the nature of the restrictions contained in an agreement, including so-called '*hardcore restrictions*'. Effect on Trade Guidelines, paragraph 50.

⁶¹⁰ Effect on Trade Guidelines, paragraph 51. However, where an agreement by its very nature is capable of affecting trade between Member States, there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement exceeds 40 million euro. According to the Effect on Trade Guidelines, in the case of such agreements, it can also often be presumed that such effects are appreciable when the market share of the parties exceeds 5% - Effect on Trade Guidelines, paragraph 53.

⁶¹¹ Effect on Trade Guidelines, paragraph 45.

potentially beyond⁶¹² and therefore led to RPM.⁶¹³ Pursuant to the Effect on Trade Guidelines, agreements involving RPM which cover the whole of a Member State may have direct effects on trade between Member States by increasing imports from other Member States and by decreasing exports from the Member State in question.⁶¹⁴ Based on this, the CMA concludes that the Agreement was capable of affecting trade between Member States.

Appreciability

- 4.225 The CMA finds that the appreciability criterion, which is part of the effect on trade test, is also met in this case.
- 4.226 The CMA concludes that the negative rebuttable presumption that the Agreement was not capable of appreciably affecting trade between Member States does not apply since the cumulative criteria of the NAAT rule are not met in this case. While the turnover limb of the NAAT test⁶¹⁵ is met,⁶¹⁶ the market share threshold⁶¹⁷ is not met since Fender Europe's market share in the (upstream) market for the supply of electric guitars, electric basses and acoustic guitars was around [35-40%]⁶¹⁸ in 2017/18 and therefore exceeded 5%.
- 4.227 The factors set out below underpin the CMA's finding that the Agreement was potentially capable of having an appreciable effect on trade between Member States:

⁶¹² To the extent that consumers based in other EU Member States purchased directly from [Reseller 1]'s UK website, the prices paid could have been affected by the Agreement.

⁶¹³ See paragraph 4.200 above.

⁶¹⁴ Effect on Trade Guidelines, paragraph 88.

⁶¹⁵ Aggregate annual Community turnover of the supplier in the products covered by the agreement not exceeding 40 million euro.

⁶¹⁶ In the CMA's view, the correct interpretation of this test is that only the value of sales of the Relevant Products from Fender Europe to [Reseller 1] is to be taken into account, as only this represents turnover related to the 'products covered by' the Agreement. The total value of electric guitars, electric basses and acoustic guitars supplied to [Reseller 1] by Fender Europe (for resale) in 2017/18 was £[>] + VAT (and £[>] + VAT in the year before). See URN C_FEN00346 (Response to April 2018 [Reseller 1] RFI dated 23 April 2018), p.2. Even if, on the basis of a more liberal interpretation, in calculating the relevant turnover, regard was had to the entirety of Fender Europe's turnover in the Relevant Products sold via the MI reseller and DTC channels in the UK (as the turnover in the type of products covered by the agreement), in 2017/18 the relevant turnover would be no more than £[>], URN C_FEN01671 (Response dated 31 May 2019 to May 2019 RFI).

⁶¹⁷ (Aggregate) market share of the parties not exceeding 5% on any relevant market affected by the agreement.

⁶¹⁸ The CMA does not have any exact market share or market value figures for the (upstream) market for the supply of electric guitars, electric basses and acoustic guitars to UK resellers. The CMA has based this approximate [35-40%] figure on the following assumptions: (1) Fender Europe's 2017 turnover (from January to December 2017) in the Relevant Products through its MI reseller and DTC channels was £[>], Fender Europe calculated relevant turnover based on the invoice price, multiplied by the number of units sold, URN C_FEN01671 (Response dated 31 May 2019 to May 2019 RFI); (2) the total estimated revenue of the retail sale of electric and acoustic guitars in the UK for 2017/18 (from April 2017 to March 2018) was £[>] million, URN E_FEN003333 (IBISWorld Report, December 2017) p.13.

- the turnover and market position of the undertaking concerned: Fender Europe holds a significant share of the market in the supply of electric guitars, electric basses and acoustic guitars. The CMA estimates Fender Europe's share of supply to be around [35-40%];⁶¹⁹
- the CMA has been provided with evidence that [Reseller 1], for a period of time, proactively sold the Relevant Products to consumers in EU Member States other than the UK⁶²⁰ and continues to make passive sales overseas totalling between 3 and 5% of total business.⁶²¹ The CMA has also received evidence that at least one other reseller sold Relevant Products to consumers in EU Member States other than the UK;⁶²²
- there is also evidence that a number of resellers based in other EU Member States were selling the Relevant Products to consumers located in other EU Member states, as well as the UK, such as [Reseller], [Reseller] and [Reseller];⁶²³
- some UK resellers complained about these resellers in other EU Member States undercutting their own UK prices;⁶²⁴

⁶¹⁹ Please see footnote 618 above for how this market share figure has been calculated.

⁶²⁰ [Reseller 1] sold Fender products through the website [§<] and a branch located in [§<] for a period of approximately [§<]. See URN C_FEN00552 ([Reseller 1] Section C of response to s.26 Notice), paragraph 3(a)(ii) and URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019), p.11, lines 4-6.

⁶²¹ URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019) p.43, line 20 to p.44, line 24.

⁶²² In March 2017 [Former Senior Employee 3] of Fender Europe described the supply arrangement with [Reseller], *'[f]rom [§<] [Reseller] have [§<] in [§<] and [EU member state]. This is an active action to have presence in [§<]. The [EU member state] [§<] to serve [§<]. Currently [Reseller] [§<] the UK and [§<].'* URN E_FEN002984 ('Online Channel Report EMEA February-March 2017' dated 23 March 2017) [Text in square brackets added by the CMA].

⁶²³ [Fender Europe Senior Employee 1] stated in an internal report *'[a] handful of key European mainland dealers are destabilising the UK market place with aggressive targeting'*. URN E_FEN003008 ('Fender Europe Senior Employee 1 Weekly Report' dated 12 June 2017), p.25.

⁶²⁴ For example, on 25 September 2015 [Senior Employee 4], [Reseller 1] forwarded an email to [Senior Employee 1] of [Reseller 1], [Fender Europe Former Senior Employee 1] and [Employee 2] of Fender Europe stating: *'[Reseller] at UK pricing? It seems not.'* URN E_FEN002695 (Email exchange between [Senior Employee 4] of [Reseller 1], [Fender Europe Former Senior Employee 1], [Employee 2] of Fender Europe and [Senior Employee 1] of [Reseller 1] dated 25 September 2015). [Reseller 1 Senior Employee 4] clarified his comments in URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019) p.194, lines 11 to 20; p.201, lines 15 to 19: CMA: *'you said "[Reseller]" are a – "[Reseller]" are a European –'* [Reseller 1 Senior Employee 4]: *'European retailer who had a, a, a showroom – er, or a retail space in the UK and were supposed to be selling at GBP. What they were actually doing was just converting the euro price at the time'*. CMA: *'[a]nd do you think it's fair to say your expectation is that their prices should have been in line with'*. [Reseller 1 Senior Employee 4]: *'[w]ell, if they were a UK – if they were doing what Fender said they were going to do, they would have been at a UK price'*. See also URN E_FEN000058 (Email from [Reseller 1 Senior Employee 4] to [Fender Europe Employee 2] and [Fender Europe Former Senior Employee 1] dated 21 September 2015). [Reseller 1 Senior Employee 4] clarified why this email was sent in URN C_FEN01886.1 (Transcript of interview with [Reseller 1 Senior Employee 4] dated 29 May 2019) p.185, line 12 to p.186, line 2. [Reseller 1 Senior Employee 4]: *'[Reseller]' were pretty new to the market... they just appeared from nowhere and were just constantly*

- the Agreement related to online commerce which, by its nature, is likely to reach consumers in other EU Member States; and
- the products that were the subject of the Agreement could be easily traded across borders as there were no significant cross-border barriers, in particular when sold through resellers online.⁶²⁵ In addition, the Commission has previously found evidence of competition across borders in the EEA in relation to musical instruments.^{626, 627}

G. Effect on Trade within the UK

4.228 For the reasons set out below, the CMA finds that the Agreement satisfies the test for an effect on trade within the UK.

I. Key legal principles

4.229 The Chapter I Prohibition applies to agreements and concerted practices which may affect trade within the UK.⁶²⁸ As set out in its guidance on Agreements and concerted practices, the CMA considers that in practice it is very unlikely that an agreement which appreciably restricts competition within the United Kingdom does not also affect trade within the United Kingdom. So, in applying the Chapter I Prohibition the CMA's focus will be on the effect that an agreement has on competition.⁶²⁹

4.230 On whether the effect on trade within the UK must be appreciable, the CAT has held that there is no need to import into the Act the rule of 'appreciability' under EU law. The CAT's reasoning for this is that in EU law the requirement of an appreciable effect on trade is a jurisdictional rule the essential purpose of which is to demarcate the fields of EU law and UK domestic law respectively. According to

throwing at us, "Can you match this price? Can you match this price? Can you match this price?"... So, I'm just saying, "one of many" in that, wow, you know, these price... -- these prices are just really, really, really low.'

⁶²⁵ See paragraphs 3.128 and 3.129 above for examples of this.

⁶²⁶ For example, in its *Yamaha* decision, the Commission found that, as evidenced by Yamaha, many dealers were engaged in substantial cross-border sales to end-users and that this showed that the transport costs were not necessarily an obstacle and that dealers had the resources and administrative capabilities necessary to engage in cross-border sales activities. *Yamaha*, paragraph 94.

⁶²⁷ Although there are factors indicating that manufacturers compete to supply electric guitars, electric basses and acoustic guitars across borders within the EEA, in the CMA's view, the available evidence is not sufficiently comprehensive or compelling to define a market wider than the UK.

⁶²⁸ 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 show 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.

⁶²⁹ *Agreements and concerted practices*, OFT 401, paragraph 2.25. This guidance was originally published by the Office of Fair Trading (OFT) and has been adopted by the CMA Board.

the CAT, there is therefore no need to import this concept into domestic competition law.⁶³⁰

II. Legal assessment

4.231 The CMA finds that the Agreement may have affected trade within the UK or a part of the UK. This is because the pricing restriction imposed by the Agreement applied to [Reseller 1]’s online prices, in relation to products which are traded throughout the UK and beyond. The pricing restriction therefore potentially affected consumers wishing to purchase the Relevant Products from [Reseller 1] throughout the whole of the UK and possibly beyond.

4.232 On this basis, the CMA concludes that the Agreement satisfies the test for an effect on trade within the UK.

H. Exclusion or Exemption

I. Exclusion

4.233 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.⁶³¹

4.234 None of the relevant exclusions applies to the Agreement.

II. Block exemption / Parallel exemption

4.235 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.

4.236 Similarly, pursuant to section 10 of the Act, an agreement is exempt from the Chapter I Prohibition provided that it falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation.⁶³²

⁶³⁰ *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11, [459]–[461]. In a subsequent case (*North Midland Construction plc v Office of Fair Trading* [2011] CAT 14, [48]–[51] and [62]), the CAT held that, although there had been some criticism of the CAT’s decision in *Aberdeen Journals*, 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. For completeness, it should be mentioned that the High Court has doubted whether the CAT was correct on this point in two cases, namely *P&S Amusements Ltd v Valley House Leisure Ltd* [2006] EWHC 1510 (Ch), paragraphs 21, 22 and 34 and *Pirtek (UK) Ltd v Joinplace Ltd* [2010] EWHC 1641 (Ch), paragraphs 61-67.

⁶³¹ 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.

⁶³² This is the case irrespective of whether or not it affects trade between EU Member States.

- 4.237 It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.⁶³³
- 4.238 Vertical agreements that restrict competition may be exempt from the Chapter I Prohibition/Article 101(1) TFEU if they fall within the Vertical Agreements Block Exemption Regulation (the VABER).⁶³⁴ 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.⁶³⁵
- 4.239 Article 4(a) of the VABER provides that the exemption provided for in Article 2 of the VABER does not apply to those agreements which directly or indirectly have as their object *‘the restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered, by any of the parties.’*
- 4.240 As set out above, the Agreement restricted [Reseller 1]’s (that is the buyer’s) ability to sell the Relevant Products online below the Minimum Price. Therefore, the Agreement restricted [Reseller 1]’s (the buyer’s) ability to determine its sale price (i.e. it amounted to RPM).⁶³⁶ The CMA therefore finds that Article 4(a) of the VABER is engaged in the present case such that the block exemption provided for in Article 2 of the VABER does not apply to the Agreement. It follows that the Agreement is not exempt from the application of the Chapter I Prohibition (by virtue of section 10 of the Act) or Article 101(1) TFEU.

III. Individual exemption

- 4.241 Agreements which satisfy the criteria set out in section 9 of the Act/Article 101(3) TFEU are exempt from the Chapter I Prohibition/Article 101(1) TFEU.
- 4.242 There are four cumulative criteria to be satisfied:
- the agreement contributes to improving production or distribution, or promoting technical or economic progress;
 - while allowing consumers a fair share of the resulting benefit;

⁶³³ See by analogy section 9(2) of the Act.

⁶³⁴ 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.

⁶³⁵ See Articles 2 – 4 of the VABER.

⁶³⁶ See paragraph 4.209 above.

- the agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and
- the agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

4.243 In considering whether an agreement satisfies the criteria set out in section 9 of the Act/Article 101(3) TFEU, the CMA will have regard to the Commission's Article 101(3) Guidelines.⁶³⁷

4.244 The CMA notes that agreements which have as their object the prevention, restriction or distortion of competition, are unlikely to benefit from individual exemption as such restrictions generally fail (at least) the first two conditions for exemption: they neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).⁶³⁸ However, each case ultimately falls to be assessed on its merits.

4.245 It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.⁶³⁹ Neither Fender, nor [Reseller 1], made any submissions on this point.

I. Attribution of liability

I. Key legal principles

4.246 For each party that the CMA finds to have infringed the Chapter I Prohibition and/or Article 101 TFEU, the CMA will first identify the legal entity that was directly involved in the infringement. It will then determine whether liability for the infringement should be shared with any other legal entity, in which case each legal entity's liability will be joint and several on the basis that all form part of the same undertaking.

4.247 Companies belonging to the same corporate group will often constitute a single undertaking within the meaning of the Chapter I Prohibition/Article 101 TFEU allowing the conduct of a subsidiary to be attributed to the parent. A parent company may be held jointly and severally liable for an infringement committed by

⁶³⁷ 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.

⁶³⁸ Article 101(3) Guidelines, paragraph 46 and Vertical Guidelines, paragraph 47.

⁶³⁹ Article 101(3) Guidelines, see paragraphs 51–58; Vertical Guidelines, paragraph 47. See also section 9(2) of the Act.

a subsidiary company where, at the time of the infringement, the parent company was able to and did exercise decisive influence over the conduct of the subsidiary, so that the two form part of a single economic unit for the purposes of the Chapter I Prohibition and/or Article 101 TFEU.⁶⁴⁰

- 4.248 According to settled case law, in the specific case where a parent company has a 100% shareholding in a subsidiary that has infringed the competition rules: (i) the parent company is able to exercise decisive influence over the conduct of the subsidiary; and (ii) there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.⁶⁴¹ The Court of Justice has held that where a parent company holds 100% of the capital of an interposed company which, in turn, holds the entire capital of a subsidiary of its group which has committed an infringement of competition law, there is also a rebuttable presumption that that parent company exercises a decisive influence over the conduct of the interposed company and also indirectly, via that company, over the conduct of that subsidiary.⁶⁴²
- 4.249 In those circumstances, it is sufficient for the CMA to prove that the subsidiary is wholly owned, either directly or indirectly via an interposed company, by the parent company in order to presume that the parent exercises decisive influence over the commercial policy of the subsidiary. The CMA will then be able to regard the parent company as jointly and severally liable for the payment of any fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.⁶⁴³
- 4.250 As to the interpretation of 'decisive influence', the CAT noted in *Durkan*⁶⁴⁴ that such influence may be indirect and can be established even where the parent does not interfere in the day-to-day business of the subsidiary or where the influence is not reflected in instructions or guidelines emanating from the parent to

⁶⁴⁰ Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 60–61; and Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130. See also Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 50.

⁶⁴¹ Case T-517/09 *Alstom v Commission*, EU:T:2014:999, paragraph 55; Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 60. Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130; and Case T-325/01 *DaimlerChrysler AG v Commission*, EU:T:2005:322, paragraphs 217–221. This principle was recently confirmed again by the General Court in its judgment of 12 July 2018, Case T-419/14 *The Goldman Sachs Group v Commission*, EU:T:2018:445, paragraph 44.

⁶⁴² See Case C-90/09 P *General Química SA v Commission* EU:C:2011:21, paragraph 88.

⁶⁴³ See Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 61 and Case T-419/14 *The Goldman Sachs Group v Commission*, EU:T:2018:445, paragraph 45. See Case C-90/09 P *General Química SA v Commission* EU:C:2011:21, paragraph 89 in respect of circumstances where there is an interposed company.

⁶⁴⁴ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6.

the subsidiary. Instead, one must look generally at the relationship between the two entities, and the factors to which regard may be had when considering the issue of decisive influence 'are not limited to commercial conduct but cover a wide range'.⁶⁴⁵

- 4.251 In examining whether a parent company has the ability to exercise decisive influence over the market conduct of its subsidiary, account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to its parent company and, therefore, of the economic reality.⁶⁴⁶
- 4.252 The actual exercise of decisive influence is assessed on the basis of factual evidence including, in particular, through an analysis of the management powers that the parent companies have over the subsidiary.⁶⁴⁷ The actual exercise of decisive influence can be shown directly by the parent's specific instructions or rights of co-determination of commercial policy and also can be inferred indirectly from the totality of the economic, organisational and legal links between the parent company and the relevant subsidiary.⁶⁴⁸ Influence over aspects such as corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters are relevant even if each of those factors taken in isolation does not have sufficient probative value.⁶⁴⁹
- 4.253 The actual exercise of decisive influence by the parent company over the subsidiary may be deduced from any, or a combination, of the following non-exhaustive factors:
- board composition and board representation by the parents on the board of the subsidiary;⁶⁵⁰
 - overlapping senior management;⁶⁵¹
 - the business relationship between the parent company and the subsidiary;⁶⁵²

⁶⁴⁵ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, [22].

⁶⁴⁶ See Joined Cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce Inc. v Commission and Commission v Fresh Del Monte Produce Inc.*, EU:C:2015:416, paragraph 76. See also Case C-440/11 P *European Commission v Stichting Administratiekantor Portielje and Gosselin Group NV*, EU:C:2013:514, paragraph 66; Case T-45/10 *GEA Group AG v Commission*, EU:T:2015:507, paragraph 133.

⁶⁴⁷ Case T-77/08 *The Dow Chemical Company v Commission*, EU:T:2012:47 confirmed on appeal Case C-179/12 *The Dow Chemical Company v Commission*, EU:C:2013:605.

⁶⁴⁸ Case T-314/01 *Avebe v Commission*, EU:T:2006:266, paragraph 136 and case-law cited; Case T-77/08 *The Dow Chemical Company v Commission*, EU:T:2012:47, paragraph 77; *Durkan v Office of Fair Trading* [2011] CAT 6, [19]–[22].

⁶⁴⁹ Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 183.

⁶⁵⁰ Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraph 38.

⁶⁵¹ Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 184.

⁶⁵² Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 184.

- presence of the parent company in the same business sector;⁶⁵³
- sole representation by the parent company in the administrative proceedings;⁶⁵⁴
- parent and subsidiary presenting themselves to the outside world as forming part of the same group, such as references in the annual reports, description of being part of the same group;⁶⁵⁵ and
- the level of control over the important elements of the business strategy of the subsidiary, the level of integration of the subsidiary into the parent company's corporate structure and how far the parent company, through representatives on the board of the subsidiary, was involved in the running of the subsidiary.⁶⁵⁶

II. Liability for Infringement

4.254 The legal entity that was directly involved in the Infringement throughout the Relevant Period was Fender Europe. Accordingly, the CMA finds Fender Europe liable for the Infringement.

4.255 Fender Europe was 100% owned by Fender International Corporation, which in turn was 100% owned by Fender US throughout the Relevant Period.⁶⁵⁷

4.256 Based on the legal principles set out in paragraph 4.248 above, this means that:

- Fender US was able to exercise decisive influence over the conduct of Fender Europe throughout the Relevant Period;
- there is a rebuttable presumption that Fender US did in fact exercise decisive influence over the conduct of Fender Europe; and
- Fender has not rebutted this presumption.

III. Conclusion on joint and several liability

4.257 In the light of the above, the CMA concludes that Fender Europe and its indirect parent company, Fender US, formed a single economic unit for the purposes of the Chapter I Prohibition and/or Article 101 TFEU throughout the Relevant Period.

⁶⁵³ Commission Decision 2007/691/EC *Fittings* (COMP/F/38.121) [2007] OJ L283/63.

⁶⁵⁴ Case C-286/98 *P Stora Kopparbergs Bergslags AB v Commission*, EU:C:2000:630.

⁶⁵⁵ Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraphs 33–36 and 62–66.

⁶⁵⁶ *Durkan v Office of Fair Trading* [2011] CAT 6, [31].

⁶⁵⁷ See paragraph 3.4 above.

Fender Europe and Fender US are therefore jointly and severally liable for the payment of any fine imposed in relation to the Infringement.

J. Burden and standard of proof

I. Burden of proof

4.258 The burden of proving an infringement of the Chapter I Prohibition/Article 101 TFEU lies with the CMA.⁶⁵⁸

4.259 This burden does not preclude the CMA from relying, where appropriate, on inferences or evidential presumptions. In *Napp*, the CAT stated:

'That approach does not in our view preclude the Director,⁶⁵⁹ in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example [...] that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged.'⁶⁶⁰

4.260 The CMA finds that it has discharged its burden of proof in this case.

II. Standard of proof

4.261 The CMA is required to show that an infringement has occurred on the balance of probabilities which is the civil standard of proof.⁶⁶¹ The CAT clarified in the *Replica Football Kit* appeals that:⁶⁶² *'[t]he standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances*

⁶⁵⁸ *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [95] and [100]. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, [164] and [928]–[931]; and *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31, [88].

⁶⁵⁹ References to the 'Director' are to the former Director General of Fair Trading (DGFT). The post of DGFT was abolished under the Enterprise Act 2002 and the functions of the DGFT were transferred to the OFT. From 1 April 2014 the OFT's competition and certain consumer functions were transferred to the CMA by virtue of the Enterprise and Regulatory Reform Act 2013.

⁶⁶⁰ *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [110]. Along similar lines, the Court of Justice in *Aalborg* stated: '56. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.' Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission*, EU:C:2004:6.

⁶⁶¹ *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31, [88].

⁶⁶² *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, [204]. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, [164]–[166].

of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.'.

- 4.262 The Supreme Court has further clarified that this standard of proof is not connected to the seriousness of the suspected infringement.⁶⁶³ The CAT has also expressly accepted the reasoning in this line of case law.⁶⁶⁴
- 4.263 The CMA finds that this standard of proof has been met in relation to the Infringement.

⁶⁶³ *Re S-B (Children)* [2009] UKSC 17 [34]. See also *Re B (Children)* [2008] UKHL 35, [72].

⁶⁶⁴ *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14, [15]–[16].

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 concluded that Fender Europe infringed the Chapter I Prohibition and/or Article 101 TFEU by entering into an agreement and/or participating in a concerted practice with [Reseller 1]:

- that [Reseller 1] would not advertise or sell online the Relevant Products below the Minimum Price;
- which amounted to RPM in respect of online sales of the Relevant Products by [Reseller 1].

5.2 The CMA finds that this agreement and/or concerted practice:

- had as its object the prevention, restriction or distortion of competition within the UK and/or between EU Member States;
- may have affected trade within the UK and/or between EU Member States; and
- lasted from 12 January 2013 at the latest to 17 April 2018.

5.3 The CMA has decided to also attribute liability for Fender Europe's Infringement to its indirect parent company, Fender US, making Fender Europe and Fender US jointly and severally liable for the Infringement.

5.4 The remainder of this Section sets out the enforcement action which the CMA is taking and its reasons for taking that action.

B. Directions

5.5 The CMA concludes that the Infringement has ceased. Therefore, in the CMA's view, it is not necessary to give directions to any party in this case.⁶⁶⁵

⁶⁶⁵ Section 32(1) of the Act provides that if the CMA has made a decision that an agreement infringes the Chapter I prohibition and Article 101(1) TFEU, it may give to such person(s) as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

C. Financial Penalties

I. General

5.6 Section 36(1) of the Act provides that on making a decision that an agreement⁶⁶⁶ has infringed the Chapter I Prohibition or Article 101(1) TFEU, the CMA may require an undertaking which is a party to the agreement concerned to pay the CMA a penalty in respect of the infringement.

5.7 As set out above, the CMA finds Fender Europe and Fender US (which are part of the same single economic unit) jointly and severally liable for the Infringement. Therefore, in the CMA's view it is appropriate to impose a financial penalty for the Infringement jointly and severally on Fender Europe and Fender US.

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

5.8 Provided the penalties the CMA imposes in a particular case are:

- a. within the range of penalties permitted by section 36(8) of the Act⁶⁶⁷ and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the 2000 Order)⁶⁶⁸; and
- b. the CMA has had regard to its guidance as to the appropriate amount of a penalty (the Penalties Guidance)⁶⁶⁹ in accordance with section 38(8) of the Act,

the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.⁶⁷⁰

5.9 The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.⁶⁷¹ Rather, the CMA makes its assessment on a case-by-case basis,⁶⁷² having regard to all relevant circumstances and the twin objectives of its policy on financial penalties.

⁶⁶⁶ Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.

⁶⁶⁷ Section 36(8) of the Act reads: 'No penalty fixed by the [OFT] under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State).'

⁶⁶⁸ SI 2000/309, as amended by the Competition Act (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

⁶⁶⁹ *CMA's guidance as to the appropriate amount of a penalty* (CMA73, 18 April 2018), paragraph 1.10.

⁶⁷⁰ *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

⁶⁷¹ See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, at [78].

⁶⁷² Penalties Guidance, paragraphs 2.5 and 2.8. 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'.

5.10 In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will have regard to the seriousness of the infringement and the need to deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.⁶⁷³

Small agreements

5.11 Section 39 of the Competition Act (which provides for limited immunity from penalties in relation to the Chapter I prohibition) does not apply in the present case on the basis that the applicable turnover of Fender Europe alone exceeded the relevant threshold,⁶⁷⁴ and, in any event, the Infringement amounts to a ‘price fixing agreement’ within the meaning of section 39(9) of the Competition Act.⁶⁷⁵ Moreover, section 39 of the Competition Act does not apply in respect of infringements of Article 101 TFEU.

II. Intention/negligence

5.12 The CMA may impose a penalty on an undertaking which has infringed the Chapter I Prohibition and/or Article 101 TFEU if it is satisfied that the infringement has been committed intentionally or negligently.⁶⁷⁶ However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent for the purposes of determining whether it may exercise its discretion to impose a penalty.⁶⁷⁷

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

‘(...) an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition.

⁶⁷³ The Act, [Chapter 1: Agreements](#).

⁶⁷⁴ Regulation 3 of the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI/2000/262) provides that the category of agreements for which no penalty may be imposed under section 39 of the Competition Act comprises ‘all agreements between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million’. The combined applicable turnover of the Parties in the business years ending in 2012 – 2017 exceeded £20 million. See Fender Europe’s 2012, 2013, 2014, 2015, 2016 and 2017 published accounts, available from Companies House: <https://beta.companieshouse.gov.uk/company/03127180/filing-history>.

⁶⁷⁵ A ‘price fixing agreement’ within the meaning of section 39(9) of the Competition Act is ‘an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates’. By virtue of section 39(1)(b) of the Competition Act, such an agreement is excluded from the benefit of the limited immunity from penalties provided by section 39 of the Competition Act.

⁶⁷⁶ Section 36(3) of the Act.

⁶⁷⁷ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, [453]–[457]; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [221].

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'.⁶⁷⁸

- 5.14 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.*'⁶⁷⁹
- 5.15 The intention or negligence relates to the facts, not the law. 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.⁶⁸⁰
- 5.16 As set out in previous decisions, the CMA takes the view that the circumstances in which the CMA might find that an infringement has been committed intentionally include situations in which the agreement or conduct in question has as its object the restriction of competition.⁶⁸¹
- 5.17 In establishing whether or not there was intention, the CMA may also have regard to numerous other factors, including documents generated by the undertaking/s in question and witness evidence.
- 5.18 The CMA notes that there is strong evidence that Fender Europe must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. This includes:
- evidence of Fender Europe's deliberate concealment of the Fender Pricing Policy, which formed the basis for the Infringement. This is strong evidence of an intentional infringement,⁶⁸²
 - concrete evidence (set out at paragraphs 3.172 to 3.192 above) which indicates that Fender Europe was, in fact, aware of the anti-competitive and illegal nature of operating and enforcing the Fender Pricing Policy, which formed the basis of the Infringement;

⁶⁷⁸ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [221].

⁶⁷⁹ Case C-280/08 P *Deutsche Telekom v Commission*, EU:C:2010:603, paragraph 124.

⁶⁸⁰ Case C-681/11 *Bundeswettbewerbsbehörde v Schenker & Co. AG*, EU:C:2013:404.

⁶⁸¹ The CMA decision of 3 May 2017 in Case 50343 *Online resale price maintenance in the light fittings sector (Light Fittings)*, paragraph 5.14; *Bathrooms*, paragraph 7.16; *Commercial Refrigeration*, paragraph 7.19; the CMA decision of 1 August 2019 in Case 50565-2 *Online resale price maintenance in the digital piano and digital keyboard sector*, paragraph 5.18.

⁶⁸² See paragraphs 4.58 to 4.64 above. Further, the CMA considers that the verbal communication of the Fender Pricing Policy to [Reseller 1] is consistent with the culture of concealment described in paragraphs 3.184 to 3.191 above

- the fact that RPM is a well-established competition law infringement and Fender Europe ought to have known that restricting [Reseller 1]’s freedom to determine its own resale prices would reduce price competition between [Reseller 1] and other Resellers;⁶⁸³ and
- finally, the fact that, the Infringement had as its object the prevention, restriction or distortion of competition⁶⁸⁴ supports a view that it was committed intentionally.⁶⁸⁵

5.19 The CMA, therefore, finds that Fender Europe committed the Infringement intentionally.⁶⁸⁶ This same evidence would also be sufficient to support the CMA’s finding that Fender Europe committed the Infringement, at the very least, negligently. The CMA finds that the conditions for imposing a penalty on Fender are therefore met.

III. Calculation of Penalties

5.20 The Penalties Guidance sets out a six-step approach for calculating the penalty. In determining the amount of the penalty in this case the CMA has considered in detail Fender’s representations on the draft penalty calculation pursuant to settlement discussions.

Step 1 – the starting point

5.21 The starting point for determining the level of financial penalty that will be imposed on an undertaking is calculated having regard to (i) the seriousness of the infringement and the need for general deterrence and (ii) the relevant turnover of the undertaking.⁶⁸⁷

5.22 In this case, the CMA has decided to apply a starting point percentage of 19% to a relevant turnover of £[X], leading to a starting point of £[X] based on the considerations set out below.

⁶⁸³ See paragraphs 3.172 to 3.192 above.

⁶⁸⁴ See paragraphs 4.197 and 4.213 above.

⁶⁸⁵ Previous CMA decisions where the CMA has concluded that the circumstances in which the CMA might find that an infringement has been committed intentionally include situations in which the agreement or conduct in question has as its object the restriction of competition: *Light Fittings*, paragraph 5.14; *Bathrooms*, paragraph 7.16; *Commercial refrigeration*, paragraph 7.19; *Design, construction and fit-out services* Case 50481, 16 April 2019, paragraph 6.11 and *Supply of productions to the construction industry (pre-cast concrete drainage products)*, Case 50299, 23 October 2019, paragraph 6.16.

⁶⁸⁶ See paragraph 5.14 above.

⁶⁸⁷ Penalties Guidance, paragraphs 2.3 to 2.10.

Seriousness of the Infringement and need for general deterrence

- 5.23 The CMA will apply a starting point of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers). In applying the starting point, the CMA will also reflect the need to deter the infringing undertaking and other undertakings generally from engaging in that type of infringement in the future.⁶⁸⁸
- 5.24 In making this case-specific assessment, the CMA will first take into account how likely it is for the type of infringement at issue to, by its nature, harm competition.⁶⁸⁹ As set out in the Penalties Guidance, the CMA will generally use a starting point between 21% and 30% of the relevant turnover for the most serious types of infringement. In relation to infringements of the Chapter I prohibition and/or Article 101, this includes cartel activities, such as price-fixing and market-sharing and other, non-cartel object infringements which are inherently likely to cause significant harm to competition.⁶⁹⁰
- 5.25 At the second stage, the CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of the specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately consumers.⁶⁹¹
- 5.26 Finally, the CMA will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence.⁶⁹²

Nature of the infringement

- 5.27 RPM is a serious by object infringement of the Chapter I prohibition and Article 101 TFEU. However, it is generally less serious than horizontal price-fixing, market-sharing and other cartel activities, which would ordinarily attract a starting point towards the upper end of the 21% to 30% range.⁶⁹³

Specific circumstances relevant to the extent and likelihood of harm to competition in this case

- 5.28 The relevant specific circumstances in this case were:

⁶⁸⁸ Penalties Guidance, paragraph 2.4.

⁶⁸⁹ Penalties Guidance, paragraph 2.5.

⁶⁹⁰ Penalties Guidance, paragraph 2.6.

⁶⁹¹ Penalties Guidance, paragraph 2.8.

⁶⁹² Penalties Guidance, paragraph 2.9.

⁶⁹³ Penalties Guidance, paragraph 2.6. See also the CMA's decision in *Light Fittings*, paragraph 5.25.

- *The nature of the product, including the nature and extend of demand for the product:* Evidence obtained from the 12 Resellers indicates that, on average, almost 40% of MI sales are online.⁶⁹⁴ The CMA considers that the ability to sell or advertise goods at discounted prices on the internet can intensify price competition between resellers (online and/or offline) due to the increased transparency and reduced search costs from internet shopping.⁶⁹⁵
- *The structure of the market including the market share of Fender Europe:* There are several competitors to Fender Europe in the supply of electric guitars, electric basses and acoustic guitars including Gibson, Epiphone, Ibanez, Yamaha, Music Man, ESP, G&L, PRS and private label brands.⁶⁹⁶ However, Fender Europe is a significant player in the marketplace with a relatively large market share of [35-40%].⁶⁹⁷
- *The market coverage of the infringement:* The Infringement covered all of the Relevant Products sold online by [Reseller 1].⁶⁹⁸ It had a clear effect on [Reseller 1], with Fender Europe seeking to prevent or restrict [Reseller 1]'s ability to determine its own online retail prices for the Relevant Products.
- *The actual or potential effect of the infringement on competitors and third parties:* The Infringement would likely have had a wider effect in the market: reducing downward pressure on the retail price of Fender's electric guitars, electric basses and acoustic guitars more widely, including through the MI reseller and D2C channels.⁶⁹⁹ The evidence indicates that when setting their own prices, MI resellers used each others' prices as a reference point.⁷⁰⁰ This view is supported by the fact that many of Fender Europe's resellers used monitoring software to keep track of their competitors' online prices, therefore amplifying the effect of the Infringement.⁷⁰¹ As [Reseller 1] was one of Fender Europe's most important resellers, many other resellers would likely have reacted to [Reseller 1] raising its prices to the Minimum Price by raising their own prices.⁷⁰²

⁶⁹⁴ See paragraph 3.34 above.

⁶⁹⁵ See paragraph 3.35 and 3.36 above.

⁶⁹⁶ See paragraph 3.17 above.

⁶⁹⁷ See footnote 618 above.

⁶⁹⁸ See paragraph 4.37 above.

⁶⁹⁹ See paragraphs 3.38, 3.39 and 3.47 to 3.76 above.

⁷⁰⁰ See Sections 3.C.IV: Illustrative examples of Fender Europe's monitoring and enforcement and 4.C.IV: Agreement and/or concerted practice between Fender Europe and [Reseller 1] above.

⁷⁰¹ See paragraph 3.90 above.

⁷⁰² See paragraphs 3.80 to 3.84 above.

General deterrence

- 5.29 In setting the starting point at 19%, the CMA has also taken into account the need to deter other undertakings from engaging in similar infringements in the future. In particular, the CMA notes the high prevalence of RPM-related letters on the register of warning and advisory letters issued by the CMA in 2017 and 2018.⁷⁰³

Relevant turnover

- 5.30 The 'relevant turnover' is defined in the Penalties Guidance as the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year.⁷⁰⁴ The 'last business year' is the financial year preceding the date when the infringement ended.⁷⁰⁵
- 5.31 In this case, the relevant turnover of Fender Europe from the supply of electric guitars, electric basses and acoustic guitars in the UK through the MI reseller and D2C channels was £[X] for the financial year ending 31 December 2017.

Step 2 – adjustment for duration

- 5.32 The starting point under step 1 may be increased, or in particular circumstances, decreased to take into account the duration of the infringement.⁷⁰⁶ 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.⁷⁰⁷
- 5.33 In this case, the CMA applied a multiplier of 5.5 years to the starting point to reflect the finding that the duration of the Infringement, which lasted from 12 January 2013 at the latest to 17 April 2018 (5 years, 3 months and 5 days).^{708, 709}

⁷⁰³ See register of [Warning letters](#) issued by the CMA and register of [Advisory letters](#) issued by the CMA.

⁷⁰⁴ Penalties Guidance, paragraph 2.11. The CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v OFT* and *JJJ Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 169 that: '[...] *neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty.*' The Court of Appeal considered that it was sufficient for the OFT to 'be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement' (at paragraphs 170 to 173).

⁷⁰⁵ Penalties Guidance, paragraph 2.11.

⁷⁰⁶ Penalties Guidance, paragraph 2.16.

⁷⁰⁷ Penalties Guidance, paragraph 2.16.

⁷⁰⁸ Penalties Guidance, paragraph 2.16.

⁷⁰⁹ Fender submitted that as the Infringement only lasted 5 days more than 5 years and 3 months that it was appropriate to reduce the duration multiplier to 5.25 years. Fender cited the *Conduct in the transport sector (facilities at airports)* case in support of this rounding down. The CMA is not persuaded by this submission. The CMA considers that *Conduct in the transport sector (facilities at airports)* can be distinguished from this case on its facts. In this case, there was no

Step 3 – adjustment for aggravating and mitigating factors

5.34 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are mitigating factors.⁷¹⁰ A non-exhaustive list of aggravating and mitigating factors is set out in paragraphs 2.18 and 2.19 of the Penalties Guidance. In the circumstances of this case, the CMA considers that it is appropriate to adjust the penalty at step 3 to take account of the factors set out below.

Aggravating factor: involvement of directors or senior management

5.35 The involvement of directors or senior management in an infringement can be an aggravating factor.⁷¹¹

5.36 In the present case, [Former Senior Employee 1], a senior employee of Fender Europe throughout the Relevant Period⁷¹² was closely involved in the Infringement to the extent that he:

- explained the Fender Pricing Policy to Fender Europe colleagues and took an active part in its operation at various times;⁷¹³
- was directly involved in the enforcement of the Fender Pricing Policy at various times;⁷¹⁴ and
- was directly involved in the Infringement through instructions given to [Fender Europe Employee 2] and direct involvement in communications with [Reseller 1].⁷¹⁵

5.37 Given the nature and impact of the direct involvement of [Fender Europe Former Senior Employee 1], the CMA considers that it is appropriate to apply an uplift of 15% to the penalty for director and senior management involvement.

equivalent confirmation from Fender to the CMA that the Fender Pricing Policy or the Infringement would not be enforced for part of the Relevant Period.

⁷¹⁰ Penalties Guidance, paragraph 2.17.

⁷¹¹ Penalties Guidance, paragraph 2.18.

⁷¹² From the start of the Relevant Period to [redacted], [Fender Europe Former Senior Employee 1] was [redacted] of Fender GBI. For the remainder of the Relevant Period, [Fender Europe Former Senior Employee 1] was [redacted] of Fender Europe. On whether his responsibilities changed between the roles, [Fender Europe Former Senior Employee 1] stated 'Not particularly. [redacted].' URN C_FEN00776 (Transcript of interview with [Fender Europe Former Senior Employee 1] dated 18 April 2018). Page 10, lines 7-10. [redacted].

⁷¹³ See paragraphs 3.60 to 3.65 above.

⁷¹⁴ See paragraphs 3.86, 3.92 to 3.95, 3.104 to 3.105 and footnote 243, 3.128 to 3.129, 3.149, 3.152 to 3.155, 3.164 to 3.166, and 4.49 above.

⁷¹⁵ See paragraphs 3.86, 3.89, 3.93, 3.128 to 3.129, 4.45, 4.86, 4.90, 4.93, 4.96, 4.100, 4.104, 4.105, and 4.129 above. See also footnotes 519 and 520 above.

Aggravating factor: committing the infringement intentionally

- 5.38 The fact that an infringement was committed intentionally rather than negligently can be an aggravating factor.⁷¹⁶
- 5.39 The CAT has determined that an infringement is committed '*intentionally*' for the purposes of section 36(3) of the Competition Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition.⁷¹⁷ As set out in paragraph 5.18 above, there is a large body of evidence indicating that Fender Europe must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition.
- 5.40 The CMA therefore considers that it is appropriate to apply an uplift of 10% to Fender's penalty, for committing the infringement intentionally.

Mitigating factor: adequate steps having been taken to ensure compliance with competition law

- 5.41 The CMA may decrease the penalty at step 3 where an undertaking can show that adequate steps have been taken to ensure compliance with competition law.⁷¹⁸
- 5.42 The CMA considers that it is appropriate to grant Fender a 10% discount as, pursuant to this investigation and settlement discussions, it has now taken adequate steps with a view to ensuring future compliance with competition law, including providing competition compliance training to senior managers and all sales staff.
- 5.43 Fender has now provided details of a comprehensive new competition law compliance programme. This includes appropriate steps relating to competition

⁷¹⁶ Penalties Guidance, paragraph 2.18 and footnote 31.

⁷¹⁷ *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 221. See also: *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 paragraph 456: '*...an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition... It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without it being necessary to show that the undertaking also knew that it was infringing the Chapter I or Chapter II prohibition.*'

⁷¹⁸ Penalties Guidance, paragraph 2.19 and footnote 33. To qualify, an undertaking has to provide evidence of adequate steps taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation, from the top down, together with appropriate steps relating to competition compliance risk identification, risk assessment, risk mitigation and review activities. The CMA will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount to the penalty of up to 10%.

law risk identification, assessment, mitigation and review, to which its Board has fully and publicly committed.⁷¹⁹

- 5.44 The CMA considers that Fender has provided sufficient evidence of compliance activities which demonstrate a clear and unambiguous commitment to future competition law compliance throughout the organisation from the top down to warrant a reduction in penalty.
- 5.45 In terms of its public commitment, Fender has published a statement regarding its commitment to competition law compliance on all of its global websites.⁷²⁰ Fender has also committed to submitting a report to the CMA on its compliance activities every year, for the next three years.

Step 4 – adjustment for specific deterrence and proportionality

- 5.46 At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round.⁷²¹ The penalty may be adjusted either to:
- a. Increase it to achieve specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future); or
 - b. reduce it to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking at the time the penalty is being imposed as well as any other relevant circumstances in the case.⁷²²
- 5.47 The penalty for the Infringement after step 3 is £[~~8~~]. The CMA considers that this figure should be reduced in order to be proportionate. In reaching this view, the CMA has had regard in particular to the following factors.

⁷¹⁹ Fender submitted representations in relation to compliance between 11 October and 20 December 2019. On 20 December 2019, Fender confirmed its Board had approved and committed to implementing to the compliance steps detailed in its submissions. See also paragraph 2.37 above.

⁷²⁰ See, for example:

- United Kingdom: <https://shop.fender.com/en-GB/competition-law>; and
- United States: <https://shop.fender.com/en-US/start>

Fender has also included the competition law statement on all of its country specific websites in Europe and Asia Pacific.

⁷²¹ Penalties Guidance, paragraph 2.24.

⁷²² The CMA will generally consider three years averages for profits and turnover, and may consider indicators of size and financial position from the time of the infringement, see the Penalties Guidance, paragraph 2.20. The CMA has considered a range of financial indicators in this regard, based on published accounting information and information provided by Fender at the time of calculating the penalty. Those financial indicators included relevant turnover; average worldwide turnover (three-year average); average operating profit (three-year average); average profit after tax (three-year average); net assets (for the last financial year); dividends (three-year average); and net assets and dividends (assets for the last financial year plus three years' dividends).

- *Fender's size and financial position:* Having assessed a range of financial indicators, the CMA notes that the unadjusted penalty would amount to:
 - [~~3~~] % of Fender US' profit after tax for the year to December 2017 and [~~3~~] % of Fender US' 3-year average profit after tax;⁷²³
 - [~~3~~] % of Fender US' 2017 net assets and [~~3~~] % of its adjusted net assets;⁷²⁴ and
 - approximately [~~3~~] times Fender Europe's average annual profits.⁷²⁵
- *the nature of the infringement:* The CMA's finding relates to an agreement between Fender and one reseller.⁷²⁶ As a result, the turnover directly affected by the Infringement was lower than the relevant turnover.

5.48 The CMA considers that, in this case, it is appropriate to apply a reduction to ensure the penalty is proportionate for this form of conduct in the specific circumstances of the case, and in the light of Fender's financial size and position. The CMA has therefore applied a reduction of [~~3~~] % at step 4 to ensure that the penalty is not disproportionate or excessive.

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

5.49 The CMA may not impose a penalty for an infringement that exceeds 10% of an undertaking's '*applicable turnover*', that is the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision.⁷²⁷ The CMA has assessed the penalty against this threshold. The assessment has not led to the need for any reduction of the penalty at step 5 of the penalty calculation.

⁷²³ Fender US' 3-year average profit after tax has been calculated with reference to the financial years 2016 to 2018. C_FEN01972 (Fender US financial data 9 October 2019 in response to September 2019 RFI).

⁷²⁴ C_FEN01972 (Fender US financial data 9 October 2019 in response to September 2019 RFI).

⁷²⁵ Fender Europe's 2018 accounts included a £7.5m provision relating to the CMA's investigation which resulted in a loss not consistent with its performance in previous years. As a result, Fender Europe's average annual profit has been calculated with reference to the financial years 2015 to 2017. URN E_FEN003343 (Annual Report and Financial Statements of Fender Europe dated 3 January 2016), p.8; URN E_FEN003342 (Annual Report and Financial Statements of Fender Europe dated 1 January 2017), p.8; URN E_FEN003322 (Annual Report and Financial Statements of Fender Europe dated 31 December 2017), p.8.

⁷²⁶ Though the CMA notes that the Infringement took place within the context of the Fender Pricing Policy notwithstanding that the Fender Pricing Policy may not have been universally applied across all resellers at all times throughout the period.

⁷²⁷ Section 36(8) of the Act and the 2000 Order, as amended. See also Penalties Guidance, paragraph 2.25. The business year on the basis of which worldwide turnover is determined will be the one preceding the date on which the decision of the CMA is taken or, if figures are not available for that business year, the one immediately preceding it.

5.50 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another Member State of the EU in respect of the same agreement or conduct.⁷²⁸ As neither the European Commission nor any body in another Member State has imposed a penalty in this case, no adjustments to avoid double jeopardy were necessary.

Step 6 – application of reductions for leniency and settlement

5.51 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 the case with the CMA.⁷²⁹

Leniency

5.52 As set out in paragraphs 2.7 to 2.10, 2.28 and 2.30 above, 3 months after the start of the investigation, Fender approached the CMA with an application for leniency. Fender has admitted its involvement in the Infringement and signed a leniency agreement with the CMA (dated 3 October 2019). Provided Fender continues to co-operate and comply with the conditions of the CMA’s leniency policy, as set out in the leniency agreement, Fender will benefit from a 60% leniency discount.

Settlement

5.53 The CMA will apply a penalty reduction where an undertaking agrees to settle with the CMA, which will involve, among other things, the undertaking admitting its participation in the infringement.⁷³⁰

5.54 In this case, the CMA considers it appropriate to grant a 20% discount to reflect the fact that Fender has admitted the Infringement and agreed to cooperate in expediting the process for concluding the Investigation. This discount is granted on condition that Fender continues to comply with the continuing requirements of settlement as set out in the settlement agreements between each of Fender Europe and Fender US and the CMA.

Penalty

5.55 The following table sets out a summary of the penalty calculation and the penalty that the CMA requires Fender to pay in relation to the Infringement.

⁷²⁸ Penalties Guidance, paragraph 2.28.

⁷²⁹ Penalties Guidance, paragraphs 2.29 and 2.30.

⁷³⁰ Penalties Guidance, paragraph 2.30.

Figure 5.1: Summary table of the penalty calculation

Step	Description	Adjustment	Figure	
	Relevant turnover		£[X]	
1	Starting point as a percentage of relevant turnover	x 19%	£[X]	
2	Adjustment for duration	x 5.5	£[X]	
3	Adjustment for aggravating and mitigating factors	<i>Aggravating: Director involvement</i>	+ 15%	£[X]
		<i>Aggravating: Intentionally committed</i>	+ 10%	£[X]
		<i>Mitigating: Steps ensure compliance</i>	- 10%	£[X]
		Total Adjustment	+ 15%	£[X]
4	Adjustment for specific deterrence and proportionality	[X]%	[X]	
	Maximum Penalty after Step 4		£14,159,953	
5	Adjustment to prevent the statutory maximum being exceeded	N/A	N/A	
6	Leniency discount	- 60%	- £8,495,972	
	Penalty after leniency discount		£5,663,981	
	Settlement discount	-20%	- £1,132,796	
	Maximum penalty payable for the Infringement		£4,531,185	

IV. Payment of penalty

5.56 In light of the above, the CMA requires Fender to pay a penalty of £4,531,185. The individual figures in the summary table at Figure 5.1 above are rounded to the nearest pound sterling.

5.57 The CMA requires Fender to pay £4,531,185 to the CMA by close of banking business in England and Wales on 23 March 2020⁷³¹ at the latest.⁷³²

5.58 If that date (23 March 2020) has passed and:

- the period during which an appeal against the imposition, or amount, of that penalty may be made has expired without an appeal having been made, or
- such an appeal has been made and determined,

the CMA may commence proceedings to recover from Fender any amount payable under the penalty notice which remains outstanding, as a civil debt due to the CMA.⁷³³

SIGNED:

22 January 2020

Ann Pope

Senior Director of Antitrust Enforcement

for and on behalf of the Competition and Markets Authority

⁷³¹ The next working day two calendar months from the expected receipt of the Decision.

⁷³² Details on how to pay the penalty are set out in the letter accompanying this Decision.

⁷³³ Section 37(1) of the Act.