Decision of the Competition and Markets Authority

Nortriptyline Tablets

Information Exchange

Case 50507.2

Addressed to:

Alissa Healthcare Research Limited
King Pharmaceuticals Limited
Praze Consultants Limited
Lexon (UK) Limited

Section 31 Competition Act 1998

4 March 2020

Contents

1. Introduction and executive summary

1.1 This Decision is addressed to:

(a) Alissa Healthcare Research Limited (company number 05848896) ('**Alissa**');

(b) King Pharmaceuticals Limited (company number IE224619) ('**King Limited**');

(c) Praze Consultants Limited (company number 03758431) ('**Praze**') (the CMA has found that during the relevant period[1], King Limited and Praze formed part of the undertaking '**King**'[2]); and

(d) Lexon (UK) Limited (company number 03076698) ('**Lexon**').

These companies (each a '**Party**', together the '**Parties**') are active in the pharmaceutical sector in the the UK.

1.2 Nortriptyline is a prescription-only medicine used for the relief of the symptoms of depression and for the treatment of some cases of neuropathic pain and nocturnal euresis (bedwetting), supplied principally to the NHS. At the relevant time[3], nortriptyline was available in two strengths, 10mg and 25mg.[4] It is an unbranded, generic medicine.

1.3 Until June 2015, i.e. the period just prior to the infringement, King and Auden Mckenzie (Pharma Division) Limited (together with Auden Mckenzie Holdings Limited, '**Auden Mckenzie**') were the only two UK licensed suppliers of 10mg and 25mg tablets containing nortriptyline ('**Nortriptyline Tablets**'). In March 2015, Medreich Limited ('**Medreich**') obtained UK licences to supply Nortriptyline Tablets. Medreich had developed these licences as part of a joint venture arrangement with Lexon (the '**Lexon/Medreich JV'**).

1.4 In July 2015, Lexon and Medreich started to supply the market with Nortriptyline Tablets manufactured pursuant to the Medreich licences (the '**Lexon/Medreich JV Product'**). Each of Lexon and Medreich supplied the Lexon/Medriech JV Product directly into the market. In

[1] See paragraph 1.9.
[2] See paragraph 6.13.
[3] See paragraph 1.9.
[4] Nortriptyline tablets in 50mg strength were introduced in March 2017. https:\\assets.publishing.service.gov.uk\government\uploads\system\uploads\attachment_data\file\552454\Monthly_new_MA_listing_August_2016.pdf

addition, the Lexon/Medreich JV Product was supplied by Teva, by virtue of an own label supply agreement.

1.5 With the potential for new sources of supply, King quickly came under pressure from customers to reduce its prices to match or beat prices purportedly offered by the new entrants. Within days of the launch of the Lexon/Medreich JV Product, King contacted Lexon to understand better the new competitive threat that it faced and (later) to verify the claims made by customers about the prices offered.

1.6 From July 2015 onwards, contacts between King and Lexon continued over a period of months. Then, in March 2016, King learned that Alissa had also obtained its own licences to supply Nortriptyline Tablets in the UK. King contacted Alissa and, from this point, details of Alissa's launch plans were also disclosed.

1.7 The exchanges of information concerning prices, volumes, timing of supplies and entry plans occurred via email and text messages, telephone conversations and, on one occasion, a face-to-face meeting between directors of all three companies held at a hotel in London. The Parties exchanged information about prices, volumes, timing of supplies and entry plans with the objective to maintain the prices of Nortriptyline Tablets in the UK or at least slow their decline (the **'Price Maintenance Objective'**).

1.8 As set out in this Decision, the Competition and Markets Authority ('**CMA**') has found that the Parties engaged in a concerted practice (or series of concerted practices) by which they knowingly substituted practical cooperation between them for the risks of competition. Specifically:

(a) King, Lexon and Alissa exchanged competitively sensitive strategic information on pricing,[5] volumes, timing of supplies and entry plans in relation to the supply of Nortriptyline Tablets in the UK (see paragraphs 5.56 to 5.97 and 5.104 to 5.105). The exchange of information reduced strategic uncertainty in the market and was capable of influencing the Parties' conduct on the market;

[5] Including the Parties' own prices or pricing strategy, pricing of the Lexon/Medreich JV Product (from both Medreich and Teva), rival suppliers' prices and claims (including from customers) concerning rival suppliers' prices.

(b) Each of the Parties took account of the information exchanged with their competitors for the purposes of determining their conduct on the market (see paragraphs 5.98 to 5.103 and 5.106);

(the '**Information Exchange**').

1.9 King, Lexon and Alissa participated in the Information Exchange at different times. The CMA has found that:

(a) King participated during the periods from 27 July 2015 to 27 May 2016 ('**Relevant Period 1**') and from 5 December 2016 to 27 January 2017 ('**Relevant Period 2**');[6]

(b) Alissa participated during the periods from 2 March 2016 to 27 May 2016 (part of Relevant Period 1) and from 5 December 2016 to 27 January 2017 (Relevant Period 2); and

(c) Lexon participated during the period from 27 July 2015 to 27 May 2016 (Relevant Period 1).

1.10 The CMA has found that the Information Exchange had the object of restricting competition in the supply of Nortriptyline Tablets in the UK, having regard to its:

(a) Legal and economic context (see section 5D). The legal and economic context in which the Information Exchange took place was one in which the product in question (Nortriptyline Tablets) was homogenous in nature, with price as the key driver of competition; immediately before the Information Exchange the market was highly concentrated, competition was muted and prices had increased significantly; and the entry of the Lexon/Medreich JV Product and the potential entry of Alissa increased the intensity of competition and uncertainty in the market. This created opportunities for customers to 'play off' suppliers against one another, putting downward pressure on prices. King, Lexon and Alissa were actual or potential competitors and they each stood to gain if prices remained the same or decreased more slowly; and

(b) Content and objectives (see sections 5E and 5F). Specifically, the Parties shared competitively sensitive strategic information concerning pricing, volumes, timing of supplies and entry plans. The CMA has found that the object of the Information Exchange was to maintain the prices of Nortriptyline Tablets in the UK or at

[6] Relevant Period 1 and Relevant Period 2 are together referred to as the '**Relevant Period**'.

least to slow their decline. The Parties thereby sought to create conditions of competition which did not correspond to the normal conditions of the market.

1.11 Further, the CMA has found that, in each of Relevant Period 1 and Relevant Period 2, the Information Exchange was a single continuous infringement, which together formed a single repeated infringement. Specifically, King, Lexon and Alissa's conduct within each of Relevant Period 1 (with respect to all three Parties) and Relevant Period 2 (with respect to King and Alissa only) constitutes a single continuous infringement on the basis that:

(a) the Parties pursued a common objective, namely to maintain the prices of Nortriptyline Tablets in the UK or at least slow their decline (the Price Maintenance Objective);

(b) each of King, Lexon and Alissa were aware of the conduct which was put into effect by the other Parties in pursuit of the Price Maintenance Objective, or could reasonably have foreseen it and were prepared to take the risk; and

(c) each of the Parties made an intentional contribution to the Price Maintenance Objective pursued.

1.12 Accordingly, by this Decision, the CMA has concluded that the Parties have infringed the prohibition imposed by section 2(1) of the Competition Act 1998 (the '**Act**') (the '**Chapter I prohibition**') and Article 101(1) of the Treaty on the Functioning of the European Union ('**TFEU**')[7].

(the '**Infringement**').

1.13 The CMA has decided to impose financial penalties on King Limited, Praze, Lexon and Alissa under section 36 of the Act in respect of the Infringement.

[7] See paragraph 5.7 below.

2. The CMA's investigation

2.1 This Chapter sets out the key procedural steps taken by the CMA during its investigation of the Infringement.

A. Commencement of the Investigation

2.2 On 10 October 2017, the CMA opened a formal investigation under the Act as it had reasonable grounds for suspecting that King Limited, Auden Mckenzie and Accord-UK Limited ('**Accord-UK**') had infringed the Chapter I prohibition and/or Article 101(1) TFEU in relation to the supply of Nortriptyline Tablets (the '**Investigation**').

2.3 The scope of the Investigation was expanded on 13 March 2018 to include Lexon and Alissa and on 29 March 2019 to include Praze.

B. Evidence gathering and engagement during the Investigation

2.4 In this section, the CMA provides details of key procedural steps taken in the Investigation in relation to evidence gathering and engagement with the Parties and third parties.

I. King Limited/Praze

2.5 On 10 October 2017, the Competition and Consumer Protection Commission in Ireland served King Limited, which is an Irish company, with a request for information on behalf of the CMA pursuant to Article 22 of EU Regulation 1/2003. King Limited explained to the CMA that Praze (trading as Kite Consultency), which is based in the UK, conducts the corporate and commercial services of King Limited, on a consultancy basis.[8] Therefore, on 20 October 2017, the CMA required Praze to provide information and/or documents under section 26 of the Act. The CMA required King Limited and Praze to provide further information and/or documents under section 26 of the Act on 15 February 2018, 13 March 2018 and 7 March 2019.

2.6 The CMA required [✂] [Herein referred to as 'King Director'] (the owner of King Limited and Praze) to provide information and/or documents under section 26 of the Act on 13 March 2018, 26 April 2018, 18 June 2018, 7 March 2019, and 4 April 2019.

[8] As set out in paragraph 6.13 of this Decision, King Limited and Praze form a single economic unit or undertaking (referred to in this Decision as '**King**').

2.7 The CMA conducted compulsory interviews under section 26A of the Act with current employees and a former consultant of King:

(a) [King Director] (Managing Director, King) on 22 March 2018 and 22 November 2018;

(b) [King Office Manager] on 24 January 2019; and

(c) [Consultant to King 1] on 31 January 2019.

2.8 The CMA held state of play meetings with King Limited on 5 November 2018 and 5 March 2019.

II. ***Lexon***

2.9 On 13 March 2018, the CMA conducted an unannounced inspection at the premises of Lexon under section 27 of the Act.

2.10 The CMA conducted voluntary interviews with [✂] [Herein referred to as 'Lexon Director'] (co-owner and Director, Lexon) on 14 March 2018 and 21 February 2019 and a compulsory interview under section 26A of the Act on 2 August 2018.

2.11 The CMA conducted a voluntary interview with [Lexon Generics Buyer] on 22 January 2019.

2.12 The CMA required Lexon to provide information and/or documents under section 26 of the Act on 15 March 2018, 13 June 2018, 11 September 2018, 21 December 2018, 20 March 2019 and 18 April 2019.

2.13 The CMA held state of play meetings with Lexon on 8 November 2018 and 28 February 2019.

III. ***Alissa***

2.14 On 13 March 2018, the CMA conducted an unannounced inspection at the premises of Alissa under section 27 of the Act.

2.15 The CMA conducted a voluntary interview with [✂] [Herein referred to as 'Alissa Director'] (Managing Director, Alissa) on 13 March 2018 and a compulsory interview with him under section 26A of the Act on 26 July 2018.

2.16 The CMA required Alissa to provide information and/or documents under section 26 of the Act on 14 March 2018.

2.17 The CMA held state of play meetings with Alissa on 6 November 2018 and 5 March 2019.

IV. ***Other sources of information***

(a) Anonymous submission

2.18 In October 2016, the CMA received an anonymous submission which stated that Nortriptyline Tablets had been the subject of anti-competitive arrangements.[9]

(b) Third party evidence

[✂][10]

2.19 On [✂], the CMA conducted a search of [✂]'s business premises under section 28 of the Act.

2.20 On [✂], the CMA conducted compulsory interviews under section 26A of the Act with [✂].

2.21 On 26 January 2018, the CMA required [✂] to provide information and/or documents under section 26 of the Act.

[✂]

2.22 On [✂], the CMA conducted a search of [✂]'s business premises under section 28 of the Act.

2.23 The CMA conducted voluntary interviews on [✂] with [✂] and [✂] and a compulsory interview under section 26A of the Act on [✂] with [✂], who had left the employment of [✂] by this date.

2.24 The CMA required [✂] to provide information and/or documents under section 26 of the Act on [✂].

2.25 The CMA required [✂] and [✂] to provide information and/or documents under section 26 of the Act on [✂].

[9] Document NOR-C0001, anonymous submission, dated October 2016.
[10] [✂]

[✂]

2.26 On [✂], the CMA issued a notice under section 27 of the Act that it intended to enter [✂]'s premises to conduct an inspection on [✂].

2.27 The CMA required [✂] to provide information and/or documents under section 26 of the Act on [✂].

[✂]

2.28 [✂]

2.29 [✂]

2.30 [✂] [✂][11] [✂][12]

2.31 [✂]

2.32 The CMA conducted compulsory interviews with [✂] under section 26A of the Act:

(a) [✂];

(b) [✂]; and

(c) [✂].

[✂]

2.33 On [✂], the CMA conducted an unannounced inspection at the premises of [✂] under section 27 of the Act.

2.34 On [✂] and [✂], the CMA required [✂] to provide information and/or documents under section 26 of the Act.

2.35 The CMA conducted compulsory interviews with former employees under section 26A of the Act:

(a) [✂]

(b) [✂].

[11] [✂]
[12] [✂]

Other third parties

2.36 During the Investigation, the CMA also obtained information from the following companies and organisations under section 26 of the Act: Amimed Direct Limited, Beachcourse Limited, Blackrock Pharmaceuticals Limited, CD Pharma Limited, [✂] (Roskar Consulting), Ecosse Pharmaceuticals Limited, Expono Limited, Flamingo Pharma (UK) Limited, Focus Pharmaceuticals Limited, H. Lundbeck A/S, Key Pharmaceuticals Limited, Landmark, Manx Healthcare Limited, the Medicines and Health Products Regulatory Agency ('**MHRA'**), MPT Pharma Limited, the NHS Business Services Authority ('**NHS BSA'**), and Teva.

2.37 The CMA conducted a voluntary witness interview with [Employee of Alissa's product development partner] on 26 July 2018.[13]

C. Statement of Objections

2.38 On 18 June 2019, the CMA issued a Statement of Objections to Alissa, King and Lexon in which it proposed to make a decision that they had infringed the Chapter 1 prohibition and Article 101 TFEU.

2.39 Following the issue of the Statement of Objections, a Case Decision Group was appointed within the CMA to act as the decision-maker on:

(a) whether or not the legal test for establishing an infringement had been met; and

(b) the appropriate amount of any penalty.

D. Settlement

2.40 On 18 September 2019, the CMA settled the case with King and Alissa after King and Alissa each signed terms of settlement in which they:

(a) admitted that it had infringed the Chapter 1 prohibition and/or Article 101 TFEU in the terms set out in the Statement of Objections dated 18 June 2019, which are now reflected in this Decision;

[13] [Employee of Alissa's product development partner] is the joint owner of [Alissa's Product Development Partner] [✂]. [Alissa's product development partner] develops pharmaceutical product dossiers which it subsequently out-licences. [Alissa's product development partner] developed Nortriptyline Tablets and partnered with Alissa which was responsible for the sales and marketing of the product in the UK.

(b) agreed to accept a maximum penalty as set out in chapter 7; and

(c) agreed to cooperate in expediting the process for concluding the CMA's investigation (the **'Terms of Settlement'**).

E. Representations

2.41 Lexon did not settle with the CMA. On 10 September 2019, Lexon submitted written representations on the Statement of Objections (the '**Written Representations**').[14] These Written Representations were accompanied by a witness statement from [Lexon Director] (the '**Witness Statement**'). On 29 November 2019, Lexon made oral representations on the Statement of Objections (the '**Oral Representations**'). Alissa made written representatons on the Statement of Objections on 27 August 2019. King made no representations on the information exchange allegations set out in the Statement of Objections.

2.42 On 6 January 2020, the CMA issued a Draft Penalty Statement to Lexon. Lexon provided written representations on the matters set out in the Draft Penalty Statement on 17 January 2020 ('**Written Penalty Representations**') and made oral representations on 21 January 2020.

[14] Lexon amended its Written Representations on 23 September 2019.

3. Factual background

3.1 This Chapter explains the dynamics of the market for the supply of Nortriptyline Tablets in the UK relevant to the Infringement, and the facts of the conduct under investigation, including:

(a) the key companies active in the supply of Nortriptyline Tablets and the key individuals referred to in this Decision (see section 3A);

(b) a description of the Product (see section 3B);

(c) the framework of supply of Nortriptyline Tablets (see section 3C);

(d) the key events immediately prior to the Information Exchange (see section 3D) and;

(e) the facts of the conduct under investigation (see section 3E).

This factual background forms part of the legal and economic context which is relevant to the CMA's finding that the Information Exchange constitutes a restriction of competition by object.[15]

A. Key companies and individuals

3.2 The key companies referred to in this Decision are King Limited and Praze (together the undertaking King), Lexon and Alissa. Details of each of these companies and the key individuals associated with them are set out below.

I. King

3.3 King Limited is an Irish pharmaceuticals company which operates principally in the UK. [King Director holds a controlling shareholding in the company. [King Office Manager] holds the remaining shares in King Limited and is the company secretary.

3.4 King Limited established a branch office in the UK in 1995.

3.5 In May 2014, King Limited entered into an agreement for the supply of services with **Praze** (trading as Kite Consultancy), which is wholly-owned by [King Director]. [King Office Manager] is employed by Praze as the office manager. The corporate and commercial services of King

[15] See paragraph 5.13 of this Decision.

Limited are conducted by Praze on King Limited's behalf.[16] King Limited supplies generic pharmaceutical products to wholesalers and retail pharmacy groups. During the Relevant Period, in addition to Nortriptyline Tablets, King Limited supplied two other pharmaceutical products.[17]

II. Lexon

3.6 Lexon is [✂]. Since 1 March 2018, it has been a subsidiary of **Lexon UK Holdings Limited**. Lexon UK Holdings Limited is owned by [Lexon Director] (22.5%), [✂] (21.5%), [✂] (13%), [✂] (13%), [✂] (10%), [✂] (10%) and [✂] (10%).[18]

3.7 Lexon is primarily a wholesaler of pharmaceutical products to retail pharmacies. Of Lexon's annual turnover of £201 million, approximately £15 million of turnover is generated from sales by Lexon to other wholesalers or to pharmacy groups which distribute products to their own shops themselves.

3.8 Lexon first engaged in developing its own generic medicines in 2005. As part of Lexon's development of its own generic medicines, it entered into a Product Development and Profit Sharing Agreement with Medreich (a company registered in India) on 25 February 2008 (the Lexon/Medreich JV).[19] Under that agreement, Medreich was responsible for developing Marketing Authorisations (**'MAs'**) and manufacturing a range of pharmaceutical products (including Nortriptyline Tablets). [✂].[20] Lexon was exclusively responsible for negotiating and setting the selling price for onward sales in the UK and elsewhere. The agreement provided for the profits on sales to be shared by Lexon and Medreich.[21]

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[16] Document NOR-C0040, response to the CMA's request for information dated 10 October 2017. Praze also provides consultancy services to another pharmaceutical company, [✂]. See Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 12-13, lines 26-3.

[17] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 14.

[18] Document NOR-C2091, Lexon's response to question 1 of the CMA's section 26 notice dated 11 September 2018.

[19] Document NOR-C0296, Medreich's response to question 5 of the CMA's section 26 notice dated 10 October 2017.

[20] Clause 4, Product Development and Profit Sharing Agreement. See Document NOR-C0288, Medreich's response to question 5 of the CMA's section 26 notice dated 10 October 2017.

[21] Clause 4, Product Development and Profit Sharing Agreement. See Document NOR-C0296, Medreich's response to question 5 of the CMA's section 26 notice dated 10 October 2017. As described below in paragraph 3.35, the agreement was not applied in this way for nortriptyline.

III. Alissa

3.9 Alissa is a subsidiary of Alissa Healthcare Holdings Limited. Alissa Healthcare Holdings Limited is controlled by [Alissa Director] who holds 99.95% of the company's shares. Alissa supplies generic pharmaceutical products to wholesalers of pharmaceutical products, and multiple retail pharmacy groups.

IV. Key individuals and companies referred to in this Decision

3.10 The key individuals and companies referred to in this Decision are set out in the tables below.

Table 1: Key individuals referred to in this Decision

Individual & Company	Role
Alissa	
[Alissa Director]	Owner and Managing Director, 2006 to present[22]
King Limited	
[King Director]	Owner and Managing Director, 1996 to present[23]
[King Office Manager]	Company Secretary, 1996 to present[24]
[Consultant to King 1]	Consultant to King, March/May 2014 to February 2018[25]
[Consultant to King 2]	Consultant to King[26]
[Consultant to King 3]	Consultant to King[27]
Praze	
[King Director]	Owner and Managing Director, 1994 to present[28]
[King Office Manager]	Office Manager, 1994 to present[29]
Lexon	

[22] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 8 lines 13-14.
[23] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 8-9 lines 24-12.
[24] https:\\beta.companieshouse.gov.uk\company\FC019337\officers
[25] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 26-27 lines 23-5. Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 12 lines 5-6. Document NOR-C2911, transcript of [Consultant to King 1] interview dated 31 January 2019, pages 8-9 lines 16-24 and page 26 lines 14-20.
[26] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 30 lines 5-14.
[27] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 30 lines 5-14.
[28] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 10-11 lines 11-5.
[29] Document NOR-C2884, transcript of [King Company Secretary] interview dated 31 January 2019, page 9 lines 11-22.

Individual & Company	Role
[Lexon Director]	Co-owner and Director, October 1995 to present [30]
[Lexon Generics Buyer]	Generics Buyer, August 2011 to present [31]

Table 2: Other Key Companies referred to in this Decision

Company	Description
Medreich	Medreich plc is a multinational pharmaceutical manufacturer and a subsidiary of Meji Group. [32]
Actavis/Accord	Actavis UK Limited is involved in the supply of generic medicines in the UK. [33] In 2017, it was acquired by Accord Healthcare Limited, a subsidiary of Intas Pharmaceuticals Limited, and was renamed Accord-UK Limited. [34]
Teva	Teva Pharmaceutical Industries Limited is a global pharmaceutical manufacturer and developing company. [35] Teva acquired Auden Mckenzie in August 2016. [36]
Bestway/Co-op	Chain of independent UK pharmacies, the Co-Operative Group's pharmacy business was acquired by the Bestway Group in July 2014. [37] The Co-operative Pharmacy, was rebranded to 'Well' in February 2015. [38]
Alliance/Boots	Walgreens Boots Alliance is a multinational wholesaler and distributor business. Alliance UniChem merged with the Boots Group in 2006 ('Alliance Boots'), Alliance Boots then merged with Walgreens in 2014. [39]
Rowlands	Chain of pharmacies in the UK, owned by the Phoenix Group since 1998. [40]
Phoenix	Phoenix UK Group is a wholesaler and a subsidiary of the Phoenix Group. [41]
Numark	Numark Limited is a pharmacy membership organisation in the UK. [42]

[30] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018 pages 7-8 lines 24-16.
[31] Document NOR-C2729, transcript of [Lexon Generics Buyer] interview dated 22 January 2019 pages 7-8 lines 21-19.
[32] https:\\www.medreich.com\about-company.php
[33] https:\\www.accord-healthcare.com\uk\about
[34] In August 2016, Auden Mckenzie (Pharma Division) Limited and its parent company Auden Mckenzie Holdings Limited, were sold by Allergan plc to the Israeli company Teva Pharmaceutical Industries Limited. Actavis UK Limited was sold to the Indian company Intas Pharmaceuticals Limited and its European subsidiary, Accord Healthcare Limited, and was renamed Accord-UK Limited. Accord-UK currently sells Nortriptyline Tablets in the UK.
[35] https:\\www.bloomberg.com\quote\TEVA:US
[36] See Footnote 32.
[37] https:\\www.bestwaygroup.co.uk\sectors\pharmacy
[38] https:\\www.bestwaygroup.co.uk\sectors\pharmacy
[39] http:\\www.alliance-healthcare.co.uk\about-us\our-history
[40] https:\\www.phoenixgroup.eu\en\business-areas\retail\rowlands-pharmacy\
[41] https:\\www.phoenixmedical.co.uk\en\our-group\phoenix-uk-group\
[42] https:\\www.phoenixmedical.co.uk\en\our-group\our-brands\numark\

Company	Description
Sigma	Sigma Pharmaceuticals plc is an independent pharmacy wholesaler in the UK.[43]
Peak Pharmacy/P&AJ Cattee	Chain of pharmacies in the UK, owned by PCT Healthcare limited.[44]
Manor Drug	Manor Pharmacy Group is an independent pharmacy group located in Hertfordshire.[45]
AAH/Lloyds	AAH is a UK pharmaceutical wholesaler, owned by McKesson UK, a subsidiary of McKesson Europe.[46] Lloyds is chain of pharmacies in the UK,[47] also owned by McKesson UK.[48]
Day Lewis	The Day Lewis Group own a chain of independent pharmacies in the UK and Europe.[49]
McKeevers	McKeevers Chemists is a chain of pharmacies in Northern Ireland and England.[50]
Creo	Creo Pharma is a UK pharmaceutical supplier and a subsidiary of Zentiva.[51]
Prinwest	Prinwest Limited is a wholesaler of pharmaceutical products.[52]
Currentmyth	Currentmyth Limited is a wholesale distributor of pharmaceutical medicines in the UK.[53]
Wavedata	Wavedata Limited is a pricing data company for the pharmaceutical sector.[54]

B. The product: Nortriptyline Tablets

3.11 Nortriptyline is a prescription-only medicine used for the relief of symptoms of depression and for the treatment of some cases of neuropathic pain and nocturnal enuresis (bedwetting).[55] It is an unbranded, generic medicine.

3.12 As it is a prescription-only medicine, nortriptyline must be prescribed to patients by a GP or another qualified healthcare professional.

[43] https:\\www.sigmaplc.com\about\
[44] http:\\pcthealthcare.com\about\about-pct-healthcare-limited-peak-pharmacy-timms-and-parker.php
[45] https://www.manor-pharmacy.co.uk/about/
[46] http:\\www.aah.co.uk\shop\en-GB\aahpoint\the-aah-story
[47] http:\\www.lloydspharmacy.com\en\info\about-lloyds-pharmacy
[48] http:\\mckesson.uk\community-pharmacy\
[49] https:\\www.daylewis.co.uk\ourstory\
[50] http:\\www.mckeevers-chemists.com\About-Us.aspx
[51] http:\\creopharma.co.uk\
[52] http:\\www.prinwest.co.uk\
[53] http:\\home.btconnect.com\currentmyth.co.uk\
[54] http:\\www.wavedata.co.uk\newabout.asp
[55] For the treatment of depression in adults, the prescribed dose of nortriptyline must not exceed 150mg per day. In the case of neuropathic pain, the dose prescribed initially is 10mg once daily, increased if necessary, to 75mg daily. See https:\\bnf.nice.org.uk\drug\nortriptyline.html#interactions

3.13 In the UK, nortriptyline is mainly sold in tablet form.[56] Nortriptyline tablets were sold in 10mg and 25mg packs until March 2017, when the 50mg presentation was introduced.[57] The 10mg tablets are the most common strength of Nortriptyline Tablets dispensed, accounting for around 67% of all Nortriptyline Tablets dispensed between 2012 and 2017.[58]

C. Framework of supply of Nortriptyline Tablets in the UK

3.14 This section sets out an explantion of the operation of the market for the supply of Nortriptyline Tablets in the UK prior to and during the Relevant Period, including the authorisation process for companies supplying in the UK.

I. The supply chain for Nortriptyline Tablets in the UK

3.15 The following types of companies are typically involved at different stages of the supply chain for Nortriptlyine Tablets.

(a) Marketing Authorisation holders in the UK

3.16 To market and sell a pharmaceutical product in the UK, a company must obtain an MA from the MHRA. An MA will only be granted if the pharmaceutical product meets satisfactory standards of safety, quality and efficacy in treating the condition for which it is intended. A company holding an MA may manufacture the pharmaceutical product itself or contract a third-party manufacturer to produce the product on its behalf.

3.17 Table 3 lists the companies that have been granted or have acquired MAs to supply Nortriptyline Tablets in the UK, the dates they obtained their MAs and when they started supplying Nortriptyline Tablets in the UK.

[56] This includes film-coated tablets. Nortriptyline capsules are also available. See; http://www.mhra.gov.uk/spc-pil/index.htm?subsName=NORTRIPTYLINE HYDROCHLORIDE&pageID=SecondLevel.
[57]https:\\assets.publishing.service.gov.uk\government\uploads\system\uploads\attachment_data\file\552454\Monthly_new_MA_listing_August_2016.pdf PCA data indicates that there were no sales of 50mg nortriptyline tablets before March 2017. This is based on CMA analysis of PCA data for England. See http:\\www.nhsbsa.nhs.uk\PrescriptionServices\3494.aspx.
[58] CMA analysis based on PCA data for England only between January 2012 and December 2017.

Table 3: Companies that have been granted or have acquired MAs to supply Nortriptyline Tablets in the UK

Name of company	Date MAs granted/acquired	Date supply started
King	March 1998[59]	March 1998[60]
NRIM/Auden Mckenzie[61]	May 2009[62]	January 2011[63]
Medreich[64]	March 2015[65]	July 2015[66]
Alissa	February 2016[67]	November 2016[68]
Focus Pharmaceuticals Limited	August 2016[69]	March 2017[70]
Blackrock Pharmaceuticals Limited	October 2016[71]	March 2017[72]
Key Pharmaceuticals Limited	May 2017[73]	Not marketed[74]

(b) Parallel importers

3.18 A pharmaceutical product which has been authorised in another EU Member State can also be marketed in the UK under the parallel import licensing scheme, provided that the imported product is not

[59] This is the date when King acquired the MA for Allegron 10mg and 25mg tablets, the branded version of nortriptyline, from Eli Lilly & Company Limited, the originator.
See http:\\www.mhra.gov.uk\home\groups\par\documents\websiteresources\con546117.pdf (page 5)
[60] This corresponds with the date when King acquired the MA for Allegron 10mg and 25mg tablets.
[61] NRIM was granted an MA to supply Nortriptyline Tablets in May 2009. Auden Mckenzie acquired NRIM, and the MAs for Nortriptyline Tablets in 2012.
[62] See https:\\webarchive.nationalarchives.gov.uk\20140208142435\http:\\www.mhra.gov.uk\home\groups\l-reg\documents\licensing\con049260.pdf
[63] Document NOR-E4650, NRIM sales volume between January 2011 and December 2011.
[64] The Medreich MA was developed pursuant to the Lexon\Medreich JV (see paragraph 3.8 above).
[65] https:\\www.gov.uk\government\publications\marketing-authorisations-granted-in-march-2015
[66] Document, NOR-C0296, Medreich's response to question 5 of the CMA's section 26 notice dated 10 October 2017.
[67] See https:\\assets.publishing.service.gov.uk\government\uploads\system\uploads\attachment_data\file\506701\Monthly_new_MA_listing_Feb_2016__2_.pdf
[68] Document NOR-C1450, Annex 2 of Alissa's response to the CMA's section 26 dated 14 March 2018.
[69] See https:\\assets.publishing.service.gov.uk\government\uploads\system\uploads\attachment_data\file\552454\Monthly_new_MA_listing_August_2016.pdf
[70] Document NOR-C2027, Focus Pharmaceuticals Limited (UK)'s response to question 1 of the CMA's section 26 notice dated 19 July 2018.
[71] See https:\\assets.publishing.service.gov.uk\government\uploads\system\uploads\attachment_data\file\571206\Monthly_new_MA_listing_Oct_2016.pdf
[72] Document NOR-C1861, Blackrock Pharmaceuticals Limited's response to question 1 of the CMA's section 26 notice dated 19 July 2018.
[73] See https:\\assets.publishing.service.gov.uk\government\uploads\system\uploads\attachment_data\file\618854\Monthly_new_MA_listing_May_2017.pdf
[74] Document NOR-C1845, Key Pharmaceuticals Limited's response to question 1 of the CMA's section 26 notice dated 19 July 2018.

therapeutically different from the version of the product for which a UK MA has been granted.[75]

3.19 In order to parallel import a product, companies are required to submit an application to the MHRA for a parallel import licence ('**PLPI**'). PLPIs are granted by the MHRA for a period of five years, subject to renewal.

3.20 In the period January 2011 to March 2017, there were several parallel importers of 25mg nortriptyline tablets (including Lexon), which were active to varying degrees and at different times.[76] There were no parallel imports of 10mg nortriptyline tablets in the same period.

(c) Wholesalers

3.21 Wholesalers source Nortriptyline Tablets from suppliers and sell on to pharmacies. In the UK, most pharmaceutical products are distributed through wholesalers to pharmacies.[77]

3.22 From January 2011 to March 2017, AAH and Alliance were the two main wholesalers supplying Nortriptyline Tablets to pharmacies in the UK. They jointly accounted for around 60% of total sales of each of the 10mg and 25mg tablets supplied from King, Auden Mckenzie, Alissa and the Lexon/Medreich JV. Other wholesalers active at the time included the following: Phoenix, Bestway and Currentmyth.[78]

(d) Pharmacies

3.23 Pharmacies can source Nortriptyline Tablets directly from a supplier or via a wholesaler.

3.24 The purchase price paid by a pharmacy for Nortriptyline Tablets is determined following negotiation between the pharmacy and the relevant supplier or wholesaler. Pharmacies then receive a payment for the prescriptions they fulfil from the NHS patients' Clinical Commissioning Groups.[79] As explained in more detail in paragraphs

[75] See https:\\www.gov.uk\guidance\medicines-apply-for-a-parallel-import-licence

[76] These included: B&S Healthcare, Beachcourse, CD Pharma, Ecosse, Expono, Kosei, Landmark, Manx, MPT Pharma, S&M Medical and Amimed.

[77] CMA, A report on the anticipated acquisition by Celesio AG of Sainsbury's Pharmacy Business 29 July 2016, paragraph 13. See https:\\assets.publishing.service.gov.uk\media\579b817540f0b64974000014\sainsbury_s-celesio-final-report.pdf.

[78] [Alissa Director] told the CMA that pharmacy groups such as Day Lewis also have a wholesale operation. See Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, pages 137-138 lines 21-3.

[79] CCGs are the relevant purchaser in England. The purchasing entities differ in Scotland, Wales and Northern Ireland, but the CMA considers that this does not materially impact on the findings.

3.46 and 3.49 to 3.50 below, the amount that pharmacies receive is specified in the Drug Tariff (the '**NHS Reimbursement Price**').[80] As their profit margin is the difference between the NHS Reimbursement Price and the purchase price paid for a product, pharmacies are incentivised to purchase from suppliers/wholesalers at the lowest possible price in order to achieve higher margins.

3.25 In 2016/2017 there were 11,699 community pharmacies, of which 4,434 were independent, in the UK.[81] The largest pharmacy groups are: Lloyds (a subsidiary of AAH), Boots (a subsidiary of Alliance), Well (a subsidiary of Bestway), Rowlands and Superdrug. In 2015, these pharmacy groups together held around 44% of the retail pharmacy market.[82] Boots is the largest single chain, with the highest market share.[83]

(e) The steps in the supply chain

3.26 As set out above, the MA holder is responsible under its license for the manufacture of Nortriptyline Tablets. Following manufacture, there are a number of ways by which Nortriptyline Tablets are distributed from an MA holder to a retail pharmacy.

3.27 Typically, an MA holder will sell to a pharmaceutical wholesaler, which will then distribute the product to retail pharmacies. Some MA holders carry out the functions of a wholesaler in-house, by selling and distributing Nortriptyline Tablets to retail pharmacies themselves. An MA holder may also sell its Nortriptyline Tablets to a multiple retail pharmacy group; a business operating multiple retail pharamacies. The multiple retail pharmacy group will then distribute Nortriptyline Tablets to its own branches.

[80] The NHS Reimbursement Price is produced on a monthly basis by NHS Prescription Services. See www.nhsbsa.nhs.uk\prescriptionservices.aspx. These prices relate to England. NHS Reimbusement Price data is not available on a monthly basis for the whole of the UK.
[81] Data for England only. General Pharmaceutical Services in England 2007\2008 to 2016\2017. https:\\digital.nhs.uk\data-and-information\publications\statistical\general-pharmaceutical-services\general-pharmaceutical-services-england-2007-08-to-2016-17. Community pharmacies were known as chemists in the past. They are pharmacies that deal directly with people in their local area. Community pharmacy contractors who own five or less pharmacies are known as 'independents'.
[82] Based on number of pharmacy licences – see a CMA report on the anticipated acquisition by Celesio AG of Sainsbury's Pharmacy Business 29 July 2016, paragraph 2.8. https:\\assets.publishing.service.gov.uk\media\579b817540f0b64974000014\sainsbury_s-celesio-final-report.pdf
[83] A CMA report on the anticipated acquisition by Celesio AG of Sainsbury's Pharmacy Business 29 July 2016, paragraph 2.8. https:\\assets.publishing.service.gov.uk\media\579b817540f0b64974000014\sainsbury_s-celesio-final-report.pdf

3.28 Alternatively, an MA holder may sell its Nortriptlyine Tablets to another business associated with the supply of pharmaceutical products, which has its own in-house distribution network.

King

3.29 During Relevant Period 1 and Relevant Period 2, King sold Nortriptyline Tablets to pharmaceutical wholesalers and multiple retail pharmacy groups.[84]

Alissa

3.30 Alissa started to supply Nortriptyline Tablets in the UK in November 2016. During Relevant Period 2, it supplied pharmaceutical wholesalers and multiple retail pharmacy groups.[85]

Lexon/Medreich JV

3.31 Lexon and Medreich (pursuant to the the Lexon/Medreich JV) started to supply the Lexon/Medreich JV Product from July 2015. During Relevant Period 1, the Lexon/Medreich JV supplied Nortriptyline Tablets to Teva, a global pharmaceutical manufacturer. Teva was supplied under an Own Label Supply and Distribution Agreement between Medreich and Teva (the '**OLS Agreement'**). The terms of the OLS Agreement were negotiated by Lexon.

3.32 Under the OLS Agreement, Medreich supplied Teva with the Lexon/Medreich JV Product packaged in Teva's livery, at the prices agreed with Lexon (the '**Transfer Price**'). In addition, Teva shared [✂] of its profits from the onward sale of the Lexon/Medreich JV Product with Medreich. Under the terms of the Lexon/Medreich JV, Medreich shared all profits generated by the OLS Agreement with Lexon; both the profit generated by supplying Teva at the Transfer Price, and the profit generated via Teva's onwards sales.

3.33 [Lexon Director] explained to the CMA that the commercial rationale for supplying Teva was that it would allow the Lexon/Medreich JV Product to gain market share:

'with Nortriptyline, the strategy was very simple […] there's other players in the market place so how do we – how do we gain access to

[84] See Documents NOR-C0261.18, NOR-C0261.19, NOR-C0261.28, NOR-C0261.29; King's sales data provided in response to question 12 of the CMA's section 26 notice dated 20 October 2017.
[85] Document NOR-C1450, Annex 2 of Alissa's response to the CMA's section 26 dated 14 March 2018.

market share quite easily? Now Teva's the biggest player in the market, they have a – they have a scheme called the Teva scheme and through their Teva scheme, which has got, I don't know, 500, 600, 700 different products, they have agreements to supply retail pharmacies but – and those – those schemes are designed where the pharmacy buys across the range. So if I can get my product into that scheme then that gives me access to about [✂] *per cent of the market. Teva will have er and did have and still do have an open policy of saying that 'Our scheme is worth about this much as a market share in the market', that's what attracts companies like us to go to them. So what happens is, is that I can tap into that access point.'*[86]

3.34 The OLS Agreement was a non-exclusive supply agreement; it did not restrict Lexon and Medreich's right to sell the Lexon/Medreich JV Product themselves, in addition to supplying Teva.

3.35 As described in paragraph 3.8 above, the terms of the Lexon/Medreich JV specified that Lexon would be exclusively responsible for negotiating and setting the selling price for sales of the Lexon/Medreich JV Product, and that profits on the sales would be shared [✂] between Lexon and Medreich. However, there was an understanding between Lexon and Medreich that this would only apply to the supplies of the Lexon/Medreich JV Product to Teva. The remaining volume of Nortriptyline Tablets manufactured under Medreich's MA was packaged in Medreich's livery and was to be shared [✂] between Lexon and Medreich, who would then sell their apportioned volumes of Nortriptyline Tablets as they wished, without sharing profits on these sales. [✂].[87]

3.36 With the remaining Medreich liveried stock, Lexon supplied retail pharmacies and pharmaceutical wholesalers. Medreich supplied a pharmaceutical wholesaler.

II. Pricing framework

(a) Branded drug prices - Pharmaceutical Price Regulation Scheme

3.37 In October 2010, King made the decision to de-brand its nortriptyline product. Throughout the Relevant Period, and the years preceding it, Nortriptyline Tablets were not subject to price regulation. Regulation of branded drug prices, under either voluntary schemes or statutory

[86] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 77 line 19 – page 78 line 5.

[87] Document NOR-C2400, transcript of [Medreich Employee 1] interview dated 16 October 2018, pages 83 to 86.

powers, aims to balance the need to provide adequate incentives to innovator companies to develop new drugs against the need to ensure that the NHS can supply necessary medicines within the constraints of its budget.[88]

3.38 A number of voluntary schemes have been agreed with industry bodies pursuant to section 261 of the NHS Act. One of these voluntary schemes is the Pharmaceutical Price Regulation Scheme ('**PPRS**').

3.39 Under the PPRS, a member has freedom, within certain parameters, to set the price of a new drug.[89] Once the price is set, the PPRS prevents the scheme member from increasing the price except in very limited circumstances.[90]

3.40 King made the decision to de-brand its nortriptyline product '*given the desire to leave the controlling strictures of the PPRS Scheme (which include the provision of annual financial data and control of profit on brands)*'.[91]

(b) Generic drug prices

Generic competition

3.41 At the expiry of the relevant patent, generic versions of a drug can be manufactured and marketed by third parties. Once generic versions of a drug have been made available that drug is considered to have been '*genericised*'.

3.42 In the UK, the suppliers of unbranded generic drugs are in principle free to set their prices as they choose. This is based on the assumption

[88] The PPRS is explicitly designed with the aim of ensuring '*that safe and effective medicines are available on reasonable terms to the National Health Service*' and promoting '*a strong, efficient and profitable pharmaceutical industry*'. 2014 PPRS, page 9, paragraph 1.2.

[89] It is assumed however that prices at launch will be set at a level that is close to their expected value as assessed by the National Institute for Health and Care Excellence ('**NICE**'). NICE assesses the clinical and cost effectiveness of most new medicines launched in the UK market. *The Pharmaceutical Price Regulation Scheme 2014*, Department of Health and Association of the British Pharmaceutical Industry, December 2013, paragraph 7.14.

[90] To increase its price, the scheme member can either (i) apply to the Department of Health and Social Care ('**DHSC**') for approval to increase a price or (ii) seek to modulate its prices. It is very rare for a scheme member to seek individual price increases.

[91] Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.

that competition will bring down prices, once generic competitors are free to enter the market and compete on price.[92]

3.43 In the majority of cases, this is believed to be an effective means of securing value for money for the NHS. For example, the British Generic Manufacturers Association states that:

'Generic medicines make the drugs bill affordable and promote innovation. When an original branded drug loses its patent protection, generic equivalents are launched, typically by many manufacturers. The competition between these manufacturers drives down prices.' [93]

3.44 Where a therapeutically equivalent generic product is available, pharmacies are able to dispense either a generic or a branded product against '*open*' prescriptions that refer to the product's generic name (rather than to the brand name).

3.45 Generic drugs have become a significant feature of the UK pharmaceutical sector. NHS statistics show that by October 2018 the proportion of products dispensed by pharmacy contractors that were generic had reached more than 75%.[94]

3.46 Where drugs are prescribed generically, the amount pharmacies receive is specified in the Drug Tariff (less any discount[95]). Subject to any clinical guidance, pharmacies therefore have an incentive to dispense the cheapest medicine available. Generic suppliers will typically therefore compete on price to incentivise pharmacies to dispense their product and win market share from the competing branded and generic suppliers.

3.47 Research suggests that competition from generic drugs typically results in significant price falls:

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[92] See https:\\www.gov.uk\government\publications\health-service-medical-supplies-costs\health-service-medical-supplies-costs-bill-factsheet.

[93] British Generics Manufacturers Association About generics available at http:\\www.britishgenerics.co.uk\about-generics.

[94] Pharmaceutical Services Negotiating Committee, NHS Statistics – Dispensing statistics graphs, available at http:\\psnc.org.uk\funding-and-statistics\nhs-statistics\.

[95] See the NHS Act 2006, sections 164 and 165, and the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013/349, Regulation 89. Pharmacies can buy some medicines cheaper than the Drug Tariff Price. As such, the NHS applies a discount to pharmacies' payments. This discount is often referred to as 'clawback' and was designed to share with the NHS the profits pharmacies can make by purchasing medicines at below the price at which they are reimbursed.

(a) The European Commission's Pharmaceutical Sector Inquiry found that, in the EU, the price at which generic companies entered the market was, on average, 25% lower than the price of the originator medicines prior to the loss of exclusivity.[96]

(b) Generic entry can also have the effect of decreasing the price of the originator product. In markets where generic entry occurred, average prices dropped by almost 20% one year after the loss of exclusivity and about 25% after two years.[97] In some cases the decrease was as much as 80-90%.[98]

(c) According to one UK trade association, generic drugs cost between 20% to 90% less than the original price of their brand-name equivalents.[99]

3.48 However, this model of relying on competition to keep prices for generic drugs down can only work where competitors enter the market and compete on price. The markets for some generic drugs do not deliver these benefits: this could be because of market features (such as barriers to entry or expansion or because the market is too small to attract entry) or because of externalities such as anticompetitive collusion. Such generics, which attract limited market entry, often due to their low sales volumes, have been referred to by industry players as '*niche generics*':

(a) While King did not explicitly use the word '*niche*' to describe King's business strategy, he nonetheless made it clear that King's model is to focus on generics in relation to which price competition is weak due to limited threat of entry: '*Kite Consultancy* [*the trading name of Praze*] *approached Eli Lilly in early 1996 about the potential acquisition of a small portfolio of their products – including Allegron (Nortriptyline 10mg and 25mg tablets). This brand fitted a "template" that Kite Consultancy used to identify brands for potential acquisition, i.e. small and stable (in volume terms) which at the time did not yet face competition from generic suppliers; and where competitors in the same therapeutic area were significantly*

[96] Pharmaceutical Sector Inquiry Final Report (8 July 2019), Executive Summary section 2.1.2. See http:\\ec.europa.eu\competition\sectors\pharmaceuticals\inquiry\staff_working_paper_part1.pdf
[97] Pharmaceutical Sector Inquiry Final Report (8 July 2019) paragraph 212. See http:\\ec.europa.eu\competition\sectors\pharmaceuticals\inquiry\staff_working_paper_part1.pdf
[98] Pharmaceutical Sector Inquiry Final Report (8 July 2019) paragraph 212. See http:\\ec.europa.eu\competition\sectors\pharmaceuticals\inquiry\staff_working_paper_part1.pdf
[99] British Generics Manufacturers Association, About generics available at http:\\www.britishgenerics.co.uk\about-generics.

lower in price (in other words the product had differentiating clinical features which supported its use). (ii) In light of the information above, King Pharmaceuticals expected the brand price, and supply price to remain static. Due to the relatively small volume sales of the product, only limited (if any) generic competition was anticipated.'[100]

(b) Alissa explained in response to a section 26 notice that, as early as 2012/2013: '*[Alissa Director] and [Employee of Alissa's product development partner] agreed to jointly develop a number of niche generic medicines including Nortriptyline tablets'*.[101]

(c) In an interview with the CMA on 14 December 2017, [Auden Mckenzie Senior Employee] explained that Auden Mckenzie looked at entering the market for Nortriptyline Tablets and other drugs because they '*were basically niche pharma products which is what we specialised in.*'[102]

The Drug Tariff

3.49 The amount pharmacies receive from the NHS for dispensing generic prescription medicines is set out in the Drug Tariff Medicines listed in Part VIIIA of the Drug Tariff. Prescription medicinces fall under one of three categories which determine how the Drug Tariff price is calculated:[103]

(a) Category C – typically applies when a product is only available as a branded product or as a generic product from one or two sources. The price of a drug within Category C is based on a list price for a particular proprietary product, manufacturer or supplier;

(b) Category A – prices are based on the list price (the supplier's price before customer-specific discounts) of commonly used generics that are typically readily available from several sources. The price of a drug within Category A is set using a weighted average of prices from a basket of two wholesalers and two generic

[100] Document NOR-C0261, response to question 7, King's response to the CMA's section 26 notice dated 20 October 2017.
[101] Document NOR-C1447, response to question 3, Alissa's response to the CMA's section 26 notice dated 15 March 2018.
[102] Document NOR-C1595, transcript of [Auden Mckenzie Senior Employee] interview dated 14 December 2017, page 124 lines 18-19.
[103] See NHS Business Services Authority, https:\\www.nhsbsa.nhs.uk\pharmacies-gp-practices-and-appliance-contractors\drug-tariff.

manufacturers. There is a minimum requirement that products in Category A are listed either (i) by two wholesalers, or (ii) by one wholesaler and by two manufacturers;[104]

(c) Category M – typically applies to commonly used generics that are available from several sources. A drug is eligible for inclusion in Category M if it is a generic which is readily available in the given presentation (i.e. made by more than one Scheme M manufacturer).[105] The price of a drug within Category M is set using a weighted average from retrospective sales (net of customer-specific discounts) and volume data supplied to the Department of Health and Social Care (the **'DHSC')** by manufacturers who are members of Scheme M. These prices are then adjusted by a formula to ensure that pharmacy contractors retain the profit margin agreed as part of the funding of the community pharmacy contractual framework. The reimbursement price of Category M drugs is calculated by the DHSC and is based on a weighted average of data provided by the Scheme M members.

3.50 From January 2000, Nortriptyline Tablets fell under Category C of the Drug Tariff.[106] The 10mg tablets moved to Category A in June 2011 and the 25mg tablets moved to Category A in December 2011. Under Category A, the Drug Tariff price for Nortriptyline Tablets was originally calculated as an average of AAH and Alliance's list prices to pharmacies. From August 2015, Teva's prices were included and from November 2015 Actavis' prices also contributed to the calculation. In April 2016, both strengths of Nortriptyline Tablets moved to Category M.[107]

Table 4: **Drug Tariff category change**

	10mg tablets	**25 mg tablets**
Category C	January 2000[108]	January 2000
Category A	June 2011	December 2011
Category M	April 2016	April 2016

[104] The four manufacturers and suppliers whose prices are used to calculate Category A prices are AAH, Alliance, Teva and either Actavis or Accord-UK.
[105] Scheme M is a voluntary scheme between the Secretary of State and the British Generic Manufacturers Association, as the representative body for the generics industry. It applies to those manufacturers and suppliers of generic medicines for use in the NHS who choose to join it. See Sections 261(2) and 266(6) of the NHS Act 2006, and PAD030 '*Revised long-term arrangements for reimbursement of generic medicines*', paragraph 4.
[106] Document NOR-C1447, Alissa's response to question 5 of the CMA's section 26 notice dated 14 March 2018.
[107] Document NOR-C0929, NHS BSA's response to question 1 of Annex 1 of the CMA's section 26 notice dated 13 December 2017.
[108] Document NOR-C1447, response to question 5, Alissa's response to the CMA's section 26 notice dated 14 March 2018.

III. Suppliers' market shares

3.51 Table 5 below lists the main suppliers' share of supply of the 10mg tablets for the period January 2011 to March 2017.

Table 5: UK licence holders' share of supply by volume for the supply of 10mg tablets between January 2011 and March 2017

	King	NRIM/Auden Mckenzie	Lexon/ Medreich JV	Alissa	Parallel imports
2011	67%	33%	-	-	-
2012	57%	43%	-	-	-
2013	55%	45%	-	-	-
2014	54%	46%	-	-	-
2015	36%	37%	27%	-	-
2016	26%	40%	32%	2%	-
Jan17-Feb17	20%	30%	39%	12%	-

3.52 Source: CMA analysis based on data submitted by the Parties and third parties.[109]
Notes:
a) 2017 data - January 2017 to February 2017 only.
b) Lexon/Medreich JV data include Medreich sales to Teva and Medpro, and Lexon sales.

3.53 Table 6 below lists the main suppliers' share of supply of 25mg nortriptyline tablets for the period January 2011 to March 2017. The parallel imports solely comprise of imports of Paxtibi which, as explained in paragraph 3.71 below, is an Auden McKenzie product. Auden Mckenzie's share of supply of 25mg tablets in 2015 in the UK would be just under 60%, if UK sales of Paxtibi were included.

Table 6: UK licence holders' share of supply by volume for the supply of 25mg nortriptyline tablets between January 2011 and March 2017

	King	NRIM/Auden Mckenzie	Lexon/ Medreich JV	Alissa	Parallel imports
2011	50%	35%	-	-	15%
2012	50%	35%	-	-	16%
2013	41%	35%	-	-	24%
2014	41%	26%	-	-	33%
2015	20%	19%	33%	-	28%
2016	23%	29%	32%	2%	13%

[109] King (Documents NOR-C0261.13 – NOR-C0261.20), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord-UK (Document NOR-C0949), Lexon\Medreich JV (Document NOR-C3050, NOR-C2092), Alissa (Document NOR-C1450), and for parallel imports (PI): B&S Healthcare (Document NOR-C1939, Beachcourse (Document NOR-C2001.2), CD Pharma (Document NOR-C1866.1) Ecosse (Document NOR-C1948), Expono (Document NOR-C1908), Kosei (Document NOR-C1930), Landmark (Document NOR-C2010), Manx (Document NOR-C1871), MPT Pharma (Document NOR-C1878), S&M Medical (Document NOR-C1945), Amimed (Document NOR-C2067.2), Lexon (Document NOR-C1459).

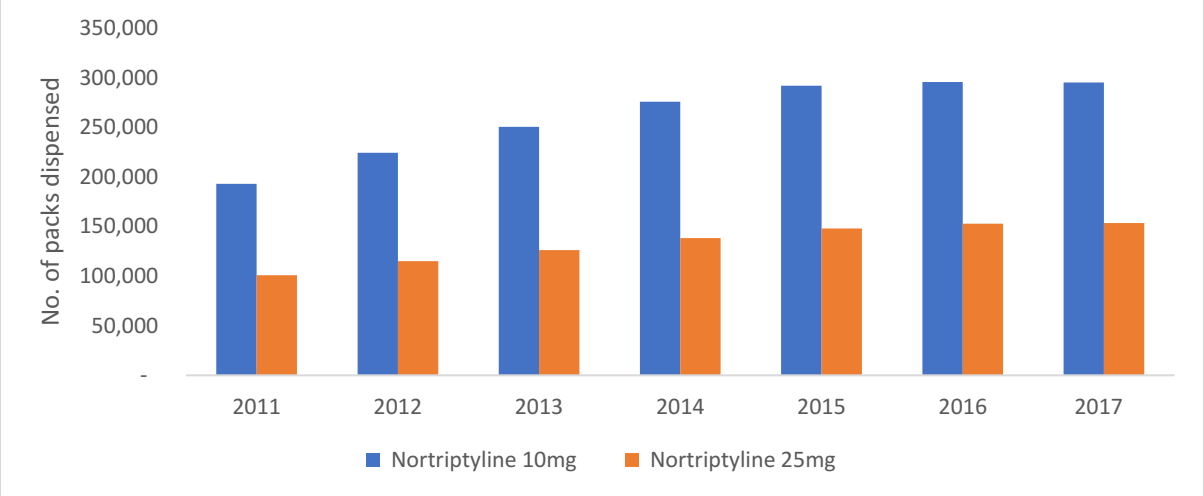
Jan17-Feb17	26%	42%	5%	21%	7%

Source: CMA analysis based on data submitted by the Parties and third parties.[110]
Notes:
a) To avoid double-counting of volumes, parallel import purchases from outside UK have been used to produce the table.
b) 2017 data - January 2017 to February 2017 only.
c) Lexon/Medreich JV data include Medreich sales to Teva and Medpro, and Lexon sales.

IV. The volume of Nortriptyline Tablets supplied in the UK [111]

3.54 Nortriptyline Tablets are a homogeneous product and demand is influenced by therapeutic need. Total demand for Nortriptyline Tablets in the UK increased gradually from approximately 193,000 packs in 2011 to approximately 295,500 packs in 2016 for 10mg tablets; and from approximately 101,000 packs in 2011 to approximately 153,000 packs in 2016 for 25mg tablets.[112]

Figure 1: Annual UK volumes of Nortriptyline Tablets (January 2011 to 2017)

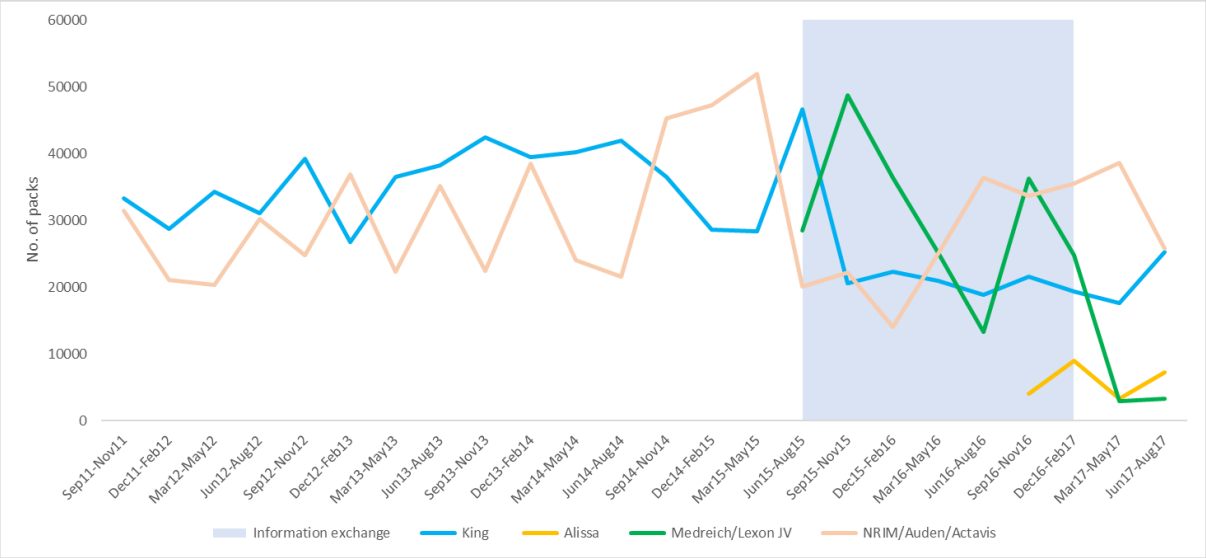


Source: CMA analysis of PCA data for the UK.
Notes:
1) The data include both branded and unbranded Nortriptyline Tablets.
2) NHS data for Scotland were missing from April 2016 onwards and have been therefore estimated.
3) Figures for 2017 have been estimated by pro-rating 2017 total volumes.

[110] King (Document NOR-C0261.22 – NOR-C0261.29), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord-UK (Document NOR-C0949), Lexon\Medreich JV (Document NOR-C3050, NOR-C2092), Alissa (Document NOR-C1450), and for parallel imports (PI): B&S Healthcare (Document NOR-C1939), Beachcourse (Document NOR-C2001.2), CD Pharma (Document NOR-C1866.1) Ecosse (Document NOR-C1948), Expono (Document NOR-C1908), Kosei (Document NOR-C1930), Landmark (Document NOR-C2010), Manx (Document NOR-C1871), MPT Pharma (Document NOR-C1878), S&M Medical (Document NOR-C1945), Animed (Document NOR-C2067.2), Lexon (Document NOR-C1459).
[111] The data below include both branded and unbranded versions of Nortriptyline Tablets.
[112] For England only total demand for Nortriptyline Tablets increased gradually from approximately 12,700 packs in January 2011 to approximately 22,500 packs in March 2017 for 10mg tablets; and from approximately 6,300 packs in January 2011 to approximately 11,000 packs in March 2017 for 25mg nortriptyline tablets.

3.55 Figure 2 and Figure 3 set out suppliers' sales volumes of Nortriptyline Tablets in the UK on a three-monthly basis between September 2011 and February 2017.

Figure 2: Three monthly sales volumes for 10mg nortriptyline tablets



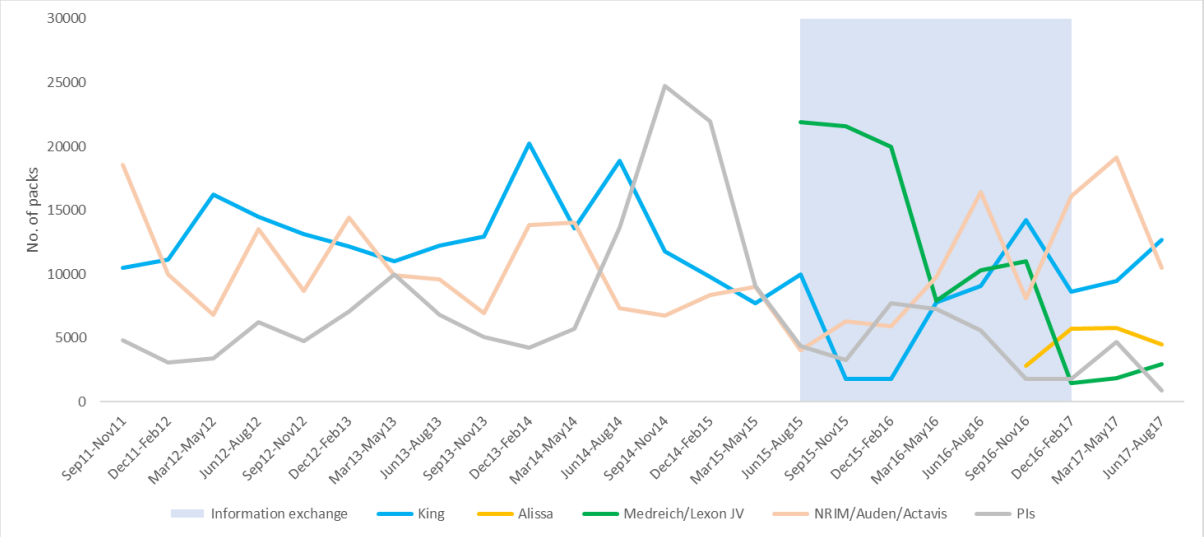
Source: CMA analysis based on data submitted by the Parties.[113]

Notes:

Medreich/Lexon JV revenues include revenues realised by both entities but exclude stock transfers from Medreich to Lexon. Lexon's purchases of nortriptyline from King and Auden Mckenzie prior to Medreich obtaining its own MA are included in King's and Auden Mckenzie's sales

[113] King (Documents NOR-C0261.13 – NOR-C0261.20), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord-UK (NOR-C0949), Lexon\Medreich JV (Document NOR-C3050, NOR-C2092), Alissa (Document NOR-C1450).

Figure 3: Three monthly sales for 25 mg nortriptyline tablets



Source: CMA analysis based on data submitted by the Parties [114]
Notes:
a) Medreich/Lexon JV revenues include sales made by both entities but exclude stock transfers from Medreich to Lexon.
b) To isolate volumes from outside the UK, for parallel imports total cost of purchases from outside UK have been used to produce the figure.
c) Lexon parallel imported purchases of nortriptyline have been included in the PI volumes.
d) Lexon's purchases of nortriptyline from King and Audsen Mckenzie prior to Medreich obtaining its own MA are included in King's and Auden Mckenzie's sales.

3.56 Three-monthly sales volume data is lumpy, in part due to the delivery dates and stock holding levels of the main wholesale customers.

3.57 The Lexon/Medreich JV Product enters with significant volumes of both strengths in July 2015 and there were corresponding falls in the volumes supplied by the other UK MA holders, King and Auden (now Actavis), and in parrallel imports of the 25mg. The Lexon/Medreich JV volumes fell back somewhat in the first half of 2016.

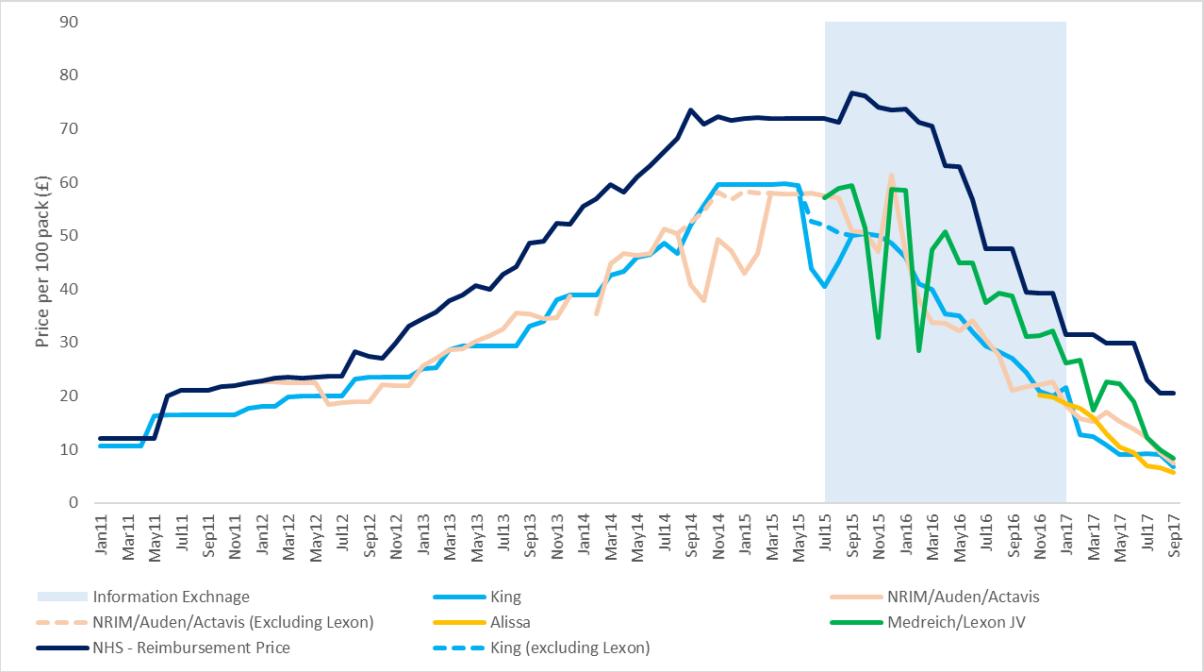
V. The price of Nortriptyline Tablets supplied in the UK

3.58 Figure 4 and Figure 5 set out the monthly NHS Reimbursement Price paid by the NHS from January 2011 to March 2017 and suppliers'

[114] King (Documents NOR-C0261.13 – NOR-C0261.20), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord-UK (NOR-C0949), Lexon\Medreich JV (Document NOR-C3050, NOR-C2092), Alissa (Document NOR-C1450) and for parallel imports (PI): B&S Healthcare (Document NOR-C1939), Beachcourse (Document NOR-C2001.2), CD Pharma (Document NOR-C1866.1) Ecosse (Document NOR-C1948), Expono (Document NOR-C1908), Kosei (Document NOR-C1930), Landmark (Document NOR-C2010), Manx (Document NOR-C1871), MPT Pharma (Document NOR-C1878), S&M Medical (Document NOR-C1945), Animed (Document NOR-C2067.2), Lexon (Document NOR-C1459).

monthly Average Selling Prices[115] ('**ASP**') for Nortriptyline Tablets during the same period.

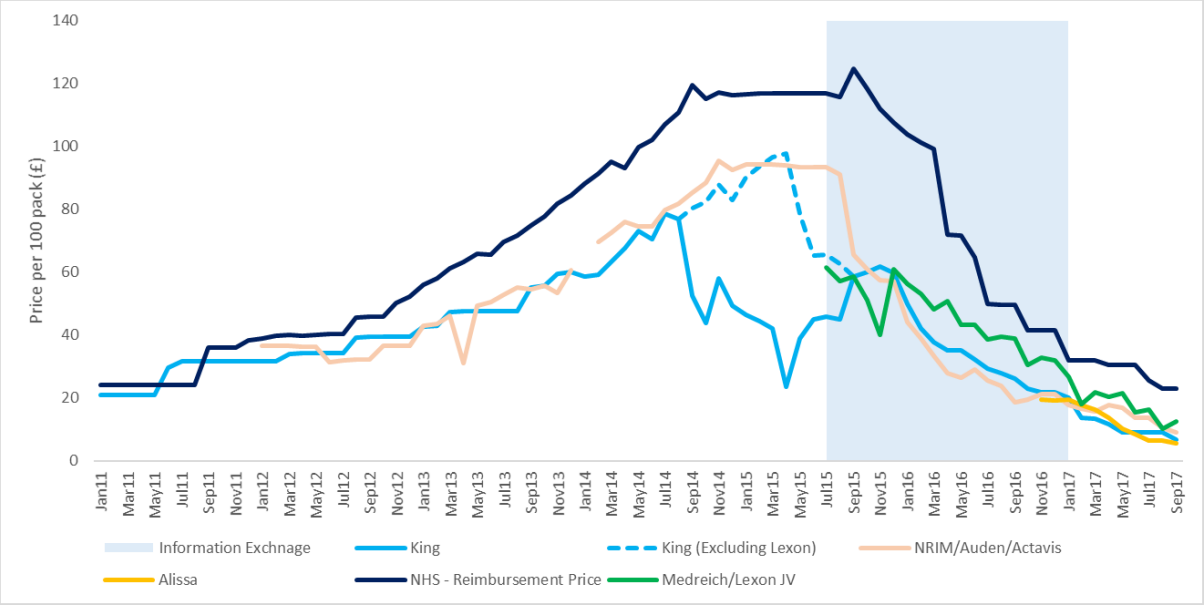
Figure 4: UK MA holder monthly ASP and NHS England Reimbursement Price for 10mg tablets



Source: CMA analysis based on data submitted by the Parties[116] and PCA data for England.
Notes:
a) ASPs for NRIM are missing between April 2011 and December 2011.
b) In January 2014, Auden Mckenzie ASP has been excluded as it was negative (possibly due to stock returns).
c) NHS Reimbursement Price refers to the branded and unbranded version of 10mgTablets.
d) Lexon/Medreich JV prices represent Lexon ASPs to wholesalers and pharmacies.

[115] Average Selling Price or 'ASP' is defined as the gross price per pack for each of the 10mg and 25mg tablets, net of rebates for a defined period of time (for example, an annual ASP is the annual average selling price).
[116] King (Documents NOR-C0261.13 – NOR-C0261.20), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord-UK (NOR-C0949), Lexon\Medreich JV (Document NOR-C1459), Alissa (Document NOR-C1450).

Figure 5: UK MA holder monthly ASP and NHS England Reimbursement Price for 25mg nortriptyline tablets



Source: CMA analysis based on data submitted by the Parties and PCA data for England.[117]
Notes:
a) ASPs for NRIM are missing between April 2011 and Dec 2011.
b) In January 2014, Auden Mckenzie ASP has been excluded as it was negative (possibly due to stock returns)
c) NHS Reimbursement Price refers to the unbranded and branded version of 25mgTablets.
d) Lexon/Medreich JV prices represent Lexon ASPs to wholesalers and pharmacies.

3.59 Following NRIM's entry in January 2011 and King's de-branding of Nortriptyline Tablets (see paragraph 3.37 to 3.40 above), King and Auden Mckenzie/NRIM's[118] ASPs for 10mg nortriptyline tablets repeatedly increased up to August 2014. Prices remained at that increased level until the end of May 2015,[119] when the sale of Auden to Actavis was completed.[120]

3.60 Thereafter, and following entry of the Lexon/Medreich JV Product in July 2015, the ASP for 10mg tablets started to come down, continuing to fall during the Relevant Period.

3.61 Similarly, King and Auden Mckenzie/NRIM increased the ASP for 25mg tablets up to August 2014. Prices remained at that increased level until

[117] King (Documents NOR-C0261.22 – NOR-C0261.29), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord-UK (NOR-C0949), Lexon\Medreich JV (Document NOR-C1459), Alissa (Document NOR-C1450).
[118] NRIM was acquired by Auden McKenzie in November 2012.
[119] This is the case for Auden's ASP to all customers, other than Lexon, where a special low price had been agreed.
[120] The sale was publicly announced in January 2015 and completed at the end of May 2015.

May 2015.[121] Following the independent entry of the Lexon/Medreich JV and during the Relevant Period, the ASP for 25mg tablets started to come down.

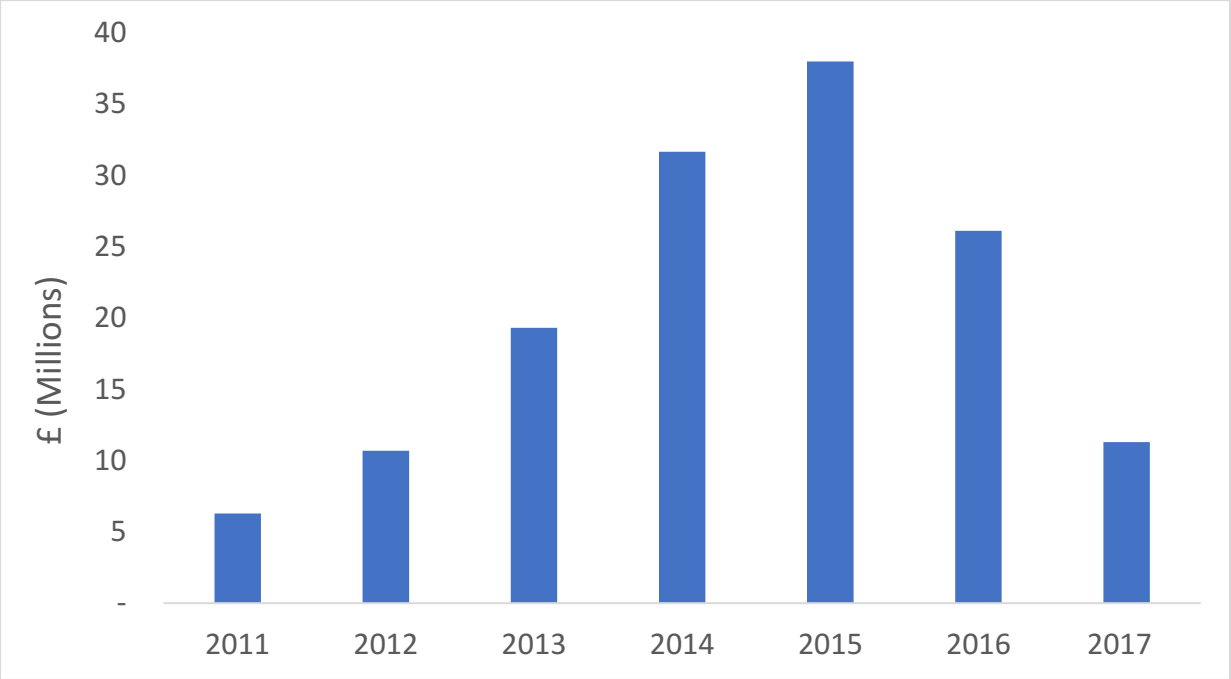
3.62 The NHS Reimbursement Price for 10mg tablets increased from £12.06 per pack in January 2011 to its peak of £76.77 per pack in September 2015, two months after the entry of the product supplied by Lexon/Medreich JV, and a 537% increase. For 25mg tablets, the NHS Reimbursement Price increased from £24.02 per pack in January 2011 to £124.63 per pack in September 2015; a 419% increase. Since September 2015, the NHS Reimbursement Price has been declining. In March 2017, when Focus Pharmaceuticals Limited entered, the NHS Reimbursement Price was £31.54 and £31.80 per pack, and, by November 2019, it had fallen to £7.70 and £8.90 per pack for 10mg and 25mg tablets respectively.

VI. NHS spending on Nortriptyline Tablets

3.63 Figure 6 sets out the annual NHS spend on Nortriptyline Tablets in the UK from January 2011 (when NRIM entered) to 2017. In 2011, NHS total spend on Nortriptyline Tablets was £6.3 million. Spend peaked at £38 million in 2015, falling thereafter to £26.1 million in 2016. While volumes did grow by just over 50% over that period, prices increased by around ten times that amount, driving the increase in NHS spending on nortriptyline.

[121] This is the case for King's ASP to all customers, other than Lexon, where a special low price had been agreed.

Figure 6: NHS total expenditure – UK



Source: CMA analysis of PCA data for the UK.
Note:
1) The data include both branded and unbranded Nortriptyline Tablets.
2) NHS expenditure for Scotland was missing from April 2016 onwards. It has been therefore estimated.
3) NHS expenditure in 2017 has been estimated by pro-rating the 2017 NHS expenditure.

D. Key events prior to the Infringement

3.64 King acquired the UK MAs for the branded version of Nortriptyline Tablets (Allegron) from Eli Lilly & Company Limited on 30 March 1998. King was the sole supplier of Nortriptyline Tablets in the UK and was subject to the PPRS until June 2011.[122]

3.65 NRIM was granted MAs for Nortriptyline Tablets on 1 May 2009.[123]

3.66 In October 2010, King made the decision to de-brand its Nortriptyline Tablets. King explained that this decision was taken due to '*the desire to leave the controlling strictures of the PPRS Scheme (which include the provision of annual financial data and control of profit on brands)*'.[124] King obtained the MHRA's approval to add the generic name to the MA for both presentations on 19 November 2010[125] and

[122] Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.
[123] See Table 3: Companies that have been granted or have acquired MAs to supply Nortriptyline Tablets in the UK.
[124] Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.
[125] Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.

notified wholesalers of the name change to the generic version of the 10mg and 25mg packs in March 2011 and May 2011 respectively.[126]

3.67 NRIM started selling Nortriptyline Tablets in the UK in January 2011.[127]

3.68 King told the CMA that following NRIM's entry, it '*took a decision not to aggressively retain volume business through price discounting and following initial 40% - 50% volume declines […] sales volumes stabilised'*.[128] At interview, [King Director] was asked about King's response to NRIM taking King's market share on entry. He told the CMA: '*You can compete on price in which case […] the market just disappears, or […] you just have to suck it and say that's what they've done and that's what happened, so we didn't compete on price'*.[129]

3.69 Following NRIM's entry, King and NRIM's ASPs for both tablet strengths repeatedly increased.

3.70 In November 2012, Auden Mckenzie acquired NRIM (including its MAs for Nortriptyline Tablets in the UK and in other European countries).[130] Following the acquisition, both King and Auden Mckenzie's ASPs continued to increase.[131]

3.71 In 2013, Auden Mckenzie acquired the Spanish licence for 25mg nortriptyline tablets sold under the brand name Paxtibi from the Spanish company, Biomed S.L. ('**Biomed**').[132] That year Auden Mckenzie entered into a distribution agreement with Biomed for the supply of Paxtibi in Spain.[133] Biomed agreed to supply Paxtibi in Spain on Auden Mckenzie's behalf. Paxtibi accounted for all parallel imports coming into the UK between January 2011 and March 2017.

3.72 Sales of Paxtibi increased significantly in the UK between 2012 and 2014; from less than 16% of total sales of 25mg tablets in 2012 to 33%

[126] Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.
[127] Document NOR-E4650, NRIM sales volume between January 2011 and December 2011.
[128] Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.
[129] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 49 lines 12-16. See also page 55 lines 5-6: "*I took a commercial decision that we would not try and compete on value*".
[130] Document NOR-C1749, [Auden Mckenzie Senior Employee]'s response to question 1 of the CMA's section 26 notice dated 18 June 2018.
[131] The NHS Reimbursement Price for 10mg tablets peaked at £76.77 per pack in September 2015; a 537% increase from the price at the time of NRIM's entry in 2011 (£12.06). For 25mg tablets, the peak was £124.63; a 419% increase from the price at the time of NRIM's entry (£24.02).
[132] Document NOR-C1749, [Auden Mckenzie Senior Employee]'s response to question 1 of the CMA's section 26 notice dated 18 June 2018.
[133] Document NOR-C1885, Actavis' response to question 1 of the CMA's section 26 notice dated 29 July 2018. See Distribution Agreement between Auden Mckenzie and Biomed dated 5 August 2013.

in 2014. The price of 25mg tablets was high and rising at this time (see paragraphs 3.58 and 3.61) resulting in increasing margins for parallel imports into the UK.

3.73 In February 2014, King learned that Medreich was developing a nortriptyline product (as part of its Product Development and Profit Sharing Agreement with Lexon)[134] and that it had submitted an application for MAs to the MHRA.[135] King was concerned that the launch of a competing Medreich product would have a serious negative impact on its business, and that it would lose *'most probably*' 50% of its sales.[136] [King Director] tried, unsuccessfully, to block the progress of Medreich's MA application for Nortriptyline Tablets.[137]

3.74 On 25 February 2014, [Consultant to King 1] met with [Lexon Director]. [Consultant to King 1] was engaged by King to gather market intelligence and to conduct negotiations with certain of King's key customers.[138] This contact is recorded in an email from [Consultant to King 1] to [King Director] and copied to [Lexon Director]. The email shows that [Lexon Director] asked [Consultant to King 1] to pass [King Director] a message regarding Lexon's development of Nortriptyline Tablets:

'Hi [King Director],
I have seen [Lexon Director] *today, who asked me to get in contact with you.*
[Lexon Director] has informed me that he is expecting his Nortriptyline licenses to drop at any point, and, wanted to talk to you directly.
Not sure if you had his details but, I have listed below just in case:-
[Lexon Director]'s email address]
Tel:-[Lexon Director's telephone number]

[134] Document NOR-C2978, King's response to the CMA's section 26 notice dated 7 March 2019.
[135] Document NOR-E1490, email from [King Director] to [Employee of GIAE] dated 20 February 2014.
[136] Document NOR-E1490, email from [King Director] to [Employee of GIAE] dated 11 March 2014.
[137]
Document NOR-E5715, email from [King Director] to [Employee of GIAE] dated 12 February 2014, Document NOR-E5151, email from [King Director] to [Employee of GIAE] dated 14 February 2014, Document NOR-E5718, email from [Employee of GIAE] to [King Director] dated 20 February 2014, Document NOR-E5722, email from [King Director] to [Employee of GIAE] dated 20 February 2014, Document NOR-E1490, email from [Employee of GIAE] to [King Director] dated 13 March 2014, Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 97-98 lines 16-8.
[138] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 26-27 lines 23-14; see also Document NOR-C2618 transcript of [King Director] interview dated 22 November 2018, page 12 lines 5-6.

Regards
[Consultant to King 1]'.[139]

3.75 [King Director] told the CMA that he did not contact [Lexon Director] as a result of this email.[140] [Lexon Director] told the CMA that he could not remember the conversation [Consultant to King 1] referred to in the email.[141]

3.76 From September 2014 to August 2015, King supplied Lexon with 25mg nortriptyline tablets at a price of £4 per pack. Auden Mckenzie supplied Lexon with the 10mg nortriptyline tablets at a price of £4 per pack from September 2014 until February 2015. [✂]. Auden Mckenzie increased the price of 10mg nortriptyline tablets to Lexon from March 2015 and ceased supply altogether from May 2015, just before the sale to Actavis was completed. King took over the supply of the 10mg tablets from June 2015, supplying both strengths of Nortriptyline Tablets to Lexon at £4 per pack until the end of July 2015.[142]

E. The conduct under investigation

3.77 This section describes communications between participants in the market for the supply of Nortriptyline Tablets in the UK. The CMA describes these communications below without an assessment of the accuracy of the underlying information. Where necessary, such an assessment is included in the legal assessment section of this Decision (see chapter 5).

I. Discussions between King, Lexon and Alissa during Relevant Period 1: 27 July 2015 to 27 May 2016

3.78 As explained in paragraphs 3.59 and 3.60, in September 2015, the NHS Reimbursement Price of both strengths of Nortriptyline Tablets started to fall; from £76.77 and £124.63 per pack for 10mg and 25mg tablets respectively in September 2015 to £63.01 and £71.70 per pack for 10mg and 25mg tablets respectively in May 2016 - falls of 18% and

[139] Document NOR-E1483, email from [Consultant to King 1] (agent for King) to [King Director] dated 25 February 2014.
[140] Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 160 lines 16-19.
[141] Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 168-169.
[142] Document NOR-C0261.13, Document NOR-C0261.14, Document NOR-C0261.15, Document NOR-C0261.16, Document NOR-C0261.17, Document NOR-C0261.18, Document NOR-C0261.19, Document NOR-C0261.20, Document NOR-C0261.22, Document NOR-C0261.23, Document NOR-C0261.24, Document NOR-C0261.25, Document NOR-C0261.26, Document NOR-C0261.27, Document NOR-C0261.28, Document NOR-C0261.29

42%. Entry of the Lexon/Medreich JV Product in July 2015 contributed to the downward pressure on prices for Nortrityline Tablets in the UK.

3.79 From July 2015 onwards, King began to seek information from [Lexon Director] about the supply of the Lexon/Medreich JV Product.

(a) Discussions between King and Lexon between July 2015 and March 2016

3.80 On a number of occasions between July 2015 and March 2016, [King Director] and [Lexon Director], actual competitors in the supply of Nortriptyline Tablets in the UK, exchanged information about pricing and other terms of supply, some of which [King Director] believed Lexon had access to by virtue of its Product Development and Profit Sharing Agreement with Medreich (see paragraph 3.73). In particular:

(a) [King Director] contacted [Lexon Director] to verify information received from King's consultant ([Consultant to King 1]) regarding Teva's low offer prices to Bestway/Co-op (a customer of King);

(b) [King Director] sought information from [Lexon Director] about the volume and timing of supply of the Lexon/Medreich JV Product to Teva. King used this information to inform its negotiations with Bestway/Co-op; and

(c) [King Director] and [Lexon Director] discussed the volume of Nortriptyline Tablets supplied to the overall market by King, Teva and Actavis, as well as by parallel importers.

3.81 These discussions took place at a time when King was bidding to supply Bestway/Co-op,[143] a customer of both King and Teva. At the time, Teva was receiveing the Lexon/Medreich JV Product from Medreich, on the terms agreed between Lexon and Teva.[144]

3.82 On 27 July 2015, at 15:26, [King Director] received information from [Consultant to King 1] about Teva's prices for Nortriptyline Tablets. [Consultant to King 1] told [King Director] that Teva was offering lower

[143] In July 2014, The Co-Operative Group's pharmacy business was acquired by the Bestway Group. The business, formerly known as The Co-operative Pharmacy, was rebranded to 'Well' in February 2015 (see Bestway Group website).

[144] As set out at paragraph 3.31 above, the terms of the OLS Agreement under which Medreich supplied Teva were negotiated by Lexon. For completeness, Alissa had not yet obtained its MA for the supply of Nortriptyline Tablets in the UK and was not involved in these discussions.

prices in their ongoing negotiations with Bestway/Co-op than King's current prices, and that Teva would soon be in stock with the product:

'Teva are quoting pricing around 15% lower than the current pricing offered by ourselves directly into the Coop *[Bestway/Co-op]*.

They are stating that is direct supply from Medreich (Lexon license agreement), and, they will have stock in August.

Teva as a company are way behind their numbers this year and co-op [Bestway/Co-op] are also behind on their rebate with them also, hence the scrambling for stock purchases. Would it be possible to shed some further light on this and what you would like me to respond with'.[145]

3.83 On 27 July 2015, [King Director] emailed [Lexon Director] asking him to confirm the prices at which he was supplying Teva:

'Can you let me know prices you are supplying nortriptyline to Teva please?'.[146]

3.84 [Lexon Director] replied to [King Director] on the same day:

'Its [sic] at a base price plus profit share

As I said before I was doing an own label for them and only a limited volume to cover their scheme'.[147]

3.85 Two days later, on 29 July 2015, [King Director] replied to [Lexon Director], requesting a call to '*have a chat on supplies etc'*.[148]

3.86 [Lexon Director] told the CMA in interview that he could not remember whether he had a subsequent conversation with [King Director] about '*supplies*'. However, he assumed that *'by virtue of the fact he needs to chat about supplies he's [King Director]'s probably trying to establish what my intentions were with the supply of that product to Teva and possibly establish how much or what volumes or -- he was planning to*

[145] Document NOR-E1574, email from [Consultant to King 1] to [King Director], dated 27 July 2015.
[146] Document NOR-E8228, email from [King Director] to [Lexon Director] dated 27 July 2015. Since September 2015, Teva sourced its supplies of Nortriptyline Tablets from Medreich which Medreich had jointly developed with Lexon (see paragraph 3.8).
[147] Document NOR-E8228, email from [Lexon Director] to [King Director] dated 27 July 2015. [Lexon Director] was questioned about his response at interview: see Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 9 lines 2-3.
[148] Document NOR-E8228, email from [King Director] to [Lexon Director] dated 29 July 2015.

supply. I, I genuinely can't remember. There were, there were several different conversations… where it was to do with how we were supplying Teva and, and the volumes that were going there and for what purpose'.[149]

3.87 On 30 July 2015, the day after [King Director] requested a call with [Lexon Director], [King Director] told [King Office Manager] that he was intending to speak to [Lexon Director] about Teva's offer to deliver '*full volume supply*' of the Lexon/Medreich JV Product (supplied by Medreich) to Bestway/Co-op at a reduced price and would update [Consultant to King 1] , who was conducting negotiations with Bestway/Co-op on behalf of King:

*'Ask him to call me Friday. I should have spoken to [Lexon Director] by then to find out what the f*** is going on'.*[150]

3.88 On 31 July 2015, a call of 26 seconds' duration took place between [King Director] and [Lexon Director]'s mobile devices.[151]

3.89 On 5 August 2015, [King Director] sent a text message to [Lexon Director], querying why Lexon was ordering Nortriptyline Tablets from King given that the Lexon/Medreich JV Product was now available:

'[Lexon Director]

Teva will supply Bestway/CooP for total demand from September

Received an order from Lexon. If Medreich are producing, why?'[152]

3.90 [Lexon Director] replied:

[149] Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 10 line 5 and page 11 lines 2-9.
[150] Document NOR-E1574, email from [Consultant to King 1] to [King Director] dated 27 July 2015 and email from [King Director], using his personal email address to [King Director], business account (which was monitored by [King Office Manager]) dated 30 July 2015.
[151] Document NOR-C3011, telephone call made by [King Director].
[152] Document NOR-E8457.1, iMessage from [King Director] to [Lexon Director] dated 5 August 2015. Although the name appearing on the iMessage is '[Mispelling of King Director's name]', [Lexon Director] confirmed that this is a reference to [King Director]. See Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 12 lines 7-10.

'As I said I have only supplied 1batch of each to Teva and so you don't get stuck with excess happy for now to buy some from you even at a higher cost'.[153]

3.91 [King Director] sent a further text on the same day saying that King would not be *'stuck with stock',* and asking that [Lexon Director] call him, when he got a chance.[154]

3.92 On 28 August 2015, [Employee of Lexon] sent an internal email to Lexon's sales representative, passing on [Lexon Director]'s instruction that Lexon has '*a very low cost price on [Nortriptyline Tablets] and […] make a massive profit*' and that when offering prices for Nortriptyline Tablets to Lexon's customers, they should not '*go out aggressively'* which would *'bring down the market price*'.[155]

3.93 On 14 September 2015, [King Director] asked [Lexon Director] to give him a call.[156] Ten days later, on 24 September 2015, [King Director] exchanged text messages with [Lexon Director], referring to a call having taken place and discussing the timing of supplies of the Lexon/Medreich JV Product to Teva. As part of this exchange, [Lexon

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[153] Document NOR-E8457.8, iMessage from [Lexon Director] to [King Director] dated 5 August 2015. [Lexon Director] told the CMA that he had understood that King might be '*stuck with excess*' stock given that Lexon, through its arrangement with Medreich was getting a licence to supply and, also, owing to the potential of Teva's own label product, launched in September 2015, to have an impact on King's sales:
'*I'm guessing that it's a case of he* [King Director] *was not aware that I was getting a licence granted; he wasn't aware of any deal that I'd done to supply Teva on an own-label basis. So, I'm assuming that because, as we've launched a product in the marketplace he would have an excess of, of stock from previous -- perhaps forecasts or whatever from manufacture -- so, I'm guessing that he's, he's worried that he's not selling as many.*'
Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 13 lines 15-21. [Lexon Director] said that his offer to purchase King's excess stock was not unique to King. On a number of previous occasions, Lexon had offered to purchase stock from other suppliers under similar circumstances '*…if they've got a problem with stock...*'. See Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 15 lines 11-18. [Lexon Director] said that he did not believe he purchased any more stock from King, once the Medreich product had been launched. However, he also noted that it was '*common practice*' in the industry to purchase stocks of the same product from different sources:
'*I buy stock from, Alliance UniChem. I buy stock from, other wholesalers who are all competitors. It's common practice in the industry, to buy stock from, many sources. I'd suggest, quite a significant percentage of the purchases that we have are actually from competitors. You could argue that Teva -- me supplying them within their scheme is also -- because they're servicing retail pharmacies they're a competitor. So, it's very common practice in the industry to buy, from, from wherever.*'
See Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 16 lines 17-25.
[154] Document NOR-E8457.2, iMessage from [King Director] to [Lexon Director] on 5 August 2015. [Lexon Director] told the CMA that he could not remember whether he had contacted [King Director] as he had been requested to do. Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 18 lines 7-14.
[155] Document NOR-E8231, email from [Employee of Lexon] to [Employee of Lexon] and [Employee of Lexon] dated 28 August 2015.
[156] Document NOR-E8457.5, iMessage from [King Director] to [Lexon Director] dated 14 September 2015.

Director] agreed to supply timings that were requested by [King Director]:

[King Director] (at 7:45): *'Thanks for the call*
When will they [be] back in stock'
[Lexon Director] (at 8:34)*: 'I am not supplying for at least 3 weeks'*
[King Director] (at 10:42)*: 'Could you make it late October'*
[Lexon Director] (at 10:42)*: 'Will do'*
[King Director] (at 10:56)*: 'Thanks'*[157]

3.94 Both [Lexon Director] and [King Director] told the CMA that they could not remember the above exchange.[158] However, [Lexon Director] also told the CMA that the exchange must have been about the supply of stock to Teva.[159]

3.95 On the same day, 24 September 2015, after being told that Lexon would not supply Teva until the end of October, [King Director] contacted [Auden Mckenzie Senior Employee] to let him know that Teva would be out of stock until then: '*Teva are out of stock of 10mg and 25mg until end of October [2015] at the earliest. Can Lexon let Auden McKenzie aware?*'[160]

3.96 Following the receipt of information from [Lexon Director] about the timing of supplies of the Lexon/Medreich JV Product to Teva (and therefore Teva's ability to supply Bestway/Coop) (see paragraph 3.93), [King Director], [Consultant to King 1] and [King Office Manager] exchanged a number of emails regarding how this could affect King's ongoing negotiations with Bestway/Co-op:

(a) On 26 September 2015, [King Office Manager] told [Consultant to King 1] that Teva would be out of stock until the end of October and that he (on instruction from [King Director]) should approach Bestway/Co-op with an offer to revert to the prices previously charged by King if Bestway/Co-op committed to 6 months' supply

[157] Document NOR-E8457.6, iMessage exchange between [King Director] and [Lexon Director] dated 14 September 2015.
[158] Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 19 line 8; Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 23 lines 9-11.
[159] Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 19 lines 2-4.
[160] Document NOR-E8369, email from [King Director] to [Auden Mckenzie Senior Employee] dated 24 September 2015.

of their total demand.[161] [Consultant to King 1] confirmed that he would do so.[162]

(b) On 29 September 2015, [Consultant to King 1] told [King Office Manager] that Bestway/Co-op had told him they were not experiencing any problems obtaining supplies from Teva.[163]

(c) [King Director] sent an email to [Consultant to King 1] the following day, confirming that Teva were out of stock:

'*Just to confirm Teva are out of stock.*

Well / Bestway [Bestway/Co-op] approached Lexon for stock at the beginning of last week. They could not, obviously, supply as all their product goes to Teva.

Teva will not be back in stock until the end of October 15, at the earliest.'[164]

(d) In the same email, [King Director] repeated his willingness to supply Bestway/Co-op at a reduced price, if they committed to purchasing specific stock levels from King over a minimum six month period.[165]

(e) On 1 October 2015, [Consultant to King 1] reported back to [King Director] on a meeting he had with [Employee of Bestway/Co-op] to discuss King's offer, saying that Bestway/Co-op would continue to obtain supplies from Teva, but would prefer to deal with King in 2016.[166]

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[161] Document NOR-E1588, email from [King Office Manager] to [Consultant to King 1] dated 26 September 2015.

[162] Document NOR-E1588, email from [Consultant to King 1] to [King Office Manager] dated 26 September 2015.

[163] Document NOR-E1588, email from [Consultant to King 1] to [King Office Manager] dated 29 September 2015.

[164] Document NOR-E1589, email from [King Director] to [Consultant to King 1] dated 30 September 2015.

[165] Document NOR-E1589, email from [King Director] to [Consultant to King 1] dated 30 September 2015: '*Willing to supply them at £55 for the 10mg and £65 for the 25mg on the proviso that it is for full volume of both strengths and this runs for a minimum of 6 months. Just to let you know that the Tariff has changed for October and gone up by approx. 8% on both presentations. £76.75 – 10mg and £124.58 – 25mg. Well [Bestway\Co-op] would make more money on the 25mg than we do*.'

[166] Document NOR-E1589, email from [Consultant to King 1] to [King Director] dated 1 October 2015, '*I have spoken in depth to* Employee of Bestway/Co-op] *at a meeting today regarding Notriptyline [sic].*
Teva are still insisting that they have no issue, but, [Employee of Bestway/Co-op] *has spoken to their planning department today and they have admitted that they arte [sic] trying to sort the situation out (i.e. begging* [Lexon Director] *for more stock).*

(f) Later that month, on 22 October 2015, [Consultant to King 1] forwarded an email he received from Bestway/Co-op to [King Director], saying that Bestway/Co-op were continuing to look for cheaper sources of supply of Nortriptyline Tablets: '*Well [Bestway/Co-op]… have been delaying their response [on King's offer], trying to find cheap stock from the market place (or at least evidence to show this)'*.[167] In the same email, *[Consultant to King 1]* also said that '*Teva are still informing both Well [Bestway/Co-op] & Rowland's that they have no issues and will be able to fulfil their commitments, however, this would be their stock replenishment team reading from a spreadsheet*'.[168]

3.97 Separately to the discussions that King had with Lexon in relation to Teva, on 21 October 2015, [King Director] emailed [Lexon Director] regarding supply to the wholesaler, Alliance, and asked for details of a contact at Actavis (who held the Auden Mckenzie MA) explaining that: '*We [King] have had not [sic] sales at all through Alliance Unichem for the past 10 days and the only explanation I can think of is they have done a deal with Actavis and not told us'*.[169] On the same day (21 October 2015), [Lexon Director] provided a contact name: *' [Actavis Employee] is probably the best guy to get hold of as he is national sales manager'*.[170]

3.98 [Lexon Director] told the CMA that [King Director] would have asked him for a contact at Actavis to discuss Actavis' strategy in relation to Nortriptyline Tablets. He explained that [King Director] would have

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I have informed her of the current situation and of course of the offer that we have available for them, to which she is going to act upon, but, has to check once more due to retro agreements that they have in place with Teva until year end. She has stock in the warehouse at the present time and orders outstanding with Teva that as stated they are stating they will deliver, however, [Employee of Bestway/Co-op] *does now need to shore up her supply and will come back to me on Monday (she is not in tomorrow) to let me know the volumes etc. for commitment at the prices and time frames I have informed her of*.'; Document NOR-E1590, email from [Consultant to King 1] to [King Director] dated 15 October 2015: '*I have spoken to* [Employee of Bestway/Co-op] *in depth about our offer and she will confirm volumes etc. to me tomorrow. Teva have again been assuring her that there is no issue with their stock and are gaining their full volumes in their own livery from the first of November. Unfortunately, they are including the Notriptyline [sic] sales in their 2105 [sic] retro and Well [Bestway\Co-op] will receive* [✂] [Employee of Bestway/Co-op] *also confirmed that she has been receiving King stock, but via Teva - I would assume that this maybe the stock you helped out* [Lexon Director] *with earlier on.* [Employee of Bestway/Co-op] *has challenged this, and, this is why they are confident that they can honor [sic] their commitment to them, even if the stock is not Medreich, which is why they are communicating this to not only Well [Bestway\Co-op] but also to Rowland's also.* [Employee of Bestway/Co-op] *has confirmed that they will not want to buy via Teva in 2016 as this seems to be an unstable route for them and would prefer to deal direct with ourselves*.'

[167] Document NOR-E4063, email from [Consultant to King 1] to [King Director] dated 22 October 2015.

[168] Document NOR-E4063, email from [Consultant to King 1] to [King Director] dated 22 October 2015.

[169] Document NOR-E5778, email from [King Director] to [Lexon Director] dated 21 October 2015.

[170] Document NOR-E1609, email from [Lexon Director] to [King Director] dated 21 October 2015.

wanted to speak to Actavis for the '*same reasons that he kept emailing me, because ….he's not, getting any, any sales from Alliance UniChem; so, I'm presuming that he wants to get in touch with these guys to find out what, what they're doing in the market with…, that product … because they had it at the same time*.'[171]

3.99 On 29 October 2015, [King Director] implied in an email to [King Office Manager] that he had spoken to [Lexon Director] about the effect that the sale of Teva to Actavis would have on the market: '*[Lexon Director] seemed relaxed about the Teva/Actavis merger and thought the consolidation would be helpful*'.[172] This exchange followed a question from [Consultant to King 1] about how this consolidation might affect supply to Bestway/Co-op. [Consultant to King 1] informed [King Director] that he had not received a response from Well (Bestway/Co-op) on King's offer: '*Not heard a thing from Well [Bestway/Co-op], even after repeated call [sic] – Teva are desperate to hold onto the volumes and seem to be promising all sorts regarding supply etc. This appears to be in preparation of taking over their own Actavis / Auden license next year and not wanting to break the supply chain. The integration is planned for January, do you know where this would leave [Lexon Director] on supply as they plan to switch over immediately*.'[173] Subsequently, in March 2016, [King Director] emailed [Consultant to King 1] explaining that the acquisition of Actavis by Teva would not affect the terms on which Teva could acquire Nortriptyline Tablets in the UK.[174]

3.100 On 2 November 2015, [King Director] asked [Lexon Director] '*Are Teva back in stock?*'.[175] Within a couple of minutes [Lexon Director] confirmed that Teva were back in stock.[176]

3.101 Approximately one month later, on 10 December 2015, [King Director] asked [Lexon Director] for Teva's monthly sales for 25mg tablets and provided him with the monthly sales volumes of King and Actavis: '*Do you know Teva monthly sales of the 25mg? Trying to work out PI [parallel import] volumes. Ours [King's] now less than 500 packs and*

[171] Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 22 lines 10-17.
[172] Document NOR-E1614, email from [King Director], using his personal email address to [King Director] business account (which was monitored by [King Office Manager]) dated 29 October 2015.
[173] Document NOR-E1614, email from [Consultant to King 1] to [King Director] dated 29 October 2015.
[174] Document NOR-E5957, email from [King Director] to [Consultant to King 1] dated 18 March 2016: '*As you will gather the Actavis and Teva businesses will not be merged in the UK and Ireland. This means the nortriptyline Teva will have to live with the existing Lexon / Medreich agreement i.e. high CGS and limited volumes*.'
[175] Document NOR-E5176, email from [King Director] to [Lexon Director] dated 2 November 2015.
[176] Document NOR-E5177, email from [Lexon Director] to [King Director] dated 2 November 2015.

Actavis around 1000 per month. PCA data indicate a total market of around 9500 per month'.[177]

3.102 When asked about this email and how he obtained Actavis' volume data, [King Director] told the CMA that the information may have come through [Consultant to King 1].[178] He told the CMA that he asked for Teva's monthly sales information because he was attempting to understand what was '*happening in the market place*':[179]

'end of 2015, beginning of 2016,… our [King's] volume sales just basically fell off a cliff, of the 25mg […] And so I'm trying to understand what is happening in the market-place.'[180]

'So I'm in contact with [Lexon Director] *… trying to get, as it says, trying to get hold of volume data to try and calculate what's happening with …. the parallel importation size.'*[181]

3.103 On the same day (10 December 2015), [Lexon Director] emailed [King Director] with the information that he had requested and, in addition, provided [King Director] with the volumes of 25mg tablets that Lexon had sold in November:

'November 25mg

Teva - 1637

Lexon - 482'[182]

3.104 [Lexon Director] explained to the CMA the reasons for providing Lexon's sales volumes to [King Director]: *'I'm trying to reassure him that I'm not manufacturing and putting lots and lots [of] product into the market place and flooding the market because he seems to think that I am'*.[183] '[King had] *given me product beforehand. I'd – I'd upset him by suddenly announcing the fact that I've got a generic licence and then I – I'd reassured him that I'm supplying Teva and Lexon and I just told him what I'd supplied to, to Teva to assure him that I'm not going out having had a deal off him in advance, going out and then selling to all*

[177] Document NOR-E1648, email from [King Director] to [Lexon Director] dated 10 December 2015.
[178] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 165 lines 5-6.
[179] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 169 line 6.
[180] Document NOR-C2012, transcript of i[King Director] interview dated 22 March 2018, page 168-169-, lines 24-6.
[181] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 164 lines 13-15.
[182] Document NOR-E1650, email from [Lexon Director] to [King Director] dated 10 December 2015.
[183] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 162 lines 18-20.

and sundry in the market place… I've – on many instances shared volumes with other suppliers whether it's Lexon's or what I'm selling to the market purely because it helps them forecast what their own needs are'.[184] *[Lexon Director]* told the CMA that '*those numbers look pretty specific so I would have picked them up from a reconciliation or whatever it may be'*.[185] Subsequently, in his Witness Statement, [Lexon Director] stated that the volume figures he had provided [King Director] were inaccurate. He said that in fact, Lexon and Teva supplied 794 and 1,841 packs of 25mg tablets respectively, in November 2015.[186]

3.105 [Lexon Director] told the CMA that if Lexon supplied the market with larger volumes of Nortriptyline Tablets, King would simply undercut Lexon's prices. Therefore, it was important to reassure [King Director] that Lexon had not supplied the market with larger volumes:

'if there's lots and lots of stuff in the market, all that's happening is, is that he's [King Director] effectively gonna undercut me. He's then gonna bring the price down, which okay fine, you know you can argue that I'm not colluding with him to what selling price he's selling at, I'm trying to reassure him that it's not me that's going out everywhere and selling lots and lots of stock. All I'm doing is confirming that I've brought a bit of stock in to sell through Lexon, Medreich would have sold a little bit and the rest was just going through Teva to supply to them. That's all I'm trying to reassure him. The market size was always defined. If anybody knew how – how big the market was it would have been these guys beforehand 'cause they were the only suppliers in the marketplace. So yeah I'm just – I'm just literally reassuring that if you think that it's me that's going here, there and everywhere, it's not.'[187]

3.106 [Lexon Director] also told the CMA in his Witness Statement that: '*all I was doing at this time was to help King, as a past supplier to Lexon, in providing what I considered to be non-confidential publically available information to help him better understand the market so that he could*

[184] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 158 lines 16-25.
[185] The reference is to the monthly reconciliations provided by Teva. Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 163 lines 11-13.
[186] Document NOR- C3224.3 [Lexon Director] Witness Statement, paragraph 63.
[187] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, pages 162-163 lines 25-7.

gauge whether what he was being told by [Consultant to King 1] about the availability of the product from other sources was accurate.'[188]

3.107 Again on the same day (10 December 2015) [King Director] emailed [Lexon Director] to thank him for the information provided: '*Thanks As I thought we are being stuffed 6000 packs of PI monthly*'.[189] *[Lexon Director]* replied shortly afterwards stating that he would, '*make a few enquiries but I think your biggest culprit is Alliance*'.[190]

3.108 [Lexon Director] told the CMA that, following his email of 10 December 2015 to [King Director] in which he provided Teva's and Lexon's sales volume data (see paragraph 3.103), he may have exchanged other emails with [King Director]:

'there was a short period of time where he was mithering me about "What's going on with the market", there could have been one or two more emails subsequent to that.'[191]

3.109 On 14 December 2015, [King Director] asked [Lexon Director] to give him a call so that he could pass on some information: '*If you get a couple of minutes this afternoon can you give me a call? Just want to pass on some info.*'[192] [Lexon Director] told the CMA that he could not recall whether he subsequently spoke to [King Director], although he guessed that the information that [King Director] wanted to '*pass on*' would have been similar to the information in [King Director]'s other emails regarding Nortriptyline Tablets:

'"Why is this person selling there?" "Who's selling this?" "I've got the…" you know, "I'm selling this into here", or so on and so forth.'[193]

3.110 One week later, on 21 December 2015, [Lexon Director] emailed [King Director] in relation to an offer of parallel imported 25mg tablets which had been received by Lexon: '*Seems like there is still a large amount of 25mg in Spain as just been offered 6000 packs*'.[194] [King Director] replied the same day requesting further details, including on the offer

[188] [Lexon Director] Witness Statement paragraph 66.
[189] Document NOR-E1652, email from [King Director] to [Lexon Director] dated 10 December 2015.
[190] Document NOR-E4167, email from [Lexon Director] to [King Director] dated 10 December 2015.
[191] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 164 lines 12-14.
[192] Document NOR-E5181, email from [King Director] to [Lexon Director] dated 14 December 2015.
[193] Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 24 lines 11-13.
[194] Document NOR-E8253, email from [Lexon Director] to [King Director] dated 21 December 2015.

price.[195] [Lexon Director] responded within a few minutes, providing the details requested:

'6000x25

They quoted 9 euros per 25 but are prepared to negotiate depending on volume

This indicates to me that the stock is on the floor rather than a speculative offer'.[196]

(b) Discussions between King, Lexon and Alissa in March 2016

3.111 The MHRA published the fact that it had granted MAs to Alissa for Nortriptyline Tablets in 11 March 2016.[197] During March 2016, [King Director], [Lexon Director] and [Alissa Director] discussed the impact that new entry, including Alissa's supply of Nortriptyline Tablets in the UK, would have on market dynamics and prices. King shared with Lexon and Alissa market intelligence on supply prices that customers said they were offered by Teva and Medreich (see paragraphs 3.80 to 3.110). Lexon disputed the validity of the pricing information provided to King and disclosed to both King and Alissa an indication of the Transfer Price of the Lexon/Medreich JV Product to Teva[198] and details of volumes supplied. Alissa told King and Lexon what level of market share it sought to achieve upon its entry (see paragraph 3.125). King also disclosed to Lexon and Alissa the price it intended to offer to an existing customer, Alliance (see paragraph 3.135(a)).

3.112 On 1 March 2016, shortly before Alissa was granted its MAs for Nortriptyline Tablets, [King Director] emailed [Alissa Director]: '*Just spoken to [Consultant to King 3]*[199] *on the phone as I am out of the office today. In the office tomorrow if you could give me a call around 10am*'.[200] [King Director] told the CMA that he asked [Alissa Director] to

[195] Document NOR-E8253, email from [King Director] to [Lexon Director] dated 21 December 2015.
[196] Document NOR-E8253, email from [Lexon Director] to [King Director] dated 21 December 2015.
[197] https:\\www.gov.uk\government\publications\marketing-authorisations-granted-in-february-2016
[198] Medreich entered into an Own-label Supply and Distribution Agreement with Teva on 20 July 2015. See Document NOR-C0285: Own Label Supply and Distribution Agreement between Teva UK Limited and Medreich PLC. Under the agreement, Teva paid Medreich an agreed transfer price and shared the profits generated from the sale of the product with Medreich (Schedule 2).[✂]
[199] [King Director] confirmed that he was referring to [Consultant to King 3] in his email. [King Director] told the CMA that '[[Consultant to King 2] and [Consultant to King 3]] *left and formed a company called* [✂] *and that consultancy business effectively does for clients what* [Consultant to King 1] *did as well*'. See Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 30.
[200] Document NOR-E5924, email from [King Director] to [Alissa Director] dated 1 March 2016.

give him a call as he wanted to find out whether Alissa '*had actually been granted a licence*'.[201]

3.113 [Alissa Director] told the CMA that King would have perceived Alissa as a '*big threat*':

> *'So if you're King and you're selling huge volumes in the market place, at the kind of prices that they were achieving back in this period, then without trying to calculate the number, by looking at some; some data, the cost to the NHS of Nortriptyline at this time, would be huge yeah. So for someone like Alissa to pop up with marketing authorisations, we suddenly become a big threat to someone that is making large sums of money.'*[202]

3.114 [Alissa Director] told the CMA that he was contacted by [Consultant to King 3] '*to actually try and pull together a conversation [with [King Director]*':[203]

> *'When somebody rings you and talks to you and says "oh can you speak to [King Director] about Nortriptyline" it is going to end up in a situation, where somebody wants to protect what they've; they've got. But I've got to say, he's made absolutely no offer to me whatsoever, we've never received any payments, we've never purchased stock from; from him; we've retained our complete individual activity, independent; sorry I should say independent activity even independent of [Lexon Director] [Lexon].'* [204]

3.115 One day later, on 2 March 2016, [King Director] emailed [Alissa Director] to say: '*Tried your office number and no response. Could you give me a call sometime after 2.30pm today please?*'.[205]

3.116 [Alissa Director] told the CMA that he had a conversation with [King Director] and although he could not recall the details '*there would be only two things that [King Director] would want to talk about […] 'When we were going to launch product… and where I anticipated him telling me where not to approach'*.[206]

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[201] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 171 lines 14-15.
[202] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 70 lines 11-17.
[203] Document NOR-C1988, transcript with [Alissa Director] interview dated 13 March 2018, page 73 lines 20-21.
[204] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 75 lines 1-8.
[205] Document NOR-E5927, email from [King Director] to [Alissa Director] dated 2 March 2016.
[206] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 74 lines 4-10.

3.117 [King Director] told the CMA that he had spoken to [Alissa Director] for his expert opinion on what might happen to prices for Nortriptyline Tablets following the entry of new suppliers into the market:

'[Alissa Director] considered to be a, if not the, expert in the UK on the impact on pricing of multiple generic entries into a market-place, so I wanted to talk to him about where he thought prices would end up going.'[207]

3.118 [King Director] told the CMA that [Alissa Director] told him that '*he had got licences granted for Nortriptyline*'[208] and that he and [Alissa Director] had discussed a proposed meeting with [Lexon Director]. [209] [King Director] told the CMA that the proposed meeting was to discuss '*market dynamics*' and '*the pricing issue*', in particular in light of rumours that there were other potential new entrants who might enter the market shortly:

'I said, you know, I was aware from market feedback that there were at least another couple of companies who had – were about to get licences at the same – yeah, within the next month or two, was what I'd been told, and [I wanted to discuss] what the likely impact would be on supply prices.' [210]

3.119 Shortly afterwards (over a series of communications on 2 and 3 March 2016) [King Director], [Alissa Director] and [Lexon Director] arranged to meet in person:

(a) Following his conversation with [King Director], [Alissa Director] emailed [King Director], copying [Lexon Director], about a meeting at the Landmark Hotel in London:

'Good to talk to you earlier today.

Unfortunately I am out of the UK next week, I am available this month on the following days:

15th, 16th, 18th, 21st, 22nd and 23rd

[207] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 173 lines 20-23 and page 178 lines 13-16.
[208] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 175 lines 15-16.
[209] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 174 line 16 and page 175 lines 15-16.
[210] Document NOR-C2012, transcript with [King Director] interview dated 22 March 2018, page 179 lines 5-14.

[Lexon Director] might be able to meet us in London and suggest the Landmark Hotel near Marylebone station as there are many seating areas suitable for a quiet discussion.

Let me know if you can make any of the dates.'[211]

(b) [Lexon Director] replied: '*Hi Both 23rd at anytime is best for me'*.[212]

(c) [Alissa Director] also confirmed that he was available on 23 March.[213]

(d) On 3 March 2016, [King Director] emailed [Lexon Director] and [Alissa Director] confirming his availability to attend the meeting. [King Director] also asked [Alissa Director] to call him: '*[Alissa Director]*, *I am in meetings all day today with lawyers but could you call me tomorrow please as I have a favour to ask you'*.[214]

3.120 [Alissa Director] replied directly to [King Director] and promised to call him back.[215] Neither [Alissa Director][216] nor [King Director][217] could recall whether the call took place or details of the '*favour*' that [King Director] wanted to discuss.

3.121 On 4 March 2016, [King Director] emailed both [Alissa Director] and [Lexon Director] to confirm availability to meet in person on 23 March 2016.[218] Later the same day, [Lexon Director] suggested a meeting at 12pm on 23 March 2013 at the Landmark Hotel.[219] [Alissa Director] and [King Director] agreed.[220]

3.122 On 9 March 2016, [King Director] emailed [Lexon Director], copying [Alissa Director], forwarding an email exchange that he had had with

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[211] Document NOR-E5928, email from [King Director] to [Alissa Director] and [Lexon Director] dated 2 March 2016.
[212] Document NOR-E5195, email from [Lexon Director] to [Alissa Director] and [King Director] dated 2 March 2016.
[213] Document NOR-E5195, email from [Alissa Director] to [Lexon Director] and [King Director] dated 2 March 2016.
[214] Document NOR-E5199, email from [King Director] to [Alissa Director] and [Lexon Director] dated 3 March 2016.
[215] Document NOR-E5932, email from [Alissa Director] to [King Director] dated 3 March 2016.
[216] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, pages 78-79 lines 17-9.
[217] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 183-184 lines 18-1.
[218] Document NOR-E5203, email from [King Director] to [Alissa Director] and [Lexon Director] dated 4 March 2016.
[219] Document NOR-E5203, email from [Lexon Director] to [King Director] and [Alissa Director] dated 4 March 2016.
[220] Document NOR-E5934, email from [Alissa Director] to [Lexon Director] and [King Director] dated 4 March 2016 and document NOR-E5935, email from [King Director] to [Alissa Director] dated 4 March 2016.

[Consultant to King 1] the previous day (8 March 2016) and asking to discuss the position with Teva:

'See email trail below from [Consultant to King 1], who handles a number of key accounts on our behalf.

To say I am confused about the situation with Medreich and Teva is an understatement. Could you give me a call this morning please?

Market looks completely destabilised.'[221]

3.123 The email chain that [King Director] forwarded to his competitors ([Lexon Director] and [Alissa Director]) contained the following information:

(a) Market intelligence (including on Teva, Medreich and Actavis' pricing and customers with whom they were negotiating) that [Consultant to King 1] had gathered and emailed to [King Director]:

'Teva and Medreich have gone to war with each other, even though they have the same product!! My meetings with both AAH and Well [Bestway/Co-op] as expected, but, info that has come over to me today has somewhat blown this out of the water.

AAH - Actavis have matched the pricing from ourselves, but, also what Teva have also offered to them

(details below)

Well [Bestway/Co-op] - Teva are currently supplying, but, as Medreich have been offering stock into the market at very low costs, Well [Bestway/Co-op] approach Teva with what they could pick up from the grey market and they in turn reduced the price to them

Teva Pricing: -

10mg - 29

20mg - 38

[221] Document NOR-E5207, email from [King Director] to [Lexon Director] and [Alissa Director] dated 9 March 2016.

Medreich Pricing

10mg 30

20mg – 40[222]

In turn Teva have today approached Alliance with a price, as they want to secure orders for their own livery stock from Medreich.

10mg - 28

20mg - 28

They have formally offered Alliance this afternoon for group business, but this is the pricing that Teva would have to supply to Alliance to make it work for the scheme business also ([✂]).

Could we speak tomorrow, as Teva are pushing hard on this and wanted an answer by the end of the week from [Employee of Alliance] *. Not sure what [Lexon Director] ahs [sic] struck with them [Teva], but, since the "rumours" of [Alissa Director] coming to market are doing the rounds, everyone has gone a little crazy.'*[223]

[King Director] told the CMA that *[Consultant to King 1]*'s use of the phrase '*everyone has gone a little crazy*',[224] meant that the '*market [was] completely destabilising*'[225] as a result of '*prices falling*'.[226]

(b) [King Director] response (to [Consultant to King 1]) that he was '*confused'* about how Teva could be competing with Medreich:

'Call me in the morning

[222] Document NOR-E5936, email from [Consultant to King 1] to [King Director] dated 8 March 2016.
[223] Document NOR-E5936, email from [Consultant to King 1] to [King Director] dated 8 March 2016. When asked about this email, [King Director] explained that the reference to the deal that [Lexon Director] had struck with '*them'*, was a reference to Lexon's deal with Teva while the rumours relating to ' [Alissa Director]*'*, were a reference to [Alissa Director]. Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 186-187 lines 22-1 and page 188 lines 6-9.
[224] Document NOR-E5936, email from [Consultant to King 1] to [King Director] dated 8 March 2016.
[225] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 188 line 20.
[226] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 190 line 15.

I'm confused as Lexon have the rights to the Medreich nortriptyline in the UK and they have a deal with Teva to promote

How can Teva be competing with Medreich.'[227]

(c) Further details on the activities of Medreich and Teva that [Consultant to King 1] had provided to [King Director], and [Consultant to King 1] suggestion that [King Director] contact [Lexon Director] for clarification:

'Will call when I am able, I'm in the office tomorrow.

It came as a shock to me but [Employee of Medreich] from Medreich is actively selling in the market place against Teva, to also have Medreich market share in their livery. Teva have their own label coming and they had already committed to 30% market share with the current label (something they are no where near at present - especially low through their scheme also).

They have stated to both Well [Bestway/Co-op] & Alliance that they want 30% direct market share, due to the lack of scheme business they are obtaining at present.

It maybe worth clarifying with [Lexon Director] if there is any change in the arrangement and how this now affects the market.

Call you as soon as I can tomorrow' [228]

3.124 [King Director] told the CMA that he had forwarded his email exchange to [Lexon Director] and [Alissa Director], as he was planning to meet both in two weeks' time:

'...to talk about pricing and the impact of generic – multiple generic entries into what, as I've said, is a completely destabilised price – pricing set-up, so what is going to happen in future?'[229]

[227] Document NOR-E5206, email from [King Director] to [Consultant to King 1] dated 8 March 2016.
[228] Document NOR-E5206, email from [Consultant to King 1] to [King Director] dated 8 March 2016.
[229] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 191-192 lines 23-2.

3.125 One day later, on 9 March 2016, [Alissa Director] replied to [King Director], setting out his views on the information that had been forwarded, and on price levels in the market.[230] In addition, [Alissa Director] told [King Director] that '*to assist any conversation'*, Alissa was looking to achieve a '*modest 20% share'* for its product once launched[231] and that he hoped '*things don't become a free for all'*:

'I am out of the U.K today but felt compelled to respond.

Prices quoted seem ridiculously low especially the 10mg which I understood was circa £38 - £40 in groups and as high as £50 in some short liners.

I was aware that PI was £20 per 2 x 50 pack size however the two customers I have had discussions with both confirm limited availability.

It does appear as if Teva/Medreich are looking to push too much into the market.

To assist any conversation today I will tell you now that I am looking to take a modest 20% share. That's all I have geared up for and hope things don't become a free for all.' [232]

3.126 On the same day (9 March 2016), [Lexon Director] forwarded the email he received from [King Director] to [Medreich Employee 1]. [Medreich Employee 1] responded: '*No way we have gone to Wells [Bestway/Co-op] and Alliance. What Medreich pricing is he talking abt ??*'.[233] Shortly afterwards, [Medreich Employee 1] forwarded to [Lexon Director] an email from [Employee of Teva] to [Employee of Teva] dated from the previous year (17 July 2015), which included monthly volume projections for Nortriptyline Tablets. In his email, [Medreich Employee 1] said that the information [Consultant to King 1] had provided was '*not right… I keep Teva hand to mouth'*.[234]

3.127 On the same day (9 March 2016), [Lexon Director] forwarded the email he received from [King Director] to [Medreich Employee 1]. [Medreich Employee 1] responded: '*No way we have gone to Wells [Bestway/Co-*

[230] Document NOR-E5943, email from [Alissa Director] to [King Director] dated 9 March 2016.
[231] Both 10mg and 25mg tablets. See document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 100 lines 12-13.
[232] Document NOR-E5943, email from [Alissa Director] to [King Director] dated 9 March 2016.
[233] Document NOR-E8283, email from [Medreich Employee 1] to [Lexon Director] dated 9 March 2016.
[234] Document NOR-E8284, email from [Medreich Employee 1] to [Lexon Director] dated 9 March 2016.

op] and Alliance. What Medreich pricing is he talking abt ??'.[235] Shortly afterwards, [Medreich Employee 1] forwarded to [Lexon Director] an email from [Employee of Teva] to [Employee of Teva] dated from the previous year (17 July 2015), which included monthly volume projections for Nortriptyline Tablets. In his email, [Medreich Employee 1] said that the information [Consultant to King 1] had provided was '*not right… I keep Teva hand to mouth'*.[236]

3.128 [King Director] emailed [Alissa Director] on 9 March 2016, to let him know that he and [Lexon Director] had spoken, and to pass on [Lexon Director] views on the information in the forwarded email chain: *'Spoke to [Lexon Director] and he said to disregard [Consultant to King 1]'s note as it was complete bulls**t. [✂] The problem appears to be Actavis not Teva/Medreich'*.[237]

3.129 [Alissa Director] told the CMA that [King Director]'s reference in that email to a '*problem*', and that '*the problem appears to be Actavis not Teva/Medreich'*, would have meant the falling supply prices for Nortriptyline Tablets:

'There's only one possible problem that these guys can be referring to and all of this is about prices coming down.'[238]

3.130 The next day (10 March 2016) [Alissa Director] asked [King Director]: '*Is it possible for [Consultant to King 1] to join us when we meet up next week?*'.[239] [Lexon Director] responded that it was a '*Good idea*'.[240]

3.131 On 11 March 2016:

(a) [King Director] emailed both [Alissa Director] and [Lexon Director] providing them with details of a conversation he had with [Consultant to King 1] who was '*positive*' that Teva was '*causing the market destabilisation'.* This email contained details of pricing offered by Teva to particular customers (as gathered by [Consultant to King 1]:

[235] Document NOR-E8283, email from [Medreich Employee 1] to [Lexon Director] dated 9 March 2016.
[236] Document NOR-E8284, email from [Medreich Employee 1] to [Lexon Director] dated 9 March 2016.
[237] Document NOR-E5953, email from [King Director] to [Alissa Director] dated 9 March 2016.
[238] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 103 lines 25-26.
[239] Document NOR-E5953, email from [Alissa Director] to [King Director] dated 10 March 2016.
[240] Document NOR-E5953, email from [Lexon Director] to [Alissa Director] and [King Director] dated 10 March 2016.

'I had a long conversation with [Consultant to King 1] *yesterday and he is positive it is Teva who are causing the market destabilisation.*

He was with [Employee of Bestway/Co-op] yesterday and he phoned [Employee of Teva] on speaker phone. Teva are, apparently, 20% down on topline sales in the first two months of this year and they are desperate for sales. He confirmed the offer prices of £29 for the 10mg and £38 for the 25mg and said he was willing to go down in price if volumes increased through Well's [Bestway/Co-op] nacent wholesale group. [Consultant to King 1] also [sic] [Employee of Sigma] and he confirmed that he had been offered the same prices as Well [Bestway/Co-op].'

[Employee of Alliance] called [Consultant to King 1] and confirmed Teva's offer price of £28 per pack for both presentations for the whole of the Alliance Unichem business. [Consultant to King 1] is meeting with her today. They are our sole customer now and I really have no other option than matching prices.'[241]

(b) [Lexon Director] then emailed [King Director] and [Alissa Director] to say that [King Director] has been provided with '*fictitious*' supply prices for Teva. [Lexon Director] gave an indication of the level of the transfer price for the Lexon/Medriech JV Product to Teva and provided information on the supply volumes:

'I have just got off the phone to [Employee of Teva] and he claims not to have even spoken to [Employe of Bestway/Co-op] yesterday. I have a minimum transfer price to Teva which also means that they would be selling at a loss. This is also backed up by an average selling price report I receive monthly.

I cant stop you from matching fictitious prices but I think it is a crazy Teva would not even have the volume to supply Alliance as they don't get enough from me (since August I have supplied 55k 10mg and 40k 25mg of which one batch of each was only delivered last week)

[241] Document NOR-E5953, email from [King Director] to [Lexon Director] and [Alissa Director] dated 11 March 2016.

I really do think it would be a good idea for [Consultant to King 1] to be in the meeting.'[242]

The Transfer Prices at which Teva purchased the Lexon/Medreich JV product were in fact £16.20 and £27 for packs of 10mg and 25mg tablets, respectively. [243]

(c) [King Director] responded to [Lexon Director], copying [Alissa Director], saying that the information [Lexon Director] provided was '*worrying from [his] perspective*', and that he would '*try and get him [Consultant to King 1] along on the 23rd*'.[244]

(d) Shortly afterwards, [Alissa Director] emailed [Lexon Director] separately:

'cat/pigeons 😊 😊 😊

Quite an upsetting situation really, I think [King Director] is a good bloke getting the wool pulled over his eyes.'[245]

3.132 When asked about this email, [Alissa Director] told the CMA that this comment meant that [Consultant to King 1] was deliberately providing [King Director] with information that was '*not true*' because '*his remuneration was probably based on whatever he sells*'.[246]

3.133 On 11 March 2016 the MHRA published the fact that it had granted MAs to Alissa for Nortriptyline Tablets.[247]

(c) Meeting between King, Lexon and Alissa at the Landmark Hotel in London on 23 March 2016

3.134 The three competitors, [King Director], [Lexon Director] and [Alissa Director] arranged to meet at 12pm on 23 March 2016 at the Landmark

[242] Document NOR-E5953, email from [Lexon Director] to [Alissa Director] and [King Director] dated 11 March 2016.
[243] See Document NOR-C0285: Own Label Supply and Distribution Agreement between Teva UK Limited and Medreich PLC .
[244] Document NOR-E5953, email from [King Director] to [Lexon Director] and [Alissa Director] dated 11 March 2016.
[245] Document NOR-E8286, email from [Alissa Director] to [Lexon Director] dated 11 March 2016.
[246] Document NOR-C2108, transcript of [Alissa Director] interview dated 26 July 2018, page 27 lines 7-21.
[247] https:\\www.gov.uk\government\publications\marketing-authorisations-granted-in-february-2016

Hotel in London (the '**Landmark Hotel Meeting**') (see paragraphs 3.119 to 3.121 above).[248]

3.135 Shortly before that meeting (on 23 March 2016), [King Director] forwarded to [Lexon Director] and [Alissa Director] an email that he had sent to [Employee of Alliance] and a reply that he received from [Consultant to King 1]. [King Director]'s cover message read as follows: *'See below for info. Looking forward to meeting up later on today'*.[249] The forwarded email included information on King's proposed offer price to Alliance:

(a) An email that [King Director] had sent to [Employee of Alliance] on 22 March 2016 querying why Alliance had not placed any orders with King for Nortriptyline Tablets: '*We have had no sales of the Nortriptyline 10mg and 25mg this week and there are no orders pending'*,[250] and asking '*to discuss supply prices for the Generics Purchase Framework Agreement which starts on 1st April 2016*'.[251]

(b) A separate response from [Consultant to King 1] to [King Director] on 22 March 2016 stating that Alliance *'have suspended orders it would seem as they want the teva price but I said no. They have still not confirmed volume they can gain from teva either …Do you want me to discuss the mid thirties price again'*.[252]

3.136 [Lexon Director] told the CMA that, by his comment '*Do you want me to discuss the mid thirties price'*, [Consultant to King 1] was referring to the possibility of King's price matching Teva's price to Alliance: '*what [Consultant to King 1] is saying is that – they've – they said in earlier emails, he keeps saying about "my volumes are going down" […] and now he's saying that Teva are on the scene and that he's gonna move over to them. So – and he's saying to– "Do you want me to price match?"*'.[253] [Lexon Director] told the CMA that the email from [Consultant to King 1] confirms that [Consultant to King 1] was providing [King Director] with false information:

'I smiled when I – I read it because it just reconfirms that I'm disputing the – the information that [King Director] seems to be receiving from [Consultant to King 1]. I know – I know the size of

[248] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, pages 75-76 lines 26-1; Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 168 lines 7-10.
[249] Document NOR-E5960, email from [Consultant to King 1] to [King Director] dated 23 March 2016.
[250] Document NOR-E5960, email from [King Director] to [Employee of Alliance] dated 22 March 2016.
[251] Document NOR-E5960, email from [King Director] to [Employee of Alliance] dated 22 March 2016.
[252] Document NOR-E5960, email from [Consultant to King 1] to [King Director] dated 22 March 2016.
[253] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 217 lines 5-13.

the market, if – if – if Teva want to supply that product into Alliance, un – unless they've served notice to say "Look, we're not buying it off you anymore and we're gonna elsewhere", they would have had to need sufficient stocks to go into a supply agreement with Teva

[…]

Teva didn't have the stock, so it just – it makes me smile because it's just a – it's just made up information that [Consultant to King 1]'s making up or he's been given a pack of lies from [Employee of Alliance] effectively.'[254]

3.137 Subsequently, in his Witness Statement, [Lexon Director] told the CMA that '*[t]here was no limit imposed on the volume which Teva could buy from Medreich under the Teva Supply Agreement*'[255] and '*[s]o far as [he] was aware, Teva could buy as much Product as it wanted*.' [256] He '*only discovered that Medreich was limiting supply when [he] received the email from [Medreich Employee 1]* [on 9 March 2016]'[257] (see paragraph 3.126).

3.138 [King Director] told the CMA that, at the Landmark Hotel Meeting, he, [Alissa Director] and [Lexon Director]:

'*talked in general terms about volumes…and parallel importation in particular, because…our sales then were still incredibly low… on the 25mg, and whether they were aware…of anything to do with the PI supply*.'[258]

3.139 In addition, [King Director] told the CMA that [Alissa Director] spoke about '*pricing dynamics*'[259]:

'*He was prescient. He said he thought it would be down to £5 a pack, supply prices, by the end of 2017 and we talked about categories…how…generic purchasers, are effectively what he called 'category managers' rather than…brand managers or generic purchasing managers, that they actually manage the decline of a*

[254] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, pages 212 – 213 lines 19-4.
[255] Witness Statement of [Lexon Director], paragraph 56.
[256] Witness Statement of [Lexon Director], paragraph 28.
[257] Witness Statement of [Lexon Director], paragraph 28.
[258] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 182 lines 17-21.
[259] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 179 – 180 lines 24-3.

product from Category A into Category M, where effectively pricing becomes controlled by the Department of Health.'[260]

3.140 [Lexon Director] told the CMA that, at the Landmark Hotel Meeting, he, [Alissa Director] and [King Director] discussed falling prices, Lexon's intention not to amend its pricing or customer acquisition strategy and Alissa's pricing intentions upon entry:

'the conversation would have been basically ''Look guys, you know I've got a Nortriptyline licence and you know that I am selling the product''. I would almost certainly have confirmed that the market prices were coming down and ever since from that date has continued to come down. I would have said ''Look guys you know who I sell to, there's no difference. Business as usual from me in so much that my strategy hasn't changed at all''. While Teva are there and they're putting in the scheme, I continue to do so. Obviously Teva as I explained, soon after that stopped buying it from Lexon. Had they moved it to elsewhere? I'm not aware they had. And then I've not supplied any other person apart from supplying as I sell at the moment. So I've not gone to Alissa or… [King Director] to say "Let me supply you", or anything like that so the point I'm trying to get to with that meeting was it was just a introduction to… [Alissa Director]… it was triggered from the fact that [King Director] wanted to speak to [Alissa Director] about Nortriptyline and what his aspirations were I assume… I was just telling it again, yet another person reiterated what my commercial strategy was in the market place. They could then go and choose and do what they wanted to as far as I was concerned…

I was just confirming what – I mean the market knew I was supplying Teva, it was blatantly obvious because Teva's product – if you look at a Teva price list, it tells you on their price list who their source is…

I'm not gonna tell them who I'm gonna try to chase to – to – to you know I'm not gonna say that I wanna go an "Ooh by the way while I'm here I'm gonna go and target Celesio or – or – or AAH for business…" 'cause that's – that's what I wanna do. It's not in the public domain… If it's not in the public domain then why

[260] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 180 lines 7-14.

would I wanna discuss that with – with anybody else. You're only giving the opportunity to be undercut…

So [Alissa Director] isn't gonna tell him 'I'm expecting to, you know sell this many' or so on and so forth. What he's gonna try to do is to say "Well look, I've got a licence, I need a market share, I need to – I've spent a lot of money on developing this product. You know I'm not out to – ruin the market price", you know and again that would have been the nature of the conversation.'[261]

3.141 [Alissa Director] told the CMA that the attendees wanted information about one another's commercial activities: '*I can remember at the end of it, [Lexon Director] saying we're just being pumped for information*'.[262] He explained that [King Director] wanted to know '*When we would launch and who we intend to sell to… He wanted to know when, he definitely wanted to know when I would be entering the market*'.[263] When asked what his response to these questions was, [Alissa Director] told the CMA: '*I passed on them really, because quite honestly I didn't know when the stock was coming out of india and the last thing I want to do, is actually give him a clue… if a competitor knows that you're coming, they will try to defend their business*'.[264]

3.142 Within a few hours of the Landmark Hotel Meeting, [Lexon Director] forwarded an email from [Employee of Lexon] to [Alissa Director], copying [King Director], and attaching a Wavedata[265] image showing March 2016 pricing for the 25mg tablets.[266] [King Director] did not have access to the Wavedata service directly.[267] [Alissa Director] responded to [Lexon Director], copying [King Director]:

[261] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 172–173 lines 13-3, page 174 lines 11-14, page 175 lines 5-17 and page 180 lines 7-12.
[262] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 76 lines 9-10.
[263] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 76 lines 22-27.
[264] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 77 lines 15-19.
[265] Wavedata is an independent source of pricing information in the UK marketplace. It provides data such as the lowest, highest and average pricing of pharmaceutical products which can be purchased in the UK marketplace. Data is provided on a monthly or weekly basis and the pricing data is distributed by individual product or the data can be accessed via Wavedata's website for a fee. See Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 42.
[266] Document NOR-E1811, email from [Lexon Director] to [Alissa Director] and [King Director] of 23 March 2016 and Document NOR-E5974, attachment to NOR-E1811 showing Wavedata image with March 2016 nortriptyline pricing information.
[267] Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 43 line 21-26

'It's a bit misleading - Teva 1 March 2016 list says £52 limited discount - not "£60.72 with [✂] " as stated in the Wavedata spreadsheet.

This is why I dislike the WaveData service... I had better not express my annoyance! Only to say this kind of misinformation harms us all significantly.'[268]

3.143 [Lexon Director] told the CMA that it is possible for anyone to subscribe to Wavedata and that he sent the screenshot to [King Director] to reassure him that Lexon was not undermining prices:

'Judging by the… email and who sent it, [Employee of Lexon] works in the purchasing team…I would've, possibly phoned her up to say "Can you have a look at what the pricing is… in the marketplace?" This is a snapshot from – what we call Wavedata, who are an independent, solution where you can pay a subscription to see what the market prices are for products. I…use it as a constant reference within our pricing policy and I, I see it as a reliable form of information, because it comes from actual price lists and invoices…

it could be after that I'm, I'm sending this information to, to – to [King Director] to say, "Look, th… that's the facts. It's in black and white, the – what I'm selling the prices at". It's not about – it – it's just a constant barrage from him, because he seemed to be thinking that I was going here, there and everywhere, undermining him and selling stock everywhere and reducing the market price. I wasn't...

So – and it's about selling prices and who's selling what, and it's not something that only I have access to; it's – anybody can get that information.'[269]

3.144 [Alissa Director] explained to the CMA:

'So, wave data is a subscription service and it actually pulls together all the different offer prices that pharmacists receive for products.'[270]

[268] Document NOR-E5973, email from [Alissa Director] to [Lexon Director] and [King Director] dated 23 March 2016.
[269] Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 26 lines 1-9, page 31 lines 7-12 and page 32 lines 4-6.
[270] Document NOR-C2108, transcript of [Alissa Director] interview dated 26 July 2018, page 29 lines 15-17.

3.145 When asked why [Lexon Director] shared this with him, [Alissa Director] stated:

'Well, I would imagine that [Lexon Director] is querying the pricing in this previous email and by providing the wave data information it's evidence to [King Director], that the pricing that his agent is suggesting is different to what's actually out there in the marketplace.'[271]

(d) Discussions between King and Alissa in April 2016

3.146 Throughout April 2016, [King Director] engaged in several separate email exchanges with [Alissa Director] regarding market entry and offers made by new and existing suppliers to customers. The exchanges included King's future intended price and volume offers to customers (including Peak Pharmacy and Manor Drug). King was concerned that Alissa would disrupt the pricing of Nortriptyline Tablets (see paragraphs 3.152 to 3.153).

3.147 [King Director] discussed the possible implications of Alissa's entry with [Consultant to King 1] and then sought to verify [Consultant to King 1]'s views with [Alissa Director]. On 7 April 2016 [Consultant to King 1] emailed [King Director] to say that Alissa was preparing to launch its product *'in two weeks time'*. He added:

'It would appear he is targeting short line, and, offering "spot buys" into the bigger accounts to move initial volume. Would you like to place some volume into Sigma and DE in the short term at around 39-41'[272]

3.148 [King Director] responded (on 8 April 2016) agreeing to the pricing proposed by [Consultant to King 1].[273] He also informed [Consultant to King 1] that *'The PI 25mg now in very short supply from Spain and only limited quantities left in the UK.*'[274] [Consultant to King 1] replied: '*It was the spot buy comments that worried me a little, as I would suspect [Alissa Director] to try and sell some to Alliance for the wholesale side of the business*'.[275] [King Director] replied stating that he would be

[271] Document NOR-C2108, transcript of [Alissa Director] interview dated 26 July 2018, page 29 lines 21-24.
[272] Document NOR-E5242, email from [Consultant to King 1] to [King Director] dated 7 April 2016.
[273] Document NOR-E5242, email from [King Director] to [Consultant to King 1] dated 8 April 2016.
[274] Document NOR-E5242, email from [King Director] to [Consultant to King 1] dated 8 April 2016.
[275] Document NOR-E5242, email from [Consultant to King 1] to [King Director] dated 8 April 2016.

speaking to [Alissa Director] later that afternoon and that he '*Will try and find out what his plans are*'.[276]

3.149 On 18 April 2016, [King Director] forwarded an email from [Consultant to King 2] to [Alissa Director]. The email set out information about Teva's supply volumes to Phoenix/Rowlands which [Consultant to King 2] had received during bilateral negotiations;

'RE: Teva supplying Phoenix […] if this is in relation to Nortriptyline then I can already confirm that Teva are the incumbent for Phoenix's generic bin and also Teva stock is used to supply Rowlands. During our discussions on our latest price challenge with Rowlands and Phoenix they both confirmed at this time that the incumbent supplier was Teva. Teva's volumes for this Phoenix/Rowlands business is approximately the following:

10mg @ ~750 packs per month

25mg @ ~ 300 packs per month

Let me know if you require any additional information on this.'[277]

3.150 [King Director] cover email to [Alissa Director] stated:

'For info. They also supply Numark pharmacies. As I said Teva also supply Sigma, Well [Bestway/Co-op], Day Lewis and Prinwest.'[278]

3.151 A few days later, on 22 April 2016, [King Director] shared information with [Alissa Director] about King's price negotiations with Peak Pharmacy (by forwarding an email dated 20 April 2016 from [Consultant to King 2]). In his cover email, [King Director] also shared additional information about King's pricing intentions and asked [Alissa Director] about his entry plans:

'See below for info.

I have said no on pricing and said I plan to increase prices from 1st May – let's hope the tariff does not fall again.

[276] Document NOR-E5242, email from [King Director] to [Consultant to King 1] dated 8 April 2016.
[277] Document NOR-E1861, email from [Consultant to King 2] to [King Director] and [Consultant to King 3] dated 18 April 2016.
[278] Document NOR-E1861, email from [King Director] to [Alissa Director] dated 18 April 2016.

Have you heard of another potential entrant?

Any news on your side?'[279]

3.152 The 20 April 2016 forwarded email from [Consultant to King 2] reporting on the outcome of his price negotiations with Peak Pharmacy stated:

'I have been with Peak Pharmacy, aka P&AJ Cattee today and we discussed Nortriptyline. Some market feedback, other than the expected price battle that seems to be starting includes the following:

- He claims that a large generic player is intent on claiming market share (he didn't say explicitly, but I take this to be Teva)

- He also mentioned that another player, other than Alyssa [sic] is thinking about brining [sic] Nortriptyline to the market and he seems to think it is either Bristol or Accord (I will try and find out more on which of these it I [sic], unless you already know?)

As you may have expected, although we have managed to maintain the prices with Peak since January, we are getting a new challenge on price from him to keep buying the King stock. He says if we can match the following prices then he will keep buying King stock (and I only tend to review prices with him on a three monthly basis, so I will hope that these prices can be maintained for the same period). Also, if the prices can be agreed, they would also be put in place for Manor Drug too, which doubles the following demand:

10mg – for 230 packs per month + 200 packs in a separate order from Manor – Peak would need £32 per pack

25mg – for 50 packs per month + 50 packs from Manor – Peak would require £29 per pack'.[280]

3.153 [King Director] reply to [Consultant to King 2], which he also forwarded to [Alissa Director], stated that he was not willing to offer those prices and that he planned to increase prices as of 1 May 2016. He added:

[279] Document NOR-E4065, email from [King Director] to [Alissa Director] dated 22 April 2016.
[280] Document NOR-E1867, email from [Consultant to King 2] to [King Director] and [Consultant to King 3] dated 20 April 2016.

'*As far as I am aware there is only Alyssa [sic] entering the market in May and they do not plan to disrupt the pricing'*.[281]

3.154 When asked about the email which he received from [King Director] on 22 April 2016 (see paragraph 3.151), [Alissa Director] told the CMA:

'the tell-tale words there are 'any news on your side'' because what he's trying to do is, establish when we're entering the market place

[…]

the guy is concerned when Alissa are going to be entering the market, he's suffered a loss in volume to the Medreich/[Lexon Director] alliance and Teva activity and he's expecting us to damage his business as well.

[…]

He's concerned that when we enter the market place there will be further price reduction'.[282]

3.155 [Alissa Director] replied to [King Director] on the same day (22 April 2016) saying that he was not aware of any other potential entrant and specifying the prices which he had understood Peak Pharmacy were paying:

'No not aware of any potential entrant although I am sure that a copy of the NRIM dossier will turn up somewhere eventually.

I would not attempt a price increase whilst Actavis and Teva are showing no signs of restraint. [Lexon Director] is meeting [Employee of Actavis] soon, I doubt if anything worthwhile will come out of this meeting. As far as I can see there is too much stock available in the market and that's before mine has landed!

The offer to Peak is a concern. We understood that they were paying £38 on both strengths.'[283]

[281] Document NOR-E1867, email from [King Director] to [Consultant to King 2] and [Consultant to King 3] dated 20 April 2016.
[282] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 111 lines 9-24.
[283] Document NOR-E1871, email from [Alissa Director] to [King Director] dated 22 April 2016.

3.156 [Alissa Director] was asked by the CMA to explain where his understanding of Peak '*paying £38 on both strengths'* came from. [Alissa Director] stated:

'we had at some stage been told, that they were paying £38…per pack…that would come from their buyer.'[284]

3.157 Later, on 22 April 2016, [King Director] reported the information he had received from [Alissa Director] about supply prices to Peak Pharmacy to [Consultant to King 2] and then forwarded [Consultant to King 2] [Consultant to King 2] response, which speculated about the pricing that Alissa and Teva were offering, to [Alissa Director]:

(a) [King Director] sent an email to [Consultant to King 2]: '*Just to muddy the waters Peak told [Alissa Director] that their supply price was £38 for each pack. Buyers are liars*.'[285]

(b) [Consultant to King 2] responded to [King Director] speculating that Peak Pharmacy were playing Alissa and Teva off against one another and that Teva had responded by lowering their prices:

'That's interesting to hear, however I believe what it really shows is how Teva reacted to an Alyssa [sic] price challenge.

The reason being, I saw in the visitor book Alyssa [sic] had been in 2 or 3 weeks ago, which would presumably when Peak said they needed £38 (as they last bought a small top up order of King stock in Feb @£40 and nothing from us since). Alyssa [sic] then probably offered to sell them product at £38 once stock arrived and then since then, before my visit on Tuesday, Teva have been in (confirmed also by the visitors book) and offered him between £34 and £32, which meant we then either had to slightly beat it (as per what Alyssa [sic] had to do) or at least match it and this is why were are now at £32.

This also aligns with Peak's comments regarding 'a large manufacturer intent on claiming market share', as Teva more than likely took the price from £38 to low 30's, instead

[284] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 120 lines 12-27.
[285] Document NOR-E1872, email from [King Director] to [Consultant to King 2] and [Consultant to King 3] dated 22 April 2016.

of offering more like the £37/£36 that we (or Alyssa [sic]) would have done in the same scenario.' [286]

(c) [King Director] forwarded this email to [Alissa Director], with the comment: '*Would appear that* [Lexon Director] *has no influence.*'[287] When asked what this statement was in reference to, [King Director] stated: '*That… [Lexon director] has no influence over Teva*'.[288]

(d) [Alissa Director] replied to [King Director], confirming that Alissa had not started pricing negotiations with potential customers therefore [Consultant to King 2] speculation was incorrect:

'We have not offered any prices in the market – it would be mental to offer before having stock available to deliver, we would be eroding the price prematurely.

The pricing in [Consultant to King 2]'s emails looks inconsistent and your comment re buyers is one I would wholeheartedly agree with.'[289]

(e) Discussions between King, Lexon and Alissa in April 2016

3.158 During April 2016, [King Director], [Lexon Director] and [Alissa Director] engaged in a number of email exchanges regarding pricing of Nortriptyline Tablets in the UK, including in relation to concerns that Teva was destabilising the market by offering low prices and that Actavis may also be pushing prices down (see paragraph 3.123). The parties discussed the prices that customers had told them they were offered and whether these were credible, based on what [Lexon Director] knew about Teva's prices in the market.

3.159 On 25 April 2016:

(a) [King Director] forwarded to [Lexon Director] the email he had exchanged with [Consultant to King 2] about Peak Pharmacy ('*Teva have been in [to Peak Pharmacy] (confirmed also by the visitors book) and offered him between £34 and £32')* and

[286] Document NOR-E1875, email from [Consultant to King 2] to [King Director] and [Consultant to King 3] dated 22 April 2016.
[287] Document NOR-E1875, email from [King Director] to [Alissa Director] dated 22 April 2016.
[288] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 234 lines 15-19.
[289] Document NOR-E1876, email from [Alissa Director] to [King Director] dated 22 April 2016.

commented '*Looks like Teva are still playing silly pricing games*'.[290] When asked about what he meant by the statement '*Looks like Teva are still playing silly pricing games*', [King Director] told the CMA:

'That they're significantly down – you know, decreasing products in the market-place to try and obtain volume.'[291]

(b) [Lexon Director] responded to [King Director]: '*I don't think they are. I have been receiving weekly average sales reports from Teva and they are certainly playing ball. Alissa visits peak every month and has been even before Nortrip*'.[292] [Lexon Director] told the CMA:

'I'm just sort of going back to him and saying 'I don't think they are I've been receiving weekly average price reports from Teva'. I haven't, I think that's a bit of a lie, I get monthly. And when I said 'They're certainly playing ball', all I'm basically…. referring to is, is I can see what they're selling from their reports'

[…]

'the average selling prices from every month when we received the report from Teva, it was – it was effectively 'This is what we sell at'. Now what I'm really – I'm genuinely referring to as 'When I'm playing ball', is they're not lying, they are not saying one thing you know they're not – people accusing them of doing something, which they're not actually doing and that's reconfirmed by the average selling prices.'[293]

3.160 [King Director] told the CMA that he understood [Lexon Director] response to mean that Teva are '*effectively not aggressively looking for increased market share*'.[294]

3.161 On 25 April 2016, [King Director] forwarded this email exchange with [Lexon Director] to [Consultant to King 2]. He said that '*[Alissa Director]*

[290] Document NOR-E1877, email from [King Director] to [Lexon Director] dated 25 April 2016. The last email in the chain which [King Director] forwarded to [Lexon Director] was the email sent from [Consultant to King 2] on 22 April 2016 at 14:59 (see paragraph 3.154(b)).
[291] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 237 lines 8-9.
[292] Document NOR-E1878, email from [Lexon Director] to [King Director] dated 25 April 2016.
[293] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 229-230 lines 25-2 and page 233 lines 3-9.
[294] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 238 lines 1-3.

says it was not him who approached Peak (he does not have product yet) so that only leaves Actavis'.[295]

3.162 [King Director] then (on 27 April 2016) emailed both [Alissa Director] and [Lexon Director] in relation to the Drug Tariff prices for Nortriptyline Tablets in May 2016, *'Just to let you know the tariff has not changed for May* [2016] *i.e. prices remain at £63.01 for the 10mg and £71.67 for the 25mg'*.[296]

3.163 [Lexon Director] replied:

'Something is not right

I saw actavis yesterday and they are only supplying AAH and their scheme which is around 30% of the market in total.

They are trying to control the 25mg but he was vague.

10mg especially as there is no PI volumes don't seem right compared to Rx data.'[297]

3.164 [King Director] told the CMA of [Lexon Director] comment, '*Something is not right*':

'what I think what it's saying is – something doesn't stack up. One party's accusing Teva of being the destabiliser, so what [Alissa Director] *was saying, so therefore it has to be Actavis, and then [Lexon Director] saying, 'Well, it's not Actavis, 'cause they're saying their market share is stable. 'So what's causing the price destabilisation? They don't – we don't know.'*[298]

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[295] Document NOR-E1879, email from [King Director] to [Consultant to King 2] dated 25 April 2016.

[296] Document NOR-E1883, email from [King Director] to [Alissa Director] and [Lexon Director] dated 25 April 2016.

[297] Document NOR-E1883, email from [Lexon Director] to [King Director] and [Alissa Director] dated 25 April 2016. [King Director] told the CMA of [Lexon Director]'s comment, '*They are trying to control the 25mg*', that '*they [Actavis] acquired the Spanish licence at the same time, I would presume… when they acquired Auden Mckenzie, they acquired Auden Mckenzie in Spain, …that's where they were the MA holders for Paxtibi… I would imagine what he's saying is that they are trying to limit the amount of parallel import that is coming into the UK*' (Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 242 lines 1-12). Although [Lexon Director] could not recall sending the email, he told the CMA that his comment '*They are trying to control the 25mg*' meant '*AAH are quite a big parallel importer. They have a company – one of their subsidiaries, which is one of the UK's biggest parallel importers. Alliance, they're a huge parallel importer. They have their own subsidiaries in Spain. So it could be that what – what Actavis are doing is saying "Look guys, don't import the pack", like was done with me ages and ages ago "We'll give you a price on it", so but I don't know. I – I'm only guessing. It's a good educated guess though*.' (Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, pages 242-243 lines 27-6).

[298] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 241 lines 18-23.

3.165 [Alissa Director] told the CMA that [Lexon Director] comment '*Something is not right*' related to market share figures implied by the lack of change in the Drug Tarrif:

'there's two ways of dividing up the; the market share, between the manufacturers and then when the product has gone into the distribution system, the market share is split between what you would describe as the wholesalers and the multiple retailers and most of the multiple retailers, are also conducting wholesale activities as well. So Alliance Boots, AAH, Lloyds even companies like Day Lewis have a wholesale operation, yeah. So I think that [Lexon Director] is questioning these percentage numbers and saying that, they don't all add up.'[299]

3.166 On 27 April 2016, [Alissa Director] sent both [Lexon Director] and [King Director] certain market intelligence about who was supplying certain customers:

'Actavis have Day Lewis and Sigma business.

I am told the Sigma deal is loyalty from [✂] The Day Lewis deal was struck as Teva wouldn't meet the required prices, do you believe that? 😊

I was told yesterday that some importers are supplying generic stock although I haven't validated this yet.'[300]

3.167 On the same day (27 April 2016), [King Director] forwarded an email (that he had received from [Employee of AAH] on 8 May 2015) to [Lexon Director] and [Alissa Director], saying '*From the figures provided last year by* [Employee of AAH]*, AAH represent 50% of the market for the 10mg and 40% for the 25mg*'.[301] In that email, [Employee of AAH] had provided details of AAH's volumes for Nortriptyline Tablets to [King Director]:

'10mg 10,000 per month

[299] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, pages 137-138 lines 21-2.
[300] Document NOR-E6021, email from [Alissa Director] to [Lexon Director] and [King Director] dated 27 April 2016.
[301] Document NOR-E1884, email from [King Director] to [Alissa Director] and [Lexon Director] dated 27 April 2016.

25mg 3,500 per month'[302]

3.168 [Lexon Director] told the CMA he could not recall the email exchange with [King Director] above. However, he considered that the figures provided by [King Director] concerned supply to both retail pharmacies and hospitals and expressed surprise at them.[303]

(f) Discussions between King, Lexon and Alissa in May 2016

3.169 During May 2016, there was further contact between [King Director], [Lexon Director] and [Alissa Director]. Market intelligence gathered from King's customers on the price offers made to them by Teva and other competitors was shared by King with Alissa in one instance, and Lexon and Alissa in another (see paragraphs 3.170 to 3.173). King wanted to determine whether these prices were '*representative of the market place*' and he asked [Lexon Director] in particular about the prices of the Lexon/Medreich JV Product because Lexon had access to '*certain Teva pricing information*' (see paragraph 3.174). In so doing, King shared information about the customers it was planning to supply. In responding to the request, Lexon and Alissa shared information about their pricing intentions (see paragraphs 3.80 to 3.110 and 3.123 above). The parties also discussed the possible reasons for the fall in the Drug Tarrif, including the possibility that it was caused by Actavis.

3.170 On 4 May 2016, [King Director] emailed [Alissa Director] with information about Teva's supply prices to Well (Bestway/Co-op),[304] '*Feedback from Well [Bestway/Co-op] is that Teva have increased their supply price to £40 for the 10mg and £38 for the 25mg. Just to keep you in the loop*'.[305]

3.171 [King Director] told the CMA that he shared the information with [Alissa Director] because:

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[302] Document NOR-E1884, email from [AAH Employee] to [King Director] and [AAH Employee] dated 8 May 2015.

[303] Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 36 lines 1-8: ''*Alliance Healthcare own a third of the pharmacies in the UK and the fact that they would buy them -- they wouldn't be buying that product [Nortriptyline Tablets] from AAH. So, they would have about a third automatically*.'

[304] [King Director] told the CMA that [Consultant to King 1] had provided him with this information. Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 249 lines 9-12: '*[Consultant to King 1] had very good contacts with Co-op\Well [Bestway\Co-op], so this information, I would imagine, would have come from – from* [Consultant to King 1]*, and there might even be an email from* [Consultant to King 1] *to me containing that information. I don't know*.'

[305] Document NOR-E6035, email from [King Director] to [Alissa Director] dated 4 May 2016.

'It's the way that we've been sharing information since our meeting [at the Landmark Hotel on 23 March 2016] to do with…prices within the market-place.'[306]

3.172 [Alissa Director] told the CMA that this information was '*pretty irrelevan*t' as Alissa was not entering the market with its product for a further six months, and he did not recall responding to [King Director] email[307] (nor could [King Director] recall receiving a response).[308]

3.173 On 12 May 2016, [King Director] asked [King Office Manager] to forward information he had received about the prices offered to McKeevers for Nortriptyline Tablets to [Alissa Director] and [Lexon Director] and ask them whether these prices were '*from them/Teva*'.[309] The forwarded email exchange included an email from [Employee of Mckeevers] [310] listing the prices for various drugs, including Nortriptyline Tablets, that McKeevers claimed had been offered to them:

'Nortriptyline Tabs 10mg (100) x 1064 @ £37.75

Nortriptyline Tabs 25mg (100) x 532 @ £35.95'.[311]

3.174 [King Director] told the CMA that he was attempting to discover whether, '*these prices were representative in the market-place'*[312] and had asked [Lexon Director] in particular, '*Because, obviously, Lexon have access to certain Teva pricing information*'.[313]

3.175 On 12 May 2016, as requested by [King Director], [King Office Manager] forwarded the email from [Employee of Mckeevers] to both [Alissa Director] and [Lexon Director], with the question, '*Are these prices from either of you / Teva?*'.[314] [Lexon Director] replied by saying

[306] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 247 lines 2-3.
[307] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, pages 138 – 139 lines 15-7.
[308] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 249 lines 16-18.
[309] Document NOR-E1906, email from [King Director], using his personal email address to [King Director] at business account dated 12 May 2016. Note that in his email, [Consultant to King 3] addresses '[King Office Manager]'; therefore, it can be inferred that the exchange is between [King Director] and [King Office Manager] .
[310] Document NOR-E1906, email from [King Director], using his business email address to [King Director] at his personal account dated 12 May 2016. Note that in his email, [Consultant to King 3] addresses '[King Office Manager]'; therefore, it can be inferred that the exchange is between [King Office Manager] and [King Director].
[311] Document NOR-E1906, email from [Employee of McKeever] to [Consultant to King 3] and [Consultant to King 2] dated 11 May 2016.
[312] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 250 lines 17-18.
[313] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 253 lines 4-5.
[314] Document NOR-E1912, email from [King Director] to [Alissa Director] and [Lexon Director] dated 12 May 2016.

it was not him and identifying '*Currentmyth*', a pharmaceutical wholesaler, as the supplier saying that '*He gets stock out of AAH and Well [Bestway/Co-op]*'.[315]

3.176 [Lexon Director] told the CMA that [King Director] wanted to identify whether Lexon was selling '*outside what [Lexon] normally [did]*':

'obviously disbelieves me constantly… I keep telling him "Look, it's not me, it's nothing to do with me", he constantly keeps disbelieving me that I'm doing something behind his back. He's – he's – he's massively paranoid about this product… Selling it ... outside what I normally do, which is I sell to – I sell to retail pharmacy and we sell to Teva and we sell to a – a few other groups. I may have – we may have sold some product to – to Currentmyth I don't know is – is the truth. Our records don't show whether we've sold it to them or not.'[316]

3.177 [Alissa Director] also replied to [King Director] on the same day (12 May 2016) confirming that the prices quoted to McKeevers were not offered by Alissa as he had not yet started to supply: '*I am not in the market therefore cannot quote any customer*'.[317] [Alissa Director] explained to the CMA that [King Director] should have already known that the prices quoted were not from Alissa:

'[King Director] should know perfectly well that at that point in time, I'm not operation [sic] in the market place and I think it's underlying on this, it's not so much about the price, it's an enquiry to try and find out when I'm coming into the market place.'[318]

3.178 On 23 May 2016, [King Director] forwarded [Lexon Director] an email in which [Consultant to King 3] had provided details of his discussions with [Wholesaler A], a pharmaceutical wholesaler, about the possibility of [Wholesaler A] purchasing Nortriptyline Tablets from King:

'I have spoken to [Employee of Wholesaler A] [319] at [Wholesaler A] this morning. He would be happy to buy some nortriptyline

[315] Document NOR-E5256, email from [Lexon Director] to [King Director] dated 12 May 2016.
[316] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, pages 250-251 lines 22-7.
[317] Document NOR-E6048, email from [Alissa Director] to [King Director] dated 12 May 2016.
[318] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 142 lines 17-20.
[319] [King Director] told the CMA that the reference in this email is to [Employee of Wholesaler A] . Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 260 line 13.

from us but is currently paying £22.80 on both strengths, from Actavis.

At the moment they are stocking Teva product for the Teva scheme, and Actavis for the Actavis scheme plus their "open bin".

Other comments:

- Teva scheme price is still high £40 - £50.

- PI is still "freely available" on the 25mg and the Actavis price is competing with that.'[320]

In his cover email to [Lexon Director], [King Director] stated, '*No idea what Actavis are playing at. Competing with their own PI product?!'*[321]

3.179 [Lexon Director] replied to [King Director] copying [Alissa Director]: '*Never believe what [Employee of Wholesaler A] says*'.[322] [Lexon Director] told the CMA why he had said that [Employee of Wholesaler A] should not be trusted:

'[Employee of Wholesaler A] is – is a buyer. The buyers job is to get the best price… and if – if he sees a vulnerable seller, he might try to sort of mislead them to what he's paying to see if he can get a better price.'[323]

3.180 Later the same day (23 May 2016), [Lexon Director] sent a further email to [King Director], copying [Alissa Director], asking why King would be offering stock to [Wholesaler A]:

'On a separate note

Why would you be offering them stock as I thought you did Alliance in the main

By talking about it one only drives the market down.'[324]

[320] Document NOR-E6056, email from [Consultant to King 3] to [King Director], [King Office Manager] and [Consultant to King 2] dated 23 May 2016.
[321] Document NOR-E6056, email from [King Director] (recipients are not listed) dated 23 May 2016. Document NOR-E1927 reveals that the recipients were [Lexon Director] and [Alissa Director].
[322] Document NOR-E6056, email from [Lexon Director] to [King Director] and [Alissa Director] dated 23 May 2016.
[323] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 256 lines 9-15.
[324] Document NOR-E1929, email from [Lexon Director] to [King Director] and [Alissa Director] dated 12 May 2016.

3.181 [Lexon Director] told the CMA that his comment, '*By talking about it one only drives the market down'* meant:

> *'what I'm saying is … is that it's pointless constantly going everywhere, talking about products… you're driving the market price down because all that's gonna happen is, is – is again as I've said before, is every time you go and offer somebody a price, they go back to their existing supplier and challenge it and see if they can get a better price out of them. So what is the achievement? On one side you keep phoning me and saying – and sending me emails saying 'You're driving the price down. You're driving the price down "cause of what you're doing", on the other side it's he's the one that's talking to all the buyers constantly and asking them about – and getting feedback on pricing and so on and so forth, so what I'm saying is it doesn't make sense.'* [325]

3.182 On 23 May 2016, [King Director] replied to [Lexon Director]'s question regarding King's rationale for offering [Wholesaler A] stock, copying [Alissa Director]. [King Director] said: '*I don't supply them […] pulled a supply agreement with [Wholesaler A] last year*'.[326] [Lexon Director] replied directly to [King Director]: '*Great minds think alike*'.[327]

3.183 On 25 May 2016, [King Director] received information from [Alissa Director][328] and [Lexon Director][329] about who was offering certain prices and shared that information with [Consultant to King 1]:

(a) [Consultant to King 1] emailed [King Director] suggesting that Alissa may be offering stock in the market: '*Stock is being offered on the grey market at around 29 and it would appear this is Medreich direct but it may be spot buy opportunities form [sic]* [Alissa Director] *(if he has launched*)'.[330]

(b) [King Director] emailed [Consultant to King 1]:

> *'[Alissa Director] not launched yet*

[325] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, pages 258-259 lines 23-8.
[326] Document NOR-E1932, email from [King Director] to [Lexon Director] and [Alissa Director] dated 23 May 2016.
[327] Document NOR-E5277, email from [Lexon Director] to [King Director] dated 23 May 2016.
[328] See paragraph 3.174.
[329] See paragraph 3.176.
[330] Document NOR-E1939, email from [King Director] to [Consultant to King 1] dated 25 May 2016.

These prices have been offered to [Wholesaler A] by Actavis as well

Call me at 3 if you can.'[331]

3.184 In late May 2016, [Alissa Director], [King Director] and [Lexon Director] discussed the fall in the Drug Tariff prices, and Actavis' role in this decline:

(a) On 26 May 2016, [Alissa Director] emailed [King Director] and [Lexon Director] with the Drug Tariff prices for Nortriptyline Tablets in June 2016, noting that there was a reduction of 9% - 10%:

'10mg - £56.76

25mg - £64.57

9% - 10% reductions.'[332]

(b) [King Director] responded to [Alissa Director] and [Lexon Director] the next day, forwarding a table listing the prices offered by Actavis through [Wholesaler A] and Alliance on their scheme: '*explains why the tariff is falling as scheme prices are in the "public domain". Someone needs to give them [Actavis] a call*.'[333]

	Cat M	**Cat M – Less std discount**	**Scheme & W/S buying price**	**Price minus retro**
Nortriptyline 10mg tablets	100 56.76	£49.67	£29.80	£26.82
Nortriptyline 25mg tablets	100 64.57	£56.50	£33.90	£30.51
				£28.66 (Av Price)

3.185 With regard to his statement to [Alissa Director] and [Lexon Director] that '*Someone needs to give them a call',* [King Director] told the CMA that he was only making a '*flippant, throwaway comment*' and that it had not been his intention for someone to contact Actavis about this matter.

3.186 [Alissa Director] was asked by the CMA what he understood was the purpose of the '*call*' which [King Director] had suggested:

[331] Document NOR-E1939, email from [King Director] to [Consultant to King 1] dated 25 May 2016.
[332] Document NOR-E1954, email from [Alissa Director] to [King Director] and [Lexon Director] dated 26 May 2016.
[333] Document NOR-E1954, email from [King Director] to [Alissa Director] and [Lexon Director] dated 27 May 2016.

'With a purpose of saying; ok the price is tumbling, do something about it yeah… Don't sell it any cheaper.'[334]

II. ***Discussions between King and Alissa immediately prior to and during Relevant Period 2 (5 December 2016 to 27 January 2017)***

3.187 Immediately prior to and during Relevant Period 2, King and Alissa discussed the impact that new entry, including Alissa's supply of Nortriptyline Tablets in the UK, would have had on pricing to existing and potential customers.

(a) Discussions leading up to Alissa's entry: immediately prior to Relevant Period 2

3.188 On 10 October 2016, [Consultant to King 1] emailed [King Director] about a discussion that he [Consultant to King 1] had with [Alissa Director] about Alissa's entry plans. He also told [King Director] that [Alissa Director] had shared information with him about Lexon's strategy in relation to Nortriptyline Tablets. The email stated that [Consultant to King 1] had *'found out some interesting info*' from [Alissa Director] at a CPhI[335] event the previous week:

'[Alissa Director] is planning to have stock very shortly, and, is currently dressing Alissa for sale on the open market. I was under the impression that he had stock already, but, this maybe form [sic] [Lexon Director]*??*

He did also say that Lexon / Medreich are also looking to give the product to the generic side of Concordia (Focus), as a route to try and gain the Alliance business, as they have a solus distribution agreement with them which may hold sway over other suppliers. He also stated that Lexon were also exporting some volumes of Nortriptyline, but, i was not aware that there was an export market for this – could you shed any light here. Some other info came up about Neon healthcare activities and pricing which may be worth discussing further.'[336]

[334] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 158 lines 11-20.
[335] CPhI brings together pharmaceutical professionals active at all levels of the supply chain through exhibitions, conferences and online communities (see www.cphi.com).
[336] Document NOR-E2255, email from [Consultant to King 1] to [King Director]) dated 10 October 2016.

(b) Discussions following Alissa's launch: during Relevant Period 2

3.189 Following launch in November 2016 of Alissa's product, King discussed certain pricing information with Alissa (see paragraph 3.188 above and paragraphs 3.191 to 3.195 below). King also shared with Alissa market intelligence on the price offers made by a new entrant to potential customers. Alissa shared its views on the price levels that customers said they had been offered (see paragraphs 3.199 to 3.200 below).

3.190 On 1 November 2016, [Alissa Director] confirmed to [Employee of Alliance] that Alissa was able to supply Nortriptyline Tablets: '*Good news today, **Nortriptyline** is here in stock*'.[337] He also asked if they could '*have a brief discussion or meeting on this in the very near future (rather than waiting for our next apt)?*'[338]

3.191 On 21 November 2016, [King Director] asked [Alissa Director] to call him as he had '*Just spoken to [Consultant to King 3]*'.[339] [Alissa Director] replied saying that he was at the CPhI in India but would call him on his return.[340]

3.192 On 1 December 2016, [King Director] received information about the impact of Alissa's entry from [Consultant to King 2], which he asked [Alissa Director] to call him about as follows:

(a) The information was an email from [Employee of Day Lewis] to [Consultant to King 2] with a purchase order for the 10mg tablets:

'FYI order below from [Employee of Day Lewis] for the 10mg [480 units x £20 each].

He has explained that he has now split the order and only ordered 2 weeks' worth of stock, as he confirmed that Alyssa [sic] are now officially offering prices and have stock, therefore he wants to see how the market price develops over the next 2 weeks before placing the rest of the order.'[341]

(b) In response, [King Director] asked [King Office Manager] to set up a call with [Alissa Director] before he reverted to Consultant to King

[337] Document NOR-E5019, email from [Alissa Director] to [Employee of Alliance] dated 1 November 2016.
[338] Document NOR-E5019, email from [Alissa Director] to [Employee of Alliance] dated 1 November 2016.
[339] Document NOR-E2396, email from [King Director] to [Alissa Director] dated 21 November 2016.
[340] Document NOR-E2483, email from [Alissa Director] to [King Director] dated 5 December 2016.
[341] Document NOR-E6384, email from [Consultant to King 2] to [King Director], [King Office Manager] and [Consultant to King 3] dated 1 December 2016.

2].[342] [Alissa Director] responded to the request for a call, noting that he was '*available from 11:00*' on 5 December 2016. [343]

(c) On 5 December 2016, [King Director] asked [Alissa Director] to call him:

'Call me sometime.

The pricing information you have is incorrect.

Buyers will be liars?'[344]

3.193 When asked about this email and what the pricing information related to, [King Director] told the CMA: '*It would have to be Nortriptyline'*.[345] [King Director] told the CMA that for him to say that the pricing information that [Alissa Director] had was incorrect '*would infer that we must have spoken'*.[346] As to his statement '*Buyers will be liars'*, [King Director] told the CMA: *'[this] would be the generic purchasing guy at one of the chains, I would imagine.*'[347]

3.194 [Alissa Director] told the CMA that he understood the statement '*The pricing information you have is incorrect'*[348] to mean: '*He's saying that the, the market price is higher, yeah.*'[349] [Alissa Director] told the CMA that he understood the statement '*Buyers will be liars*' to mean '*[t]hat I'm now picking up false information in the marketplace*'.[350] [Alissa Director] explained: '*he's trying to suggest, that we're picking up pricing that isn't true*'. [351]

3.195 When asked about the purpose of the call, [Alissa Director] told the CMA: '*what he's trying to do is really is say to me, that I'm selling at a price that is out of line with market pricing*'. [352] Having considered further, [Alissa Director] also clarified that he believed that King may have learned the prices Alissa intended to offer on the market indirectly. He explained that Alissa had sent price lists for the month of

[342] Document NOR-E6386, email exchange between [King Director] and [King Office Manager] dated 1 December 2016.
[343] Document NOR-E2483, email from [Alissa Director] to [King Director] dated 1 December 2016.
[344] Document NOR-E2483, email from [King Director] to [Alissa Director] dated 1 December 2016.
[345] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 289 lines 8.
[346] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 291 line 6.
[347] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 290 lines 1-2.
[348] Document NOR-E2483, email from [King Director] to [Alissa Director] dated 5 December 2016
[349] Document NOR-C2108, transcript of [Alissa Director] interview dated 26 July 2018, page 42 line 19.
[350] Document NOR-C2108, transcript of [Alissa Director] interview dated 26 July 2018, page 42 line 24.
[351] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 164 lines 16 to 17.
[352] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 163 lines 18 to 19.

November 2016 to its established customers. King's consultants ([Consultant to King 1], [Consultant to King 3] or [Consultant to King 2]) may have picked up on this information and then informed [King Director]. He believed that this is what led to the emails from [King Director] on 21 November 2016 and the subsequent call on 5 December 2016.[353]

3.196 On 8 December 2016, [Alissa Director] discussed the contact he had had with [King Director] in relation to Nortriptyline Tablets with [Employee of Alliance]. [Alissa Director] told [Employee of Alliance], '*I really don't like [King Director] contacting me … I will show you his messages when we meet on the 19th…he's a law unto himself*'.[354] [Alissa Director] then sent [Employee of Alliance] an email that he had received from [King Director] on 5 December 2016 (see paragraph 5.104(a)),[355] from which [Employee of Alliance] inferred that [Alissa Director] had '*sent him [King Director] some pricing information*'.[356] [Alissa Director] responded to [Employee of Alliance] refuting this and referring to further emails which he had received from [King Director]:

'First and foremost I cannot send competitors any information on pricing, customers, volumes…

…there are two other emails from [King Director], but it's best to show you all face-to-face.

And I certainly would not in a trillion years let anyone know we what we discussed between ourselves.'[357]

3.197 On 17 January 2017, [Employee of Alissa] sent a text message to [Alissa Director]: '*Creo launched nortrip yesterday so increased pressure on pricing no doubt. We should take the day lewis order or lose out*'.[358] [Alissa Director] replied: '*I said yes to DL [Day Lewis] – gloves off get everything you can – I am going to quote Alliance and upset King'*.[359]

[353] Document NOR-C3026, State of Play Meeting Note of meeting held at the CMA offices with Alissa on 5 March 2019 and Document NOR-C3013 clarification in [Alissa Director]'s email dated 25 March 2019.
[354] Document NOR-E5040, email from [Alissa Director] to [Employee of Alliance] dated 8 December 2016.
[355] Document NOR-E5040, email from [Alissa Director] to [Employee of Alliance] dated 8 December 2016.
[356] Document NOR-E5040, email from [Employee of Alliance] to [Alissa Director] dated 8 December 2016.
[357] Document NOR-E5040, email from [Alissa Director] to [Employee of Alliance] dated 8 December 2016.
[358] Document NOR-E8459.1, text message from [Employee of Alissa] to [Alissa Director] dated 17 January 2017.
[359] Document NOR-E8459.1, text message from [Alissa Director] to [Employee of Lexon] to dated 17 January 2017.)

3.198 [Alissa Director] explained what he meant by the statement '*gloves off get everything you can - I am going to quote Alliance and upset King'*:[360]

'I want to get rid of my stocks as quickly as possible.

[…]

'I purchased this stock and I know the sales rate that I have and I have customers that actually have committed to me. And basically, once you've got those customers you need to look after them, because the nature of the business is if you run out of stock, you lose the customer and your credibility as a supplier suffers. But in this case, it was a case where another new entrant into the marketplace and I felt we just had to really get as aggressive as possible and make sure we didn't get into the position where the market price was below our cost of goods, which has happened with the 10 milligram. We… have short dated stock now and we're selling it at, literally, on or under cost of goods.'[361]

3.199 On 27 January 2017, [King Director] emailed [Alissa Director] to verify information consultants to King had received from Alliance about the prices being offered by Creo (Blackrock Pharmaceuticals Limited) to Alliance.[362]

'It would appear that Creo (MAH Blackstone) have crashed the market. Offering £11 and £12 on the 10mg and 25mg, respectively. You picked up anything similar?'[363]

3.200 [Alissa Director] replied: '*Not at all…prices are much higher than that. Not sure who has given you that feedback but it is way off the mark*'.[364]

3.201 A few minutes after receiving this email from [Alissa Director] (paragraph 5.104(b)), [King Director] emailed [Consultant to King 3]

[360] Document NOR-E8459.1, text message from [Alissa Director] to [Employee of Lexon] dated 17 January 2017.
[361] Document NOR-C2108, transcript of [Alissa Director] interview dated 26 July 2018, page 56 line 6 and pages 56-57 lines 16-1.
[362] Document NOR-E2712, email from [Consultant to King 2] to [King Director], [King Office Manager] and. [Consultant to King 3] dated 18 January 2017; Document NOR-E6687, email from [King Director] to [Employee of Alliance] dated 27 January 2017; Document NOR-E6687, email from [King Director] to [Consultant to King 3] and [Consultant to King 2] of 27 January 2017; Document NOR-E6689, email from [Consultant to King 3] to [King Director] and [Consultant to King 2] dated 27 January 2017.
[363] Document NOR-E2768, email from [King Director] to [Alissa Director] dated 27 January 2017.
[364] Document NOR-E2768, email from [Alissa Director] to [King Director] dated 27 January 2017.

and [Consultant to King 3] confirming that the information that Alliance had shared with King was inaccurate: '*We know [Consultant to King 3] was not offering those prices.* [Alissa Director] *has also said that these prices are incorrect*.'[365]

3.202 [Alissa Director] was asked by the CMA to clarify how he knew the prices were *'much higher'* than the prices quoted in the email:

'Well at that point I'm actually selling the price, the product, so I'm aware of what we're invoicing out to customers. But I'm not particularly keen to be specific to him, on what the prices are that we're offering in all that.'[366]

3.203 When asked by the CMA what his sense of what others were pricing in the market was based on, [Alissa Director] went on to further explain:

'our price would be dependent on feedback from our customers, those customers that would say to us, ok for example we purchase from Actavis our current prices is here say £20 or £21, so we'd have to make an offer that was attractive, to encourage them to switch. But in some cases it's very difficult to persuade customers with just a lower price, because the impact as I mentioned earlier, if they are consuming a large quantity of Nortriptyline and they take that out of the basket, from Actavis or Teva, that means that they could jeopardise their annual rebate, which could be a substantial amount of money.'[367]

3.204 On 27 January 2017, [Alissa Director] emailed [Employee of Alliance]:

'Out of the blue an email has arrived this morning from [*King Director] trying to clarify what you've been offered on Nortriptyline!*

I wish he wouldn't contact me.'[368]

3.205 On 10 February 2017, in an email to [Employee of Alliance], [Alissa Director] said:

[365] Document NOR-E6689, email from [King Director] to [Consultant to King 3] and [Consultant to King 2] dated 27 January 2017.
[366] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, pages 166-167 lines 25-1.
[367] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, pages 167-168 lines 27-9.
[368] Document NOR-E5056, email from [Alissa Director] to [Employee of Alliance] dated 27 January 2017.

'I have it confirmed Well Group [Bestway/Co-op] . . . buy Nortriptyline from King . . . that must be why matey was discussing it with [Employee of Bestway/Co-op] It does make me smile when [King Director] *says ''buyers are liars'' . . . I think he's been found out!* 😊*'*[369]

3.206 In March 2017, Focus Pharmaceuticals Limited and Blackrock Pharmaceuticals Limited started supplying Nortriptyline Tablets in the UK. This increased competition by increasing the number of MA holders supplying Nortriptyline Tablets from four to six.

[369] Document NOR-E5057, email from [Alissa Director] to [Employee of Alliance] dated 10 February 2017.

4. Market definition

4.1 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.[370] 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 and/or concerted practice between undertakings which has as its object the appreciable prevention, restriction or distortion of competition.[371]

4.2 Nonetheless, the CMA has formed a view of the '*relevant market'* in order to calculate each of the Parties' 'relevant turnover' in the market affected by the Infringement, as this is required for the purposes of establishing the level of the financial penalty that the CMA will impose on the Parties.[372]

4.3 For the purposes of this case, the CMA has found that the '*relevant market'* is no wider than the supply of Nortriptyline Tablets in the UK. The analysis below considers a product dimension and a geographic dimension.[373]

A. The relevant product market

4.4 In this case, the Focal Product of the Infringement is the supply of Nortriptyline Tablets.

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[370] T-62\98 *Volkswagen v Commission* EU:T:2000:180, paragraph 230, and T-29\92 *SPO and Others v Commission* EU:T:1995:34, paragraph 74.

[371] 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*'.

[372] For the avoidance of doubt, where the term "*relevant market*" is used in this Decision, it must be understood in this context.

[373] When defining the relevant market, the CMA applies the so-called hypothetical monopolist test. The hypothetical monopolist test is employed to establish which products are close enough substitutes to be in the relevant market. First, it establishes the closest substitutes to the product that is the focus of the investigation (the '**Focal Product**', which is nortriptyline in this case). Second, it asks whether a hypothetical monopolist of the Focal Product in the geographic area in which the product is sold (the '**Focal Area**') could profitably sustain a small but significant non-transitory increase in price (a **'SSNIP'**) above the competitive level. If such an increase would be profitable then the test is complete and the Focal Product is the relevant market. If it would not be profitable then the test is repeated by assuming that the hypothetical monopolist controls both the Focal Product and its closest substitute. That test is repeated until it is profitable for the hypothetical monopolist to sustain a SSNIP.

I. Different tablet strengths

4.5 As set out in paragraph 3.13, during the Relevant Period, Nortriptyline Tablets were supplied in 10mg and 25mg tablets. In this Investigation, the Infringement relates to the supply of both 10mg and 25mg tablets. As such, the CMA does not need to conclude whether 10mg and 25mg tablets each constitute separate '*product markets'* or whether they together constitute a single '*product market'*. This is because the Parties' relevant turnover for the purposes of the calculation of any financial penalty would be the same under either scenario. Thus, for the purposes of the calculation of the financial penalty, the CMA has considered the Parties' relevant turnover in the supply of both 10mg and 25mg tablets.

II. Other anti-depressant drugs

4.6 Whilst it is not necessary to come to a definitive view on market definition, a product market limited to Nortriptyline Tablets is consistent with Auden Mckenzie's and King's ability to profitably sustain a series of price increases during the period prior to September 2014 and to maintain prices thereafter, until May 2015. The price levels they sustained were significantly above the levels observed following the entry of further suppliers (see Figures 4 and 5 at paragraph 3.58), indicating that other anti-depressant drugs did not constrain the price of nortriptyline. After the entry of Lexon/Medreich JV Product, King's and Auden McKenzie's prices experienced a downward trend with some fluctuations.

III. Different customer groups

4.7 The CMA considers that the relevant market should not be separated by customer type; for example, separating the market into the supply of Nortriptyline Tablets to wholesalers and the supply of Nortriptyline Tablets to retail pharmacies.[374] Nortriptyline Tablets are a homogenous product and therefore no changes to production would be required to supply wholesalers rather than retail pharmacies, or vice versa. Indeed, King, Auden, Alissa and Lexon[375] all supplied Nortriptyline Tablets to both wholesalers and retail pharmacies throughout the Relevant Period

[374] Lexon submitted that the relevant market should be separated into different customer groups (pharmacies and wholesalers). Document C3224.2, Lexon's Written Representations, paragraph 16.
[375] See Figures 2 and 3, pages 31 and 32: Lexon's revenue data shows it has frequently sold to both customer groups.

to varying degrees. Consequently, if prices to one customer group were to rise, undertakings that do not currently supply that group, or only do so to a limited extent, would be able to supply that group at short notice.[376] Moreover, the CMA is not aware of any capacity constraints that would restrict such supply side substitution.[377]

B. The relevant geographic market

4.8 In previous cases in the pharmaceutical sector, the relevant geographic market has consistently been defined as national in scope.[378] In these cases, relevant factors were;

(a) the regulatory schemes for authorising and reimbursing medicines across countries;

(b) marketing strategies used by pharmaceutical companies;

(c) doctors' prescribing practices; and

(d) prices.

4.9 The CMA considers that, for the same reasons, it is appropriate to define the relevant geographic market in this case as UK-wide. In particular, the CMA notes that in order to sell Nortriptyline Tablets in the UK, it is necessary to obtain an MA from the MHRA, and an MA covers the whole of the UK.[379] In addition, the pricing framework which determines how pharmacies are reimbursed for the dispensing of Nortriptyline Tablets is specific to the UK, but not to other countries (see further paragraphs 3.45 and 3.49). The CMA considers that these factors are consistent with the market being national in scope.

4.10 The CMA concludes that, in light of the above, it is appropriate to define the relevant geographic market in this case as national (UK-wide) in scope.

[376] See CMA Guidance on Market Definition, OFT403, paragraph 3.13.
[377] See CMA Guidance on Market Definition, OFT403, paragraph 3.16.
[378] See, for example, Case COMP/A.37.507/F3 *AstraZeneca*, Commission decision of 15 June 2005, paragraph 503; and Case CA98/02/2011 *Reckitt Benckiser*, OFT decision of 12 April 2011, paragraphs 4.170 to 4.171.
[379] The existence of parallel imports is not inconsistent with the market being national in scope since parallel importers need to obtain a PIPL from the MHRA to sell in the UK.

5. Legal assessment of the Information Exchange

A. Introduction

5.1 The CMA has found that the Parties engaged in a concerted practice (or series of concerted practices) by which they knowingly substituted practical cooperation between them for the risks of competition. Specifically:

(a) King, Lexon and Alissa exchanged competitively sensitive strategic information on pricing,[380] volumes, timing of supplies and entry plans in relation to the supply of Nortriptyline Tablets in the UK. The exchange of information reduced strategic uncertainty in the market and was capable of influencing the Parties' conduct on the market.

(b) the Parties took account of the information exchanged with their competitors for the purposes of determining their conduct on the market. (the Information Exchange).

5.2 King, Lexon and Alissa participated in the Information Exchange at different times. The CMA has found as follows:

(a) King participated during the periods from 27 July 2015 to 27 May 2016 (Relevant Period 1) and from 5 December 2016 to 27 January 2017 (Relevant Period 2);[381]

(b) Alissa participated during the periods from 2 March 2016 to 27 May 2016 (part of Relevant Period 1) and from 5 December 2016 to 27 January 2017 (Relevant Period 2); and

(c) Lexon participated during the period from 27 July 2015 to 27 May 2016 (Relevant Period 1).

5.3 The CMA has found that the Information Exchange had the object of restricting competition in the supply of Nortriptyline Tablets in the UK, having regard to its:

(a) Legal and economic context. Specifically, the homogenous nature of the product, with price as the key driver of competition; the fact that, immediately before the Information Exchange, the market was

[380] Including the Parties' own prices or pricing strategy, pricing of the Lexon/Medreich JV Product (from both Medreichs and Teva), rival suppliers' prices and claims (including from customers) concerning rival suppliers' prices.
[381] Relevant Period 1 and Relevant Period 2 are together referred to as the '**Relevant Period**'.

highly concentrated, competition was muted and prices had increased significantly; and the fact that the entry of the Lexon/Medreich JV Product and the potential entry of Alissa increased the intensity of competition and uncertainty in the market. This created opportunities for customers to '*play off*' suppliers against one another, putting downward pressure on prices. King, Lexon and Alissa were actual or potential competitors and they each stood to gain if prices remained the same or decreased more slowly; and

(b) Content and objectives. Specifically, the Parties shared competitively sensitive strategic information concerning pricing, volumes, timing of supplies and entry plans. The CMA has found that the object of the Information Exchange was to maintain the prices of Nortriptyline Tablets in the UK or at least to slow their decline (the Price Maintenance Objective). The Parties thereby sought to create conditions of competition which did not correspond to the normal conditions of the market.

5.4 Further, the CMA has found that, in each of Relevant Period 1 and Relevant Period 2, the Information Exchange was a single continuous infringement, which together formed a single repeated infringement. Specifically, King, Lexon and Alissa's conduct within each of Relevant Period 1 (with respect to all three Parties) and Relevant Period 2 (with respect to King and Alissa only) constitutes a single continuous infringement on the basis that:

(a) the Parties pursued a common objective, namely to maintain the prices of Nortriptyline Tablets in the UK or at least slow their decline (the Price Maintenance Objective);

(b) each of King, Lexon and Alissa were aware of the conduct which was put into effect by the other Parties in pursuit of the Price Maintenance Objective, or could reasonably have foreseen it and were prepared to take the risk; and

(c) each of King, Lexon and Alissa made an intentional contribution to the Price Maintenance Objective pursued.

5.5 Accordingly, by this Decision, the CMA has concluded that the Parties have infringed the Chapter I prohibition and Article 101(1) TFEU (the Infringement).

5.6 Section 5B below sets out the key applicable provisions of UK and EU law and section 5C below sets out the burden and standard of proof. The following sections then contain the CMA reasoning in relation to:

(a) the legal and economic context relevant to the Information Exchange (see section 5D);

(b) the existence and content of the Information Exchange (see section 5E);

(c) the object of the Information Exchange (see section 5F);

(d) the single continuous, and single repeated, nature of the Information Exchange (see section 5G);

(e) the duration of the Information Exchange (see section 5H);

(f) the Information Exchange as an appreciable restriction of competition (see section 5I);

(g) the effect on trade of the Information Exchange (see Section 5J); and

(h) whether any exclusion or exemption to the Chapter I prohibition / Article 101(1) TFEU is applicable (see Section 5K).

B. Key provisions of the UK and EU competition rules

5.7 The CMA's conclusions are based on the following provisions of the UK and EU competition rules:

(a) the Chapter I prohibition[382] prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. This prohibition applies unless an applicable exclusion is satisfied or the agreement, decision or concerted practice in question is exempt in accordance with the provisions of the Act. References to the UK are to the whole or part of the UK.[383]

(b) Article 101 TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices,

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

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

5.8 Under the European Union (Withdrawal Agreement) Act 2020, section 2(1) of the European Communities Act 1972 (under which EU law has effect in the UK's national law) remains in force until the end of the Transition Period.[384] This means that directly applicable EU law, including Articles 101 and 102 TFEU and Regulation 1/2003[385] will continue to apply in the UK during the Transition Period.

C. Burden and standard of proof

I. Legal framework

5.9 The burden of proving an infringement of the Chapter I Prohibition/Article 101 TFEU lies with the CMA.[386]

5.10 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,[387] 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.'*[388]

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[384] Section 1A, Withdrawal Agreement Act (as introduced by section 1, Withdrawal Agreement Act).
[385] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 4.1.2003, p. 1–25.
[386] *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 at paragraphs 95 and 100. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, paragraphs 164 and 928–931; and *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31, paragraph 88.
[387] 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.
[388] *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, paragraph 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*

5.11 The CMA is required to show that an infringement has occurred on the balance of probabilities which is the civil standard of proof.[389] The CAT clarified in the *Replica Football Kit* appeals that: *'[t]he standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.'* [390]

5.12 The Supreme Court has further clarified that this standard of proof is not connected to the seriousness of the suspected infringement.[391] The CAT has also expressly accepted the reasoning in this line of case law.[392]

II. Application

5.13 The CMA has discharged its burden of proof in this case to the requisite standard of proof (namely, the balance of probabilities).

D. The economic and legal context relevant to the Infringement

I. Legal framework

5.14 In order to determine whether an agreement or concerted practice reveals a sufficient degree of harm such as to constitute a restriction of competition by object, regard must be had to the economic and legal context of which it forms a part. This includes:

(a) the nature of the goods affected; and

(b) the real conditions of the functioning and structure of the market.[393]

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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.' C-204/00P etc *Aalborg Portland A/S and Others v. Commission,* EU:C:2004:6.

[389] *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31, paragraph 88.

[390] *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, paragraph 204. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, paragraphs 164 to 166.

[391] *Re S-B (Children)* [2009] UKSC 17 [34]. See also *Re B (Children)* [2008] UKHL 35, paragraph 72.

[392] *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14, paragraphs 15 to 16.

[393] C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 53, citing C-32/11 *Allianz Hungaria v Commission*, EU:C:2013:160, paragraph 36 and the case law cited. See also C-373/14 P *Toshiba v Commission* EU:C:2016:26, paragraph 27.

5.15 The economic and legal context includes whether the parties are actual or potential competitors at the time of entering into the agreement.[394]

(a) Actual competition

5.16 Two companies are treated as actual competitors if they are active on the same relevant market.[395]

(b) Potential competition

5.17 The examination of conditions of competition on a given market must be based not only on existing competition between undertakings already present in the relevant market, but also on potential competition.

5.18 The Court of Justice has stated that where an undertaking has a *'firm intention and an inherent ability to enter the market*' where there are no insurmountable barriers to entry it will be a potential competitor.[396]

5.19 In examining potential competition, the critical assessment is whether the potential entrant had '*real concrete possibilities*' of entering the market. In other words, it must be determined whether it *'has the ability to enter that market*':[397]

(a) The first key element to assess is whether it had a '*firm intention and an inherent ability*' to enter the market at the time the agreement was concluded. This is established where the potential entrant has taken '*sufficient preparatory steps to enable it to enter the market concerned within such a period of time as to impose competitive pressure*' on the incumbent. These preparatory steps '*permit the conclusion that [an undertaking] has a firm intention and an inherent ability to enter the market*'.[398]

(b) The second key element to assess is whether there were any insurmountable barriers to entry.[399]

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[394] See, for example, CMA decision in case CE-9531/11 *Paroxetine*, sections 6.C.vi and vii.

[395] The Horizontal Guidelines, paragraph 10.

[396] Case C-307/18 *Generics UK and ors v Commission* ('Paroxetine') EU:C:2020:52, paragraphs 46 and 58.

[397] T-461\07 *Visa Europe and Visa International Service* v *Commission*, EU:T:2011:181, paragraphs 166-168 (emphasis added); T-360\09 *E.ON Ruhrgas and E.ON v Commission*, EU:T:2012:332, paragraph 87; and T-472\13 *ck v Commission*, EU:T:2016:449, paragraph 101.

[398] Case C-307/18 *Generics UK and ors v Commission* ('Paroxetine') EU:C:2020:52, paragraphs 43 and 44.

[399] C Case C-307/18 *Generics UK and ors v Commission* ('Paroxetine') EU:C:2020:52, paragraph 45.

5.20 In *Lundbeck* the General Court stated that it '*is certainly the case* [that undertakings had real, concrete possibilities to enter '*when those undertakings had made significant investments in order to enter the market and when they had already obtained MAs or had taken the necessary steps to obtain them within a reasonable period*.'[400]

5.21 An undertaking '*does not have to have a readily marketable product*' in order to be considered a potential competitor.[401] Where specific market characteristics exist that may have an impact on potential entry, it is necessary to test whether those characteristics form insurmountable barriers to the potential entrant which rule out any potential competition.[402] Potential competition is likely to be exerted throughout the MA application process unless the applicant encounters '*objectively insurmountable difficulties*'.[403]

5.22 With respect to the timeframe within which potential entry should take place, it is only required to take place '*with sufficient speed to form a constraint on market participants'*.[404]

5.23 The Court of Justice has held that '*the perception of the established operator is a factor that is relevant to the assessment of the existence of a competitive relationship between that party and an undertaking outside the market since, if the latter is perceived as a potential entrant to the market, it may, by reason merely that it exists, give rise to competitive pressure on the operator that is established in that market.*'[405]

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[400] T-472\13 *Lundbeck v Commission* EU:T:2016:449, paragraph 131 (emphasis added). See also paragraph 171, where the General Court stated: '*potential competition includes inter alia the activities of generic undertakings seeking to obtain the necessary MAs, as well as all the administrative and commercial steps required in order to prepare for entry to the market*'.

[401] Commission decision of 10 December 2013 in Case 39.685 *Fentanyl*, paragraph 226 and cases cited therein.

[402] T-472/13 *Lundbeck v Commission* EU:T:2016:449, paragraph 124, citing T-519/09 *Toshiba v Commission* EU:T:2014:263, paragraph 230. See also C-373/14 P *Toshiba v Commission* EU:C:2016:26, paragraph 31: '…*since Article 101 TFEU also concerns potential competition, the Gentlemen's Agreement was capable of restricting competition, unless insurmountable barriers to entry to the European market existed that ruled out any potential competition from Japanese producers'*. See also T-112/07 *Hitachi and Others v Commission* EU:T:2011:342, paragraph 230.

[403] T-679\14 *Teva v Commission*, EU:T:2018:919, paragraph 149.

[404] T-461\07 *Visa Europe and Visa International Service v Commission* EU:T:2011:181, paragraph 189. T-472\13 *Lundbeck v Commission* EU:T:2016:449, paragraph 104 and 203. See also T-360\09 *E.ON Ruhrgas and E.ON v Commission* EU:T:2012:332, paragraph 114.

[405] Case C-307/18 *Generics UK and ors v Commission* ('Paroxetine') EU:C:2020:52, paragraph 42. See also. T-472\13 *Lundbeck v Commission* EU:T:2016:449, paragraph 104. See also T-360\09 *E.ON Ruhrgas and E.ON v Commission* EU:T:2012:332, paragraph 106, which adds, consistent with the case law quoted above, that '*the purely theoretical possibility of market entry is not sufficient to establish the existence of potential competition*'.

II. ***The economic and legal context relevant to the Infringement***

(c) Nature of the goods affected: Nortriptyline Tablets

5.24 As set out at paragraph 1.2, nortriptyline is an important medicine used in the treatment of depression. The NHS is the main purchaser of nortriptyline in the UK, spending £38m on the drug in 2015. Nortriptyline is an off-patent, unbranded, homogeneous product. The suppliers of unbranded generic drugs are in principle free to set their prices as they choose; for unbranded generic drugs the government relies on competition in the market to keep prices down (see paragraph 3.42).[406]

(d) Real conditions of the functioning and structure of the market for the supply of Nortriptyine Tablets in the UK

5.25 Total demand for nortriptyline is primarily driven by the clinical need of the patient. Hence despite the ASP for Nortriptyline Tablets increasing significantly from 2011 until 2015 (see Figures 4 and 5, paragraph 3.58), total demand for Nortriptyline Tablets in the UK continued to increase gradually over that period (see Figure 1, paragraph 3.54). As such, overall demand is not very price-sensitive.

5.26 Medreich obtained its MA in March 2015 and the Lexon/Medreich JV Product was launched in July 2015. Prior to that, there were only two MA holders licensed to supply Nortriptyline Tablets in the UK: King and Auden Mckenzie. These companies supplied both strengths of Nortriptyline Tablets (10mg and 25mg). These companies were the only suppliers of 10mg tablets in the UK. The only alternative source of 25mg tablets was parallel imports of the Auden Mckenzie owned Paxtibi from Spain.[407]

5.27 In that period, the market was therefore highly concentrated and, in the case of the 10mg tablets, duopolistic. Nortriptyline was a '*genericised*' drug, meaning that suppliers were free to set their prices as they choose (paragraph 3.42 above). As nortriptyline is a commodity, there was potential for very strong price competition between suppliers. However, there is no evidence of significant price competition between King and Auden Mckenzie before the Infringement. Rather, in the period whilst there were two MA holders (i.e. January 2011 to June

[406] See https:\\www.gov.uk\government\publications\health-service-medical-supplies-costs\health-service-medical-supplies-costs-bill-factsheet.

[407] See Tables 4 and 5, paragraphs 3.51 and 3.52

2015), the price of the 10mg and 25mg tablets increased by 497%[408] and 387%[409] respectively. Despite scope for rivalry on price, price competition was limited. Referring to this period, [King Director] stated at interview: '*You can compete on price in which case […] the market just disappears […] so we didn't compete on price.*'[410]

5.28 The launch of the Lexon/Medreich JV Product in July 2015 therefore changed the competitive landscape for nortriptyline. From this time, there were five potential sources of supply: King, Auden Mckenzie and Lexon, Medreich and Teva (the latter three supplying the Lexon/Medreich JV product), alongside parallel importers, where there had previously been only Auden Mckenzie, King and parallel importers. This was the case throughout Relevant Period 1 (see paragraphs 3.31 to 3.36).

5.29 The launch of the Lexon/Medreich JV Product in July 2015 contributed to downward pressure on prices for Nortriptyline Tablets which had not existed beforehand. The launch of the Lexon/Medreich JV Product led to greater uncertainty concerning the supply and pricing of Nortriptyline Tablets in the market as there were now five potential sources of supply rather than just two. In these market conditions, King and Lexon, as suppliers, and Alissa, as a potential supplier, of Nortriptyline Tablets in the UK could not perfectly observe past or current pricing, or predict future pricing, of their competitors. Whilst Drug Tariff information could provide market participants with information about the price that customers/pharmacies receive in payment/reimbursement for a particular product at a point in time, and price lists and services such as Wavedata give an indication of past supplier list prices, the supply prices that a customer actually pays are often the result of confidential, non-public negotiation. Given the homogenous nature of the product, price is a key driver of purchasing decisions. As such, a customer may seek to 'play off' two suppliers by informing an existing or potential supplier of the price it currently pays (or by telling an existing supplier the price at which a rival has offered to supply) in the hope of paying less for supplies. In either scenario the customer may also successfully 'bluff' and achieve a lower price, even if no alternative source of supply is available. In deciding their conduct on the market, suppliers must choose whether or not to match the prices that customers claim to have been offered and, given the uncertainty about the prices that rivals

[408] From £12.06 to £72.01.

[409] From £24.02 to £116.89.

[410] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 49 lines 12-16. See also pages 54-55 lines 12-8 "*I took a commercial decision that we would not try and compete on value.*"

have offered, face the risk of losing the sale if they do not match the claimed quotation.

5.30 In addition, Actavis completed its acquisition of Auden Mckenzie in May 2015. When questioned about the purchase of Auden Mckenzie by Actavis, [King Director] told the CMA that he had anticipated Actavis would '*compete more aggressively'* than Auden Mckenzie.[411]

5.31 From July 2015, and throughout the Relevant Period, the ASP for both strengths of Nortriptyline Tablets decreased (see paragraph 3.58). The downward pressure on ASPs further intensified with the prospect of Alissa's entry to the market in 2016.

5.32 The sale of Auden Mckenzie, the launch of the Lexon/Medreich JV Product and the prospect of Alissa's entry created incentives for the Parties to seek to reduce the uncertainty in the market as they each stood to gain if prices remained the same or decreased more slowly. In Lexon's case, in addition to the direct benefit from its own sales if prices could be maintained, Lexon would enjoy higher revenues and profits from the supply of the Lexon/Medreich JV Product to Teva, through its profit share arrangement with Medreich.

(e) Actual and potential competition

King and Lexon

5.33 King and Lexon were both active in the supply of Nortriptyline Tablets in the UK throughout Relevant Period 1: both King and Lexon were supplying Nortriptyline Tablets to wholesalers and pharmacies in the UK. Accordingly, the CMA finds that they were actual competitors in the supply of Nortriptyline Tablets in the UK throughout the Relevant Period.

Alissa

5.34 Alissa was a potential competitor to both King and Lexon during the period of its participation in Relevant Period 1 because it had real, concrete possibilities of entering the market for the supply of Nortriptyline Tablets in the UK. Alissa had taken '*sufficient preparatory steps'* to demonstrate its '*firm intention and an inherent ability*' to do so. This is because, by the date of its first participation in the Information Exchange (2 March 2016), Alissa held an MA for both strengths of

[411] Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 154 lines 21-25.

Nortriptyline Tablets (obtained on 24 February 2016), and had a source of product in place through partnering with [Alissa's product development partner].[412] Nothwithstanding the fact that [Alissa's product development partner] encountered some technical difficulties and delays in its efforts to get the product to market, at no point during Relevant Period 1 did Alissa face insurmountable barriers to entry: Alissa had the ability to enter the market with sufficient speed to constrain the other market participants and, in fact, it started supplying Nortriptyline Tablets in the UK from November 2016 (see below). [413]

5.35 Having started to supply Nortriptyline Tablets in the UK from November 2016, Alissa was an actual competitor throughout Relevant Period 2 (see paragraph 3.55). Alissa supplied pharmaceutical wholesalers, and multiple retail pharmacy groups .[414]

Lexon's representations

5.36 Lexon submits that King and Lexon were not competitors in relation to the supply of Nortripyline Tablets, and certainly not '*hard-core competitors*.' Lexon asserts that it was active at a different level of the supply chain to King, on the basis that King supplies its products through wholesalers whereas Lexon is a '*large wholesaler*' supplying almost exclusively to pharmacies. Lexon also refers to its past vertical relationship King, pursuant to which King supplied Lexon with Nortriptyline Tablets.[415]

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[412] [Alissa's product development partner] is an [✂] company that develops pharmaceutical product dossiers which it subsequently out-licences. [Alissa's product development partner] developed a nortriptyline tablet product and partnered with Alissa which was responsible for the sales and marketing of the product in the UK. See also Document NOR-E4843, email from [Alissa Director] to [Employee of Alissa's Product Development Partner] dated 9 July 2013; Document NOR-E4848, email from [Employee of Alissa's Product Development Partner] to [Alissa Director] dated 16 August 2013 (Alissa and [Alissa's Product Development Partner] agreed to develop the product both in the UK and Ireland); Document NOR-E4910, email from [Alissa Director] to [Employee of Alissa's Product Development Partner] dated 7 October 2015; Document NOR-E4911, email from [Alissa Director] to [Employee of Alissa's Product Development Partner] dated 26 October 2015; Document NOR-E4955, email from [Alissa Director] to [Employee of Alissa's Product Development Partner] dated 18 March 2016, Document NOR-E4983, email from [Employee of Alissa's Product Development Partner] to [Alissa Director] dated 12 May 2016, Document NOR-E4983, email from [Employee of Alissa's Product Development Partner] to [Alissa Director] dated 13 May 2016, Document NOR-E4997, email from [Employee of Alissa's Product Development Partner] to [Alissa Director] dated 02 June 2016 and Document NOR-C1525, Profit Share\Revenue Agreement between Alissa and [Alissa's product development partner] dated 9 September 2016.

[413] See https:\\assets.publishing.service.gov.uk\government\uploads\system\uploads\attachment_data\file\506701\Monthly_new_MA_listing_Feb_2016__2_.pdf

[414] Document NOR-C1450, Annex 2 of Alissa's response to the CMA's section 26 dated 14 March 2018.

[415] Document NOR-C3224.2, Lexon's Written Representations, paragraphs 16 and 18.

5.37 In its oral representations, Lexon accepted that it was not the case that King and Lexon '*never compete*' or '*cannot be viewed as competitors in a meaningful way*'.[416] Rather, Lexon emphasised that it wore '*two hats*' and that its relationships with other companies are '*a bit more nuanced [because companies in this sector] have dual capacities going on all over the place*.'[417] Accordingly, Lexon asserted that there was no '*neat*' distinction between competitors and suppliers.[418]

5.38 The CMA accepts that Lexon's wider business was primarily that of a wholesaler and that King is not a wholesaler. In contrast to King, as a wholesaler Lexon had an in-house distribution network capable of distributing the product direct to pharmacies. Nevertheless, in relation to Nortriptyline Tablets during Relevant Period 1, the competitive dynamic between these two undertakings was unquestionably horizontal in nature, as explained below. Lexon's representations therefore do not call into question the CMA's findings that Lexon and King competed with each other in the supply of Nortriptyline Tablets in the UK throughout Relevant Period 1:

(a) Lexon is incorrect to claim that it and King supplied different levels of the market. King's sales during Relevant Period 1 were to both wholesalers and pharmacy chains in the UK.[419] Similarly, as illustrated in the table below, Lexon made sales to both wholesale and retail pharmacies throughout Relevant Period 1 (the pink highlighting shows the period during which Lexon participated in the Infringement). Whilst Lexon may have purchased Nortriptyline Tablets from King in the past, by the start of Relevant Period 1 it had stopped purchasing from King and instead entered the market with supplies of Medreich-liveried Lexon/Medreich JV product. It was therefore making sales to wholesalers and pharmacies and therefore was active at the same level of the market as King.

Lexon's revenues from sales of nortriptyline[420]

	Sales to Retail	Sales to Wholesale
Q1 2015	£201,483	£457,156
Q2 2015	£216,762	£731,211
Q3 2015	£186,352	£429,926
Q4 2015	£171,128	£75,879

[416] Transcript of Lexon's Oral Representations, page 29, lines 4-22.

[417] Transcript of Lexon's Oral Representations, page 28, lines 1-4 and page 30 lines 6-7.

[418] Transcript of Lexon's Oral Representations, pages 28, lines 19-23.

[419] See NOR-C0261.18, NOR-C0261.19, NOR-C0261.28, NOR-C0261.29, King's sales data provided in response to question 12 of the CMA's section 26 notice dated 20 October 2017

[420] See Documents NOR-C1460 (Lexon's sales of 25mg tablets by retail channel and wholesale channel), and Document NOR-C1461 (Lexon's sales of 10mg tablets by retail channel and wholesale channel), submitted by Lexon in response to the CMA's Section 26 notice dated 15 March 2015.

Q1 2016	£151,832	£75,263
Q2 2016	£119,135	£128
Q3 2016	£104,688	£12,556
Q4 2016	£92,691	£35,500

(b) Indeed, the competitive interaction between Lexon and the other players in the supply of Nortriptyline Tablets in the UK is confirmed by Lexon's own representations to the CMA. Lexon told the CMA that its conduct positively led to a decrease in the price of Nortriptyline Tablets through the launch of the Lexon/Medreich JV Product.[421] The fact that Lexon's entry constrained pricing in the market is fundamentally at odds with Lexon's submission that it did not compete with King.

(c) Any past vertical relationship between King and Lexon in relation to the supply of Nortriptyline Tablets is irrelevant to the question of whether they were actual competitors during the period of Lexon's participation in the Infringement (i.e. Relevant Period 1). The CMA assesses the position of the parties as competitors at the time of the Infringement.

5.39 For the reasons set out above, the CMA rejects Lexon's representations that Lexon and King were not actual competitors in the supply of Nortriptyline Tablets in the UK during Relevant Period 1.[422]

(f) Conclusion

5.40 The legal and economic context in which the Information Exchange took place was one in which the product in question (Nortriptyline Tablets) was homogenous in nature, with price as the key driver of competition; immediately before the Information Exchange the market was highly concentrated, competition was muted and prices had increased significantly; and the entry of the Lexon/Medreich JV Product and the potential entry of Alissa increased the intensity of competition and uncertainty in the market. This created opportunities for customers to 'play off' suppliers against one another putting downward pressure on prices. King, Lexon and Alissa were actual or potential competitors

[421] Document NOR-C3224.2, Lexon's Written Representations, paragraph 7: "*[…] Lexon and* [*Lexon Director] were responsible for instilling greater competition in the market and for prices decreasing by circa 40%.*"
[422] Alternatively, even if it were true that Lexon had suppled exclusively to pharmacy and King had supplied exclusively to wholesale, Lexon and King each had the ability to supply both wholesalers and pharmacies/pharmacy chains throughout the period of the Infringement (see the CMA's findings on market definition as set out at paragraph 4.7). Accordingly, they had the ability to enter the putative pharmacy and wholesale segments and therefore competed in this respect.

and they each stood to gain if prices remained the same or decreased more slowly.

E. The Information Exchange as a concerted practice

I. Legal framework: concerted practices for the purpose of the Chapter I prohibition/Article 101(1) TFEU[423]

5.41 A concerted practice is '*a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition*'.[424] The Court of Justice has added that '*by its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants*'.[425]

5.42 The concept of a concerted practice must be understood in light of the fundamental principle that '*each [undertaking] must determine independently the policy that it intends to adopt'* on the market, including the prices and commercial terms it offers to customers.[426] This requirement of independence '*does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors*' but it does '*strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors*'[427] or to disclose to them the course of conduct which they themselves have decided to adopt or contemplate adopting where '*the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of*

[423] With respect to the burden and standard of proof, see Section 5 (paragraphs 5.8 to 5.12) of this Decision.
[424] C-48\69 *ICI v Commission*, EU:C:1972:70, paragraph 64. See also C-8\08 *T-Mobile Netherlands and Others*, EU:C:2009:343 paragraph 26 and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 151.
[425] C-48\69 *ICI v Commission*, EU:C:1972:70 paragraph 65. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 151.
[426] See, e.g. C-40\73 *Suiker Unie v Commission*, EU:C:1975:174, paragraph 173.
[427] C-40\73 *Suiker Unie v Commission*, EU:C:1975:174 paragraph 174. See also C-8\08 *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 33; and *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(v).

the products or services offered, the size and number of the undertakings involved and the volume of that market'.[428]

5.43 As set out below a concerted practice requires that three criteria are fulfilled:

(a) contact which is accepted;

(b) subsequent conduct on the market; and

(c) a 'relationship of cause and effect' between the contact and the conduct on the market.

5.44 The General Court and Court of Justice (the '**European Courts'**) and the Competition Appeal Tribunal (CAT) have emphasised that in a properly functioning competitive market, competitors should not know how their competitors are likely to behave. A reduction in that uncertainty is a key part of the concept of a concerted practice.[429] This strict rule applies equally to potential competitors.[430]

5.45 The concept of concerted practice implies '*the existence of reciprocal contacts […] That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it*'.[431]

5.46 It is sufficient that the exchange of information '*reduces strategic uncertainty in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete*'.[432] Strategic information is

[428] C-172\80 *Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paragraph 14; C-49\92 *Commission v Anic Partecipazioni*, EU:C:1999:356 paragraph 117; and C-8\08 *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 33; Case C-286\13 *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184 (*Banana*s), paragraph 120.

[429] T-25\95 *Cimenteries CBR SA and Others v Commission of the European Communities,* EU:T:2000:77, paragraphs 1849 and 1852 and *Balmoral Tanks Limited v CMA* [2017] CAT 23 at paragraph 39.

[430] The Court of Justice in *Suiker Unie* stated at paragraph 173 that "***each economic operator** must determine independently the policy which he intends to adopt on the common market*" (emphasis added), the rule therefore clearly extends to potential competitors as well as actual competitors, C-40\73 *Suiker Unie v Commission*, EU:C:1975:174.

[431] T-25/95 *Cimenteries CBR SA and Others v Commission of the European Communities,* EU:T:2000:77, paragraph 1849

[432] See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ 2011 C 11\1, paragraph 61. See also Guidelines on the application of Article 81(3) of the Treaty OJ 2004 C 101/97, paragraph 15: '*co-ordination can take the form of … arrangements that influence the market conduct of at least one of the parties by causing a change in its incentives.*'

'*sensitive information from the point of view of competition which [is] capable of influencing directly the commercial strategy of the competitors or [is] capable of affecting normal competition.*'[433]

5.47 Information need not be confidential (in the sense that it is held subject to an obligation of non-disclosure) for it to be '*strategic*' or competitively sensitive. Information can be strategic or competitively sensitive if it is not readily accessible.[434] The General Court has previously found that, even where the information in question is notified to customers before being exchanged with a competitor, that fact does not imply that, at that time, the information was '*readily accessible'*. In that case, the General Court found that the '*organisation of the disputed meetings allowed the participants to become aware of that information more simply, rapidly and directly than they would from the market'*.[435]

5.48 An infringement can even occur where competitors discuss information which is publicly available or capable of being obtained from other sources. In *Bananas* it was found that '*even if information about various topics discussed could be obtained from other sources, […] the competitors' views about them, exchanged in bilateral discussions, could not'*.[436]

5.49 It is also not necessary to show that the information exchanged was accurate. What matters is whether the information is capable of influencing the conduct of undertakings on the market. As the General Court stated in *Smart Chips: 'the very disclosure of that type of information on future prices, whether correct or inaccurate, is capable of influencing the conduct of undertakings on the market.*[437]

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[433] C-98/17 P *Koninklijke Philips NV v Commission*, EU:C:2018:774, paragraph 37.

[434] See the discussion of 'non-public' information at paragraph 92 of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ 2011 C 11/1.

[435] Case T-202/98 etc, *Tate & Lyle and Ors v Commission*, EU:T:2001:185 (British Sugar), paragraph 60 and *Balmoral Tanks Limited v CMA* [2017] CAT 23 at paragraph 39. See also the Horizontal Guidelines, paragraph 92. Note, in *Balmoral* the appellant argued that customers commonly tell a supplier what price they have been quoted by competing suppliers, thus the exchange of such information was not capable of influencing the parties' conduct. The CAT rejected this submission, upholding the CMA's assessment that the meeting in question '*provided an opportunity for the parties to confirm their understanding of what prices were being charged for particular tanks directly from their competitors and, moreover, to gain a better understanding of what prices their competitors might charge in the future.*' *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraphs 121-122.

[436] T-588/08 *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:T:2013:130, paragraph 295. Judgment upheld on appeal: C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184

[437] T-762/14 *Koninklijke Philips NV v Commission*, EU:T:2016:738 (*Smart Chips*), paragraph 91 (upheld by the Court of Justice on appeal, C-98/17 P *Koninklijke Philips NV v Commission*, EU:C:2018:774).

5.50 A concerted practice '*implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two'*.[438] However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.[439]

5.51 In order to find a concerted practice, '*it is not therefore necessary to show that the competitor in question has formally undertaken… to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market… It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market*'.[440]

5.52 Further, the Court of Justice has made clear that '*subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period.*'[441]

5.53 When a company receives '*strategic data from a competitor (be it in a meeting, by mail, or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to review such data*.'[442] This presumption applies equally to potential competitors because a potential competitor cannot fail to take account of strategic information disclosed to it when preparing its entry. Accordingly,

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[438] C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 118.

[439] C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 124. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(xi).

[440] T-25\95 *Cimenteries CBR SA and Others v Commission of the European Communities,* EU:T:2000:77, paragraphs 1849 and 1852.

[441] C-199/92 P *Hüls v Commission*, EU:C:1999:358, paragraph 162 and C-49/92 *Commission v Anic Partecipazioni*, EU:C:1999:356 paragraph 84. See also C-373\14 P *Toshiba v Commission,* EU:C:2016:26, paragraph 71. The Court of Justice has also held that a concerted practice can arise as a result of a single meeting. See Case C-8/08 *T-Mobile Netherlands BV v Dutch Competition Authority*, EU:C:2009:343, paragraphs 59-61.

[442] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ 2011 C 11/1, paragraph 62; C-199/92 P *Hüls v Commission*, EU:C:1999:358 and C-49/92 *Commission v Anic Partecipazioni*, EU:C:1999:356. See also C-74/14 *Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42, paragraph 50.

'*conduct on the market*' includes conduct preparatory to selling in the market.

II. ***Assessment of the Information Exchange as a concerted practice***

(a) Summary

5.54 The CMA has found that the Parties participated in a concerted practice (or series of concerted practices) by which they knowingly substituted practical cooperation between them for the risks of competition. Specifically:

(a) King, Lexon and Alissa exchanged competitively sensitive strategic information on pricing,[443] volumes, timing of supplies and entry plans in relation to the supply of Nortriptyline Tablets in the UK (see paragraphs 5.56 to 5.97 and 5.104 to 5.105). The exchange of information reduced strategic uncertainty in the market and and was capable of influencing the Parties' conduct on the market.

(b) The Parties took account of the information exchanged with their competitors for the purposes of determining their conduct on the market (see paragraphs 5.98 to 5.103 and 5.106).

(the Information Exchange)

5.55 King, Lexon and Alissa participated in the Information Exchange at different times. The CMA has found as follows:

(a) King participated during the periods from 27 July 2015 to 27 May 2016 (Relevant Period 1) and from 5 December 2016 to 27 January 2017 (Relevant Period 2)[444];

(b) Alissa participated during the periods from 2 March 2016 to 27 May 2016 (part of Relevant Period 1) and from 5 December 2016 to 27 January 2017 (Relevant Period 2); and

(c) Lexon participated during the period from 27 July 2015 to 27 May 2016 (Relevant Period 1).

[443] Including the Parties' own prices or pricing strategy, pricing of the Lexon/Medreich JV Product (from both Medreichs and Teva), rival suppliers' prices and claims (including from customers) concerning rival suppliers' prices.
[444] Relevant Period 1 and Relevant Period 2 are together referred to as the Relevant Period.

(b) Reciprocal contact during Relevant Period 1

5.56 The CMA has found that King and Lexon exchanged strategic information throughout Relevant Period 1 (from 27 July 2015 to 27 May 2016). Alissa participated in the information exchange with King and Lexon from 2 March 2016 to 27 May 2016. This concerned pricing information (see paragraphs 5.59 to 5.615.82), volume information (see paragraphs 5.83 to 5.92) and information concerning new entry (see paragraphs 5.93 to 5.97) about the supply of Nortriptyline Tablets.

5.57 Each of the exchanges was '*reciprocal*'.[445] In some instances, the strategic information in question was requested by the recipient. In other cases, the competitor responded to the relevant disclosure, either by disclosing further strategic information or commenting on the strategic information that had been disclosed. Importantly, the recipient(s) of the disclosures never responded to those disclosures with a clear statement that it did not wish to receive the information in question.

5.58 The CMA's conclusion that '*strategic*' information was disclosed is explained below.[446]

Pricing information

5.59 The CMA has found that the Parties exchanged various types of competitively sensitive strategic pricing information during Relevant Period 1. The exchanged information concerned the price at which customers could or might be able to acquire Nortriptyline Tablets in the market, and assurances that the Parties would not compete intensely with each other on price. The exchanges took place against the relevant context set out at paragraph 5.29 above, in which customers would seek to '*play off*' potential suppliers against one another and '*bluff*' that they had alternative, more competitive, sources of supply. The information exchanged therefore significantly reduced the level of strategic uncertainty that each Party faced (concerning pricing available in the market) during negotiations with existing and prospective customers, compared to that which it would have faced if it had not exchanged the information and had engaged in independent decision making.

[445] See paragraph 5.53(a).
[446] See paragraph 5.46.

5.60 In consequence, the exchanges were capable of influencing the Parties' future decision making: in fact, the Parties cannot have failed to take those exchanges into account in their future price-setting decisions.

5.61 The specific exchanges of strategic pricing information to which the CMA objects and Lexon's detailed representations on those exchanges are set out below.

King's disclosures of specific pricing intentions

5.62 [King Director] disclosed to Lexon and Alissa information concerning his own pricing intentions, including current and future prices to certain specific customers (Alliance and Peak Pharmacy). This information included [King Director] intention not to match competitors' prices and the price levels he was proposing to discuss with Alliance:

(a) On 23 March 2016, [King Director] forwarded an email from [Consultant to King 1] to Lexon and Alissa. The email reported on negotiations with King's main customer, Alliance: *'[Alliance] have suspended orders it would seem as they want the teva price but I said no […] Do you want me to discuss the mid thirties price again.'*[447] [Lexon Director] told the CMA at interview that he understood this to mean that [Consultant to King 1] was asking [King Director] whether he should match the Teva price.[448]

(b) On 22 April 2016, [King Director] forwarded an email to [Alissa Director] containing a demand from Peak Pharmacy and Manor Drug to purchase specified quantities of 10mg packs at £32 per pack and specified quantities of 25mg packs at £29 per pack. In the covering email to [Alissa Director], [King Director] states: '*I have said no on pricing and said I plan to increase prices from 1st May*'.[449]

5.63 In the exchanges at paragraph 5.62 above, King disclosed information to Lexon and Alissa concerning its pricing intentions, including current and future prices to certain specific customers. Considering the non-public nature of such information, this is the most strategic form of information that can be exchanged.[450] These disclosures reduced the

[447] Document NOR-E5960, email from [Consultant to King 1] to [King Director] dated 22 March 2016.
[448] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 217, lines 11-13.
[449] Document NOR-E4065, email from [King Director] to [Alissa Director] dated 22 April 2016.
[450] The Horizontal Guidelines, paragraph 73 (see paragraph 5.43).

uncertainty that Lexon and Alissa faced regarding the prices at which customers could source Nortriptyline Tablets from King.

Lexon's disclosures of Medreich's pricing of the Lexon/Medreich JV Product to Teva and Teva's onwards sales prices

5.64 Lexon disclosed to King and Alissa information relating to the pricing of the Lexon/Medreich JV Product supplied by Medreich to Teva[451] and consequently also [Lexon Director] views on Teva's likely onward prices to customers:

(a) On 9 March 2016, an email sent by [King Director] to [Alissa Director] demonstrates that [Lexon Director] had revealed information about Teva's prices in a discussion with [King Director]. The email records that [Lexon Director] disputed the credibility of a claim made by Alliance[452] to King that it could obtain supplies from Teva at £28 per pack on both strengths:[453] '*Spoke to [Lexon Director] and he said to disregard [Consultant to King 1]'s note as it was complete bulls**t. … The problem appears to be Actavis not Teva/Medreich.*'[454]

(b) On 11 March 2016, in response to an email from [King Director] reporting a claim by Alliance that it could source Nortriptyline Tablets for £28 per pack (see paragraph 5.66(b) below), Lexon disclosed to King and Alissa an indication that Medreich's price to Teva was higher than this and noted that Teva would not have the volume to supply Alliance in any event: *'I have a minimum transfer price to Teva which also means that they would be selling at a loss [if they were selling at £28/pack for both strengths of pack] […] I cant stop you from matching fictitious prices but I think it is a crazy [sic] Teva would not even have the volume to supply Alliance as they don't get enough from me (since August I have supplied 55k*

[451] Lexon had access to this information by virtue of its Product Development and Profit Sharing Agreement with Medreich, pursuant to which Lexon and Medreich had agreed to share the profits from Medreich's supply of the Lexon\Medreich Product and via the monthly sales breakdown which it received from Teva in relation to this agreement. See Document NOR-E8259 and Document NOR-E8260.

[452] Walgreens Boots Alliance is a multinational wholesaler and distributor business. Alliance UniChem merged with the Boots Group in 2006 ('Alliance Boots'). Alliance Boots then merged with Walgreens in 2014.

[453] See paragraphs 3.124 and 3.125. Document NOR-E5953, email from [King Director] to [Alissa Director] dated 9 March 2016.

[454] See paragraph 3.124. [✂]. However, the accuracy of the information shared does not undermine the CMA's conclusions concerning the Infringement: see pargraph 5.66

10mg and 40k 25mg of which one batch of each was only delivered last week'.[455]

(c) On 25 April 2016, in response to an email from King, Lexon disclosed an indication that Teva was '*playing ball'* (i.e. that Teva's likely pricing for the Lexon/Medreich JV product was not '*between £34 and £32*' but higher than that). The body of the email forwarded by [King Director] to [Lexon Director] contains a report from Consultant to King 2] that Teva visited Peak Pharmacy and offered to supply nortriptyline at '*between £34 and £32'*. The email also revealed that this offer was below King's perception of the prevailing market price: *'Teva more than likely took the price from £38 to [the] low 30's, instead of offering more like the £37/£36 that we (or Alyssa) would have done in the same scenario.*'[456] In response to the comment in the cover email from [King Director] '*Looks like Teva are still playing silly pricing games*', [Lexon Director] stated, '*I have been receiving weekly average sales reports from Teva and they are certainly playing ball*'.[457]

(d) On 12 May 2016, [King Director][458] asked [Lexon Director] and [Alissa Director] whether an offer to supply McKeevers with Nortriptyline Tablets ('*I have the following prices for today only: / Nortriptyline Tabs 10mg (100) x 1064 @ £37.75 / Nortriptyline Tabs 25mg (100) x 532 @ £35.95'*) was '*from either of you / Teva*'.[459] [King Director] told the CMA that this request was an attempt to discover whether, '*these prices were representative in the market-place'*[460] and he had asked [Lexon Director] in particular '*Because, obviously, Lexon have access to certain Teva pricing information*'.[461] [Lexon Director] responded to [King Director] question '*That's Currentmyth / Not me / He gets stock out of AAH and Well [Bestway/Co-op]*'.[462] [Lexon Director] told the CMA that

[455] See paragraph 3.127. Document NOR-E5953, email from [Lexon Director] to [Alissa Director] and [King Director] dated 11 March 2016

[456] See paragraph 3.154. Document NOR-E1875, email from [Consultant to King 2] to [King Director] and [Consultant to King 3] dated 22 April 2016.

[457] See paragraph 3.156. Document NOR-E1878, email from [Lexon Director] to [King Director] dated 25 April 2016.

[458] The email was sent by [King Office Manager] on the instructions of [King Director] .

[459] Document NOR-E1906, email from [King Director], using his personal email address to [King Director] at business account dated 12 May 2016. Note that in his email, [Consultant to King 3] addresses '[first name of King Office Manager]'; therefore, it can be inferred that the exchange is between [King Director] and [King Office Manager] . Document NOR-E5256, email from [Lexon Director] to [King Director] dated 12 May 2016.

[460] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 250 lines 17-18.

[461] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 253 lines 4-5.

[462] Document NOR-E5256, email from [Lexon Director] to [King Director] dated 12 May 2016.

[King Director] was trying to identify whether Lexon was selling '*outside what [he] normally [did]*': *'I keep telling him "Look, it's not me, it's nothing to do with me", he constantly keeps disbelieving me that I'm doing something behind his back.*'[463]

5.65 In the exchanges at paragraph 5.64 above, Lexon disclosed to King and Alissa information relating to the pricing of the Lexon/Medreich JV Product supplied by Medreich to Teva[464] and consequently also [Lexon Director] views on Teva's likely onward prices to customers. Thus, the disclosures reduced the strategic uncertainty King and Alissa faced regarding their customers' ability to source Nortriptyline Tablets from Teva at reduced prices. Overall, Lexon's disclosures aimed to reassure King and Alissa that the competitive threat posed by Teva was limited. As such the disclosures were capable of influencing King and Alissa's conduct on the market with the consequences set out at paragraph 5.60 above.

Lexon's representations

5.66 Lexon submitted that there was no disclosure of strategic information in the exchanges cited above:

(a) With regard to the exchange on 9 March 2016 (see paragraph 5.64(a)) Lexon submitted that the information (i.e. '*Spoke to* [Lexon Director] *and he said to disregard* [Consultant to King 1]*'s note as it was complete bulls**t.'*), provided '*nothing*' about Teva's prices save to doubt the credibility of information provided by [Consultant to King 1]. Lexon submitted that it had no knowledge of Teva's pricing save that which was published in its monthly price lists and quarterly reports to Lexon.[465]

(b) With regard to the exchange on 11 March 2016 (see paragraph 5.64(b)) Lexon submitted that the information it provided (i.e. *'I have a minimum transfer price to Teva which also means they would be selling at a loss* [if they were selling at £28/pack for both strengths of pack] […] *I can't stop you matching ficticious prices but*

[463] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, pages 250-251 lines 22-7.

[464] Lexon had access to this information by virtue of its Product Development and Profit Sharing Agreement with Medreich, pursuant to which Lexon and Medreich had agreed to share the profits from Medreich's supply of the Lexon\Medreich Product and via the monthly sales breakdown which it received from Teva in relation to this agreement. See Document NOR-E8259 and Document NOR-E8260.

[465] Document NOR-C3224.3, [Lexon Director] Witness Statement, paragraph 84 submitted with Lexon's Written Represenations

I think it is a crazy'), was incorrect as the true price of supply to Teva was lower than £28 per pack.[466] Further, Lexon submitted that it had no knowledge of Teva's actual offers to Alliance, or whether Teva made any offer to Alliance at all.[467]

(c) With regard to the exchange on 25 April 2016 (see paragraph 5.64(c)) Lexon accepted that [Lexon Director] statement (i.e. that Teva was '*playing ball*') meant that '*Teva were not undermining the market by selling at very low prices*' but stated that this was merely '*an expression of opinion […] based on information which would have been generally available in the market.*'[468] Lexon expanded upon this submission in its Oral Representations, submitting that this did not amount to a disclosure of strategic information: '*All [Lexon] says is, "I think they are playing ball and they are not trashing the market" […], if you are accused of trashing the market and you say I am not - and actually I am not because you can see I am not if by reference to publicly-available data - I do not actually see that puts this into an object box'.*[469]

(d) With regard to the exchange on 12 May 2016 (see paragraph 5.64(d)) Lexon submitted that its response (i.e. confirming that Lexon / Teva was not the source underlying McKeevers' offer of supply at £37.75 for 10mg packs and £35.95 for 25mg packs), contained no pricing information about Teva or Medreich's sales.[470]

5.67 As set out at paragraph 5.65 above, each of Lexon's disclosures referred to above aimed at reassuring King that Teva was not pricing aggressively to take market share (and that the supply price of the Lexon/Medreich JV Product to Teva would make it difficult for Teva to compete aggressively on price). In some cases, the information disclosed by Lexon revealed its own competitive position (by virtue of its role in the Lexon/Medreich JV and in the terms of supply for the

[466] In fact, the transfer prices to Teva were £16.20 and £27 for packs of 10mg and 25mg tablets, respectively. See Document NOR-C0285: Own Label Supply and Distribution Agreement between Teva UK Limited and Medreich PLC.
[467] Document NOR-C3224.3, [Lexon Director] Witness Statement, paragraphs 69 and 85 submitted with Lexon's Written Representaions.
[468] Document NOR-C3224.3, [Lexon Director] Witness Statement, paragraph 76 submitted with Lexon's Written Representations
[469] Document NOR-C3226.1, Transcript of the Oral Hearing with Lexon on 29 November 2019, page 44 line 12-21.
[470] Document NOR-C3224.3, [Lexon Director] Witness Statement, paragraph 78 submitted with Lexon's Written Representations.

Lexon/Medreich JV Product to Teva). In other cases, the information disclosed by Lexon revealed Teva's competitive position, based on the knowledge that Lexon had about the terms upon which Teva was supplied with the Lexon/Medreich JV Product. In both cases, the disclosed information was not public nor was it readily available to King,[471] and its disclosure aimed at reassuring King that the competitive threat posed by Teva was limited. As such, the disclosures reduced the degree of strategic uncertainty over the terms of supply of the Lexon/Medreich JV Product available in the market and were capable of influencing King's conduct in supplying the market with the consequence set out at paragraph 5.60 above. Lexon's submissions to the contrary do not call this conclusion into question. The CMA also concludes the following in relation to Lexon's specific representations:

(a) ***Inaccuracy*** (representation at 5.66(b))**:** the fact that certain of the pricing information that Lexon disclosed to King may have been inaccurate (e.g. the fact that the Transfer Price to Teva was actually lower than £28 per pack) does not mean that the disclosure was not *'strategic'* in nature.[472] The disclosure of this information was capable of influencing King's conduct[473] and, indeed, was aimed at doing so ('*I can't stop you matching ficticious prices but I think it is a crazy'*). In its negotiations with Alliance, King faced uncertainty as to the competitive threat posed by Teva. Lexon disclosed to King information regarding constraints on Teva's pricing ability. This reduced King's uncertainty and was capable of influencing King's conduct in those negotiations.

(b) ***Level of detail*** (representations at 5.66(a) to 5.66(d)): the level of detail of the disclosures made by Lexon was sufficient for them to influence King's conduct on the market, accordingly the disclosures were *'strategic'* in nature. The message which Lexon sought to convey to King in each of the instances above was that Teva/Medreich was not undermining prices on the market, and that King therefore did not need to lower its own prices. Lexon did not need to provide King precise figures to achieve this objective. Thus, Lexon's indications to King that the information that it had received was '*bulls**t*' or '*ficticious*' and indications that Teva was still '*playing ball'* and that McKeevers' low prices did not originate

[471] Lexon had access to information about Teva's volumes, cost of supply and past pricing and sales data through the Joint Venture sales of the product to Teva.
[472] It is the capacity of the disclosed information to influence the conduct of undertakings on the market which is relevant to the determine whether information is 'strategic' in nature- see case law cited at paragraph 5.45 above.
[473] King regarded Lexon as a credible source of information, see paragraph 5.66(c) below.

from Teva, all reduced strategic uncertainty and were capable of influencing King's conduct on the market.

(c) ***Opinion / readily available information*** (representation at 5.66(a) and 5.66(c)): the fact that Lexon did not know Teva's precise selling prices does not undermine the finding that these disclosures were '*strategic*' in nature. King regarded the information it received from Lexon as credible and not merely readily available public information.[474] Indeed, case law establishes that competitors' views about public domain information is not itself readily available information because these views cannot be obtained from other sources.[475] [Lexon Director] sought to present himself as an authoritative source of information on the subject by referring to the '*minimum transfer price*' to Teva (which King could not verify itself), by referring to '*weekly average sales reports from Teva'* which he had received (and which King did not know were in fact monthly in arrears) and by suggesting he had spoken directly with Teva about the matter.[476] Accordingly, Lexon went well beyond merely drawing King's attention to readily accessible public information. Lexon's disclosures of its strategic insights were capable of influencing King's conduct on the market. Similarly, by informing King that Currentmyth (not Teva) was the source of certain prices in the market (5.66(d)), Lexon made that information available to King '*more simply, rapidly and directly*' than it would have done from the market and eliminated (or reduced) any doubt King may have had regarding Teva's pricing.[477] The information disclosed cannot therefore be considered '*readily available public information*', as Lexon contends.

(d) '***Trashing the market***' **/ non-specific statements** (representation at 5.66(c)): With regard specifically to Lexon's statement on 25 April 2016 that Teva was '*playing ball*', the CMA does not agree with Lexon's submission that this was a response to a general assertion by King that Lexon was '*trashing the market'* and that the reply was merely a reference to readily available, public information. As is clear from paragraph 5.64(c) above, King made a

[474] [King Director] told the CMA at interview that he had asked [Lexon Director] about Teva sales, '*Because, obviously, Lexon have access to certain Teva pricing information*'. Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 253 lines 4-5.

[475] In *Dole* discussions between competitors covered a number of topics including weather conditions: see case law cited at paragraph 5.47 above.

[476] See paragraph 3.127(b) above: '*I have just got off the phone to [Employee of Teva] and he claims not to have even spoken to [Employee of Bestway\Co-op] , Bestway\Co-op] yesterday* […]'

[477] See cases cited in paragraph 5.46 above.

specific allegation that Teva was pricing to Peak Pharmacy in the range of £32 to £34, rather than the prevailing market price of around £38. Lexon denied that allegation specifically and did so by reference to its own non-public knowledge based on its unique position as a member of the Lexon/Medreich JV which was supplying Teva: '*I have been receiving weekly average sales reports from Teva and they are certainly playing ball.*' Lexon went well beyond merely referring King to readily available public information, such as a link to Teva's price list on its website.

(e) ***Unsolicited contact ('pestering')***: In its Written Representations, Lexon described the contacts from King as '*pestering*' and it emphasised that '*King wanted the information, not Lexon*.'[478] The CMA accepts that the instances of contact set out in this section were all inititiated by King. However, Lexon nonetheless disclosed strategic information in response. The fact that King may have triggered this disclosure is irrelevant. In any event, the CMA does not accept that the contact between King and Lexon amounted to mere pestering. [Lexon Director] actively responded to [King Director], he gave [King Director] the impression that he could speak authoratitively about the matters [King Director] raised and – as Lexon's Written Representations acknowledge – he took it upon himself to assist King by '*correcting an incorrect impression on King's part.*'[479] Moreover, as set out at paragraph 5.32 above, Lexon stood to benefit from these exchanges with King, since it could gain higher profits if King refrained from competing strongly on price.

The Parties' disclosures of rival suppliers' pricing, terms of parallel import supply and general market pricing

5.68 King disclosed to Lexon and Alissa purported details of rival suppliers' pricing, which it had received through bilateral discussions with its customers:

(a) On 9 March 2016, [King Director] forwarded an email he had received from [Consultant to King 1] to Lexon and Alissa setting out:[480]

[478] Document NOR-C3224.2, Lexon's Written Representations paragraph 13.
[479] Document NOR-C3224.2, Lexon's Written Representations, paragraph 13, 9
[480] See paragraph 3.119 Document NOR-E5936, email from [Consultant to King 1] to [King Director] dated 8 March 2016

(i) The prices at which Bestway/Co-op[481] claimed to be able to obtain supplies of the Lexon/Medreich JV Product from Teva and Medreich: ('*Teva Pricing:- / 10mg - [£]29 / 25mg - [£]38 / Medreich Pricing / 10mg [£]30 / 25mg - [£]40*');

(ii) A claim by AAH that Actavis had matched the prices set out above: '*Actavis have matched the pricing from ourselves [i.e. King], but also what Teva have also offered to them*'; and

(iii) A claim by Alliance that Teva had offered to supply the Lexon/Medreich JV Product at £28 per pack for both strengths of tablet: '*Teva have today approached Alliance with a price, as they want to secure orders for their own livery stock from Medreich. / 10mg – [£]28 / 25mg – [£]28*'.[482]

(b) On 11 March 2016, [King Director] sent an email to Lexon and Alissa that recorded details of a conversation he had had with [Consultant to King 1].[483] The email reported in particular:

(i) That whilst visiting a buyer at Bestway/Co-op, [Consultant to King 1] had apparently witnessed a call (on speakerphone) between the buyer at Bestway/Co-op and a seller at Teva.[484] During that call the Teva seller *'confirmed the offer prices [to Bestway/Co-op] of £29 for the 10mg and £38 for the 25mg and said he was willing to go down in price if volumes increased*';

(ii) Information that Sigma[485] had been offered the same prices as Bestway/Co-op;

(iii) A claim made by Alliance that Teva had offered to supply the Lexon/Medreich JV Product at £28 per pack for both strengths of tablet: ' [Employee of Alliance] *called [Consultant to King 1] and confirmed Teva's offer price of £28 per pack for both presentations for the whole of the Alliance Unichem business.*'

(c) On 4 May 2016, [King Director] emailed [Alissa Director] to report on King's negotiations with Bestway/Co-op: '*Feedback from Well*

[481] Bestway\Co-op is a chain of independent UK pharmacies. The Co-Operative Group's pharmacy business was acquired by the Bestway Group in July 2014.
[482] [Lexon Director] disputed the credibility of this claim: see paragraph 5.63(a) above.
[483] See paragraph 3.127. Document NOR-E5953, email from [King Director] to [Lexon Director] and [Alissa Director] dated 11 March 2016
[484] The email does not explicitly state whether or not the seller at Teva was aware that [Consultant to King 1] was listening to the conversation. From the context it appears that the seller at Teva was unaware.
[485] Sigma is an independent pharmacy wholesaler in the UK.

[Bestway/Co-op] is that Teva have increased their supply price to £40 for the 10mg and £38 for the 25mg'.[486] [King Director] told the CMA that he had shared the information with [Alissa Director] because: '*it's the way that we've been sharing information since [the Landmark Hotel Meeting] to do with…prices within the market-place*'.[487]

(d) On 23 May 2016, [King Director] forwarded an email he had received from [Consultant to King 2] to [Lexon Director] and [Alissa Director]. The email set out a claim by a buyer at [Wholesaler A] ([employee of Wholesaler A]) regarding the prices [Wholesaler A] received for Nortriptyline Tablets: *'[Wholesaler A] is currently paying £22.80 on both strengths, from Actavis*'.[488] [Lexon Director] responded '*Never believe what [Employee of Wholesaler A] says*'.[489]

(e) On 27 May 2016, [King Director] sent an email to [Lexon Director] and [Alissa Director] with a table which sought to calculate the prices at which Actavis was supplying the market via [Wholesaler A] and Alliance: *'£28.66 (Av Price) / This is what Actavis are offering through [Wholesaler A] and Alliance on their scheme. The average price explains the offer prices that [Wholesaler A] have quoted to Neon*.' The CMA infers that the reference to the '*offer prices that [Wholesaler A] have quoted to Neon*' relates to the *'£22.80'* quotes set out in [King Director] email of 23 May 2016 (see (d) above).

5.69 Lexon also disclosed to King details of an offer of supply of parallel imported Nortriptyline Tablets which had been made directly to it. On 21 December 2015, [Lexon Director] emailed [King Director] regarding parallel imports available from Spain and [King Director] requested further details. In response, [Lexon Director] disclosed to King strategic information relating to the prices and quantities it had been offered for parallel imports of Nortriptyline Tablets from Spain ('*6,000x25 / They quoted 9 euro per 25 but are prepared to negotiate depending on*

[486] See paragraph 3.167. Document NOR-E6035, email from [King Director] to [Alissa Director] dated 4 May 2016.
[487]Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 247 lines 2-3.
[488] See paragraph 3.175 Document NOR-E6056, email from [Consultant to King 3] to [King Director], [King Office Manager] and [Consultant to King 2] dated 23 May 2016.
[489] See paragraph 3.176 Document NOR-E6056, email from [Lexon Director] to [King Director] and [Alissa Director] dated 23 May 2016

volume').[490] Lexon submitted that this disclosure was non-confidential, publicly available information which was provided to [King Director] '*to help him better understand the market*'. Lexon contended that the offer would have been '*generally known in the market*'. The CMA rejects these submissions for the same reasons as those set out at paragraph 5.67(c) above: Lexon made the information available to King more simply, rapidly and directly than would otherwise have been the case.[491]

5.70 Alissa disclosed its understanding of market pricing in response to King's emails set out at paragraph 5.68 above:

(a) On 9 March 2016, Alissa disclosed to King and Lexon detailed feedback from two unidentified customers concerning pricing in the market and availability of parallel imports: '*I […] felt compelled to respond. Prices quoted seem ridiculously low especially the 10mg which I understood was circa £38 - £40 in groups and as high as £50 in some short liners. I was aware that PI was £20 per 2 x 50 pack size however the two customers I have had discussions with both confirm limited availability*.'

(b) On 22 April 2016, Alissa disclosed to King its understanding of the price at which Peak Pharmacy[492] was able to obtain supplies: '*We understood that they [Peak Pharmacy] were paying £38 on both strengths*'. [493]

5.71 In the exchanges at paragraphs 5.68 to 5.70 above, King disclosed to Lexon and Alissa purported details of rival suppliers' pricing, which it had received through bilateral discussions with its customers (see paragraph 5.68) and, on certain occasions, Alissa and Lexon commented on the credibility of those claims (see paragraphs 5.68(d) and 5.70); similarly, on one occasion Lexon disclosed to King details of an offer of supply of parallel imported nortriptyline which had been made directly to it (see paragraph 5.69) and Alissa disclosed its understanding of market pricing (including for parallel imports) (see paragraph 5.70). In each case, the disclosing party made the disclosed information available to recipients '*more simply, rapidly and directly*'

[490] See paragraph 3.107. Document NOR-E8253, email from [Lexon Director] to [King Director] dated 21 December 2015.
[491] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 66 submitted with Lexon's Written Represenations
[492] Peak Pharmacy is a chain of pharmacies in the UK.
[493] See paragraph 3.152. Document NOR-E1871, email from [Alissa Director] to [King Director] dated 22 April 2016.

than it was available from the market[494] and fostered a sense of mutual cooperation between the Parties. These disclosures therefore allowed the Parties to reduce uncertainty regarding the available prices for Nortriptyline Tablets. The disclosures also reduced uncertainty regarding the credibility of claims made by customers about the availability of alternative (cheaper) supplies, thereby reducing uncertainty as to the prices that the Parties would need to charge in order to retain or win business. The contacts also provided the Parties the opportunity to confirm their understanding of what prices were being offered directly from their competitors. This information would not be readily available in other ways.[495] As such, the disclosures were capable of influencing the Parties' conduct in the market with the consequence set out at paragraph 5.60 above.

The Parties' disclosures / reassurances concerning pricing strategy

5.72 Lexon, King and Alissa each disclosed information relating to their pricing strategy; namely their intention to avoid intense price competition.

5.73 On 9 March 2016, [Alissa Director] disclosed to King and Lexon his desire to avoid a pricing '*free for a*ll'.[496] This disclosure reduced uncertainty as to Alissa's likely future conduct on the market, by providing a reassurance that Alissa did not intend to price aggressively to take market share. As such, the disclosure was capable of influencing the Parties' conduct in the market with the consequence set out at paragraph 5.60 above.

5.74 On 23 March 2016, at 12pm, [Lexon Director], [King Director] and [Alissa Director] met at the Landmark Hotel in London (the Landmark Hotel Meeting). No agenda was prepared for the meeting, nor were any notes taken by the participants. Nevertheless, for the reasons that follow, the CMA infers that at the Landmark Hotel Meeting (and via the emails sent immediately before and after the meeting), the Parties each disclosed information relating to their pricing strategy: namely their intention to avoid intense price competition (see paragraphs 5.75 to 5.77 below). These disclosures reduced uncertainty as to their likely future conduct on the market, by providing reassurance that the disclosing party did not intend to price aggressively to take market

[494] See cases cited in paragraph 5.45 above.
[495] See paragraph 5.39 above.
[496] See paragraph 3.122. Document NOR-E5943, email from [Alissa Director] to [King Director] dated 9 March 2016.

share (or, in the case of Lexon, that the terms upon which the Lexon/Medreich JV Product was supplied to Teva would not allow Teva to price aggressively). As such, the disclosures through the emails and orally at the Landmark Hotel Meeting were capable of influencing the Parties' conduct in the market with the consequence set out at paragraph 5.60 above.

5.75 The witness evidence relating to the Landmark Hotel Meeting was as follows:

(a) At interview, [King Director] told the CMA that his intention in arranging the Landmark Hotel Meeting had been to discuss *'market dynamics and what's gonna happen in the future'*[497] with the advent of new entry, including the impact of entry on supply prices. [King Director] said that the discussion was high level ('*we talked in general terms about volumes*') rather than including detail about specific customers,[498] and long term in nature (*'[Alissa Director] said he thought it would be down to £5 a pack […] by the end of 2017*').[499]

(b) [Alissa Director] told the CMA at interview that, during the Landmark Hotel Meeting, he (and [Lexon Director]) had been '*pumped for information*' by [King Director]. In particular, he said that [King Director] wanted to know when '*[Alissa] would launch and who* [Alissa] *intend to sell to… He wanted to know when, he definitely wanted to know when I would be entering the market*'.[500] [Alissa Director] denied he had responded meaningfully to [King Director] questions: '*I passed on them really, because quite honestly I didn't know when the stock was coming out of india and the last thing I want to do, is actually give him a clue… if a competitor knows that you're coming, they will try to defend their business.*'

(c) [Lexon Director] told the CMA at interview that, during the Landmark Hotel Meeting:

(i) [King Director] suggested that Lexon was reducing prices: '*it's just a constant barrage from him [King Director], because he seemed to be thinking I was going here, there and everywhere,*

[497]Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 179, lines 5 and 6.
[498] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 182, line 17.
[499] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 180, lines 7-8
[500] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 76 lines 22-27.

undermining him and selling stock everywhere and reducing the market price.'[501]

(ii) He ([Lexon Director]) confirmed that his commercial strategy in the marketplace had not changed: *'Look guys you know who I sell to, there's no difference. Business as usual from me in so much that my strategy hasn't changed at all … I've not supplied any other person apart from supplying as I sell at the moment… I was just telling it again, yet another person reiterated what my commercial strategy was in the market place. They could then go and choose and do what they wanted to as far as I was concerned.'*[502]

(iii) [King Director] '*wanted to speak to [Alissa Director] about Nortriptyline and what his aspirations were.'*[503]

(iv) [Alissa Director] sought to reassure King and Lexon that he was not intending to destabilise prices: *'What [Alissa Director] [is] gonna try to do is to say "Well look, I've got a licence, I need a market share, I need to - I've spent a lot of money on developing this product. You know I'm not out to - to ruin the market price", you know and again that would have been the nature of the conversation'*. [504]

5.76 All three witnesses are clear that [King Director] purpose in arranging the Landmark Hotel Meeting was to find out more about his competitors' activities. Although [Alissa Director] told the CMA that he had not in fact provided the information sought (see paragraph (b) above) and [King Director] told the CMA that the discussion was only high level and long term in nature (see paragraph (a)), the CMA considers these explanations to be implausible. As noted by the CAT in *Balmoral*, '*it is hard to think of any legitimate reason why competitors should sit together and discuss prices at all*.'[505] Moreover, these accounts conflict with the account of [Lexon Director], who makes clear that pricing strategy (namely their intention to avoid intense price competition) was discussed (see paragraphs 5.75(c)(ii) and (iv) above).

[501] Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 31 lines 9-12.
[502] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 172 lines 18-20, page 173, lines 1-3 and lines 20-23.
[503] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 172 lines 2-3.
[504] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 180, lines 8-12.
[505] *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 41. See also paragraph 5.9 above.

5.77 The contemporaneous documents also strongly suggest that the Parties' pricing strategies were discussed at the Landmark Hotel Meeting in line with the evidence of [Lexon Director]:

(a) There were two emails sent on the day of the Landmark Hotel Meeting:

(i) Immediately before the Landmark Hotel Meeting, [King Director] forwarded an exchange of emails he had had with [Consultant to King 1] to [Alissa Director] and [Lexon Director]. The forwarded emails concerned competition King faced from Teva in its ongoing negotiations with Alliance, and by forwarding the exchange [King Director] disclosed the prices that King was contemplating offering to Alliance ([Consultant to King 1] asks [King Director] if he should '*discuss the mid thirties price again*'). From his covering email to [Lexon Director] and [Alissa Director], it is clear that [King Director] intended that the content of the forwarded email would be discussed at the Landmark Hotel Meeting:

'See below for info.

Looking forward to meeting up later on today.

[King Director]'.[506]

(ii) Immediately after the Landmark Hotel Meeting, [Lexon Director] sent [King Director] and [Alissa Director] an email[507] containing a screenshot showing March 2016 pricing for 25mg tablets drawn from the subscription service Wavedata[508] (a service to which King did not subscribe).[509] This screenshot set out the prices at which Lexon was selling the Lexon/Medreich JV Product. [Lexon Director] told the CMA in interview that the purpose of sharing the data on Lexon's pricing retrieved from Wavedata was to substantiate the reassurance he had provided to [King Director] and [Alissa Director] that he was not reducing prices and that he was '*not undermining [King*

[506] Document NOR-E5960, email from [Consultant to King 1] to [King Director] dated 22 March 2016.
[507] Document NOR-E1811, email from [Lexon Director] to [Alissa Director] and [King Director] of 23 March 2016.
[508] Wavedata is an independent source of pricing information in the UK marketplace. It provides data such as the lowest, highest and average pricing of pharmaceutical products which can be purchased in the UK marketplace. Data is provided on a monthly or weekly basis and the pricing data is distributed by individual product or the data can be accessed via Wavedata's website for a fee. See Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 42.
[509] Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 43, line 25.

Director] and selling stock everywhere and reducing the market price. I wasn't.'[510] In providing this reassurance, [Lexon Director] disclosed his intention to avoid intense price competition.

(b) On 20 April 2016, around four weeks after the Landmark Hotel Meeting, [King Director] sent an email to [Consultant to King 2] indicating that he had knowledge that Alissa was about to launch in May 2016 and that Alissa '*did not plan to disrupt the pricing*'.[511] Whilst this email does not state when or how [King Director] learned of Alissa's plan not to disrupt pricing, the email is consistent with [Lexon Director] interview evidence that [Alissa Director] had reassured [King Director] at the Landmark Hotel Meeting that Alissa would not engage in intense price competition on entry. Based on the evidence cited at paragraphs 5.75 to 5.77 above, the CMA considers that there is ample support to justify its inference that the Parties each made disclosures to one another of their pricing strategy (namely their intention to avoid intense price competition) at the Landmark Hotel Meeting.

5.78 As set out at paragraphs 5.93 and 5.95(c) below, the CMA also finds that Alissa disclosed strategic information concerning its planned entry during the Landmark Hotel Meeting.

5.79 In any event, the CMA finds that the two emails referred to at paragraph 5.77 above constituted disclosures of strategic information in and of themselves which reduced strategic uncertainty regarding pricing on the market and which were capable of influencing the recipients' conduct on the market with the consequence set out at paragraph 5.60 above:

(a) The email King sent before the Landmark Hotel Meeting revealed King's current negotiating position vis-à-vis Alliance. This was commercially sensitive information regarding future pricing which was not otherwise available to the recipients (see paragraphs 5.62(a), 5.63 and 5.77 above).

(b) The email Lexon sent after the Landmark Hotel Meeting revealed to King information from the market of which it was not aware (see paragraph 5.77(a)(ii). The CMA notes that, even if King could have learned the prices that Lexon had charged its customers revealed in the screenshot (either by purchasing a subscription from

[510] Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 31, lines 7-12.
[511] Document NOR-E1867, email from [King Director] to [Consultant to King 3] dated 20 April 2016.

Wavedata or by seeking out the information from customers itself), the General Court has observed that sharing pricing quotations directly with a competitor makes that information available to the competitor more '*simply, rapidly and directly*' than it would be on the market, it therefore is not '*readily available*'.[512] [King Director] had no subscription to Wavedata, accordingly by sharing the screenshot with [King Director], Lexon reduced uncertainty on the market for King and fostered a climate of mutual certainty regarding future prices on the market. Indeed, [Lexon Director] told the CMA during his Oral Representations that the purpose of this disclosure was to furnish [King Director] with more accuarate information than he had at his disposal.[513]

Lexon's representations

5.80 Lexon submitted that it did not disclose any strategic information at the Landmark Hotel Meeting. [Lexon Director] told the CMA in his Witness Statement that:

(a) He agreed to attend the Landmark Hotel Meeting because it was an opportunity to meet [King Director] whom he had not met before and he thought '*it would be useful to meet him*.[514] In an email sent in the run up to the meeting, he had requested that [Consultant to King 1] attend the meeting because '*I wanted to challenge him on the misleading information he was providing to [King Director]'.*[515] [Lexon Director] stated that he was '*annoyed*' because *[Consultant to King 1]* and [King Director] '*were persisting in their claim that I was destabilising the market through Medreich and/or Teva in selling the Product at unsustainably low prices.*'[516]

(b) During the meeting [King Director] was attempting to '*pump*' [Lexon Director] and [Alissa Director] for information. However, [Lexon

[512] T-202/98 etc, *Tate & Lyle and Ors v Commission*, EU:T:2001:185 paragraph 60. See also the Horizontal Guidelines, paragraph 92.
[513] Document NOR-C3226.1, Transcript of the Oral Hearing with Lexon on 29 November 2019, page 43: '*Am I not simply responding to an allegation that you are selling, you are doing this or this is what is being done and I am saying, "Look, I am not". That genuinely is what I was -- that is what I was trying to achieve, I was being accused and I am saying, "Look, you have got your information and the person that is feeding you that information was giving you inaccurate information"*.'
[514] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 67, submitted with Lexon's Written Representations
[515] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 73, submitted with Lexon's Written Representations
[516] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 69, submitted with Lexon's Written Representations

Director] stated that he '*did not provide information as to Lexon's sales or Teva's sales*'. Rather, [King Director] '*only got public and non-strategic information from me.*'[517]

(c) After the meeting, [Lexon Director] sent [King Director] and [Alissa Director] the Wavedata image '*simply to demonstrate what the current market price was.*' In Lexon's submission, this demonstrated that the participants '*only talked about public non-strategic information*.' This Wavedata information was '*readily available for a modest subscription.'* Further, although [Lexon Director] had the ability to provide non-public Lexon information, he had not done so.[518]

5.81 Notwithstanding Lexon's submissions to the contrary, the CMA concludes, for the following reasons, that [Lexon Director] must have at least disclosed to [King Director] and [Alissa Director] its intention to avoid intense price competition at the Landmark Hotel Meeting:

(a) [Lexon Director] own evidence in his Witness Statement is that he wished to deny allegations that Lexon was '*destabilising*' the market. [Lexon Director] told the CMA that he wanted to challenge [Consultant to King 1] because the information that [Consultant to King 1] had been providing to [King Director] was misleading, as [Consultant to King 1] was claiming that Lexon was responsible for destabilising the market. It is difficult to understand how he could have set about achieving this aim without disclosing information regarding Lexon's strategy on the market.

(b) [Lexon Director] provides no positive explanation of what was discussed, only the vague statement that '*the state of the industry in general and the market for Nortriptyline*'. Moreover, his Witness Statement evidence does not seek to qualify, amend or refute his earlier statement at interview that he assured the other participants that it was '*[b]usiness as usual from me in so much that my strategy hasn't changed at all*' (see paragraph 5.75(c) above). His statement at interview is in line with the contemporaneous documentary evidence, which showed that King had arranged the meeting to discuss his ongoing negotiation with Alliance (see paragraph 5.77(a)(i) above).

[517] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraphs 74, 92 and 93, submitted with Lexon's Written Representations

[518] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraphs 74 and 91, submitted with Lexon's Written Representations

(c) The CMA does not accept that the fact that [Lexon Director] shared a screenshot of Wavedata after the meeting demonstrates that the participants discussed only readily available public information. As set out at paragraph 5.77(a)(ii) above, [Lexon Director] purpose in sending this screenshot was to lend credibility to his claim that he did not wish to destabilise prices by reference to incontrovertible data in the face of claims to the contrary made by King. The significance of this disclosure was not simply the figures from Wavedata themselves but the indication (whether or not it was true) that Lexon was not intending to push prices down. [King Director] had arranged the Landmark Hotel Meeting against the background of his ongoing negotiations with Alliance and the information he had received from [Consultant to King 1] that Teva was undercutting King's prices. Accordingly, it is clear that a disclosure of this nature in these circumstances was liable to affect King's conduct on the market.

(d) Moreover, it is clear from his Witness Statement that [Lexon Director] fails to appreciate that informing his competitors that he did not intend to change his commercial strategy was itself a disclosure of strategic information, since such a statement was capable of influencing his competitors' conduct on the market. Accordingly, his statement that [King Director] '*got only public and non-strategic information from me*' is not reliable.

5.82 In any event, the CMA has found that Lexon received and accepted strategic information disclosed by the other Parties (see paragraphs 5.75(c)(iv) and 5.79(a) above). None of the interview evidence (nor [Lexon Director] Witness Statement) indicate that he made any attempt to distance himself from this topic of conversation. Accordingly, Lexon can be presumed to have accepted the information and participated in the concerted practice at the Landmark Hotel Meeting.[519]

Volumes and timing of supplies

5.83 The CMA has found that the Parties exchanged competitively sensitive strategic information concerning volumes and timing of supplies during Relevant Period 1. Given the relevant context set out at paragraph 5.40, the information exchanged significantly reduced the level of

[519] As noted by the CAT in the *Replica Football Kits* case: '*The fact of having attended a private meeting at which prices were discussed and pricing intentions disclosed, even unilaterally, is in itself a breach of the Chapter I prohibition, which strictly precludes any direct or indirect contact between competitors having, as its object or effect, either to influence future conduct in the market or to disclose future intentions*'. *JJB Sports v Office of Fair Trading* [2004] CAT 17, paragraph 873.

uncertainty that the recipients faced during negotiations with customers (concerning availability of nortriptyline in the market), compared to that which it would have faced if it had engaged in independent decision making. This reduction in uncertainty enabled the Parties to assess more accurately the credibility of their actual and/or potential customers' claims about the availability of alternative (cheaper) supplies and ultimately reduced uncertainty during negotiations with customers.

5.84 In consequence, the exchanges were capable of influencing the Parties' future decisions regarding terms of supply to customers: in fact, the Parties cannot have failed to take those exchanges into account in their dealings with customers.

5.85 The specific exchanges of strategic information on volumes and timing of supplies to which the CMA objects and Lexon's detailed representations on those exchanges are set out below.

Lexon's disclosures concerning the volumes of the Lexon/Medreich JV Product supplied to Teva

5.86 Lexon disclosed to King and Alissa information concerning the volumes of the Lexon/Medreich JV Product supplied to Teva. This information included limitations on the volumes Teva was able to supply, past and current volumes supplied to Teva, and information regarding the timing of Medreich's supplies to Teva:

(a) On 27 July 2015, in response to [King Director] email asking, '*Can you let me know prices you are supplying notriptyline to Teva please?*' Lexon disclosed to King that the volume of Lexon/Medreich JV Product supplied to Teva was limited to the levels necessary to cover Teva's membership scheme, meaning that Teva would be unable to compete to supply further customers: '*it's a base price plus profit share […] only limited volume to cover their scheme'.*[520]

(b) On 31 July 2015, a call of 26 seconds' duration took place between [King Director] and [Lexon Director]'s mobile devices.[521] No note of that call was taken and [King Director] told the CMA that he did not remember the content of the call.[522] Based on contemporaneous

[520] See paragraph 3.83. Document NOR-E8228, email from [Lexon Director] to [King Director] dated 27 July 2015.
[521] Document NOR-C3011, telephone call made by [King Director].
[522] Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 14-15.

emails leading up to the call, the witness evidence of [Lexon Director] set out below, and an email sent by [Lexon Director] to [King Director] on 5 August 2015, the CMA infers that the call took place and that during the call [Lexon Director] made oral disclosures concerning the volumes of stock available to Teva:

(i) On 29 July 2015, [King Director] (in reply to [Lexon Director] email at paragraph 5.86(a) above) emailed [Lexon Director] asking '*to have a chat on supplies etc.*'[523]

(ii) On 29 July 2015, [Consultant to King 1] emailed [King Director] reporting a claim made by Bestway/Co-op made during bilateral negotiations with King that Teva '*are quoting [Bestway/Co-op] full volume supply at a quite reduced price*'. [King Director] then emailed [King Office Manager] to arrange a further call with [Consultant to King 1] for 31 July 2015, explaining that *'[King Director] should have spoken to* [*Lexon Director] by then to find out what the f*** is going on'*.[524]

(iii) At interview with the CMA, when questioned about [King Director] email to him of 29 July 2015, [Lexon Director] explained that [King Director] was '*probably trying to establish what my intentions were with the supply of that product to Teva and possibly to establish how much or what volumes or – he was planning to supply*'.[525]

(iv) A near contemporaneous email indicates that a conversation did take place and that the content of the conversation concerned the volumes supplied to Teva (see the email of 5 August 2015, set out in paragraph 5.86(c), commencing '***As I said***' (emphasis added)).

(c) On 5 August 2015, in response to a question in an email from [King Director] regarding Teva's supply to Bestway/Co-op, Lexon disclosed to King the volume of Lexon/Medreich JV Product supplied to Teva: '*As I said I have only supplied [Teva with] 1batch of each [strength of tablet]*'.[526]

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[523] Document NOR-E8228, email from [King Director] to [Lexon Director] dated 29 July 2015

[524] Document NOR-E1574, email from [King Director], using his personal email address to [King Director], business account (which was monitored by [King Office Manager]) dated 30 July 2015.

[525] Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 11, lines 2-5.

[526] See paragraph 3.88(a). Document NOR-E8457.8, iMessage from [Lexon Director] to [King Director] dated 5 August 2015.

(d) On 24 September 2015, Lexon disclosed to King the timing of supplies of Lexon/Medreich JV Product to be made to Teva. King requested that this timing be delayed, and Lexon agreed:

Lexon: *'I am not supplying for at least three weeks'*

King: *'Could you make it late October'*

Lexon: *'Will do'*.[527]

(e) On 2 November 2015, King asked Lexon to confirm whether Teva had been supplied and Lexon provided this confirmation:

King: *'Are Teva back in stock'*
Lexon: '*Yes*'.[528]

(f) On 10 December 2015, [King Director] asked [Lexon Director] for Teva's monthly sales for 25mg nortriptyline tablets and disclosed that '[*King's] now less than 500 packs'*. [529] Lexon responded by disclosing to King the total volume of Lexon/Medreich JV Product supplied by Medreich to Teva:

'*November 25mg*
Teva - 1637 [packs were supplied]'.[530]

At interview [Lexon Director] told the CMA: *'those numbers look pretty specific so I would have picked them up from a reconciliation or whatever it may be*'.[531,532] Subsequently, in his Witness Statement, [Lexon Director] clarified that the number provided was in fact incorrect and that the the true figure for Teva was 1,841 packs. In his Witness Statement, [Lexon Director] told the CMA that in telling [King Director] that Teva had supplied 1637 packs of 25mg tablets in November 2015: '*I believe I simply guessed what the Teva figure was.*'[533]

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[527] See paragraphs 3.90. Document NOR-E8457.6, iMessage exchange between [King Director] and [Lexon Director] dated 14 September 2015.
[528] See paragraphs 3.97. Document NOR-E1614, email from [Consultant to King 1] to [King Director] dated 29 October 2015.
[529] Document NOR-E1648, email from [King Director] to [Lexon Director] dated 10 December 2015.
[530] Document NOR-E1650, email from [Lexon Director] to [King Director] dated 10 December 2015.
[531] The reference is to the monthly reconciliations provided by Teva. Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 163 lines 11-13.
[532] [✂]. However, the accuracy of the information shared does not undermine the CMA's conclusions concerning the Infringement: see paragraph 5.66.
[533] Document NOR- C3224.3[Lexon Director] Witness Statement, paragraphs 63-64.

(g) On 11 March 2016, Lexon disclosed to King and Alissa the total volume of Lexon/Medreich JV Product supplied by Medreich to Teva: '*Teva would not have the volume to supply Alliance as they don't get enough from me (since August I have supplied 55k 10mg and 40k 25mg of which one batch of each was only delivered last week*)'.[534]

5.87 In each of the exchanges at paragraph 5.86 above, Lexon disclosed to King and Alissa information concerning the purported volumes of the Lexon/Medreich JV Product supplied to Teva, including information on past and current volumes, and – in one instance – an indication of future volumes and information regarding the timing of Medreich's supplies to Teva (see paragraph 5.86(d) above). In reality, certain of the information Lexon provided was not precisely accurate or was untrue, in particular because [Lexon Director] did not have access to detailed up-to-date information regarding Teva and Medreich's sales volumes (see paragraphs 5.86(d) and 5.86(f) above). However, it was not apparent to the recipients that the information may not be fully accurate (indeed, King regarded Lexon as a credible source of information see paragraph 5.67(c) above). Nevertheless, the exchanges reduced the uncertainty that King and Alissa faced concerning the quantities of Nortriptyline Tablets that their customers or potential customers were able to obtain from Teva and were capable of influencing their conduct on the market with the consequece set out at paragraph 5.84 above. For example, having been informed two days earlier that Teva would not receive stock from Medreich until late October 2015, [King Director] informed [Consultant to King 1] on 26 September 2015 that '*Teva are out of stock […] until the end of October at the earliest*' and instructed him to make a specific offer to Bestway/Co-op proposing that it commit to six months supply from King for its total demand for a reduced price.[535]

Lexon's representations

5.88 Lexon submitted that there was no disclosure of strategic information by Lexon in the exchanges cited above:

(a) With regard to the exchange on 27 July 2015 ('*it's a base price plus profit share […..] only a limited volume to cover their scheme*' - see

[534] See paragraph 3.127. Document NOR-E5953, email from [King Director] to [Lexon Director] and [Alissa Director] dated 11 March 2016.

[535]Document NOR-E8457.6, iMessage exchange between [King Director] and [Lexon Director] dated 14 September 2015. Document NOR-E1588, email from [Consultant to King 1] to [King Office Manager] dated 29 September 2015.

paragraph 5.86(a)), [Lexon Director] told the CMA that he had deliberately refrained from disclosing to [King Director] '*confidential information*' regarding the arrangements between Teva and Medreich and between Lexon and Medreich, but that he '*did not want [King Director] to think I was being unhelpful.'* In fact, he submitted, he had given [King Director] '*no information at all*'. Further, he submitted that his statement that Teva was provided only a limited volume to cover its scheme '*was not strictly true'* since there was no contractual volume limit imposed on Teva.[536]

(b) With regard to the telephone call on 31 July 2015 (see paragraph 5.86(b)) [Lexon Director] accepted that it was '*probably correct*' that [King Director] had contacted him to try to establish what Lexon's '*intentions were with the supply of that product to Teva*' but he submitted that he was '*sure*' that he '*would not have given any information about what my intentions were with regard to the supply of the Product to Teva.'*[537]

(c) With regard to the exchange on 5 August 2015 ('*I have only supplied [Teva with] 1 batch of each [strength of tablet]*', see paragraph 5.86(c) and 5.86(b)(iv)), [Lexon Director] accepted that [King Director] '*was trying to get me to intervene to stop Teva selling to Bestway/Co-op*' but he submitted that he had '*no power to do so*' but that he '*did not want to be negative'* to King and so replied '*without giving him information about sales to Teva which would have been any use.*' According to [Lexon Director]: '*[i]n reality this meant nothing. I was trying to fob him off.'*[538]

(d) With regard to the exchange on 24 September 2015 (Lexon: '*I am not supplying for at least three weeks*' King: '*Could you make it late October*' Lexon: '*Will do',* see paragraph 5.86(d)), Lexon submitted this was another instance of [Lexon Director] '*trying to fob off*' [King Director] without giving the impression of being unhelpful. The information provided – that Teva would not be supplied for at least three weeks – was incorrect, it was mere '*speculation*'. Lexon had no power to slow down Teva's restocking. In any event, Teva's nortriptyline stock availability was readily available information

[536] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraphs 57 and 94, submitted with Lexon's Written Representations.
[537] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 95, submitted with Lexon's Written Representaions.
[538] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 58, submitted with Lexon's Written Representations

provided to all its customers in its weekly Stock List (the 29 September 2015 list shows Teva was out of stock of 10mg packs but would have them back in stock in '*Sept-15*').[539]

(e) With regard to the exchange on 2 November 2015 (King: '*Are Teva back in stock*' Lexon: '*Yes*', see paragraph 5.86(e)), Lexon submitted that this response was made simply '*to get rid of*' [King Director] and provided no information that was not readily available from the Teva Stock List.[540]

(f) With regard to the exchange on 10 December 2015 (in which Lexon stated that Teva had been supplied 1,637 packs of 25mg tablets in November 2015 (when the true figure was in fact 1,841 packs)), see paragraph 5.86(f)), [Lexon Director] submitted that he '*simply guessed*' what the Teva sales figure was as he would not have had the reconciliation statement from Medreich until early January 2016. Accordingly, the information provided was incorrect.[541]

(g) With regard to the exchange on 11 March 2016 (Lexon: '*Teva would not have the volume to supply Alliance as they don't get enough from me (since August I have supplied 55k 10mg and 40k 25mg of which one batch of each was only delivered last week',* see paragraph 5.86(g)), Lexon submitted that this information was incorrect as Teva was free to purchase as much volume as it wanted under the OLS Agreement.[542]

5.89 As set out at paragraph 5.83 above, each of Lexon's disclosures at paragraph 5.86 referred to above reduced the level of uncertainty which King (or King and Alissa) faced during any negotiations with customers. In particular, the disclosures reduced uncertainty regarding whether customers had alternative sources of nortriptyline available to them. As such, the disclosures were capable of affecting King's (or King and Alissa's) conduct on the market with the consequence set out at paragraph 5.84 above. Lexon's submissions to the contrary do not call this conclusion into question:

[539] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 59, submitted with Lexon's Written Representations

[540] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 62, submitted with Lexon's Written Representations

[541] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 63, submitted with Lexon's Written Representations

[542] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 85, submitted with Lexon's Written Representations

(a) **Inaccuracy** (representation at 5.88(a), (d), (f) and (g))**, level of detail** (representation at 5.88(a) and (c)) **and 'opinion / readily available information'** (representation at 5.88(d)): the CMA rejects these submissions for reasons analogous to those set out at paragraph 5.67. In addition, in relation to the representation at paragraphs 5.88(a) to 5.88(c), 5.66(a) and 5.88(f), the CMA finds that the information disclosed to King was not, in any event, materially inaccurate. Using the PCA data for 2015 to estimate the market size for nortriptyline in any given month in 2015, the difference in the figure Lexon disclosed to King (1,637 packs), and the corrected figure [Lexon Director] provided in his Witness Statement (1,841 packs), represents a difference between Teva having a market share of 13.3% and 14.9%. In relation to the representation at paragraph 5.88(a), that Lexon disclosed no strategic information to King during the call on 31 July 2015, this is shown to be incorrect by the email sent on 5 August 2015 (see paragraph 5.86(b)(iv) above).

(b) **Not 'confidential' information** (representation at 5.88(a))**:** even if it is correct that the volume information which Lexon disclosed to King on 27 July 2015 (see paragraph 5.88(a) above) was not *'confidential'* (i.e. not subject to any obligation of confidence to Teva or Medreich), this does not mean that it cannot be considered '*strategic*' in nature. The disclosed information – that Teva received only enough volume to cover its scheme – was capable of influencing King's conduct on the market as it suggested that King's customers had limited ability to source product from Teva (and therefore that they were in a weak baragaining position).

(c) **No control over Teva volumes** (representation at 5.88(d) and (g)): even if Lexon's power (under the terms of the Lexon/Medreich JV arrangement) to control Teva's ability to source additional volumes from Medreich was limited, the exchanges in which Lexon told King that Teva had access to only limited volumes were nevertheless *'strategic'* in nature since they were capable of influencing King's conduct on the market.[543] These disclosures occurred at a time when King was bidding to supply a customer. Lexon led King to believe that it did have the power to influence supplies to Teva and would do so (King in September 2015: '*Could you [delay supplies to Teva until] late October*' Lexon: '*Will do.'* Lexon in March 2016: '*Teva would not have the volume to supply*

[543] The Court of Justice has established that information need not be accurate for it to be considered 'strategic' - see case law cited at paragraph 5.45 above.

Alliance as they don't get enough from me'). If anything, by misleading King in this manner, Lexon was able to exert a greater influence over King's conduct on the market than if King had known the true position.

(d) **'Fobbing off'** (representation at 5.88(d) and (e)): Lexon submitted that, in reality, it was providing King with no real information. Rather, it was '*fobbing off*' King with nothing at all. The CMA accepts that, in a number of the instances, Lexon provided King with less information (or less detailed information) than King had requested. Nevertheless, for the reasons set out above, the information which Lexon did provide went well beyond purely readily available public information and can be considered strategic in nature because it was capable of influencing King's conduct on the market. By [Lexon Director] own admission, he was trying to appear '*helpful*' to King. Further, by maintaining contact with King – rather than distancing himself from the contact – [Lexon Director] encouraged [King Director] to believe that King did not need to compete intensely on the market.

Lexon and King's disclosure of information concerning the volumes of Nortriptyline Tablets supplied to customers in the UK (other than Teva) by themselves and by other suppliers

5.90 Lexon and King disclosed information concerning the volumes of Nortriptyline Tablets supplied to Alliance, AAH and by themselves and by other suppliers:

(a) On 21 October 2015, [King Director] emailed [Lexon Director] in relation to supply to Alliance and asked for details of a contact at Actavis, explaining that: '*We [King] have had not [sic] sales at all through Alliance Unichem for the past 10 days and the only explanation I can think of is they have done a deal with Actavis and not told us*'.[544]

(b) On 10 December 2015, [Lexon Director] disclosed to King the total volume of Lexon/Medreich JV Product Lexon had sold: '*November 25mg […] Lexon – 482 [packs were supplied].*' At interview, [Lexon Director] explained to the CMA the reasons for providing these volumes to [King Director]: '*I'm trying to reassure him that I'm not manufacturing and putting lots and lots [of] product into the market*

[544] Document NOR-E5778, email from [King Director] to [Lexon Director] dated 21 October 2015.

place and flooding the market because he seems to think that I am.'[545] Subsequently, in his Witness Statement, [Lexon Director] said that the number he provided was in fact incorrect. The true figure for Lexon was in fact 794 packs.[546].

(c) On 18 April 2016, [King Director] forwarded an email from Consultant to King 2] to [Alissa Director] identifying that Phoenix and Rowlands currently purchased the Lexon/Medreich JV Product from Teva and setting out their approximate level of demand in terms of volume: Pheonix, Rowlands and other customers '*10mg @ ~750 packs per month / 25mg @ ~ 300 packs per month*'.[547]

(d) On 27 April 2016, Lexon sent an email to King and Alissa disclosing information on the quantities of the market controlled by Actavis: '*I saw actavis yesterday and they are only supplying AAH and their scheme which is around 30% of the market in total*'[548] and noting Actavis' intention to control parallel imports of the 25mg Paxtibi tablets, possibly through their ownership of Paxtibi: '*They [Actavis] are trying to control the 25mg but he was vague*'.[549]

5.91 In the exchanges at parapgraph 5.90 above, Lexon and King disclosed information concerning the volumes of Nortriptyline Tablets supplied to customers in the UK (other than by Teva) by themselves and by other suppliers. These disclosures reduced uncertainty as to the quantities of Nortriptyline Tablets that their customers or potential customers were able to obtain from other sources and – on one occasion - provided reassurance that the disclosing party (Lexon) did not intend to flood the market (see paragraph 5.90(b)). Accordingly, the disclosures were capable of influencing their conduct on the market with the consequeces set out at paragraph 5.84 above.

[545] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 162 lines 18-20. As regards to [Lexon Director] knowledge, see the final two sentences of paragraph 5.65 above.
[546] Document NOR-C3224.3, [Lexon Director] Witness Statement, paragraphs 63-65 submitted with Lexon's Written Representations.
[547] See paragraph 3.146. Document NOR-E1861, email from [Consultant to King 2] to [King Director] and [Consultant to King 3] dated 18 April 2016.
[548] See paragraph 3.159. Document NOR-E1883, email from [Lexon Director] to [King Director] and [Alissa Director] dated 25 April 2016.
[549] See paragraph 3.159. Document NOR-E1883, email from [Lexon Director] to [King Director] and [Alissa Director] dated 25 April 2016.

Lexon's representations

5.92 Lexon submitted that there was no disclosure of strategic information by Lexon in the exchanges cited above:

(a) With regard to the exchange on 10 December 2015 (in which Lexon stated that it had supplied 482 packs of 25mg tablets in November 2015 (when the true figure was in fact 794 packs) - see paragraph 5.90(b)), [Lexon Director] submitted that the figure provided was incorrect and that the CMA was therefore wrong to conclude that he supplied Lexon's sales volumes to King.[550] For the reasons stated at paragraph 5.67(a) above, the fact that the information provided may have been inaccurate does not mean it was not '*strategic*' in nature since the disclosure was capable of influencing King's conduct on the market.

(b) With regard to the exchange on 27 April 2016 ('*actavis […] are only supplying AAH and their scheme which is around 30% of the market in total*' - see paragraph 5.90(d)), [Lexon Director] submitted that the information he provided regarding Actavis's supplying only AAH and the approximate size of its sales was information that was '*generally known'*.[551] For reasons analogous to those stated at paragraph 5.67(c) above, the CMA rejects this submission. King had no reason to doubt the credibility of the information it received from Lexon. The information about who Actavis was supplying, which [Lexon Director] implied he knew from his conversation with Actavis a day earlier, was not readily available public information. The statement that Actavis was supplying '*only*' AAH reduced King's uncertainty about the competitive threat from Actavis. As such, the disclosure was capable of influencing King's conduct on the market.

(c) Lexon did not make any specific representations in relation to the exchanges on 21 October 2015 and 18 April 2016.

Entry plans

5.93 The CMA has found that Alissa disclosed to King and Lexon competitively sensitive strategic information concerning its planned entry during the latter part of Relevant Period 1, as described in more

[550] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraphs 63 and 64, submitted with Lexon's Written Representations

[551] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 66, submitted with Lexon's Written Representations

detail at paragraph 5.95 below, including Alissa's 20% target market share and timing of entry. Given the relevant context set out at paragraph 5.40 above, the information exchanged significantly reduced the uncertainty that would otherwise have existed as to Alissa's future strategic decisions on the market, by significantly reducing the level of uncertainty that the recipients faced during negotiations with customers (concerning availability of nortriptyline in the market), compared to that which they would have faced if the Parties had engaged in independent decision making. This reduction in uncertainty enabled King and Lexon to assess more accurately the credibility of their actual and/or potential customers' claims about the availability of supply from other sources (including Alissa).

5.94 In consequence, the exchanges were capable of influencing the Parties' future decisions regarding terms of supply to customers: in fact, the Parties cannot have failed to take those exchanges into account in their dealings with customers.

5.95 The specific disclosures to which the CMA objects are set out below:

(a) The CMA infers from an email sent by [Alissa Director] to [King Director] that the two individuals spoke on the telephone on 2 March 2016: '*Good to speak to you earlier today*.'[552] There is no documentary record of what was discussed, however [Alissa Director] stated in interview with the CMA that, although he could not recall the details, '*there would be only two things that* [King Director] *would want to talk about […] "When we were going to launch product… and where I anticipated him telling me where [i.e. which customers] not to approach"*'.[553] At interview [King Director] confirmed that he had arranged the call with [Alissa Director] on 2 March 2016 '*To find out whether […] Alissa had actually been granted a licence*'.[554] [King Director] told the CMA that [Alissa Director] told him that '*he had got licences granted for Nortriptyline'*, and that he and [Alissa Director] had discussed a proposed meeting with [Lexon Director].[555] The MHRA published

[552] See paragraphs 3.116(a). Document NOR-E5928, email from [King Director] to [Alissa Director] and [Lexon Director] dated 2 March 2016.
[553] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 74 lines 4-10.
[554] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 171, lines 14-15.
[555] Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 174 line 16 and page 175 lines 15-16.

its decision to grant Alissa's nortriptyline MAs nine days later, on 11 March 2016.

(b) On 9 March 2016, Alissa sent an email to King in which it disclosed its market share aspirations: '*To assist any conversation today I will tell you now that I am looking to take a modest 20% share. That's all I have geared up for and hope things don't become a free for all*.'[556] [Alissa Director] shared this email with [Lexon Director] on 10 March 2016.[557] [Alissa Director] told the CMA that he sent this email '*to assist any conversation'*[558] at the Landmark Hotel Meeting.

(c) On 23 March 2016 [Alissa Director] attended the Landmark Hotel Meeting with [Lexon Director] and [King Director]. [Alissa Director] told the CMA at interview that during the meeting he (and [Lexon Director]) had been '*pumped for information*' by [King Director]. In particular, he told the CMA that [King Director] wanted to know when Alissa would enter. However, [Alissa Director] stated that he did not disclose such information and that he '*passed*' on the question because he '*didn't know when the stock was coming out of india*' and would not have had an incentive to share the information because '*if a competitor knows that you're coming, they will try to defend their business.*'[559] Given the communications both prior to and after the Landmark Hotel Meeting, which related to Alissa's entry plans, the fact that [Alissa Director] had specifically proposed the venue as suitable for a '*quiet discussion*' and had made the effort to attend the meeting, and the witness testimony of [Lexon Director] about the discussion at the meeting,[560] the CMA considers [Alissa Director]'s suggestion that he '*passed*' on answering questions relating to Alissa's entry to be implausible. The CMA therefore infers that [Alissa Director] must have disclosed to King and Lexon that Alissa was not yet quoting customers because of its lack of stock (such a disclosure would be consistent with the subsequent disclosures made by Alissa recorded in emails

[556] See paragraph 3.122. Document NOR-E5943, email from [Alissa Director] to [King Director] dated 9 March 2016.
[557] Document NOR-E4947, email from [Alissa Director] to [Lexon Director] and [King Director] dated 10 March 2016.
[558] See document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 100 lines 12-13.
[559] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, pages 76-77.
[560] See paragraph 3.116(a).

dated 22 April and 12 May 2016 – see paragraphs 5.95(d) and 5.95(e) below).

(d) On 22 April 2016, [Alissa Director] confirmed to [King Director] that Alissa was not, at that point in time, quoting prices to any customers: '*We have not offered any prices in the market - it would be mental to offer before having stock available to deliver, we would be eroding the price prematurely.*'[561]

(e) On 12 May 2016, in response to a query from King regarding who was offering certain prices to McKeevers,[562] [Alissa Director] confirmed to both King and Lexon that Alissa had not, at that point in time quoted prices to any customers: '*I am not in the market therefore cannot quote any customer*'.[563] [Alissa Director] explained to the CMA that he considered that [King Director] question was primarily driven by a desire to understand when Alissa would be entering the market: '…[King Director] *should know perfectly well that at that point in time, I'm not operation [sic] in the market place and I think it's underlying on this, it's not so much about the price, it's an enquiry to try and find out when I'm coming into the market place*.'[564]

5.96 In the exchanges at paragraph 5.95 above, Alissa made disclosures which reduced the strategic uncertainty which King and Lexon faced in relation to Alissa's anticipated entry:

(a) Alissa confirmed to King that it had been granted MAs for Nortriptyline Tablets (before this information had been published by the MHRA) (see paragraph 5.95(a)). This confirmation reduced some of [King Director] uncertainty about the likelihood and timing of the entry of Alissa. King could not have failed to take this into account in assessing the credibility of customer claims about price and how King should respond.

(b) Alissa disclosed information regarding its readiness to get to market and its decisions on whether to quote customers in advance of launching (see paragraphs 5.95(c) to 5.95(e)). These disclosures reduced uncertainty for King and Lexon as to the

[561] Document NOR-E1876, email from [Alissa Director] to [King Director] dated 22 April 2016.
[562] See paragraphs 3.170 to 3.174.
[563] See paragraph 3.174. Document NOR-E6048, email from [Alissa Director] to [King Director] dated 12 May 2016.
[564] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 142 lines 17-24.

credibility of claims made by customers concerning the price at which they could secure alternative supply of Nortriptyline Tablets. The disclosed information was not readily available to King and Lexon from other sources.[565]

(c) In addition, Alissa disclosed to King and Lexon its target market share and its intention to avoid heavy price discounting (see paragraph 5.95(b)). It is not relevant whether this information was accurate:[566] by indicating that Alissa was looking for a '*modest*' market share and hoping to avoid '*a free for all*', Alissa reduced uncertainty about its likely entry strategy and reduced uncertainty for King and Lexon as to the volumes Alissa intended to supply, and its pricing strategy.

5.97 Each of the above reductions of strategic uncertainty were capable of influencing the recipients' conduct on the market with the consequence set out at paragraph 5.94 above. Lexon did not make any specific representations on these disclosures.

(c) Conduct on the market, and a relationship of cause and effect during Relevant Period 1

5.98 The CMA has found that, during Relevant Period 1, King and Lexon each remained active on the market: thus, they can be presumed to have taken account of the information exchanged with their competitors for the purposes of determining their conduct on the market. This finding is supported by the fact that the exchanges occurred regularly over a considerable period of time (King and Lexon participated in the Information Exchange from 27 July 2015 to 27 May 2016. King also participated in the Information Exchange from 5 December 2016 to 27 January 2017).

5.99 Alissa took part in the concerted action during the latter part of Relevant Period 1 (from 2 March 2016 onwards). Whilst it was a potential competitor at that time, and not selling on the market, the presumption is equally applicable in respect of exchanges of information to and from Alissa.[567] At the time of the disclosures, Alissa was planning to enter imminently. The information exchanged could not have failed to influence its entry plans (including in relation to prices and volumes).

[565] See the materials referred to in paragraph 5.46 above.
[566] See paragraph 5.48 above.
[567] See paragraph 5.43 above.

5.100 In any event, even if the presumption outlined at paragraph 5.50 above was not found to apply in the case of the exchange of strategic information with a potential competitor, the CMA considers that the contemporaneous documents establish conduct on the market on the part of Alissa and a relationship of cause and effect between the information exchanged and that conduct. Alissa began supplying in November 2016. However, at least during May 2016, while engaging in the discussions with King and Lexon, [Alissa Director] was making and implementing decisions regarding Alissa's entry strategy, including in relation to volumes and timing of orders of Nortriptyline Tablets. On 13 May 2016, [Alissa Director] emailed [Employee of Alissa's product development partner] stating:

'Nortriptyline is hotting up in the UK! I have had various discussions with several stakeholders however these guys seem only interested in talking and not action. I am also wary that the talk doesn't reflect reality. Re forecast, I believe we need to be looking at having across the year stock available to generate sales of circa 75k packs × 10mg and 34k packs × 25mg. The issue is the speed of the initial uptake as believe Teva and Actavis will try and block us. I suggest we indicate a third shipment for around December/January however we need to get to the point when the second order is with us before confirming.'[568]

5.101 Accordingly, the CMA rejects [Alissa Director] suggestion that the information he received from [King Director] and [Lexon Director] in May 2016 in relation to the pricing and volumes of Nortriptyline Tablets[569] was '*pretty irrelevant*'[570] and had *'no significance*',[571] as Alissa had not yet entered the market and '*there is nothing I can do with the information that he's provided me*'.[572]

[568] Document NOR-E4983, email from [Alissa Director] to [Employee of Alissa's Product Development Partner] dated 13 May 2016.
[569] See, for example, an email from [King Director] to [Lexon Director] and [Alissa Director] providing details of AAH's volumes of Nortriptyline Tablets (Document NOR-E1884, email from [Employee of AAH] to [King Director] and [Employee of AAH] dated 8 May 2015) and an email from [Alissa Director] to [King Director] regarding prices for Nortriptyline Tablets quoted to McKeevers (Document NOR-E6048, email from [Alissa Director] to [King Director] dated 12 May 2016).
[570] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 138, lines 15-21.
[571] Document NOR-C2108, transcript of [Alissa Director] interview dated 26 July 2018, page 32, line 25.
[572] Document NOR-C2108, transcript of [Alissa Director] interview dated 26 July 2018, page 32, lines 25-26.

Lexon's representations (conduct on the market)

5.102 Lexon submitted that it simply '*ignored*' the information disclosed to it by King on 9 and 11 March 2016 (see paragraphs 5.68(a) and 5.68(b) above) since they '*provided no useful market intelligence because I simply did not believe what* [Consultant to King 1] *was telling King*.'[573] Similarly, Lexon submitted that the information disclosed by King on 12 May 2016 regarding an offer to supply made by McKeevers[574] (see paragraph 5.64(d) above) and on 27 May 2016 regarding [Wholesaler A]'s quoted price of £22.80 (see paragraph 5.68(e) above) were of '*no value*'. Lexon did not elaborate on why the Mckeevers offer was of no value. Lexon submitted that the email regarding [Wholesaler A] was of no value because Lexon did not sell to [Wholesaler A], who was a competing wholesaler. [575] More generally, Lexon submitted that the information provided by King referred to in paragraph 5.68 above, was of '*no commercial value*' because '[g]*ossip about what prices are being offered in the industry are commonplace.*'[576]

5.103 As explained above (see paragraph 5.53), case law establishes that an undertaking that remains active on the market is presumed to have accepted information and adapted its market conduct unless it responds with a clear statement that it does not wish to review such data.[577] Lexon made no such clear statement and, the CMA concludes, has failed to discharge the burden of proof upon it. In any event, the CMA rejects the suggestion that the information provided was of no value to Lexon: the information was strategic in nature for the reasons set out in paragraph 5.71 above. Further, the CMA notes that Lexon made no representations regarding the various disclosures made by Alissa, including the disclosure of its 20% target market share (see paragraph 5.95(b) above).

[573] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 88, submitted with Lexon's Written Representations
[574] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 78, submitted with Lexon's Written Representations
[575] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 89, submitted with Lexon's Written Representations
[576] Document NOR-C3224.3 [Lexon Director] Witness Statement, paragraph 86, submitted with Lexon's Written Representations
[577] See cases cited at paragraph 5.52 above.

(d) Reciprocal contact during Relevant Period 2

Pricing information

5.104 The CMA has found that King and Alissa exchanged competitively sensitive strategic information in two reciprocal exchanges during Relevant Period 2. The exchanges are detailed below:

(a) Various emails provide clear evidence that one or more telephone calls took place between [King Director] and [Alissa Director] on 5 December 2016.[578] There is no documentary record of precisely what was discussed, however, the CMA infers from an email sent by [King Director] to [Alissa Director] on 5 December 2016, that [Alissa Director] had disclosed to him strategic information relating to a customer: '*Call me sometime. / The pricing information you have is incorrect. / Buyers will be liars?*'[579] [Alissa Director] commented in interview that [King Director] was likely referring to pricing information which he ([Alissa Director]) had received from customers ('*he's trying to suggest, that we're picking up pricing that isn't true*') [580] and the purpose of the call was for [King Director] to explain to [Alissa Director] that he did not need to match the prices which customers had claimed to have been quoted ('*what he's trying to do is really is say to me, that I'm selling at a price that is out of line with market pricing*').[581]

(b) In an email exchange on 27 January 2017[582] King disclosed to Alissa strategic information relating to CREO's pricing: *'It would appear that Creo (MAH Blackstone) have crashed the market. / Offering £11 and £12 on the 10mg and 25mg, respectively. / You picked up anything similar?*' In reply, Alissa disclosed to King strategic information relating to its understanding of the prices in

[578] Document NOR-E5041, email from [Alissa Director] to [Consultant to King 3] dated 8 December 2016: (' [King Director] *said to me* [Alissa Director] *on Monday* [5 December 2016] *that he had heard the company was on the market*').
[579] Document NOR-C3026, paragrapgh 13, note of State of Play meeting between the CMA and Alissa on 5 March 2019. At a State of Play meeting on 5 March 2019, [Alissa Director] told the CMA that Alissa had circulated prices for Nortriptyline Tablets to its customer base on 30 November 2016 and had sold Nortriptyline Tablets to Alliance Healthcare in November 2016. He told the CMA that he believed that [King Director] 's email to him on 5 December 2016 ('*The pricing information you have is incorrect')* was a response to Alissa's market activity.
[580] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018 page 164 lines 16-17.
[581] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018 page 163 lines 18-19.
[582] See paragraph 3.196. Document NOR-E2768, email from [King Director] to [Alissa Director] dated 27 January 2017.

the market: '*Not at all […] prices are much higher than that. / Not sure who has given you that feedback but it is way off the mark.'*

5.105 The exchanges in paragraph 5.104 above concerned customer claims regarding rival suppliers' pricing and the credibility of those claims. The exchanges took place against the relevant context set out at paragraph 5.29 above, in which customers would seek to 'play off' potential suppliers against one another and 'bluff' that they had alternative, more competitive, sources of supply. The information exchanged therefore significantly reduced the level of strategic uncertainty that each Party faced (concerning pricing available in the market) during negotiations with existing and prospective customers, compared to that which it would have faced if it had not exchanged the information and had engaged in independent decision making. As such, the exchanged information was capable of influencing the Parties' conduct on the market with consequence as set out at paragraph 5.60 above.

(e) Conduct on the market, and a relationship of cause and effect during Relevant Period 2

5.106 The CMA has found that, during Relevant Period 2, King and Alissa each remained active on the market: thus, they can be presumed to have taken account of the information exchanged with each other for the purposes of determining their conduct on the market. At this point in time, both King and Alissa were actively selling Nortriptyline Tablets to the market.[583]

F. Restriction of competition by object

I. Legal framework

5.107 To come within the Chapter I prohibition and/or the prohibition in Article 101 TFEU, an agreement or concerted practice must have '*as [its] object or effect'* the prevention, restriction or distortion of competition within the UK and/or the internal market. It is settled case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition, such that there is no need to examine their effects. That case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal

[583] Alissa entered the market in November 2016.

competition.[584] In *Cartes Bancaires*, the Court of Justice found that the concept of an infringement by object must be interpreted '*restrictively*'.[585]

5.108 The term '*object*' in both the Chapter I prohibition and the prohibition in Article 101 TFEU refers to the sense of '*aim*', '*purpose*', or '*objective*' of the coordination between undertakings in question.[586] This is assessed objectively. It is not necessary to establish that the parties jointly intended, subjectively, to pursue an anti-competitive aim – only that they had a common understanding whose terms, assessed objectively, pursue or result in such an aim.[587]

5.109 An agreement or concerted practice 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.[588]

5.110 In order to determine whether an agreement or concerted practice reveals a sufficient degree of harm such as to constitute a restriction of competition by object, regard must be had to:

(a) The economic and legal context of which it forms a part (which is assessed at section 5D above);

(b) Its content; and

(c) Its objectives.[589]

5.111 It is well established that an agreement or concerted practice need not be implemented to fall foul of the prohibition on anti-competitive agreements, including whether it amounts to a restriction of competition by object.[590] However, evidence of the parties' conduct showing that

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[584] C-373\14 P *Toshiba v Commission,* EU:C:2016:26, paragraph 26; and C-67\13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 50.
[585] C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 58.
[586] See, for example, respectively: C-56\64 *Consten & Grundig v Commission*, EU:C:1966:41, page 343; C-96\82 *IAZ and Others v Commission*, EU:C:1983:310, paragraph 25; C-209\07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643, paragraphs 32- 33.
[587] T-168\01 *GlaxoSmithKline Services Unlimited v Commission*, EU:T:2006:265, paragraph 77 (upheld on appeal in Joined cases C-501\06 P etc *GlaxoSmithKline Services Unlimited v Commission*, EU:C:2009:610).
[588] C-209\07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643, paragraph 21.
[589] C-67\13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 53, citing C-32\11; *Allianz Hungaria v Commission*, EU:C:2013:160, paragraph 36 and the case-law cited. See also C-373\14 P *Toshiba v Commission,* EU:C:2016:26, paragraph 27.
[590] C-277/87 *Sandoz v Commission,* EU:C:1989:363; *WANO Schwarzpulver*, (1979) OJ L322, 16.11.78, p. 26, [1979] 1 CMLR 403; C-19/77 *Miller v Commission*, EU:C:1978:19, paragraphs 7 to 10. See also *French Beer*, [2006] 4 CMLR 577, paragraph 9.

the agreement or concerted practice was implemented may corroborate the assessment of its content and objectives.[591]

5.112 Although the parties' intentions are not a necessary factor in determining whether an agreement or concerted practice is restrictive of competition, there is nothing prohibiting a competition authority from taking the parties' intentions into account.[592]

(a) Information exchange as a 'by object' infringement

5.113 The European Courts have held on numerous occasions that the exchange of strategic information between competitors (including, but not limited to, intended future prices or quantities) is considered a restriction by object.[593] That is, they have held that certain exchanges can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.

5.114 The Court of Justice has held that the exchange of information between competitors is liable to be incompatible with Article 101 TFEU (and EU Member States' equivalent national competition laws, including therefore the Chapter I prohibition) if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.[594] In particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anti-competitive object.[595] In *Smart Chips*, the General

[591] C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraphs 81 to 94 and 109. An infringement may be proven by direct evidence and/or indirect evidence, '*for example in the form of conduct*': T-168/01 *GlaxoSmithKline Services Unlimited v* Commission, EU:T:2006:265, paragraphs 82 to 83.

[592] C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 54; and C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 118. See also C-32/11 *Allianz Hungaria v Commission*, EU:C:2013:160, paragraph 37 and the caselaw cited.

[593] See for example: Judgment in C-286\13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraphs 113 to 127; See also Judgment in C-8\08 *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 45: the '*exchange of information between competitors is laible to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted'*.. See also *Horizontal Cooperation Agreements Guidelines* OJ 2011 C 11\1; and *Article 101(3) Guidelines*, paragraph 72 to 74.

[594] C-286\13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 121; C-194\99 P *Thyssen Stahl v Commission*, EU:C:2003:527, paragraph 81; C-8\08 *T-Mobile v Commission*, EU:C2009:343, paragraph 35. See also *Horizontal Cooperation Agreements Guidelines* OJ 2011 C 11\1; and *Article 101(3) Guidelines*, paragraphs 72 to 74.

[595] C-286\13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 122; and C-8\08 *T-Mobile v Commission*, EU:C2009:343, paragraph 41.

Court found that discussion of a price that a customer had requested, and the intention of the appellants not to offer that price, was '*an exchange of information relating to the future pricing strategy of the undertaking in general, and of a customer in particular*' which is '*capable of affecting normal competition'.*[596]

5.115 As set out at paragraphs 5.42 and 5.44 above, the notion that each economic operator must determine independently the policy which he intends to adopt on the market is inherent in the Chapter I prohibition and Article 101(1) TFEU. This requirement of independence strictly precludes any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors, or disclose to them its decisions or intentions concerning its own conduct on the market, where the object of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question (regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market).

5.116 The CAT has stated that '*[t]he strictness of the law in this regard reflects the fact that it is hard to think of any legitimate reason why competitors should sit together and discuss prices at all'*[597] and has previously held that *'[t]he fact of having attended a private meeting at which prices were discussed and pricing intentions disclosed, even unilaterally, is in itself a breach of the Chapter I prohibition'*.[598] Exchanging information with competitors, even on a single occasion, can restrict competition by object.[599]

5.117 In *Bananas,* the Court of Justice held that the exchange of information regarding price setting factors, price trends and/or indications of quotation prices restricted competition by object. According to the Court of Justice, this '*made it possible to reduce uncertainty for each of the participants as to the foreseeable conduct of competitors, […] and therefore gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article [101]*".[600]

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[596] T-762\14 *Koninklijke Philips NV v Commission*, EU:T:2016:738 (*Smart Chips*), paragraph 84 (upheld on appeal to the Court of Justice in C-98\17 P *Koninklijke Philips NV v Commission*, EU:C:2018:774).
[597] *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 41.
[598] *JJB Sports v Office of Fair Trading* [2004] CAT 17, paragraph 873 (cited with approval by the Competition Appeal Tribunal in *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 41).
[599] *Galvanised Steel Tanks*, upheld on appeal to the Court of Appeal in *Balmoral Tanks Ltd & Anor v Competition and Markets Authority* [2019] EWCA Civ 162 and also C-8\08 *T-Mobile v Commission*, EU:C :2009:343.
[600] Case C-286\13 *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184 ('***Bananas***'), paragraph 134.

II. Object of the Information Exchange

5.118 For the reasons set out below, the CMA has found that (having regard to its legal and economic context, its content and its objectives) the concerted practice(s) comprising the Information Exchange had the object of preventing, restricting or distorting competition. The exchanges of information reduced strategic uncertainty in the market for the purpose of maintaining the prices of Nortriptyline Tablets in the UK or at least slowing their decline (the Price Maintenance Objective). By reducing the uncertainty that the participants faced in the market, the Information Exchange created conditions of competition which did not correspond to the normal conditions of the market. Therefore, the Information Exchange can be regarded, by its very nature, as being harmful to the proper functioning of normal competition. Following a finding of an anti-competitive object, the CMA is not required to examine whether the Information Exchange produced anti-competitive effects.

5.119 Section 5D sets out the relevant legal and economic context to the concerted practice(s) comprising the Information Exchange. The legal and economic context in which the Information Exchange took place was one in which the product in question (Nortriptyline Tablets) was homogenous in nature, with price as the key driver of competition; immediately before the Information Exchange the market was highly concentrated, competition was muted and prices had increased significantly; and the entry of the Lexon/Medreich JV Product and the potential entry of Alissa increased the intensity of competition and uncertainty in the market. This created opportunities for customers to 'play off' suppliers against one another putting downward pressure on prices. King, Lexon and Alissa were actual or potential competitors and they each stood to gain if prices remained the same or decreased more slowly.

5.120 As set out in section 5E, the CMA has found that King, Lexon and Alissa participated in the concerted practice(s) comprising the Information Exchange. The exchange of information reduced strategic uncertainty in the market and and was capable of influencing the Parties' conduct on the market. In addition, the Parties took account of the information exchanged with their competitors for the purposes of determining their conduct on the market. In particular, the Parties exchanged:

(a) Strategic information concerning pricing (see paragraphs 5.59 to 5.82 above). The exchanged information concerned the price at

which customers could or might be able to acquire Nortriptyline Tablets in the market, and assurances that the Parties would not compete intensely with each other on price. These exchanges significantly reduced the level of strategic uncertainty that each Party faced (concerning pricing available in the market) during negotiations with existing and prospective customers, reducing strategic uncertainty as to the prices that the Parties would need to charge in order to retain or win business. Accordingly, the exchanges were capable of reducing downward pressure on prices and enabling the recipients to pursue the Price Maintenance Objective;

(b) Strategic information concerning volumes and timings of supplies, in particular relating to supplies of the Lexon/Medreich JV Product to Teva (see paragraphs 5.86 to 5.91 above). These exchanges significantly reduced the level of uncertainty that the recipients faced during negotiations with customers (concerning availability of nortriptyline in the market). This reduction in uncertainty enabled the Parties to assess more accurately the credibility of their actual and/or potential customers' claims about the availability of alternative (cheaper) supplies. Ultimately this reduced strategic uncertainty during negotiations. Accordingly, the exchanges were capable of reducing downward pressure on prices and enabling the recipients to pursue the Price Maintenance Objective;

(c) Strategic information concerning Alissa's entry plans (see paragraphs 5.93 to 5.97 above). This information included Alissa's 20% target market share and the timing of its entry. These exchanges reduced uncertainty regarding Alissa's future strategic decisions on the market and reduced the level of uncertainty that the recipients faced during negotiations with customers. Accordingly, the exchanges were capable of reducing downward pressure on prices and enabling the recipients to pursue the Price Maintenance Objective.

5.121 The CMA has examined the objectives of the concerted practice(s) comprising the Information Exchange. Viewed in the overall context, and assessed objectively, the purpose of the exchanges of information was to reduce strategic uncertainty in the market for the purpose of maintaining the prices of Nortriptyline Tablets in the UK, or at least slowing their decline (the Price Maintenance Objective). Specifically, the exchanges (detailed at section 5E), and the context, make clear that the purpose of the Information Exchange was to avoid further price

declines and dampen price competition in the market.[601] By disclosing strategic information on pricing, volumes, timing of supplies and entry plans, the Parties thereby disclosed information that was capable of influencing the conduct on the market of their actual or potential competitors. The exchanges of information reduced uncertainty over, and better enabled the Parties to anticipate, the future behaviour of the other participants on the market. In some instances, information was disclosed concerning the course of action which they themselves had decided to adopt or contemplated adopting. In addition, many of the disclosures of strategic information were accompanied by explicit assurances (or themselves constituted implicit assurances) that the disclosing party (or a third party) was not undermining (or did not intend to undermine) the pricing of the recipient.

5.122 When viewed in their overall context, these exchanges therefore had the object of creating conditions of competition that did not correspond to the normal conditions of competition. It is well established that information exchange which is capable of reducing or removing the uncertainty between participants as regards the timing, extent and details of modifications to be adopted by undertakings in their conduct on the market must be regarded as pursuing an anti-competitive object (see paragraph 5.114 above).

(b) Parties' intentions

5.123 Although the parties' subjective intentions are not a necessary factor in determining whether an agreement is restrictive of competition, those intentions may be taken into account as corroboration of the objective assessment.

5.124 The CMA finds that the intentions of the Parties in exchanging the information were to reduce strategic uncertainty and to maintain the prices of Nortriptyline Tablets or at least slow their decline (see paragraph 5.125 below). Specifically, in finding that the Information Exchange amounted to a single continuous infringement (see paragraphs 5.158 below), the CMA has found that the Parties made an intentional contribution to the pursuit of a common objective, namely the Price Maintenance Objective (see paragraphs 5.165 to 5.167 below) and that they were aware of the offending conduct of the other participants (see paragraphs 5.162 to 5.164).

[601] See *Smart Chips* General Court judgment.

5.125 The documentary and witness evidence confirm that the Parties' intentions were to reduce strategic uncertainty and to maintain the prices of Nortriptyline Tablets or at least slow their decline, in line with the objective assessment above. For example:

(a) [Lexon Director] took steps on a number of occasions to reassure [King Director] that Teva was not undercutting market prices (see paragraph 5.64) and on one occasion he explicitly advised him against '*matching ficticious prices.*' (see parapgraph 5.66(b)).

(b) In March 2016, [Alissa Director] disclosed to [King Director] that '*I will tell you now that I am looking to take a modest 20% share. That's all I have geared up for and hope things don't become a free for all*'.[602]

(c) [King Director] told the CMA that he had wanted to meet with [Alissa Director] at the Landmark Hotel to talk to him about where he thought prices would end up going. He also said that he wanted to talk about pricing and the impact of generic entry into a market with '*a completely destabilized pricing set-up*' and to get [Alissa Director]'s views on what was going to happen in the future (see paragraph 3.1245.75(a)).

(d) [Alissa Director] told the CMA that [King Director] contacted him before Alissa had entered the market because he wanted to '*protect*' what he had (see paragraph 3.114). He said that [King Director] wanted information about when Alissa was planning to launch and that [King Director] would tell him which customers he should not approach (see paragraph 3.116). [Alissa Director] also told the CMA that [King Director] had contacted him after Alissa had entered the market to inform him that Alissa was '*selling at a price that is out of line with market pricing*' (see paragraph 3.195).

(e) In his explanation of what was discussed at the Landmark Hotel Meeting, [Lexon Director] explained that [Alissa Director] had wanted to reassure him and [King Director] that he did not intend to '*ruin the market*' i.e. bring the market price down (see paragraph 3.1405.82).

(f) In his explanation of his email correspondence with [King Director] regarding the prices being offered to Bestway/Co-op by Teva and

[602] Document NOR-E5943, email from [Alissa Director] to [King Director] dated 9 March 2016.

other competitors,[603] [Lexon Director] explained that he thought that "*[Employee of Bestway/Co-op] of Bestway/Co-op was giving [Consultant to King 1] misleading information, knowing that it would be fed back to King to secure a lower price*".[604] [Lexon Director] explained that he therefore provided [King Director] with information '*to help him better understand the market so that he could gauge whether what he was being told by [Consultant to King 1] about the availability of product from other sources was accurate*'.[605]

(c) Lexon's representations

5.126 Lexon submitted that the CMA has not established that the exchanges of information constituted an infringement of competition '*by object'*. In Lexon's submission: '*When the nature, purpose and timing of these communications are placed in their proper context, the information provided to King cannot rationally have [the] 'purpose of maintaining prices of Nortriptyline Tablets in the UK' as alleged.*'[606] Lexon drew attention to:

(a) Its contention that '*the information provided by Lexon to King was not as a competitor'* on the basis that they were not competitors (or, at least, not '*hard-core*' competitors).[607]

(b) Its contention that the information it disclosed was not '*strategic*' in nature.[608]

(c) The '*real world context*'[609] which, Lexon submitted, included the downward spiral of prices and increased price competition in the market which, it said, was '*largely the result of* [Lexon Director]*'s own initiative*'.[610] Lexon asserted that the Lexon/Medreich JV's

[603] Document NOR-E5953, email from [King Director] to [Lexon Director] and [Alissa Director] dated 11 March 2016; Document NOR-E5953, email from [Lexon Director] to [Alissa Director] and [King Director] dated 11 March 2016; Document NOR-E5953, email from [King Director] to [Lexon Director] and [Alissa Director] dated 11 March 2016; Document NOR-E8286, email from [Alissa Director] to [Lexon Director] dated 11 March 2016.
[604] Document NOR-C3224.3, Witness Statement of [Lexon Director] dated 10 September 2019, submitted alongside Lexon's response to the Statement of Objections, paragraph 71.
[605] Document NOR-C3224.3, Witness Statement of [Lexon Director] dated 10 September 2019, submitted alongside Lexon's response to the Statement of Objections, paragraph 66.
[606] Document NOR-C3224.3, Lexon's Written Response, paragraph 14.
[607] Document NOR-C3224.3, Lexon's Written Response, paragraphs 16 and 18
[608] Document NOR-C3224.3, Lexon's Written Response, paragraph 13.
[609] In the oral hearing [Document NOR-C3226.3, page 9], Lexon highlighted the opinion of Advocate General Bobek in C-228/18 *Budapest Bank*, EU:C:2019:678 in which the Advocate General stated at paragraphs 48 and 49 that it is necessary, when applying Article 101 TFEU to conduct a '*basic reality check*'.
[610] Document NOR-C3224.3, Lexon's Written Respresenations, paragraph 11.

entry on to the market, and sale of the Lexon/Medreich JV Product through Lexon, Medreich and Teva, introduced price competition in to the market, resulting in the fall in the prices for Nortriptyline Tablets from September 2015, which shows that the '*purpose*' of the communications '*was <u>not</u> to maintain prices'* (Lexon's emphasis).[611]

5.127 The CMA rejects these contentions for the following reasons:

(a) First, as explained in detail at paragraphs 5.38 to 5.39, Lexon's representations do not call into question the CMA's findings that Lexon and King competed with each other in the supply of Nortriptyline Tablets in the UK throughout Relevant Period.

(b) Second, as explained in detail at paragraphs 5.67, 5.81, 5.82, 5.89 and 5.92, the CMA does not accept that the information disclosed by Lexon was not strategic.

(c) Third, it is not inconsistent for Lexon to have taken decisions which contributed to downward pressure on prices (such as the decision to enter the market, or its decision to commercialise the Lexon/Medreich JV Product via Teva, Medreich and its own sales), while seeking to maintain the prices of Nortriptyline Tablets or at least slowing their decline. Indeed, as set out in more detail at paragraph 5E.I, in *Smart Chips*, the General Court (upheld by the Court of Justice) considered the relevance of several factors to a finding of anti-competitive information exchange, including the fact that prices for the relevant product (smart card chips) were constantly falling and that there was downstream pressure on pricing.[612] The CMA has carefully considered that real world context of the downward pressure on pricing (see paragaphs 5.25 to 5.32). That context does not cast doubt on the CMA's conclusion, arrived at from looking at the content and objective of the restriction itself.[613] Indeed, as set out at paragraphs 5.28 and

[611] Document NOR-C3224.3 Lexon's Written Respresentions, paragraph 12.

[612] T-762\14 *Koninklijke Philips NV v Commission*, EU:T:2016:738 (*Smart Chips*) (upheld on appeal to the Court of Justice in C-98\17 P *Koninklijke Philips NV v Commission*, EU:C:2018:774), at paragraphs [71] - [72]: *'The exchange of that information on the market for smart card chips […] was capable, as the Commission observed in recitals 287 and 288 of the contested decision, of enabling the competitors 'to limit the impact that the challenging market developments … entailed for them', 'to manage the continued price drops and squeezed margins', in order to 'slow down the price decrease inherent to the smart card chip market'. [72] In those circumstances, the applicants' argument that the economic analysis report drawn up at their request on the basis of the Statement of Objections concludes that, 'when the particular features of the market are taken into consideration', the information that they exchanged 'was not such as to significantly reduce strategic uncertainty', cannot succeed.*

[613] See paragraph 5.117.

5.29, the CMA has found that the launch of the Lexon/Medreich JV Product was one factor which contributed to downward pressure on prices and which created incentives for the Parties to seek to reduce uncertainty in the market.

G. Single continuous infringement

I. Legal framework

5.128 An infringement of the Chapter I prohibition and Article 101 TFEU need not be based on a single, isolated act, but may operate through a pattern of conduct involving a series of agreements and concerted practices entered into over a period of time. Such an infringement may be viewed as a single and continuous infringement where the practices at issue are interlinked in terms of pursuing a common anti-competitive objective. The existence of a single and continuous infringement has been confirmed in several European Commission and CMA (and its predecessors) decisions.[614]

5.129 Undertakings may participate in an infringement in which:

(a) continuous conduct takes place in pursuit of a single economic aim that distorts competition; and/or

(b) there is a series of related and separate actions that make up the overall infringement.

5.130 Thus, the single and continuous infringement concept can be used for complex cartels involving a range of different types of conduct or separate actions over a period of time. The concept requires the behaviour to be classified not just as a series of individual breaches but as operating through a pattern of conduct involving a series of agreements and/or concerted practices over a period of time where '*it would be artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement*

[614] OFT Decision of 28 June 2006, *Agreement to fix prices and share the market for aluminium double glazing spacer bars*, Case CA98\04\2006; and OFT Decision of 31 March 2006, *Price fixing and market sharing in stock check pads*, Case CA98\03\2006; Commission Decision of 21 October 1998, *Pre-insulated Pipes Cartel*, Case IV\35.691, paragraph 119 (**'Commission Decision in *Pre-insulated Pipes Cartel*'**); Commission Decision of 14 October 1998, *British Sugar plc*, Case IV\F-3\33.708; Commission Decision of 27 July 1994, *PVC*, Case IV\31.865; and Commission Decision of 10 July 1986, *Roofing Felt*, Case IV\31.371 and others mentioned in this section.

which progressively manifested itself in both agreements and concerted practices'.[615]

5.131 These separate actions may amount to separate infringements themselves or may amount to one overall infringement when considered as a whole.[616] Therefore, the characterisation of a complex cartel as a single infringement is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute infringements.[617] Indeed, single and continuous infringements typically involve an overall common objective which is manifested through a series of actions, some of which may amount to an individual infringement and some of which may not.

5.132 Practices can vary in intensity and effectiveness, with undertakings participating more or less over the period of the infringement, where there is evidence of continuity of method, practice and/or purpose.[618] In *LR AF 1998 v Commission*, the General Court noted the cartel at issue developed from a single country market to a pan-European cartel over the period of its existence, subject to a short period of abeyance.[619]

5.133 The General Court held in *BPB v Commission* that *'[w]here there is a complex, single and continuous infringement, each manifestation corroborates the actual occurrence of such an infringement*'.[620]

5.134 The European Courts have established a number of conditions which need to be satisfied in order that an undertaking's liability for a '*single and continuous infringement*' be established:

(a) The existence of a series of efforts made by the undertakings in pursuit of a common objective, or single economic aim;

(b) The intentional contribution of the undertaking to the common objectives pursued by all the participants; and

[615] C-49\92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 82. Further the Commission does not have a discretion as to whether to analyse the evidence as a single continuous infringement on the one had or as a series of separate agreements on the other. See T-373\10, *Villeroy & Boch GmBH and Others v Commission*, EU:T:2013:455, paragraph 36.
[616] Joined cases C-204\00 P *Aalborg Portland and Others v Commission*, EU:C:2004:6, paragraph 13.
[617] Commission Decision of 10 December 2003, *Organic Peroxides*, Case E-2\37.857, paragraphs 307 to 308. C-49\92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 81.
[618] T-385\06 *Aalberts Industries v Commission*, EU:T:2011:114, paragraph 105.
[619] T-23\99 *LR AF 1998* v *Commission*, EU:T:2002:75, paragraphs 106-109.
[620] T-53\03 *BPB v Commission*, EU:T:2008:254, paragraph 249.

(c) The undertaking's awareness of the offending conduct of the other participants in pursuit of the same objectives, or that it could have reasonably foreseen it and was prepared to take the risk.[621]

(a) Common objective, or single economic aim

5.135 There must be evidence showing the existence of a series of efforts made by the undertakings in pursuit of a '*common objective'* or '*single economic aim'*.[622] It therefore must be demonstrated that what might otherwise appear to be different conduct has an '*identical*' purpose or object to the anti-competitive aims allegedly being pursued, so that the various concerted practices and agreements detected can be considered to have been *'part of a series of efforts made by the undertakings in question, in pursuit of a single economic aim'*.[623]

5.136 In this respect the common objective must be based on objective elements linking the various actions together, showing that they were indeed in pursuit of the same common objective or single economic aim.

5.137 In order to establish the existence of an overall objective that interlinks a set of anti-competitive practices, it must be proven that they share common features.

5.138 In a number of judgments, the General Court has found that to find a common objective, the practices at issue must not only share a common purpose, but they must also be complementary in nature. However, the Court of Justice has clarified that no such criterion must be fulfilled. Nevertheless, an authority must ascertain whether there are any elements characterising the various instances of conduct forming part of the infringement which are capable of indicating that the conduct in fact implemented by other participating undertakings does not have an identical object or identical anti-competitive effect.[624]

5.139 It is clear from the case law of the European Courts that, when assessing the common features of a set of anti-competitive practices in order to determine whether there is a series of efforts made in pursuit

[621] T-204\08 *Team Relocations v Commission*, EU:T:2011:286, paragraph 37 ('***Team Relocations***'). Judgment in *Commission v Anic Partecipazioni* C-49\92 P, EU:C:1999:356, paragraph 197.
[622] Judgment in *Commission v Anic Partecipazioni* C-49\92 P, EU:C:1999:356, paragraph 197. T-204\08 *Team Relocations v Commission*, EU:T:2011:286, paragraph 37.
[623] Case-49\92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 42.
[624] Case C-239\11 P *Siemens v Commission,* EU:C:2013:866, paragraph 248: '*The General Court is not in fact required to examine such an additional condition of complementarity*.'

of a common objective, it is necessary to look at the available elements together.[625] The authority should be guided by a combination of the relevant objective factors considered below, rather than dependence on a single element, and in that sense, the authority benefits from a margin of discretion as to which combination of elements are relevant to its decision.

(b) Identical nature of objectives of the practices at issue

5.140 The objectives of the practices will be a question of fact and characterisation, based on the evidence gathered.

5.141 In order to demonstrate a common objective, there needs to be more than a general reference to the distortion of competition in the relevant product market.[626] For example, in one of the *Gas Insulated Switchgear* cartel appeals, the General Court ruled that the practice at issue shared a common objective, namely the establishment of a system of sharing the worldwide market for gas insulated switchgear projects and allocating those projects among the various participants. The Court of Justice ruled that such finding did not amount to a general reference to a distortion of competition in the relevant product market and was therefore sufficient to stand as the objective of the practice.[627]

Identical nature of the goods and/or services and/or geographic area concerned

5.142 Where the nature of the goods and/or services concerned and/or the geographic scope of the anti-competitive practices is identical, a common overall objective may be found to exist.

Identical nature of undertakings participating

5.143 Where the number of common undertakings between two cartels is limited, no overall objective may be found. However, a change in the number or identity of the participating undertakings does not necessarily rule out the finding of an identity link. It has been found on a number of occasions that '*members may join or leave a cartel from*

[625] Joined Cases T-259\02 to T-264\02 and T-271\02 *Raiffeisen Zentralbank Osterreich v Commission*, EU:T:2006:396, paragraph 121 ('***Raiffeisen***').
[626] *T-101\05 BASF and UCB v Commission,* EU:T:2007:380, paragraph 180.
[627] T-113\07 *Toshiba v Commission*, EU:T:2011:343, paragraph 228; see also C-498\11 *Siemens and Others v Commission*, EU:C:2013:866*,* paragraph 246.

time to time without it having to be treated as a new agreement with each change in participation.'[628]

Identical timeline of the practices at issue / interruptions and single repeated infringements

5.144 The continuity of a practice throughout time is an essential feature of a single and continuous infringement and is linked to the requirement to establish the duration of the infringement. However, it is settled case law that the CMA may assume that an infringement has not been interrupted even if, in relation to a specific period, it has no evidence of the participation of the undertaking concerned in the infringement, provided that that undertaking participated in the infringement prior to and after that period and provided that there is no proof or indicia that the infringement was interrupted so far as concerns that undertaking.[629] Thus, in the context of an overall common objective extending over many years, a gap of several months between the various manifestations may be immaterial. The assessment of such time gap is highly fact-specific.

5.145 Sufficient evidence must be adduced to establish the existence of the facts constituting the infringement and '*if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates*.'[630] However, it is '*not required to provide precise and consistent evidence of each element of the offense, provided that the bundle of indicia, assessed globally, satisfies this requirement*'.[631]

5.146 However, when such evidence is not adduced for specific periods, this does not preclude the infringement from being regarded as having been established during a more extensive period, '*provided that such a finding is based on objective and consistent indicia.'* [632] It is also

[628] Commission Decision in *Pre-insulated Pipes Cartel*, paragraph 134.
[629] T-147\09 *Trelleborg Industrie v Commission*, EU:T:2013:259, paragraphs 61. In such circumstances, the authority is entitled to impose a fine during the whole period of the infringement, including the period in respect of which it does not have evidence of the participation of the undertaking concerned: paragraph 87.
[630] T-43\92 *Dunlop Slazenger International Ltd v Commission*, EU:T:1994:79, paragraph 79 (***'Dunlop Slazenger'***). Affirmed in T-62\98 *Volkswagen v Commission*, EU:T:2000:180.
[631] T-195\06 *Solvay Solexis v Commission*, EU:T:2011:280, paragraph 95 – translated from French.
[632] In C-113\04 P *Technische Unie v Commission*, EU:C:2006:593 at paragraph 169, when discussing the existence of a single and continuous infringement from 1986 to 1994, the Court of Justice stated '*In the context of such an infringement, extending over a number of years, the fact that the infringement is demonstrated at*

subject to the parties not having adduced evidence proving on the contrary that they did not participate in the infringement during those periods (for example, by showing they were pursuing a different overall objective, or they had publicly distanced themselves from the activities of the cartel).[633]

5.147 In examining the continuous nature of an infringement, the question of whether or not a gap is long enough to constitute an interruption of the infringement cannot be examined in the abstract and should be assessed in the context of the functioning of the cartel in question.[634]

5.148 For instance, in *ICAP*, the undertaking appealed the finding of a single and continuous infringement characterising it as facilitating the exchange of information allowing the manipulation of the JPY LIBOR rate. The rates were set on a daily basis and required positive measures on the part of ICAP to share information, a fact the General Court considered relevant to the question of continuity of participation or the duration of the cartel. The General Court stated that it was necessary to adduce evidence of ICAP's repeated positive measures: '*In circumstances where the pursuit of an agreement or of concerted practices requires special positive measures, the Commission cannot assume that the cartel has been pursued in the absence of evidence that those measures were adopted'.*[635] In *Trelleborg* the fact that the rigging of bids that occurred in May 1997 might have continued to impact upon the market until December 1997, was insufficient to

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different periods, which may be separated by more or less long periods, has no impact on the existence of that agreement, provided that the various actions which form part of the infringement pursue a single aim and come within the framework of a single and continuous infringement'.

[633] T-99\04 *AC-Treuhand,* EU:T:2008:256, paragraph 130. See also T-450\14 *Sumitomo v Commission*, EU:T:2018:455, which held distancing must be '*firm and unequivocal'.* In that case, the Court held JPS's attempts had failed this test and it had not succeeded in publicly distancing itself from the cartel. Additionally, the attempts '*overall, rather show a hesitant approach on the part of JPS towards the cartel. Such an approach is characteristic of an undertaking which, while wishing not to lose the benefits of participating in an anti-competitive agreement, tries to avoid the risks associated with that participation'* (at paragraph 101).

[634] T-83\08 *Denki Kagaku,* EU:T:2012:48, paragraphs 223 – 224 In this case *'the gap of slightly less than nine months between the applicants' participation in the cartel meeting of 12 or 13 May 1993 in Florence and their participation in the cartel meeting of 8 or 9 February 1994 in Tokyo (or a gap of eleven months between the meeting of 12 or 13 May 1993 in Florence and the meeting of 11 April 1994 in Zurich), is not relevant. The cartel extended over a number of years and, accordingly, a gap of nine months between the various manifestations of that cartel, during which the applicants did not distance themselves from it, is immaterial.'* By contrast, in an appeal from the Commission's *Marine Hoses* decision, the General Court in Case T-147 *Trelleborg v Commission,* EU:T:2013:259, paragraph 68, ruled that an 18-month period in the course of the cartel, for which there was no evidence of anti-competitive contacts between the appellant and other cartelists, was to be regarded as an interruption in the appellant's participation in the cartel.

[635] *ICAP*, paragraph 223.

establish a continuous infringement in a situation where bid-rigging did not resume until 21 June 1999.[636]

5.149 If the conduct constituting an infringement is interrupted, the infringement cannot be classified as continuous but may be classified as a single repeated infringement provided a single objective is pursued both before and after the interruption.[637] This is in contrast to an individual undertaking's own participation ceasing and resuming, which is unlikely in itself to jeopardise the characterisation of the infringement as continuous but may be reflected in the level of that undertaking's fine.

5.150 The key difference in such cases lies in the fact that if the infringement is single and repeated, a penalty may not be imposed for the period of the interruption, whereas a penalty may be imposed for the whole period in the case of a single and continuous infringement.[638]

(c) Intentional contribution of the undertaking to the common objective

5.151 It is necessary to establish evidence for each undertaking to have contributed, at its own level, to the pursuit of the common objective.[639] Thus, the undertakings, through their conduct, must have contributed to an anti-competitive '*identical purpose*' or *'single economic aim'* which can be characterised as their *'common objective*'. Accordingly, it is necessary to show that each undertaking made an '*intentional contribution*' to the pursuit of the common objective.[640]

5.152 Furthermore, participation need only be minimal in order to demonstrate involvement in a single and continuous infringement. The fact that the participation of an undertaking was limited to minor aspects of the infringement does not affect its liability for the conduct of other undertakings in the context of the infringement throughout the period of its participation in the infringement, as long as the undertaking was aware of the illicit acts of the other participants (see further paragraphs 5.153 to 5.157 below), in view of the overall common objective. However, limited participation in the single and continuous infringement may be taken into account at a later stage, when

[636] T-147 *Trelleborg Industrie v Commission*, EU:T:2013:259, paragraphs 47 and 68.
[637] T-147 *Trelleborg Industrie v Commission*, EU:T:2013:259, paragraphs 88 and 89.
[638] T-147 *Trelleborg Industrie v Commission*, EU:T:2013:259, paragraphs 88 and 89.
[639] C-49\92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 206.
[640] T-204\08 *Team Relocations v Commission,* EU:T:2011:286*,* paragraph 37.

assessing the gravity of the infringement in order to determine the level of the fine for the particular undertaking.

(d) Awareness of illicit acts by other participants

5.153 It must be shown that each undertaking in question '*was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk*'.[641] In other words, even if a particular undertaking did not directly participate in every aspect of the single and continuous infringement, it can still be found liable for the whole infringement if it was '*aware (proved or presumed) of the offending conduct of the other participants'*. [642]

5.154 However, whilst an undertaking's awareness must be proven, the requirement of awareness is subject to a low threshold: the mere reasonable foreseeability of illicit acts by the other participants is deemed to fulfil this requirement.[643] As discussed above, attendance at meetings where anti-competitive plans were made or reinforced would be clear evidence of awareness.

5.155 It is not necessary for each undertaking to be aware of the full detail of all the participants' activities, so long as each had sufficient awareness of the overall common objective and intended to contribute to it.[644]

5.156 As noted above, participation and awareness are often linked issues: an undertaking can only be held liable '*for the conduct in which [the undertaking] had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk.*'[645] Therefore where awareness cannot be demonstrated or inferred, the undertaking is liable only for its own conduct and not for the full extent of the single and continuous infringement.

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[641] C-49\92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 203.
[642] T-204\08 *Team Relocations v Commission,* EU:T:2011:286, paragraph 37.
[643] C-49\92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 87.
[644] In T-271\02 *Raiffeisen Zentralbank Osterreich v Commission*, EU:T:2006:396, the General Court stated at paragraph 193: '*Similarly, neither the fact that RBW was not familiar with the detail of the concerted practices taking place within numerous committees in which it did not participate nor the fact that it was unaware of the existence of certain committees, such as those concerning cross-border operations, if their existence is established, can detract from the Commission's finding that it participated in the cartel as a whole.'*
[645] C-441\11 *Verhuizingen Coppens* EU:C:2012:778, paragraph 44.

5.157 In *Infineon*, the Court of Justice reiterated that the finding of the existence of a single and continuous infringement is separate from the question of whether liability for the infringement as a whole is imputable to an undertaking.[646] Therefore, establishing an undertakings' awareness of the infringement as a whole (including if it was reasonably foreseeable) is key to establishing the extent of its liability.[647]

II. The Information Exchange as a single, continuous infringement

5.158 The CMA has found that, in each of Relevant Period 1 and Relevant Period 2, the Information Exchange was a single continuous infringement, which together formed a single repeated infringement.[648] Specifically:

5.159 King, Lexon and Alissa's conduct within each of Relevant Period 1 and Relevant Period 2 constitutes a single continuous infringement on the basis that:

(a) The Parties pursued a common objective, namely to maintain the prices of Nortriptyline Tablets in the UK or at least slow their decline (the Price Maintenance Objective);

(b) Each of King, Lexon and Alissa (during their respective periods of participation in the Information Exchange) were aware of the conduct that was put into effect by the other Parties in pursuit of the Price Maintenance Objective (namely the reciprocal exchanges of information), or could reasonably have foreseen it and were prepared to take the risk; and

(c) Each of the Parties made an intentional contribution to the pursuit of the Price Maintenance Objective.

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[646] Case C-99\17 P *Infineon Technologies v Commission*, EU:C:2018:773, paragraphs 171-177 (**'*Infineon*'**).
[647] T-67\00 *JFE Engineering Corp v Commission,* EU:T:2004:221, paragraph 371. *T-53\03 BPB v Commission, EU:T:2008:254*, paragraph 253.
[648] For the avoidance of doubt, the individual contacts may be infringements in their own right. For example, exchanging information on individualised pricing and\or quantities has been found to be a by-object infringement of Chapter I and Article 101 TFEU. However, the fact that the contacts may amount to individual infringements does not prevent the finding that they are part of a single continuous infringement or single repeated infringement (as explained at paragraph 5.131).

(e) The content of the common objective

5.160 The CMA has found that the common objective of King and Lexon (from the date that their participation began; 27 July 2015), and of Alissa (from the date that its participation began; 2 March 2016), was to reduce strategic uncertainty in the market for the purpose of maintaining the prices of Nortriptyline Tablets in the UK or at least slowing their decline (the Price Maintenance Objective) (see paragraph 5.121 above).[649] King, Lexon and Alissa sought to achieve this aim by exchanging the categories of strategic information described in section 5E above. Specifically, the CMA considers that the contacts, and the context, make clear that the purpose of the reciprocal contacts was to seek to avoid further price declines and, as such, to dampen price competition in the market. In addition, many of the disclosures of strategic information were accompanied by explicit assurances (or themselves constituted implicit assurances) that the disclosing party (or a third party) was not undermining (or did not intend to undermine) pricing on the market.

The common elements characterising the relevant contacts

5.161 As noted at paragraphs 5.128 to 5.134 above, in order to determine whether there exists a series of efforts made in pursuit of a a common objective, it is necessary to consider the available elements together. An authority must also ascertain if there are any elements characterising the various instances of conduct capable of indicating that the conduct does not have an identical object and consequently do not form part of a '*common objective*'.

(a) Identical nature of objectives of the practices at issue: the relevant contacts pursued an identical Price Maintenance Objective: see paragraph 5.160 above.[650]

(b) Identical nature of the goods and geographic area concerned: the contacts all concerned the supply of Nortriptyline Tablets in the UK, a homogenous product available in two strengths. The relevant product did not change during the Relevant Period.

[649] For the avoidance of doubt, the CMA reaches this finding in respect of each of the contacts to which the CMA objects, including both those falling within Relevant Period 1 and those falling within Relevant Period 2.
[650] As noted at paragraph 5.137, recent case law has indicated that it is not necessary to demonstrate that the practices at issue not only shared a common objective, but were also complementary in nature. However, an absence of complementarity can call into question the existence of a common objective. In this case, the CMA considers it clear that all the instances of contact in pursuit of the common objective are complementary as they are each intended to deal with a consequence of the normal pattern of competition, namely price competition.

(c) Identical nature of the undertakings participating: whilst not every Party was directly involved in each relevant contact, they were all party to the single and continuous infringement and knowingly participated in the pursuit of the common objective. The fact that (i) Alissa joined the arrangement later than King and Lexon; and the fact that (ii) Lexon ceased participation before King and Alissa, are both compatible with a finding of a single and continuous infringement. Additionally, the same key individuals were involved in the relevant contacts.

(d) Identical timeline of the practices at issue: The Information Exchange started on 27 July 2015 and continued until 27 May 2016 (during Relevant Period 1). It may then have fallen into abeyance for a period until it resumed on 5 December 2016 (by King and Alissa only) and continued until 27 January 2017 (i.e. Relevant Period 2). The CMA's reasoning for this finding is as follows:

(i) All of the relevant contacts during Relevant Period 1 and Relevant Period 2 contributed to and supported the same Price Maintenance Objective.

(ii) With regard to Relevant Period 1, although there was a considerable increase in the intensity of the information exchange activity from 2 March 2016, this was a logical consequence of King and Lexon becoming aware that there was at that point a new MA-holder in the market (Alissa) and their need to react to the threat Alissa posed to the Price Maintenance Objective. This change in circumstances engendered more frequent contact between the (now) three participants: contact changed from being approximately monthly or bimonthly in the early part of Relevant Period 1 (before Alissa participated) to approximately weekly or fortnightly in the latter part of Relevant Period 1 (once Alissa also participated). This change in the intensity of the contact is therefore entirely consistent with the existence of the common Price Maintenance Objective throughout Relevant Period 1.

(iii) The CMA has considered whether the gaps between each relevant contact in Relevant Period 1 would preclude the finding of an uninterrupted single continuous infringement. There is no evidence to suggest any break during Relevant Period 1 in any Party's intentional contribution to the Price Maintenance Objective through the exchange of strategic

information, and no evidence to suggest that any time gap between the instances of contact in Relevant Period 1 led to a cessation in the pursuit of the Price Maintenance Objective. Within a single continuous infringement, it is possible for practices to vary in intensity and effectiveness over time. Given the fragmentary and sporadic items of evidence that may be available in cartel cases, it is settled case law that such evidence should be capable of being supplemented by inferences and the CMA may assume that an infringement has not been interrupted, provided there is no proof or indicia that it was interrupted.[651] Further, taking account of the context of the functioning of the Information Exchange, the manifestations of conduct (i.e. the instances of information exchange) within Relevant Period 1 were sufficiently proximate in time for it to be reasonable to find that the Information Exchange continued uninterruptedly during Relevant Period 1: the distortive potential of each relevant contact would have been capable of enduring for a period of at least 10 weeks (the longest time gap between contacts during Relevant Period 1). Since the Parties understood that each was avoiding aggressive price competition, more frequent contacts would not be necessary in order to support the Price Maintenance Objective. For example, on the basis of the evidence before the CMA:

- Monthly, bimonthly or quarterly negotiations were the norm with customers.
- Orders for Nortriptyline Tablets were placed no more frequently than approximately monthly
- The Parties' commercial strategies remained relatively constant. For example, [Lexon Director] told the CMA that he had reassured [King Director] that '*you know who I sell to, there's no difference. Business as usual from me in so much that my strategy hasn't changed at all*.'[652]

(iv) The CMA notes that there was a time gap of 192 days (27½ weeks) between the end of Relevant Period 1 (the King/Lexon/Alissa contact on 27 May 2016) and the beginning of Relevant Period 2 (the King/Alissa contact on 5 December 2016). In view of the absence of clear evidence of contacts

[651] See paragraph 5.145 above. For discussion of the standard and burden of proof generally see Section C.I.
[652] Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018 page 172, lines 18-20.

between the parties from 27 May 2016 to 4 December 2016 (i.e. in the period between Relevant Period 1 and Relevant Period 2) the CMA accepts that there may have been a temporary suspension in King and Alissa's pursuit of the Price Maintenance Objective, such that there was an '*interruption*' within the meaning of the case law, before the infringement was resumed on 5 December 2016 until 27 January 2017 (see the following subparagraph).

(v) The CMA has found that the Information Exchange was resumed by King and Alissa between 5 December 2016 and 27 January 2017. [653] The identical Price Maintenance Objective remained in place both before the interruption and after the interruption. Furthermore, there was a continuity of method and practice between the contacts during Relevant Periods 1 and 2 in terms of: (a) the identical nature of the objective pursued: the Price Maintenance Objective; (b) the identical nature of the goods and geographic area concerned: Nortriptyline Tablets in the UK; and (c) the identical nature of the undertakings participating: King and Alissa, who participated in both Relevant Period 1 and Relevant Period 2. The CMA has considered whether the gap between the two contacts within Relevant Period 2 would preclude the finding of an uninterrupted single continuous infringement. The gap amounts to a period of 52 days (seven ½ weeks). There is no evidence to suggest any break during Relevant Period 2 in any Party's intention to continue to pursue the Price Maintenance Objective through the exchange of strategic information. Taking account of the context of the functioning of the Information Exchange as set out at paragraph 5.161 above, the CMA finds that the instances of exchange within Relevant Period 2 were sufficiently proximate in time for it to be reasonable to find that the Information Exchange continued uninterruptedly during Relevant Period 2.

(f) Awareness of (or reasonable ability to foresee) the conduct put into effect by the other Parties

5.162 For the following reasons, the CMA has found that each of Lexon, King and Alissa, was (during their respective periods of participation in the Information Exchange) aware of the conduct of the other Parties in

[653] See cases cited at paragraphs 5.130 to 5.133.

pursuit of the Price Maintenance Objective (or could reasonably have foreseen such conduct and was prepared to take the risk of such conduct).

5.163 Each of Lexon, King and Alissa, when receiving (and accepting) strategic information from the other Parties, was aware that the disclosing Party was making the disclosure with the aim of participating in and supporting the Price Maintenance Objective. In this respect, each communication occurred in circumstances where the shared, common objective was either implicitly understood or explicitly voiced.

5.164 Further, whilst not all of King, Lexon and Alissa were directly involved in every contact during the period of their participation, the CMA considers that, through the contacts in which they were involved, they were aware that the other Parties were not competing under normal terms of competition.

(g) Intentional contribution of the parties to the Price Maintenance Objective

5.165 For the following reasons, the CMA has found that the reciprocal contact between the Parties demonstrates their intentional contribution to the pursuit of the common objective; the common Price Maintenance Objective.

5.166 The CMA finds that the contacts (as described at section 5E) demonstrate that each of King, Lexon and Alissa actively participated in the exchanges in pursuit of the Price Maintenance Objective. Accordingly, each of King, Lexon and Alissa contributed, at its own level, to the pursuit of the Price Maintenance Objective.

5.167 The contribution of each Party was also intentional in nature. The circumstances of the exchanges is such that the Parties could not have failed to be aware that the information disclosed was to be used by the recipient(s) in pursuit of the Price Maintenance Objective: the disclosures took place almost entirely through either private email chains directly between the Parties or via direct telephone conversations and, on one occasion, through a face-to-face meeting in a hotel in London. These communications occurred in circumstances where the shared objective of maintaining prices (or at least slowing their decline) was either implicitly understood or explicitly voiced. For example:

(a) In an email from Alissa to King and Lexon, [Alissa Director] disclosed his market share ambition and remarked '*hope things don't become a free for all*'.[654]

(b) In an email from King to Alissa, [King Director] identified Actavis as the '*problem*' i.e. as the party causing market destabilisation.[655]

(c) In an email from Lexon to King and Alissa, [Lexon Director] voiced the opinion that King would be '*crazy*' to match low prices said to be offered by Teva.[656]

(d) As explained in paragraph 5.160 and 5.124 above, the documentary and witness evidence confirm that the Parties' intended to reduce strategic uncertainty and to maintain the prices of Nortriptyline Tablets or at least slow their decline.

H. Duration

5.168 The duration of the Infringement is a relevant factor for determining the financial penalties that the CMA will impose following a finding of infringement.

5.169 The CMA has found that the Infringement had a duration from 27 July 2015 until 27 May 2016 and from 5 December 2016 until 27 January 2017, a total of 11 months and 23 days.

5.170 The CMA has found that King, Lexon and Alissa participated in the Information Exchange as follows:

(a) King participated during the periods from 27 July 2015 to 27 May 2016 (Relevant Period 1) and from 5 December 2016 to 27 January 2017 (Relevant Period 2);[657]

(b) Alissa participated during the periods from 2 March 2016 to 27 May 2016 (part of Relevant Period 1) and from 5 December 2016 to 27 January 2017 (Relevant Period 2); and

[654] See paragraph 3.122. Document NOR-E5943, email from [Alissa Director] to [King Director] dated 9 March 2016.
[655]See paragraph 3.124. Document NOR-E5953, email from [King Director] to [Alissa Director] dated 9 March 2016
[656]See paragraph 3.127(b). Document NOR-E5953, email from [Lexon Director] to [Alissa Director] and [King Director] dated 11 March 2016.
[657] Relevant Period 1 and Relevant Period 2 are together referred to as the Relevant Period.

(c) Lexon participated during the period from 27 July 2015 to 27 May 2016 (Relevant Period 1).

5.171 Accordingly, the CMA has found that the duration of King, Alissa and Lexon's participation in the Infringement was as follows:

(a) Lexon for a total of 10 months and 1 day (during the period from 27 July 2015 to 27 May 2016);

(b) King for a total of 11 months and 23 days during the periods:

(i) From 27 July 2015 to 27 May 2016 (10 months 1 day); and

(ii) From 5 December 2016 to 27 January 2017 (1 month 22 days);

(c) Alissa for a total of 4 months and 15 days during the periods:

(i) From 2 March 2016 to 27 May 2016 (2 months 25 days); and

(ii) From 5 December 2016 to 27 January 2017 (1 month 22 days).

I. Appreciable restriction of competition

I. *Legal framework*

5.172 An agreement that is restrictive of competition by '*object'* will fall within the Chapter I prohibition or Article 101 TFEU only if it has as its object an appreciable prevention, restriction or distortion of competition.[658]

5.173 The Court of Justice has clarified that an agreement that may affect trade between EU 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.[659] In accordance with section 60(2) of the Act,[660] this principle also applies in respect of the Chapter I prohibition and the UK. An agreement that may affect trade within the UK and that has an anti-competitive object

[658] 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 C-226\11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 16 citing, among other cases, C-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.

[659] 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.

[660] Section 60(2) of the Act provides that, when determining a question in relation to the application of Part 1 of the Act (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the European Court in respect of any corresponding question arising in EU law. Section 60 continues to aply during the Transition Period, see paragraph 5.7 above.

therefore constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

II. ***Assessment***

5.174 The CMA has found that the Infringement had the object of preventing, restricting or distorting competition. Given that the effect on trade test is satisfied (see section 5J below), the CMA has found that the Infringement constitutes, by its very nature, an appreciable restriction of competition in the supply of Nortriptyline Tablets in the UK for the purposes of the Chapter I prohibition and Article 101 TFEU prohibition.

5.175 In any event, and in the alternative, the CMA has found that the Infringement had an appreciable impact on competition for the supply of Nortriptyline Tablets within the EU (for the purposes of Article 101 TFEU) and the UK (for the purposes of the Chapter I prohibition). This conclusion is based on the following findings:

(a) The geographic scope of the Infringement covered the whole of the UK; and

(b) The suppliers involved in the Infringement; King, Lexon and Alissa, represented three of the four UK MA holders for Nortriptlyine Tablets at the time of the Infringement. During the Relevant Period:

(i) King supplied approximately 25% of the Nortriptyline Tablets supplied to the UK market.

(ii) The Lexon/Medreich JV accounted for 38% of Nortriptyline Tablets supplied in the UK and this can be divided into three categories:

- Lexon's supply of Nortriptyline Tablets to its own customers, in relation to which Lexon retained all profits. These supplies represented approximately 4% of all Nortriptyline Tablets supplied.

- Medreich's supply of Nortriptyline Tablets to its own customers, in relation to which Medreich retained all profits. These supplies represented approximately 10% of all Nortriptyline Tablets supplied.

- the Lexon/Medreich JV's supply to Teva, in relation to which Lexon and Medreich shared the profits [✂]. These

supplies represented approximately 24% of all Nortriptyline Tablets supplied.

(iii) Alissa supplied 2% of all Nortriptyline Tablets. It should be noted that Alissa's supply of Nortriptyline Tablets commenced in November 2016.[661]

J. Effect on trade

5.176 For the reasons set out below, the CMA has found that the Infringement was capable of affecting trade both within the UK, and between EU Member States, such that Article 101 TFEU applies as well as the Chapter I prohibition.

I. Effect on trade within the UK

(a) Legal framework

5.177 The Chapter I prohibition applies to agreements 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.[662] For the purposes of the Chapter I prohibition, the UK includes, in relation to an agreement which operates or is intended to operate only in a part of the UK, that part.[663]

5.178 To infringe the Chapter I prohibition, the conduct does not actually have to affect trade as long as it is capable of doing so.[664] The concept of effect on trade is also not read as importing a requirement that the effect on trade within the UK should be appreciable.[665]

(b) Application to this case

5.179 The Infringement was implemented in the UK and was capable of having an effect on sales of Nortriptyline Tablets in the UK. As set out at paragraph 5.175(b) above, the suppliers involved in the Infringement

[661] CMA analysis of the following documents: King (Documents NOR-C0261.13 – NOR-C0261.20), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord-UK (Document NOR-C0949), Lexon\Medreich JV (Document NOR-C3050, NOR-C2092), Alissa (Document NOR-C1450), and for parallel imports (PI): B&S Healthcare (Document NOR-C1939, Beachcourse (Document NOR-C2001.2), CD Pharma (Document NOR-C1866.1) Ecosse (Document NOR-C1948), Expono (Document NOR-C1908), Kosei (Document NOR-C1930), Landmark (Document NOR-C2010), Manx (Document NOR-C1871), MPT Pharma (Document NOR-C1878), S&M Medical (Document NOR-C1945), Amimed (Document NOR-C2067.2), Lexon (Document NOR-C1459).
[662] Section 2(1) of the Act.
[663] Section 2(7) of the Act.
[664] See, for example, T-228\97 *Irish Sugar plc v Commission,* EU:T:1999:246, paragraph 170.
[665] *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 11, paragraphs 459 and 460.

accounted for a significant proportion of sales of Nortriptyline Tablets in the UK and sold to customers located across the UK. Accordingly, the CMA has found that the Infringement may have affected trade in the buying and selling of pharmaceutical products (Nortriptyline Tablets) within the whole or part of the UK.

II. Effect on trade between EU Member States

(f) Legal framework

5.180 Where the CMA applies national competition law to agreements between undertakings which restrict competition by object where such conduct may have an effect on trade between EU Member States, the CMA must also apply Article 101 TFEU.[666]

5.181 For the purposes of assessing whether trade between EU Member States may be affected, the CMA follows the approach set out in the Commission's Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (the '**Effect on Trade Guidelines**')[667] and the case law of the European Courts.

5.182 It is not necessary that the conduct actually has or has had an effect on trade between EU Member States. It is sufficient that the conduct is '*capable'* of having an effect, i.e. that it may have a direct or indirect, actual or potential influence on the pattern of trade between at least two EU Member States.[668] The effect on trade between EU Member States must be appreciable.[669]

5.183 The nature of the relevant products also provides an indication of whether trade between EU Member States is capable of being affected. An effect on trade between EU Member States is more likely to exist, when by their nature, products are easily traded across borders.[670] Trade between EU Member States may also be affected in cases where the relevant market is national or sub-national.[671]

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[666] Article 3 of Council Regulation (EC) No 1\2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[667] *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (Effect on Trade Guidelines), OJ C 101, 27.4.2004, p. 81 to 96.
[668] Effect on Trade Guidelines, paragraphs 21 to 26.
[669] Effect on Trade Guidelines, paragraphs 44 to 49.
[670] Effect on Trade Guidelines, paragraph 30.
[671] Effect on Trade Guidelines, paragraph 22.

5.184 In order for there to be an effect on trade between EU Member States, it is not necessary that trade is reduced. Instead, it is sufficient that an appreciable change is capable of being caused in the pattern of trade between EU Member States and this change can be positive or negative.[672]

(g) Application to this case

5.185 The CMA has found that the Infringement was capable of affecting trade between EU Member States for the following reasons:

(a) The geographic scope of the Infringement covered the whole of the UK. The UK constitutes a substantial part of the internal market.[673]

(b) An effect on trade between EU Member States is not confined to cases where a measure results in compartmentalisation of markets through restrictive effects. The potential for the Infringement to increase, or decrease, parallel importation exists because the Parties sought to influence, through the exchange of strategic information, price competition for Nortriptyline Tablets in the UK. This had the potential to have an effect on price differentials between the prices in the UK and the prices charged in other EU Member States for Nortriptyline Tablets. Consequently, the commercial incentives for importing Nortriptyline Tablets from other EU Member States could have been affected. As a result, the Infringement had the potential to lead to a change in the competitive structure of the single market and therefore it is capable of affecting trade between EU Member States.[674]

5.186 Accordingly, the CMA has found that the Infringement was capable of affecting trade between EU Member States.

[672] Effect on Trade Guidelines, paragraphs 33 to 35 and 77; Case COMP\F-2\36.693 - *Volkswagen*, Commission decision of 29 June 2001, at paragraph 88.
[673] See, for example, T-228\97 *Irish Sugar v Commission*, EU:T:1999:246, paragraph 99.
[674] See, for example, C-6\73 *Commercial Solvents v Commission*, EU:C:1974:18, paragraphs 32 and 33.

K. Exclusion or exemption

I. Legal framework

(a) Exclusion

5.187 The Chapter I prohibition does not apply in any of the cases in which it is excluded by or as a result of Schedules 1 to 3 of the Act.[675]

(b) Exemption

5.188 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.

5.189 There are four cumulative criteria to be satisfied:

(a) the agreement contributes to improving production or distribution, or promoting technical or economic progress;

(b) while allowing consumers a fair share of the resulting benefit;

(c) the agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and

(d) the agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

5.190 In considering whether an agreement satisfies the above criteria, the CMA will have regard to the European Commission's Article 101(3) Guidelines[676] and relevant case law.

5.191 Agreements which have as their object the prevention, restriction or distortion of competition are unlikely to benefit from exemption as such restrictions generally fail (at least) the first two conditions: they neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition

[675] 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.
[676] 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.

(indispensability).[677] However, each case ultimately falls to be assessed on its merits.

5.192 Any undertaking claiming the benefit of an exemption bears the burden of proving that the conditions in section 9(1) of the Act/Article 101(3) TFEU are satisfied.[678]

II. ***Application to this case***

5.193 The CMA has concluded that none of the relevant exclusions or exemptions apply to the concerted practice (or practices) which comprise the Infringement.

5.194 The CMA notes that agreements and concerted practices which have as their object the prevention, restriction or distortion of competition are unlikely to benefit from exemption. The CMA has concluded that the Infringement had an anti-competitive object.

5.195 It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.[679] None of the Parties have claimed that an exemption should apply in this case.

[677] Article 101(3) Guidelines, paragraph 46 and *Guidelines on Vertical Restraints* [2010] OJ C130\1, paragraph 47.
[678] The Act, section 9(2); *GlaxoSmithKline and others v CMA (Paroxetine)* [2018] CAT 4, paragraph 83.
[679] Article 101(3) Guidelines, see paragraphs 51 to 58; *Guidelines on Vertical Restraints* [2010] OJ C130\1, paragraph 47. See also section 9(2) of the Act.

6. Attribution of liability

A. Legal framework

I. ***Personal responsibility for infringement of competition rules***

6.1 If an undertaking infringes the competition rules, it falls, under the principle of personal responsibility, to that undertaking to answer for that infringement.[680]

6.2 Given the requirement to impute an infringement to a legal entity or entities on which fines may be imposed and to which an infringement decision is to be addressed, it is necessary to identify one or more legal persons that form part of the undertaking in question.[681] An infringement decision imposing a fine can be addressed to any legal person forming part of the undertaking who was directly involved in the infringing conduct. Such a directly involved legal person will be liable for the actions of all persons forming part of the undertaking (not just for its own actions). Where there are two or more such directly involved legal persons, those persons will be jointly and severally liable for the actions of all persons forming part of the undertaking (and for the entirety of any financial penalty imposed on the undertaking).[682]

II. ***Concept of an 'undertaking'***

6.3 Competition law refers to the activities of '*undertakings*'. An undertaking is any entity engaged in economic activity, regardless of its legal status and the way in which it is financed.[683] 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*'.[684]

6.4 In prohibiting undertakings from entering into anti-competitive agreements or abusing dominant positions, competition law '*is aimed at economic units which consist of a unitary organisation of personal,*

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[680] C-97\08 P *Akzo Nobel v Commission*, EU:C:2009:536, paragraphs 54 to 56.
[681] C-97\08 P *Akzo Nobel v Commission*, EU:C:2009:536, paragraph 27.
[682] *Sainsbury's Supermarkets Ltd v MasterCard* [2016] CAT 11, paragraph 363(8) and 363(21), citing the Opinion of the Advocate General in C-231\11 P *Commission v Siemens*, EU:C:2013:578, paragraphs 80 to 81. See also T-9\99 *HFB v Commission*, EU:T:2002:70, paragraph 66: '*In the absence of a* [legal] *person at its head to which* […] *responsibility could have been imputed for the infringements committed by the various component companies of the group, the Commission was entitled to hold the component companies jointly and severally responsible for all the acts of the group* […].'
[683] C-97\08 P *Akzo Nobel v Commission*, EU:C:2009:536, paragraph 54 and the case law cited.
[684] C-118\85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement'.[685]

6.5 It is thus well established that an undertaking does not correspond to the commonly understood notions of a legal entity or corporate group, for example under English commercial or tax law; and that a single undertaking may comprise one or more legal and/or natural persons.[686]

6.6 In the context of the Chapter I prohibition and Article 101(1) TFEU, the term '*undertaking*' therefore '*must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal'*.[687]

6.7 The Court of Justice has emphasised that: '*for the purposes of applying the rules on competition the formal separation between two parties resulting from their separate legal personality is not conclusive, the decisive test being the unity of their conduct on the market*.'[688]

6.8 The existence of an economic unit comprising separate legal persons such as sister companies may '*be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such a unit'*.[689] Such evidence may include:

(a) The fact that legal persons have common shareholders: this is '*one of the elements capable of establishing the existence of an economic unit'*;[690] and

[685] T-9\99 *HFB v Commission*, EU:T:2002:70, paragraph 54 and the case law cited.
[686] *Sepia Logistics Limited v Office of Fair Trading* [2007] CAT 13, paragraphs 70 to 80 and the case law cited.
[687] C-217\05 *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA*, EU:C:2006:784, paragraph 40, citing C-170\83 *Hydrotherm v Commission*, EU:C:1984:271, paragraph 11.
[688] C-217\05 *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA*, EU:C:2006:784, paragraph 41, referring to C-48\69 *ICI v Commission* EU:C:1972:70, paragraph 140. For example, in *Copper Plumbing Tubes* (European Commission decision of 3 September 2004 relating to Copper Plumbing Tubes (COMP\E-1\38.069)), the Commission found that legal persons within a corporate group formed separate undertakings only for the period in which they were sister companies with separate management boards, operational management and reporting structures and which acted independently by competing against one another on the market. After a restructuring creating a parent-subsidiary relationship, significant overlaps between management boards and coordinated operational management, they formed a single undertaking: see recitals 564 to 566.
[689] C-407\08 P *Knauf Gips v Commission,* EU:C:2010:389, paragraph 65.
[690] C-407\08 P *Knauf Gips v Commission,* EU:C:2010:389*,* paragraph 73.

(b) Other close economic and management links between family-owned companies.[691]

6.9 For example, in *HFB v Commission*, the European Courts upheld the Commission's finding that two separate groups of companies together formed a single undertaking in relation to an anti-competitive agreement on the basis that they were subject to common ownership and control by a single individual, who also represented them both in relation to the infringement:

(a) The General Court upheld the Commission's finding that two sister companies and their subsidiaries, all ultimately majority owned by a single individual (Mr Henss), formed a single undertaking.

(b) The Court dismissed the appellants' argument that these companies could not be an undertaking as they did not have a single parent or financing company. Since the companies '*were, in one form or another, controlled by Mr Henss*' via majority shareholding and/or sole directorships; and since Mr Henss represented those companies at meetings of the cartel directors' club, '*the Commission was entitled to regard the activities within the cartel*' by the four companies '*as being the conduct of a single economic entity, under single control and pursuing a common long-term economic aim.*[692] This was confirmed by the companies' internal documents.[693]

(c) There was no need for that undertaking to have legal personality (consistent with the case-law discussed above).

III. ***Approach in this Decision***

6.10 The CMA has first identified the legal entities directly involved in the Infringement during the Relevant Period. It has then determined whether liability for the Infringement should be shared with another legal entity, in which case each legal entity's liability will be joint and several.

[691] C-407\08 P *Knauf Gips v Commission,* EU:C:2010:389, paragraphs 66-72.
[692] T-9\99 *HFB v Commission*, EU:T:2002:70, paragraphs 55 and 61.
[693] T-9\99 *HFB v Commission*, EU:T:2002:70, paragraph 62.

B. Assessment

I. Application to King Limited and Praze

6.11 The CMA has found that King Limited and Praze are jointly and severally liable for the Infringement which they committed and for the resulting financial penalty which the CMA has decided to impose, for the reasons that follow in paragraphs 6.12 and 6.13.

6.12 King Limited and Praze were both directly involved in the Infringement:

(a) King Limited was directly involved in the Infringement. It was King Limited's strategic information which was disclosed to Alissa and Lexon during the Infringement.

(b) Praze was also directly involved in the Infringement for the following reasons:

(i) King Limited has no employees. Pursuant to contractual arrangements between the two companies, King Limited's business was conducted by [King Director] and [King Office Manager] in their capacity as employees of Praze.[694]

(ii) [King Director] used his Praze email account (@kiteconsultancy) in the furtherance of the Infringement. For example, on 23 March 2016; the morning of the Landmark Hotel Meeting, [King Director] sent an email to [Lexon Director] and [Alissa Director] from his Praze account.[695]

6.13 The CMA has also found that King Limited and Praze formed a single economic unit, or '*undertaking'*, and thus liability for the Infringement is imputed to that undertaking. The two companies can be regarded as a single economic unit on the basis of a body of consistent evidence demonstrating that there was a common controlling shareholder for both companies and strong economic and management links between the companies during the time of the Infringement:

(a) [King Director] holds a controlling shareholding in both companies.

[694] The corporate and commercial services of King were conducted by Praze on King Limited's behalf under an agreement which they entered into in May 2014.
[695] Document NOR-E5960, email from [Consultant to King 1] to [King Director] dated 22 March 2016, forwarded by [King Director] to [Alissa Director] and [Lexon Director] on 23 March 2016.

(b) [King Director] is a director of both companies. He is the sole director of Praze and one of only two directors of King Limited.

(c) As noted above, pursuant to contractual arrangements between the companies, [King Director] and [King Office Manager] conducted the day to day management of both companies and used Praze email addresses (@kiteconsultancy) to conduct King Limited's business activities (see paragraph 6.12 above).[696] Since King Limited had no employees it was totally reliant on Praze to conduct its business.

(d) King Limited and Praze have the same registered office address and share office premises. King Limited's IT system and hardcopy records are located in their shared premises.

(e) King Limited and Praze have been represented jointly in this investigation by [King Director]. [King Director] told the CMA in response to the information request served on King Limited by the CCPC on 12 October 2017 that he was responding in the name of both King Limited and Praze: '*King and Praze wish to cooperate fully with the CMA's Investigation*'.[697]

(f) Praze conducted only limited consultancy work for entities other than King Limited.[698]

II. Application to Lexon

6.14 As set out in Section 3E, Lexon was directly involved in the Infringement during Relevant Period 1. Accordingly, the CMA attributes liability to Lexon for the Infringement and for the resulting financial penalty which the CMA has decided to impose.

III. Application to Alissa

6.15 As set out in Section 3E, Alissa was directly involved in the Infringement (from 2 March 2016 onwards). Accordingly, the CMA attributes liability to Alissa for the Infringement and for the resulting financial penalty which the CMA has decided to impose.

[696] The corporate and commercial services of King Limited were conducted by Praze on King Limited's behalf under an agreement which they entered into in May 2014.
[697] Document NOR-C0040, email from [King Director] to the CMA, dated 12 October 2017.
[698] During the period of the Infringements, Praze's only other client was Flynn Pharma Ltd.

7. The CMA's action

A. The CMA's decision

7.1 On the basis of the evidence set out in this Decision, the CMA has concluded that the Parties participated in a concerted practice (or series of concerted practices) which had as its object the prevention, restriction or distortion of competition in the UK and thereby infringed the Chapter I prohibition and Article 101(1) TFEU.

7.2 Penalties in respect of the Infringement are imposed on the addressees of the Decision listed in paragraph 1.1. The undertakings in question comprise the legal entities that participated in the conduct that is the subject of the Infringement.

B. Directions

7.3 The CMA considers that the Infringement has ceased. Therefore, the CMA has found that it is not necessary to give directions to any Party in this case.[699]

C. Financial penalties

I. General

7.4 Section 36(1) of the Act provides that on making a decision that an agreement or concerted practice has infringed the Chapter I prohibition or Article 101(1) TFEU, the CMA may require undertakings party to the agreement to pay the CMA a penalty in respect of the infringement. In accordance with section 38(8) of the Act, the CMA must have regard to the guidance on penalties being in force at the time when setting the amount of the penalty (the '**Penalties Guidance'**).[700]

7.5 The CMA has decided to impose financial penalties in respect of the Infringement and to attribute liability for any such penalties on King Limited, Praze, Lexon and Alissa in line with chapter 6 above.

[699] 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.
[700] *Guidance as to the appropriate amount of a Penalty* (CMA73 18 April 2019).

II. The CMA's margin of appreciation

7.6 Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '**2000 Order**'),[701] and (ii) the CMA has had regard to the Penalties Guidance in accordance with section 38(8) of the Act, the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.[702]

7.7 The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.[703] Rather, the CMA makes its assessment on a case-by-case basis,[704] having regard to all the relevant circumstances and the twin objectives of the CMA's policy on financial penalties, namely:

(a) to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and

(b) to ensure that the threat of penalties will deter both the infringing undertaking and other undertakings from engaging in anti-competitive activities.[705]

III. Small agreements

7.8 Section 39(3) of the Act provides that a party to a '*small agreement'* is immune from financial penalties for infringements of the Chapter I prohibition. This immunity does not apply to infringements of Article 101 TFEU. A '*small agreement'* is an agreement between undertakings whose combined applicable turnover does not exceed £20 million for the business year ending in the calendar year preceding the one during which the infringement occurred.[706]

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[701] SI 2000/309, as amended by the Competition Act (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

[702] *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 168 and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, paragraph 102.

[703] See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, paragraph 78.

[704] See, for example, *Kier Group and Others v OFT* [2011] CAT 3, paragraph 116 where the CAT noted that *'other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent'.* See also *Eden Brown and Others v OFT* [2011] CAT 8, paragraph 97 where the CAT observed that '*[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case*'.

[705] Section 36(7A) of the Act and Penalties Guidance, paragraph 1.4.

[706] Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), Regulation 3. The term 'applicable turnover' means the turnover determined in accordance with the Schedule to the Regulations.

7.9 The small agreements immunity does not apply in this case as the combined applicable turnover of King, Lexon and Alissa exceeded the relevant threshold. Moreover, this immunity does not apply to infringements of Article 101 TFEU.

IV. Intention / negligence

(a) Legal framework

7.10 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition and/or Article 101 TFEU only if it is satisfied that the infringement has been committed intentionally or negligently.[707] However, the CMA is not obliged to specify whether it considers the infringement to have been intentional or merely negligent.[708]

7.11 The CAT and Court of Appeal have defined the terms 'intentionally' and '*negligently*' as follows:

> *'an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition'*.[709]

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

> *'the question whether the infringements were committed intentionally or negligently […] is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty.'*[710]

[707] Section 36(3) of the Act.
[708] *Napp Pharmaceutical Holdings v OFT* [2002] CAT 1, paragraphs 453-457. See also *Argos and Littlewoods*, at [221].
[709] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221. This wording was approved by the Court of Appeal in *Ping v CMA* [2020] EWCA Civ 13, paragraph 117.
[710] Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 124.

7.13 Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.[711]

(b) Application to this case

7.14 There is a large body of evidence indicating that the Parties must have been aware, or could not have been unaware, that their conduct would result in a restriction or distortion of competition:

(a) For the reasons given at section 5F above, the CMA has found that the Infringement had as its object the prevention, restriction or distortion of competition. By exchanging commercially sensitive strategic information on prices, volumes, timing of supplies and entry plans, the Parties significantly reduced the level of uncertainty that they faced in the market. Given the nature of the information exchanged, the Parties must have been aware, or could not have been unaware that sharing such information with their competitors would result in a restriction or distortion of competition.

(b) Further, for the reasons given at section 5F.II above, the CMA has found that, in participating in the Information Exchange, the Parties' intended to reduce strategic uncertainty in the market and to maintain the prices of Nortriptyline Tablets or at least slow their decline (the Price Maintenance Objective).

7.15 The CMA therefore concludes that the Infringement was committed intentionally. In the alternative, for these same reasons, each of the Parties ought to have known that their conduct would result in a restriction or distortion of competition. Accordingly, at the very least, the Infringement was committed negligently.

7.16 In addition, King and Alissa, as part of their Terms of Settlement, have accepted that they have infringed the Chapter I Prohibition and the prohibition in Article 101(1) TFEU and that they are liable to pay a penalty.

[711] See the Court of Justice's comments in Judgment in *Bundeswettbewerbsbehörde v Schenker & Co. AG,* C-681/11, ECR, EU:C:2013:404, paragraph 38: '*the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct'* and paragraph 41 '*It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine*.'

7.17 Lexon submitted that the information that it disclosed '*was not of sufficient importance*' to merit a finding of intentional or negligent breach of the competition rules. In particular, the information was '*not of a sufficiently strategic nature to give rise to any anti-competitive effects.*' However, the CMA finds that there is evidence that Lexon, King and Alissa were aware that their exchanges had the capacity to maintain prices (or at least slow their decline) (see section 5F.II). For example:

(a) [Alissa Director] told the CMA that [King Director] had asked to speak to him on 1 March 2016,[712] shortly before Alissa was granted its MAs, because '*for someone like Alissa to pop up with marketing authorisations, we suddenly become a big threat to someone that is making large sums of money*.'[713]

(b) On 9 March 2016, [Alissa Director] sent an email to [King Director] in which he disclosed that he was aiming for a limited market share and wanted to avoid a '*free for all*': '*To assist any conversation today I will tell you now that I am looking to take a modest 20% share. That's all I have geared up for and hope things don't become a free for all.'*[714]

(c) On 11 March 2016, [Lexon Director] emailed [King Director] and [Alissa Director] to say he couldn't stop King '*from matching fictitious prices but I think it is a [sic] crazy*'.[715]

(d) [Lexon Director] told the CMA in interview that, during the Landmark Hotel Meeting, [King Director] had suggested that Lexon was reducing prices: '*it's just a constant barrage from him [King Director], because he seemed to be thinking I was going here, there and everywhere, undermining him and selling stock everywhere and reducing the market price*.'[716]

7.18 Accordingly, Lexon's representations do not call into question the CMA's finding that the infringement was committed intentionally or, in the alternative, at the very least negligently.

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[712] Document NOR-E5924, email from [King Director] to [Alissa Director] dated 1 March 2016.
[713] Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, page 70 lines 11-17.
[714] See paragraph 3.122. Document NOR-E5943, email from [Alissa Director] to [King Director] dated 9 March 2016.
[715] Document NOR-E5953, email from [Lexon Director] to [Alissa Director] and [King Director] dated 11 March 2016.
[716] Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 31 lines 9-12.

V. Calculation of penalties

7.19 As noted at paragraph 7.6 above, when setting the amount of the penalty, the CMA must have regard to the guidance on penalties in force at that time. The Penalties Guidance establishes a six-step approach for calculating the penalty. The six steps and their application in this case are set out below.

(a) Step 1 – starting point

7.20 The starting point for determining the level of financial penalty is calculated having regard to:

(a) the relevant turnover of the undertaking; and

(b) the seriousness of the infringement and the need for general deterrence.[717]

Relevant turnover

7.21 An undertaking's '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. In this context, an undertaking's last business year is the financial year preceding the date when the infringement ended.[718]

7.22 Relevant turnover is a measure of the '*scale and impact of infringing activity for the purpose of calculating the appropriate penalty*'. [719]

7.23 As explained in section 4 above, the relevant market for these purposes is the supply of Nortriptyline Tablets in the UK.

Application to Alissa

7.24 Alissa's participation in the Infringement ended on 27 January 2017. Alissa's last financial year preceding 27 January 2017 is the financial year ending 30 November 2016.

[717] The Penalty Guidance, paragraph 2.3.
[718] The Penalty Guidance, paragraph 2.11. The Relevant turnover will be calculated after the deduction of sales rebates, value added tax and other taxes directly related to turnover.
[719] *Eden Brown and Others v OFT* [2011] CAT 8, paragraph 55.

7.25 Alissa was a new entrant with limited business in relation to the supply of Nortriptyline Tablets in the UK at the time of the Infringement. It began supplying Nortriptyline Tablets in the UK in November 2016. Relevant Turnover during the one-month period to 30 November 2016 was only £136,997.50. Turnover in the '*relevant market'* in the remining months of the Relevant Period, i.e. December 2016 and January 2017, was £49,785 and £137,120 respectively. The timing of Alissa's financial year means that applying the relevant turnover from the period indicated by the Penalties Guidance would only capture one month of Alissa's sales. The CMA does not consider that this would be an accurate reflection of Alissa's real economic situation at the time of the Infringement.[720]

7.26 Having had regard to the Penalties Guidance, the CMA considers that a more appropriate approach in the particular circumstances of this case is to use the 12-month period immediately preceding the end of the Infringement as a basis for Relevant Turnover. Alissa's Relevant Turnover in this period was £323,912.50.

7.27 This gives a more accurate reflection of Alissa's economic situation at the time of the Infringement, as a new entrant to the nortriptyline market, as compared to alternative approaches, such as using the previous financial year ending 30 November 2016 (which includes only one month of turnover),[721] or the three month period of turnover to January 2017 grossed up to a full 12 month period, or using Alissa's turnover from a later period (such as at the end of the financial year during which the Infringement took place).

7.28 While the CMA is obliged to have regard to the Penalties Guidance pursuant to section 38(8) of the Act, the Penalties Guidance is not legally binding and it is permissible for the CMA to depart from the approach set out in the Penalties Guidance where appropriate. The CMA considers that in the circumstances of this particular case, it is appropriate to exercise its discretion in order to give effect to the requirement that the relevant turnover reflect the undertaking's real economic situation at the time the infringement was committed.

[720] See, *Balmoral v CMA* [2017] CAT 23, paragraph 141: "*the CMA was right and fair to identify the 12 month period ending with the date of the Meeting rather than the financial year ending on 31 March 2012 as a more representative period of Balmoral's business for this purpose*"; *Kier Group plc v OFT* [2011] CAT 3, paragraphs 126, 132 and 138, where the CAT makes clear that the level of penalty should reflect the undertaking's real economic situation at the time the infringement was committed.

[721] As envisaged by paragraph 2.11 of the Penalties Guidance.

7.29 On the basis of the approach above, the CMA considers it is appropriate to use the figure of £323,912.50 as the Relevant Turnover for Alissa.

Application to King

7.30 King's participation in the Infringement ended on 27 May 2016. King's last financial year preceding this date is the financial year ending 30 April 2016. King's Relevant Turnover in this period was £6,009,630.

Application to Lexon

7.31 Lexon's participation in the Infringement ended on 27 May 2016. Lexon's last financial year preceding this date is the financial year ending 30 April 2016.

7.32 Lexon generated income from three activities on the relevant market in the financial year ending 30 April 2016:

(a) Lexon's sales to retail pharmacies: £576,248.[722]

(b) Lexon's sales to wholesalers: £1,015,708.

(c) the Lexon/Medreich JV's supply to Teva: £1,577,871.[723]

7.33 Lexon submitted that turnover in a product comprises the value of goods sold, and that the income it generated from the Lexon/Medreich JV's supply to Teva represented revenue from a joint venture, rather than turnover from a product. It submitted that it had no control over Teva's sales of the Lexon/Medreich JV Product, and that it was incorrect to include its income from the supply to Teva in the calculation of its Relevant Turnover at Step 1 of the penalty calculation.[724]

7.34 Lexon's income from supply of the Lexon/Medreich JV Product to Teva was a significant part of the income it received in relation to its activities on the relevant market. The CMA considers that any calculation of Relevant Turnover which did not include this income would not reflect the true scale of Lexon's activities in the relevant market, and would not be an appropriate measure of the scale and impact of the infringing

[722] Lexon's total revenues from sales and distribution to retail pharmacies was £691,498. In respect of these sales, the CMA has assumed that Lexon's price included a 20% distribution fee. In calculating Lexon's income from sales to retail pharmacy, the CMA has deducted this distribution fee, resulting in the figure of £576,248.
[723] This is the revenue generated by Lexon from the Lexon/Medreich JV, as included in its annual accounts.
[724] Lexon's Written Representations on the CMA's Draft Penalty Statement, paragraphs 2.1 - 2.3.

activity in which it was engaged.[725] Accordingly, in calculating Lexon's Relevant Turnover, the CMA considers it appropriate to include this income.

7.35 Further, the inclusion of Lexon's income from sale of the Lexon/Medreich JV Product to Teva in the calculation of Lexon's Relevant Turnover is consistent with Lexon's own accounting practice, in which it includes this income in its calculation of turnover for its audited accounts.[726] The CMA will generally base relevant turnover on figures from an undertaking's audited accounts, departing from this practice only where the use of a different figure reflects the true scale of the undertaking's activities in the relevant market.[727] For the reasons discussed in paragraph 7.34, such a departure is not warranted in this case.

7.36 Lexon's total Relevant Turnover for the purpose of Step 1 of the penalty calculation is therefore £3,169,827.

Seriousness of the infringement

7.37 The starting point (expressed as a percentage rate applied to the Relevant Turnover) depends in particular upon the seriousness of the infringement: the more serious the infringement, the higher the starting point is likely to be. 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 future.[728]

7.38 The CMA will apply a rate of up to 30% to an undertaking's Relevant Turnover in order to reflect adequately the seriousness of the particular infringement. A starting point of 21% to 30% will be used for the most serious infringements of competition law, including hardcore cartel activity. A starting point between 10% and 20% is more likely to be appropriate for certain, less serious object infringements, and for infringements by effect. [729]

7.39 The CMA will then consider whether it is appropriate to adjust the starting point upwards or downwards to take account of specific

[725] See for comparison the CMA's approach to calculating the Relevant Turnover in case CE-9531/11 *Paroxetine* Section 11 C) i) b)
[726] See Transcript of the 21 January 2020 Penalty Hearing, page 19.
[727] The Penalty Guidance, paragraph 2.12.
[728] The Penalty Guidance, paragraph 2.4.
[729] The Penalty Guidance, paragraph 2.6.

circumstances of the case. When making this assessment, the CMA will consider a number of factors, including the nature of the product, the structure of the market, the market coverage of the infringement, and the effect on competitors and third parties. The extent and likelihood of damage to consumers, whether directly or indirectly, will also be an important consideration. The assessment will be made on a case-by-case basis for all types of infringement, taking account of all the circumstances of the case.[730]

7.40 Finally, the CMA will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence. In particular the CMA will consider the need to deter other undertakings, whether in the same market or more broadly, from engaging in the same or similar conduct.

Application in this case

7.41 In light of the factors set out below, the CMA considers that a starting point of 20% should be applied in this case.

The likelihood that the type of infringement at issue will, by its nature, cause harm to competition

7.42 The concerted practice(s) comprising the Infringement had the object of preventing, restricting or distorting competition by creating conditions of competition which did not correspond to the normal conditions of the market. The exchanges of information reduced strategic uncertainty in the market for the purpose of maintaining the prices of Nortriptyline Tablets in the UK or at least slowing their decline. Therefore, the Infringement can be regarded, by its very nature, as being harmful to the proper functioning of normal competition, such that the CMA would generally use a starting point in the 21% to 30% range.

The extent and/or likelihood of harm to competition in the specific relevant circumstances in this case

The nature of the product

7.43 Nortriptyline is an important medicine, prescribed according to clinical need, and relied on by patients to alleviate the symptoms of depression. Price is a key driver of competition for purchasers of Nortriptyline Tablets, given the homogeneity of the product. Customers may quote offered prices to rival suppliers, including '*bluff*' prices, to

[730] The Penalty Guidance, paragraph 2.6.

encourage price competition. In this context, the exchange of information on actual prices offered to customers by suppliers has the potential to cause serious harm to competition.

The structure of the market and coverage of the concerted practice(s)

7.44 Over the Relevant Period, the Parties represented three of the four UK MA holders supplying Nortriptyline Tablets in the UK.[731] Accord-UK was the only other UK MA holder supplying the UK.[732] A number of companies held licences to import 25mg nortriptyline tablets from Spain. During the period July 2015 to January 2017:

(a) King supplied approximately 25% of the Nortriptyline Tablets supplied to the UK market.

(b) The Lexon/Medreich JV accounted for 38% of Nortriptyline Tablets supplied in the UK and this can be divided into three categories:

(i) Lexon's supply of Nortriptyline Tablets to its own customers, in relation to which Lexon retained all profits. These supplies represented approximately 4% of all Nortriptyline Tablets supplied.

(ii) Medreich's supply of Nortriptyline Tablets to its own customers, in relation to which Medreich retained all profits. These supplies represented approximately 10% of all Nortriptyline Tablets supplied.

(iii) the Lexon/Medreich JV's supply to Teva, in relation to which Lexon and Medreich shared the profits [✂]. These supplies represented approximately 24% of all Nortriptyline Tablets supplied.

(c) Alissa supplied 2% of all Nortriptyline Tablets. It should be noted that Alissa's supply of Nortriptyline Tablets commenced in November 2016.

[731] Lexon participated in the Infringement from 27 July 2015 to 27 May 2016. Alissa obtained its MA in February 2016 and commenced supply in November 2016. The MA held by the Lexon/Medreich JV was in Medreich's name.

[732] MAs were granted to Focus Pharmaceuticals in August 2016, and to Blackrock Pharmaceuticals Limited in October 2016, however, both undertakings first supplied Nortriptyline Tablets after the end of the Infringement in January 2017.

The actual or potential effect of the Infringement on competitors and third parties, and the actual or potential harm caused to consumers

7.45 As noted in paragraph 5.118 above, the CMA found that the object of the Infringement was to maintain prices or at least slow their decline. The NHS Reimbursement Prices for Nortriptyline Tablets peaked in the first months of the Infringement; in September 2015, the NHS Reimbursement Prices were £76.77 for 10mg tablets, and £124.63 for 25mg tablets. Subsequently, the NHS Reimbursement Prices decreased. In March 2017, the NHS reimbursement prices were £31.54 for 10mg tablets and £31.80 for 25mg tablets. Information exchanges aimed at preventing prices from declining had the potential to prevent the NHS from benefitting from those declines and therefore had the potential to cause significant harm.

7.46 The information exchanged, which included pricing information, information on the volumes and timing of supplies and information on entry plans, had the purpose of significantly reducing the level of uncertainty that King, Lexon and Alissa face during negotiations with customers.[733] It can be presumed that King, Lexon and Alissa took account of the information for the purposes of determining their conduct on the market.

Sufficiency of the starting point and conclusion

7.47 Information exchange between horizontal competitors is a serious by object infringement of the Chapter I prohibition and Article 101 TFEU; the CMA will therefore generally use a starting point in the 21% to 30% range.

7.48 In this case, the exchanges did not involve all the MA holders active in the UK at the time and while the information exchanged reduced uncertainty on the market, significant uncertainty remained. This indicates that the top of the 21% to 30% range is not appropriate for the Infringement. On the other hand, the exchanges aimed at maintaining the prices of Nortriptyline Tablets in the UK or at least slowing their decline, and were therefore clearly anti-competitive in nature, they also formed part of a series of exchanges or discussions over an extended period of time. In the light of these factors, a starting point of 20% appears sufficient for the purpose of general deterrence, and in

[733] See paragraphs; 7.50 in relation to information about pricing, 7.58 in relation to information on the volumes and timing of supplies and 7.27 in relation to information about entry plans.

particular, to deter other undertakings from engaging in the same or similar conduct.

Lexon's submission on the starting point

7.49 Lexon submitted that, if the CMA was to impose a penalty in this case, the Infringement does not merit a starting point of 20%; rather, a starting point of 10% would be appropriate. In particular, Lexon submitted that there was no credible basis for the allegation that the Infringement was liable to cause significant harm to competition because:

(a) the market shares of the participating undertakings were small and Lexon could not control the actions of competitors;

(b) prices for Nortriptyline Tablets fell by around 40% during the Relevant Period; and

(c) the CMA had conducted no effects analysis.[734]

7.50 First, the CMA has taken into account the structure of the market in setting the starting point at 20%.[735] While the CMA acknowledges that the Infringement did not cover the entire market and that therefore the Information Exchange could not remove all uncertainty, it nonetheless occurred between horizontal competitors who, between them, accounted for a material share of the supply of Nortriptyline Tablets in the UK.

7.51 Second, the CMA has considered the fall in prices for Nortriptyline Tablets during the Relevant Period in its assessment of the legal and economic context of the Infringement. The CMA has found that downward pressure on prices created incentives for the Parties to seek to reduce the uncertainty in the market as they each stood to gain if prices remained the same or decreased more slowly.[736] The CMA therefore rejects the contention that the fall in the prices implies that the Infringement was not able to restrict competition.

7.52 Finally, for the reasons set out in section 5F above, the CMA has concluded that the Infringement had as its object the prevention, restriction or distortion of competition, therefore it is not necessary for

[734] Document Number NOR-C3228.1, Lexon's Representations on the Draft Penalty Statement, paragraphs 3.1 to 3.5.
[735] See paragraph 7.46 above.
[736] See section 5D.II.

the CMA to conduct an analysis of the effects of the conduct on prices.[737] The conduct can be regarded, by its very nature, as being harmful to the proper functioning of competition.

Conclusion on starting point

7.53 Overall, the exchange of commercially sensitive information is serious, and inherently risks harm to competition, therefore a starting point of 10% would be insufficient to deter other undertakings from engaging in similar conduct in the future. For the reasons given at paragraphs 7.41 to 7.48 and 7.50 to 7.52 above, the CMA is satisfied that a starting point of 20%, just below that which is generally applicable to the most serious type of infringements,[738] is appropriate in this case.

(b) Step 2 – adjustment for duration

7.54 The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement. Where the total duration of an infringement is less than one year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the infringement. In exceptional circumstances, the starting point may be decreased where the duration of the infringement is less than one year.[739]

7.55 The CMA has found that:

(a) Alissa participated in the Infringement from 2 March 2016 to 27 May 2016 and from 5 December 2016 to 27 January 2017 (a total of 4 months and 17 days).

(b) King participated in the Infringement from 27 July 2015 to 27 May 2016 and from 5 December 2016 to 27 January 2017 (a total of 11 months and 23 days).

(c) Lexon participated in the Infringement from 27 July 2015 to 27 May 2016 (a total of 10 months and 1 day).

7.56 Given that all Parties participated in the Infringement for less than one year, the CMA has applied a multiplier of 1 to the figures reached for all Parties at the end of step 1.

[737] C-373\14 P *Toshiba v Commission,* EU:C:2016:26, paragraph 26; and C-67\13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 50.
[738] Penalties Guidance, paragraph 2.6.
[739] Penalties Guidance, paragraph 2.16.

7.57 At the end of steps 1 and 2, the penalties are as follows:

Party	**Penalty**
Alissa	£64,782
King	£1,201,926
Lexon	£633,965

(c) Step 3 – adjustment for aggravating and mitigating factors

7.58 The CMA may, at step 3, increase a penalty where there are aggravating factors, and/or decrease it where there are mitigating factors. A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.[740] In the circumstances of this case, the CMA has adjusted the penalties at step 3 to take account of the factors set out below:

Aggravating factor – involvement of directors or senior management

7.59 The involvement of directors or senior management in an infringement can be an aggravating factor.[741]

7.60 In this case, almost all of the conduct was carried out by [Alissa Director], [King Director] and [Lexon Director]; the managing directors of Alissa, King and Lexon respectively.

7.61 Taking into account the active involvement these directors in the Infringement, the CMA considers that an uplift of 15% to the penalties of all Parties is appropriate and proportionate in the circumstances of this case.

Aggravating factor – instigation

7.62 The CMA may increase the penalty at step 3 to recognise the role of an undertaking as a leader in, or an instigator of, the infringement.[742]

7.63 In this case, the first evidence of an exchange of information occurred on 27 July 2015 when [King Director] emailed [Lexon Director] asking him, '*Can you let me know prices you are supplying nortriptyline to Teva please?'*[743] In addition, the majority of the subsequent exchanges

[740] The Penalties Guidance, paragraphs 2.18 and 2.19.
[741] Penalties Guidance, paragraph 2.18.
[742] Penalties Guidance, paragraph 2.18.
[743] Decision, paragraph 3.82.

between the Parties were instigated by [King Director]. The CMA therefore considers that an uplift of 5% to the penalty of King is appropriate and proportionate.

Mitigating factor – cooperation

7.64 The CMA may decrease the penalty at step 3 for cooperation which enables the enforcement process to be concluded more effectively and/or speedily. The Penalties Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion to merit a reduction at step 3).[744]

7.65 In this case, all of the Parties agreed to a streamlined access to file process, which led to savings of time and resources. Lexon's engagement with the access to file process resulted in more limited resource savings for the CMA, than resulted from the other case parties' cooperation. However, Lexon made a director available for two voluntary interviews, and another member of staff available for one voluntary interview; these interviews assisted the CMA's investigation. The CMA therefore considers that a 5% reduction for cooperation for Alissa, King and Lexon is appropriate and proportionate in the circumstances of this case.

Mitigating factor – compliance policy

7.66 The CMA may decrease the penalty at step 3 where adequate steps have been taken by an undertaking with a view to ensuring future compliance with competition law.[745] 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%.

7.67 Alissa and Lexon have provided the CMA with details of their compliance plans and the steps taken to ensure a compliance culture within each respective undertaking.

[744] Penalties Guidance, paragraph 2.19 and footnote 28.
[745] Penalties Guidance, paragraph 2.19.

Alissa

7.68 Following the CMA's investigation and the settlement discussions in the present case, Alissa has engaged constructively with the CMA to introduce a number of enhancements to its competition law compliance programme.

7.69 The CMA considers that the enhancements to compliance activities by Alissa demonstrate a clear and unambiguous commitment to competition law compliance, in that it has engaged in appropriate steps relating to risk identification, assessment, mitigation and review.

7.70 In particular, the CMA has been provided with evidence that, prior to this Decision, Alissa has rolled out an updated competition law compliance policy, held in-person competition law training sessions, amended its disciplinary policy to include disciplinary consequences for breach of competition law and made a clear statement on its website regarding its commitment to competition law compliance.

7.71 Alissa will also submit a report to the CMA on its compliance activities every year for the three years after the date of this Decision.

7.72 The CMA therefore considers that it is appropriate to decrease Alissa's penalty for the Infringement by 10% to reflect Alissa's enhanced compliance activities.

Lexon

7.73 On 22 January 2020, over seven months after receipt of the Statement of Objections, the Lexon Board passed a resolution to take steps to instruct an external law firm to implement a compliance programme and nominated a non-executive director to oversee Lexon's compliance activities. Lexon placed a one-page document explaining competition law and the Board's commitment to compliance in the '*Terms and Conditions'* tab accessed through the footers of its website. Lexon explained to the CMA that it is intending to introduce a number of compliance steps, including training, a compliance manual and a whistle blowing mechanism by the second or third quarter of 2020. On 13 February 2020, Lexon updated its whistle blowing policy to include reference to the CMA and European Commission whistleblowing helplines.

7.74 However, the CMA does not consider that Lexon has demonstrated that adequate steps have been taken to achieve a clear and unambiguous commitment to compliance throughout the undertaking.

In particular, the large majority of the steps which Lexon proposes to take in relation to compliance have not yet been implemented and Lexon has not provided the CMA with any evidence that detailed planning has been undertaken in relation to the proposed programme. For example, it has not provided details of the proposed scope or content of the compliance manual, it has not identified the staff who will receive competition compliance training (either specifically, or by reference to their roles within Lexon's business) and it has not provided any information about the proposed content of the competition compliance training which it intends to introduce. The public statement of Lexon's commitment to competition law compliance has been placed on the website, but the CMA considers that this is not sufficiently visible.

7.75 The CMA therefore does not consider that it is appropriate for Lexon to receive a reduction in its penalty for compliance.

(d) Step 4 – adjustment for specific deterrence and proportionality

7.76 The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the undertaking in question will deter it from engaging in anti-competitive practices in the future), or to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.[746] At step 4, the CMA will assess whether, in its view, the overall penalty is proportionate in the round.[747] Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.

7.77 Increases to the penalty figure at step 4 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of the penalty reached at the end of step 3. The assessment of the need to adjust the penalty will be made on a case-by-case basis for each individual infringing undertaking.[748] In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or excessive having

[746] Penalties Guidance, paragraph 2.20.
[747] Penalties Guidance, paragraph 2.24.
[748] Penalties Guidance, paragraph 2.21.

regard to the infringing undertaking's size and financial position and the nature of the infringement.[749]

7.78 Where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the infringing activity on competition.[750]

7.79 The CMA's consideration of step 4 in calculating each Party's financial penalty is set out below.

Application to Alissa

7.80 The penalty for Alissa at the end of step 3 is £64,782. The CMA considers that Alissa's penalty after step 3 should be increased by 200%, to £194,347, to ensure that the level of the penalty is sufficient to ensure specific deterrence.

7.81 The CMA's view is that this increase is appropriate having regard to:

(a) the fact that Alissa generates a significant proportion of its turnover outside the relevant market; and

(b) indicators of Alissa's size and financial position.

7.82 The total fine at the end of step 3 represents less than 1% of Alissa's total worldwide turnover in the financial year ending in November 2018. As such, without the application of an uplift, the fine would be disproportionately low, and would not have sufficient deterrent effect. With the uplift, the fine represents:

(a) 2.6% of Alissa's global turnover in the financial year ended November 2018.

(b) 15.6% of Alissa's profits after tax in the financial year ended November 2018.

(c) 2.7% of Alissa's net assets in the financial year ended November 2018.

[749] Penalties Guidance, paragraph 2.23.
[750] Penalties Guidance, paragraph 2.24.

7.83 Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty of £194,347 is appropriate in this case for deterrence purposes without being disproportionate or excessive.

Application to King

7.84 The penalty for King at the end of step 3 is £1,382,215. The CMA considers that King's penalty after step 3 should be increased by 50%, to £2,073,322, to ensure that the level of the penalty is sufficient to ensure specific deterrence.

7.85 The CMA's view is that, notwithstanding King's current low turnover and profitability, this increase is appropriate having regard to the fact that:

(a) during the financial year ended April 2016 (which falls within the Relevant Period), King generated total revenues of £7.25 million, of which £6.0 million related to nortriptyline;

(b) during the financial year ended April 2016 (which falls within the Infringement Period), King generated profit after tax of £3.81million; and

(c) in 2018, King held net assets of £17,484,033.

7.86 Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty of £2,073,322 is appropriate in this case for deterrence purposes without being disproportionate or excessive.

Application to Lexon

7.87 The penalty of £697,362 at the end of step 3 would represent:

(a) 0.35% of Lexon's worldwide turnover in the last year for which accounts have been provided;[751]

(b) 8.53% of Lexon's profits after tax in the last year for which accounts have been provided;[752] and

[751] £200,860,000, in the year ending 31 April 2018.
[752] £8,174,000, in the year ending 31 April 2018.

(c) 2.01% of Lexon's net assets in the last year for which accounts have been provided.[753]

7.88 Given that Lexon's nortriptyline business represents only a small proportion of Lexon's overall turnover,[754] the CMA considers that the provisional penalty at the end of step 3 would have a limited impact on Lexon's overall financial position and would therefore be insufficient to deter Lexon from engaging in anti-competitive conduct in the future. The CMA considers the penalty requires uplifting at step 4, to ensure it has sufficient deterrent effect on Lexon.

7.89 The CMA considers that an uplift of 75%, resulting in a penalty of £1,220,383, will ensure the penalty has sufficient impact on Lexon to have the necessary deterrent effect. In coming to this assessment, the CMA notes that a penalty of £1,220,383 represents:

(a) 0.61% of Lexon's worldwide turnover in the last year for which accounts have been provided;[755]

(b) 14.93% of Lexon's profits after tax in the last year for which accounts have been provided;[756] and

(c) 3.64% of Lexon's net assets in the last year for which accounts have been provided.[757]

Lexon's submissions in relation to step 4

7.90 Lexon submitted that it was '*excessive, unfair and disproportionate*'[758] to uplift its penalty by 75% at step 4 of the penalty calculation, given the need to reflect the important differences between Lexon on the one hand, and King and Alissa on the other. It also submitted that it was '*perverse and disproportionate*' for the financial penalty imposed on Lexon to be so much greater than the penalties imposed on the other parties, before application of the settlement discount.[759]

[753] £33,566,000, in the year ending 31 April 2018.
[754] As recorded at paragraph 7.38 above, Lexon's turnover from the sale of Nortriptyline Tablets in the year ending 30 April 2016 was £3,169,827. It's overall turnover over the same period was £200,046,000. As such, turnover attributable to Nortriptyline Tablets represented 1.6% of Lexon's overall turnover in the year ending 30 April 2016.
[755] £200,860,000.
[756] £8,174,000, in the year ending 31 April 2018.
[757] £33,566,000, in the year ending 31 April 2018.
[758] Lexon's Representations on the Draft Penalty Statement, paragraph 3.7.
[759] Lexon's Representations on the Draft Penalty Statement, paragraph 3.9.

7.91 As explained in the Penalties Guidance, it is appropriate to assess the proportionality and deterrence effect of a penalty by reference to a particular undertakings size and financial position. Undertakings can vary in size and financial position, such that variation between uplifts applied at step 4 in the penalty calculation in multi-party cases does not, in itself, demonstrate a failure to observe the principle of equal treatment.[760]

7.92 In multi-party cases, there may be objective differences between the parties, which justify different treatment to the parties at each step of the penalty calculation; variation in the final amount of the penalties cannot, in itself, demonstrate that a particular penalty is '*perverse or disproportionate*'.[761] The CMA is satisfied that the variation in the amount of Alissa, King and Lexon's penalties, resulting from the application of each step of the penalty calculation, is justified by objective differences between the parties,[762] and that the penalty imposed on Lexon is not '*perverse or disproportionate*'.

7.93 In addition, Lexon submitted that the following differences between Lexon on the one hand and King and Alissa on the other should be reflected in the calculation of Lexon's penalty:

(a) '*Lexon was responsible for introducing substantial competition in the market for Nortriptyline […] which led directly to a decrease in the prices of Nortriptyline of circa 40%*';

(b) In contrast to King, whose penalty was uplifted by 50% at step 4, '*Lexon was not the initiator of the information exchange*' and '*did not actively seek information*' from the other participants;

(c) Lexon participated in the Infringement for only a short period of 10 months; and

(d) '*Lexon did not seek to influence the volumes or prices at which Medreich or Teva sold Nortriptyline into the market'*.[763]

7.94 The CMA does not consider that any of the points raised by Lexon constitute '*relevant circumstances*'[764] which would justify a departure

[760] Penalties Guidance, footnote 17 to paragraph 2.1.
[761] See *GF Tomlinson and Others v OFT* [2011] CAT 7 paragraph 152.
[762] For example, differences in the Parties' Relevant Turnover (see paragraphs 7.23 to 7.38) or adjustment to prevent the maximum penalty being exceeded (see paragraph 7.99).
[763] Lexon's representations on the Draft Penalty Statement, paragraphs 3.7 and 3.8.
[764] Penalties Guidance, paragraph 2.20.

from the CMA's usual approach to proportionality and deterrence. Taking Lexon's specific submissions in turn:

(a) The CMA recognises that the introduction of the Lexon\Medreich JV Product forms an important part of the economic and legal context to the Infringement. However, rather than constituting a relevant consideration in the context of specific deterrence, the downward pressure on prices resulting (at least in part)[765] from the entry of the Lexon\Medreich JV Product was one factor which created incentives for the Parties to engage in the Infringement, as it led [King Director] to contact [Lexon Director] in order to learn details of the terms of supply to Teva of the Lexon\Medreich JV Product (see paragraph 5.86 above) and it prompted [Lexon Director] to respond with assurances that he was not seeking to '*trash the market*'.[766]

(b) As explained in the Penalties Guidance, the role of an undertaking as a leader in, or an instigator of, an infringement is a relevant factor to be considered at step 3 of the penalty calculation.[767] Accordingly, King's role in instigating the infringement is reflected in the uplift to its fine at step 3 of the penalty calculation.[768] The CMA has not imposed any uplift on Lexon for instigation.

(c) As explained in the Penalties Guidance, the duration of an infringement is considered at step 2 of the penalty calculation.[769] Accordingly, the duration of Lexon's participation in the infringement has been taken into account at that stage of the penalty calculation.[770]

(d) The CMA has not alleged that Lexon sought to influence directly the volume of Nortriptyline Tablets supplied by Medreich or Teva, or the prices at which they supplied. The level of penalty has not been reached on the basis that it did so, or might have done so.

7.95 The CMA considers that, based on the size and financial position of Lexon, a penalty representing 0.61% of Lexon's worldwide turnover, and 14.93% of Lexon's profits after tax is not disproportionate or

[765] See paragraph 5.126(c) above.
[766] See paragraph 5.85.
[767] Penalties Guidance, paragraph 2.18.
[768] See paragraph 7.60 above.
[769] Penalties Guidance, paragraph 2.16.
[770] See paragraph 7.76 above.

excessive when considered in the round and is sufficient to ensure specific deterrence.

7.96 The CMA therefore considers that a 75% uplift, leading to a penalty of £1,220,383 is appropriate. At the end of Step 4, the penalties for each Party are as follows:

Party	**Penalty**
Alissa	£194,347
King	£2,073,322
Lexon	£1,220,383

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

7.97 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.[771]

7.98 The CMA has assessed the Parties' penalties against this threshold:

(a) No adjustment is necessary in relation to the penalties imposed on Alissa and Lexon.

(b) King's worldwide turnover in the business year preceding the date of this decision was £839,702. The CMA has adjusted King's penalty to ensure that it does not exceed the maximum that the CMA may impose. The adjusted penalty for King is £83,970.

7.99 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another EU Member State in respect of the same agreement or conduct.[772] As there is no such applicable penalty or fine, no adjustment is necessary in this case in that regard.

7.100 At the end of Step 5, the penalties for each party are as follows

Party	**Penalty**
Alissa	£194,347

[771] Section 36(8) of the Act, the 2000 Order, as amended, and Penalty Guidance, paragraph 2.25.
[772] Penalties Guidance, paragraph 2.28.

King	£83,970
Lexon	£1,220,383

(f) Step 6 – application of reductions for leniency and settlement

7.101 The CMA will apply a penalty reduction where an undertaking has a leniency agreement with the CMA and/or agrees to settle with the CMA.[773]

7.102 Reductions for leniency are not applicable to any of the Parties in this case.

7.103 Reductions for settlement are applicable in relation to Alissa and King. Alissa and King expressed a genuine interest and willingness to enter into settlement discussions with the CMA after the CMA issued the Statement of Objections.

7.104 As part of settlement Alissa and King admitted the Infringement as set out in the Statement of Objections and cooperated with the CMA and thereby expediting the process for concluding the investigation.

7.105 In light of these considerations, the CMA has reduced the financial penalties imposed on each of Alissa and King by 10% at step 6.

7.106 A reduction for settlement is not applicable to Lexon in this case.

VI. Payment of penalty

7.107 As set out in the table below:

(a) The total penalty imposed on Alissa for its involvement in the Infringement is £174,912;

(b) The total penalty imposed on King[774] for its involvement in the Infringement is £75,573; and

(c) The total penalty imposed on Lexon for its involvement in the Infringement is £1,220,383.

Step	Description	Alissa	King	Lexon
	Relevant turnover	£323,912	£6,009,630	**£3,169,827**
1	Starting point as a percentage of relevant turnover	20%	20%	20%

[773] Penalties Guidance, paragraphs 2.29 and 2.30.

[774] King Limited and Praze are jointly and severally liable for the full penalty (£75,573), see paragraph 6.11 above.

2	Adjustment for duration		1	1	1
3	Adjustment for aggravating or mitigating factors	*Aggravating: Director involvement*	+15%	+15%	+15%
		Aggravating: Instigation	N/A	+5%	N/A
		Mitigating: Co-operation	-5%	-5%	-5%
		Mitigating: Compliance programme	-10%	N/A	N/A
4	Adjustment for specific deterrence or proportionality		+200%	+50%	+75%
	Interim penalty at end of step 4		**£194,347**	**£2,073,322**	**£1,220,383**
5	Adjustment to take account of the statutory maximum penalty		N/A	10% of worldwide turnover	N/A
	Interim penalty at end of step 5		**£194,347**	**£83,970**	**£1,220,383**
6	Leniency discount		N/A	N/A	N/A
	Settlement discount		-10%	-10%	N/A
	Penalty payable		**£174,912**	**£75,573**	**£1,220,383**

7.108 The penalty will become due to the CMA in its entirety on 5 May 2020[775] and must be paid to the CMA by close of banking business on that date.[776]

SIGNED:

[✂]

Kip Meek, CMA Panel Member (Chair of the Case Decision Group), for and on behalf of the Competition and Markets Authority

[✂]

Paul Hughes, CMA Panel Member, for and on behalf of the Competition and Markets Authority

[775] The next working day two calendar months from the expected dated of receipt of the Decision.
[776] Details on how to pay the penalty are set out in the letter accompanying this Decision.

[✂]

Juliette Enser, Senior Director, State Aid, for and on behalf of the Competition and Markets Authority

All of whom are the members of, and who together constitute, the Case Decision Group.