

# Decision of the Competition and Markets Authority

Online resale price maintenance  
in the synthesizer and  
hi-tech sector

29 June 2020

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

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 Names have been replaced by a general descriptor of the individual's role.

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## **1. INTRODUCTION AND EXECUTIVE SUMMARY**

- 1.1 This Decision is addressed to Korg (UK) Limited (Korg UK) and to its ultimate parent company, Korg Inc. (together, Korg).
- 1.2 By this Decision,<sup>1</sup> the Competition and Markets Authority (the CMA) has concluded that:
- a. Korg UK infringed the prohibition in section 2(1) of the Competition Act 1998 (the Act) (the Chapter I prohibition) and/or Article 101 of the Treaty on the Functioning of the European Union (the TFEU) by entering into an agreement and/or participating in a concerted practice with [Reseller 1], one of Korg UK's MI Resellers:
    - i. that [Reseller 1] would not advertise or sell online synthesizers and hi-tech products supplied to it by Korg UK (the Relevant Products) below a price specified by Korg UK from time to time (the Minimum Price);
    - ii. which amounted to resale price maintenance (RPM) in respect of online sales of the Relevant Products by [Reseller 1]; and
  - b. the agreement and/or concerted practice:
    - i. had as its object the prevention, restriction or distortion of competition within the United Kingdom (UK) and/or between EU Member States;
    - ii. may have affected trade within the UK and/or between EU Member States; and
    - iii. lasted from 9 June 2015 to 17 April 2018 (the Relevant Period)
- (together referred to below as the Infringement).
- 1.3 The CMA has decided to attribute Korg UK's liability for the Infringement to Korg UK's ultimate parent company, Korg Inc., making Korg UK and Korg Inc. (together, Korg) jointly and severally liable for the Infringement.
- 1.4 The CMA has applied Rule 10(2) of the CMA Rules in this case and has addressed this Decision only to Korg, and not to [Reseller 1].
- 1.5 The CMA has decided to impose a financial penalty on Korg UK and Korg Inc. pursuant to section 36(1) of the Act.

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

## A. Glossary

Term	Definition
[Reseller]	[X]
[Mass Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller 1 Employee 5] Interview	Interview conducted under section 26A of the Act on 9 December 2019 with [Reseller 1 Employee 5]
[Reseller]	[X]
[Korg Senior Employee 3] First Interview	Interview conducted voluntarily on 18 April 2018 with [Korg Senior Employee 3] of Korg UK
[Korg Senior Employee 3] Second Interview	Interview conducted voluntarily on 14 June 2019 with [Korg Senior Employee 3] of Korg UK
[Korg Senior Employee 3] Third Interview	Interview conducted voluntarily on 3 July 2019 with [Korg Senior Employee 3] of Korg UK
[Reseller 1]	[X]
[Reseller 1] Additional Data	Data provided by [Reseller 1] detailing one sample increase, ascribed to '[code 44]', in [Reseller 1]'s pricing to the Minimum Price on each of 26 additional Relevant Products (as further specified in footnote 721 of this Decision)
[Reseller 1] Data	Data provided by [Reseller 1] detailing prices that [Reseller 1] adopted, and prices that [Reseller 1] considered adopting, on 37 Relevant Products (as further specified in footnote 720 of this Decision)
[Reseller 1] Historical Data	The [Reseller 1] Data and the [Reseller 1] Additional Data, taken together
[Reseller]	[X]
[Distributor]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Korg Employee 8] Interview	Interview conducted under section 26A of the Act on 16 December 2019 with [Korg Employee 8] at Korg UK
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Korg Employee 15] Interview	Interview conducted voluntarily on 14 June 2019 with [Korg Employee 15] at Korg UK
12 Resellers	Twelve MI Resellers of the Relevant Products to which the CMA sent s.26 Notices on 17 April 2018, as listed at footnote 3 below
Act	Competition Act 1998
Agreement	The agreement and/or concerted practice between Korg UK and [Reseller 1] that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price
Article 101 TFEU	Article 101 of the Treaty on the Functioning of the European Union

<b>Term</b>	<b>Definition</b>
<b>ASM</b>	Area Sales Manager
<b>Bundle</b>	Any package, offered for sale, comprising any Korg product (including any Relevant Product) and any other product or accessory (possibly including other products or accessories from a supplier other than Korg UK)
<b>CAT</b>	Competition Appeal Tribunal
<b>Chapter I prohibition</b>	The prohibition imposed by section 2(1) of the Act
<b>CMA</b>	The Competition and Markets Authority
<b>CMA Rules</b>	The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/58)
<b>Commission</b>	The European Commission
<b>Court of Justice</b>	The Court of Justice of the European Union (formerly the European Court of Justice)
<b>Decision</b>	This decision dated 29 June 2020
<b>Effect on Trade Guidelines</b>	Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty ([2004] OJ C101/07)
<b>EU</b>	The European Union
<b>European Courts</b>	The General Court and the Court of Justice
<b>General Court</b>	The General Court of the European Union (formerly the Court of First Instance)
<b>Hasselblad</b>	Commission Decision 82/367/EEC <i>Hasselblad</i> (IV/25.757) [1982] OJ L161/18
<b>IBISWorld</b>	IBISWorld Limited (Company Number: 07223190)
<b>IBISWorld Report</b>	IBISWorld Industry Report G47.591 <i>Musical Instrument Retailers in the UK</i> (published in either March 2019 or February 2020, as specified in each relevant footnote of this Decision)
<b>Infringement</b>	The infringement of the Chapter I prohibition and/or Article 101 TFEU regarding the Relevant Products, as specified in paragraph 1.2 above.
<b>Korg</b>	Korg Inc. and Korg UK
<b>Korg Charter</b>	The Charter introduced by Korg UK in 2017 across its network of MI Resellers
<b>Korg Inc.</b>	Korg Inc. (Company Number: 8-0113-0100-2577, a company incorporated in Japan), the ultimate parent company of Korg UK
<b>Korg Pricing Policy</b>	The arrangements between Korg UK and its MI Resellers according to which MI Resellers would not advertise or sell the Relevant Products online at prices below the Minimum Price
<b>Korg UK</b>	Korg (UK) Limited (Company Number: 02355914)
<b>MAP</b>	Minimum Advertised Price
<b>MI</b>	Musical instruments and music-making equipment, that is, instruments and equipment not used solely for the playback of recorded music but used in the creation and/or live playing of music by musicians
<b>MI Resellers</b>	Resellers which sell principally MI and usually stock and sell a broad selection of MI including the Relevant Products and other products sold by Korg UK. They have a physical store and may have an e-commerce website.
<b>Minimum Price</b>	The minimum price specified by Korg UK from time to time in connection with the Korg Pricing Policy, which was referred to by Korg UK at different times in its price lists (e.g. as ' <i>RRP Ex VAT</i> ' (RRP exclusive of VAT), ' <i>SSP inc. VAT @20%</i> '/' <i>SSP inc VAT @20%</i> ' (SSP inclusive of VAT), ' <i>UK SSP inc VAT</i> ' (SSP inclusive of VAT), or as a 'street' price
<b>OFT</b>	The Office of Fair Trading, one of the CMA's predecessor organisations

<b>Term</b>	<b>Definition</b>
<b>Penalties Guidance</b>	CMA's <i>Guidance as to the appropriate amount of a penalty</i> (CMA73, April 2018)
<b>Price Alerts</b>	Automated price alert email notifications via Orange Spider software informing Korg UK in real-time of changes to prices advertised online by MI Resellers for certain Relevant Products
<b>Price Reports</b>	Price reports created via Orange Spider software, sometimes daily between July 2013 and early 2017, and circulated by email within Korg UK to inform Korg UK of prices advertised online by one or more MI Resellers for at least certain Relevant Products
<b>Relevant Period</b>	9 June 2015 to 17 April 2018
<b>Relevant Products</b>	The relevant products covered by the Infringement are synthesizers and hi-tech equipment manufactured by or on behalf of Korg and supplied in the UK, in particular during the Relevant Period. Whenever this term is used, it may also refer to any subset of these products.
<b>RPM</b>	Resale price maintenance
<b>RRP</b>	Recommended retail price
<b>s.26 Notice</b>	A notice issued by the CMA under section 26 of the Act
<b>s.27 Notice</b>	The notice issued by the CMA under section 27 of the Act to Korg UK on 17 April 2018
<b>SDA</b>	Selective Distribution Agreement
<b>SO</b>	The Statement of Objections dated 24 March 2020 addressed to Korg UK and Korg Inc.
<b>SSP</b>	Suggested selling price
<b>TFEU</b>	The Treaty on the Functioning of the European Union
<b>UK</b>	The United Kingdom of Great Britain and Northern Ireland
<b>VABER</b>	Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices ([2010] OJ L102/1), known as the Vertical Agreements Block Exemption Regulation
<b>Vertical Guidelines</b>	Commission Guidelines on Vertical Restraints [2010] OJ C130/1
<b>Yamaha</b>	Commission Decision of 16 July 2003 <i>PO/Yamaha</i> (COMP/37.975)

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

## 2. INVESTIGATION

- 2.1 On 17 April 2018, the CMA opened a formal investigation under section 25 of the Act into a suspected competition law infringement by Korg UK. The CMA did so having determined that it had reasonable grounds for suspecting that:
- Korg UK had infringed the Chapter I prohibition and/or Article 101 TFEU by being involved in anti-competitive agreements and/or concerted practices ('arrangements' where the context permits) with at least one UK reseller;
  - these arrangements restricted the prices at which one or more resellers in the UK advertised online musical instruments (MI) supplied by Korg UK; and
  - this, in turn, restricted the price at which MI were sold by one or more resellers, making the arrangements a form of RPM.
- 2.2 At the same time, the CMA made an administrative decision to focus the evidence-gathering in this investigation on:
- the period from 1 January 2013; and
  - the 'Relevant Products' (i.e. synthesizers and hi-tech equipment manufactured by or on behalf of Korg UK and supplied in the UK).

### *Inspections and voluntary submissions*

- 2.3 On 17 April 2018, the CMA entered Korg UK's business premises under section 27 of the Act and required documents relevant to its investigation to be produced and information relevant to its investigation to be provided (the s.27 Notice). The CMA subsequently reviewed approximately 70,000 items provided by Korg UK in response to the s.27 Notice.<sup>2</sup> Ultimately, the CMA deemed around 1,300 of these items to be responsive to the s.27 Notice and transferred them onto the case file.
- 2.4 Korg UK made some voluntary submissions concerning certain matters relating to the investigation (e.g. on 23 August 2018).

### *Requests for evidence*

- 2.5 The CMA requested evidence formally – under section 26 of the Act (via 's.26 Notices') – from Korg, the 12 Resellers,<sup>3</sup> [Reseller 1], [Reseller 1 Employee 2] and [Reseller 1 Employee 3] and [Korg Employee 2] of Korg UK. All s.26 Notices addressed to individuals required them to respond in their individual capacity. The

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<sup>2</sup> The CMA's review of these items was aided, in part, by creating and using a computer assisted review model (predictive coding) to prioritise certain items for manual review. Predictive coding describes the process whereby software was 'trained' to help identify information that may be 'relevant' to this investigation.

<sup>3</sup> [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], and [Reseller] (together, the '12 Resellers').



CMA also requested evidence from four competitors to Korg UK without recourse to the CMA's formal powers.

### *Interviews*

2.6 During the investigation the CMA conducted voluntary interviews with:

- [Korg Senior Employee 3] at Korg UK, on 18 April 2018 (the [Korg Senior Employee 3] First Interview), 14 June 2019 (the [Korg Senior Employee 3] Second Interview) and 3 July 2019 (the [Korg Senior Employee 3] Third Interview); and
- [Korg Employee 15] at Korg UK, on 14 June 2019 (the [Korg Employee 15] Interview).

2.7 During the investigation the CMA conducted compulsory interviews<sup>4</sup> with:

- [Reseller 1 Employee 5], on 9 December 2019 (the [Reseller 1 Employee 5] Interview); and
- [Korg Employee 8] at Korg UK, on 16 December 2019 (the [Korg Employee 8] Interview).

### *Other steps in the investigation*

2.8 The CMA provided a State of Play update by way of a letter to Korg UK dated 29 March 2019 (and by way of a telephone call with Korg on 24 April 2019).<sup>5</sup>

2.9 On 3 April 2019, the CMA informed Korg Inc. of the CMA's decision to expand the scope of the investigation, to include Korg Inc. (as the ultimate parent company of Korg UK).

2.10 On 9 January 2020, the CMA decided to scope in [Reseller 1] as a Rule 5(3) party.<sup>6</sup>

2.11 On 25 February 2020, the CMA wrote to Korg to advise Korg of the settlement timetable and draft Terms of Settlement. On 3 March 2020 Korg confirmed that it agreed in principle to settlement in this case.<sup>7</sup>

2.12 On 24 March 2020, the CMA issued a Statement of Objections to Korg UK and Korg Inc. (the SO), in which the CMA made a provisional decision that Korg UK had

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<sup>4</sup> Under section 26A of the Act. The CMA also conducted compulsory interviews with three current or former employees of [Reseller] (on 7 June 2019, 28 June 2019 and 31 July 2019).

<sup>5</sup> The CMA provided a further update to Korg, by way of a letter dated 16 January 2020.

<sup>6</sup> On 3 May 2019, the CMA initially decided to scope in [Reseller] as a Rule 5(3) party. On 23 March 2020, the CMA decided to scope out [Reseller] as a Rule 5(3) party.

<sup>7</sup> This follows Korg UK/Korg having written to the CMA, on 6 March 2019, 17 April 2019 and 22 January 2020, to express an interest in entering into discussions to explore settlement in relation to this investigation.

infringed the Chapter I prohibition and/or Article 101 TFEU. The SO also set out the CMA's intention to hold Korg Inc. jointly and severally liable for Korg UK's Infringement, on the basis that Korg Inc. had been Korg UK's parent company throughout the period of the Infringement. In the circumstances of this case, the CMA applied Rule 5(3) of the CMA Rules and addressed the SO only to Korg UK and Korg Inc., and not to the reseller counterparty to the alleged agreement/s and/or concerted practice/s.<sup>8</sup>

- 2.13 On 24 March 2020, the CMA informed [Reseller 1] that the CMA had issued the SO to Korg, and alerted [Reseller 1] to the opportunity for [Reseller 1] to provide representations on the SO. Following a request on 24 March 2020 from [Reseller 1] to see the SO, on 31 March 2020 the CMA provided [Reseller 1] with a non-confidential copy of the SO. On 14 April 2020, having seen that non-confidential copy of the SO, [Reseller 1] confirmed that it would make no substantive representations.
- 2.14 On 6 April 2020, following receipt of the SO, Korg reconfirmed its agreement in principle to settlement in this case.
- 2.15 On 14 April 2020, Korg confirmed that it would make no representations to the CMA in relation to manifest factual inaccuracies in the SO.<sup>9</sup>
- 2.16 Between 26 September 2019 and 7 May 2020, Korg submitted representations and information in relation to mitigating factors (including in relation to its competition law compliance programme) to be taken into account in the calculation of any financial penalty.<sup>10</sup>
- 2.17 On 21 May 2020, following settlement discussions, Korg offered to settle the case. Korg voluntarily, clearly and unequivocally admitted the facts and allegations of the alleged infringement as set out in the SO, which are now reflected in the Decision, and agreed to co-operate in expediting the process for concluding the case. On 22 May 2020, the CMA confirmed that it would settle the case with Korg and that it intended to proceed to issue an infringement decision.

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<sup>8</sup> Likewise the CMA has addressed this Decision to Korg UK and Korg Inc. only, applying Rule 10(2) of the CMA Rules.

<sup>9</sup> *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8, January 2019), paragraphs 14.8, 14.14 and 14.19.

<sup>10</sup> See paragraph 5.33 (and footnote 667) below.

### **3. FACTS**

#### **A. Addressees of the Decision**

##### **I. Korg (UK) Limited**

- 3.1 Korg UK is a business active in the distribution of MI including but not limited to electronic MI in the UK and Republic of Ireland.<sup>11</sup> Korg UK supplies MI under two brands of Korg Inc.: Korg and Vox.<sup>12</sup> In the UK, Korg UK also distributes other MI under various other brands, such as Takamine (guitars), Mapex (percussion), Vic Firth (drumsticks) and Paiste (cymbals and gongs).<sup>13</sup>
- 3.2 Korg UK is a private limited company registered at Companies House under company number 02355914 with its registered office address at 1 Harrison Close, Knowlhill, Milton Keynes, Buckinghamshire, MK5 8PA.<sup>14</sup>
- 3.3 Korg UK had a turnover of £11.5 million for the year ended 31 March 2019, the most recent financial year for which Korg UK has published audited accounts.<sup>15</sup>

##### **II. Korg Inc.**

- 3.4 Throughout the Relevant Period, Korg UK has been a wholly-owned subsidiary of Korg Inc., which is the ultimate parent company of Korg UK.<sup>16</sup> Korg Inc. supplies, amongst other products, electronic MI under the Korg brand.
- 3.5 Korg Inc. is a global corporation incorporated and headquartered in Japan, with head office at 4015-2 Yanokuchi, Inagi-City, Tokyo 206-0812, Japan and with company registration number 8-0113-0100-2577.<sup>17</sup>
- 3.6 Korg Inc. directly owns three subsidiaries based in Europe, including Korg UK, and Vox Amplification Limited (both registered in the UK). Korg Inc. has further subsidiaries in Europe, Japan, Vietnam and the United States of America.<sup>18</sup>

#### **B. Synthesizer and hi-tech sector overview**

- 3.7 Part 3.B. provides an overview of those aspects of the sector for the types of MI relevant to this investigation, namely synthesizers and hi-tech equipment.

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<sup>11</sup> URN C\_KOR02362 (Korg UK Report and Financial Statements for the year ended 31 March 2018), p.2 (as printed).

<sup>12</sup> Vox is an amplification brand: see e.g. URN C\_KOR02363 (Korg UK Report and Financial Statements for the year ended 31 March 2019), p.2 (as printed).

<sup>13</sup> URN C\_KOR00766 (Transcript of the [Korg Senior Employee 3] First Interview), p.24, lines 2–6.

<sup>14</sup> See <https://beta.companieshouse.gov.uk/company/02355914> (accessed on 26 June 2020).

<sup>15</sup> URN C\_KOR02363 (Korg UK Report and Financial Statements for the year ended 31 March 2019), p.10 (as printed).

<sup>16</sup> URN C\_KOR00496 (Korg UK reply dated 2 May 2018 to a s.26 Notice), p.2; p.4 ('no change' to Korg structure since 2008).

<sup>17</sup> URN C\_KOR00496 (Korg UK reply dated 2 May 2018 to a s.26 Notice), p.2.

<sup>18</sup> URN C\_KOR00496 (Korg UK reply dated 2 May 2018 to a s.26 Notice), p.2.

## **I. UK keyboards, pianos and organs sector (including synthesizers)**

- 3.8 A market research company, IBISWorld Ltd (IBISWorld), estimates that the UK MI sector's total value in 2019-20 was around £428 million, of which keyboards, pianos, and organs (including synthesizers) made up [10-20]%<sup>19</sup> (i.e. £[50-60] million).
- 3.9 The keyboards, pianos, and organs sector broadly consists of the supply of synthesizers, electric pianos, acoustic pianos, digital pianos, Musical Instrument Digital Interface (MIDI) keyboards, and organs.<sup>20</sup> Synthesizers are among the instruments making up an expanding share of this sector.<sup>21</sup> Their popularity reflects both their musical versatility (a synthesizer can replicate the sound of any instrument), and changing trends in musician and audience preferences and popular music in general,<sup>22</sup> i.e. a trend towards more electronic music production.

## **II. UK hi-tech equipment sector**

- 3.10 Hi-tech equipment that is relevant to this investigation includes DJ equipment, electronic percussion, stage pianos, and controllers.<sup>23</sup>
- 3.11 IBISWorld does not publish research specific to hi-tech equipment. However, at least some products generally considered to be hi-tech equipment (e.g. DJ equipment) may fall within the 'amplification and DJ equipment' sector featured in IBISWorld's research.<sup>24</sup> IBISWorld estimates that amplification and DJ equipment made up [10-20]% of the UK MI sector's total value in 2019-20 (i.e. £[70-80] million) – and that within amplification and DJ equipment, DJ equipment has been the fastest growing product type reflecting the embracing of MI digital media by professional and amateur DJs.<sup>25</sup>

## **III. Korg UK's involvement in the supply of synthesizers and hi-tech equipment**

- 3.12 Synthesizers are electronic hardware MI used to create and reproduce sounds that may be pre-programmed (by a manufacturer) and/or programmed by the end user. Synthesizers may imitate sounds such as other instruments or a voice, and offer

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<sup>19</sup> URN C\_KOR02815 (IBISWorld Report, February 2020), pp.3, 14 and 32. The CMA calculates that [10-20]% of the UK MI sector's total value in 2019–20 (£428 million) is around £[50-60] million.

<sup>20</sup> URN C\_KOR01540 (IBISWorld Report, March 2019), p.13. MIDI is a technical standard for certain equipment enabling the inter-connection of electronic MI, computers and related devices for playing, editing and recording music. A MIDI keyboard may trigger digital sounds to be reproduced by a keyboard amplifier, and may be used to e.g. help a user to produce and record music in the studio: see e.g. URN C\_KOR01540 (IBISWorld Report, March 2019), p.31.

<sup>21</sup> Other products that make up an expanding share of this product segment are digital pianos, electric pianos and MIDI keyboards: URN C\_KOR01540 (IBISWorld Report, March 2019), p.13.

<sup>22</sup> URN C\_KOR01540 (IBISWorld Report, March 2019), p.13.

<sup>23</sup> URN C\_KOR01154 (Korg reply dated 29 April 2019 to CMA queries on a s.26 Notice reply, attachment 4).

<sup>24</sup> IBISWorld describes that segment as including equipment designed for DJs (e.g. turntables and mixers). However, at least some other products generally considered to be hi-tech equipment may fall within other such sectors. For example, hi-tech products enabling users to record a music performance may fall within the 'audio recording equipment' sector featured in IBISWorld's research (on which, see URN C\_KOR02815 (IBISWorld Report, February 2020), p.13).

<sup>25</sup> URN C\_KOR02815 (IBISWorld Report, February 2020), pp.13 and 14. The CMA calculates that [10-20]% of the UK MI sector's total value in 2019–20 (£428 million) is around £[70-80] million.

users extensive sound editing capabilities. They are designed to be used alongside other MI, e.g. in a group or in recordings. Their electronic circuitry may be analogue-format or involve digital signal processing. They may have – and be controlled by – a keyboard or may be modular, i.e. designed for use as part of a larger system (e.g. they may be controlled via other input devices).<sup>26</sup>

- 3.13 Hi-tech equipment encompasses a broad range of electronic hardware used by musicians or DJs in a recording studio and/or performance environment, to help create and reproduce sounds. The key feature of hi-tech equipment is that it offers users significant sound manipulation and/or sound control capabilities. The range of such equipment also includes products with recording capabilities. The possible uses of an individual piece of hi-tech equipment may be relatively wide or much more specialised (e.g. one use only). It may have (and be controlled by) a mini keyboard or may be used to control other MI-related software and/or devices.<sup>27</sup>
- 3.14 Korg UK supplies the following MI and MI-related products, mainly via UK-based MI Resellers:
- synthesizers (Analogue, Microkorg Synthesizer, Synthesizer and Volca);
  - hi-tech equipment (Stage Piano, DJ, Monotron, Controller, Electric Percussion and other Hi-tech); and
  - accessories that may be used with at least some of these MI (e.g. pedals/foot controllers, cases, bags, stands, benches and cables).<sup>28</sup>
- 3.15 Within synthesizers and hi-tech equipment, Korg UK categorises its products further by segments according to their characteristics.
- Synthesizer segments identified by Korg UK are (i) Analogue; (ii) Volca; (iii) Microkorg; and (iv) Synthesizers.
  - Hi-tech segments identified by Korg UK are (i) DJ; (ii) Monotron; (iii) Controllers; (iv) Electronic Percussion; (v) Stage Pianos; and (vi) Other hi-tech.<sup>29</sup>
- 3.16 Figure 3.1 below sets out an overview of product categories and segments, and approximate estimated retail price points, for the Relevant Products.

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<sup>26</sup> Synthesizers with a built-in sequencer (multi-track recording feature) are also known as workstations: URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), pp.4–5/question 6(a).

<sup>27</sup> URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), pp.4–5/question 6(a). See also Figure 3.1 below.

<sup>28</sup> See e.g. Korg UK's website at <https://www.korg.com/uk/products/accessories/> (accessed on 26 June 2020).

<sup>29</sup> URN C\_KOR01154 (Korg reply dated 29 April 2019 to CMA queries on a s.26 Notice reply, attachment 4); URN C\_KOR01557 (Korg reply dated 24 June 2019 to a s.26 Notice), pp.2–4/questions 4(b) and 4(c); URN C\_KOR01197 (Korg spreadsheet titled 'Revision of Attachments 2 and 3 – 15) Product Segment and 18b) Revenue by Segment dated May 19 [2019]').

**Figure 3.1: Korg UK synthesizers and hi-tech equipment segments, and UK pricing**

Category	Segment	Indicative prices (Summer 2019)	Description – and example of typical use (* denotes that typically used, e.g., by home music producers and musicians/DJs performing live or in the studio)
<b>Synthesizers</b>	Analogue/ Analog	£[<] – £[<]	Synthesizer featuring keyboard in various note numbers/key sizes and analogue-format sound processing*
	Volca	£[<] – £[<]	Small portable device with step sequencer and either analogue, FM or digital sound*
	Microkorg	£[<] – £[<]	Portable synthesizer featuring mini keyboard and virtual analogue-format sound processing*
	Synthesizer (Other)	£[<] – £[<]	Typical standard synthesizer, i.e. an instrument on which music can be created using a variety of sound parameters (in contrast to the very specific synthesizer types in the segments above)
<b>Hi-tech</b>	DJ	£[<] – £[<]	'Loop' sequencer, for the creation of short musical phrases*
	Monotron	£[<]	Pocket device, featuring ribbon keyboard and analogue-format sound processing*
	Controllers	£[<] – £[<]	Small to mid-sized device for the control of MI-related software or other compatible devices*
	Electronic Percussion	£[<] – £[<]	Electronic drum synthesizer, with multi-sensor playing surface or sensor clips – used e.g. for drum practice and/or professional use by musicians performing live or in the studio
	Stage Piano	£[<] – £[<]	73-key or 88-key professional instrument, featuring realistic 'piano feel' keyboard – used e.g. by professional or semi-professional musicians performing live or in the studio
	Hi-tech (Other) <sup>30</sup>	£[<] – £[<]	Products enabling users to record a music performance, based on technology, e.g. an interface enabling an external audio/MIDI device to connect directly into a tablet or phone

The sources for Figure 3.1 are as set out at footnote 29 above.

#### IV. Other UK suppliers of synthesizers and hi-tech equipment

3.17 Korg UK submitted that other suppliers of each of synthesizers and hi-tech equipment in the UK include Yamaha, Roland, Nord and Novation.<sup>31</sup>

#### V. UK resellers of MI

3.18 There is a large number of small resellers of MI in the UK, most of which operate from only one physical location. These are referred to as 'independent' resellers in the industry, and 'MI Resellers' in this Decision.<sup>32</sup> IBISWorld reported that in 2019-20 there were [1,500-2,000] enterprises in the UK's MI sector as a whole, a number that

<sup>30</sup> Korg UK referred to this segment as comprising products that 'fundamentally enable the user to record a music performance. The key difference is in the technology used to achieve this and the overall quality of the final result. [...] [S]ince 2010 [...] there is only one product in this segment, PLUGKEY. This is a low-cost interface which enables users to directly connect an external audio/MIDI device to an iPad or iPhone.' Korg UK produces [<]. See URN C\_KOR01557 (Korg reply dated 24 June 2019 to a s.26 Notice), pp.2–4/questions 4(b) and 4(c).

<sup>31</sup> URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), pp.6–7/question 7(a).

<sup>32</sup> Korg UK submissions referred to 'independent' resellers; this means the same as 'MI Resellers' in this Decision.

declined at an annual rate of [less than 1]% in the five preceding years.<sup>33</sup> MI Resellers compete on several aspects including price, range, service and location.<sup>34</sup> IBISWorld estimated that four MI Resellers accounted for [30-40]% of the MI retail industry's total revenue in 2019-20, but stated that the industry currently has no '*dominant nationwide chain of musical instrument stores*'.<sup>35</sup> The CMA does not have detailed information relating specifically to MI Resellers' supply of synthesizers and hi-tech equipment.

- 3.19 MI are sold not just through these specialist MI Resellers, but also sold by larger retail chains which do not specialise solely in MI. These are referred to as 'mass-market' resellers by Korg UK, and 'Mass Resellers' in this Decision. These Mass Resellers include large national retailers and other non-specialist resellers with one or more physical stores and/or one of more websites.<sup>36</sup>
- 3.20 Sales are made both through the internet and traditional bricks-and-mortar stores, many of which also sell online. Lower overheads have allowed online-only stores to offer wider product ranges at lower prices. IBISWorld stated that the internet and online retailing are increasingly important in the MI sector with online-only resellers posing a competitive threat to traditional bricks-and-mortar MI retailers. IBISWorld stated that, for consumers, bricks-and-mortar resellers have several advantages over internet-only resellers (e.g. chance to test products before buying, more personalised advice and speed of delivery).<sup>37</sup>
- 3.21 IBISWorld also stated that MI consumers '*are relatively price conscious, especially when purchasing more expensive products, and will compare prices in different shops to find the lowest price possible*' and may use bricks-and-mortar stores to try out MI '*before shopping around online to get the best price*'.<sup>38</sup>

## **VI. Korg UK's sales and distribution network**

- 3.22 During the Relevant Period, Korg UK sold primarily via a distribution network of resellers in the UK comprised of MI Resellers and Mass Resellers.<sup>39</sup>
- 3.23 Whether a reseller can access a given Korg product is not differentiated by sales channel. Rather, it is based on whether:

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<sup>33</sup> URN C\_KOR02815 (IBISWorld Report, February 2020), pp.32; and p.6. The CMA's analysis indicates that the annual rate of decline was based on 2014–15 to 2018–19 data, and as such that rate appears not to reflect the potential impact of the Coronavirus (COVID-19) pandemic.

<sup>34</sup> URN C\_KOR02815 (IBISWorld Report, February 2020), p.22.

<sup>35</sup> The MI retail industry's top resellers being G4M, S&T Audio, Dawsons and J & A Beare Ltd: URN C\_KOR02815 (IBISWorld Report, February 2020), pp.3, 20 and 24.

<sup>36</sup> URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at questions 4 and 16.

<sup>37</sup> URN C\_KOR01540 (IBISWorld Report, March 2019), pp.6–8.

<sup>38</sup> URN C\_KOR01540 (IBISWorld Report, March 2019), p.21.

<sup>39</sup> URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at question 4. Korg UK also submitted that it may – but in practice does not – supply the education sector directly: see footnote 254 below.

- the given Korg product is classed by Korg UK as [REDACTED]; and
- the reseller chooses to meet the terms of Korg UK's Selective Distribution Agreement (SDA).<sup>40</sup>

**Korg product range:[REDACTED]**

- 3.24 The key difference between [REDACTED] is that Korg UK requires [REDACTED]. Korg UK submitted that [REDACTED]. MI Resellers allowing for this [REDACTED].<sup>41</sup>
- 3.25 Korg UK price lists typically denoted [REDACTED]. The Relevant Products included [REDACTED].<sup>42</sup>

**MI Resellers**

- 3.26 MI Resellers are specialist resellers of MI, with one or more physical store, and may have one or more websites selling MI.<sup>43</sup> The vast majority of Korg UK's total sales of the Relevant Products went through MI Resellers: around [90-100]% on average across the three Korg UK financial years completed during the Relevant Period (and at least [90-100]% in any of those years).<sup>44</sup> Korg UK submitted that it also supplies certain educational establishment customers via MI Resellers.<sup>45</sup>
- 3.27 Since [REDACTED],<sup>46</sup> a MI Reseller wanting to access Korg's full range of products, including [REDACTED], must enter into Korg UK's SDA.<sup>47</sup>

<sup>40</sup> URN C\_KOR01905 (Email from [Korg Senior Employee 3] to [Korg Employee 1] on 11 December 2014).

<sup>41</sup> URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at question 17(a) and question 17(e); URN EY\_KOR01083 (Email from [Korg Senior Employee 5] to a number of Korg colleagues on 17 November 2017).

<sup>42</sup> See e.g. URN C\_KOR01933 (KORG Confidential UK Main dealer Trade Price List - August 2016): 'Products marked "" are only available to approved KORG Main Dealers, with a [REDACTED] commitment. General products are available to approved KORG dealers. All other products are '[REDACTED]' and can be purchased by any dealer with a KORG UK credit account.'

<sup>43</sup> URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at question 16.

<sup>44</sup> As calculated by sales value. URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at questions 16 and 17(a); CMA analysis of URN C\_KOR01153 (Follow-up Korg reply dated 29 April 2019 to a s.26 Notice), attachment 3, in respect of Korg UK's FYE 31 March 2016, FYE 31 March 2017 and FYE 31 March 2018.

<sup>45</sup> Korg UK submitted that it may supply the education sector directly – but in practice in Korg UK's past 10 financial years any sales it made to the sector were via MI Resellers, and not accounted for separately by Korg UK. URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at question 16; URN C\_KOR01153 (Follow-up Korg reply dated 29 April 2019 to a s.26 Notice), attachment 3, covers Korg UK's past 10 financial years.

<sup>46</sup> URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at question 17. It is possible that some similar contractual terms were in place before July/August 2014 between Korg UK and its resellers. However, given the Relevant Period starts in 2015, this Decision contains no information on any such terms.

<sup>47</sup> [Korg Senior Employee 3] told the CMA that MI Resellers can choose whether to become an authorised Korg reseller, as in essence they have the following choice: '[I]f you were a brand new dealer opening today and you said, "Look, I would like access to your big synthesizers and all these different products", we'd go, "Find, here's an account application form, here's our selected distribution agreement, please sign it". If they just want, "No, I just want your little tuners and I just want your little products", then fine, you don't need to sign our SDA.' URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.60, line 21 to p.61, line 7. Korg UK also submitted that it would class as authorised dealers all resellers purchasing products from Korg UK, across Korg UK's MI Reseller, Mass Reseller and education sector distribution channels: URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at question 16.



## Selective Distribution Agreements

- 3.28 Korg UK's SDA permits authorised MI Resellers to buy products, including the Relevant Products, from Korg UK at the trade prices set out in price lists issued by Korg UK from time to time. Korg UK's SDA requires an authorised MI Reseller:
- a. to develop [X] (Appendix 1), and meet certain standards (specified in Appendix 1) for:
    - i. [X]; and
    - ii. [X];
  - b. [X] (Article 7);
  - c. [X] (Article 8); and
  - d. [X] (Appendix 1).<sup>48</sup>
- 3.29 The SDAs entered into between Korg UK and its MI Resellers [X].<sup>49</sup>
- 3.30 Once a MI Reseller enters into Korg UK's SDA, the SDA runs indefinitely, until terminated by Korg UK or the MI Reseller.<sup>50</sup>
- 3.31 Korg UK submitted that in 2017 it augmented Korg UK's SDA with the 'Korg Charter'.<sup>51</sup> This set out what it meant to be a MI Reseller for Korg UK, and the requirements on Korg UK and the MI Reseller (e.g. [X]): see paragraphs 3.54 to 3.58 below.

## **Mass Resellers**

- 3.32 Mass Resellers are not MI specialists but may have one or more physical stores and/or websites offering Korg products for sale. A small minority of Korg UK's total sales of the Relevant Products went through Mass Resellers: around [0-10]% on average across the three Korg UK financial years completed during the Relevant Period (and at most [0-10]% in any of those years).<sup>52</sup>

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<sup>48</sup> All SDA provision references are based on URN C\_KOR02077 (SDA between Korg UK and [Reseller 1] dated [X]).

<sup>49</sup> URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at question 17(a) and question 17(e)i.

<sup>50</sup> URN C\_KOR02077 (SDA between Korg UK and [Reseller 1] dated [X]), Article 12.

<sup>51</sup> [Korg Senior Employee 3] submitted that the SDA and Korg Charter '*run side by side. [...] [T]he SDA is a thing that they sign, which is a sort of probably a legally binding [...] whereas the Korg Charter was [...] just something that we did that, wasn't legally binding.*': URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.59, line 18 to p.60, line 1.

<sup>52</sup> See data, and CMA analysis, referred to in paragraph 3.26 above and footnote 44 above.

- 3.33 During the Relevant Period, [X] supplied by Korg UK [Mass Reseller].<sup>53</sup> Korg UK supplies [Mass Reseller] with [X].<sup>54</sup>

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

- 3.34 IBISWorld estimates that spending in the MI sector is likely to increase at an annual rate of [less than 1]% to reach £[400-500] million, in the five years to 2024-25.<sup>55</sup>
- 3.35 Each of the 12 Resellers submitted to the CMA data on the average proportion of its annual revenue accounted for by online sales as having increased during the Relevant Period. The average proportion of online sales by the 12 Resellers was 38% in 2015 (in which the Relevant Period started), and 39% in early 2018 (when the Relevant Period ended), with a range of around 9% to 87% across the 12 Resellers. Over a five-year period, the average proportion of online sales across the 12 Resellers was 36% (with a range of around 10% to 80%) at the start of 2013, and 39% (with a range of around 10% to 80%) in early 2018.<sup>56</sup>
- 3.36 Korg UK submitted that in the Relevant Period the proportion of retail sales made online grew significantly, and that this growth is greater in synthesizers and hi-tech equipment, due partly to the products' consistent nature (in terms of sound-production quality) and partly to the type of consumer buying them (i.e. increasing numbers of digitally-literate customers, including electronic music producers). As Korg UK's traditional music store network reduces, online business has become an essential part of Korg UK's overall distribution mix. Korg UK's marketing has also migrated online, to communicate directly with consumers (for instance, Korg UK provides video demonstrations online as an alternative way to experience products to compensate for the declining bricks and mortar store network).<sup>57</sup>

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<sup>53</sup> Korg UK submissions referred, variously, to Korg UK supplying [Mass Reseller]: see URN e.g. C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at question 17(a), and URN C\_KOR01557 (Korg reply dated 24 June 2019 to a s.26 Notice), at question 1. In this Decision '[Mass Reseller]' refers to [X] and any associated legal entity with it that Korg UK dealt with day-to-day in relation to the supply of the Relevant Products in the UK. In any event, Korg UK supplied this Mass Reseller in the context of [X]: URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), e.g. at question 17(e)ii.

<sup>54</sup> [X]: URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at questions 16, 17(a), 17(e)i and 17(e)ii.

<sup>55</sup> URN C\_KOR02815 (IBISWorld Report, February 2020), pp.4 and 8.

<sup>56</sup> Based on CMA analysis of: URN C\_KOR00485 ([Reseller] Section C of response to s.26 Notice) and URN C\_KOR00484 ([Reseller] Section C of response to s.26 Notice); URN C\_KOR00475 ([Reseller] Section C of response s.26 Notice); URN C\_KOR00513 ([Reseller] Section C of response to s.26 Notice); URN C\_KOR00493 ([Reseller] Section C of Annex 3 on a s.26 Notice); URN C\_KOR00490 ([Reseller] Section C of response to s.26 Notice); URN C\_KOR00408 ([Reseller] Section C of response to s.26 Notice); URN C\_KOR00487 ([Reseller] Section C of response to s.26 Notice); URN C\_KOR00534 ([Reseller] Section C of response to s.26 Notice); URN C\_KOR00286 ([Reseller] Section C of response to s.26 Notice); URN C\_KOR00423 ([Reseller] Section C of response to s.26 Notice); URN C\_KOR00455 ([Reseller] Section C of response to s.26 Notice); URN C\_KOR00264 ([Reseller] Section C of response to s.26 Notice). The proportion of online sales by any one reseller may not be representative of a wider industry trend, and may be influenced by several factors (including e.g. product type/brand, and a reseller's own commercial preferences).

<sup>57</sup> Korg UK also submitted that the Relevant Period saw '*an increase in the development of software products which replace or replicate the functions of hardware devices, generally at a lower cost which has impacted the hardware market*': URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), pp.3–4/questions 4–5.

- 3.37 Consumers seeking to purchase MI may be attracted to shopping online due to a number of factors including a wider range of products, lower prices and the convenience of shopping from their homes. While some online sales are made by resellers who also own bricks-and-mortar stores, others are online only. The latter are able to offer lower prices as they face relatively low operating costs.<sup>58</sup>
- 3.38 The CMA considers that the ability to sell or advertise MI at discounted prices on the internet can intensify price competition – not only between online resellers, but also between online and bricks-and-mortar resellers – due to the increased transparency and reduced search costs associated with internet shopping. Greater price competition increases resellers’ incentives to act efficiently and to pass on cost savings to consumers in the form of lower retail prices.
- 3.39 Therefore, preventing or restricting MI Resellers’ ability to determine their own online retail prices for the Relevant Products would likely:
- reduce price competition from online sales of the Relevant Products;
  - reduce downward pressure on the retail price of Relevant Products; and
  - thereby potentially result in higher prices for consumers for the Relevant Products.

## **C. Korg Pricing Policy**

### **I. Introduction**

#### ***Korg Pricing Policy: Conclusion***

- 3.40 The CMA has concluded that during the Relevant Period, Korg UK operated and enforced a wide-ranging pricing policy (the Korg Pricing Policy), the purpose of which was to ensure that MI Resellers would not advertise or sell the Relevant Products online below a certain minimum price specified by Korg UK from time to time, e.g. in Korg UK’s price lists (the Minimum Price).
- 3.41 In the CMA’s view, Korg UK intended that the Korg Pricing Policy should apply across all or at least the vast majority of Korg UK’s MI Reseller network, including to [Reseller 1], for the reasons set out in this Part 3.C.

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<sup>58</sup> For example, wages in bricks and mortar retail stores are typically higher than those paid by online only retailers: URN C\_KOR01540 (IBISWorld Report, March 2019), pp.21–22 and p.27.

## People involved and their roles

3.42 To make it easier to understand the context to the relevant evidence, set out in Figures 3.2 and 3.3 below are the names and roles of key Korg and [Reseller 1] staff.

**Figure 3.2: Relevant Korg Employees**

Korg employee	Area of responsibility (and dates)
[Korg Senior Employee 1]	[X]
[Korg Senior Employee 2]	[X]
[Korg Senior Employee 3]	[X]
[Korg Senior Employee 4]	[X]
[Korg Senior Employee 5]	[X]
[Korg Senior Employee 6]	[X]
[Korg Employee 1]	[X]
[Korg Employee 2]	[X]
[Korg Employee 3]	[X]
[Korg Employee 4]	[X]
[Korg Employee 5]	[X]
[Korg Employee 6]	[X]
[Korg Employee 7]	[X]
[Korg Employee 8]	[X]
[Korg Employee 9]	[X]
[Korg Employee 10]	[X]
[Korg Employee 11]	[X]
[Korg Employee 12]	[X]
[Korg Employee 13]	[X]
[Korg Employee 14]	[X]
[Korg Employee 15]	[X]

Sources: URN C\_KOR01151 (Table of relevant employees provided in response dated 26 February 2019 to a s.26 Notice); URN C\_KOR02332 ([Korg Employee 2] reply dated 30 January 2020 to a s.26 Notice), p. 1/question 1; URN C\_KOR02659 (Korg response dated 17 March 2020 to CMA informal request for information).

**Figure 3.3 Relevant [Reseller 1] Employees**

[Reseller 1] employee	Area of responsibility (and dates)
[Reseller 1 Employee 1]	[X]
[Reseller 1 Employee 2]	[X]
[Reseller 1 Employee 3]	[X]
[Reseller 1 Employee 4]	[X]
[Reseller 1 Employee 5]	[X]

Sources: URN C\_KOR02036 ([Reseller 1] organisational chart). See also URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.21, lines 2–17.

3.43 Part 3.C. below sets out the relevant factual background to the Korg Pricing Policy as shown by the evidence, including:

- its commercial aims, content and communication and scope and duration;
- its monitoring and enforcement;
- Korg UK's awareness of competition law and potential illegality, including how Korg UK's staff operated under a culture of concealment and tried not to generate an evidence trail of potentially incriminating written records relating to the Korg Pricing Policy (see paragraphs 3.147 to 3.162 below);
- the possible consequences for MI Resellers of non-compliance; and
- illustrative examples of Korg UK's monitoring and enforcement of the Korg Pricing Policy (underlining the wide application of, and adherence to, the Korg Pricing Policy in relation to all types of Relevant Products, and across Korg UK's network of MI Resellers, throughout the Relevant Period).

3.44 The nature of the Korg Pricing Policy was such that Korg UK rarely needed to contact MI Resellers about it (in writing or otherwise), when MI Resellers were complying with it because the Minimum Price was, in general, clearly displayed on Korg's UK's price lists relating to the Relevant Products (see paragraphs 3.68 to 3.70 below).<sup>59</sup>

3.45 This generally limited the need for verbal and written communications concerning the Korg Pricing Policy, and therefore limited the amount of written records related to the Korg Pricing Policy. Despite this, the CMA has obtained evidence which, in the CMA's view, demonstrates the existence of the Korg Pricing Policy. Relevant contemporaneous documentary evidence is corroborated by certain witness evidence describing verbal and/or written communications that took place between Korg UK and its MI Resellers during the Relevant Period.

## II. Commercial aims, content and communication, scope and duration

### **Commercial aims**

3.46 The evidence shows that Korg UK's commercial aims for introducing the Korg Pricing Policy were at least two-fold:

- it was designed to enable Korg UK's MI Resellers to achieve attractive margins through the maintenance of high and stable pricing, thus increasing the

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<sup>59</sup> There is evidence that MI Resellers were aware of a MAP/RPM agreement even if it was not explicitly stated in Korg UK's correspondence with them. For example, Korg UK referred in communications with MI Resellers to the Minimum Price in various ways, e.g. '*RRP Ex VAT*' (Recommended Retail Price exclusive of VAT) or '*street price*' (see paragraphs 3.65–3.66 below). Notwithstanding that description, the MI Reseller [Reseller] queried new prices in June 2014, asking '*How's things with trying to get [Reseller] [a rival reseller] prices up to UK street...?*', URN EY\_KOR00081 (Email exchange between [Employee of Reseller] and [Korg Senior Employee 3] on 17 June 2014). In addition, on 7 August 2017 [Reseller] sent Korg UK two emails titled '*Map*' referring to other resellers' listings: see paragraphs 3.209–3.210 below.

attractiveness of the Korg brand and encouraging MI Resellers to stock and sell the Relevant Products (and the Korg brand more generally);<sup>60</sup> and

- in doing so, it aimed to help Korg UK secure, maintain and/or improve its UK market position in the Relevant Products relative to its competitors, in particular, by maintaining the brand value of the Relevant Products.<sup>61</sup>

3.47 The evidence shows that the origins of the Korg Pricing Policy pre-date the Relevant Period.<sup>62</sup> Its aims were in part formulated to address pressure from certain UK-based MI Resellers<sup>63</sup> to maintain their margins in the face of competition, partly aided by currency fluctuations, from MI Resellers selling into the UK from a base in another EU Member State. This competition caused pricing instability and reduced the margins that UK-based MI Resellers could make on Korg products. This appears to have remained an issue for much of the Relevant Period.

Aims: Protection of MI Resellers' margins (and of Korg UK's MI Reseller network) to improve Korg UK's market position

3.48 Korg UK staff considered that if MI Resellers could sell (and maximise their margins on) Korg products, this would encourage more orders for Korg UK, as opposed other MI manufacturers. [Korg Senior Employee 3] submitted that if a MI Reseller made *'an unsustainable margin, so maybe making sort of 3%, 4%, 5% margin'* on sales of Korg products *'that worries us.'*<sup>64</sup> Korg UK and its staff submitted that Korg UK was [X]. Hence, if Korg UK contacted a MI Reseller about the margin the MI Reseller was making if it sold at its then advertised retail price, the aim was for Korg UK *'to support all the dealers to make some margin.'*<sup>65</sup>

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<sup>60</sup> URN EY\_KOR00882 (Note titled *'The Situation / Background'* dated 12 January 2017). This note, believed to be drafted by [Korg Senior Employee 3], stated that *'Price war got worse in last 6 months due to [Reseller], [Reseller] and [Reseller] fighting each other for market share without growing the market'* and that price instability was causing *'customer confusion due to wide range of prices.'* The note referred to a need to protect Korg's *'brand and company reputation by taking a stronger position'* as *'international internet traders are growing their own brand whilst damaging our brands.'* See also URN EY\_KOR00899 (Email from [Korg Senior Employee 5] to various recipients on 9 February 2017): *'NO DEALER IS BIGGER THAN OUR BRANDS OF KORG [...] we will not let anyone or anything play games with our brand.'*

<sup>61</sup> URN EY\_KOR00074 (Korg UK Business Commentary dated 4 June 2014), p.1, notes a desire to *'improve the quality and quantity of our coverage of the UK dealers', 'grow our business' and 'avoid our brands being involved in European price wars between [X] such as [Reseller], [Reseller], [Mass Reseller], [Reseller] and [Reseller].'*

<sup>62</sup> It appears that, as early as 2012, Korg UK was engaged in conduct at least similar to the Korg Pricing Policy; a number of MI Resellers were adhering to the Korg Pricing Policy; and MI Resellers' adherence to the Korg Pricing Policy was being monitored and enforced. Korg UK submitted that it had received complaints from MI Resellers *'since circa 2012'* (see paragraph 3.86 below). See also e.g. URN ER\_KOR00028 (Email from [Korg Employee 12] to a number of [Reseller] recipients on 27 January 2013): *'Please could you ensure that your pricing on new introduction product is not less than indicated below. There are currently some discrepancies causing issue. Please would you give this your urgent attention.'* See also e.g. URN ER\_KOR00089 (Email from [Employee of Reseller] to [Korg Employee 6] on 15 March 2013): *'We were under the impression that the pricing would be policed, hence we bought into the deal.'*

<sup>63</sup> Commenting on URN C\_KOR00956 (iPhone note written by [Korg Senior Employee 3] on 20 October 2016), [Korg Senior Employee 3] told the CMA that Korg *'had a price increase'*, [Reseller] had *'done the right thing'* and *'adjusted'* and was noting *'that [Reseller] and [Reseller] haven't'*: URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.195, lines 2–4.

<sup>64</sup> URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.48, lines 5–21; p.203, lines 9–10 (*'They're only going to sell them and stock them if they can make some margin out of them'*).

<sup>65</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.183 line 10 to p.184, line 26; p.302, lines 8–10. URN C\_KOR00798 (Korg UK note of 23 August 2018 on its dealings with resellers), paragraph 1.2.

- 3.49 Korg UK was aware that a MI Reseller may reduce its orders if its margin on Korg products was *'disappointing [...] when competing with other retailers in the UK.'*<sup>66</sup>

Aims: Maintenance of high and stable pricing to maintain 'Korg' brand in the UK

- 3.50 During 2015, Korg UK continued to note online price competition from MI Resellers selling into the UK but based in other EU Member States, partly due to currency fluctuations, and that this was increasing the volatility of prices advertised in the UK, including by UK-based MI Resellers.<sup>67</sup>
- 3.51 [Korg Senior Employee 3] submitted that when currency volatility particularly affected the real value of sterling trade prices, Korg UK offered some UK-based MI Resellers a *'3% support package'* or *'buffer'*, to support their margins for the month.<sup>68</sup>
- 3.52 The evidence shows that Korg UK continued to consider ways to stabilise prices advertised in the UK in response to these challenges, with a view to maintaining the commercial aims of the Korg Pricing Policy.<sup>69</sup> Korg Inc. appears to have supported this pricing initiative.<sup>70</sup>
- 3.53 By 2017, concerned that MI Resellers based in other Member States may be damaging the Korg brand by selling *'products below cost and discounting new products before launch'*,<sup>71</sup> Korg UK introduced the 'Korg Charter'. This is described more fully at paragraphs 3.54 to 3.58 below.

The Korg Charter introduced by Korg UK

- 3.54 Korg UK's response to *'international internet traders ...damaging our brands'* was to introduce the 'Korg Charter' in early 2017.<sup>72</sup> Its aim was to stabilise and improve

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<sup>66</sup> See e.g. URN EY\_KOR00160 (Emails between [Korg Employee 14], [Employee of Reseller] and [Korg Employee 2] on 13 March 2015).

<sup>67</sup> URN EY\_KOR00198 (Korg & KHS Meeting slides dated 23–24 June 2015). Slide 11 notes *'market challenges'* e.g. the *'recent price war between [Reseller], [Reseller] and [Reseller] decimated achievable margins across the Union with unmanned and/or unregulated Spider tracker software systems driving prices into an unprecedented downward spiral. [Mass Reseller]'s entry into the market in many areas further complicates the picture.'*

<sup>68</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.247, line 22 to p.252, line 14.

<sup>69</sup> See URN EY\_KOR00080 (Email from [Korg Senior Employee 3] to [Korg Senior Employee 6] on 13 June 2014), p.2. [Korg Senior Employee 6] sent in [Korg Senior Employee 6]'s email message within Korg transcripts of internal Skype chats discussing moving prices back up and issuing new RRP's to tackle dealers' pricing complaints. *'[Korg Senior Employee 6]: Hi, 1st of July we will launch the new recommended price list for all KORG & VOX. Some [X] products will also be adjusted on 1st July as per our last meeting. Concerning [X]: If [Reseller]'s system needs to VAT adjust in other markets, then this is OK...ultimately [X]. Calculating this way means [Reseller], [Reseller], [Reseller] are in theory in line with their Euro price being advertised on their sites. Which is actually the case now with the current price system.'* URN EY\_KOR00752 (Note titled *'Meeting with [Distributor] Sept 16'* dated 21 September 2016), *'We have to monitor closely and should the rate move up/down more than 5% then it would trigger a UK new price list. I think this makes sense and we can drive this. What we don't want is a wildly different price in £ from Euro and no action.'*

<sup>70</sup> URN EY\_KOR00419 (Email from [Korg Senior Employee 2] to [Korg Senior Employee 3] on 26 May 2016) recorded that [Korg Senior Employee 5] of Korg Inc. *'will tell [Distributor] that Korg Inc want Korg UK to set European guide prices in Pounds and Euros.'*

<sup>71</sup> URN EY\_KOR00882 (Note titled *'The Situation / Background'* dated 12 January 2017) cited concerns that the price war has impacted Korg UK's ability to be represented by [X].

<sup>72</sup> URN EY\_KOR00882 (Note titled *'The Situation / Background'* dated 12 January 2017), p.1.

business across Korg UK's UK MI Reseller network. [Korg Senior Employee 3] added that the *'Charter was a genuine attempt to try and elevate the brand, Korg.'*<sup>73</sup>

- 3.55 Korg UK noted internally that it could *'require retailers to present our products in a professional way and when they do so we can reward them with profit'*, and Korg and Vox brands had *'premium market position [...] so should be well presented'* online and instore. Korg UK also noted internally that the Korg Charter aimed to list *'requirements we all expect from our dealers'* and *'explain how we expect our products to be presented by our customers'*.<sup>74</sup> MI Resellers who signed up to the Korg Charter and met certain criteria (e.g. by fulfilling requirements in terms of [§<]) could receive [§<].<sup>75</sup>
- 3.56 The Korg Charter was *'an addendum to'* Korg UK's SDA *'and stands alone in its own right'*.<sup>76</sup> [Korg Senior Employee 3] of Korg UK told the CMA that the Korg Charter: *'wasn't legally binding [...] a document that stated who we were as a company. This is our background. We've been going for 40-odd years. The Korg charter was introduced in February 2017. This was [...] our voluntary sort of code of conduct really and the dealers responded well to it.'*<sup>77</sup>
- 3.57 Korg UK noted that the Korg Charter was well received by its MI Resellers.<sup>78</sup> The evidence shows that the Korg Charter may have helped to stabilise and increase MI Resellers' pricing for Korg products. For example, in May 2017 Korg UK noted that [Reseller] ([§<])<sup>79</sup> was *'really pleased'* as *'other brands are currently very volatile'* while *'KORG is stable'*, and *'[s]ince February, [Reseller]'s Korg and Vox margin has increased by 10%'*.<sup>80</sup> [Korg Senior Employee 3] surmised this was *'possibly a by-product'* of the Korg Charter.<sup>81</sup>
- 3.58 Korg UK submitted that the Korg Charter was *'not about price but [...] how the brands are presented to the customer.'*<sup>82</sup> When asked if the Korg Charter had

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<sup>73</sup> URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.47, lines 22–23. Similarly, Korg UK submitted that it set *'out to (re)establish the brand Korg as a Japanese boutique manufacturer of high-end products with a penchant for innovation'*: URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice). This accords with URN EY\_KOR00966 (Korg UK *'Annual Report Year Ended April 2017'*), p.3: *'We have created the Korg Charter as a way to protect our brands and this has slowed the decline in Korg European business.'*

<sup>74</sup> URN EY\_KOR00966 (Korg UK *'Annual Report Year Ended April 2017'*), p.6. URN EY\_KOR00882 (Note titled *'The Situation / Background'* dated 12 January 2017).

<sup>75</sup> The Korg Charter set out potential additional discounts of up to [§<]: see e.g. URN EY\_KOR00966 (Korg UK *'Annual Report Year Ended April 2017'*), p.29.

<sup>76</sup> URN C\_KOR00310 (Korg Charter 2017), p.5, footer.

<sup>77</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.26, lines 4–9.

<sup>78</sup> URN EY\_KOR00928 (Email exchange between [Korg Senior Employee 5] and [Korg Senior Employee 3] on 6–13 March 2017). URN EY\_KOR00966 (Korg UK *'Annual Report Year Ended April 2017'*), p.6.

<sup>79</sup> URN C\_KOR00108 (Korg UK reply dated 17 April 2018 to a s.26 Notice), at question 2(b)(i). The CMA understands that this relates to Korg UK's FYE 31 March 2018.

<sup>80</sup> URN EY\_KOR00940 (Email exchange between [Korg Senior Employee 5], [Korg Senior Employee 3] and [Korg Senior Employee 2] on 3 May 2017: *'[Employee of Reseller] cited concerns with a few local UK dealers and five European dealers but was overall pleased with the level of support from KORG'*).

<sup>81</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.218, line 3 to p.219, line 23.

<sup>82</sup> URN EY\_KOR00966 (Korg UK *'Annual Report Year Ended April 2017'*), p.6. Also see URN C\_KOR00967 (iPhone note of [Korg Senior Employee 3] on 24 January 2018), *'The KC [i.e. Korg Charter] was never about price.'*



impacted MI Resellers' retail prices for Korg products, [Korg Senior Employee 3] said that this '*wasn't the idea*' but Korg UK had hoped it would be '*one of the*' by-products.<sup>83</sup>

### **Content and communication**

- 3.59 The following paragraphs outline the CMA's findings regarding the content of the Korg Pricing Policy and the way in which it was communicated to MI Resellers.
- 3.60 Although the Korg Pricing Policy does not appear to have been written down, it was communicated through price lists Korg UK sent its MI Resellers periodically, which revealed the content of the Korg Pricing Policy. The Korg UK price lists:
- specified main dealer prices and trade prices at which MI Resellers and other resellers could purchase the Relevant Products from Korg UK;
  - indicated the Minimum Price at or above which MI Resellers were expected to advertise and sell the Relevant Products online; and
  - thereby revealed the margin a MI Reseller could expect to make when advertising and selling the Relevant Products online.
- 3.61 As explained further below, Korg UK staff would often contact MI Resellers after issuing a price list to check that the MI Resellers understood the content: see paragraphs 3.83 to 3.85 below.

### **The Minimum Price**

- 3.62 The evidence shows that Korg UK communicated the Minimum Price for the Relevant Products to its MI Resellers, e.g. via price lists issued by Korg UK from time to time.<sup>84</sup> These price lists referred to, for example, the terms set out below.
- From May 2015 to November 2016, for example, Korg UK price lists included a '*RRP Ex VAT*' price (amongst others). The CMA concludes that '*RRP Ex VAT*' referred to the Minimum Price for the Relevant Products at that time.<sup>85</sup>
  - In February 2017 and June 2017, for example, Korg UK price lists included a '*SSP inc. VAT @20%*' price or '*SSP inc 20% VAT*' (amongst others). The CMA

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<sup>83</sup> URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.46, line 21 to p.47, line 6 ('*[I]t wasn't the idea [...] I think it is fair to say that one of the bi-products would have been that we would have hoped, if our dealers start to consider us and understand who we are, that they may not trash our prices [...] So, we weren't directly saying to them, "Please put your prices up", we were just saying, "Please respect our brand".*').

<sup>84</sup> 17 Korg UK price lists, in force over a 35 month-period (5 May 2015 to 31 March 2018), are referred to in this Decision.

<sup>85</sup> See '*RRP Ex VAT*' in e.g. URN C\_KOR01923 (KORG Confidential UK Trade Price List - effective May 5th, 2015) and URN C\_KOR01939 (KORG Confidential UK Trade Price List - November 1st 2016).

concludes that ‘SSP inc. VAT @20%’ price or ‘SSP inc 20% VAT’ referred to the Minimum Price for the Relevant Products at that time.<sup>86</sup>

- From July 2017 to February 2018, for example, Korg UK price lists included a ‘UK SSP inc VAT’ price (amongst others). The CMA concludes that ‘UK SSP inc VAT’ referred to the Minimum Price for the Relevant Products at that time.<sup>87</sup>

### Communication

- 3.63 As set out at paragraph 3.62 above, the evidence shows that Korg UK communicated the Minimum Price for the Relevant Products to its MI Resellers through e.g. the circulation of price lists. Korg UK would often contact its MI Resellers around the time that Korg UK issued a price list to flag and follow up on the price list. Price lists were therefore an integral part of the Korg Pricing Policy.
- 3.64 The CMA notes that Korg UK was keen to ensure that MI Resellers adjusted their pricing to the Minimum Price contained in new price lists. There is evidence of Korg UK contacting MI Resellers before and immediately after the issue of a new price list and requesting the relevant MI Reseller to adjust its pricing to the Minimum Price as set out in such price list. A [Reseller 1] employee told the CMA that Korg UK typically call or emailed [Reseller 1] in relation to price lists to be issued and issued by Korg UK.<sup>88</sup> There is also evidence, as set out in this Decision (e.g. in Part 3.C.V. below, Part 4.C. below and Annex A), of subsequent and more *ad hoc* written and oral requests which Korg UK made of MI Resellers to revert to the Minimum Price.
- 3.65 In its written or oral communications with its MI Resellers, Korg UK referred to the Minimum Price in various ways, e.g. ‘RRP Ex VAT’ (Recommended Retail Price exclusive of VAT), ‘SSP’<sup>89</sup> (Suggested Selling Price exclusive of VAT), ‘SSP ex VAT’ (SSP exclusive of VAT) or ‘UK SSP inc VAT’, ‘SSP inc. VAT @20%’ and ‘SSP inc 20% VAT’ (in each case, SSP inclusive of VAT), or ‘street price’.<sup>90</sup>
- 3.66 Korg UK’s [Korg Employee 15] submitted that ‘a retail price and ex VAT retail price would generally be the street price’, but ‘it can vary’.<sup>91</sup> Korg UK’s [Korg Employee 8]

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<sup>86</sup> See ‘SSP inc. VAT @20%’ in URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017), and ‘SSP inc 20% VAT’ in URN C\_KOR01945 (KORG Confidential UK Trade Price List - June 20th 2017).

<sup>87</sup> See ‘UK SSP inc VAT’ in each of URN C\_KOR01949 (KORG Confidential UK Trade Price List - 7th July 2017) and URN C\_KOR01950 (KORG UK Trade Pricing dated 22 February 2018).

<sup>88</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), e.g. p.44, line 15 to p.46, line 7 (‘With a new pricelist, usually you had, a few calls to [...] get your [sic] [...] ready [...], giving you an explanation, what’s coming out, and then they were really, pushing -- pushing us to, set the new prices, advertise for the new prices on the website’); p.157, lines 10–19.

<sup>89</sup> URN EY\_KOR00252 (Korg UK spreadsheet ‘OS margins’ dated 11 January 2016). This contains tabs titled ‘Master price list’, ‘Selling Price’ and ‘Margin’. The ‘Master price list’ included prices labelled e.g. ‘SSP’ and ‘RRP INC’.

<sup>90</sup> See e.g.: URN EY\_KOR00050 (Email from [Korg Employee 13] to [Korg Senior Employee 3] on 10 March 2014): ‘The street price is the price we issue (RRP Ex Vat)’; URN EY\_KOR00523 (Email from [Korg Senior Employee 3] to [Korg Senior Employee 5] on 21 July 2016): ‘We’re planning on presenting an EX VAT retail price and an inclusive VAT retail price in Sterling and Euro. ...[O]ur prices across Europe are still presented as a full retail price and a street price (which corresponds to the ex VAT price) whilst recognising that all our dealers across Europe are free to sell at whichever price they like.’

<sup>91</sup> URN C\_KOR01957 (Transcript of the [Korg Employee 15] Interview), p.67, lines 7–8 and 13.

told the CMA that Korg UK would refer its MI Resellers to its RRP/SSP – or, on occasion, to a ‘street price’ slightly below RRP/SSP. For example, at a given time for a Relevant Product Korg UK’s ‘RRP Ex VAT’ may have been £315.00, but the ‘street price’ may have been £299.00 (if several MI Resellers were pricing at £299.00).<sup>92</sup>

### ***Scope of the Korg Pricing Policy***

3.67 The following paragraphs outline the CMA’s view regarding the scope of the Korg Pricing Policy. As set out below, the evidence shows that the Korg Pricing Policy:

- applied to online pricing of the Relevant Products;
- applied to all the Relevant Products;
- applied to MI Resellers and not Mass Resellers; and
- applied to pricing of any Korg product, including any Relevant Product, sold in any package also comprising (i.e. ‘bundled’ with) one or more other products or accessories (possibly from a supplier other than Korg UK).

#### **Scope: applied to online pricing of the Relevant Products**

3.68 Some MI Resellers may price instore as they do online, or *vice versa*,<sup>93</sup> hence may have adhered to the Minimum Price both online and in-store. However, the CMA prioritised the investigation of conduct relating to MI Resellers’ online retail prices for the Relevant Products.

3.69 In any event, the evidence shows that Korg UK’s enforcement of the Korg Pricing Policy was focussed on online retail pricing. For example, [Korg Senior Employee 3] indicated that Korg UK’s use of automated software to monitor changes in MI Resellers’ advertised prices (as explained at paragraphs 3.91 to 3.104 below) was ‘*just aimed at*’ MI Resellers with ‘*a big online presence*’, as instore prices may be affected by a number of factors.<sup>94</sup>

#### **Scope: applied to all Relevant Products**

3.70 The evidence shows that during the Relevant Period the Korg Pricing Policy applied to every type of Korg UK’s synthesizers and hi-tech equipment,<sup>95</sup> and thus all of the Relevant Products featured on Korg UK’s price lists during the Relevant Period,

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<sup>92</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.77, line 1 to p.78, line 3; p.216, line 8 to p.218, line 19; p.223, line 9 to p.226, line 19; p.288, lines 7–12; p.321, lines 14–17.

<sup>93</sup> For example, [Reseller 1]’s pricing on its own websites is the same as its offline pricing: URN C\_KOR02423 ([Reseller 1] reply dated 10 February 2020 to a s.26 Notice), pp.4–5/question 5.

<sup>94</sup> URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.90, lines 6–14 and p.151 lines 17–23 (‘[...] *you can go into a store and cut a deal and you might have a part-exchange*’).

<sup>95</sup> For the synthesizer and hi-tech equipment segments identified by Korg UK, see paragraphs 3.15–3.16 above.

whether categorised by Korg UK as [X] or [X] (as both featured on Korg UK's price lists: see paragraph 3.25 above).

Scope: applied to Korg UK's MI Resellers, but not Mass Resellers

- 3.71 During the Relevant Period, Korg UK supplied Relevant Products to around 150 MI Resellers.<sup>96</sup> The CMA has seen no evidence indicating that the Korg Pricing Policy did not apply to any of those MI Resellers in the Relevant Period.
- 3.72 On balance, the evidence shows that the Korg Pricing Policy did not apply directly to (but may have indirectly affected) Korg UK's Mass Reseller distribution channel. Some evidence shows that:
- a. MI Resellers monitored [Mass Reseller]'s retail pricing and complained to Korg UK if they were being undercut by this Mass Reseller;<sup>97</sup> and
  - b. Korg UK may have attempted to influence [Mass Reseller]'s retail pricing at least indirectly, by influencing the retail pricing of MI Resellers whom it may have been following,<sup>98</sup> e.g. on two occasions in 2017.<sup>99</sup>
- 3.73 However, Korg UK did not have the same bargaining power vis-à-vis [Mass Reseller] as it did with MI Resellers. This is demonstrated by Korg UK's submission that [Mass Reseller] 'fundamentally advise on what terms' Korg UK supplies it, and 'demanded' different contractual arrangements relative to Korg UK's usual terms.<sup>100</sup> This is also demonstrated by [Mass Reseller]'s limited reply when Korg UK asked it to disclose which MI Reseller(s) [Mass Reseller] was price-matching.<sup>101</sup>

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<sup>96</sup> URN C\_KOR01995 (Korg reply dated 16 August 2019 to a s.26 Notice).

<sup>97</sup> See e.g. URN EY\_KOR00189 (Email from [Reseller] to [Korg Employee 7] on 1 June 2015), in which the reseller [Reseller] told Korg UK, in relation to a Korg product: 'If it's Korg's strategy to supply [Mass Reseller] directly, why do they bother with a dealer network? [Mass Reseller] clearly get preferential terms ... This is just one more example for you where [Mass Reseller] are £16 cheaper (13%) than the lowest price of any dealer'. See also URN ER\_KOR00616 (Email exchange between [Employee of Reseller] and [Korg Senior Employee 3] dated 24 March 2016), in which [Reseller] emailed [Korg Senior Employee 3] (subject: 'Please help...') weblinks to listings which included the prices of [Mass Reseller] [X] and of other resellers for Korg's Volca Beats and Volca Keys (both Relevant Products).

<sup>98</sup> [Mass Reseller] stated that it was 'a price follower, not leader': URN EY\_KOR00319 (Emails between Korg UK and [Mass Reseller] on 18–19 February 2016).

<sup>99</sup> See e.g. URN C\_KOR02603 (WhatsApp messages of [Korg Employee 9] and [Korg Employee 7] on 11 May 2017): on 11 May 2017, [Korg Employee 9] circulated within Korg UK a weblink for a Vox amplifier listing, after having written '[Korg Employee 7] [...] Can you have a word with [Reseller]. I think this is influence [sic] [Mass Reseller]'. Within 3 minutes, [Korg Employee 7] of Korg UK replied 'Cheers [Korg Employee 9]. Will sort this morning'. See e.g. URN C\_KOR02611 (WhatsApp messages of [Korg Senior Employee 1], [Korg Employee 8], [Korg Employee 2] and [Korg Employee 4] dated 21 November 2017): on 21 November 2017, Korg UK's [Korg Senior Employee 1] circulated within Korg UK a weblink about a 'Volca Keys issue'. Korg UK's [Korg Employee 2] then circulated various screenshots of resellers' advertised prices on Volca products – commenting on one screenshot showing [Mass Reseller] and four other resellers advertising at £124.00 (lower than at least six other resellers): 'And keys which is now impacting on [Mass Reseller] [...] appears the Oct price increase has been mostly ignored'. Korg UK's [Korg Employee 15] replied 'At the top of all these lists are [Reseller] are we speaking to them?'. [Korg Senior Employee 1] replied 'On [Reseller] re Volcas, can we get others to move...', then '[Reseller] now also moving so we need to go through all issues with Volca quickly to get UK dealers OK'.

<sup>100</sup> URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), p.15/questions 17(b) and 17(c).

<sup>101</sup> 'I'm not able to provide any more information [...] we are following a competitor', namely 'a major UK online retailer': see URN EY\_KOR00319 (Emails between Korg UK and [Mass Reseller] on 18–19 February 2016).

Scope: applied to the ‘bundling’ of Korg products (including Relevant Products)

- 3.74 The evidence shows that the Korg Pricing Policy included restrictions relating to the pricing of any package comprising any Korg product (including any Relevant Product) and any other product or accessory, possibly including other products or accessories from a supplier other than Korg UK (Bundle).
- 3.75 The Korg Charter stated that Korg UK did ‘*not sanction bundles with low priced products that will have a negative effect on the Korg brand*’.<sup>102</sup> Korg UK’s [Korg Employee 8], for example, told the CMA that Korg UK did not permit Korg products to be bundled with low-quality non-Korg products for brand prestige reasons, and actively monitored Bundles advertised by MI Resellers for this reason.<sup>103</sup>
- 3.76 However, the CMA concludes that the evidence shows that Korg UK tried to prevent MI Resellers from using Bundles to circumvent the Korg Pricing Policy. As set out at paragraphs 3.77 and 3.78 below, at least two MI Resellers understood that, while it was not stated in writing, the Korg Pricing Policy prohibited any Bundle including a Relevant Product if that Bundle’s total price meant the Relevant Product was, in effect, at a discount to the Minimum Price.
- 3.77 [Reseller 1] submitted that its staff recalled that Korg UK requested verbally (but not in writing) that [Reseller 1] stop bundling Relevant Products in order to improve product presentation and that [Reseller 1] had to seek consent before offering any promotions.<sup>104</sup> The evidence set out at paragraphs 4.174 to 4.176 and paragraph 4.205 below also shows that [Reseller 1] understood that the Korg Pricing Policy prohibited any Bundle including a Relevant Product if the Bundle’s total price meant the Relevant Product was, in effect, at a discount to the Minimum Price.
- 3.78 The evidence shows that, as MI Resellers developed their approaches to Bundles, Korg UK communicated the requirements relating to the composition and pricing of its Bundles from time to time (e.g. over the phone or to individual MI Resellers, instead of in writing or to all MI Resellers at once). For example, on 21 March 2017 [Employee of Reseller] emailed Korg UK then wrote to a colleague: ‘*All remaining [Reseller] bundles are being removed today - if you ever see anyone doing them report them to [Korg Employee 8] or [Korg Senior Employee 3]. Also no free gifts on any Korg items.*’ When a colleague asked ‘*no bundles at all [sic]*’, [Employee of Reseller] replied: ‘*[N]ow spoken to [Korg Senior Employee 3] he said if you want to bundle any items, firstly the item must be available on your site for the full list [price] and the bundle is to be higher than the list price [...] Defo [sic] no free gifts*’.<sup>105</sup>

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<sup>102</sup> URN C\_KOR00310 (Korg Charter 2017), p.5, at point 2.

<sup>103</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.253, line 13 to p.254, line 11.

<sup>104</sup> URN C\_KOR02423 ([Reseller 1] reply dated 10 February 2020 to a s.26 Notice), p.4.

<sup>105</sup> URN ER\_KOR00895 (Email from [Employee of Reseller] to [Employee of Reseller] and [Employee of Reseller] on 21 March 2017). Earlier that day [Employee of Reseller] emailed [Korg Senior Employee 3] (subject: ‘*Rules on free gifts /Bundles*’) a [Reseller] weblink for a Bundle comprising Korg’s Microkorg and free headphones and cables, asking ‘*Can you*

## Duration

- 3.79 The evidence does not clearly show when the relevant conduct began or ended. [Korg Senior Employee 3] indicated that UK ASMs were already contacting MI Resellers about pricing when he joined Korg UK, in [X]. [Korg Employee 8] indicated that the sort of emails set out in Part 4.C.IV. below (for example) continued into ‘late 2017, 2018’: early 2016 was the period he was ‘most busy’, and then ‘it kind of just petered out.’<sup>106</sup>
- 3.80 While the CMA makes no findings in respect of any other period other than the Relevant Period, the CMA sets out elsewhere in this Decision certain evidence indicating that the origins as well as the monitoring and enforcement of the Korg Pricing Policy pre-date the Relevant Period and may date back to 2012.<sup>107</sup>
- 3.81 Korg UK submitted that any infringing conduct had ceased since the date that the CMA commenced this investigation.<sup>108</sup> On this basis, the CMA concludes that the monitoring and enforcement of Korg Pricing Policy lasted throughout the Relevant Period, and ceased as a result of the launch of this investigation on 17 April 2018.

## III. Monitoring and enforcement of the Korg Pricing Policy

### Overview

- 3.82 As set out below, the evidence shows that Korg UK sought to monitor and enforce the Korg Pricing Policy during the Relevant Period by:
- contacting MI Resellers in advance of Korg UK issuing a new price list or immediately after issue to ensure early compliance with the Korg Pricing Policy (see paragraphs 3.83 to 3.85 below);
  - monitoring online retail pricing through MI Resellers reporting other MI Resellers’ prices below the Minimum Price to Korg UK (see paragraphs 3.86 to 3.90 below);
  - Korg UK itself monitoring online retail pricing, including via automated price-monitoring software called Orange Spider (see paragraphs 3.91 to 3.104 below);
  - enforcing the Korg Pricing Policy by contacting directly MI Resellers (including [Reseller 1]) who Korg UK found or suspected to be advertising online any

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confirm what you are happy with to be bundled with your items, if you are happy to do it or if you want to keep it clean and say no bundles?’: URN ER\_KOR00892 (Email from [Employee of Reseller] to [Korg Senior Employee 3] on 21 March 2017). Text in square brackets added by the CMA.

<sup>106</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.97, line 13 to p.98, line 6. URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview); p.155, line 12 to p.156, line 11; and p.357, line 22 to p.359, line 13.

<sup>107</sup> See e.g. paragraph 3.47 above and paragraph 3.118 below. The CMA also notes similar evidence, slightly post-dating the Relevant Period, of at least one MI Reseller reporting to Korg UK pricing that ‘everyone should be on’: URN EY\_KOR01241 (Email from [Employee of Reseller] to [Korg Employee 8] on 18 April 2018).

<sup>108</sup> URN C\_KOR02626 (Korg representations dated 13 March 2020), p.6.

Relevant Product(s) at prices below the Minimum Price, and requesting that they increase pricing to the Minimum Price (see paragraphs 3.105 to 3.112 below);

- monitoring whether MI Resellers contacted by Korg UK were adhering to the Korg Pricing Policy by increasing their pricing to the Minimum Price (see paragraphs 3.113 to 3.114 below);
- making certain changes to how it monitored the Korg Pricing Policy (see paragraph 3.115 below);
- at times considered applying, intimated that it may (or had applied) and did in fact threaten and apply sanctions against MI Resellers (including [Reseller 1]) who did not comply with the Korg Pricing Policy (see Part 0. below, paragraphs 4.96 to 4.126 below and Annex A).

***Contacting MI Resellers in advance of Korg UK issuing a new price list or immediately after issue to ensure early compliance with the Korg Pricing Policy***

- 3.83 The evidence shows that Korg UK staff may contact a MI Reseller in advance of Korg UK issuing a new price list, then follow this up just after issue of the new price list by checking if that MI Reseller had subsequently increased its pricing to the Minimum Price, to adhere to the Korg Pricing Policy.
- 3.84 Sometimes Korg UK would contact a MI Reseller before Korg UK issued a new price list, to request in advance that its pricing be adjusted to the Minimum Price set out on that new price list. An employee of [Reseller 1], for example, submitted that *'[w]ith a new pricelist, usually you had, a few calls to [...] get [...] ready'* and if *'you had a new pricelist coming'* then *'the tone of voice'* of Korg UK staff on such calls conveyed *'urgency, stress'*.<sup>109</sup>
- 3.85 The evidence also shows that Korg UK would generally contact a MI Reseller just after Korg UK issued a new price list, to request that the MI Reseller's pricing be adjusted to the Minimum Price set out in Korg UK's new price list. For example, on 9 August 2016, Korg UK's [Korg Employee 8] sent [Employee of Reseller] an email titled *'Korg new pricelist'*, referring to a price list dated 'Aug 2016'. [Korg Employee 8] wrote *'I have highlighted the items that have not yet been updated. There are still quite a few but hopefully that made it a little less painful.'*<sup>110</sup> Similarly, on 10 June 2016, Korg UK's [Korg Employee 5] emailed [Employee of Reseller] and [Employee of Reseller], stating *'[a]s discussed earlier'* and attaching a June 2016 list stating *'CURRENT'* and *'NEW'* prices. [Employee of Reseller] replied: *'I'm ready to press the*

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<sup>109</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.44, line 15 to p.46, line 7; p.86, lines 18–24. Text in square brackets added by the CMA.

<sup>110</sup> The relevant chain of events is set out in further detail at paragraph 3.178 below.

*button. I just need to know that the others will defiantly [sic] do the same.'* [Korg Employee 5] wrote *'Please do it. I will take the sh\*t for any let downs'*.<sup>111</sup>

### **MI Resellers reporting other MI Reseller prices below the Minimum Price to Korg UK**

- 3.86 The evidence shows that MI Resellers proactively monitored each other's pricing – and often sent Korg UK automated price-monitoring software reports, texts and/or weblinks to alert Korg UK to other MI Resellers' pricing which was below the Minimum Price.<sup>112</sup> Korg UK submitted that this practice occurred *'routinely'* or *'regularly'*, and *'since circa 2012'*.<sup>113</sup>
- 3.87 [Korg Employee 8] of Korg UK told the CMA that MI Resellers might email other MI Resellers' weblinks to Korg UK, usually to report MI Resellers pricing at a discount – which *'they have to match'* so they would *'not make the margin they would like [...]*'.<sup>114</sup> He described getting *'multiple calls daily'*, taking up a *'relatively crippling'* amount of his time.<sup>115</sup>
- 3.88 Korg UK also stated that from September 2016 to December 2017 a MI Reseller ([Reseller]) sent [Korg Employee 15] of Korg UK *'screenshots'* of its *'tracker report requesting [Korg Employee 15] to fix the issues'*. The CMA's case file includes around 20 [Reseller] reports. Each typically cited prices advertised by [Reseller], and by two or three other MI Resellers, for 20 or so Relevant Products. These reports were sent on around 20 different dates between 28 May 2016 to 4 August 2017 to [Korg Employee 15], who occasionally forwarded these to Korg UK colleagues.<sup>116</sup>
- 3.89 Korg UK considered that it had to appear to respond positively to any MI Reseller's complaint about another MI Reseller's pricing of a Relevant Product below the Minimum Price – even if (in *'the majority'* of cases) Korg UK only acknowledged the complaint. According to Korg UK, such complaints would *'[o]ccasionally'* lead to Korg UK contacting other MI Resellers about their retail pricing. [Korg Senior Employee 3] of Korg UK submitted that, when a MI Reseller called to say that it could make no margin if it matched another MI Reseller's low prices, the complainant may well have hoped that Korg UK would follow up with the other MI Reseller (and Korg UK may

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<sup>111</sup> The relevant chain of events is set out in further detail at paragraph 3.174 below.

<sup>112</sup> For example, see Part 3.C.V. below.

<sup>113</sup> URN C\_KOR01218 (Korg reply dated 10 June 2019 to a s.26 Notice); URN C\_KOR00798 (Korg UK note of 23 August 2018 on its dealings with resellers). The CMA nonetheless makes findings in respect of the Relevant Period only, i.e. 9 June 2015 to 17 April 2018.

<sup>114</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), e.g. at p.29, lines 15–18 (*'[L]ots of dealers would phone up with the finger-pointing email or [...] "Those guys are trashing the product; I can't make any money; why should I buy it?" That would happen an awful lot.'*); p.189, line 14 to p.191, line 7.

<sup>115</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.29, line 11 to p.30, line 3.

<sup>116</sup> URN C\_KOR01218 (Korg reply dated 10 June 2019 to a s.26 Notice). For example, URN EY\_KOR00618 (Email from [Employee of Reseller] to [Korg Employee 15] on 11 August 2016) was forwarded by [Korg Employee 15] to [Korg Employee 2].



have done so). [Korg Senior Employee 3] also submitted that MI Resellers could put more pressure on Korg UK than *vice versa*.<sup>117</sup>

- 3.90 The CMA, following its assessment of the totality of the evidence, including contemporaneous documents, does not find persuasive Korg UK's submission that it would only '*[o]ccasionally*' follow up on MI Resellers' complaints about other MI Resellers pricing below the Minimum Price. The CMA notes in this regard the numerous internal communications within Korg UK on this matter and the number of contacts Korg UK initiated with MI Resellers pricing below the Minimum Price recorded in the contemporaneous documentary evidence (see Part 3.C.V. and Part 4.C.IV. below). Further, the CMA is aware in this regard that Korg UK tried to minimise its written communications. Therefore, the CMA finds that such complaints generally resulted in Korg UK contacting the MI Reseller pricing below the Minimum Price and asking it to revert to the Minimum Price.

### ***Korg UK itself monitoring online retail pricing, via Orange Spider software***

- 3.91 Korg UK submitted that it used automated price-monitoring software to monitor MI Resellers' advertised pricing for Korg products from around September 2013 until 2017.<sup>118</sup> This software, known as Orange Spider, was created and operated by [Reseller] (which was also a Korg UK MI Reseller). This collated prices from a range of MI Resellers on various Korg products and highlighted prices below the Minimum Price (e.g. Korg UK's '*RRP Ex VAT*').<sup>119</sup> This provided to Korg UK:

- MI Reseller price reports, in Excel spreadsheet format (Price Reports); and
- real-time email notifications from '*notification@orangespider.co.uk*' of any 'price lowered' or 'price raised' by a MI Reseller for a given product (Price Alerts).

- 3.92 As early as July 2013, Korg UK's [Korg Employee 13] was circulating to Korg UK ASMs '*some reports every morning [...] showing information on our dealers and our products that we are getting from*' Orange Spider. He and [Korg Senior Employee 3] circulated Price Reports within Korg UK in 2015 and 2016, for example.<sup>120</sup>

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<sup>117</sup> URN C\_KOR00798 (Korg UK note of 23 August 2018 on its dealings with resellers), paragraph 2.3. URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.17, lines 10–19 ('*the balance of power is that these dealers are a lot bigger than we are, and they need, you know, we need them a lot more than they need us*'); p.67, line 26 to p.68, line 10; p.70, line 5 to p.71, line 24 ('*[I]f a dealer, like [Reseller], decides to not buy any products, then that's a pretty powerful weapon*'); p.126, line 19 to p.129, line 13; p.143, lines 23–25.

<sup>118</sup> URN C\_KOR01218 (Korg reply dated 10 June 2019 to a s.26 Notice). See also e.g. URN EY\_KOR00019 ('Orange Spider Software Demo' meeting for 7 August 2013 organised by [Korg Employee 13]).

<sup>119</sup> URN EY\_KOR00050 (Email from [Korg Employee 13] to [Korg Senior Employee 3] on 10 March 2014): '*This is the data showing the marketing of our dealers. There is a colour scale that shows the lowest price (Red) to the highest (Green). The street price is the price we issue (RRP Ex Vat)*'.

<sup>120</sup> URN EY\_KOR00195 (Email from [Korg Employee 13] to e.g. [Korg Employee 3] and [Korg Employee 14] on 30 July 2013); URN EY\_KOR00174 (Email from [Korg Senior Employee 3] to e.g. [Korg Employee 3] and [Korg Employee 7] on 6 May 2015); URN EY\_KOR00339 (Email from [Korg Employee 2] to [Korg Employee 13] on 14 March 2016).

- 3.93 However, it is not clear whether Korg UK continued to circulate Price Reports internally on a daily basis throughout the Relevant Period. [Korg Senior Employee 3] said that he did not ‘*recall that we sent them out every single day*’ and added that he understood that they would be circulated ‘*periodically*.’<sup>121</sup>
- 3.94 The CMA reviewed around 50 Price Reports from about 75 provided by Korg UK, which were saved under various different filenames (referring to e.g. ‘*Orange Spider*’, ‘*Spider Report*’ and ‘*OS margins*’) and dated between July 2014 and February 2017. For example, a Price Report dated 11 January 2016 stated the ‘Selling Price’ on 16 MI Resellers’ UK websites and whether this was below the Minimum Price.<sup>122</sup> [Korg Employee 15] of Korg UK stated that these Price Reports were created to forewarn them of ‘*the calls we’re going to get on Monday*’, i.e. from other MI Resellers – but that they may then have called MI Resellers cited in them pre-emptively, to flag pricing issues.<sup>123</sup>
- 3.95 The CMA reviewed around 1,600 Price Alerts, from within the data of six of Korg UK’s staff, dated between 29 April 2014 to 14 January 2017. The end date roughly accords with [Korg Employee 8] and [Korg Employee 15] both of Korg UK having apparently asked in January 2017 to stop receiving ‘*all notifications*’.<sup>124</sup> Korg UK’s [Korg Senior Employee 3] indicated that the Price Alerts were ‘*just aimed at*’ MI Resellers with ‘*a big online presence*’. This somewhat accords with the fact that the 407 Price Alerts which are on the case file relate to the prices of seven prominent MI Resellers.<sup>125</sup>
- 3.96 Korg UK submissions on the extent to which Korg UK staff used outputs from Orange Spider varied but Korg UK staff generally submitted that Orange Spider was only used to a limited extent. However, it is not clear from the documentary evidence and other evidence if this is accurate.
- 3.97 [Korg Employee 2] of Korg UK submitted that Price Reports were, for a period of time, shared weekly with Korg UK senior managers.<sup>126</sup>

- 3.98 Some evidence shows that Korg UK staff such as [Korg Senior Employee 3] or [Korg Senior Employee 2] made *ad hoc* requests for Orange Spider outputs, for specific purposes.<sup>127</sup>
- 3.99 Korg UK submitted that the Price Reports were used '*rarely*', but were used in certain circumstances. For example, it '*was deemed sensible for a Korg UK salesman to be aware of pricing information before meeting with that dealer*'.<sup>128</sup>
- 3.100 [Korg Senior Employee 3] told the CMA that he '*didn't get involved that deeply into*' Orange Spider, but recalled that Korg UK used the automated Orange Spider software '*on occasion*'. He further recalled Korg UK used Price Alerts to monitor the prices of '*the main players*', i.e. those with '*a big online presence*' – '*it didn't cover all of them*'. He did '*not recall any particular focus on*' the Price Reports, and recalled that Korg UK staff were too busy day-to-day to focus on these.<sup>129</sup>
- 3.101 In addition, Korg UK submitted that Orange Spider was used to check '*key Korg product prices*' in 2014 and 2015. Korg UK also indicated that [Korg Senior Employee 3] may have received Price Reports, then forwarded these to Korg UK's ASMs. Korg UK said that at least 23 of its staff '*may have seen the output from the OS [i.e. Orange Spider] from time to time*'.<sup>130</sup>
- 3.102 [Korg Employee 8] of Korg UK explained that any action he took was probably not as a result of automated reports, but '*normally [...] because of an interaction between myself and [Korg Employee 15] [of Korg UK] – or following interactions with more senior colleagues via WhatsApp, 'because the bosses were in the group and it needed to be seen that we weren't just ignoring everything that was going on'*'.<sup>131</sup>
- 3.103 Korg UK submitted that it ceased to use Orange Spider software in January 2017 after [Korg Employee 13] left Korg UK.<sup>132</sup> However, some evidence shows that Korg UK (and/or Korg Inc.) may have used Orange Spider software after then, e.g. to monitor retail pricing in the UK in March 2017 (see paragraph 4.191 below) or elsewhere in the EU around that time.<sup>133</sup> Korg UK only stopped its subscription in December 2017.<sup>134</sup>

<sup>127</sup> See e.g. URN EY\_KOR00231 (Email from [Korg Senior Employee 3] to [Korg Employee 13] on 23 November 2015); URN EY\_KOR00400 (Email from [Korg Senior Employee 3] to [Korg Employee 13] on 19 May 2016); URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.85, lines 8–12.

<sup>128</sup> URN C\_KOR01218 (Korg reply dated 10 June 2019 to a s.26 Notice), p.3/question 3.

<sup>129</sup> URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.65, line 7 to p.66, line 8; p.89, line 11 to p.91, line 10. URN C\_KOR01218 (Korg reply dated 10 June 2019 to a s.26 Notice), p.1.

<sup>130</sup> URN C\_KOR02628 (Korg annotations to s.26 Notice reply of 10 June 2019, as re-submitted on 13 March 2020). Text in square brackets added by the CMA.

<sup>131</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.235, lines 3–13. Text in square brackets added by the CMA.

<sup>132</sup> URN C\_KOR02332 ([Korg Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.2/question 4.

<sup>133</sup> URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.87, line 15 to p.88, line 16.

<sup>134</sup> URN C\_KOR01218 (Korg reply dated 10 June 2019 to a s.26 Notice), p.4.

- 3.104 The CMA concludes that, in Orange Spider, Korg UK procured a sophisticated and automated way of monitoring whether certain MI Resellers were pricing at the Minimum Price. In particular, the Price Alerts provided Korg UK with real-time information on particular MI Resellers who were pricing below the Minimum Price and so would have greatly facilitated swift enforcement of the Korg Pricing Policy.

***Contacting MI Resellers advertising or selling below the Minimum Price***

- 3.105 The evidence shows that Korg UK staff often contacted MI Resellers to highlight their online retail pricing, and asked MI Resellers to increase their retail pricing to the Minimum Price on one or more Relevant Products. Korg UK appears to have done so both as a response to complaints, and proactively.<sup>135</sup>
- 3.106 Korg UK said that it contacted MI Resellers about retail pricing on a ‘*complaint led*’ basis, and ‘*never*’ had a ‘*proactive, professional, sort of, MAP strategy*’.<sup>136</sup>
- 3.107 However, this contrasts somewhat with certain other evidence from Korg UK.
- a. [Korg Employee 8] of Korg UK told the CMA that Korg UK monitored online prices both reactively and proactively: for example, he and others posted ‘*pre-emptive*’ WhatsApp messages to anticipate complaints from MI Resellers.<sup>137</sup>
  - b. Moreover, [Korg Employee 15] of Korg UK told the CMA how he sometimes called MI Resellers about retail pricing not due to a complaint he had received, but because [Korg Senior Employee 3] or [Korg Senior Employee 1] told him to do so. [Korg Employee 15] recalled this happening ‘*certainly every week*’, and possibly focusing on a particular product, product category or dealer. [Korg Employee 15] also indicated that Korg UK may have called MI Resellers based on its own proactive price monitoring. For example, [Korg Employee 15] also told the CMA that Korg UK created a spreadsheet on 11 January 2016 to forewarn us of ‘*the calls we’re going to get on Monday*’ – but may then have called MI Resellers pre-emptively cited in Korg UK’s Price Reports, to highlight issues with their pricing.<sup>138</sup>
  - c. Certain contemporaneous discussions support [Korg Employee 15]’s claim that, on at least some occasions, Korg UK’s own price monitoring was the trigger for Korg UK contacting certain MI Resellers to highlight issues with their pricing. For example, as set at paragraph 4.191 below, on 10 March 2017, [Korg Employee 2]

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<sup>135</sup> URN ER\_KOR00644 (Email from [Korg Employee 5] to [Employee of Reseller] on 10 June 2016). See also URN ER\_KOR00686 (Email from [Korg Employee 8] to [Employee of Reseller] on 9 August 2016).

<sup>136</sup> URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), e.g. at p.14, lines 18–20 – and p.66, lines 12–18; URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.301, lines 6–18.

<sup>137</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.58, line 5 to p.59, line 21 (‘*it would be a pre-emptive, “I’m ready for this phone call; this is coming”*’).

<sup>138</sup> URN EY\_KOR00252 (Korg UK spreadsheet ‘OS margins’ dated 11 January 2016). URN C\_KOR01957 (Transcript of the [Korg Employee 15] Interview), p.152, line 17 to p.155, line 26; p.185, line 11 to p.186, line 21; p.214, lines 14–16. See also, in relation to the Price Reports and other monitoring software used by Korg UK, paragraphs 3.91–3.104 below.

of Korg UK circulated certain price information and referred to Korg UK's 'spider.' [Korg Employee 2] told the CMA that he sourced this information 'from Google and [Reseller 1]'s web site', possibly initiated by 'information from colleagues'.<sup>139</sup>

3.108 Korg UK and its staff submitted that Korg UK would, at least, in principle contact a MI Reseller about its retail pricing only out of concern that the MI Reseller was missing an opportunity to make more margin or had made an error in its pricing.

- a. [Korg Senior Employee 3] of Korg UK submitted that Korg UK's general aim in contacting MI Resellers about retail pricing was to be '*seen to be [...] trying to support all the dealers to make some margin.*'<sup>140</sup>
- b. [Korg Employee 8] likewise submitted that he contacted MI Resellers about retail pricing to '*point out they could be making more margin - absolutely with the caveat of, "Do whatever you want at the end of the day"*', or highlight '*any potential errors*'. [Korg Employee 8] submitted that his aim was the same if he sent to his Korg UK colleague [Korg Employee 15] complaints about the pricing of MI Resellers in [Korg Employee 15]'s area (the '[X]'), e.g. [Reseller]. [Korg Employee 8] explained that this was in line with competition law training he received upon joining Korg UK.<sup>141</sup>

3.109 The CMA concludes that the above evidence shows that Korg UK was using the reference to 'margin' as code for advertised price. It was doing so as part of its enforcement of the Korg Pricing Policy. This interpretation is supported by the fact that Korg UK contacted MI Resellers so frequently and, on occasions, repeatedly about the 'margin' of the same Relevant Products. This, in turn, further shows that the likely explanation for such contact was that it was in relation to the retail price rather than any opportunity to make more margin.

3.110 In addition, other evidence from Korg UK shows that Korg UK did not contact MI Resellers about pricing only to discuss margin opportunities or potential errors but to request that their pricing be increased to the Minimum Price. For example:

- a. [Korg Senior Employee 3] of Korg UK told the CMA, '*I've confirmed that the sales team at Korg were calling dealers and requesting them to put their prices up*'.<sup>142</sup> This accords with how [Korg Senior Employee 3] worded a text to [Reseller] on 14 December 2015: '*MS-20 Mini [Reseller] are back at £399, and we're talking to*

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<sup>139</sup> URN C\_KOR02332 ([Korg Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.2/question 4.

<sup>140</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.183 line 10 to p.184, line 26.

<sup>141</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.28, lines 12–21; p.42, line 10 to p.43, line 13 (e.g. '*it would be to say, "Do they actually realise" because the margins were so low, "Do they realise they're making no money on that?"*', and he [Korg Employee 15] would phone them, and basically give them the opportunity to do to either put the price up, if they wanted to, or not. But there was never any, there was never, kind of, "*Get your prices up*", because, frankly, we do not have the power to do that as Korg, even if we wanted to [...]').'; p.51, line 16, to p.54, line 14. See also URN C\_KOR00798 (Korg UK note of 23 August 2018 on its dealings with resellers), e.g. at paragraphs 2.3 and 3.3. Text in square brackets added by the CMA.

<sup>142</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.148, line 26 and p.149 line 1.

*everyone today to request £399 price*'.<sup>143</sup> This followed another reseller ([Reseller]) having emailed [Korg Senior Employee 3] on 12 December 2015, apparently to complain about having to match a £349 price advertised for Korg's MS20Mini by [Reseller] and [Reseller].<sup>144</sup>

- b. [Korg Employee 15] of Korg UK told the CMA that when a MI Reseller complained to Korg UK about another MI Reseller's pricing of Relevant Products, *'they're expecting you to get whoever it is they're complaining about to put their price up'*. [Korg Employee 15] told the CMA that he would contact MI Resellers to ask them to explain their pricing and request them to increase it to the Minimum Price. For example, he described how on 14 March 2017 he called to ask [Reseller] to increase a price to the Minimum Price, and [Reseller] did so, maybe during the call (see paragraph below 3.119). [Korg Employee 15] stated that *'[l]ots of time'* was spent on tracking and corresponding about MI Resellers' retail pricing.<sup>145</sup>
- c. Similarly, when asked by the CMA if his goal in sending MI Resellers weblinks was, in general, to move their pricing to the Minimum Price, [Korg Employee 8] of Korg UK replied *'No, **not every time**, no'*.<sup>146</sup> The CMA concludes that this response was an admission by [Korg Employee 8] that on some occasions this was his goal.

3.111 Further, Korg UK staff operated under a culture of concealment and tried to avoid generating an evidence trail of potentially incriminating written records related to the Korg Pricing Policy (see paragraphs 3.147 to 3.162 below). Despite this, the CMA has obtained copies of at least some written correspondence showing that Korg UK requested MI Resellers to increase their pricing to the Minimum Price for Relevant Products: see e.g. paragraphs 3.174 and 3.178 below.

3.112 For the reasons set out above the CMA concludes that Korg UK often contacted MI Resellers and requested that they adjust their pricing to the Minimum Price, in accordance with the Korg Pricing Policy.

### ***Monitoring whether MI Resellers contacted by Korg UK were adhering to the Korg Pricing Policy by increasing their pricing to the Minimum Price***

3.113 The evidence shows that Korg UK often contacted MI Resellers to request that they increase their pricing for a specific Relevant Product to the Minimum Price, then

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<sup>143</sup> URN ER\_KOR01215 (Text message from [Korg Senior Employee 3] to [Employee of Reseller] on 14 December 2015). The CMA notes that £399.00 matched the *'RRP Ex VAT'* price Korg's MS20Mini: URN C\_KOR01927 (KORG Confidential UK Trade Price List - effective November 20th 2015).

<sup>144</sup> URN C\_KOR02627 (Korg representations dated 13 March 2020 – Accompanying paginated bundle), p.29 (Email from [Employee of Reseller], copying [Korg Senior Employee 3], on 12 December 2015). [Reseller] is a trading name of [Reseller].

<sup>145</sup> URN C\_KOR01957 (Transcript of the [Korg Employee 15] Interview), p.151, lines 3–5 (e.g. *'we did ring dealers up and we did ask them to review pricing'*); p.159, lines 16–19; p.175, lines 6–13; p.238, lines 15–22.

<sup>146</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.287, lines 12–20. Bold emphasis added by the CMA.

followed up a short time afterwards to check they were adhering with the Korg Pricing Policy. For example, on 26 April 2016 at 3:14pm, Korg UK's [Korg Employee 8] wrote to [Reseller 1 Employee 3] *'I have just seen this on your site and im [sic] concerned about your margin. Worth taking a look when you can'* in an email titled *'MicroKorg XL+'* (a Relevant Product). Various subsequent emails were exchanged in the hours following: e.g. [Reseller 1 Employee 3] emailed [Korg Employee 8] *'Sorted? Ok, [Reseller 1 Employee 5] will look at tomorrow'*. At 9:19am on 27 April 2016, [Korg Employee 8] sent [Reseller 1 Employee 3] an email and attachment indicating that [Reseller 1]'s Microkorg XL+ pricing was below various other resellers' prices. [Reseller 1 Employee 3] told the CMA that *'[Korg Employee 8] was pressurising us again to raise the price'*, perhaps because *'[Reseller 1]'s listings can take some time to update online'*.<sup>147</sup>

- 3.114 The CMA concludes that the above shows that often Korg UK staff contacted MI Resellers, then followed up by checking if they had subsequently increased their pricing to the Minimum Price, to adhere to the Korg Pricing Policy.

### ***Changes to the way Korg UK monitored the Korg Pricing Policy***

- 3.115 The evidence set out below shows that Korg UK made certain changes to how it monitored and enforced the Korg Pricing Policy during the Relevant Period.
- From summer 2013 until 2017, Korg UK staff monitored MI Resellers' advertised pricing using Orange Spider software and its outputs (see paragraphs 3.91 to 3.104 above).
  - From at least March 2016, Korg UK staff communicated internally via the WhatsApp messaging platform – *'probably [...] on a daily basis'* – to discuss MI Resellers' retail pricing and related actions (see paragraph 3.152 below).
  - In late 2016, Korg UK created a WhatsApp group *'to enable the streamlined discussion'* by its staff of MI Resellers' complaints (see paragraph 3.161 below).
  - In 2017, for example, Korg UK was using Google Shopping to monitor the Korg Pricing Policy (e.g. to check whether MI Resellers had implemented prices changes).<sup>148</sup> This evidence is supported by [Korg Employee 2] of Korg UK who told the CMA that when Korg UK monitored MI Resellers' online prices it not only used individual MI Resellers' websites to do this, but also Google.<sup>149</sup>

<sup>147</sup> The relevant chain of events is further detailed at paragraphs 4.158–4.161 below.

<sup>148</sup> *'[Reseller] showing low price on google but the site is right'* in URN C\_KOR00980 (WhatsApp messages of [Korg Employee 8] on 17 February 2017) at 12:11pm. See also URN C\_KOR00931 (WhatsApp messages of [Korg Employee 8] on 22–23 June 2017), at 9:42am, and URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.239, lines 1–5.

<sup>149</sup> URN C\_KOR02332 ([Korg Employee 2] reply dated 30 January 2020 to a s.26 Notice), question 4.

- From early to late 2017, Korg UK staff such as [Korg Employee 2] and [Korg Employee 8] downloaded and were using a price-monitoring app called *pricespy*.<sup>150</sup>
- By the end of 2017, the geographic scope of Korg UK's monitoring appeared to extend beyond the UK to cover prices in e.g. [Σ<].<sup>151</sup>
- In late February 2018, [Korg Senior Employee 1] of Korg UK was '*looking at software that would [...] help us keep our products competitive in the market place*'.<sup>152</sup>

### **Consequences for MI Resellers of non-compliance with the Korg Pricing Policy**

- 3.116 The evidence below shows that Korg UK considered applying (and in some cases did apply) pressure on MI Resellers to comply with the Korg Pricing Policy, including by intimating that Korg UK had threatened other MI Resellers with consequences for non-compliance (e.g. loss of access to certain products, closure of an account, or non-payment of rebates).<sup>153</sup>
- 3.117 Korg UK and its staff (e.g. [Korg Employee 15]) submitted that Korg UK never applied any sanction to any MI Reseller.<sup>154</sup> [Korg Senior Employee 3] told the CMA that Korg UK had never '*put anybody on stop*' (i.e. ceasing to offer credit temporarily or permanently, in relation to the supply of Korg products) or '*withheld supply of product*'.<sup>155</sup> Korg UK's [Korg Employee 8] also submitted that Korg UK never reduced any MI Reseller's margin, removed any permits or closed any accounts.<sup>156</sup>
- 3.118 The CMA makes no findings in respect of any period other than the Relevant Period but considers that certain evidence which pre-dates the Relevant Period may impact on MI Resellers' perception of evidence from the Relevant Period. The CMA notes,

<sup>150</sup> URN C\_KOR00909 (WhatsApp message of [Korg Employee 2] on 10 March 2017). [Korg Employee 2] told the CMA '*Pricespy is a free price comparison mobile application, it was not adopted by KORG. I use it for personal shopping and looking at price history.*' The CMA notes, however, [Korg Employee 8]'s comments '*Just downloaded the price spy so will get into it properly this afternoon*' (URN C\_KOR00910 (WhatsApp message of [Korg Employee 8] on 13 March 2017)) and '*[Reseller] at £310 on microkorg according to pricespy*' (URN C\_KOR00932 (WhatsApp message of [Korg Employee 8] on 30 June 2017)). In addition, on 21 November 2017 at 6:56pm [Korg Employee 2] circulated a screenshot to Korg UK colleagues showing that a [Σ<] price for Korg's Minilogue had been '*Reduced by £35.07*', commenting '*Price Spy alert*': URN C\_KOR02611 (WhatsApp messages of [Korg Senior Employee 1], [Korg Employee 2], [Korg Employee 15] on 21 November 2017).

<sup>151</sup> URN C\_KOR02611 (WhatsApp messages of [Korg Senior Employee 1], [Korg Employee 2], [Korg Employee 15] on 21 November 2017); URN C\_KOR02613 (WhatsApp messages of [Korg Employee 8], [Korg Senior Employee 1], [Korg Senior Employee 3] and others on 11–12 December 2017).

<sup>152</sup> URN EY\_KOR01176 (Email from [Korg Senior Employee 1] to [Korg Senior Employee 3] on 23 February 2018).

<sup>153</sup> In addition, Korg UK sometimes threatened [Reseller 1] with – and occasionally did in fact apply to [Reseller 1] – sanctions for non-compliance with the Korg Pricing Policy. See e.g. paragraphs 4.96–4.126 below and Annex A.

<sup>154</sup> '*Korg wish to emphasise that it has never forced a reseller to sell Korg products to its customers at a certain price and has never taken any action against a reseller regarding its selling price*': URN C\_KOR00798 (Korg UK note of 23 August 2018 on its dealings with resellers), e.g. at paragraphs 2.1–2.4; URN C\_KOR01957 (Transcript of the [Korg Employee 15] Interview), p.93, lines 24–25 and p.94, line 1.

<sup>155</sup> URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.17, lines 10–19; p.63, line 25 to p.64, line 5.

<sup>156</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.292 lines 13–15, p.149, lines 11–23, p.153, lines 2–5; p.346, lines 3–15.



for example, evidence of Korg UK writing to MI Resellers in 2013-2014 that if ‘marketing’ was not ‘correct’ MI Resellers risked ‘losing the permit to have this product’, having an ‘account immediately suspended’ and having ‘stock permits and credit facility removed’. One such email resulted in the relevant MI Reseller reverting to the Minimum Price.<sup>157</sup> The CMA considers that MI Resellers receiving such threats may still have maintained a credible fear of consequences for non-compliance with the Korg Pricing Policy during the Relevant Period.

3.119 The evidence available to the CMA shows that Korg UK considered sanctions for non-compliance with the Korg Pricing Policy.

- a. On 10 February 2017, [Korg Senior Employee 5] of Korg Inc. emailed Korg UK’s [Korg Senior Employee 3] and other Korg colleagues, showing that [Korg Senior Employee 5] not only supported the closure of accounts of MI Resellers not adhering to the Korg Pricing Policy, but had discussed this possibility with MI Resellers such as [Reseller] (and was reporting that these MI Resellers ‘approve of this strong approach’).<sup>158</sup>
- b. On 14 March 2017, Korg UK staff exchanged messages showing that Korg UK at least considered withholding ‘margin’ from at least one of [Reseller 1], [Reseller] and [Reseller] due to their pricing having been below the Minimum Price (see paragraphs 4.99 to 4.101 below).<sup>159</sup>
- c. On 13 July 2017, Korg UK staff exchanged messages<sup>160</sup> showing that they hoped termination of [Reseller 1]’s Korg UK account was imminent (e.g. ‘Pull the ’ [plug symbol]). Within these messages, [Korg Employee 15] also set out alternative measures that he considered possible: ‘turn permits off today [...] Just

<sup>157</sup> On 8 March 2013 Korg UK’s [Korg Employee 14] wrote to [Reseller], ‘Please immediately correct your current marketing of the KingKorg or you risk losing the permit to have this product’; shortly afterwards [Reseller] ‘[c]hanged [its price] on till and [X]’: URN ER\_KOR00088 (Email from [Employee of Reseller] to [Employee of Reseller] on 8 March 2013). On 6 July 2013 Korg UK’s [Korg Employee 12] wrote to unknown recipients (the CMA considers these would be Korg UK MI Resellers): ‘As a clear message to our dealership - from the close of business on Monday 8th July [2013], ANY ACCOUNT using incorrect marketing or inappropriate advertising on their web or any ecommerce channel will have their account immediately suspended and all product permits removed’: URN ER\_KOR00115 (Email from [Korg Employee 12] to unknown recipients on 6 July 2013). On 10 June 2014 Korg UK’s [Korg Employee 3] wrote that Korg UK resellers should ‘handle the marketing and presentation of our products in a professional manner... All accounts across Europe not in line with this policy will have their stock permits and credit facility removed’; [Reseller] noted internally a need to ensure ‘all of our Korg/ Vox pricing is in line today’: URN ER\_KOR01129 (Email from [Korg Employee 3] to unknown recipients on 10 June 2014). Text in square brackets added by the CMA.

<sup>158</sup> URN EY\_KOR00901 (Email from [Korg Senior Employee 5] to multiple recipients on 9 February 2017): ‘To be completely honest once again, I am itching to say goodbye to one of the big dealers. Really, I would love this to happen because the message to everyone would be that Korg is finally serious. And frankly the discussions that I had with [Reseller] and [Reseller], and that [Employee of Distributor]) had with [Employee of Reseller], indicate that they approve of this strong approach.’

<sup>159</sup> In the CMA’s view, this evidence accords with a note, made by [Korg Senior Employee 3] on a mobile device on 17 December 2017 about the Korg Charter: ‘we need to reinforce what we’ve done but I will be looking at different ways for F18 [presumably FYE 31 March 2019], perhaps including holding back marketing rebate which is given to good dealers and not to ones who cause a problem’: URN C\_KOR00962 (Note of [Korg Senior Employee 3] titled ‘[Korg Senior Employee 5] Conversation’ dated 17 December 2017). See also, within that note: ‘I want my sales team to be on the right side of the law so I think the best way forward will be to reduce the margin off invoice and hand back as a marketing rebate’.

<sup>160</sup> URN C\_KOR01757 (WhatsApp messages of [Korg Employee 4], [Korg Employee 8] and [Korg Employee 15] on 13 July 2017).

*not allow them access to permitted stock [...] And everything else is “out of stock”.*

- 3.120 The evidence shows that Korg UK intimated to MI Resellers that it may apply or had applied sanctions for non-compliance with the Korg Pricing Policy. Other MI Resellers considered this to be a credible threat. Examples of this evidence, from [Reseller]’s internal emails, are set out below.
- a. [Early] 2017: *‘[Korg Senior Employee 4] [...] has informed every distributor in Europe to respect and represent the brand correctly, he sees no problem with pulling any dealer no matter the size - [Reseller], [Reseller], [Reseller] have all been told and everyone in Europe is on the same price plan - every country have a set price list which each dealer must use for that region [...] Everyone in each territory has to get in line by 14th of next month with the official dealer agreement coming out in March - they will be monitoring those that get in line by the 14th and those that don’t will not get the first extra marketing discount when the agreements are all signed.’*<sup>161</sup>
  - b. [X] July 2017: *‘[Reseller 1] seem to be pulling Korg [prices] down, do you know if there’s a plan there?’*. *‘Yes the new charter goes live tomorrow [...] [Reseller 1] had not signed the agreement [...] if it’s not done by tomorrow then they will no longer have access to the stock and will be forced to remove it from the site.’*<sup>162</sup>
  - c. [X] July 2017: *‘I did meet [Korg Senior Employee 5] who is serious about this being sorted so lets [sic] give them time to sort out the dealers that are cheaper not getting stock any more - this I am told is what is going to happen.’*<sup>163</sup>
  - d. [early] 2018: *‘[Korg Senior Employee 3] said [Reseller] will move today, they blamed it on a computer glitch.... [Korg Senior Employee 3] did say look at [Reseller 1] who always were cheaper in the UK and they are not now, he assures me Europe will be sorted – alone in the UK they have suspended a lot of accounts already and this is going on in Europe’.*<sup>164</sup>

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

- irrespective of whether sanctions for non-compliance were ever imposed on MI Resellers, they were credible and were at least intimated as having been threatened and imposed, directly or indirectly, by Korg UK; and

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<sup>161</sup> URN ER\_KOR00835 (Email from [Employee of Reseller] to [Employee of Reseller], [Employee of Reseller] and others [in early] 2017).

<sup>162</sup> URN ER\_KOR00948 (Email from [Employee of Reseller] to [Employee of Reseller] and [Employee of Reseller] on [X] July 2017). These internal [Reseller] emails were exchanged after a survey of market prices.

<sup>163</sup> URN ER\_KOR00959 (Email from [Employee of Reseller] to [Employee of Reseller] on [X] July 2017). Text in square brackets added by the CMA.

<sup>164</sup> URN ER\_KOR01119 (Email from [Employee of Reseller] to [Employee of Reseller] on [early] 2018).

- the fear of being sanctioned for non-compliance played an important part in encouraging MI Resellers to adhere to the Korg Pricing Policy.

#### IV. Korg UK staff's knowledge of competition law and awareness of potential illegality of the Korg Pricing Policy

##### *Korg UK staff's knowledge of competition law*

- 3.122 The evidence shows that Korg UK staff were very familiar with competition law. For example, Korg UK *'implemented a compliance code of conduct in 2015.'*<sup>165</sup>
- 3.123 In particular, [Korg Senior Employee 3] and [Korg Senior Employee 2] (both of Korg UK) took an active role in giving competition compliance training as part of the induction for new Korg UK staff. [Korg Senior Employee 3] indicated that he recognised the *'importance of making sure that we are complying with competition law'*, telling the CMA *'we decided that this was something we wanted to really make sure that we were really strict on'* and that this *'was something that [Korg Senior Employee 2] and I spoke about.'*<sup>166</sup> This evidence accords with [Korg Senior Employee 3] and [Korg Senior Employee 2] discussing in December 2014 a *'briefing sheet for the Competition Law update'*, in relation to which [Korg Senior Employee 2] told [Korg Senior Employee 3] *'[w]e need to make sure [Korg Employee 14] and [Korg Employee 3] are updated as well as the category managers. If you make a start with this during the new guys induction period I can follow up with more training and Q and A later.'*<sup>167</sup>
- 3.124 [Korg Senior Employee 3] of Korg UK subsequently conducted competition compliance training, in particular for new Korg UK sales staff.
- a. Emails record [Korg Senior Employee 3] having given *'the compliance training to our new guitar sales team'* (noting a plan *'to deliver the same training to the Hitech and PA team'*) in January 2015 and trained two other staff in March 2016.<sup>168</sup>
  - b. Similarly, Korg UK's [Korg Employee 8] told the CMA that in January 2016 *'[X] [...] I was sat down and it was explained'*, by [Korg Senior Employee 3] *'that you under no circumstances can you tell a dealer what to sell for.'*<sup>169</sup>
  - c. [Korg Senior Employee 3] told the CMA how an email he sent [Korg Senior Employee 2] in July 2016 recorded that *'[w]e have a brand new salesman in and we have gone through it and explained with him, and then I have emailed my*

<sup>165</sup> URN C\_KOR02626 (Korg representations dated 13 March 2020), p.6.

<sup>166</sup> URN C\_KOR00766 (Transcript of the [Korg Senior Employee 3] First Interview), p.45, lines 11–12, and p.66, lines 1–2.

<sup>167</sup> URN EY\_KOR00138 (Email from [Korg Senior Employee 3] to [Korg Senior Employee 2] on 23 December 2014).

<sup>168</sup> URN EY\_KOR00145 (Email from [Korg Senior Employee 3] to [Korg Senior Employee 2] on 21 January 2015). URN EY\_KOR00362 (Email from [Korg Senior Employee 3] to [Korg Senior Employee 2] on 30 March 2016).

<sup>169</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.51, line 16 to p.54, line 14.

boss' to say "*I have done that. This is what I have given him*", so that everyone knows.'<sup>170</sup>

- 3.125 For a certain period (e.g. in November 2015) at least some Korg UK staff had email signatures stating e.g. '*As a strict company policy, we absolutely refuse to discuss advertised pricing in any way. Recommended retail prices communicated by Korg UK are guide prices only.*'<sup>171</sup>
- 3.126 On 26 July 2016, [Korg Senior Employee 3] sent [Korg Senior Employee 2] (copying e.g. [Korg Senior Employee 1]) a link to an article titled '*Amazon UK reseller fined for price fixing.*' [Korg Senior Employee 2] replied: '*It's clear here that two parties used repricing software to fix prices. Our customers need to be clear that agreeing to fix prices [...] and especially using software to do this is illegal. This type of story helps maintain our good knowledge of Competition Law. If there are any questions on Competition Law at this stage do not hesitate to ask and we will clarify, train and take advice.*'<sup>172</sup>
- 3.127 The CMA published in June 2016, a document titled '*Restricting resale prices: an open letter to suppliers and retailers*' following two RPM infringement decisions. A copy, albeit saved on 15 November 2016, was found within Korg UK's data.<sup>173</sup>
- 3.128 On 26 June 2017, Korg UK's [Korg Senior Employee 1] emailed Korg UK's [Korg Senior Employee 3] a link to an article titled '*EU Antitrust commission looking into competitor prices of HiFi products*', published on [www.insitetrack.co.uk](http://www.insitetrack.co.uk), about one RPM investigation by the European Commission (the Commission).<sup>174</sup>
- 3.129 On 29 June 2017, [Korg Senior Employee 1] sent to [Korg Senior Employee 3] two PowerPoint slides, the second of which was entitled '*European Market in Five Years*' and included a bullet stating: '*Tighter controls on Pricing fixing [sic] and cartels.*'<sup>175</sup>

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<sup>170</sup> URN C\_KOR00766 (Transcript of the [Korg Senior Employee 3] First Interview), p.45, lines 4–7; URN EY\_KOR00534 (Email from [Korg Senior Employee 3] to [Korg Senior Employee 2] on 26 July 2016), in which [Korg Senior Employee 3] reported: '*I held a meeting with [Korg Senior Employee 1] on 25th July 2016 regarding the Competition Act 1998 and KORG UK. We went through the whole company policy and I am satisfied that he understands our commitment to trade fully within the terms of the Competition Act.*'

<sup>171</sup> See e.g. URN EY\_KOR00231 (Email from [Korg Senior Employee 3] to [Korg Employee 13] on 23 November 2015).

<sup>172</sup> URN EY\_KOR00538 (Email from [Korg Senior Employee 2] to [Korg Senior Employee 3], copying e.g. [Korg Senior Employee 1], on 27 July 2016). For details of the CMA case featured in this document, see <https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products> (accessed on 26 June 2020).

<sup>173</sup> URN EY\_KOR00816 ('*Restricting resale prices: an open letter to suppliers and retailers*' from Ann Pope of the CMA dated 21 June 2016). For details of the CMA cases featured in this document, see <https://www.gov.uk/cma-cases/bathroom-fittings-sector-investigation-into-anti-competitive-practices> and <https://www.gov.uk/cma-cases/commercial-catering-sector-investigation-into-anti-competitive-practices> (both accessed on 26 June 2020).

<sup>174</sup> URN EY\_KOR00967 (Email from [Korg Senior Employee 1] to [Korg Senior Employee 3] on 26 June 2017). The CMA understands that [www.insitetrack.co.uk](http://www.insitetrack.co.uk) is operated by a vendor of data services '*to enable retailers and brands to remain competitive*', e.g. through price monitoring: <https://www.insitetrack.co.uk/about-us/> (accessed on 26 June 2020). The CMA has no evidence that Korg UK purchased any services from this data provider. The article to which [Korg Senior Employee 1] sent a link stated: '*On 2 February 2017, the European Commission started formal antitrust proceedings against D&M Holdings Inc. (Denon & Marantz) and all companies directly or indirectly controlled by them. The investigation relates to suspected agreements to fix the retail price or fix a minimum selling price on products sold in the Economic European Area.*'

<sup>175</sup> URN EY\_KOR00970 (Graph sent by [Korg Senior Employee 1] to [Korg Senior Employee 3] on 29 June 2017), as attached to URN EY\_KOR00969 (Email from [Korg Senior Employee 1] to [Korg Senior Employee 3] on 29 June 2017).

- 3.130 On 17 November 2017, [Korg Senior Employee 5] (Korg Inc.) sent an email to Korg colleagues (including Korg UK's [Korg Senior Employee 3]) which indicated his awareness that minimum advertised pricing (MAP) '*is illegal in Europe*'.<sup>176</sup>
- 3.131 The above evidence shows that Korg UK staff were very familiar with competition law and appeared to know what conduct would constitute a breach of it. Senior Korg UK staff (e.g. [Korg Senior Employee 2] and [Korg Senior Employee 3]) considered they had sufficient knowledge to deliver competition law compliance training to colleagues.

### ***Awareness of potential illegality of the Korg Pricing Policy***

- 3.132 The evidence shows that Korg UK staff were aware of the potential illegality of both the Korg Pricing Policy and Korg UK's interactions with its MI Resellers in connection with Korg Pricing Policy. The evidence set out below shows:
- that MI Resellers alerted Korg UK staff to the possibility that the implementation and enforcement of the Korg Pricing Policy was potentially illegal;
  - direct knowledge on the part of Korg UK staff that the implementation and enforcement of the Korg Pricing Policy was potentially illegal; and
  - Korg UK staff, in the light of their knowledge of the illegality of their conduct, operated under a culture of concealment and tried to avoid generating an evidence trail of potentially incriminating written records.

### ***MI Resellers alerting Korg UK to possible illegality of the Korg Pricing Policy***

- 3.133 In [REDACTED] 2014, one MI Reseller ([Reseller]) sought compensation for damages, from Korg UK, which the MI Reseller considered it had suffered due to the Korg Pricing Policy having breached UK and EU competition law.<sup>177</sup>
- 3.134 Following these allegations, Korg UK discussed internally: '*How would we settle without incriminating ourselves in any future investigation*'.<sup>178</sup> Though Korg UK denied the MI Reseller's allegations, the matter was settled after several months of negotiation, with Korg UK [REDACTED].<sup>179</sup>

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<sup>176</sup> URN EY\_KOR01083 (Email from [Korg Senior Employee 5] to a number of Korg colleagues on 17 November 2017): '*Because MAP pricing is illegal in Europe, we have set up dealer agreements where we have worked out with the dealers to [sic] groups of products: [REDACTED].*'

<sup>177</sup> URN C\_KOR00556 (Letter on behalf of [Reseller] to [Korg Senior Employee 2] dated [REDACTED] 2014), pp.1–2: '*As we are confident Korg is aware, the MAP policy is a form of resale price maintenance (RPM), which is in breach of Article 101(1) TFEU and the Chapter I prohibition in the Competition Act 1998, in that it has as its object or effect the prevention, restriction or distortion of competition within the internal market.*'

<sup>178</sup> URN EY\_KOR00129 (Document titled '[Reseller]' dated [REDACTED] 2014).

<sup>179</sup> URN C\_KOR00511.4 (Settlement Deed and Release between Korg and [Reseller] dated [REDACTED] 2015).

### ***Korg UK staff's direct knowledge of potential illegality of the Korg Pricing Policy***

- 3.135 In June 2015, [Reseller 1 Employee 5] sent Korg UK's [Korg Employee 3] an email, titled '*Korg Volca Beats*', which included numerous other resellers' weblinks for Korg products (including Relevant Products). [Korg Employee 3] forwarded this to Korg UK's [Korg Employee 2] and [Korg Senior Employee 3], describing it as a '*response from [Reseller 1] regarding margin volatility*'. [Korg Employee 2]'s reply – that '*pricing is set at the discretion of each dealer and we cannot influence pricing*' – shows his awareness of competition law.<sup>180</sup>
- 3.136 In late 2016 and early 2017, Korg Inc.'s European business (including Korg UK) tried to address a price war between certain resellers. As set out at paragraphs 3.50 to 3.53 above, the evidence shows that Korg aimed for greater pan-European harmonisation of retail prices for its products. [Korg Senior Employee 5] of Korg Inc. wrote that while this could raise competition law issues, Korg's initiatives were not about '*breaking any EU laws, price-fixing or restraint of trade*'.<sup>181</sup>
- 3.137 On 15 March 2017, [Korg Employee 7] circulated to Korg UK colleagues via WhatsApp (e.g. [Korg Senior Employee 3], [Korg Employee 2] and [Korg Employee 8]) a link to a news article about Apple having been '*found guilty of Russian price-fixing*'.<sup>182</sup>
- 3.138 On 13 September 2017, internal Korg UK WhatsApp messages included a screenshot indicating that [Reseller 1] was, at that time, the lowest-priced MI Reseller on five Relevant Products. [Korg Employee 8] and [Korg Senior Employee 3] communicated about why Korg UK should not approach [Reseller 1] about pricing, at that time.<sup>183</sup> In relation to this exchange, in interview [Korg Employee 8] described how Korg UK had '*been sending all these messages [to resellers] and [...] counsel has said don't speak to them about that [pricing] anymore [...] you're in dangerous territory with it*'.<sup>184</sup>
- 3.139 On 17 December 2017, [Korg Senior Employee 3] made a note either planning for or possibly recording a telephone call with his colleague [Korg Senior Employee 5] of Korg Inc. [Korg Senior Employee 3]'s note referred to competition law concerns arising from certain Korg internal conversations on social media platforms (e.g. WhatsApp and Telegram): see paragraphs 3.152 to 3.157 below. In it, [Korg Senior

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<sup>180</sup> URN C\_KOR02244 (Email from [Korg Employee 2] to [Korg Employee 3] on 10 June 2015).

<sup>181</sup> URN EY\_KOR00901 (Email from [Korg Senior Employee 5] to multiple recipients on 9 February 2017).

<sup>182</sup> URN C\_KOR00911 (WhatsApp message of [Korg Employee 7] on 15 March 2017).

<sup>183</sup> [Korg Employee 8] asked '*would you like me to break radio silence with [Reseller 1]?*'. [Korg Senior Employee 3] replied '*No [Korg Employee 8]. We have a procedure which we are following and we definitely shouldn't approach them regarding pricing*'. URN C\_KOR00939 (WhatsApp messages of [Korg Employee 8] and [Korg Senior Employee 3] on 13 September 2017). In relation to this exchange, [Korg Senior Employee 3] stated that '*I didn't want [Reseller 1] to think, had we done anything to [...] their account [...] based on, on, pricing; that, that we were shutting them down because, really, we didn't like their pricing*'. URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.235, lines 10–12.

<sup>184</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.344, line 24 to p.345, line 3. Text in square brackets added by the CMA.

Employee 3] stated: *'I feel it's got out of hand. In the UK my ASMs are using a WhatsApp group and openly discussing about resetting [sic] prices along with adjusting [Reseller] price for example on a specific product to a price point. In the meantime, [Competitor], [Competitor] and [Competitor] are [...] not having any conversations about pricing at all.'* [Korg Senior Employee 3] noted that another MI manufacturer's sales representative had *'said that he would never work for a [sic] company that made him police pricing as its illegal and not the way to be working in 2017 [sic]'*.<sup>185</sup>

- 3.140 [Korg Senior Employee 3] also noted, in relation to the secure, end-to-end encrypted Telegram messaging app group in which Korg staff discussed matters affecting prices in the UK (and elsewhere): *'My concern is the open way that this group operates - I've got screenshots of [Employee of Distributor] saying that [Reseller] have fixed their prices! It's awful and I'm really concerned that KORG seem to be one of the only major players who are doing this in the face of [Competitor] [Competitor] and [Competitor]'s hands off approach.'* The note ended with [Korg Senior Employee 3] stating *'that KE [Korg Europe] need to stop this before we find ourselves being fined 10% of each distributors [sic] turnover for the past 10 years!'*, and that *'I want my sales team to be on the right side of the law [...]'*.<sup>186</sup>
- 3.141 On 20 December 2017, [Korg Senior Employee 3] of Korg UK made a note to himself after a discussion with [Employee of Distributor]. In it, [Korg Senior Employee 3] recorded that two years previously [Distributor] had retained a lawyer who had advised, *'don't worry, our industry isn't ever going to get investigated. they [sic] will go after big companies like VW'*. [Korg Senior Employee 3] also appears to have recorded a difference of views. His view was *'[w]e are running an incredible risk [...] The [X] in the industry has found a way to not have any pricing conversations [...] They could tell the OFT to look at us.'*<sup>187</sup>
- 3.142 [Korg Senior Employee 3] told the CMA that when [X] of Korg UK from [Korg Senior Employee 2] in [X] *'we were meeting with'* Korg UK's legal advisers *'and that was something actually that [Korg Senior Employee 2] was still very much leading, saying, "Look, we need to take advice [...] and make sure that we're not crossing the*

<sup>185</sup> URN C\_KOR00962 (Note of [Korg Senior Employee 3] titled *'[Korg Senior Employee 5] Conversation'* dated 17 December 2017). Text in square brackets added by the CMA. For example Korg UK staff discussed a 'reset' of resellers' pricing in URN C\_KOR00948 (WhatsApp messages between [Korg Employee 15], [Korg Employee 11], [Korg Employee 8], [Korg Senior Employee 3] and [Korg Senior Employee 1] on 30 November and 1 December 2017).

<sup>186</sup> URN C\_KOR00962 (Note of [Korg Senior Employee 3] titled *'[Korg Senior Employee 5] Conversation'* dated 17 December 2017). Text in square brackets added by the CMA. The CMA considers *'[Employee of Distributor]'* was [Employee of Distributor].

<sup>187</sup> URN C\_KOR00965 (Note of [Korg Senior Employee 3] titled *'Korg no spider'* dated 20 December 2017). Text in square brackets added by the CMA. When asked to explain this at interview, [Korg Senior Employee 3] said: *'the risk is that we'll get caught by you guys if -- if we were, sort of, looking at pricing and you know, crossing the line that I referred to before.'* URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.101, lines 2–4. [Korg Senior Employee 3] confirmed that *'[Employee of Distributor]'* was [Employee of Distributor], and *'[X]'* was [Competitor]: see URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.98, lines 9–11; p.101, line 22 to p.102, line 3. The CMA concludes that 'OFT' meant Office of Fair Trading, i.e. a predecessor of the CMA (on which, see footnote 617 below).

*line".* [Korg Senior Employee 3] described how a factor in the timing of [Korg Senior Employee 2]'s departure was his frustration and worry arising from *'conversations in that grey area'* giving rise to a potential competition law infringement: *'We were aware that we were crossing that line'* and *'[...] that's why we've sort of, you know, owned up'*.<sup>188</sup>

3.143 On 14 February 2018, a Korg document appears to have recorded a Skype discussion involving *'[Employee of Distributor], [Employee of Distributor], [Korg Senior Employee 3], [Korg Senior Employee 2]'*.<sup>189</sup> This stated, for example, that *'We are taking the occasion of the first anniversary of the [Korg] Charter to remind our dealers of the content of Charter and the SDA and their obligations'* and *'The most important. We must stay within the law and be "Inspectable" [sic] at all times. We must assume that we may get investigated at any time and we should welcome any investigation. We therefore must continually train staff, keep records and not tolerate anything that is against the law. We discussed the idea of a training script that help staff avoid being at risk.'*

3.144 Another Korg document, also dated 14 February 2018, and referring to the Korg Charter anniversary, follows up on this by stating *'[i]n addition to the SDA and Charter principals [sic] (as a reminder and conversation guide); We do talk about P.R.I.C.E.S.'* This mnemonic appears to provide instructions on how Korg UK employees needed to communicate certain messages to its UK MI Resellers in order to be compliant with competition law, and included:

*'I - INDICATION, our price guide is **always** for indication only and you are **always** free to sell at whatever price you like. [...]*

*S - SUGGESTION, we can only ever suggest a sales price, you are **always** free to set your own.'*<sup>190</sup>

3.145 On 20 March 2018, Korg UK's [Korg Senior Employee 1] asked the sales staff including [Korg Employee 8] of Korg UK to *'read carefully through the attached'* – which was entitled *'Korg UK Competition Law Compliance Code'* and set out e.g. that:

*'• Dealers are free to decide the price at which they advertise or sell any product, both online and instore.'*

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<sup>188</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.73, line 15 to p.74, line 11; p.86, line 24 to p.89, line 10. Text in square brackets added by the CMA.

<sup>189</sup> URN EY\_KOR01159 (Korg document titled *'14<sup>th</sup> February 2018 Valentines Day'* dated 14 February 2018). The CMA considers that this note refers to [Employee of Distributor] and [Employee of Distributor] (both of [Distributor]), [Korg Senior Employee 3] and [Korg Senior Employee 2]: see, for example, URN C\_KOR01211 (Korg reply dated 10 June 2019 to a s.26 Notice, questions 1 and 2). Text in square brackets added by the CMA.

<sup>190</sup> URN EY\_KOR01161 (Korg UK note *'PRICES – staying on the righ [sic] sides of OFT'* dated 14 February 2018); the CMA concludes that *'OFT'* in the title meant Office of Fair Trading: see footnote 187 above. Bold emphasis in original text.



- *No action, implied or undertaken, can have the effect of forcing a dealer to increase prices.*
- *No threats can be made with regard to what will happen if a dealer reduces, or does not increase, prices.*
- *No discussion can be entered into with a dealer with regard to the pricing policy of another dealer.*<sup>191</sup>

3.146 The CMA concludes that the evidence above shows that during the Relevant Period Korg UK staff dealing with MI Resellers understood that certain discussions with MI Resellers could amount to illegal RPM, and that Korg UK's enforcement of the Korg Pricing Policy may have been illegal.<sup>192</sup>

***Korg UK's staff, in the light of their knowledge of the illegality of their conduct, operated under a culture of concealment and tried not to generate an evidence trail of potentially incriminating written records***

3.147 The evidence shows that Korg UK staff, given their knowledge of competition law and of the potential illegality of the Korg Pricing Policy (see paragraphs 3.122 to 3.146 above), operated under a culture of concealment and tried not to generate an evidence trail of potentially incriminating written records. As set out below, this culture of concealment manifested itself in various ways:

- Korg UK staff tried to avoid creating written records related to the Korg Pricing Policy, preferring oral or less formal methods of communications if possible;
- Korg UK staff sought to use increasingly more secure and encrypted forms of written communication;
- Korg UK staff tried to avoid potentially incriminating language in its internal/external contacts, and used coded language in written communications with MI Resellers about the Korg Pricing Policy; and
- Korg UK staff deleted potentially incriminating evidence.

**Korg UK's preference to communicate via means other than via email**

3.148 The evidence shows that, from at least October 2015 to December 2017, Korg UK staff sought to communicate not via email – but orally or by less formal, and increasingly more secure methods of communications.

<sup>191</sup> URN EY\_KOR01208 (Email from [Korg Senior Employee 1] to [Korg Employee 15], [Korg Employee 8] and others, all of Korg UK on 20 March 2018), attaching URN EY\_KOR01207 ('Korg UK Competition Law Compliance Code' dated 14 February 2018).

<sup>192</sup> Since the Relevant Period Korg UK has e.g. emailed its resellers about competition law compliance, mentioning e.g. a competition law compliance officer: URN C\_KOR02442 (Email from Korg UK to [Reseller 1] on 21 November 2019).

### Telephone

- 3.149 On 17 December 2017, Korg UK's [Korg Senior Employee 3] wrote, in relation to a call with [Korg Senior Employee 5] of Korg Inc.: *'Reason for wishing to have a phone conversation [...] Pricing issue and we can't send email correspondence'*.<sup>193</sup>

### Text message

- 3.150 On 28 October 2015, Korg UK's [Korg Employee 15] texted Korg UK's [Korg Senior Employee 3], stating: *'I have been very careful not to send any texts or emails concerning any pricing problems to any dealers. Would you like me to adopt the same approach between staff? I can always call in the future so we can keep this water tight'*. [Korg Senior Employee 3] replied *'Please. Best to stay with texts I believe thanks'*.<sup>194</sup>
- 3.151 Korg UK staff also used text messages in relation to pricing issues. For example, on 21 March 2016, [Korg Senior Employee 3] and [Korg Employee 8] of Korg UK exchanged text about pricing intelligence received from one MI Reseller, and maybe another source;<sup>195</sup> and on 5 July 2016, [Korg Employee 8] exchanged texts with [Employee of Reseller] (with [Korg Employee 8] texting *'[w]e are on it. People are moving and we are monitoring it every hour'*).<sup>196</sup>

### WhatsApp

- 3.152 Korg UK staff communicated internally extensively via the WhatsApp messaging platform during the Relevant Period – *'probably [...] on a daily basis'*.<sup>197</sup> These WhatsApp discussions (whether between 2, or 10, people) mirror those in internal emails and/or texts, on issues such as: MI Resellers' complaints about other MI Resellers pricing below the Minimum Price;<sup>198</sup> MI Resellers to contact about pricing; and/or instances of any MI Reseller(s) having increased pricing to the Minimum Price. Within Korg UK's WhatsApp messages, *'sort'* (and *'sorted'*) may have referred

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<sup>193</sup> URN C\_KOR00962 (Note of [Korg Senior Employee 3] titled *'[Korg Senior Employee 5] Conversation'* dated 17 December 2017).

<sup>194</sup> URN C\_KOR00970 (iMessages of [Korg Senior Employee 3] and [Korg Employee 15] on 28 October 2015). Regarding this exchange, [Korg Senior Employee 3] stated that: *'[Korg Employee 15] was quite new in the company then and he was starting to get emails and texts from -- from dealers about the pricing issues. And I was saying to him, "Look, you need to be very careful about sending these around the company", you know. And, I have no recollection of any follow-up of any of this, but it was just a general comment to him about that.'* URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.141, lines 2–7.

<sup>195</sup> URN C\_KOR01749 (SMS messages of [Korg Employee 8] and [Korg Senior Employee 3] on 21 March 2016). The CMA considers that *'[Employee at Reseller]'* (reported in this message as having advised Korg UK of a [Reseller] price lower than other resellers) was [Employee at Reseller].

<sup>196</sup> URN C\_KOR02919 (SMS messages of [Korg Employee 8] and [Employee at Reseller] on 5 July 2016; revised version of URN C\_KOR01750).

<sup>197</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.58, lines 2–3. [Korg Employee 8] stated that at least some WhatsApp messages were sent to proactively monitor MI Resellers' prices (and pre-empt complaints from other MI Resellers): URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.58, line 14 to p.59, line 10. WhatsApp messages exchanged within via Korg UK – whether between 10 or so staff in this group (see e.g. paragraph 3.195 below), or fewer Korg UK staff (e.g. in March 2016: see paragraph 3.171 below) – were retrieved by the CMA using digital forensic procedures and have been cited in this Decision.

<sup>198</sup> See e.g. URN C\_KOR01957 (Transcript of the [Korg Employee 15] Interview), p.138, lines 2–19.

to when a MI Reseller would increase (or had increased) its pricing to the Minimum Price after Korg UK had contacted that MI Reseller about its pricing below the Minimum Price.<sup>199</sup>

- 3.153 The CMA notes that the WhatsApp platform has end-to-end encryption '*always activated*', enabling only the sender and recipient(s) to read what is sent.<sup>200</sup>

Telegram and Signal

- 3.154 Korg UK has described to the CMA that some of its staff used another platform, Telegram, to discuss '*pan EU marketing matters*' (including some MI Reseller pricing in the UK) from mid-2017 until early/April 2018. According to Korg UK, this was because some considered Telegram '*a more robust and stable platform for messaging*'.<sup>201</sup>
- 3.155 In relation to the secure, end-to-end encrypted Telegram messaging app group in which Korg staff discussed matters affecting prices in e.g. the UK, Korg UK's [Korg Senior Employee 3] noted: '*My concern is the open way that this group operates - I've got screenshots of [Employee at Distributor] saying that [Reseller] have fixed their prices! [...] KE [Korg Europe] need to stop this before we find ourselves being fined 10% of each distributors [sic] turnover for the past 10 years!*', and that '*I want my sales team to be on the right side of the law [...]*'.<sup>202</sup>
- 3.156 Notwithstanding his concern about Korg UK's use of Telegram, [Korg Senior Employee 3] noted on 17 December 2017: '*The advice is to get off Telegram*' and use '*another peer to peer secure app called Signal which evidently is far more secure [...]*'.<sup>203</sup> However, Korg UK indicated that Signal was an '*[e]ncrypted peer-to-peer messaging app*' that Korg UK's management today '*cannot recall being used*'.<sup>204</sup>
- 3.157 The CMA concludes that Korg UK became increasingly concerned about the potentially illegal nature of the conversations that its staff had on these platforms about MI Resellers' pricing. Therefore, Korg UK considered moving to even more

<sup>199</sup> URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.181, lines 23–26.

<sup>200</sup> See e.g. WhatsApp website at <https://faq.whatsapp.com/en/android/28030015/> (accessed on 26 June 2020).

<sup>201</sup> For example, the pricing of [Reseller] (e.g. outside the UK) or [Reseller] or [Reseller] (e.g. in the UK), on e.g. Korg's Krome (a Relevant Product). Telegram was used in this context by e.g. [Korg Senior Employee 2], [Korg Senior Employee 3], [Korg Senior Employee 1], [Korg Employee 2], [Korg Employee 10], [Korg Senior Employee 6], [Korg Senior Employee 5] '*and [...] each of the European distributors*'. Korg UK indicated that in April 2018 all users were asked to leave the group, but [Korg Senior Employee 2], [Korg Senior Employee 3], and [Korg Senior Employee 1] had done so in January 2018: URN C\_KOR01211 (Korg reply dated 10 June 2019 to a s.26 Notice, questions 1 and 2), and URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.24, lines 12–15.

<sup>202</sup> URN C\_KOR00962 (Note of [Korg Senior Employee 3] titled '*[Korg Senior Employee 5] Conversation*' dated 17 December 2017): see p.2 for various references to Telegram. Text in square brackets added by the CMA.

<sup>203</sup> URN C\_KOR00962 (Note of [Korg Senior Employee 3] titled '*[Korg Senior Employee 5] Conversation*' dated 17 December 2017). This accords with [Korg Senior Employee 3]'s note dated 19 December 2017 that he proposed, in relation to Korg UK's internal communications, to '*change from an insecure network to a more secure network and stop using direct language*', commenting '*It's inconceivable that [Competitor] would allow this type of communication [...]*': URN C\_KOR00964 (iPhone note of [Korg Senior Employee 3] dated 19 December 2017).

<sup>204</sup> URN C\_KOR01211 (Korg reply dated 10 June 2019 to a s.26 Notice, questions 1 and 2).

secure and encrypted messaging services, potentially with a view to avoiding detection. This interpretation is supported by a third-party report describing how *'Telegram was built to protect privacy and help people escape intrusion and censorship from their government'* and how Signal is *'the other privacy-centric service that journalists often favor [sic] for secure communication'*.<sup>205</sup>

Korg UK tried to avoid potentially incriminating language, and instead used coded language, in its internal/external contacts

- 3.158 On 17 December 2017, [Korg Senior Employee 3] of Korg UK noted that his UK *'ASMs are using a WhatsApp group and openly discussing about resetting [sic] prices along with adjusting [Reseller] price for example on a specific product to a price point. [...] I decided last week to shut this account down and delete the group[.] I will open up a new group in January but it will have very clear guidelines that we never even mention price specifically - an image may be wrong on Volca FM for example and I want to encourage the team to post real issues - no video on [Reseller] Kronos page for example'*.<sup>206</sup>
- 3.159 Similarly, on 20 December 2017, [Korg Senior Employee 3] noted a need *'to communicate and explain that [Reseller] will increase their prices once that [Reseller] have increased there's! [sic]'*. [Korg Senior Employee 3] appears to have noted different views, with his view being that *'the link is enough. It may not be perfect but for KORG and VOX we have to be very careful. [...] I think we need to find a way that when communicating about KORG and Vox we are non specific.'*<sup>207</sup>
- 3.160 The CMA also notes, as set out at paragraphs 4.62 to 4.64 below, [Reseller 1] submitted that Korg UK sought to minimise written communications by making them as brief and indirect as possible, e.g. by referring to *'margin'* in written correspondence to [Reseller 1] in order to highlight [Reseller 1]'s advertised retail pricing.

Korg UK staff deleted potentially incriminating evidence

- 3.161 Korg UK staff created a WhatsApp group named *'Message for Julian'* around November 2016. Korg UK's [Korg Senior Employee 3] told the CMA that this *'was chosen because it was a secure, or meant to be a secure group'*.<sup>208</sup> Korg UK submitted that this was *'to enable the streamlined discussion of dealer complaints*

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<sup>205</sup> <https://www.bloomberg.com/news/newsletters/2019-11-29/telegram-is-a-better-safer-whatsapp-and-you-should-use-it> (accessed on 26 June 2020).

<sup>206</sup> URN C\_KOR00962 (Note of [Korg Senior Employee 3] titled *'[Korg Senior Employee 5] Conversation'* dated 17 December 2017). Five weeks before this note, on 6 November 2017 at 12:08pm a Korg UK employee wrote to colleagues via WhatsApp *'[Reseller] on board with reset'*: URN C\_KOR00941 (WhatsApp messages between [Korg Employee 11] and other Korg UK staff on 3–6 November 2017).

<sup>207</sup> URN C\_KOR00965 (Note of [Korg Senior Employee 3] titled *'Korg no spider'* dated 20 December 2017). In relation to this note, [Korg Senior Employee 3] flagged a risk that Korg UK, if it was *'looking at pricing and [...] crossing the line'*, will *'get caught'* by a competition authority. URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.101, lines 2–4. Text in square brackets added by the CMA.

<sup>208</sup> URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.29, lines 11–19.

*received* – but in December 2017, after concerns about the discussions and ‘a review of company competition law compliance, [Korg Senior Employee 2] instructed the group to be shut down.’ [Korg Senior Employee 1] asked all 10 or so users to leave the group, and [Korg Senior Employee 3] then deleted the group.<sup>209</sup>

- 3.162 The CMA concludes that in the light of the above evidence, Korg UK staff operated under a culture of concealment and tried to avoid generating an evidence trail of potentially incriminating written records.

## **Conclusion**

- 3.163 In the light of the evidence set out above, the CMA concludes that:
- a. Korg UK knew that the implementation and enforcement of the Korg Pricing Policy was illegal, including through complaints from a MI Reseller and its own internal competition knowledge built up over time;
  - b. Korg UK staff operated under a culture of concealment and tried to avoid generating an evidence trail of potentially incriminating written records related to the Korg Pricing Policy (communicating orally, by less formal means or in ‘code’, using secure encrypted platforms, and deleting communications in relation to the Korg Pricing Policy), to avoid the detection of potential illegality;
  - c. Korg UK and its staff had a clear understanding that enforcing the Korg Pricing Policy was anticompetitive and despite this carried out the Infringement in the knowledge that it constituted illegal RPM.

## **V. Illustrative examples of Korg UK’s monitoring and enforcement during the Relevant Period**

- 3.164 The evidence shows that Korg UK staff, in the light of their knowledge of the illegality of the Korg Pricing Policy, operated under a culture of concealment and tried to avoid generating an evidence trail of potentially incriminating written records related to the Korg Pricing Policy (see paragraphs 3.147 to 3.162 above). As set out below, the evidence nonetheless includes illustrative examples of contact between Korg UK and its MI Resellers which show a widespread application of, and adherence to, the Korg Pricing Policy in relation to the Relevant Products, across Korg UK’s network of MI Resellers throughout the Relevant Period.

- 3.165 More specifically, these communications show that throughout the Relevant Period:

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<sup>209</sup> URN C\_KOR01211 (Korg reply dated 10 June 2019 to a s.26 Notice, questions 1 and 2). [Korg Employee 15] similarly submitted that the group was used to exchange messages, daily, to monitor resellers prices: URN C\_KOR01957 (Transcript of the [Korg Employee 15] Interview), p.141, lines 13–17. See also URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.29, lines 11–19; p.32, line 24 to p.33, line 12. While Korg UK submitted that the group was deleted, the CMA was nonetheless able to access records of group discussions from at least one Korg UK mobile/tablet device.



the Volcas [Relevant Products] from Korg'<sup>213</sup> and 'send me all the links of companies undercutting the RRP.' On 10 June 2015, [Reseller 1 Employee 1] increased [Reseller 1]'s pricing on four Relevant Products in the Volca range to the Minimum Price. [Reseller 1 Employee 5] then sent Korg UK's [Korg Employee 3] 79 other MI Resellers' weblinks for the Volca Bass, Volca Keys and Volca Beats respectively.

- 3.169 [Reseller 1 Employee 5] told the CMA that these events were part of a pattern in the period 2015-2017. [Reseller 1] would receive what it considered to be requests from Korg UK to increase [Reseller 1]'s pricing to the Minimum Price. [Reseller 1] would then report to Korg UK other MI Resellers' pricing below the Minimum Price. Korg UK may then indicate to [Reseller 1] that it would contact those MI Resellers.
- 3.170 These events show that Korg UK was actively monitoring MI Resellers' prices, that [Reseller 1] adhered to the Korg Pricing Policy by agreeing to increase pricing to the Minimum Price, and that [Reseller 1] was supporting the Korg Pricing Policy by monitoring other MI Resellers' prices and reporting to Korg UK other MI Resellers not adhering to the Korg Pricing Policy.

### **2016 examples of monitoring and enforcement of the Korg Pricing Policy**

#### March 2016: Minilogue ([Reseller], [Reseller], [Reseller], [Reseller])

- 3.171 On 2 March 2016, Korg UK's [Korg Employee 8] and [Korg Employee 15] discussed via WhatsApp the pricing of [Reseller] and [Reseller] for Korg's Minilogue, a Relevant Product. At 3:43pm, [Korg Employee 8] wrote '*Hi mate. [Reseller] and [Reseller] are still at £435 on minilogue. [Reseller] went up earlier today. [Reseller] have chased me on those guys.*' [Korg Employee 15] wrote '*[g]ive me 10 mins I'll sort*' at 3:51pm, then '*[b]oth sorted*' at 3:55pm. [Korg Employee 8] replied '*[t]hanks. I think we are completely sorted on minilogue now*'.<sup>214</sup>
- 3.172 This shows that [Reseller] was supporting the Korg Pricing Policy by actively monitoring other MI Resellers' prices and reporting to Korg UK those below the Minimum Price. The CMA's view is also supported by an internal email, from July 2017, in which one [Reseller] employee told another: '*[h]ave a look at Korg [...] see if anyone undercutting we can report*'.<sup>215</sup>
- 3.173 In the CMA's view [Korg Employee 8]'s statement, '*completely sorted*', shows that [Reseller], [Reseller] and [Reseller] adhered to the Korg Pricing Policy by agreeing to increase pricing to the Minimum Price when requested by Korg UK to do so.

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<sup>213</sup> Text in square brackets added by the CMA.

<sup>214</sup> URN C\_KOR00972 (WhatsApp messages of [Korg Employee 8] and [Korg Employee 15] on 2 March 2016).

<sup>215</sup> URN ER\_KOR00946 (Email from [Employee of Reseller] to [Employee of Reseller] on [3<] July 2017).

June 2016: Monotron Duo, Krome 73, KAOSSDJ, KRMINI and 23 other Relevant Products ([Reseller])

- 3.174 On 10 June 2016, Korg UK's [Korg Employee 5] emailed [Employee of Reseller] and [Employee of Reseller], stating '*[a]s discussed earlier*' and attaching a list of 'CURRENT' and 'NEW' prices (indicating price changes on 27 Relevant Products).<sup>216</sup> [Employee of Reseller] later replied '*I'm ready to press the button. I just need to know that the others will defiantly [sic] do the same.*' [Korg Employee 5] responded '*[p]lease do it. I will take the sh\*t for any let downs*'. [Employee of Reseller] then replied '*[d]one. It will take about 30 min to change on the website.*'<sup>217</sup>
- 3.175 This exchange shows that Korg UK was actively monitoring [Reseller]'s prices. This exchange also shows that [Reseller] adhered to the Korg Pricing Policy by agreeing to increase its pricing to the Minimum Price (the 'NEW' price), partly because [Reseller] expected that other MI Resellers ('*the others*') would also adhere to the Korg Pricing Policy.

July 2016: Volca ('most of the big players')

- 3.176 On 19 July 2016, Korg UK's [Korg Employee 8] texted his colleague [Korg Employee 9]: '*[j]ust had a look through on [Reseller] and they need to just go through the price list [that included Relevant Products] and get it to suggested. We have most of the big players inline [sic] and some of the smaller dealers are starting to follow now so it would be great if [Reseller] can do the same. The items that they slip on first tend to be the Volcas and that's a real issue for us as its [sic] what many people gauge us on.*'<sup>218</sup> In the CMA's view, in this context, '*suggested*' referred to '*suggested selling*' price, i.e. the Minimum Price.
- 3.177 This text shows that Korg UK was actively monitoring MI Reseller prices and that at least '*most of*' its larger MI Resellers were adhering to the Korg Pricing Policy by pricing at the Minimum Price. It also shows that Korg UK intended to follow up with [Reseller], which Korg UK considered was not adhering to the Korg Pricing Policy, to ask [Reseller] to change its pricing to the Minimum Price.

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<sup>216</sup> URN ER\_KOR00640 (Email from [Korg Employee 5] to [Employee of Reseller] and [Employee of Reseller] on 10 June 2016); URN ER\_KOR00641 (Attachment to URN ER\_KOR00640, titled [Reseller] HI TECH 100616); each 'NEW' price matched the 'RRP Ex VAT' price in URN C\_KOR01932 (KORG Confidential UK Trade Price List - Updated June 2016). The 27 Relevant Products on which price increases were listed by model number: KRONOS2-73; KRONOS2-61; SV-1-88-BLACK; KROME-88; SV1-73-BK; KROME-73; KROME-61; RK100S-WH; KROSS-61; ESX2; KOPROPLUS; KP3PLUS; MICROKORG; KAOSSDJ; PADKONTROL-BK; VOLCA-SAMPLE; VOLCA-BASS; VOLCA-BEATS; VOLCA-KEYS; KRMINI; MONOTRON-DUO; NANOPAD2-WH; NANOPAD2-BK; NANOKONTROL2-WH; NANOKONTROL2-BK; NANOKEY2-WH; and NANOKEY2-BK.

<sup>217</sup> URN ER\_KOR00644 (Email from [Employee of Reseller] to [Korg Employee 5] on 10 June 2016).

<sup>218</sup> URN C\_KOR00950 (SMS message of [Korg Employee 8] on 19 July 2016). Text in square brackets added by the CMA.



August 2016: NanoKontrol, Nanopad, NanoKey, Taktile and 36 other Relevant Products ([Reseller])

- 3.178 On 9 August 2016, [Korg Employee 8] sent [Employee of Reseller] an email under the subject line ‘Korg new pricelist’, stating: ‘I have highlighted the items that have not yet been updated. There are still quite a few but hopefully that made it a little less painful.’<sup>219</sup> Attached was a pricelist with around 40 Relevant Products highlighted. An hour later [Employee of Reseller] replied, ‘[a]ll done.’<sup>220</sup>
- 3.179 This exchange shows that Korg UK was actively monitoring [Reseller]’s retail prices, and that [Reseller] adhered to the Korg Pricing Policy by agreeing to increase pricing to the Minimum Price following a request from Korg UK to do so.

August 2016: WDX Global, Kaoss Pad, Volca Keys, Microkey 25, Krome 88, Kaossilator 2S, Odyssey, Volca FM, Microkorg, Monotron Duo, Monotron Delay, Volca Sample, Padkontrol ([Reseller])

- 3.180 On 15 August 2016, [Employee of Reseller] emailed Korg UK’s [Korg Employee 15], commenting ‘????’. Below that, the email included a list of the prices of [Reseller] and of two other MI Resellers on products including 13 Relevant Products, and an indication of whether [Reseller] had matched the other MI Resellers’ prices on those Relevant Products. This showed that, on each Relevant Product listed, [Reseller] had priced at Korg UK’s ‘RRP Ex VAT’ (the Minimum Price) and not matched another MI Reseller at that time.<sup>221</sup>
- 3.181 This report shows that [Reseller] was supporting the Korg Pricing by monitoring other MI Resellers’ prices and reporting to Korg UK other MI Resellers not adhering to the Korg Pricing Policy. This also shows that [Reseller] understood that under the Korg Pricing Policy it (and other MI Resellers) should not sell or advertise the Relevant Products below the Minimum Price. Further, [Reseller] also adhered, at

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<sup>219</sup> URN ER\_KOR00684 (Email from [Korg Employee 8] to [Employee of Reseller] on 9 August 2016); URN ER\_KOR00685 (Attachment to URN ER\_KOR00684 titled KORG Main Dealer Sterling Price List Aug 2016 [Reseller].xlsx). The Relevant Products highlighted were: Mini Kaoss Pad 2, Kaossilator 2, Kaossilator Pro Plus, Electribe Music Production Station, Electribe Sample (Black, Red variants), Volca Sample OK GO Edition, SQ-1 Step Sequencer, Monotron Delay, ARP Odyssey Duophonic Analog Synthesizer MK3 (Black and Orange), RK-100S Keytar (Red, Black, White variants), Microkorg, Microkorg XL+, MS20-Mini, Kross (61-key, 88-key variants), Krome (61, 73 key variants), Kronos 2 (61-key, 73-key, 88-key variants), Taktile (25-key, 49-key variants), Microkey 25, Microkey 2 (37-key, 49-key, 61-key variants) Microkey 2 Air (25-key, 37-key, 49-key, 61-key variants), Nanokontrol Studio, Nanokey Studio, Nanokontrol 2 (White), Nanopad 2 (White, Black variants), CLIPHIT CH-01, SV1 Stage Vintage Piano (73-note, 88-note variants).

<sup>220</sup> URN ER\_KOR00686 (Email from [Employee of Reseller] to [Korg Employee 8] on 9 August 2016).

<sup>221</sup> URN EY\_KOR00639 (Email from [Employee of Reseller] to [Korg Employee 15] on 15 August 2016), each of which listed an ‘Our Price’ against the following Relevant Products: Kaoss Pad 3 Plus (KP3+) at £315.00; Volca Keys at £129.00; MicroKEY 25 at £58.00; Krome 88 at £1375.00; Kaossilator 2S at £124.00; ARP Odyssey at £830.00; Volca FM at £137.00; Microkorg at £315.00; Monotron Duo at £49.00; Monotron Delay at £49.00; Volca Sample at £137.00 and PadKONTROL Black – USB MIDI Controller at £165.00. Each of these prices matched Korg’s ‘RRP Ex VAT’ in URN C\_KOR01933 (KORG Confidential UK Main dealer Trade Price List - August 2016). The same Relevant Products and prices featured in a further email the following afternoon, in which [Reseller] sent Korg UK another report and stated: ‘we’ve had to react - let me know once you have a solution’: URN EY\_KOR00649 (Email from [Employee of Reseller] to [Korg Employee 15] on 16 August 2016). That further email shows that, on each Relevant Product listed, [Reseller] had matched another MI Reseller’s price, below the Minimum Price.

least temporarily, to the Korg Pricing Policy by setting (and maintaining) its pricing for 13 Relevant Products at the Minimum Price.

#### October 2016: Kronos ([Reseller])

- 3.182 On 20 October 2016, Korg UK's [Korg Senior Employee 3] noted on his phone that [Reseller] *'have now lost a lot of business and Korg sales have dried up'*, because *'[o]ther dealers didn't move'*, i.e. *'[Reseller] and [Reseller] and [Reseller]'*. Citing one example, [Korg Senior Employee 3] noted a Relevant Product, *'Kronos £800 cheaper at [Reseller]!'*. [Korg Senior Employee 3] also noted *'[w]e have till lunchtime tomorrow to get prices sorted or [Reseller] will start to be competitive.'*<sup>222</sup>
- 3.183 This note shows that [Reseller] was supporting the Korg Pricing Policy by actively monitoring other MI Resellers' prices and reporting to Korg UK other MI Resellers not adhering to the Korg Pricing Policy. The CMA's view is supported by evidence, from March 2017, showing that [Reseller] reported to Korg UK that *'[Reseller] have dropped on many products overnight- not only Korg also other brands'*.<sup>223</sup>
- 3.184 This also shows that [Reseller] was adhering to the Korg Pricing Policy and asking Korg UK to contact those other MI Resellers to ask them to increase pricing to the Minimum Price. It is difficult to see why [Reseller] would otherwise approach Korg UK on this point and give Korg UK *'till lunchtime tomorrow...'* to ensure the other MI Resellers reverted to the Minimum Price. The CMA's view is also supported by evidence, from late 2017, showing that [Reseller] pre-notified Korg UK of planned price drops and Korg UK tried *'to hold [Reseller] off for just this evening'*<sup>224</sup> – and that [Reseller] asked Korg UK to get Korg products excluded from a 10% promotion being run by [Reseller].<sup>225</sup>

#### November 2016: Monologue ([Reseller])<sup>226</sup>

- 3.185 On 21 November 2016, [Employee of Reseller] wrote to Korg UK's [Korg Employee 15], in an email titled *'Minilogue [a Relevant Product] pricing'*: *'[Reseller]'s pricing on*

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<sup>222</sup> URN C\_KOR00956 (iPhone note written by [Korg Senior Employee 3] on 20 October 2016). [Korg Senior Employee 3] told the CMA, in relation to this document, that Korg *'had a price increase'*, [Reseller] had *'done the right thing'* and *'adjusted'*, and [Reseller] was *'commenting that [Reseller] and [Reseller] and [Reseller] haven't'*: URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.195, lines 2–4. Text in square brackets added by the CMA.

<sup>223</sup> URN C\_KOR00915 (WhatsApp messages between [Korg Senior Employee 1], [Korg Employee 5], [Korg Employee 2], [Korg Employee 15] and [Korg Employee 8] on 22 March 2017), message at 12:49pm.

<sup>224</sup> URN C\_KOR00948 (WhatsApp messages between [Korg Employee 15], [Korg Employee 8] and [Korg Senior Employee 3] on 30 November and 1 December 2017), messages on 30 November 2017 at 10:12am, 12:43pm, 12:57pm, 2:55pm and 5:01pm.

<sup>225</sup> URN C\_KOR02612 (WhatsApp messages between [Korg Senior Employee 1], [Korg Employee 11] and Korg UK staff on 22–24 November 2017), message on 23 November 2017 at 7:43pm (referring to [Employee of Reseller]) and message on 24 November 2017 at 10:10am.

<sup>226</sup> [Reseller] operates [Reseller's website] (accessed on 26 June 2020).

*the monologue [a Relevant Product] is quite low if you could take a look for me, I'm sure this is in response to [Reseller]'s price but it's not helping matters [3<]'.<sup>227</sup>*

- 3.186 This email shows that [Reseller] was supporting the Korg Pricing Policy by actively monitoring other MI Resellers' prices and reporting to Korg UK those below the Minimum Price.

December 2016: Volca ([Reseller])

- 3.187 On 8 December 2016, [Employee of Reseller] sent Korg UK's [Korg Employee 15] what appear to be weblinks to a number of MI Resellers including [Reseller 1], [Reseller], [Reseller] and [Reseller], stating: *'I've just lost out on a sale to [Reseller] who have, quite incredibly in my opinion, offered to price-match a customer who quoted the [Reseller] price. Be interested to hear your opinion on this.'*<sup>228</sup>
- 3.188 This email shows that [Reseller] was actively monitoring the Korg Pricing Policy by actively monitoring other MI Resellers' prices and reporting those below the Minimum Price to Korg UK.

**2017 examples of monitoring and enforcement of the Korg Pricing Policy**

February 2017: Kross 88 ([Reseller], [Reseller], [Reseller])

- 3.189 On 24 February 2017, Korg UK staff exchanged messages about the pricing of certain MI Resellers of a Relevant Product. At 11:43am, [Korg Employee 8] stated *'[s]eems to have been a slip on Kross 88. [Korg Employee 15] and I already on it. Looking pretty good otherwise'*.<sup>229</sup>
- 3.190 This exchange shows that Korg UK was actively monitoring MI Resellers' prices, and that [Reseller], [Reseller], and [Reseller] adhered to the Korg Pricing Policy by agreeing to increase their pricing to the Minimum Price after a request to do so from Korg UK.

March 2017: Kross 61, Kross 88 ([Reseller])

- 3.191 On 6 March 2017, Korg UK staff exchanged messages about the pricing of [Reseller] for two Relevant Products. At 2:37pm, [Korg Employee 4] wrote *'[Reseller] Kross 61 £565 should be £580 [...]. Kross 88 £779 should be £915'*. [Korg Employee 15] replied later that day *'[j]ust waiting for [Reseller] to call back'*. On 7 March 2017 at 9:02am, [Korg Employee 15] confirmed *'[Reseller] changing now'*.<sup>230</sup>

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<sup>227</sup> URN EY\_KOR00824 (Email from [Employee of Reseller] to [Korg Employee 15] on 21 November 2016). Text in square brackets added by the CMA.

<sup>228</sup> URN EY\_KOR00849 (Email from [Employee of Reseller] to [Korg Employee 15] on 8 December 2016 titled 'Korg Volca pricing').

<sup>229</sup> At 12:10pm [Korg Employee 15] replied, *'[Reseller] and [Reseller] sorting now'*. At 12:16pm [Korg Employee 8] replied *'[Reseller] sorting too'*. URN C\_KOR00905 (WhatsApp messages of [Korg Employee 8] and [Korg Employee 15] on 24 February 2017). Text in square brackets added by the CMA.

<sup>230</sup> URN C\_KOR00907 (WhatsApp messages of [Korg Employee 4] and [Korg Employee 15] on 6–7 March 2017).

- 3.192 This exchange shows that Korg UK was actively monitoring MI Resellers' prices and that [Reseller] adhered to the Korg Pricing Policy by agreeing to increase its pricing to the Minimum Price after a request to do so from Korg UK.

March 2017: Odyssey ([Reseller])

- 3.193 On 9 March 2017, [Reseller] sent [Korg Employee 15] three other MI Resellers' weblinks for Korg's Odyssey, a Relevant Product.<sup>231</sup>
- 3.194 There may be several reasons why [Reseller] sent Korg UK other MI Resellers' weblinks. The evidence shows that Korg UK and its MI Resellers would often send each other weblinks to indicate that the Relevant Product was priced below the Minimum Price (see e.g. paragraphs 3.86 to 3.90 and 3.105 to 3.112 above). Therefore, in the CMA's view, this email shows that [Reseller] was supporting the Korg Pricing Policy by actively monitoring other MI Resellers' prices and reporting to Korg UK those below the Minimum Price.

March 2017: Electribe EMX2-BL, Electribe Sampler ESX2-RD, Odyssey, Plugkey ([Reseller], [Reseller], [Reseller], [Reseller], [Reseller 1])

- 3.195 On 10 March 2017, Korg UK staff exchanged messages about [Reseller 1]'s pricing of a number of Relevant Products.<sup>232</sup> At 3:41pm and 3:45pm, Korg UK's [Korg Employee 2]<sup>233</sup> wrote in messages referring to various Relevant Products: *'[Reseller 1] still out on Electribes 339 and 390 [...] Volca fm, [Volca] sample, [Volca] keys, ms20mini, koproplus, ko2s, microkorg, odyssey all below ssp 😞'*<sup>234</sup> At 3:44pm, Korg UK's [Korg Employee 15] wrote *'Odyssey wrong also'*, adding *'[Reseller], [Reseller], [Reseller], [Reseller] have all mentioned'* at 3:46pm. In the CMA's view, [Korg Employee 15]'s comment lists MI Resellers who made Korg UK aware of other MI Resellers' pricing below the Minimum Price. [Korg Employee 15] then wrote *'[Reseller] matched but managed to get them back to £665'*<sup>235</sup> At 3:47pm, [Korg Employee 2] added *'[Reseller] and accessories also wrong on electribes'*<sup>236</sup> adding *'[Reseller]'*. At 3:48pm, [Korg Employee 15] wrote *'I'll give them a call'*, adding *'[Reseller] done'* and *'[r]inging [Reseller] now'* at 3:59pm, then *'[Reseller] sorted too'* at 4:10pm.

<sup>231</sup> URN EY\_KOR00925 (Email from [Reseller] to [Korg Employee 15] on 9 March 2017).

<sup>232</sup> URN C\_KOR00909 (WhatsApp messages of [Korg Employee 4], [Korg Employee 2], [Korg Employee 8], [Korg Employee 15] and [Korg Senior Employee 1] on 10 March 2017).

<sup>233</sup> [Korg Employee 2] submitted that *'source of my information was from Google and [Reseller 1]'s web site'* and *'I did not have a specific routine, information from colleagues would initiate a response from myself in the form of checking and sharing current web prices.'* URN C\_KOR02332 ([Korg Employee 2] reply dated 30 January 2020 to a s.26 Notice), at question 4.

<sup>234</sup> For one definition (amongst others) of this emoji, see e.g. <https://emojipedia.org/zipper-mouth-face/> (accessed on 26 June 2020). Text in square brackets added by the CMA.

<sup>235</sup> See footnote 232 above. The CMA notes £665.00 was the *'SSP inc. VAT @20%'* for the ARP Odyssey (Rev.3, black & orange): URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017).

<sup>236</sup> For the reasons set out at paragraph 4.192 below, the CMA considers that the *'electribes'* referred to here had model numbers EMX2-BL and ESX2-RD.

- 3.196 This exchange shows that, amongst the other MI Resellers mentioned, [Reseller] was supporting the Korg Pricing Policy by actively monitoring other MI Resellers' prices and reporting to Korg UK MI Resellers who were not adhering to the Korg Pricing Policy. It is difficult to see why [Reseller] would otherwise report another MI Reseller's online listing as '*wrong*' to Korg UK.
- 3.197 This exchange also shows that Korg UK was actively monitoring MI Resellers' prices, and that [Reseller], [Reseller] and [Reseller] adhered to the Korg Pricing Policy by agreeing to increase pricing to the Minimum Price after a request to do so from Korg UK.
- 3.198 In addition, as set out in much more detail at paragraphs 4.190 to 4.193 below, on 10 March 2017 at 4:59pm, [Korg Employee 2] followed up on a message in relation to [Reseller 1], writing: '*[t]hey have several prices wrong*' and cited prices on various Relevant Products, including '*Plugkey bk at 81*'. At 5:16pm, Korg UK's [Korg Employee 8] texted '*I'm on to [Reseller 1 Employee 5] now*'.<sup>237</sup> At 5:18pm, [Reseller 1 Employee 5] increased [Reseller 1]'s pricing for this Relevant Product.
- 3.199 These events show that Korg UK was actively monitoring MI Resellers' prices, and that [Reseller 1] adhered to the Korg Pricing Policy by agreeing to increase pricing to the Minimum Price after a request to do so from Korg UK.

March 2017: Microkorg XL+ ([Reseller], [Reseller 1], [Reseller], [Reseller])

- 3.200 On 13 March 2017 at 12:49pm, Korg UK's [Korg Employee 2] asked various colleagues '*[a]ny luck with [Reseller] and microkorg XL plus? [a Relevant Product] They are the reason for [Reseller] dropping*'. At 12:53pm, [Korg Employee 8] replied '*Yep. And [Reseller 1] sorting too*'. At 12:54pm, [Korg Employee 2] replied '*Great, [Reseller] [Reseller] and some others also need a nudge*'. At 1:24pm, [Korg Employee 8] replied '*[Reseller] and [Reseller] sorting*'. At 2:30pm, [Korg Employee 2] asked '*[Reseller]?*' At 2:44pm, [Korg Employee 8] replied '*[Reseller] and [Reseller] sorting yes*'.<sup>238</sup>
- 3.201 This exchange shows that Korg UK was actively monitoring MI Resellers' prices, and that MI Resellers such as [Reseller], [Reseller], [Reseller 1] and [Reseller] adhered to the Korg Pricing Policy by agreeing to increase pricing to the Minimum Price after a request to do so from Korg UK.

April 2017: Microkorg, Microkorg XL+, Volcas, SV1-88 ([Reseller 1], [Reseller], [Reseller], [Reseller], [Reseller])

<sup>237</sup> Text in square brackets added by the CMA.

<sup>238</sup> URN C\_KOR00910 (WhatsApp messages of [Korg Employee 2] and [Korg Employee 8] on 13 March 2017). [Korg Employee 2] told the CMA that his initial query arose because [Korg Employee 8] contacted [Reseller] to flag to [Reseller] an '*opportunity to make more margin*': URN C\_KOR02332 ([Korg Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.3/question 5. [Reseller] is a brand acquired by [Reseller] in [before the Relevant Period]: see e.g. [Reseller's website] (accessed on 26 June 2020). Text in square brackets added by the CMA.

- 3.202 On 21-22 April 2017, Korg UK staff exchanged messages about MI Resellers' pricing of a number of Relevant Products.
- 3.203 On 21 April 2017 at 9:22am,<sup>239</sup> Korg UK's [Korg Employee 4] wrote '*[t]here are 2 listings on [Reseller] £310 & £329 with bundle*' featuring a Relevant Product. Korg UK's [Korg Senior Employee 1] replied: '*It's Friday...can I suggest we make a call to any dealer here saying that they do have the opportunity to make more money on these lines if they choose to and say that we won't call them again on the subject. Thoughts please...*'. At 9:24am, [Korg Employee 9] of Korg UK added: '*[t]hat will be certainly relevant if they are aware of the Charter*', and [Korg Employee 4] noted '*[Reseller 1] microkorg XL+ £369 microkorg £310*' –before adding at 9:25am '*[t]hings are starting to slip*'. At 10:17am, Korg UK's [Korg Employee 8] wrote '*[Reseller 1], [Reseller], [Reseller] and [Reseller] all spoken with*'. Korg UK's [Korg Senior Employee 3] told the CMA that he viewed this as recording that Korg UK had contacted these resellers to flag '*the opportunity to make more money on these lines if you choose to*', a conversation that may occurred on various Fridays for '*a period of time where we [...] launched*' the Korg Charter.<sup>240</sup> At 2:02pm, [Korg Employee 8] added '*Volcas looking good on [Reseller 1]/[Reseller]/[Reseller] and [Reseller] now*'. At 10:22am, Korg UK's [Korg Employee 15] wrote '*[Reseller] are showing 2 versions of the sv1 88 on their website one at the old price at the new price they are sorting now honest mistake*'.
- 3.204 The exchange in paragraph 3.203 above shows that Korg UK was actively monitoring MI Resellers' prices, and that MI Resellers such as [Reseller 1], [Reseller], [Reseller], [Reseller] and [Reseller] adhered to the Korg Pricing Policy by agreeing to increase pricing to the Minimum Price following a request from Korg UK to do so.
- 3.205 Later, on 21–22 April 2017, certain Korg UK staff discussed what, in the CMA's view, was a 10% off promotion by [Reseller], which may have included various Relevant Products.<sup>241</sup> At 11:09pm, [Korg Employee 8] wrote '*Oh Dear!*', and '*[Competitor] not included in 10% off!*' at 11:31pm. [Korg Senior Employee 1] replied: '*[t]here are some [Competitor] discounts. They don't appear to be discounting products they don't have in stock. In any event, a precedent has been set.*' On 22 April 2017 at 8:46am, Korg UK's [Korg Employee 2] wrote '*[p]ossibly we are being tested in light of the [Reseller] discount last week. [Reseller] by doing this have helped relieve pressure on [Reseller] unfortunately*'. At 9:18am, Korg UK's [Korg Senior Employee 3] wrote: '*We are working on a plan. We'll talk to everyone Monday morning. The key thing is to urge dealers not to respond ahead of giving us some time to sort this.*' At 4:12pm, [Korg Employee 8] wrote '*Korg are being removed from the sale. Changed [sic] should happen with in [sic] the next 2 hours. No web team or directors in today but*

<sup>239</sup> URN C\_KOR02602 (WhatsApp messages of [Korg Employee 4], [Korg Employee 8] and others on 21–22 April 2017).

<sup>240</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.211, line 10 to p.212, line 9.

<sup>241</sup> See footnote 239 above.

*[Employee of Reseller] is contacting same chap who removed the [Competitor] products ASAP'.*

- 3.206 The messages in paragraph 3.205 above show that Korg UK was actively monitoring MI Resellers' prices, and that Korg UK would have asked certain MI Resellers not to match the prices of any other MI Reseller not pricing in line with the Korg Pricing Policy (e.g. [Reseller]). These messages also show that [Reseller] adhered to the Korg Pricing Policy by not discounting from the Minimum Price any Relevant Product in its sale.

June 2017: Microkorg, Volca Keys, Microkey Air-61, MS20 ([Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller 1], [Reseller], [Reseller])

- 3.207 On 30 June 2017, Korg UK staff exchanged messages about various MI Resellers' pricing of some Relevant Products. At 11:04am, Korg UK's [Korg Employee 8] wrote '*[Reseller], and [Reseller] sorting.*' At 11:52am, [Korg Senior Employee 1] of Korg UK asked '*[h]ow's it going everyone? Call me if it looks like we'll have any problems today.*' At 11:54am, [Korg Employee 8] replied: '*So far so good here. Just working on [Reseller] now. They are down on 8 products but to [sic] expensive on 4. [...]* *[Reseller] and [Reseller] are changing now.*' At 12:01pm, [Korg Senior Employee 1] wrote '*[Reseller] [X] 15% off [X], but at first site [sic] Korg products aren't included.*' At 12:04pm, Korg UK's [Korg Employee 15] wrote '*Microkorg fixed at [Reseller]*'. At 12:54pm, [Korg Employee 8] wrote '*[Reseller] sorting microkorg*'. At 3:25pm, [Korg Senior Employee 1] wrote '*[Reseller] at 310 on Microkorg, everyone else looks OK*'; [Korg Employee 8] wrote at 3:26pm '*[t]hey should be doing that now. I'll chase soon if not*' and that '*[a]ll [Reseller] issues are being sorted now...*' at 3:33pm. At 3:39pm, [Korg Senior Employee 1] wrote '*[Reseller 1] the only dealer off on Volca Keys*'; [Korg Employee 8] appears to have replied at 3:41pm: '*Sorting now [...]*'.<sup>242</sup>
- 3.208 This exchange shows that Korg UK was actively monitoring MI Resellers' prices, and that MI Resellers such as [Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller] and [Reseller 1] adhered to the Korg Pricing Policy by agreeing to increase pricing to the Minimum Price following a request from Korg UK to do so. This exchange also shows that [Reseller] adhered to the Korg Pricing Policy by not discounting from the Minimum Price any Relevant Product in its sale.

August 2017: Volca Beats, Microkorg ([Reseller])

- 3.209 On 7 August 2017, [Employee of Reseller] sent Korg UK's [Korg Employee 15] two emails titled '*Map*' – one including other MI Resellers' weblinks (and a screenshot

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<sup>242</sup> At 3:47pm, [Korg Employee 8] stated '*[Reseller] at £310 on microkorg according to pricespy*'; [Korg Employee 15] sent what appears to be a reply to that, at 4:05pm: '*[Reseller] sorting now.*' Likewise, at 3:49pm, [Korg Employee 8] wrote '*[Reseller] microkey air 61 at £159 not £165*'; [Korg Employee 15] appears to have replied at 4:01pm: '*[Reseller] sorted on the microkey*'. At 4:02pm, [Korg Employee 8] wrote '*[Reseller 1] wrong on ms20 White. Sorting now*', adding '*[Reseller] doing a mass up load shortly for all products inc microkorg*' at 5:00pm. URN C\_KOR00932 (WhatsApp messages of [Korg Employee 8], [Korg Senior Employee 1] and [Korg Employee 15], all of Korg UK, on 30 June 2017). See also, regarding [Reseller] advertising Korg's Microkorg at the Minimum Price a month later, URN C\_KOR00936 (WhatsApp message of [Korg Employee 15] on 31 July 2017).

illustrating certain MI Resellers' prices) for a Relevant Product, Volca Beats, and a second including screenshot illustrating certain MI Resellers' prices) for Korg's Microkorg, another Relevant Product. [Korg Employee 15] forwarded the first of these emails to Korg UK's [Korg Employee 8] and [Korg Senior Employee 1]. [Korg Senior Employee 1] replied to [Reseller] the next day: *'[Korg Employee 15] has forwarded on to me your email from yesterday. To clarify, we do not publish a minimum advertised price. Suggested retail prices communicated by Korg UK are guide prices only. Retail pricing is at the absolute discretion of the dealer who is free to determine the retail price at which products are resold, both in store and via the Internet.'*<sup>243</sup>

- 3.210 [Korg Employee 15] told the CMA that Korg UK never used the term 'Map', and said *'I don't think there was ever an expected price, from [Reseller] in particular'*.<sup>244</sup> [Korg Employee 15]'s statement about [Reseller] appears inconsistent with him telling a colleague on 12 December 2017: *'I'll call [Reseller] now'* (see paragraph 3.215 below). The CMA also notes elsewhere in this Decision (e.g. at paragraphs 3.158 to 3.160 above) that Korg UK staff took care when writing about MI Resellers' pricing to use coded language. Therefore, in the CMA's view, this exchange shows that [Reseller] understood that Korg UK was operating – and expected [Reseller 1] (and other MI Resellers) to adhere to – the Korg Pricing Policy. This exchange, and in particular Korg UK's reply to [Reseller], also shows that [Reseller] was supporting the Korg Pricing Policy by actively monitoring other MI Resellers' prices and reporting to Korg UK those below the Minimum Price.

#### November 2017: Volca Keys ([Reseller])

- 3.211 On 21 November 2017 at 7:52am, Korg UK's [Korg Senior Employee 1] emailed some of his colleagues a weblink, apparently to a listing of [Reseller], on [Online Marketplace], for a Relevant Product, Volca Keys. In the minutes following this, Korg UK's [Korg Employee 2] circulated some screenshots showing prices advertised by various MI Resellers on various Relevant Products in the Volca range. This included a screenshot circulated at 7:57am with the comment *'And keys which is now impacting on [Mass Reseller]'*, showing [Mass Reseller] (and four other resellers) listing the Volca Keys at £124.00, lower than at least six other MI Resellers. At 7:58am, [Korg Employee 2] wrote that all Volcas *'should be 145, appears the Oct price increase has been mostly ignored'*.<sup>245</sup>
- 3.212 This conversation shows that Korg UK was actively monitoring MI Resellers' prices, and that MI Resellers such as [Reseller] adhered to the Korg Pricing Policy by

<sup>243</sup> URN EY\_KOR01013 (Email from [Employee of Reseller] to [Korg Employee 15] on 7 August 2017); URN EY\_KOR01014 (Email from [Employee of Reseller] to [Korg Employee 15] on 7 August 2017); URN EY\_KOR01278 (Email from [Korg Senior Employee 1] to [Employee of Reseller] on 8 August 2017).

<sup>244</sup> URN C\_KOR01957 (Transcript of the [Korg Employee 15] Interview), p.350, lines 1–26.

<sup>245</sup> At 8:00am, [Korg Employee 15] wrote *'At the top of all these lists are [Reseller] are we speaking to them?'*. At 10:20am, [Korg Senior Employee 1] wrote *'On [Reseller] re Volcas, can we get others to move...'* – adding *'[Reseller] now also moving so we need to go through all issues with Volca quickly to get UK dealers OK'* at 10:30am. URN C\_KOR02611 (WhatsApp messages of [Korg Senior Employee 1], [Korg Employee 2], [Korg Employee 15] on 21 November 2017).



agreeing to increase pricing to the Minimum Price after a request to do so from Korg UK.

#### 7 December 2017: Kross 2 ([Reseller])

- 3.213 On 7 December 2017, Korg UK staff exchanged messages about [Reseller]'s pricing for Korg's Kross 2, a Relevant Product. At 3:00pm, [Korg Employee 15] asked certain colleagues *'Any chance we can call [Reseller] about kross 2 pricing? Seems to be about £100 cheaper than anyone else'*. At 3:03pm, [Korg Employee 8] replied, *'Yep ok'*, adding *'That's done'* at 3:25pm.<sup>246</sup>
- 3.214 This exchange shows that Korg UK was actively monitoring MI Resellers' prices, and that [Reseller] adhered to the Korg Pricing Policy by agreeing to increase pricing to the Minimum Price after a request to do so from Korg UK. The CMA's view is also supported by a WhatsApp exchange on 22 February 2018, in which Korg UK's [Korg Senior Employee 3] messaged [Employee of Reseller] *'Hi [Employee of Reseller] We're on it. Appreciate your support'*, and [Employee of Reseller] replied *'I wish everyone else in the UK would move when you give them the day to do it.... it takes ages to get [Reseller] in line why don't [Reseller] and [Reseller] ever help you guys out ?'*<sup>247</sup>

#### 11-12 December 2017: Minilogue ([Reseller 1], [Reseller], [Reseller])

- 3.215 On 11–12 December 2017, messages were exchanged within Korg UK about various MI Resellers' pricing of a Relevant Product, the Minilogue.<sup>248</sup> On 11 December 2017 at 10:47am, Korg UK's [Korg Employee 8] asked *'[d]o we need to look at Minilogue? Currently at £472. It would need a uk/Europe if we are going to do it'*.<sup>249</sup> On 12 December 2017 at 10:21am, [Korg Senior Employee 1] of Korg UK asked, *'Should we try on Minilogue?'*. At 10:32am, [Korg Employee 8] replied, *'I'm torn [...] it's only [Reseller] who have complained'*. At 12:14pm, Korg UK's [Korg Senior Employee 3] wrote *'Guys, I think with just a few days left until Xmas, we have to let it be. Also [Competitor], [Competitor], [Competitor] are all hands off so we don't want to be the ones with our heads over the parapet!! I agree with [Korg Employee 2] that we reset in the new year [...]'*. At 12:54pm, [Korg Employee 15] of Korg UK wrote *'[Reseller 1] now 449 on minilogue'* – adding at 12:55pm *'[Reseller] are wanting to drop minilogue pg to match std price as they have only sold one as price difference is too much'*. [Korg Employee 8] appears to have replied *'I'll call now'* and *'[Reseller] at £449. [Reseller 1] followed'*, at 12:56pm and 12:59pm respectively. [Korg Employee 15] replied, *'Have you managed to get [Reseller 1] to change?'*. At

<sup>246</sup> URN C\_KOR00989 (WhatsApp messages of [Korg Employee 15] and [Korg Employee 8] on 7 December 2017).

<sup>247</sup> URN C\_KOR00969 (WhatsApp messages between [Korg Senior Employee 3] and [Employee of Reseller] on 22 February 2018).

<sup>248</sup> URN C\_KOR02613 (WhatsApp messages of [Korg Employee 8], [Korg Senior Employee 1], [Korg Senior Employee 3] and others on 11–12 December 2017).

<sup>249</sup> The CMA concludes that £472.00 was the Minimum Price, for the reasons set out at paragraphs 4.201–4.203 below.

1:01pm [Korg Employee 8] replied, '*They will show the change at 4*'. [Korg Employee 15] replied immediately '*I'll call [Reseller] now*'.

- 3.216 This exchange shows that Korg UK was actively monitoring MI Resellers' prices, and that [Reseller 1] adhered to the Korg Pricing Policy by agreeing to increase pricing to the Minimum Price. This exchange also shows that [Reseller] adhered to the Korg Pricing Policy – and that [Reseller] was supporting the Korg Pricing Policy by monitoring other MI Resellers' prices and reporting to Korg UK other MI Resellers not adhering to the Korg Pricing Policy.

#### **D. Market Definition**

- 3.217 As set out below, the CMA finds that the relevant market for the purposes of this case is the supply of synthesizers and hi-tech equipment in the UK through both the MI Reseller and Mass Reseller channels.

#### **I. Purpose of and framework for assessing the relevant market**

- 3.218 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.<sup>250</sup>
- 3.219 In this case, the CMA considers that it is not necessary to reach a definitive view on market definition in order to determine whether there is an agreement between undertakings which has as its object the appreciable prevention, restriction or distortion of competition.<sup>251</sup>
- 3.220 Nonetheless, the CMA has formed a view of the relevant market, as a conclusion on this is required in order to calculate Korg UK's 'relevant turnover' in the market affected by the Infringement, for the purposes of establishing an effect on trade between Member States and the level of the financial penalty that the CMA has decided to impose on Korg.

#### **II. Relevant product market**

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

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<sup>250</sup> Case T-62/98 *Volkswagen AG v Commission*, EU:T:2000:180, paragraph 230; Case T-29/92 *SPO and Others v Commission*, EU:T:1995:34, paragraph 74.

<sup>251</sup> See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [176], in which the CAT held that in Chapter I cases '*determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement*'.

- 3.222 Korg UK supplies synthesizers and hi-tech equipment. As set out in paragraphs 3.15 to 3.16 (and Figure 3.1) above, within each of these product types, Korg UK segments its products further in terms of their characteristics. The synthesizer segments identified by Korg UK are: (i) Analogue; (ii) Volca; (iii) Microkorg; (iv) Synthesizers. The hi-tech segments it identified are: (i) DJ; (ii) Monotron; (iii) Controllers; (iv) Electronic Percussion; (v) Stage Pianos; and (vi) Hi-Tech.
- 3.223 For each of the 10 segments listed above, Korg UK identified some differences based on consumers' needs, as opposed to price. For example, some Relevant Products (e.g. 88-key instruments featuring realistic 'piano feel' keyboards) are used by professional or semi-professional musicians performing live or in the studio, who would not use for such purposes some other Relevant Products more typically used by home-based hobbyists (e.g. those featuring mini-keyboards).<sup>252</sup>
- 3.224 The evidence shows that the Korg Pricing Policy in general, and the Infringement more specifically, applied to each of the synthesizers and hi-tech equipment segments supplied by Korg UK.<sup>253</sup> Given this, all synthesizers and hi-tech equipment are focal products. It would make no difference for the calculation of relevant turnover if the CMA separated out different segments within these two product types into multiple separate product markets, or aggregated all the products into a single product market. Therefore, for the purposes of this Decision, the CMA has not made any finding as to the existence of any narrower product markets and has instead aggregated all of the segments within each of synthesizers and hi-tech equipment in a single market.
- 3.225 For the reasons set out above, for the purposes of market definition in this case, it is not necessary for the CMA to evaluate demand-side and supply-side substitutability between the product segments identified by Korg UK.
- 3.226 The CMA finds that the relevant product market for the purpose of this case is the supply of synthesizers and hi-tech equipment.

### **III. Sales through different distribution channels**

- 3.227 Korg UK supplies its synthesizers and hi-tech equipment through different distribution channels. All of Korg UK's sales of the Relevant Products were, during the Relevant Period, through both the MI Reseller and Mass Reseller channels.<sup>254</sup> As set out at paragraphs 3.26 and 3.32 above, of Korg UK's total sales of the

<sup>252</sup> URN C\_KOR01108 (Korg UK reply dated 26 February 2019 to a s.26 Notice), at questions 9(a) and 9(b).

<sup>253</sup> See e.g. at Part 3.C.V. above the illustrative examples involving the 10 segments identified by Korg, i.e.: Analogue (e.g. paragraph 3.207); Volca (e.g. paragraph 3.209); Microkorg (e.g. paragraph 3.200); Synthesizers (e.g. paragraph 3.191); DJ (e.g. paragraph 3.174); Monotron (e.g. paragraph 3.174); Controllers (e.g. paragraph 3.178); Electronic Percussion (e.g. paragraph 3.174); Stage Pianos (e.g. paragraph 3.203); and Hi-Tech (e.g. paragraph 3.198). In addition, throughout the Relevant Period, Korg UK has been active in all segments. URN C\_KOR01197 (Korg spreadsheet titled '*Revision of Attachments 2 and 3 – 15) Product Segment and 18b) Revenue by Segment dated May 19 [2019]*').

<sup>254</sup> Korg UK said that it may (but in practice it does not) supply the education sector directly: see paragraph 3.26 above. For the purposes of this case therefore the CMA has not included a separate education channel in the relevant market.

Relevant Products during the Relevant Period, on average [90-100]% related to the MI Reseller channel, and only [0-10]% related to the Mass Reseller channel. The CMA has considered whether the market for the supply of synthesizers and hi-tech equipment should be further subdivided by distribution channel.

- 3.228 The CMA would not normally define a separate market for different resellers, where resellers are sold an identical product. In determining whether there are separate markets, the key question is whether conditions of competition differ significantly between different reseller groups.
- 3.229 A number of Korg UK's [X] products were available to both the MI Reseller and Mass Reseller channels during the Relevant Period.<sup>255</sup> The [X] products sold via these channels are likely to be seen as demand-side substitutes for (identical or similar) products sold through resellers by consumers purchasing these MI and MI-related products. The evidence shows that MI Resellers monitored Korg products' availability/pricing in the Mass Reseller channel (and vice versa), and that Korg UK contacted [Mass Reseller] about its retail pricing.<sup>256</sup>
- 3.230 The CMA concludes that conditions of competition are sufficiently similar between the Mass Reseller and MI Reseller channels that, for the purposes of this case, there is no need to further sub-divide the relevant market by reseller type.
- 3.231 Based on the above, the CMA concludes that, for the purposes of this case, the relevant market for synthesizers and hi-tech equipment includes both the Mass Reseller and MI Reseller channels.

#### **IV. Relevant geographic market**

- 3.232 The CMA has considered whether the market is likely to be narrower or wider than the whole of the UK.
- 3.233 Korg UK's ASMs for synthesizer and hi-tech equipment manage MI Resellers in two different sales territories: the South (essentially Great Britain south of Birmingham, and Wales) and the North (essentially Great Britain north of Birmingham, Scotland, Northern Ireland and the Republic of Ireland).<sup>257</sup> The CMA has seen no evidence indicating that geographic areas are categorised for any reason other than administrative efficiency, and no evidence indicating that pricing and product

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<sup>255</sup> For details on [X], see paragraphs 3.24 and 3.25 above. Korg UK submitted that certain [X] Relevant Products were made available via the MI Reseller channel and via the Mass Reseller channel in the Relevant Period (e.g. Korg's Microkey-25, a Hi-Tech Controller: URN C\_KOR01558 (Spreadsheet - Korg reply dated 24 June 2019 to a s.26 Notice)). CMA analysis of this document indicates that during the Relevant Period, on average [90-100]% of the Relevant Products sold by Korg UK to Mass Resellers were also sold by Korg UK to MI Resellers and, during this same period, on average [40-50]% of the Relevant Products sold by Korg UK to MI Resellers were also sold by Korg UK to Mass Resellers.

<sup>256</sup> For example, MI Resellers such as [Reseller] viewed a Mass Reseller as a competitive threat, and the retail pricing of [Mass Reseller] may have been set by following the prices of one or more of the MI Resellers. In addition, Korg UK may have attempted to influence [Mass Reseller]'s retail pricing at least indirectly. See further paragraphs 3.72–3.73 above.

<sup>257</sup> URN C\_KOR01957 (Transcript of the [Korg Employee 15] Interview), p.18, line 19 to p.19, line 9. URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.19, lines 12–21.

availability differed across different regions of the UK (or the Republic of Ireland).<sup>258</sup> As set out at Part 3.C. above, the Korg Pricing Policy applied to MI Resellers' sales online, which could be made to any UK location<sup>259</sup> – the CMA concludes that for the purposes of this case the relevant geographical market was at least as wide as the UK.

- 3.234 The CMA has also considered whether the relevant geographic market may be wider than the UK.
- 3.235 Korg UK submitted that Korg Inc. set the RRP/SSP, on a Europe-wide basis, and while Korg UK could set its own pricing to resellers according to local market conditions, such pricing '*usually referenced*' the RRP/SSP set on a Europe-wide basis.<sup>260</sup>
- 3.236 The CMA considers that Korg UK's approach of potentially setting a different RRP/SSP in the UK, relative to other European countries, indicates that during the Relevant Period there was a separate relevant geographic market for the sale of synthesizers and hi-tech equipment in the UK. In the light of this, and adopting a cautious approach, the CMA concludes for the purpose of this case that the geographic market is no wider than the UK.

## **V. Conclusion on market definition**

- 3.237 The CMA finds that the relevant market for the purposes of this case is the supply of synthesizers and hi-tech equipment in the UK through the MI Reseller and Mass Reseller channels.

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<sup>258</sup> Korg UK's list of employees refers to [Korg Employee 15] covering the area of '[X]', which shows that there is an overlap with UK and Republic of Ireland sales personnel. There may be some common policies or sales teams overlap across Great Britain (or Northern Ireland) and the Republic of Ireland but this does not change the CMA's conclusion. URN C\_KOR01151 (Table of relevant employees provided in response dated 26 February 2019 to a s.26 Notice).

<sup>259</sup> As also described in Part 3.C. above, the Korg Pricing Policy applied to MI Resellers with stores across the UK (e.g. [Reseller], [Reseller], [Reseller]).

<sup>260</sup> URN C\_KOR01150 (Korg UK reply dated 26 February 2019 to a s.26 Notice), p.2, question 1. [Korg Senior Employee 3] also told the CMA, as regards Korg UK's pricing to resellers, that Korg UK '*would have always run some type of harmonisation*' as Korg UK sets '*a euro/ sterling rate, and obviously if the currency fluctuates, we may adjust the rate.*' URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.23, lines 25–26 and p.24, lines 1–3.

## 4. LEGAL ASSESSMENT

### A. Introduction

- 4.1 This part sets out the CMA's legal assessment of Korg UK's agreement and/or concerted practice with [Reseller 1], one of its MI Resellers, that [Reseller 1] would not advertise or sell online synthesizers or hi-tech equipment supplied to it by Korg UK (the Relevant Products) below a certain Minimum Price specified by Korg UK from time to time, in accordance with the Korg Pricing Policy.
- 4.2 As set out at paragraph 3.166 above, the CMA has reasonable grounds for suspecting that more than 20 MI Resellers of the Relevant Products were subject to the Korg Pricing Policy, and that MI Resellers generally complied with Korg UK's requests to adhere to the Minimum Price.
- 4.3 However, for reasons of administrative efficiency, in accordance with its Prioritisation Principles,<sup>261</sup> the CMA has decided to focus its findings on [Reseller 1] as one of the numerous MI Resellers of the Relevant Products, in order to show the existence of an agreement and/or concerted practice with Korg UK.
- 4.4 While the CMA has concluded that [Reseller 1] is a party to an infringing agreement and/or concerted practice with Korg UK, the CMA has decided not to address this Decision to [Reseller 1].<sup>262</sup> The evidence shows that the Korg Pricing Policy was operated as a standard policy applicable to all or at least the vast majority of Korg UK's MI Resellers. The CMA therefore considers it reasonable and proportionate to apply Rule 10(2) of the CMA Rules in this case and address this Decision only to Korg UK and its ultimate parent company, Korg Inc. This does not preclude the CMA from taking any enforcement action against [Reseller 1] or other resellers in future.
- 4.5 For present purposes, the CMA's findings are made by reference to the following provisions of the UK and EU competition rules:
- Section 2 of the Act prohibits (among other matters) agreements and concerted practices between undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are excluded or exempt in accordance with the provisions of Part 1 of the Act. References to the UK are to the whole or part of the UK.<sup>263</sup> The prohibition imposed by section 2 of the Act is referred to as 'the Chapter I prohibition'.
  - Article 101(1) TFEU prohibits (among other matters) agreements and concerted practices between undertakings which may affect trade between EU Member

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<sup>261</sup> *Prioritisation principles for the CMA* (CMA16, April 2014).

<sup>262</sup> Under Rule 10(2) of the CMA Rules, where the CMA considers that an agreement infringes the Chapter I prohibition and/or the prohibition in Article 101(1) TFEU, the CMA may address its infringement decision to fewer than all the persons who are or were a party to that agreement.

<sup>263</sup> Section 2(1) and (7) of the Act.

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.

- 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) is 'saved' until the end of the Transition Period.<sup>264</sup> This means that directly applicable EU law – including Article 101 TFEU, Regulation 1/2003<sup>265</sup> and the Vertical Agreements Block Exemption Regulation (VABER)<sup>266</sup> – will continue to apply in the UK during the Transition Period.

- 4.6 Section 60 of the Act sets out the principle that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law. Section 60 of the Act also provides that the CMA must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing that there is no inconsistency with the principles laid down by the TFEU and the European Courts, and any relevant decision of the European Courts.<sup>267</sup> The CMA must, in addition, have regard to any relevant decision or statement of the Commission.<sup>268</sup>

## **B. Undertakings**

### **I. Key legal principles**

- 4.7 For the purposes of the Chapter I prohibition and Article 101 TFEU, the focus is on the activities of an 'undertaking'. The concept of an 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.<sup>269</sup>
- 4.8 An entity is engaged in 'economic activity' where it conducts any activity '*...of an industrial or commercial nature by offering goods and services on the market*'.<sup>270</sup>

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<sup>264</sup> The European Union (Withdrawal) Act 2018, section 1A (as introduced by The European Union Withdrawal Agreement Act 2020, section 1).

<sup>265</sup> 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, pp.1–25.

<sup>266</sup> Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

<sup>267</sup> The Act, section 60(2) and (4). The 'European Courts' means the Court of Justice (formerly the European Court of Justice) and the General Court (GC) (formerly the Court of First Instance). See the Act, section 59(1).

<sup>268</sup> The Act, section 60(3). The Court of Justice held that national competition authorities '*may take into account*' guidance contained in non-legally binding Commission Notices (specifically the Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C291/01, but such authorities are not required to do so. See Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraphs 29 and 31.

<sup>269</sup> Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, paragraph 21.

<sup>270</sup> Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

- 4.9 The term ‘undertaking’ also designates an economic unit, even if in law that unit consists of several natural or legal persons.<sup>271</sup>

## **II. Conclusion on undertakings**

- 4.10 Korg UK was (and still is) engaged in the supply of MI such as synthesizers and hi-tech equipment. [Reseller 1] was (and still is) engaged, amongst other things, in the retail sale of MI and accessories.
- 4.11 The CMA therefore concludes that both Korg UK and [Reseller 1] were, and still are, engaged in an economic activity and constitute/d undertakings for the purposes of the Chapter I prohibition and Article 101 TFEU during the Relevant Period and beyond.

## **C. Agreement and/or concerted practice**

- 4.12 For the reasons set out below, the CMA finds that Korg UK and [Reseller 1] entered into an agreement and/or concerted practice that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price in accordance with the Korg Pricing Policy.

## **I. Key legal principles**

- 4.13 The Chapter I prohibition and Article 101 TFEU apply both to ‘agreements’ and ‘concerted practices’. It is not necessary, for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice.<sup>272</sup> The aim of the Chapter I prohibition and Article 101 TFEU is to catch different forms of coordination between undertakings and thereby to prevent undertakings from being able to evade the competition rules simply on account of the form in which they coordinate their conduct.<sup>273</sup>

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<sup>271</sup> Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 55.

<sup>272</sup> Case C-8/08 *T-Mobile Netherlands BV and Others v NMa*, EU:C:2009:343, paragraph 23 (citing Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 131). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, [206(ii)].

<sup>273</sup> Case C-382/12 P, *MasterCard Inc. v. European Commission*, EU:C:2014:2201, paragraph 63 and the case law cited therein. The unlawful co-ordination between undertakings may, for example, be characterised as a ‘concerted practice’ during the first phase of an infringement but may subsequently have solidified into an ‘agreement’, and then been further affirmed, or furthered or implemented by, a ‘decision of an association’. This does not prevent the competition authority from characterising the co-ordination as a single continuous infringement. See: Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission*, EU:T:2002:70, paragraphs 186–188; Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, EU:C:2006:734, paragraph 32. See also Case T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission*, EU:T:1999:80, paragraph 696: ‘*In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty.*’



## II. Agreement

- 4.14 The Chapter I prohibition and Article 101 TFEU catch a wide range of agreements, including oral agreements and ‘*gentlemen’s agreements*’.<sup>274</sup> An agreement may be express or implied by the parties, and there is no requirement for it to be formal or legally binding, nor for it to contain any enforcement mechanisms.<sup>275</sup> An agreement may also consist of either an isolated act, or a series of acts, or a course of conduct.<sup>276</sup>
- 4.15 The key question in establishing an agreement is whether there has been ‘*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties’ intention*’.<sup>277</sup>
- 4.16 The General Court of the European Union (formerly the Court of First Instance; ‘General Court’) has held that: ‘[...] *it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way* [...]’.<sup>278</sup>
- 4.17 However, it is not necessary to establish a joint intention to pursue an anti-competitive aim.<sup>279</sup> The fact that a party may have played only a limited part in setting up an agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties, does not mean that it is not party to the agreement.<sup>280</sup>
- 4.18 In the absence of an explicit agreement (for example, written down or based on a contract) between the parties to conduct themselves on the market in a specific way, tacit acquiescence by a party to conduct itself in the manner proposed by the other party is sufficient to give rise to an agreement for the purpose of the Chapter I prohibition and Article 101 TFEU.<sup>281</sup>

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<sup>274</sup> Case C-41/69 *ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular, paragraphs 106–114.

<sup>275</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, [658]. See also Commission decision 2003/675/EC *Video Games, Nintendo Distribution and Omega-Nintendo* (COMP/35.587 etc) [2003] OJ L255/33, paragraph 247.

<sup>276</sup> Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 81.

<sup>277</sup> Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, paragraph 69 (upheld on appeal in Joined Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, EU:C:2004:2, paragraphs 96–97).

<sup>278</sup> Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

<sup>279</sup> Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission*, EU:T:2006:265, paragraph 77 (upheld on appeal in Joined Cases C-501/06P etc *GlaxoSmithKline Unlimited v Commission*, EU:C:2009:610).

<sup>280</sup> *Agreements and concerted practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.8. See also: Case T-25/95 *Cimenteries CBR and Others v Commission*, EU:T:2000:77, paragraphs 1389 and 2557 (this judgment was upheld on liability by the Court of Justice in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v. Commission*, EU:C:2004:6, although the fine was reduced); and Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraphs 79–80.

<sup>281</sup> Case C-74/04 P *Commission v Volkswagen AG*, EU:C:2006:460, paragraph 39; Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, and Commission Guidelines on *Vertical Restraints* [2010] OJ C130/1 (Vertical Guidelines), paragraph 25(a).

- 4.19 The Commission's Vertical Guidelines, summarising the relevant case law and citing the judgments of the Court of Justice of the European Union (Court of Justice), describe how to establish tacit acquiescence to a unilateral policy: '[...] *in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice.*'<sup>282</sup>
- 4.20 The Vertical Guidelines provide examples of when tacit acquiescence may be deduced. Evidence of coercive behaviour or compulsion may point towards tacit acquiescence and is a relevant factor to consider. For instance: '[...] *for vertical agreements, tacit acquiescence may be deduced from the level of coercion exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement in practice its policy.*'<sup>283</sup>
- 4.21 However, a system of monitoring and penalties may not be necessary in all cases for there to be a concurrence of wills based on tacit acquiescence.<sup>284</sup>
- 4.22 The Chapter I prohibition and Article 101 TFEU apply to agreements irrespective of whether they were ever implemented.<sup>285</sup> The fact that a party does not act on or subsequently implement, the agreement at all times does not preclude the finding that an agreement existed.<sup>286</sup> In addition, the fact that a party does not respect the agreement at all times or comes to recognise that it can 'cheat' on the agreement at certain times does not preclude the finding that an agreement existed.<sup>287</sup>
- 4.23 Likewise, the fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties does not mean that it is not party to the agreement.<sup>288</sup>

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<sup>282</sup> Vertical Guidelines, paragraph 25(a).

<sup>283</sup> Vertical Guidelines, paragraph 25(a).

<sup>284</sup> Case C-260/09 P *Activision Blizzard Germany GmbH v Commission*, EU:C:2011:62, paragraph 77.

<sup>285</sup> Commission decision of 29 September 2004 *French Beer* (Case COMP/C.37.750/B2), paragraph 64.

<sup>286</sup> Case 86/82 *Hasselblad v Commission*, EU:C:1984:65, paragraph 46; and Case C-277/87 *Sandoz v Commission*, EU:C:1990:6, paragraph 3.

<sup>287</sup> Case T-141/89 *Tréfileurope v Commission*, EU:T:1995:62, paragraph 85; and Case C-246/86 *Belasco v Commission*, EU:C:1989:95, paragraphs 10–16.

<sup>288</sup> *OFT401*, at paragraph 2.8. See also, for example: Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 80; Cases T-25/95 *Cimenteries CBR SA v Commission*, EU:T:2000:77, paragraphs 1389 and 2557; and Case T-28/99 *Sigma Technologie di Rivestimento Srl v Commission*, EU:T:2002:76, paragraph 40.

- 4.24 In particular, where an agreement has the object of restricting competition (as described below), parties cannot avoid liability for the resulting infringement by arguing that the agreement was never put into effect.<sup>289</sup>

### III. Concerted practice

- 4.25 The prohibition on concerted practices prohibits, amongst other things, coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.<sup>290</sup>
- 4.26 Although the nature and extent of a concerted practice is addressed in the case law primarily in the context of so-called horizontal relationships (that is, between actual or potential competitors), it is also applicable to vertical relationships (that is, between undertakings at different levels of the supply chain).<sup>291</sup> The Court of Appeal has observed that: *'The Chapter I prohibition catches agreements and concerted practices whether between undertakings at different levels or between those at the same level of commercial operation. An agreement between a supplier and a commercial customer, which may be called a vertical agreement, may breach the same prohibition as much as an agreement between competing suppliers of the same product or same type of product, which can be referred to as a horizontal agreement.'*<sup>292</sup>
- 4.27 In the context of vertical discussions between a manufacturer and a retailer, the Competition Appeal Tribunal (the CAT) has stated that: *'It is [...] plain that an undertaking may be passively party to an infringement of the Chapter I prohibition. That is so, in particular, where it had taken part in a meeting or other contacts, and has done nothing to distance itself from the matters discussed. In those circumstances the undertaking is taken to have tacitly approved of the unlawful initiative, unless it has publicly distanced itself or informed the OFT.'*<sup>293</sup>

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<sup>289</sup> See e.g.: Case 19/77 *Miller v Commission*, EU:C:1978:19, paragraphs 7–10; *French Beer* [2006] 4 CMLR 577; Case C-277/87 *Sandoz v Commission*, EU:C:1990:6; and Commission decision 78/921/EEC *WANO Schwarzpulver* [1978] OJ L232/26.

<sup>290</sup> Cases 48/69 etc *ICI Ltd v Commission*, EU:C:1972:70, paragraph 64. See also: Case C-8/08 *T-Mobile Netherlands BV and Others v NMA*, EU:C:2009:343, paragraph 26; *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, [151]–[153]; and Commission decision 82/367/EEC *Hasselblad* (IV/25.757) [1982] OJ L161/18 (*Hasselblad*), recital 47, in which the Commission stated (in a vertical context) that: *'[f]or a concerted practice to exist it is sufficient for an independent undertaking knowingly and of its own accord to adjust its behaviour in line with the wishes of another undertaking.'*

<sup>291</sup> See e.g.: Case T-43/92 *Dunlop Slazenger International Ltd v Commission*, EU:T:1994:259 paragraph 101 *et seq.* (concerted practice between Dunlop Slazenger and certain of its exclusive distributors in respect of various measures to enforce an export ban). See also Commission decision 2003/675/EC *Video Games, Nintendo Distribution and Omega-Nintendo* (COMP/35.587 etc) [2003] OJ L255/33, paragraphs 323–324 (agreements and/or concerted practices between Nintendo and its independent distributors to restrict parallel trade). Other examples include: Commission decision 72/403/CEE *Pittsburgh Corning Europe* (IV/26894) [1972] OJ L272/35 (where a concerted practice was found between a supplier and a distributor); and Commission decision 88/172/EEC *Konica* (IV/31.503) [1988] OJ L78/34, paragraph 36 (where there was a concerted practice between a supplier and a distributor).

<sup>292</sup> *Argos Ltd and Littlewoods Ltd v Office of Fair Trading and JJB Sports plc and Allsports Limited v OFT* [2006] EWCA Civ 1318, [28].

<sup>293</sup> *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, [1043].

#### **IV. Agreement and/or concerted practice between Korg UK and [Reseller 1]**

##### ***Korg UK's communication of the Korg Pricing Policy***

- 4.28 As set out in Part 3.C. above, the CMA has found that as part of the Korg Pricing Policy, throughout the Relevant Period, Korg UK:
- a. requested MI Resellers, including [Reseller 1], not to advertise or sell the Relevant Products online below the Minimum Price set by Korg UK from time to time (see e.g. paragraphs 3.83 to 3.85 above). This applied to Relevant Products whether sold separately or as part of a Bundle for at least part of the Relevant Period (see paragraphs 3.74 to 3.78 above);
  - b. monitored, in order to enforce the Korg Pricing Policy, MI Resellers accounting for the vast majority of Korg UK's sales during the Relevant Period – Korg UK monitored online retail pricing of MI Resellers, including [Reseller 1]:
    - i. through MI Resellers reporting other MI Resellers' prices below the Minimum Price to Korg UK (see paragraphs 3.86 to 3.90 above); and
    - ii. by itself monitoring MI Resellers' online pricing, including through the Orange Spider automated price-monitoring software (see paragraphs 3.91 to 3.104 above);
  - c. enforced the Korg Pricing Policy by contacting directly MI Resellers (including [Reseller 1]) who Korg UK found or suspected were advertising online any Relevant Product(s) at prices below the Minimum Price and requesting that they increase those prices to the Minimum Price (see paragraphs 3.105 to 3.112 above); and
  - d. at times considered applying, intimated that it may (or had applied) and did in fact threaten and apply sanctions against MI Resellers (including [Reseller 1]) who did not comply with the Korg Pricing Policy (see Part 0. above, paragraphs 4.96 to 4.126 below and Annex A).

##### ***MI Resellers' adherence to the Korg Pricing Policy***

- 4.29 As set out at paragraph 3.166 above, the CMA has reasonable grounds for suspecting that more than 20 MI Resellers of the Relevant Products were subject to the Korg Pricing Policy, and that MI Resellers generally complied with Korg UK requests to adhere to the Minimum Price. However, for reasons of administrative efficiency, the CMA has chosen to focus its assessment of whether there was an agreement and/or concerted practice with Korg UK which infringed competition law on one MI Reseller only, namely [Reseller 1].

- 4.30 Nonetheless, the CMA considers that the Korg Pricing Policy could only be effective in its aim of protecting MI Resellers' margins<sup>294</sup> if there was general adherence to it by all or at least the vast majority of MI Resellers making online sales of the Relevant Products.
- 4.31 While some MI Resellers occasionally sold the Relevant Products online below the Minimum Price specified by Korg UK from time to time, the evidence shows that overall, adherence to the Korg Pricing Policy by MI Resellers was high.
- 4.32 Based on this evidence, the CMA considers that many MI Resellers were willing to comply with the Korg Pricing Policy, and other MI Resellers who may have wanted to discount online to remain competitive on price had little choice but to comply. However, the CMA makes no findings in respect of MI Resellers of the Relevant Products other than [Reseller 1].

***[Reseller 1]'s agreement with the Korg Pricing Policy***

- 4.33 The CMA concludes that:
- a. Korg UK entered into an agreement and/or concerted practice with [Reseller 1] that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price;
  - b. the agreement and/or concerted practice between Korg UK and [Reseller 1] lasted from 9 June 2015 to 17 April 2018 (i.e. the Relevant Period); and
  - c. in accordance with the Korg Pricing Policy, the agreement and/or concerted practice between Korg UK and [Reseller 1] applied to the sale online by [Reseller 1] of the Relevant Products – whether sold separately or as part of a Bundle, for at least part of the Relevant Period.
- 4.34 This was based on the joint understanding that the Korg Pricing Policy applied to all or at least the vast majority of Korg UK's MI Resellers, and that Korg UK would take steps to ensure that other MI Resellers of the Relevant Products also maintained their prices at or above the Minimum Price.

***Background: [Reseller 1]'s relationship with Korg UK***

- 4.35 At paragraphs 4.36 to 4.43 below, the CMA sets out the evidence on [Reseller 1]'s operations, and the commercial importance of Korg UK to [Reseller 1] (and *vice versa*).

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<sup>294</sup> See paragraph 3.48 above.

- 4.36 During the Relevant Period [Reseller 1]'s main activity [REDACTED].<sup>295</sup> [REDACTED].<sup>296</sup> However, selling the Relevant Products was nevertheless important to [Reseller 1]'s MI business, given its focus on (and the importance of Korg's products to) [REDACTED]: see, further, paragraph 4.40 below.
- 4.37 [Reseller 1] sells the Relevant Products online, via its own websites and the third-party platform eBay. [Reseller 1] prices at the same level on its own websites and instore, but sometimes sets higher prices on its eBay channel. Customers may visit and buy Relevant Products from [Reseller 1] at [REDACTED].<sup>297</sup>
- 4.38 [Reseller 1] has sold Korg products since [REDACTED]. Its relationship with Korg UK during the Relevant Period was, and still is, based on Korg UK's SDA (entered into by [Reseller 1] in [REDACTED]) and the Korg Charter (since [REDACTED] 2017).<sup>298</sup> However, the CMA has seen no written contractual terms between Korg UK and [Reseller 1] mentioning any restriction which formed the basis of the Korg Pricing Policy.
- 4.39 The CMA concludes that [Reseller 1] may not have been one of Korg UK's most commercially important MI Resellers during the Relevant Period.
- [Reseller 1] was Korg UK's [REDACTED] largest reseller in 2017 by sales values. Korg UK's largest MI Resellers accounted for many multiples of Korg UK's sales to [Reseller 1].<sup>299</sup> Further, [Reseller 1] did not stock [REDACTED].<sup>300</sup>
  - Korg UK gave serious consideration to closing [Reseller 1]'s account in 2017 and indeed informed at least one other MI Reseller (a competitor to [Reseller 1]) that Korg UK was doing this. Ultimately, while Korg UK did not in fact terminate [Reseller 1]'s account due to [Reseller 1]'s pricing of Relevant Products below the Minimum Price, [Reseller 1] considered termination to be a credible threat if [Reseller 1] did not adhere to the Korg Pricing Policy. For further details, see Annex A.
  - [Korg Employee 8] managed Korg UK's [Reseller 1] account. He told the CMA that [Reseller 1]'s [REDACTED] had a certain strategic value, but Korg UK's sales to [Reseller 1] had declined to '*probably less than half*', i.e. less than £[REDACTED] per annum – so if they '*stopped [...] altogether, we could find another company that*

<sup>295</sup> URN C\_KOR02354 ([Reseller 1 Financial Statements for FYE] 2015), at 'page 2' and 'page 13' (as printed); URN C\_KOR02356 ([Reseller 1 Financial Statements for FYE] 2017), at 'page 2' and 'page 13' (as printed).

<sup>296</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.25, line 26 to p.26, line 13;

<sup>297</sup> [Reseller 1] sells the Relevant Products via e.g. [Reseller 1's websites]: URN C\_KOR02067 ([Reseller 1] reply dated 3 October 2019 to a s.26 Notice), p.1/question 1(c); p.3/question 4(a). At least 90% of [Reseller 1]'s sales are made online: URN C\_KOR02463 ([Reseller 1] reply dated 18 February 2020 to a s.26 Notice). See also URN C\_KOR02423 ([Reseller 1] reply dated 10 February 2020 to a s.26 Notice), p.1/question 3, pp.4–5/question 5.

<sup>298</sup> URN C\_KOR02067 ([Reseller 1] reply dated 3 October 2019 to a s.26 Notice), p.1/question 1(a).

<sup>299</sup> URN C\_KOR00108 (Korg UK reply dated 17 April 2018 to a s.26 Notice), at question 2(b)(i). The CMA understands that this relates to Korg UK's FYE 31 March 2018.

<sup>300</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.115, lines 13–17: [Korg Senior Employee 3] told the CMA e.g. that [Reseller 1] was '[REDACTED], so they do some of our other products'.

would, in theory, take the slack [...] people would find a way to buy that from us [...] [I]t's not something that I would be panicking about.'<sup>301</sup>

- 4.40 In contrast, the evidence shows that [Reseller 1] considered that Korg UK was commercially very important to [Reseller 1]'s MI business, particularly in light of its [X] clientele. [Reseller 1] submitted data showing that, in the three [Reseller 1] financial years completed during the Relevant Period, Korg products accounted for on average [0-10]% of [Reseller 1]'s sales of MI in the UK.<sup>302</sup> Nonetheless, [Reseller 1] described Korg products as '*must stock*', and Korg UK as an '*important*' supplier (without which [Reseller 1] would lose sales of £[10,000-20,000] per month).<sup>303</sup> In addition, [Reseller 1 Employee 5] submitted that Korg UK may be in [Reseller 1]'s top 5 studio equipment suppliers and [Reseller 1] '*can't do without them in that particular sector*'.<sup>304</sup>
- 4.41 [Reseller 1 Employee 5] submitted that [Reseller 1]'s bargaining power was weaker, relative to suppliers of '*key brands*' such as Korg UK.<sup>305</sup> He also contrasted MI Resellers whose '*buying power is so, so big*' with [Reseller 1] whose buying power was of '*negligible*' importance to Korg UK. This meant, in his view, that [Reseller 1] had no scope to negotiate lower prices from Korg UK.<sup>306</sup>
- 4.42 Korg UK appears to have viewed [Reseller 1] as a discounter. On 30 September 2016, for example, Korg UK's [Korg Employee 7] noted internally that [Reseller 1] was a: '*[b]ig discounter on [X]*'.<sup>307</sup> [Korg Employee 8] of Korg UK gave a similar account to the CMA, and surmised that [Reseller 1] may have been able to discount the Relevant Products due to [X].<sup>308</sup>
- 4.43 [Reseller 1] submitted that it tried to price competitively, by matching the lowest retail prices visible to [Reseller 1] on e.g. Google Shopping and eBay. It did so manually, or on a more automated basis after [X] 2016 (when it moved to using software that can automatically monitor, and match, competitors' prices).<sup>309</sup> [Reseller 1 Employee

<sup>301</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.96, line 12 to p.97, line 17; p.101, line 23 to p.104, line 7.

<sup>302</sup> CMA analysis of URN C\_KOR02423 ([Reseller 1] reply dated 10 February 2020 to a s.26 Notice), p.1/question 1.

<sup>303</sup> URN C\_KOR02785 ([Reseller 1] reply dated 3 October 2019 to a s.26 Notice; re-redacted version of URN C\_KOR02067), p.6/questions 6(a) and 6(b).

<sup>304</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.28, lines 2–17; p.74, lines 3–15.

<sup>305</sup> The CMA notes Korg UK's view that the Korg brand had '*premium market position*': URN EY\_KOR00966 (Korg UK '*Annual Report Year Ended April 2017*'), p.6.

<sup>306</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.75, lines 18–22 ('*[W]e are not important enough for any brands - like, key brands - from that market to say, "We can't do without them". So, I suppose the balance of power is in their favour*'); p.171, lines 6–18; p.31, lines 11–18; p.35, lines 10–20; p.36, lines 6–24. The CMA notes, however, that this did not prevent [Reseller 1 Employee 5] from attempting at least once to start such a negotiation: URN ER\_KOR01816 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 20 January 2017).

<sup>307</sup> URN EY\_KOR01271 (Email from [Korg Employee 7] to [Korg Senior Employee 1], both of Korg UK, on 30 September 2016). Given [Korg Employee 7]'s focus within Korg, this may have related to [X] and/or the Relevant Products.

<sup>308</sup> For example, [Korg Employee 8] told the CMA '*Back then, they would always lead the drop, so they would be the cheapest place for a consumer to buy from.*' URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.120, lines 17–18; p.118, line 22 to p.119, line 12.

<sup>309</sup> On occasion [Reseller 1] undertook '*[m]anual over-rides*' to re-price the Relevant Products, for reasons including '*[r]equest from supplier*': URN C\_KOR02177 ([Reseller 1] reply dated 5 December 2019 to a s.26 Notice).

5] submitted that even though [Reseller 1] was '*not leading on the market*' (i.e. it was not the first MI Reseller to lower its pricing below the Minimum Price but just responded to other MI Resellers who reduced their pricing below the Minimum Price first), it was '*clashing with Korg a lot*' and Korg UK accused it of pricing below any other MI Reseller.<sup>310</sup>

***Korg UK's requests to increase [Reseller 1]'s pricing to the Minimum Price during the Relevant Period***

4.44 The CMA assesses below the totality of the evidence in relation to the contact between Korg UK and [Reseller 1] concerning [Reseller 1]'s pricing. On the basis of that assessment, the CMA concludes that Korg UK often contacted [Reseller 1] during the Relevant Period to ask it to increase its pricing of Relevant Products to the Minimum Price.

4.45 The CMA also assesses below details of [Reseller 1]'s compliance with Korg UK's requests to increase its pricing to the Minimum Price during the Relevant Period. The CMA concludes that on numerous occasions [Reseller 1] agreed to increase its pricing of Relevant Products to the Minimum Price following a request from Korg UK to do so during the Relevant Period, although, on occasions, [Reseller 1] did not always comply promptly (and, on occasion, not at all) with each such request.

**Contact between Korg UK and [Reseller 1] relating to [Reseller 1]'s pricing during the Relevant Period**

4.46 At paragraphs 4.47 to 4.73 below, the CMA sets out:

- the basis for contact between Korg UK and [Reseller 1];
- the frequency of contact between Korg UK and [Reseller 1];
- Korg UK's understanding of contact between it and [Reseller 1] about [Reseller 1]'s pricing;
- some inconsistencies in Korg UK's understanding of contact between Korg UK and [Reseller 1] about [Reseller 1]'s pricing;
- [Reseller 1]'s understanding of contact between it and Korg UK about [Reseller 1]'s pricing;
- the CMA's consideration of contact between Korg UK and [Reseller 1] about [Reseller 1]'s pricing.

4.47 As set out in paragraphs 3.147 to 3.162 above, Korg UK staff operated under a culture of concealment. Despite Korg UK's attempts not to generate a documentary

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<sup>310</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.36, line 12 to p.37, line 18; p.96, line 13 to p.97, line 23; p.101, lines 2–6; p.24, line 3 to p.25, line 5.



evidence trail, the CMA concludes that the available evidence shows that, on many occasions during the Relevant Period, Korg UK contacted [Reseller 1] about [Reseller 1]'s pricing. It generally did so to request that [Reseller 1] increase its online pricing to the Minimum Price for one or more of the Relevant Products.<sup>311</sup>

#### Basis for contact between Korg UK and [Reseller 1]

- 4.48 [Korg Employee 8] of Korg UK told the CMA that he contacted [Reseller 1] for several reasons, but mainly about [Reseller 1]'s pricing. A small minority of contacts ('maybe *two times a month*') concerned the provision in Korg UK's SDA that [Reseller 1] could not advertise [X].<sup>312</sup>
- 4.49 Korg UK often contacted [Reseller 1] about [Reseller 1]'s pricing following frequent emails and calls to Korg UK from other MI Resellers, complaining about [Reseller 1]'s pricing.
- a. [Korg Employee 8] told the CMA that '*a lot of the time*' he contacted [Reseller 1] about pricing after '*other dealers*' complained. He described [Reseller 1] as '*the bad guy to the industry; they got blamed by a lot of the other dealers as [...] leading a drop.*' [Korg Employee 8] recalled '*quite aggressive phone calls sometimes*' from MI Resellers saying '*"You need to stop supplying them; you can't give them this anymore". [...] and it's like, "Well, [...] they are doing everything they need to do to be a dealer, so we can't" [...] They definitely would have made the "Most Wanted" poster*'.<sup>313</sup>
- b. [Korg Employee 15] similarly described [Reseller 1] as '*sort of the number one dealer that you would get mentioned*' in terms of '*people that would generally start this spiral down of price*'.<sup>314</sup>
- 4.50 However, [Korg Employee 8] also indicated that he sometimes contacted [Reseller 1] about its pricing even if no other MI Resellers had complained, e.g. if he wanted to ask '*"How is this happening? You're making no money" [...] you're a business, and we're selling to you, this is of great concern, you know?"*'. This accords with [Korg Employee 8] having submitted, more generally, that Korg UK used a mixture of reactive and proactive monitoring and enforcement in relation to MI Resellers' advertised pricing.<sup>315</sup>
- 4.51 Many of [Korg Employee 8]'s emails to [Reseller 1] on the case file comprise just a few words (e.g. '*Many thanks*', '*Best Wishes*', or '*Margin*') and a [Reseller 1] weblink for a Relevant Product, or the name of a Relevant Product: e.g. those detailed at paragraphs 4.150, 4.153 and 4.158 below. [Korg Employee 8] also explained to the

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<sup>311</sup> See paragraphs 4.65–4.73 below.

<sup>312</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.82, line 13 to p.85, line 5. See paragraph 3.28.d. above.

<sup>313</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.85, lines 2–15; p.117, line 11 to p.120, line 18.

<sup>314</sup> URN C\_KOR01957 (Transcript of the [Korg Employee 15] Interview), p.289, lines 11–23.

<sup>315</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.85, lines 2–15; p.58, line 5 to p.59, line 21.

CMA what these emails related to and why they were so brief: see paragraphs 4.56 to 4.57 below.

#### Frequency of contact between Korg UK and [Reseller 1]

- 4.52 Korg UK and [Reseller 1] submitted that they were in regular telephone and/or email contact.
- 4.53 [Korg Employee 8] told the CMA that he had '*[v]ery regular contact with dealers on the phone*' and corresponded with [Reseller 1] 2-3 times a week on average, with a '*close to 50-50*' ratio of Korg UK contacting [Reseller 1] compared to [Reseller 1] contacting Korg UK.<sup>316</sup>
- 4.54 [Reseller 1] submitted that Korg UK (and since February 2016, specifically [Korg Employee 8]) contacted mainly [Reseller 1 Employee 5] and [Reseller 1 Employee 3].<sup>317</sup>
- 4.55 [Reseller 1 Employee 5] and [Reseller 1 Employee 3]<sup>318</sup> confirmed this frequency of contact between Korg UK and [Reseller 1]. [Reseller 1 Employee 5] also told the CMA that the frequency fluctuated over time. He stated that at times Korg UK would call (and email) one morning and follow up by telephone in the afternoon, '*[u]sually came at the same time, or more or less, just after a pricelist. And then I think they were focussing on some products -- key products for them, and every single time your price was just -- was different from the RRP price, they would be on the phone*'. However, the frequency of contact depended on factors such as whether a '*product was selling a lot; if it was, then they would be more intent on keeping the RRP price as high [...] the only pattern was new products, key products, and it could happen, like, three times a week, and then we didn't hear from them for a month.*'<sup>319</sup>

#### Korg UK's understanding of contact between Korg UK and [Reseller 1] relating to [Reseller 1]'s pricing

- 4.56 [Korg Employee 8] of Korg UK explained that [Reseller 1] staff would know how to respond to his very brief emails, as he likely told [Reseller 1], after starting at Korg UK: '*If I get in touch with you, it's because my concern is about the margin you're making*'. This was why, [Korg Employee 8] said, if he found a [Reseller 1] listing '*£30, £40-whatever cheaper than everyone else, I'd send that, just that link to*' [Reseller 1 Employee 5]. Further, [Korg Employee 8] told the CMA that '*sometimes there would be some text which might say, "Hello, mate. Can you have a look at*

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<sup>316</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.82, line 13 to p.85, line 5; p.28, lines 12–21 ('*Very regular contact with dealers [...] We would make phone calls and send messages to people; there is a lot of trackers involved for the dealers we'd use, so we would phone them and sometimes point out they could be making more margin*').

<sup>317</sup> URN C\_KOR02035 (Korg Contacts.xlsx attachment to [Reseller 1] reply dated 23 September 2019 to a s.26 Notice).

<sup>318</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.4/question 3: '*[Reseller 1] received requests from Korg multiple times in a month to raise its prices, often about the same product.*'

<sup>319</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.41, lines 1–4; p.44, line 1 to p.45, line 6; p.197, lines 3–8 ('*pre-Christmas is very ... very sensitive [...] They want their price to be [...] as good as possible. [...] February because this is after the, the sales period and they are really [...] putting the pressure for prices to go up again*').

*this?", sometimes it would just be a weblink, and he [Reseller 1 Employee 5] would make the judgment call from that.*<sup>320</sup>

- 4.57 [Korg Employee 8] submitted that, following his competition law training undertaken when he joined Korg UK, he understood that he could only contact MI Resellers about 'margin issues', e.g. *'point out any potential errors they may have been aware of or not'*. [Korg Employee 8] said he could email [Reseller 1] just a weblink, to signify *'the level of margin you're making is concerning [...] it seemed like a way where I could say, "Do whatever you like with this now"'* – and he understood that *'if you keep going back... it felt like very unsafe territory'*.<sup>321</sup>
- 4.58 In relation to the content of his calls to [Reseller 1], [Korg Employee 8] similarly told the CMA that *'it was never a case of you need to be at price. It was [...] "Could you have a look at this?" I didn't have a goal of getting them there.'* [Korg Employee 8] described a typical call to [Reseller 1] as *'about 20 to 30 seconds long [...] "Hello, mate; could you have a look at these for me?", and he would go, "Yeah, no problem", and he would have a look.'* [Korg Employee 8] also submitted that *'probably 80, 90%'* of his contact with [Reseller 1] was *'via email'*, and he would only call *'if I was in the car'*.<sup>322</sup>

Inconsistencies in Korg UK's evidence in relation to Korg UK's understanding of contact between Korg UK and [Reseller 1] relating to [Reseller 1]'s pricing

- 4.59 However, the CMA notes a number of inconsistencies (set out below) between the account above, and other evidence from [Korg Employee 8] or other Korg UK staff.
- a. [Korg Employee 8] explained that he contacted [Reseller 1] about its advertised pricing to flag 'margin issues' (as set out in paragraphs 4.56 to 4.58 above). However, he also told the CMA that on 14 March 2017 he contacted [Reseller 1], possibly with the goal of [Reseller 1] re-pricing to the Minimum Price (see paragraph 4.194 below).
  - b. While [Korg Employee 8] indicated that he may have contacted [Reseller 1] about its margin because *'you're a business, and we're selling to you, this is of great concern'* (see paragraph 4.50 above), he also posited that [Reseller 1] was perfectly able to discount Relevant Products due to [X]. In the light of [Korg Employee 8]'s understanding that [Reseller 1] might not require a significant margin on selling MI given [X] (see paragraph 4.42 above), it is difficult to

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<sup>320</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.113, line 10 to p.115, line 5 (*'I'd have gone down that route with them because that's the training I had [...] That was hammered home [...], mainly from [Korg Senior Employee 3] saying [...] "You cannot tell anyone what to sell for"'*). [Korg Employee 8] could not recall a specific discussion with [Reseller 1] about this, however. Text in square brackets added by the CMA.

<sup>321</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.51, line 16 to p.53, line 22; p.114, line 22 to p.116, line 2.

<sup>322</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.106, line 19 to p.107, line 8; p.109, lines 9–12; p.272, lines 8–22 (*'[J]ust to let them know that [...] you're giving away margin, you don't need to [...] You could be making more margin should you choose to'*).

understand why [Korg Employee 8] kept contacting [Reseller 1] about its margin, unless it was a pretext to request that [Reseller 1] increase its retail pricing to the Minimum Price.

- c. Many – but not all<sup>323</sup> – contemporaneous Korg UK documents citing [Reseller 1] refer only to retail price, and not to any margin opportunities available to [Reseller 1]. The CMA considers it less credible that such documents relate to Korg UK concerns that [Reseller 1] was missing out on margin, in particular if they mentioned the retail prices of multiple MI Resellers<sup>324</sup> and/or a price ‘reset’.<sup>325</sup> For instance, Korg UK noted in a 2017 WhatsApp discussion ‘*[Reseller 1] sorting at 4pm*’ and ‘*[Reseller 1] will move to 260*’, and some MI Resellers being too low (or ‘*right*’) and a price ‘reset’.<sup>326</sup>

- 4.60 The CMA concludes that the weight of evidence set out at paragraph 4.59 above casts doubt on Korg UK submissions that it only contacted [Reseller 1] to highlight that there were margin opportunities available for [Reseller 1]. This doubt is further increased by [Reseller 1]’s understanding of such contact – which is set out below.

[Reseller 1]’s understanding of contact between Korg UK and [Reseller 1] relating to [Reseller 1]’s pricing

- 4.61 [Reseller 1] did not understand contact from Korg UK about pricing to concern scope for [Reseller 1] to make more margin. Rather [Reseller 1 Employee 5] understood such contact as a complaint about [Reseller 1]’s discounting, and a request to increase pricing to the Minimum Price. He submitted that Korg UK called ‘every single time’ [Reseller 1]’s prices differed from the Minimum Price.<sup>327</sup>
- 4.62 [Reseller 1 Employee 5] told the CMA that [Reseller 1] received calls and emails asking it ‘*to look into prices, and [...] when you have been dealing with Korg for a certain amount of time, then you know exactly what [...] this means; it was just to get your price to what they are recommending.*’ To him, Korg UK’s [Korg Employee 8]’s emails with a weblink and no further explanation meant ‘“*Look into this product. The price is not what we would like it to be*”’. He understood very brief emails from Korg UK (e.g. titled ‘*urgent*’) and those where ‘*they were saying that we’re not making any margin*’ not really to be about [Reseller 1]’s margin but about [Reseller 1] pricing

<sup>323</sup> For example, on 4 March 2017 [Korg Employee 4] reported to various Korg UK colleagues via WhatsApp ‘*Volca bass £101*’ – to which his colleague [Korg Employee 2] replied, ‘*[Reseller 1] must be making a loss on that volca*’: URN C\_KOR02262 (WhatsApp messages of [Korg Employee 4] and [Korg Employee 2] on 4 March 2017).

<sup>324</sup> The CMA would not expect all resellers to necessarily make the same margin, even if at the same retail price, so all things being equal it appears less credible Korg UK would contact many resellers based on concerns about margins.

<sup>325</sup> [Korg Senior Employee 3], for example, told the CMA that a ‘reset’ (or ‘re-set’) would have involved ‘*requesting a dealer to, sort of, re-set their price to the [...] SRP*’: URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.123, lines 20–22; URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.229, lines 19–25.

<sup>326</sup> URN C\_KOR00948 (WhatsApp messages between [Korg Employee 15], [Korg Employee 11], [Korg Employee 8], [Korg Senior Employee 3] and [Korg Senior Employee 1] on 30 November and 1 December 2017).

<sup>327</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.44, lines 21–23.

below the Minimum Price, remarking *'As if we didn't know how much [margin] we were doing.'*<sup>328</sup>

- 4.63 [Reseller 1 Employee 5] indicated that Korg UK may have tried to minimise written correspondence that referred to [Reseller 1]'s advertised prices to avoid generating an evidence trail: *'Most of the time it was on -- on the phone, unless there was no, sort of, risks'*, i.e. not making *'a request that is not, I think, legally, possible'*. For example, *'setting a price at the RRP'* was not something Korg UK asked directly in writing: *'they would do it on the phone'*.<sup>329</sup>
- 4.64 [Reseller 1 Employee 3] submitted that *'Korg would mostly phone [Reseller 1 Employee 5] or me up to pressurise us to raise the prices to Korg's level & threaten us in the event we didn't. [...] [Korg Employee 8] would regularly phone us to demand we raised prices and then email us a link to the relevant product. Then, when we received just a link in an email, we knew this meant we had to raise the price of the product in the link.'*<sup>330</sup>

CMA's consideration of the contact between Korg UK and [Reseller 1] about [Reseller 1]'s pricing

- 4.65 As set out at paragraphs 4.56 to 4.58 above, Korg UK (and Korg UK staff) made various submissions to the effect that Korg UK would never have contacted [Reseller 1] to request that [Reseller 1] raise its pricing to the Minimum Price.
- 4.66 For the reasons set out below, the CMA concludes that these submissions are not credible in the light of the weight of evidence (including contemporaneous documentary evidence and evidence from [Reseller 1]'s staff).
- 4.67 First, the CMA notes some inconsistencies in Korg UK's evidence. There are inconsistencies in Korg UK's evidence relating to the content of its contact with [Reseller 1] (see paragraph 4.59 above). Those inconsistencies echo other inconsistencies in Korg UK's evidence relating to the content of its contact with MI Resellers more generally (see paragraphs 3.108 to 3.110 above).
- 4.68 Second, many – but not all – contemporaneous Korg UK documents citing [Reseller 1] refer only to retail price, and not to any margin opportunities available to [Reseller 1].

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<sup>328</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.41, lines 1–4; p.133, lines 8–10. See p.117, line 20 to p.118, line 2 in relation to the email set out at paragraphs 4.150–4.151 below. See e.g. p.108, lines 11–13 in relation to the email set out at paragraph 4.136 below (*'the subject is "Urgent". So, that's an indirect request for resetting the sterling street price on our system for [...] those [...] products'*). Text in square brackets added by the CMA.

<sup>329</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.85, lines 10–23; p.86, lines 18–24.

<sup>330</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.3/ question 3(a); p.8/question 10(d). Text in square brackets added by the CMA. [Reseller 1 Employee 2] similarly submitted that *'Korg also wanted us to adhere to their recommended retail prices, as communicated via emails to [Reseller 1 Employee 5] and [Reseller 1 Employee 3]'*: URN C\_KOR02336 ([Reseller 1 Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.1/question 1.

- 4.69 Third, while Korg UK's emails to [Reseller 1] often referred to 'margin', the regularity of contact overall (and the sometimes repeated contact regarding specific Relevant Products) belies a more immediate concern, about [Reseller 1]'s advertised pricing.
- 4.70 Fourth, Korg UK emailed [Reseller 1] only [Reseller 1] weblinks with very few words of explanation, and [Reseller 1] staff understood such emails as an instruction to raise its pricing of those Relevant Products to the Minimum Price. This shows that Korg UK had explained to [Reseller 1] at an earlier date what Korg UK meant by such emails.
- 4.71 Fifth, the CMA notes that Korg UK's staff were very familiar with competition law. [Korg Senior Employee 3] of Korg UK was prepared to admit his fears that '*[w]e were straying very close to the line, or over the line when it comes to being involved in any type of pricing conversation*'.<sup>331</sup> Korg UK's [Korg Employee 8] stated that he understood from his internal Korg UK competition law training that he was allowed to talk about 'errors' or 'margins'. The CMA concludes that Korg UK staff, because of their awareness of competition law, understood that Korg UK's conduct was illegal. Therefore, they operated under a culture of concealment and tried to avoid generating an evidence trail of potentially incriminating written records (see paragraphs 3.147 to 3.162 above). Korg UK staff did this in order to avoid detection of potential illegality in relation to the Korg Pricing Policy. One aspect of this culture was to '*stop using direct language*', i.e. to use coded wording instead to refer to resale pricing.<sup>332</sup>
- 4.72 Finally, in taking account of [Reseller 1] staff's clear understanding of [Reseller 1]'s email and telephone contact with Korg UK, the CMA concludes that [Reseller 1] correctly understood the nature and content of Korg UK's contact with [Reseller 1] to be about requesting [Reseller 1] to raise its pricing of Relevant Products to the Minimum Price (see paragraphs 4.61 to 4.64 above).
- 4.73 Therefore, the CMA concludes that Korg UK often contacted [Reseller 1] to ask it to increase its pricing of Relevant Products to the Minimum Price during the Relevant Period.

***[Reseller 1]'s general compliance with Korg UK's requests to increase [Reseller 1]'s pricing to the Minimum Price during the Relevant Period***

- 4.74 Based on the evidence set out in this Part 4.C.IV. (in particular from paragraph 4.133 below onwards) and Annex C – as complemented by the evidence set out in detail at Annex B – the CMA concludes that during the Relevant Period:

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<sup>331</sup> URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.118, line 1 to p.119, line 13 – in relation to URN C\_KOR00962 (Note of [Korg Senior Employee 3] titled '*[Korg Senior Employee 5] Conversation*' dated 17 December 2017). The CMA considers '*the line*' to be a notional dividing line denoting where conduct becomes an infringement of competition law.

<sup>332</sup> URN C\_KOR00964 (iPhone note of [Korg Senior Employee 3] dated 19 December 2017).

- [Reseller 1] complied on numerous occasions with Korg UK's requests to increase [Reseller 1]'s online pricing for one or more of the Relevant Products to the Minimum Price; and
- [Reseller 1] did not always comply promptly (and, on occasion, not at all) with each such request.

#### Evidence of [Reseller 1]'s compliance with the Korg Pricing Policy

- 4.75 The evidence shows that on numerous occasions during the Relevant Period [Reseller 1] complied with requests from Korg UK to increase [Reseller 1]'s online pricing for one or more of the Relevant Products to the Minimum Price.
- 4.76 [Reseller 1] submitted that it tried to price competitively, by matching the lowest retail prices visible to [Reseller 1] on e.g. Google Shopping and eBay. It did so manually, or on a more automated basis after [X] 2016 (when it moved to using software that can automatically monitor, and match, competitors' prices). On occasion, [Reseller 1] implemented '*[m]anual over-rides*' on its pricing – for reasons including a '*[r]equest from supplier*' (such as Korg UK) – to revert to the Minimum Price after [Reseller 1] had lowered its pricing to match a competitor's price. This would pause, in principle for 14 days, price monitoring (and any price matching) that [Reseller 1] would have otherwise undertaken on that product: the '*effect [...] would be to temporarily set the Relevant Korg Products to the RRP price, or a particular price requested by Korg*'.<sup>333</sup>
- 4.77 [Reseller 1 Employee 3] told the CMA that [Reseller 1 Employee 5] had lead responsibility (at least since May 2016) for [Reseller 1]'s responses to any '*[r]equest from supplier*' relating to [Reseller 1]'s online pricing. He added that [Reseller 1 Employee 2] had overall authority over this, and '*told me to do as the supplier demanded so that we don't lose our discounts, access to products or face account closure*'.<sup>334</sup> [Reseller 1 Employee 5] confirmed this.<sup>335</sup>
- 4.78 [Reseller 1 Employee 2] told the CMA that '*[Reseller 1 Employee 5] and [Reseller 1 Employee 3] both received requests from Korg*' and that he discussed, with these two colleagues of his, how to respond: '*temporarily comply with Korg's request by means of resetting the product's retail price, and suspending the manual or automated competitor price-matching process, for 14 days*'.<sup>336</sup>
- 4.79 [Reseller 1 Employee 5] submitted that [Reseller 1] would '*always*' adopt the Minimum Price for the Relevant Products after contact from Korg UK in

<sup>333</sup> URN C\_KOR02177 ([Reseller 1] reply dated 5 December 2019 to a s.26 Notice).

<sup>334</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.4/question 4.

<sup>335</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.71, line 3 to p.72, line 7 (e.g. '*calls from the suppliers were handled by [Reseller 1 Employee 3] at first and then, because he couldn't stand it anymore, it's been given to me*').

<sup>336</sup> URN C\_KOR02336 ([Reseller 1 Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.2/question 2: '*The process discussed by [Reseller 1 Employee 3], [Reseller 1 Employee 5] and myself was to temporarily comply with Korg's request by means of resetting the product's retail price, and suspending the manual or automated competitor price-matching process, for 14 days, after which time the manual or automated competitor price-matching would be resumed*'.

circumstances, e.g. *‘when they called directly; we thought it was a step into a sort of conflict [...] they wouldn’t let me go [i.e. put down the telephone] until that was done’*. According to [Reseller 1 Employee 5], this may have occurred once a week, in general. He explained that Korg UK may have focused *‘on some products -- key products for them, and every single time your price was just -- was different from the RRP price, they would be on the phone’*. [Reseller 1 Employee 5] also submitted that [Reseller 1] would adopt the Minimum Price if Korg UK *‘literally stressed the fact that we already received the pricelist, and [...] that it was the sort of time [...] to do something’*. When asked to indicate how often, for every ten calls he received from Korg UK, he did not cooperate [Reseller 1 Employee 5] replied *‘probably [...] a few times’*.<sup>337</sup>

- 4.80 The evidence of [Reseller 1]’s compliance with Korg UK requests to increase [Reseller 1]’s online pricing for one or more of the Relevant Products to the Minimum Price during the Relevant Period as set out above and at paragraphs 4.135 to 4.216 below (and Annex C) is complemented by certain other, quantitative evidence.<sup>338</sup>
- 4.81 The CMA has examined data detailing each *‘Competitor’* price observed by [Reseller 1] (logged as *‘Comp Price’*), and the pricing<sup>339</sup> adopted by [Reseller 1], on 37 Relevant Products (the [Reseller 1] Data). Within this [Reseller 1] Data, [Reseller 1] recorded e.g. details of other MI Resellers’ pricing compared to [Reseller 1]’s pricing at a given point in time, and whether [Reseller 1] decided to match that other pricing (or leave its own pricing unchanged). The CMA has also considered [Reseller 1]’s submissions about sample pricing increases on 26 additional Relevant Products ([Reseller 1] Additional Data). Set out in Annex B are further details relating to, and the CMA’s assessment of the quantitative evidence within the [Reseller 1] Data and the [Reseller 1] Additional Data.<sup>340</sup>
- 4.82 The CMA’s examination of the [Reseller 1] Data and the [Reseller 1] Additional Data also shows that on numerous occasions during the Relevant Period [Reseller 1] complied with requests from Korg UK to increase [Reseller 1]’s online pricing for one or more of the Relevant Products to the Minimum Price.

<sup>337</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.89, line 14 to p.90, line 22; p.91, line 23 to p.93, line 5; p.44, line 20 to p.45, line 6; p.67, line 14–18. Text in square brackets added by the CMA.

<sup>338</sup> The CMA concludes that this quantitative evidence complements other evidence, set out in this Decision, showing that Korg UK and [Reseller 1] entered into an agreement and/or concerted practice that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price in accordance with the Korg Pricing Policy. However, the CMA considers that this quantitative evidence is not actually necessary to prove the existence of such an agreement and/or concerted practice in this case, in the light of the other evidence set out in this Decision.

<sup>339</sup> [Reseller 1] sells the Relevant Products online via its own websites, and eBay. [Reseller 1] adopted sometimes the same pricing, and sometimes different pricing, as between its own websites, and eBay (see paragraph 4.37 above). In the [Reseller 1] Data, *‘[Reseller 1]’* and *‘eBay’* entries denote the pricing adopted by [Reseller 1] on its own websites and eBay respectively. In this Part 4.C.IV. and Annex C, ‘pricing’ may refer to any price(s) adopted by [Reseller 1] on its own websites and/or on its eBay channel.

<sup>340</sup> For example, within Annex B the 37 documents comprising the [Reseller 1] Data are listed at footnote 720 below, and the submission containing the [Reseller 1] Additional Data is noted at footnote 721 below.



***Evidence showing an understanding between Korg UK and [Reseller 1] that [Reseller 1] was allowed to price below the Minimum Price temporarily to match other resellers of the Relevant Products***

- 4.83 [Reseller 1 Employee 5] submitted that [Reseller 1] tried to be competitive despite the Korg Pricing Policy, by checking other MI Resellers' prices for the Relevant Products and if it found one below the Minimum Price, maybe matching it, at least temporarily – and would '*send in links [to Korg UK] to justify what we were going to do, and most of the time he said that he would sort of [...] sort the situation*'.<sup>341</sup>
- 4.84 Documentary evidence (detailed below) shows that there were regular instances when [Reseller 1] openly referred to its intention to lower its pricing for a Relevant Product as another MI Reseller was not adhering to the Korg Pricing Policy.
- 4.85 In the CMA's view, this shows that there was an understanding between Korg UK and [Reseller 1] that [Reseller 1] was allowed to price below the Minimum Price to match another MI Reseller's lower pricing, provided that [Reseller 1] raised its pricing again once the other MI Reseller's pricing increased. Based on the evidence in the CMA's possession, this was normally limited to a small subset of the Relevant Products and focussed on different products over time.

***Partial non-compliance by [Reseller 1] during the Relevant Period no impediment to finding an agreement and/or concerted practice with Korg UK***

- 4.86 [Reseller 1 Employee 5] told the CMA that whether he complied was a '*matter of if I felt that the pressure was too high and then we had to -- to satisfy their request, or if it could wait and see if they were going somewhere else or they were busy with something else again. It's not really logical or mathematical; it's more of a, just feeling how the situation is -- is going*'. He submitted that he tried to follow a policy aimed at '*not matching the RRP price straight away*' and Korg '*leaving us alone as long as possible*.' For example, he may have increased [Reseller 1]'s pricing to the Minimum Price only after Korg UK's third email request.<sup>342</sup>
- 4.87 [Reseller 1 Employee 5] told the CMA that sometimes he '*deliberately decided not to cooperate because [...] I didn't like the situation, and I didn't like the way they – they were just deciding on what we, should be doing with products that we bought, because we are [...] the owners of the products*'.<sup>343</sup> However, [Reseller 1 Employee

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<sup>341</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.94, line 16 to p.95, line 15.

<sup>342</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.71, line 3 to p.72, line 7; p.91, lines 12–16. While [Reseller 1 Employee 5] gave the impression that he had discussed these rules of thumb with [Reseller 1 Employee 3] and [Reseller 1 Employee 2], neither [Reseller 1 Employee 3] nor [Reseller 1 Employee 2] could recall them. [Reseller 1 Employee 3] submitted that [Reseller 1] had '*no official written guidelines or strategy [...] for handling any request*' – other than [Reseller 1 Employee 2] advising that [Reseller 1] should '*do as the supplier demanded so that we don't lose our discounts, access to products or face account closure*': URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.4/question 4. See also URN C\_KOR02336 ([Reseller 1 Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.2/question 2.

<sup>343</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.67, line 14, to p.68, line 7; p.90, line 6 to p.91, line 16; p.46, line 13, to p.47, line 25.

5] also submitted that while he sometimes tried to resist requests from Korg UK by explaining that [Reseller 1] was simply matching another MI Reseller's price, Korg UK would counter that the other price was '*going to be sorted*', eventually convincing him to '*put up the price*', in line with the Korg Pricing Policy: see also paragraph 4.94 below.

- 4.88 This evidence of instances of [Reseller 1]'s (sometimes temporary) non-compliance during the Relevant Period with a Korg UK request to increase [Reseller 1]'s online pricing for a Relevant Product to the Minimum Price is complemented by certain other, quantitative evidence. The CMA's assessment of this additional, quantitative evidence is set out in Annex B.
- 4.89 In any event, the CMA considers that from a legal point of view, any partial non-compliance by [Reseller 1] with the agreement and/or concerted practice – for certain Relevant Products, at certain times (whether temporary 'price-matching' and/or other 'cheating') – does not preclude the finding that an agreement and/or concerted practice existed.

### ***Sanctions for non-compliance with the Korg Pricing Policy and [Reseller 1]'s fear of sanctions***

- 4.90 The CMA sets out below, by way of contextual background, why [Reseller 1] felt under commercial pressure to adhere to the Korg Pricing Policy. The CMA then assesses details of sanctions threatened and imposed on [Reseller 1] by Korg UK. Finally, the CMA assesses the reasons why [Reseller 1] perceived there was a credible threat of sanctions if it did not comply with the Korg Pricing Policy, which led [Reseller 1] to adhere to the Korg Pricing Policy throughout the Relevant Period.

#### **Context of pressure felt by [Reseller 1] to agree to Korg UK's requests to increase prices**

- 4.91 The evidence shows that [Reseller 1] felt commercial pressure to increase its pricing of the Relevant Products to the Minimum Price, for four reasons.
- 4.92 First, [Reseller 1] considered Korg UK to be commercially very important to its MI business, and [Reseller 1]'s bargaining power to be relatively weak (see paragraphs 4.40 and 4.41 above). This accords with [Reseller 1 Employee 5] stating that he could not resist or delay every Korg UK request to increase [Reseller 1]'s pricing, as Korg UK had '*the upper hand*'.<sup>344</sup>
- 4.93 Second, [Reseller 1 Employee 5] described how fluctuations in the frequency and nature of Korg UK calls and emails could place pressure on [Reseller 1]. He submitted that Korg UK called more frequently (and for longer) if [Reseller 1]'s pricing did not change after initial Korg UK's contact, and if '*you had a new pricelist*

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<sup>344</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.67, line 24 to p.68, line 7 ('it was a question of cooperating or stopping working with them' given '*the popularity of those products -- they had [...] the upper hand*').

*coming [...] the tone of voice is more [...] conveying urgency, stress*'.<sup>345</sup> When contact from Korg UK meant that [Reseller 1 Employee 5] *'felt that the pressure was a bit too high'*, [Reseller 1] paused price-matching other MI Resellers, and priced at the Minimum Price, to ensure *'Korg's attention [was] shifting to someone else [...] we couldn't spend that much time dealing with endless issues or conflicts'*: [Reseller 1] *'had to [...] satisfy their requests and try and see when it was possible to get back to our activity as soon as possible'*.<sup>346</sup>

- 4.94 Third, [Reseller 1 Employee 5] told the CMA that calls applied more pressure than emails, such that [Reseller 1] sometimes agreed in real-time to Korg UK's requests to raise its pricing to the Minimum Price. Korg UK would call to ask why [Reseller 1] was pricing below the Minimum Price. If [Reseller 1] said it was matching another MI Reseller's price, Korg UK's [Korg Employee 8] would say that the other price was *'going to be sorted'*. [Reseller 1] would therefore *'put up the price [...] get in, out of the way and monitor pricing again'*. [Reseller 1]'s pricing was thus increased to the Minimum Price during a call maybe *'once a week, once a couple of weeks'*.<sup>347</sup> [Reseller 1 Employee 3] submitted, somewhat similarly, that [Korg Employee 8] would call [Reseller 1] in conjunction with (and possibly before) emailing [Reseller 1], thereby reinforcing his emails to [Reseller 1].<sup>348</sup>
- 4.95 Fourth, the CMA concludes that [Reseller 1] felt under pressure to agree to Korg UK requests to increase [Reseller 1]'s pricing of the Relevant Products to the Minimum Price because [Reseller 1] perceived there was a credible risk of adverse consequences if [Reseller 1] did not agree: see e.g. paragraphs 4.96 to 4.126 below and Annex A.

#### Korg UK threatened and imposed sanctions on [Reseller 1] for not adhering to the Korg Pricing Policy

- 4.96 Set out below is the CMA's assessment of Korg UK's submissions to the effect that Korg UK never threatened or imposed sanctions on [Reseller 1], and other evidence (e.g. contemporaneous documentary evidence and submissions from [Reseller 1], its staff and witness evidence from [Reseller 1] staff).

<sup>345</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.86, lines 21–24; p.44, lines 1–13 (*'If by let's say 10-11 in the morning, changes are late and [...] [Korg Employee 8] was calling, it only took about 15 minutes, 20 minutes on the phone. If in the afternoon it wasn't – still not done, then it is half an hour, 45 minutes on the phone, emails'*).

<sup>346</sup> See paragraph 4.54 above; URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.43, line 19 to p.44, line 13. Text in square brackets added by the CMA.

<sup>347</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.46, line 13 to p.47, line 8 (*'the phonecalls were triggered by a price that they found on the website [...] a price for a product that they're not really satisfied with. [...] [T]hey would give me a call, and then asking me why I would advertise at that price. So, if I had time, I would have been on Google Shopping and saying, "Well, look, you have got x and y companies doing that price, and we are just matching here to be as competitive as possible". And then he [Korg Employee 8] would have tried to manage to get that price, advertised at the RRP price again, by saying [...] "It's going to be sorted" [...]. In other words, there's no real need for us to match again, [...] to match that lowest price, or to be different, to have our retail price different from the RRP price, because they're going to rearrange all of this. So, from that point on my argument of being competitive and matching doesn't work anymore, and, well, we put up the price, and just tried to monitor -- well, tried to get in, out of the way and monitor pricing again, so renewing with price-matching afterwards'*); p.92, line 1 to p.93, line 5. Text in square brackets added by the CMA.

<sup>348</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.3, question 3(a); p.8/question 10(d). Text in square brackets added by the CMA.

4.97 As set out below, the CMA concludes that the weight of evidence shows that:

- Korg UK seriously considered internally applying sanctions on [Reseller 1] for non-compliance with the Korg Pricing Policy;
- Korg UK sometimes threatened [Reseller 1] with and occasionally did in fact apply sanctions on [Reseller 1] for non-compliance with the Korg Pricing Policy; and
- [Reseller 1] perceived there was a credible threat of sanctions if it did not comply with the Korg Pricing Policy, which led [Reseller 1] to adhere to the Korg Pricing Policy throughout the Relevant Period.

*Sanction considered internally by Korg UK: withholding [Reseller 1]'s additional discounts/rebate*

4.98 In 2017, Korg UK appears to have seriously considered withholding additional discounts from [Reseller 1] as it transitioned onto the Korg Charter.

4.99 On 14 March 2017 Korg UK staff exchanged messages about the pricing of [Reseller 1], [Reseller] and [Reseller] being below the Minimum Price: see paragraph 4.194 below. Korg UK's [Korg Employee 2] commented as follows: *'Hmnnn not impressed'; 'They obviously want [X]% margin' and 'I have a naughty list and have add [sic] all offenders for up front margin consideration when it comes to next month.'*<sup>349</sup>

4.100 [Korg Employee 2] submitted in 2020 that he could not recall the MI Resellers to which he was referring. He explained that, under the Korg Charter to be *'introduced imminently'* at that time, a *'[X]% achievable margin'* was available to MI Resellers who did not meet *'requirements in terms of [X]'* – and MI Resellers who did could receive further discounts of [X] (on [X] supplied by Korg UK). [Korg Employee 2] added that he *'was not authorised to determine the dealer margin'*, and that his use of the word *'offenders'* did *'not imply that there was a consequence for any dealer.'*<sup>350</sup>

4.101 However, Korg UK's [Korg Senior Employee 3] interpreted [Korg Employee 2]'s comments as related to [Reseller 1]'s pricing, albeit they were for amusement value only. According to [Korg Senior Employee 3] only Korg UK's [Korg Senior Employee 2] could decide what rebate/margin Korg UK paid any MI Reseller, and Korg UK never withheld any rebate/margin due under the Korg Charter.<sup>351</sup> The CMA notes

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<sup>349</sup> URN C\_KOR00911 (WhatsApp messages of [Korg Employee 2], [Korg Employee 8] and [Korg Employee 15] on 14 March 2017).

<sup>350</sup> URN C\_KOR02332 ([Korg Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.4/question 6(b): *'If the dealer met the absolute minimum requirement, for [X], they would be offered [X]'*.

<sup>351</sup> Partly because Korg UK was *'talking to'* its legal advisers *'on quite a regular basis'* about *'what can we do, what can't we do'*: URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.262, line 12 to p.265, line 23. See also URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.292, lines 13–20 (*'no margin was taken away from any dealers, [...] as far as I'm aware'*). The CMA notes that, notwithstanding Korg UK's submissions that it never withheld rebate/margin under the Korg Charter, its internal consideration of this actually pre-dated [Reseller 1]'s transition to the Korg Charter.

that [Korg Senior Employee 3] provided this explanation despite his contemporaneous notes in late 2017 about only giving ‘*marketing rebate [...] to good dealers*’ (see footnote 159 above).

- 4.102 [X]% ‘*up front*’ was cited in other messages within Korg UK on 14 March 2017 about [Reseller 1]. [Korg Employee 4] of Korg UK wrote ‘*£101.38 volca bass [Reseller 1] [i.e., almost £40 below the Minimum Price] [...] How many chances are we giving them?*’. [Korg Senior Employee 3] replied ‘*This is the transition period. They will be on the [X]% up front*’. Korg UK’s [Korg Employee 7] replied ‘*I’d like to transition them into a small dark room*’. [Korg Employee 2] replied ‘*... 6 feet under*’.<sup>352</sup>
- 4.103 [Korg Employee 2] of Korg UK submitted that a price of ‘*£101.38*’ was cited in one such message due to a belief that [Reseller 1]’s margin was only ‘*1%*’, that the ‘*transition period*’ meant just before Korg UK introduced the Korg Charter and that the ‘*How many chances*’ comment ‘*does not represent a specific threat but rather how many times we would have to identify and highlight to [Reseller 1], products that were selling at a loss and the opportunity to make more margin*’.<sup>353</sup>
- 4.104 However, Korg UK’s [Korg Employee 8] told the CMA that this exchange was ‘*implying wouldn’t it be nice if we could close them down [...] [w]hich obviously we can’t*’. [Korg Employee 8] described possible Korg Charter discounts similarly to [Korg Employee 2], adding that the ‘*original plan*’ of a MI Reseller getting ‘*[X]% off the price initially*’ then ‘*earn the other [X]% back as a rebate after [X] months [...] didn’t happen in the end*’ – after legal advice, and given the risk that ‘*you’re implying other things*’.<sup>354</sup>
- 4.105 In contrast, [Reseller 1 Employee 3] felt there was an implied link between discounts available to [Reseller 1] and [Reseller 1]’s advertised retail pricing: ‘*Korg would frequently put pressure on [Reseller 1] & threaten to take away additional discounts we were receiving unless we raised the retail price of their products*’.<sup>355</sup>
- 4.106 In support of this, the CMA notes that around [early] 2017 another MI Reseller, [Reseller], had been told that Korg UK would ‘*be monitoring those that get in line by the 14th and those that don’t will not get the first extra marketing discount when the agreements are all signed*’ (see paragraph 3.120 above).

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<sup>352</sup> URN C\_KOR02601 (WhatsApp message of [Korg Employee 4], [Korg Senior Employee 3], [Korg Employee 7] and [Korg Employee 2] on 14 March 2017). The CMA notes that £101 was below Korg UK’s ‘*SSP inc. VAT @20%*’ for the Volca Bass at the time (i.e. £139.00): see URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017). Text in square brackets added by the CMA.

<sup>353</sup> URN C\_KOR02332 ([Korg Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.5/question 8(a), in reply to CMA queries stating that these comments were [Korg Employee 2]’s, whereas they were as described in paragraph 4.102 above.

<sup>354</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.300, line 12 to p.303, line 16; p.304, lines 7–12, in reply to CMA queries stating that some comments were [Korg Employee 8]’s, whereas they were as described in paragraph 4.102 above.

<sup>355</sup> ‘*If we didn’t adhere to their demands they would take away or threaten to take away any additional discounts, but I do not recall specific instances of this*’: URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.3/question 3; p.5/question 5(d).

4.107 It is clear from this that, in early 2017, Korg UK was seriously considering withholding additional discounts from [Reseller 1] as it transitioned to the Korg Charter.

*Sanction threatened by Korg UK: termination of [Reseller 1]'s account*

4.108 The CMA sets out in Annex A its consideration of the evidence in relation to whether Korg UK threatened in or around 13 July 2017 to close [Reseller 1]'s account due to [Reseller 1] having failed to adhere to the Korg Pricing Policy.

4.109 Based on the evidence set out in Annex A, the CMA concludes that:

- Korg UK considered terminating [Reseller 1]'s account, for reasons including both [a certain condition in Korg UK's SDA] and [Reseller 1]'s pricing of Relevant Products below the Minimum Price;
- [Reseller 1] understood that Korg UK was considering termination of [Reseller 1]'s account in relation to [a certain condition in Korg UK's SDA] and its pricing of Relevant Products below the Minimum Price;
- while Korg UK did not in fact terminate [Reseller 1]'s account, [Reseller 1] considered termination to be a credible threat if [Reseller 1] did not adhere to the Korg Pricing Policy, irrespective of [a certain condition in Korg UK's SDA].

*Sanction applied by Korg UK: temporarily increasing its trade prices for [Reseller 1]*

4.110 The CMA concludes that Korg UK temporarily increased trade prices payable by [Reseller 1] by way of sanction for not adhering to the Korg Pricing Policy.

4.111 For a certain period in 2017, [Reseller 1] could only see on Korg's dealer portal a trade price for a Vox AC2RV (not a Relevant Product) which exceeded that on the relevant Korg UK price list – and the purchase price first paid by [Reseller 1]. [Reseller 1 Employee 5] emailed Korg UK about this, e.g. on 1 September 2017, stating that this apparent increase in trade prices allowed [Reseller 1] only a '9% profit margin. Not the profit margin you usually offer your dealers.'<sup>356</sup> [Reseller 1 Employee 5] emailed [Korg Employee 8] and [Korg Employee 7] of Korg UK on 15 December 2017 'once again, regarding the profit margin we are offered on Vox products'.<sup>357</sup>

4.112 [Korg Employee 8] told the CMA that he would have asked his colleague [Korg Employee 7] to deal with [Reseller 1]'s query, and there was 'every chance' that this had 'quite literally been overlooked', since [S<].<sup>358</sup>

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<sup>356</sup> URN ER\_KOR01365 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 1 September 2017). [Reseller 1 Employee 5] sent [Korg Employee 7] a similar query, on 5 September 2017: URN ER\_KOR01366 (Email from [Reseller 1 Employee 5] to [Korg Employee 7] on 5 September 2017).

<sup>357</sup> URN ER\_KOR01363 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] and [Korg Employee 7] on 15 December 2017).

<sup>358</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.362, line 3 to p.363, line 21.

- 4.113 [Reseller 1 Employee 5] submitted that he initially thought this was a '*mistake*', so '*complained several times about this to [Korg Employee 8] and [Korg Employee 7] [...] nothing happened and then at some point they just said, "Oh, we were thinking that he [i.e. the other person] was dealing with the issue"*'. Ultimately, [Reseller 1 Employee 5] believed that Korg UK had applied a sanction in the form of increased trade prices in relation to this Korg product (in this instance), for [Reseller 1] pricing below the Minimum Price on the Relevant Products. [Reseller 1] stated that '*[Reseller 1 Employee 5] believed that Korg might be punishing us for not fully cooperating with their pricing policy*'.<sup>359</sup>
- 4.114 [Reseller 1 Employee 3] similarly submitted that this situation had a '*direct connection*' to Korg UK's requests to increase [Reseller 1]'s pricing to the Minimum Price: '*If we didn't adopt the retail pricing we would have our trade discount reduced [...] If we didn't adhere to their demands they would raise or threaten to raise our trade price*'.<sup>360</sup>
- 4.115 [Reseller 1] submitted that the trade price issues '*reduced [Reseller 1]'s sales of Vox products [...] as [Reseller 1] no longer offered customers a competitive retail price. Consequently, the range reduced to the point where we sold only a few of these products*'.<sup>361</sup>
- 4.116 The CMA concludes that Korg UK's conduct in this regard helped give rise to [Reseller 1]'s understanding that there was a credible risk of Korg UK increasing [Reseller 1]'s trade prices if it did not adhere to the Korg Pricing Policy.
- Sanction applied by Korg UK: restricting [Reseller 1]'s access to certain Korg products*
- 4.117 The CMA concludes that Korg UK temporarily restricted [Reseller 1]'s access to Relevant Products.
- 4.118 Korg UK submitted that it never actually applied any sanction depriving [Reseller 1] of access to any product. [Korg Senior Employee 3] of Korg UK submitted that there '*wasn't any removal*' of [Reseller 1]'s product access permits – [Reseller 1] had '*access to everything they want and they always have done*'.<sup>362</sup> Korg UK's [Korg Employee 8] submitted, similarly, that Korg UK never turned off any [Reseller 1] product access permits.<sup>363</sup>

<sup>359</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.51, line 11 to p.52, line 7. URN C\_KOR02423 ([Reseller 1] reply dated 10 February 2020 to a s.26 Notice), p.6/question 7. Text in square brackets added by the CMA.

<sup>360</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.4/question 3(c); p.5/question 5(c).

<sup>361</sup> URN C\_KOR02423 ([Reseller 1] reply dated 10 February 2020 to a s.26 Notice), p.6/question 7.

<sup>362</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.232, line 6 to p.233, line 16.

<sup>363</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.343, lines 19–28; p.346, lines 3–15.

- 4.119 In contrast, [Reseller 1 Employee 5] told the CMA that Korg UK would call to threaten to restrict access to certain Korg products *'when I decided not to cooperate'*: *'the type of sentence that would come in the conversation, very abruptly [...]'* *"Well, if you want the next product, just -- you know what to do"*. He added that such threats may have related to certain products (but could not specifically recall Korg UK ever limiting access to a Relevant Product) or *'having the products when we -- we need them'*.<sup>364</sup> [Reseller 1 Employee 3] recalled that *'Korg would frequently put pressure on [Reseller 1]'* by means of similar general threats.<sup>365</sup>
- 4.120 [Reseller 1 Employee 5] likewise submitted that Korg UK may threaten, at least indirectly, to limit [Reseller 1]'s access to new Korg products coming to market, or to delay delivering Korg products re-ordered by [Reseller 1] (*'the restock could take time'*). [Reseller 1 Employee 5] explained that either scenario would harm [Reseller 1]'s business.<sup>366</sup>
- 4.121 [Reseller 1 Employee 3] also told the CMA that [Reseller 1] had its *'access to the Korg Volca range [of Relevant Products] removed'*. Referring to various emails in mid-2017, [Reseller 1 Employee 3] submitted that *'I believe they withheld our access to products on this occasion'*.<sup>367</sup>
- 4.122 In June 2017, [Reseller 1 Employee 3] sent Korg UK a signed dealership schedule, enabling [Reseller 1] to access e.g. the *'volca range'* in Korg UK's *'DJ'* product category. On 10 July 2017 at 11:00am, [Reseller 1 Employee 3] re-sent this to [Korg Employee 8] of Korg UK, writing: *'[Reseller 1 Employee 5] can't see the volcas and other products when he logs into your portal to order them. Is everything ok as I did post back the charter & email you the scans a month ago.'*<sup>368</sup> This was after [Reseller 1 Employee 5] asked [Reseller 1 Employee 3]: *'Did you return the schedule to Korg? Some of the products are no longer available to us on their portal. Could you contact the guy from Korg if everything was done in time please?'*, adding that *'all the main products (Volcas etc) are no longer available for [Reseller 1]'*.<sup>369</sup>
- 4.123 The CMA notes other contemporaneous evidence supporting [Reseller 1 Employee 3]'s views, including messages exchanged by Korg UK staff on 10 July 2017 about

<sup>364</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.50, line 18 to p.52, line 7; p.54, lines 1–7; p.67, lines 8–12.

<sup>365</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.3/question 3; p.4/question 3(c); pp.4–6/question 5: *'Korg would frequently put pressure on [Reseller 1] [...] unless we raised the retail price of their products. They would also imply that [...] the products would be out of stock [...] next time we placed a restocks order. [...] If we didn't adhere to their demands they would [...] threaten to withhold access of the products to us.'*

<sup>366</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.48, lines 4–9; p.57, lines 4–15 (e.g. *'[W]e could miss on what they call the "first batch" of a new product, so the first big production, they have a limited amount of products; maybe we won't get as many as we ordered, or maybe not from the first delivery, maybe the second. That's [...] never been directed straight at us, but it's always been told to us indirectly, using examples from other supplies or -- yeah'*).

<sup>367</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), pp.3–4/question 3; pp.4–6/question 5. Text in square brackets added by the CMA.

<sup>368</sup> URN C\_KOR02401 (Emails from [Reseller 1 Employee 3] to [Korg Employee 8] on 14 June 2017 and 10 July 2017) and its second attachment (URN C\_KOR02403 ([Reseller 1] 2017 Dealership Schedules for Korg UK hi-tech and synthesizer equipment)).

<sup>369</sup> URN C\_KOR02411 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 3] on 10 July 2017).



[Reseller 1]'s pricing. At 10:51am, [Korg Employee 8] circulated a screenshot of [Reseller 1]'s online listing for Korg's Monologue (Black) at £229.00, which was below the Minimum Price.<sup>370</sup> [Korg Senior Employee 3] replied two seconds later: *'Have we had any contact with them about this - they are free to set but is this a typo?'*. At 3:29pm, [Korg Employee 8] wrote *'Not managed to reach [Reseller 1 Employee 5] but will keep trying. **They have emailed saying they can't see certain items on the portal so they must know.**'* As detailed at paragraph 4.199 below, in further messages Korg UK staff discussed meeting [Reseller 1] (to explain e.g. that [Reseller 1] may lose access to [X] products). On 12 July 2017, [Korg Employee 8] then wrote to [Reseller 1 Employee 3] and [Reseller 1 Employee 5]: *'Sorry I've missed your calls [...] Can I come and see you guys at 2pm tomorrow please?'*<sup>371</sup>

- 4.124 The CMA notes the content and temporal proximity of these contemporaneous messages, together with the date of the meeting on 13 July 2017 and [Reseller 1]'s issue with accessing certain Relevant Products (e.g. the Volca range), lends further credence to the CMA's understanding that Korg UK may have specifically referred to the fact [Reseller 1] was pricing below the Minimum Price at the meeting at [X] on 13 July 2017 (see below at paragraphs A13 to A22 below).
- 4.125 The evidence also shows that these Relevant Products were commercially important to [Reseller 1]. [Reseller 1 Employee 5] described Volca products as among *'the main products'* (see paragraph 4.122 above), and *'very popular products'* that had *'been selling very, very well'*.<sup>372</sup> Further, Korg UK's [Korg Employee 8] described how these may be sold easily to [X] (major customers for [Reseller 1]).<sup>373</sup> The CMA concludes that despite [Korg Senior Employee 3]'s contemporaneous comment that [Reseller 1] was *'free to set'* its own retail pricing, which may have been of itself an attempt to conceal the underlying message (see paragraphs 3.147 to 3.162 above on Korg UK's culture of concealment more generally), the evidence shows that:
- [Reseller 1] losing its ability to see *'certain items on the portal'* was not an administrative oversight or temporary technical error;
  - Korg UK temporarily restricted [Reseller 1]'s access to certain Relevant Products, due to [Reseller 1] pricing below the Minimum Price, ahead of a key meeting to discuss whether [Reseller 1]'s access to Korg UK's [X] products would continue; and

<sup>370</sup> URN C\_KOR02600 (WhatsApp messages of [Korg Senior Employee 3] and [Korg Employee 8] on 10 July 2017); bold emphasis added by the CMA. 'SSP inc 20% VAT' was £299.00: URN C\_KOR01946 (KORG Confidential UK Trade Price List - 7th July 2017).

<sup>371</sup> URN C\_KOR02394 (Email from [Korg Employee 8] to [Reseller 1 Employee 3] and [Reseller 1 Employee 5] on 12 July 2017).

<sup>372</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.73, lines 13–18; p.180, lines 14–18: *'...and they were always talking about putting this at RRP price when, basically, you had, like, 15 companies undercutting the price'*.

<sup>373</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.102, line 23 to p.103, line 10.

- [Reseller 1] clearly perceived there was a credible risk of Korg UK restricting [Reseller 1]'s access to one or more Relevant Products if [Reseller 1] did not adhere to the Korg Pricing Policy.

**CMA's view on Korg UK threatening and imposing sanctions on [Reseller 1] for not adhering to the Korg Pricing Policy**

4.126 Based on the evidence set out above, the CMA concludes that:

- [Reseller 1] understood there was a credible threat of various sanctions if it did not comply with the Korg Pricing Policy (e.g. potential closure of its account with Korg UK);
- it appears that Korg UK did in fact threaten and imposed certain sanctions on [Reseller 1] (e.g. temporary restrictions on [Reseller 1]'s access to certain Relevant Products) for [Reseller 1]'s non-adherence to the Korg Pricing Policy; and
- [Reseller 1]'s understanding and fear of sanctions was entirely credible, and sufficient for it to adhere to the Korg Pricing Policy throughout the Relevant Period.

***[Reseller 1] adhered to the Korg Pricing Policy by monitoring and reporting other MI Resellers who did not comply***

4.127 As set out immediately below, during the Relevant Period [Reseller 1] reported to Korg UK other MI Resellers advertising or selling any Relevant Product online below the Minimum Price. In the CMA's view, this, too, shows that [Reseller 1] understood there to be an agreement and/or concerted practice with Korg UK in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not advertise or sell the Relevant Products below the Minimum Price.

4.128 [Reseller 1 Employee 5] told the CMA that on occasions [Reseller 1] would send Korg UK other MI Resellers' weblinks showing prices below the Minimum Price proactively, i.e. without any prompt from Korg UK<sup>374</sup> Examples occurring in 2015 and 2016, for instance, are set out at paragraphs 4.141 to 4.143 and 4.177 to 4.181 below.

4.129 [Reseller 1 Employee 5] also told the CMA that he reported other MI Resellers' prices to Korg UK to justify why [Reseller 1] was pricing below the Minimum Price. [Reseller 1 Employee 5] submitted that Korg UK's [Korg Employee 8] would ask [Reseller 1] *'not to react to any competitors around [...] not doing, the right thing or being at the RRP price, and to [...] send in links to justify what we were going to do, and most of the time he said that he would sort of [...] sort the situation.'* [Reseller 1

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<sup>374</sup> 'Sometimes they were forwarded because he was asking for them; sometimes they were not': URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.98, lines 15–20.

Employee 5] added that *‘there was, like a, sort of, verbal agreement [...] to send him links; [...] even sending links sometimes wasn’t enough and we had to send screenshots’*.<sup>375</sup> Sometimes the evidence shows that events occurred in the following pattern:

- a. Korg UK would contact [Reseller 1], and [Reseller 1] understood this to be a request to increase [Reseller 1]’s pricing on one or more of the Relevant Products to the Minimum Price;
- b. [Reseller 1] would then increase its pricing to the Minimum Price;
- c. This, in turn, prompted [Reseller 1] to either:<sup>376</sup>
  - i. survey the market to identify any other MI Resellers’ prices currently below the Minimum Price, then email Korg UK weblinks, to report to it other MI Resellers whose prices were below the Minimum Price; or
  - ii. simply inform Korg UK – without surveying the market further/again – which other MI Reseller’s pricing [Reseller 1] had been matching before [Reseller 1] increased its pricing to the Minimum Price.

4.130 [Reseller 1] staff clearly expected that reporting another MI Reseller’s price which was below the Minimum Price to Korg UK would lead to Korg UK contacting the other MI Reseller, to ensure its adherence to the Korg Pricing Policy. The CMA notes Korg UK submissions that when Korg UK indicated to a MI Reseller that it may contact another MI Reseller about retail pricing, it would very often not do so.<sup>377</sup> [Korg Employee 8] made similar submissions, referring to this as *‘sandbagging’*.<sup>378</sup> The CMA is not persuaded by Korg UK’s submissions on this point.

4.131 To this end, the CMA notes a significant body of contemporaneous documentary evidence (showing that Korg UK asked [Reseller 1] on numerous occasions to increase its pricing to the Minimum Price, after having been contacted by other MI Resellers) contradicting Korg UK’s submissions on this point: see e.g. see the instance of [Reseller] reporting [Reseller 1] to Korg UK at paragraphs 4.166 and 4.167 below.

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<sup>375</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.46, line 13 to p.47, line 8; p.94, lines 16–25; p.97, line 18 to p.98, line 20; p.174, line 15 to p.175, line 12; p.188, lines 8–18.

<sup>376</sup> See, for example, the events set out at paragraphs 4.150–4.152 below.

<sup>377</sup> URN C\_KOR00798 (Korg UK note of 23 August 2018 on its dealings with resellers), e.g. at paragraphs 2.1–2.4.

<sup>378</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.43, lines 14–21 (*‘if a dealer phoned up, a lot of the time they would say, “What about this?”, and we’d say “No problem, let’s have a look at that”, and nothing would happen. We referred to it as “sandbagging” [...] [Y]ou don’t want to say to these very angry dealers [...] “There’s nothing we can do” [...] [W]e would say, “Look, we will have a conversation”, and that conversation would never even happen’*). Korg UK submitted that *‘sandbagging’* and *‘sand bagged’* are not commonly used within it, so Korg UK could not comment the terms: URN C\_KOR02379 (Korg reply dated 7 February 2020 to Questions 1, 2, 3 and 5 of a s.26 Notice), p.2/question 5. The CMA notes the following meaning of *‘sandbag’*: *“furnish with sandbags,” from sandbag (n.). Meaning “pretend weakness,” 1970s perhaps is extended from poker-playing sense of “refrain from raising at the first opportunity in hopes of raising more steeply later” (1940), which perhaps is from sandbagger in the sense of “bully or ruffian who uses a sandbag as a weapon to knock his intended victim unconscious” (1882). Hence “to fell or stun with a blow from a sandbag” (1887). Related: Sandbagged; sandbagging.’* (see <https://www.etymonline.com/word/sandbag>, accessed on 26 June 2020).

4.132 The CMA concludes that the evidence above shows that [Reseller 1]:

- understood there to be an agreement and/or concerted practice with Korg UK, in relation to the Korg Pricing Policy, which meant that [Reseller 1] (and other MI Resellers) would not advertise or sell the Relevant Products online below the Minimum Price; and
- adhered to the Korg Pricing Policy and expected that Korg UK would follow up with (or ‘sort’) other MI Resellers’ pricing if [Reseller 1] had reported their advertised pricing online as being below the Minimum Price to Korg UK.

***Detailed chronology of evidence supporting a finding of agreement and/or concerted practice between [Reseller 1] and Korg throughout the Relevant Period***

4.133 Set out below is evidence, for each year in the Relevant Period, which supports the CMA’s finding that there was an agreement and/or concerted practice between Korg UK and [Reseller 1] that [Reseller 1] would adhere to the Korg Pricing Policy. In particular, the CMA sets out below the evidence relating to:

- contact between Korg UK and [Reseller 1] in relation to [Reseller 1]’s retail pricing;<sup>379</sup>
- [Reseller 1] increasing its pricing, following such contact – in particular to the Minimum Price for the Relevant Products, as advised by Korg UK;
- [Reseller 1] monitoring, and reporting to Korg UK, other MI Resellers not adhering to the Korg Pricing Policy; and
- [Reseller 1]’s occasional non-compliance with the Korg Pricing Policy – e.g. delaying price increases that it did not want to ‘*implement straightaway*’, until [Reseller 1] ‘*felt that the pressure was a bit too high*’ (albeit this is no impediment to finding an agreement and/or concerted practice with Korg UK).

4.134 The CMA concludes that the agreement and/or concerted practice between Korg UK and [Reseller 1] lasted from 9 June 2015 to 17 April 2018, when the CMA launched its formal investigation (see paragraphs 3.79 to 3.81 above).

**2015**

4.135 The evidence shows that since as early as June 2015, [Reseller 1] agreed with and/or generally adhered to, the Korg Pricing Policy. More specifically, it shows:

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<sup>379</sup> [Reseller 1] sells the Relevant Products online via its own websites, and eBay. [Reseller 1] adopted sometimes the same pricing, and sometimes different pricing, as between its own websites, and eBay (see paragraph 4.37 above). In the [Reseller 1] Data, ‘[Reseller 1]’ and ‘eBay’ entries denote the pricing adopted by [Reseller 1] on its own websites and eBay respectively. In this Part 4.C.IV. (and Annex C), ‘pricing’ may refer to any price(s) adopted by [Reseller 1] on its own websites and/or its eBay channel.

- [Reseller 1] agreeing to raise its pricing to the Minimum Price in relation to Relevant Products, on request from Korg UK;
- [Reseller 1] monitoring, and reporting to Korg UK, other MI Resellers not adhering to the Korg Pricing Policy (sometimes proactively, and sometimes at the time of agreeing to raise its pricing to the Minimum Price, on request from Korg UK); and
- [Reseller 1] was allowed to price below the Minimum Price temporarily to match other MI Resellers of the Relevant Products.

**[Reseller 1] agreeing to raise its pricing to the Minimum Price on request from Korg UK (and monitoring and reporting of other MI Resellers not adhering to the Korg Pricing Policy)**

- 4.136 On 9 June 2015, [Reseller 1 Employee 5] asked [Reseller 1 Employee 1] to ‘reset the RRP price on the Volcas from Korg’ and ‘send me all the links of companies undercutting the RRP.’<sup>380</sup> On 10 June 2015 between 10:00am and 10:39am, [Reseller 1 Employee 1] increased [Reseller 1]’s pricing on four Relevant Products in Korg’s ‘Volca’ range, to the Minimum Price.<sup>381</sup> Each increased price was ascribed to the same ‘Competitor’ code in [Reseller 1]’s systems.<sup>382</sup> On 10 June 2015 between 10:18am and 10:38am, [Reseller 1 Employee 5] sent Korg UK’s [Korg Employee 3] 79 other MI Resellers’ weblinks for three of those products: Volca Bass, Volca Keys and Volca Beats.<sup>383</sup>
- 4.137 Commenting on these specific events, [Reseller 1 Employee 5] told the CMA that they were part of a pattern in the period 2015-2017.<sup>384</sup> [Reseller 1] would receive what it considered to be requests from Korg UK to increase its pricing to the Minimum Price. [Reseller 1] would then report to Korg UK other MI Resellers’ pricing below the Minimum Price, normally by emailing weblinks to Korg UK. [Reseller 1] did this reporting either in order to support its strategy of resisting Korg UK requests (at least initially, before perhaps later accepting them) – or, if [Reseller 1] had agreed to

<sup>380</sup> URN ER\_KOR01924 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 9 June 2015).

<sup>381</sup> URN C\_KOR02113 ([Reseller 1] Data: Volca Bass), £108.00 at 10/06/2015 10:00; URN C\_KOR02114 ([Reseller 1] Data: Volca Beats), £108.00 at 10/06/2015 10:14; URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), £108.00 at 10/06/2015 10:30; URN C\_KOR02117 ([Reseller 1] Data: Volca Sample), £119.00 at 10/06/2015 10:39. Each increased price matched Korg UK’s ‘RRP Ex VAT’ in URN C\_KOR01923 (KORG Confidential UK Trade Price List - effective May 5th, 2015).

<sup>382</sup> Each increased price was ascribed, in the relevant original [Reseller 1] price records, to the ‘Competitor’ code ‘[code 44]’ (i.e. ‘[Reseller 1]’). In the versions of [Reseller 1]’s data submitted to the CMA, ‘[code 44]’ was anonymised as code 44. For brevity, in this Decision this code is generally referred to as ‘[code 44]’. See further Annex B, paragraphs B6 to B12 below.

<sup>383</sup> URN ER\_KOR01937 (Email from [Reseller 1 Employee 5] to [Korg Employee 3] on 10 June 2015); URN C\_KOR02244 (Email from [Reseller 1 Employee 5] to [Korg Employee 3] on 10 June 2015); URN ER\_KOR01942 (Email from [Reseller 1 Employee 5] to [Korg Employee 3] on 10 June 2015). [Reseller 1 Employee 1] had sent [Reseller 1 Employee 5] these weblinks beforehand: URN ER\_KOR01887 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 10 June 2015); URN ER\_KOR01888 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 10 June 2015); URN ER\_KOR01892 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 10 June 2015).

<sup>384</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.182, line 10 to p.183, line 10. See also, more generally in relation to [Reseller 1] receiving calls and emails asking [Reseller 1] ‘to look into prices’ and about [Reseller 1] sending Korg UK weblinks, paragraphs 4.62 and 4.129 above, for example.

a Korg UK request to increase pricing to the Minimum Price, in order to invite Korg UK to contact other MI Resellers about their pricing below the Minimum Price. Korg UK may then indicate to [Reseller 1] that it would contact those MI Resellers.

- 4.138 The CMA concludes that events in this pattern (such as those above, and below) show that [Reseller 1] understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.
- 4.139 On 22 October 2015 at 11:28am, Korg UK's [Korg Employee 2] listed, in an email titled '*urgent*' to colleagues such as [Korg Senior Employee 3] and [Korg Employee 15], '*Sterling Street*' prices for around 40 Korg products (including 22 Relevant Products). At 5:36pm [Korg Employee 2] then sent this to [Reseller 1 Employee 5].<sup>385</sup> At 5:41pm [Reseller 1 Employee 5] asked [Reseller 1 Employee 1] '*Can you adjust the RRP below please? Give it half a week and check the market, send me links and then do what you have to do!*'. By 5:47pm [Reseller 1 Employee 1] had increased [Reseller 1]'s pricing for five Relevant Products listed [Korg Employee 2]'s email, to the Minimum Price.<sup>386</sup>
- 4.140 [Reseller 1 Employee 5] told the CMA that on 22 October 2015 he asked [Reseller 1 Employee 1] to change [Reseller 1]'s pricing as '*a direct reaction to what*' he understood [Korg Employee 2] of Korg UK '*was asking me to do*'.<sup>387</sup> [Reseller 1 Employee 5] also stated that at the time [Reseller 1] would have sent Korg UK other MI Resellers' weblinks, on the basis that if those MI Resellers '*didn't move, then we'd be matching again very, very quickly [...] within, like, two or three days*'.<sup>388</sup>

#### **[Reseller 1]'s proactive monitoring and reporting of MI Resellers not adhering to the Korg Pricing Policy**

- 4.141 There is at least one example in 2015 of [Reseller 1] sending Korg UK, proactively, other MI Resellers' weblinks for a Relevant Product. From the start of the Relevant Period, [Reseller 1] monitored and reported to Korg UK other MI Resellers' advertised pricing (typically online) for the Relevant Products. [Reseller 1] often did so by emailing other MI Resellers' weblinks, with little or no comment or explanation. The evidence shows that [Reseller 1] wanted Korg UK to contact those other MI Resellers, to ensure their adherence to the Korg Pricing Policy.

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<sup>385</sup> URN ER\_KOR01896 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 22 October 2015).

<sup>386</sup> URN C\_KOR02117 ([Reseller 1] Data: Volca Sample), £119.00 at 22/10/2015 17:43; URN C\_KOR02114 ([Reseller 1] Data: Volca Beats), £108.00 at 22/10/2015 17:43; URN C\_KOR02113 ([Reseller 1] Data: Volca Bass), £108.00 at 22/10/2015 17:44; URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), £108.00 at 22/10/2015 17:45; URN C\_KOR02086 ([Reseller 1] Data: ARP Odyssey Rev.3 Black&Orange), £759.00 at 22/10/2015 17:47. Each increased price was ascribed to '[code 44]' (see footnote 382 above) – with one exception, on the Volca Keys. Each increased price matched Korg's '*RRP Ex VAT*' in URN C\_KOR01925 (KORG Confidential UK Main Dealer Trade Price List - effective September 8th 2015).

<sup>387</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.114, lines 3–10.

<sup>388</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.111, lines 3–7 and lines 25–26 (e.g. '*if [...] they were not pushing that much [...] for all the resellers to reset RRP prices, we'd better match again very quickly*').

- 4.142 On 28 October 2015, [Reseller 1 Employee 5] sent Korg UK's [Korg Employee 14] a series of emails, containing weblinks to 57 other MI Resellers' pricing for four Relevant Products (Volca Bass, Volca Sample, Volca Keys and Volca Beats).<sup>389</sup>
- 4.143 The example above shows that [Reseller 1] understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.

**[Reseller 1] was allowed to price below the Minimum Price temporarily to match other MI Resellers of the Relevant Products**

- 4.144 There is at least one example in 2015 of [Reseller 1] sending Korg UK other MI Resellers' weblinks for a Relevant Product around the time of [Reseller 1] reducing its pricing to match the price of a rival MI Reseller. On 10 June 2015, [Reseller 1] increased its pricing to the Minimum Price on Korg's Volca Keys, a Relevant Product (see paragraph 4.136 above). Maintaining the Minimum Price initially, [Reseller 1] recorded three times in its operational systems a price of £89.00 (below the Minimum Price) of a competitor, [Reseller].<sup>390</sup> After one of these record entries, on 15 June 2015 [Reseller 1 Employee 5] sent Korg UK's [Korg Employee 3], in two emails, 53 other MI Resellers' weblinks for Korg's Volca Keys and Volca Bass.<sup>391</sup> On 19 June 2015, [Reseller 1] reduced its Volca Keys pricing to match [Reseller], and held that price for several months.<sup>392</sup> [Reseller 1] subsequently increased its price for this Relevant Product to the Minimum Price on 22 October 2015 (see paragraph 4.139 above).
- 4.145 The CMA concludes from this that there was an understanding between Korg UK and [Reseller 1] that [Reseller 1] was allowed to price below the Minimum Price to match another MI Reseller's lower pricing, provided that [Reseller 1] raised its pricing again once the other MI Reseller's pricing increased. Based on the evidence in the

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<sup>389</sup> URN ER\_KOR01935 (Email from [Reseller 1 Employee 5] to [Korg Employee 14] on 28 October 2015); URN ER\_KOR01943 (Email from [Reseller 1 Employee 5] to [Korg Employee 14] on 28 October 2015); URN ER\_KOR01940 (Email from [Reseller 1 Employee 5] to [Korg Employee 14] on 28 October 2015); URN ER\_KOR01939 (Email from [Reseller 1 Employee 5] to [Korg Employee 14] on 28 October 2015). [Reseller 1 Employee 1] had sent [Reseller 1 Employee 5] these weblinks beforehand: URN ER\_KOR01885 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 28 October 2015); URN ER\_KOR01893 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 28 October 2015); URN ER\_KOR01890 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 28 October 2015); URN ER\_KOR01889 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 28 October 2015). This was about five days after [Reseller 1] increased [Reseller 1]'s pricing for these Relevant Products: see paragraph 4.139 above.

<sup>390</sup> URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), entries showing £89.00 at 10/06/2015 10:31, 15/06/2015 11:25 and 19/06/2015 16:54 (NB code '60' denotes [Reseller] prices: URN C\_KOR02133 (Competitor codes & names)).

<sup>391</sup> URN ER\_KOR01936 (Email from [Reseller 1 Employee 5] to [Korg Employee 3] on 15 June 2015); URN ER\_KOR01941 (Email from [Reseller 1 Employee 5] to [Korg Employee 3] on 15 June 2015). [Reseller 1 Employee 1] had sent [Reseller 1 Employee 5] these weblinks beforehand: URN ER\_KOR01886 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 15 June 2015); URN ER\_KOR01891 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 15 June 2015). This was about five days after [Reseller 1] increased its pricing for both Relevant Products: see paragraph 4.136 above.

<sup>392</sup> URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), entries showing £89.00 at 19/06/2015 16:54, 10/09/2015 15:43, 23/09/2015 12:39 and 29/09/2015 11:28 (NB code '60' denotes [Reseller] prices: URN C\_KOR02133 (Competitor codes & names)).

CMA's possession, this was normally limited to a small subset of the Relevant Products and focussed on different products over time.

- 4.146 The CMA further considers that, in any event, [Reseller 1]'s non-compliance in part with the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>393</sup>

## 2016

- 4.147 The evidence for 2016 continues to show that [Reseller 1] agreed with, or at least knowingly went along with, the Korg Pricing Policy. More specifically, it shows:

- [Reseller 1] agreeing to raise its pricing to the Minimum Price in relation to Relevant Products, on request from Korg UK;
- [Reseller 1] monitoring, and reporting to Korg UK, other MI Resellers not adhering to the Korg Pricing Policy (sometimes proactively, and sometimes at the time of agreeing to raise its pricing to the Minimum Price, on request from Korg UK);
- [Reseller 1] understood that the Korg Pricing Policy prohibited any Bundle including a Relevant Product if the Bundle's total price meant pricing the Relevant Product, in effect, below the Minimum Price;
- [Reseller 1] was allowed to price below the Minimum Price temporarily to match other MI Resellers of the Relevant Products; and
- [Reseller 1]'s occasional non-compliance with the Korg Pricing Policy (albeit this is no impediment to finding an agreement and/or concerted practice with Korg UK).

### **[Reseller 1] agreeing to raise its pricing to the Minimum Price on request from Korg UK (and monitoring and reporting of other MI Resellers not adhering to the Korg Pricing Policy)**

- 4.148 On 15 February 2016 at 3:05pm, Korg UK's [Korg Employee 8] wrote to [Reseller 1 Employee 5] '*Korg and Samson Pricelists are attached. I appreciate you are very very busy but it has gone live today so the sooner you can the better your margin will be*'.<sup>394</sup> At 3:10pm, [Reseller 1 Employee 5] asked [Reseller 1 Employee 1] to '*apply the RRP and check the price in a few days*'. On 16 February 2016 between 11:57am and 12:34pm, [Reseller 1 Employee 1] increased [Reseller 1]'s pricing for 20

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<sup>393</sup> Further, in the CMA's view, the evidence of 'cheating' is offset by the volume and quality of evidence (set out in this Decision) showing that [Reseller 1] 'agreed' with the Korg Pricing Policy and that throughout the Relevant Period, [Reseller 1] was generally supportive of, and agreed to abide by, or acquiesced in, the Korg Pricing Policy.

<sup>394</sup> All emails set out in this paragraph are recorded in URN ER\_KOR01751 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 16 February 2016). The Korg UK pricelist referred to by [Korg Employee 8] was attached as URN ER\_KOR01347.A (KORG Confidential UK Trade Price List – effective February 15th 2016.pdf) and as URN ER\_KOR01347.B (KORG Confidential UK Trade Price List – effective February 15th 2016.xlsx).



Relevant Products, to the Minimum Price.<sup>395</sup> At 1:23pm, [Reseller 1 Employee 1] replied to [Reseller 1 Employee 5] '*Prices updated*'.

- 4.149 [Reseller 1 Employee 5] told the CMA that the events set out in paragraph 4.148 above were typical: each time Korg UK issued a price list '*[Korg Employee 8] would contact us in different ways, either by phone or emails*'. [Reseller 1] would try to resist initially Korg UK's requests to increase [Reseller 1]'s pricing to the Minimum Price (i.e. '*change our trade prices just for internal use and then [...] don't change any RRP price [...] wait until they come back to us*') – albeit before likely later agreeing to Korg UK's request by increasing its pricing to the Minimum Price.<sup>396</sup> Ultimately, in this instance, to adhere to the Korg Pricing Policy, [Reseller 1] implemented a price list within 24 hours of Korg UK having sent it to [Reseller 1].
- 4.150 On 7 March 2016 at 10:43am, Korg UK's [Korg Employee 8] emailed [Reseller 1 Employee 5] a [Reseller 1] weblink for Korg's MS20Mini, a Relevant Product. At 10:49am [Reseller 1 Employee 5] sent this to [Reseller 1 Employee 1], asking [Reseller 1 Employee 1] to '*adjust the RRP again*' and for '*feedback [...] on companies undercutting the RRP*'.<sup>397</sup>
- 4.151 [Reseller 1 Employee 5] submitted that he viewed the title of Korg UK's email on 7 March 2016 ('*Margin*') as a request to increase [Reseller 1]'s pricing to the Minimum Price, so reacted accordingly.<sup>398</sup> At 11:27am, [Reseller 1 Employee 1] increased [Reseller 1]'s pricing for both the Korg's MS20Mini (Black) and MS20Mini (White), to the Minimum Price.<sup>399</sup>
- 4.152 After the price increase set out in paragraph 4.151 above, at 11:30am [Reseller 1 Employee 5] sent Korg UK's [Korg Employee 8] a weblink of [Reseller] for Korg's

<sup>395</sup> URN C\_KOR02188 ([Reseller 1] Data: EMX2-BK), £355.00 at 16/02/2016 11:57; URN C\_KOR02189 ([Reseller 1] Data: ESX2-BK), £355.00 at 16/02/2016 11:58; URN C\_KOR02090 ([Reseller 1] Data: KO2S), £113.00 at 16/02/2016 12:03; URN C\_KOR02091 ([Reseller 1] Data: KOPRO+), £299.00 at 16/02/2016 12:04; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'KP3PLUS', £299.00 at 16/02/2016 12:05; URN C\_KOR02100 ([Reseller 1] Data: KRMMini), £60.00 at 16/02/2016 12:06; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'MICROKEY-61', £120.00 at 16/02/2016 12:10; URN C\_KOR02101 ([Reseller 1] Data: Microkey2-37), £75.00 at 16/02/2016 12:11; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'MICROKEY2-49', £99.00 at 16/02/2016 12:11; URN C\_KOR02104 ([Reseller 1] Data: Microkorg), £299.00 at 16/02/2016 12:12; URN C\_KOR02103 ([Reseller 1] Data: Microkorg XL+), £379.00 at 16/02/2016 12:13; URN C\_KOR02105 ([Reseller 1] Data: Mini-KP2S), £113.00 at 16/02/2016 12:14; URN C\_KOR02106 ([Reseller 1] Data: Minilogue), £449.00 at 16/02/2016 12:16; URN C\_KOR02109 ([Reseller 1] Data: NanoPAD2-BK), £42.00 at 16/02/2016 12:21; URN C\_KOR02110 ([Reseller 1] Data: NanoPAD2-WH), £42.00 at 16/02/2016 12:21; URN C\_KOR02111 ([Reseller 1] Data: Taktile25), £120.00 at 16/02/2016 12:30; URN C\_KOR02112 ([Reseller 1] Data: TaktileTR49), £265.00 at 16/02/2016 12:32; URN C\_KOR02113 ([Reseller 1] Data: Volca Bass), £120.00 at 16/02/2016 12:33; URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), £120.00 at 16/02/2016 12:34; URN C\_KOR02117 ([Reseller 1] Data: Volca Sample), £129.00 at 16/02/2016 12:34. [Reseller 1] confirmed that URN C\_KOR02101 ([Reseller 1] Data: Microkey2-37), despite its original title, contained price data relating to Korg's Microkey2-37 (not the Microkey2-37Air): URN C\_KOR02559 (Email from [Reseller 1] to the CMA on 8 March 2020). Each increased price was ascribed to '*[code 44]*' (see footnote 382 above) – with one exception, on the Volca Sample. Each increased price matched Korg's '*RRP Ex VAT*' in the pricelist at footnote 394 above.

<sup>396</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.154, line 17 to p.157, line 2. Text in square brackets added by the CMA.

<sup>397</sup> URN ER\_KOR01633 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 7 March 2016).

<sup>398</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.117, line 20 to p.120, line 7.

<sup>399</sup> URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH), £449.00 at 07/03/2016 11:27; URN C\_KOR02190 ([Reseller 1] Data: MS20Mini-BK), £449.00 at 07/03/2016 11:27. Each increased price was ascribed to '*[code 44]*' (see footnote 382 above) – and matched Korg UK's '*RRP Ex VAT*' in the pricelist at footnote 394 above.

MS20Mini.<sup>400</sup> In the CMA's view, this shows that [Reseller 1] was reporting another MI Reseller's non-adherence to the Korg Pricing Policy. This shows that [Reseller 1] understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.

- 4.153 On 16 March 2016 at 1:10pm, [Korg Employee 8] wrote '*Volca bass* [a Relevant Product] *sir*', in an email titled '*Best Wishes*', to [Reseller 1 Employee 5]. At 1:32pm [Reseller 1 Employee 5] sent this to [Reseller 1 Employee 1], asking [Reseller 1 Employee 1] to '*reset the [code 181] and send me links*'.<sup>401</sup> At 2:00pm [Reseller 1 Employee 5] replied to [Korg Employee 8] '*We're correct! Look at these please*', referring to three other MI Resellers' weblinks. At 2:02pm, [Korg Employee 8] replied '*Great. Already in hand*'.<sup>402</sup>
- 4.154 [Reseller 1 Employee 5] explained that Korg UK's initial email on 16 March 2016 was a request to ensure [Reseller 1]'s pricing was at the Minimum Price but [Reseller 1]'s pricing for Korg's Volca Bass was already at the Minimum Price. Korg UK's subsequent reply indicated that it was contacting other MI Resellers about their pricing.<sup>403</sup>
- 4.155 The events of 16 March 2016 show that [Reseller 1] was adhering to the Korg Pricing Policy and that it understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.
- 4.156 On 17 March 2016 at 8:43am, Korg UK's [Korg Employee 8] wrote '*Microkorg and microkorg xl* [two Relevant Products]. *Sorting now*' to [Reseller 1 Employee 5]. At 8:46am, [Reseller 1 Employee 5] sent this to [Reseller 1 Employee 1], asking [Reseller 1 Employee 1] to '*adjust the [code 181] and send me links*'.<sup>404</sup> [Reseller 1 Employee 5] told the CMA that this was Korg UK in effect asking him to increase [Reseller 1]'s pricing to the Minimum Price, because while some other MI Resellers were '*undercutting the RRP prices*' at the time, Korg UK indicated to [Reseller 1] that

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<sup>400</sup> URN ER\_KOR01618 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 7 March 2016). [Reseller 1 Employee 1] had sent [Reseller 1 Employee 5] this weblink at 11:29am, which [Reseller 1 Employee 1] appeared to describe as '*undercutting the price*' at 12:03pm: URN ER\_KOR01623 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 7 March 2016); URN ER\_KOR01633 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 7 March 2016).

<sup>401</sup> URN ER\_KOR01655 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 16 March 2016). Text in square brackets added by the CMA.

<sup>402</sup> URN ER\_KOR01348 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 16 March 2016).

<sup>403</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.192, line 15 to p.193, line 18. No change to [Reseller 1]'s Volca Bass pricing was recorded at this time, after this had been increased on 16 February 2016: see paragraph 4.148 above, and lack of entries between 16/02/2016 and 21/03/2016 in URN C\_KOR02113 ([Reseller 1] Data: Volca Bass).

<sup>404</sup> URN ER\_KOR01647 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 17 March 2016). Text in square brackets added by the CMA.

the other MI Resellers would be '*increasing their price*'.<sup>405</sup> [Korg Employee 8] stated that while his words '*Sorting now*' indicated that Korg UK would contact other MI Resellers about pricing, he may not have done so.<sup>406</sup> Nonetheless, at 10:04am and 10:08am, [Reseller 1 Employee 1] increased [Reseller 1]'s pricing for these two Relevant Products, to the Minimum Price.<sup>407</sup>

- 4.157 After the price increase set out in paragraph 4.156 above, on 17 March 2016 at 10:09am and 10:23am [Reseller 1 Employee 5] sent [Korg Employee 8] four or five other MI Resellers' weblinks for each of Korg's Microkorg XL+ and Microkorg (both Relevant Products).<sup>408</sup> In the CMA's view, by reporting other MI Resellers' non-adherence to the Korg Pricing Policy, [Reseller 1] was again showing that it understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.
- 4.158 On 26 April 2016, Korg UK's [Korg Employee 8] wrote to [Reseller 1 Employee 3], in an email titled '*MicroKorg XL+ [a Relevant Product]*': '*I have just seen this on your site and im [sic] concerned about your margin. Worth taking a look when you can*'.<sup>409</sup>
- 4.159 At 6:18pm that day, [Reseller 1 Employee 3] replied to [Korg Employee 8] '*There's a match going on*', pasting a screenshot indicating that [Reseller 1] was price-matching the reseller [Reseller].<sup>410</sup> At 6:19pm, [Korg Employee 8] replied '*Sorted. Many thanks*'.<sup>411</sup> At 6:22pm, [Reseller 1 Employee 3] wrote to [Korg Employee 8] that the [Reseller] '*listing has been the same since 19<sup>th</sup> February & nothing appears to have changed*'.<sup>412</sup> At 6:23pm, [Reseller 1 Employee 3] sent [Korg Employee 8] an email with the same subject line, stating '*Sorted? Ok, [Reseller 1 Employee 5] will look at tomorrow*'.<sup>413</sup> [Reseller 1 Employee 3] told the CMA that he '*felt that Korg was asking [Reseller 1] to raise the price for that product so I was making him aware that we were matching [Reseller]' price*' and '*knew that Korg would want action from us, so I*

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<sup>405</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.165, line 12 to p.166, line 6 (referring to e.g. p.46, lines 13–26 of the same transcript).

<sup>406</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.177, lines 11–22; p.178, line 16 to p.180, line 16.

<sup>407</sup> URN C\_KOR02103 ([Reseller 1] Data: Microkorg XL+), £379.00 at 17/03/2016 10:04; URN C\_KOR02104 ([Reseller 1] Data: Microkorg), £299.00 at 17/03/2016 10:09. Each increased price was ascribed to '*[code 44]*' (see footnote 382 above) – and matched Korg UK's '*RRP Ex VAT*' in the pricelist at footnote 394 above.

<sup>408</sup> URN ER\_KOR01474 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 17 March 2016); URN ER\_KOR01831 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 17 March 2016). [Reseller 1 Employee 1] had sent [Reseller 1 Employee 5] these weblinks beforehand: URN ER\_KOR01765 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 17 March 2016); URN ER\_KOR01647 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 17 March 2016).

<sup>409</sup> URN ER\_KOR01343 (Email from [Korg Employee 8] to [Reseller 1 Employee 3], copying [Reseller 1 Employee 5], on 26 April 2016). Text in square brackets added by the CMA.

<sup>410</sup> URN C\_KOR02786 (Email from [Reseller 1 Employee 3] to [Korg Employee 8], copying [Reseller 1 Employee 5], on 26 April 2016; version generated by adding one image to URN ER\_KOR01341).

<sup>411</sup> URN ER\_KOR01340 (Email from [Korg Employee 8] to [Reseller 1 Employee 3], copying [Reseller 1 Employee 5], on 26 April 2016).

<sup>412</sup> URN ER\_KOR01339 (Email from [Reseller 1 Employee 3] to [Korg Employee 8], copying [Reseller 1 Employee 5], on 26 April 2016).

<sup>413</sup> URN ER\_KOR01342 (Email from [Korg Employee 8] to [Reseller 1 Employee 3], copying [Reseller 1 Employee 5], on 26 April 2016).

*told him that [Reseller 1 Employee 5] would have a look into this the next day as it was already past 6pm and [Reseller 1 Employee 5] was no longer in the office’.*<sup>414</sup>

- 4.160 At 6:26pm that day, [Korg Employee 8] sent a first reply to [Reseller 1 Employee 3] *‘Thanks for checking that. I have just had confirmation emailed so I’ll keep an eye too’*. At 6:27pm, [Korg Employee 8] sent, as a second reply, a [Reseller] weblink for Korg’s Microkorg XL+. <sup>415</sup>
- 4.161 At 9:03am the next day, i.e. on 27 April 2016, [Reseller 1 Employee 5] increased [Reseller 1]’s Microkorg XL+ pricing, to the Minimum Price.<sup>416</sup> [Reseller 1 Employee 3] told the CMA that Korg UK *‘pressurised us into raising the price so we adhered to their demands’*.<sup>417</sup> Notwithstanding this, at 9:19am [Korg Employee 8] sent [Reseller 1 Employee 3] an email titled *‘Many thanks’* and an attachment indicating that [Reseller 1]’s pricing for Korg’s Microkorg XL+ was below that of various other resellers.<sup>418</sup> [Reseller 1 Employee 3] told the CMA that *‘[Korg Employee 8] was pressurising us again to raise the price’, as ‘our website was probably still showing the product at £319’* because *‘[Reseller 1]’s listings can take some time to update online’*.<sup>419</sup>
- 4.162 On 12 July 2016 at 11:56am and 11:57am, respectively, [Korg Employee 8] sent [Reseller 1 Employee 5] [Reseller 1] weblinks, including for Korg’s Kaossilator Pro+ and Taktile 25 (both Relevant Products).<sup>420</sup> At 11:58am and 12:00pm, respectively, [Reseller 1 Employee 5] increased [Reseller 1]’s pricing for these Relevant Products to the Minimum Price.<sup>421</sup>
- 4.163 Other events on and around 12 July 2016 appear to follow Korg UK’s [Korg Employee 8] emailing [Reseller 1 Employee 5] on 8 July 2016 at 10:44am, attaching *‘the pricelist we sent around back in May’* and writing that *‘quite a few items [...] are not achieving the margin they can so it would be good to check through the new list and if you list at the suggested retail less vat then you will be achieving [X]%. [...] [Q]uite a few dealers may have missed this so it going round [sic] to everyone and*

<sup>414</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.6/question 7(a).

<sup>415</sup> URN ER\_KOR01337 (Email from [Korg Employee 8] to [Reseller 1 Employee 3], copying [Reseller 1 Employee 5], on 26 April 2016); URN ER\_KOR01342 (Email from [Korg Employee 8] to [Reseller 1 Employee 3], copying [Reseller 1 Employee 5], on 26 April 2016).

<sup>416</sup> URN C\_KOR02103 ([Reseller 1] Data: Microkorg XL+), £379.00 at 27/04/2016 09:03. The increased price was ascribed to *‘[code 44]’* (see footnote 382 above) – and matched Korg UK’s *‘RRP Ex VAT’* in URN C\_KOR01930 (KORG Confidential UK Trade Price List - updated April 4th 2016).

<sup>417</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.7/question 7(b).

<sup>418</sup> URN ER\_KOR01307 (Email from [Korg Employee 8] to [Reseller 1 Employee 3], copying [Reseller 1 Employee 5], on 27 April 2016); URN ER\_KOR01307.A ([Reseller 1]’s pricing for Korg’s Microkorg XL). The attachment showed the following prices: £319.00 ([Reseller 1]); £337.99 ([Reseller]); £379.00 ([Reseller], [Reseller], [Reseller], [Reseller], [Reseller], [Reseller]).

<sup>419</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.7/question 7(c).

<sup>420</sup> URN ER\_KOR01654 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 12 July 2016); URN ER\_KOR01351 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 12 July 2016).

<sup>421</sup> URN C\_KOR02091 ([Reseller 1] Data: KOPRO+), £299.00 at 12/07/2016 11:58; URN C\_KOR02111 ([Reseller 1] Data: Taktile25), £120.00 at 12/07/2016 12:00. Each increased price was ascribed to *‘[code 44]’* (see footnote 382 above) – and matched Korg UK’s *‘RRP Ex VAT’* in URN C\_KOR01932 (KORG Confidential UK Trade Price List - Updated June 2016).

*people are moving urgently to make that margin which is obviously good for all parties*'. [Reseller 1 Employee 5] asked [Korg Employee 8] to flag *'where the issues are'*, and [Korg Employee 8] replied *'No Problem. Ill [sic] get back to you shortly'*.<sup>422</sup>

- 4.164 [Reseller 1 Employee 5] told the CMA that he did not want to *'implement straightaway'* the price list – and was telling Korg UK *'if you can just tell us that X and X products is [sic] not satisfying your request or your expectations'* (and *'don't make me go through, like, 200 products, because I'm spending four hours doing this'*). [Reseller 1 Employee 5] also submitted that Korg UK later sent a list highlighting *'every single product'* on which [Reseller 1] was *'not at [...] RRP'* so *'had to [...] change'*.<sup>423</sup>
- 4.165 On 12 July 2016 at 1:12pm, [Korg Employee 8] sent [Reseller 1 Employee 5] a partially highlighted price list, under the coded heading *'Quote'*. At 1:16pm, [Reseller 1 Employee 5] sent this to [Reseller 1 Employee 1], asking *'Can you adjust the [code 181] of the products highlighted in yellow? Send me links of companies undercutting the [code 181]. Check it out in a week'*.<sup>424</sup> By 3:51pm, [Reseller 1 Employee 1] had increased [Reseller 1]'s pricing for 18 Relevant Products to the Minimum Price.<sup>425</sup>
- 4.166 The events on 12 July 2016 set out above follow Korg UK's [Korg Employee 15] and [Korg Employee 8] having discussed that day contacting MI Resellers about their pricing. At 9:35am, [Korg Employee 8] said: *'I'm going to work through the list from [Reseller] this morning and then push on from there.'*<sup>426</sup> [Korg Employee 8] told the CMA that this *'list'* noted prices advertised below the Minimum Price, by MI Resellers

<sup>422</sup> URN ER\_KOR01659 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 8 July 2016).

<sup>423</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.157, line 15 to p.158, line 21.

<sup>424</sup> URN ER\_KOR01437 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 12 July 2016); URN ER\_KOR01437.A (KORG Confidential UK Trade Price List - May 2016).

<sup>425</sup> URN C\_KOR02090 ([Reseller 1] Data: KO2S), £113.00 at 12/07/2016 13:32; URN C\_KOR02189 ([Reseller 1] Data: ESX2-BK), £355.00 at 12/07/2016 13:45; URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), £120.00 at 12/07/2016 13:49; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'MONOTRON-DELAY', £45.00 at 12/07/2016 13:54; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'MONOTRON-DUO', £45.00 at 12/07/2016 14:00; URN C\_KOR02086 ([Reseller 1] Data: ARP Odyssey Rev.3 Black&Orange), £795.00 at 12/07/2016 14:05; URN C\_KOR02104 ([Reseller 1] Data: Microkorg), £299.00 at 12/07/2016 14:11; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'KINGKORG', £709.00 at 12/07/2016 14:15; URN C\_KOR02190 ([Reseller 1] Data: MS20Mini-BK), £469.00 at 12/07/2016 14:15; URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH), £469.00 at 12/07/2016 14:15; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'KROSS-61', £509.00 at 12/07/2016 14:20; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'TAKTILE49', £189.00 at 12/07/2016 14:25; URN C\_KOR02112 ([Reseller 1] Data: TaktileTR49), £265.00 at 12/07/2016 15:30; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'MICROKEY-25', £52.00 at 12/07/2016 15:32; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'MICROKEY2-61', £120.00 at 12/07/2016 15:36; URN C\_KOR02108 ([Reseller 1] Data: Nanokontrol ST), £113.00 at 12/07/2016 15:37; URN C\_KOR02110 ([Reseller 1] Data: NanoPAD2-WH), £42.00 at 12/07/2016 15:48; URN C\_KOR02100 ([Reseller 1] Data: KRMini), £60.00 at 12/07/2016 15:51. Each increased price was ascribed to *'[code 44]'* (see footnote 382 above) – and matched Korg UK's *'RRP Ex VAT'* in URN C\_KOR01932 (KORG Confidential UK Trade Price List - Updated June 2016).

<sup>426</sup> URN C\_KOR00975 (WhatsApp message of [Korg Employee 8] on 12 July 2016), also quoted in paragraph 4.167 below. The CMA notes apparently similar events a week before this: on 4 July 2016 at 6:37pm, [Korg Employee 8] wrote to [Korg Employee 15] *'Got a 9.30 call with [Reseller] tomorrow am. Will run through the whole price list and let you know when it's done so you can let [Reseller] know'*: URN C\_KOR00974 (WhatsApp messages between [Korg Employee 8] and [Korg Employee 15] on 4 July 2016).

other than [Reseller], about which Korg UK would have contacted these MI Resellers (by email, in [Reseller 1]’s case, probably).<sup>427</sup>

- 4.167 At 10:20am, [Korg Employee 8] wrote *‘I’m going to do [Reseller], [Reseller 1], [Reseller] and [Reseller] shortly’*. At 2:16pm, [Korg Employee 8] told [Korg Employee 15]: *‘Just bombarded your inbox with some emails from [Reseller 1] with a few issues. Some are mine and some are yours. Just gives a good overall picture of who is where’*. This accords with [Reseller 1] having sent [Korg Employee 8] on 12 July 2016, in 23 emails, other MI Resellers’ weblinks for certain Relevant Products.<sup>428</sup> In the CMA’s view, by reporting other MI Resellers’ non-adherence to the Korg Pricing Policy, [Reseller 1] was showing that it understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.
- 4.168 On 1 September 2016, Korg UK’s [Korg Employee 8] and [Korg Employee 15] exchanged messages about the pricing of MI Resellers including [Reseller 1]. At 3:12pm, [Korg Employee 8] wrote: *‘Any chance you can get [Reseller] to £299 on microkorg? [a Relevant Product] I’ll get [Reseller 1] on now. They should be £315 but everyone is at £299 and I don’t have the time to sort all the others at the mo [moment]’*.<sup>429</sup>
- 4.169 At 3:13pm and 3:16pm that day, [Korg Employee 8] sent [Reseller 1 Employee 3] emails entitled, respectively, *‘Thank you’* (including a [Reseller 1] weblink for Korg’s Microkorg) and *‘I’ve seen this btw.. thanks’* (including a [Reseller] weblink for Korg’s

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<sup>427</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.189, line 14 to p.192, line 13; p.194, lines 6–16.

<sup>428</sup> 11 of these 23 emails were sent before 2:16pm – see e.g.: URN ER\_KOR01587 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01404 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01511 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01516 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01512 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01382 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01416 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01497 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016). At least 3 of those 11 emails were forwarded to [Korg Employee 15] before 2:16pm: URN EY\_KOR01281 (Email from [Korg Employee 8] to [Korg Employee 15] on 12 July 2016); URN EY\_KOR01279 (Email from [Korg Employee 8] to [Korg Employee 15] on 12 July 2016); URN EY\_KOR01280 (Email from [Korg Employee 8] to [Korg Employee 15] on 12 July 2016). 12 of these 23 emails were sent after [Korg Employee 8]’s message of 2:16pm, namely: URN ER\_KOR01621 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01543 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01455 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01836 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01479 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01557 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01573 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01838 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01456 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01566 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01370 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016); URN ER\_KOR01834 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016).

<sup>429</sup> URN C\_KOR00979 (WhatsApp messages of [Korg Employee 8] and [Korg Employee 15] on 1–2 September 2019). Text in square brackets added by the CMA.

Microkorg). [Reseller 1 Employee 3] sent both emails to [Reseller 1 Employee 5] on 5 September 2016.<sup>430</sup>

- 4.170 [Korg Employee 8] told the CMA that the respective aims of his emails of 1 September 2016 were to: (i) invite [Reseller 1] to consider its retail pricing; and (ii) to proactively pre-empt any reply from [Reseller 1] about a price advertised by [Reseller] (which [Korg Employee 8] had probably found via a Google search).<sup>431</sup> [Reseller 1 Employee 5] told the CMA that he '*most probably*' understood from this contact '*that I had to match that*', i.e. the £299 price of [Reseller].<sup>432</sup> This accords with [Reseller 1 Employee 5] having increased [Reseller 1]'s Microkorg pricing, to £299.00, at 12:16pm on 5 September 2016.<sup>433</sup>
- 4.171 [Korg Employee 8] also submitted that the events of 1 September 2016 were an example of how Korg UK sometimes flagged to MI Resellers a 'street' price, which was lower than SSP (the Minimum Price).<sup>434</sup> In light of this submission, and the evidence set out in this paragraphs 4.168 to 4.170 above, in this instance, in the CMA's view the Minimum Price was a 'street' price of £299.00, even though this was below Korg UK's '*RRP Ex VAT*' for Korg's Microkorg.<sup>435</sup> The CMA therefore concludes that Korg UK requested [Reseller 1] to increase its pricing to the Minimum Price, and [Reseller 1] agreed to do so.<sup>436</sup>
- 4.172 On 19 October 2016 at 12:51pm, Korg UK's [Korg Employee 8] sent [Reseller 1 Employee 5] a [Reseller 1] weblink for Korg's Electribe Sampler ESX2, a Relevant Product. [Reseller 1 Employee 5] described this as '*a classic, email where [...] he's thanking me in advance for changing the price*' – and saying "*Look into this product. The price is not what we would like it to be*".<sup>437</sup> [Reseller 1 Employee 5] sent this to [Reseller 1 Employee 1], asking [Reseller 1 Employee 1] to '*reset the [code 181]*'. At 12:54pm-12:55pm, [Reseller 1 Employee 1] replied '*Done!!*' after having increased [Reseller 1]'s ESX2 pricing, to the Minimum Price.<sup>438</sup>

<sup>430</sup> URN ER\_KOR01228 (Email from [Reseller 1 Employee 3] to [Reseller 1 Employee 5] on 5 September 2016); URN ER\_KOR01235 (Email from [Reseller 1 Employee 3] to [Reseller 1 Employee 5] on 5 September 2016).

<sup>431</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.216, lines 8–19; p.224, line 12 to p.225, line 1.

<sup>432</sup> Although [Reseller 1 Employee 5] may not have understood initially why [Korg Employee 8] sent a [Reseller] weblink (see URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.131, lines 12–14, hence [Reseller 1 Employee 5] writing '???') to [Korg Employee 8] on 5 September 2016 at 12:18pm (see URN ER\_KOR01453 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 5 September 2016))).

<sup>433</sup> URN C\_KOR02104 ([Reseller 1] Data: Microkorg), £299.00 at 05/09/2016 12:16. The increased price was ascribed to '*[code 44]*' (see footnote 382 above).

<sup>434</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.77, line 1 to p.78, line 3; p.216, line 4 to p.218, line 19; p.222, line 19 to p.226, line 19; p.288, lines 7–16; p.321, lines 7–17.

<sup>435</sup> £315.00: see URN C\_KOR01935 (KORG Confidential UK Main dealer Trade Price List - Updated September 2016).

<sup>436</sup> This is notwithstanding that [Korg Employee 8] sent [Reseller 1 Employee 5] a [Reseller 1] weblink for Korg's Microkorg, under the subject '*Many Thanks*', at 12:23pm – which [Korg Employee 8] told the CMA was '*another request to have a look at the product*'. URN ER\_KOR01453 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 5 September 2016); URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.226, lines 1–7.

<sup>437</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.132, line 8 to p.135, line 7.

<sup>438</sup> URN ER\_KOR01631 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 19 October 2016). URN C\_KOR02089 ([Reseller 1] Data: ESX-RD), £390.00 at 19/10/2016 12:54. The increased price was ascribed to '*[code 44]*' (see footnote 382 above) and matched '*RRP Ex VAT*' in URN C\_KOR01936 (KORG Confidential UK Main dealer Trade Price List - October 18th 2016).

- 4.173 Additional examples of [Reseller 1] agreeing, in 2016, to raise its pricing to the Minimum Price on request from Korg UK are set out in Annex C, paragraphs C2 to C14 below.

**[Reseller 1]’s understanding that the Korg Pricing Policy prohibited any Bundle including a Relevant Product if the Bundle’s total price meant pricing the Relevant Product, in effect, below the Minimum Price**

- 4.174 On 29 February 2016 at 10:50am, [Korg Employee 8] sent [Reseller 1 Employee 5] a [Reseller 1] weblink, stating *‘Just spotted this deal on your site and with the deck saver margin maybe lower than you want’*. At 11:07am, [Reseller 1 Employee 4] told [Reseller 1 Employee 5] *‘sorted, cheers mate’*. At 11:13am, [Reseller 1 Employee 5] told [Korg Employee 8] *‘It’s been looked into’*.<sup>439</sup> [Reseller 1 Employee 5] told the CMA that the weblink related to a Bundle comprising Korg’s Volca Keys (a Relevant Product) and a ‘deck saver’ accessory and that [Reseller 1 Employee 4] *‘took it off the website or he adjusted the price’* (to *‘full price plus the deck saver’*).<sup>440</sup> These events show that [Reseller 1] understood that the Korg Pricing Policy prohibited any Bundle including a Relevant Product if the Bundle’s total price meant the Relevant Product was, in effect, at a discount to the Minimum Price and so took steps to adhere to the Korg Pricing Policy.
- 4.175 On 30 August 2016, [Reseller 1 Employee 3] asked Korg UK’s [Korg Employee 8] *‘[Reseller] are offering £[X] off any order over £[X] using the code [X] & it works on your products. Is this something you’ve allowed them to do? If so, can we do the same?’*. Two minutes later, [Korg Employee 8] replied *‘I was not aware of that. Leave it with me and ill [sic] get back to you’*.<sup>441</sup>
- 4.176 [Korg Employee 8] told the CMA that [Reseller] was *‘offering a voucher [...] which, obviously, they are entitled to do’*, but his reply may have indicated to [Reseller 1] that he would contact [Reseller] about its offer. He didn’t recall [Reseller 1] or other MI Resellers asking Korg UK for permission to discount.<sup>442</sup> Three [Reseller 1] staff provided accounts contradicting that of [Korg Employee 8]. For example, [Reseller 1 Employee 3] said that he was asking Korg UK *‘to clarify if they were now ok with promotions as my impression had been that Korg required us to seek permission before implementing any promotions’*. [Reseller 1 Employee 3] recalled *‘[Korg Employee 8] saying verbally that it cheapened or damaged their brand image if their products were bundled with other products or included in promotions of any kind’*.<sup>443</sup>

<sup>439</sup> URN ER\_KOR01359 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 29 February 2016).

<sup>440</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.190, line 26 to p.191, line 24.

<sup>441</sup> URN ER\_KOR01236 (Email from [Korg Employee 8] to [Reseller 1 Employee 3] on 30 August 2016).

<sup>442</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.208, line 4 to p.211, line 14.

<sup>443</sup> [Reseller 1 Employee 3] submitted that he could find no *‘evidence of these rules being set out in any written documents’*, but [Reseller 1] sought *‘Korg’s approval for any kind of promotion because they had always been against it when we had suggested them in the past’*: URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.7/question 8. [Reseller 1 Employee 5] similarly submitted that, while not a written term of supply, promotions on Korg products were *‘not allowed. You don’t promote, you don’t discount products’*: URN C\_KOR02479 (Transcript of the [Reseller



[Reseller 1]'s email and submissions to the CMA show that it understood that the Korg Pricing Policy prohibited any Bundle including a Relevant Product if the Bundle's total price meant the product was, in effect, at a discount to the Minimum Price (see paragraphs 3.74 to 3.78 above).

**[Reseller 1]'s proactive monitoring and reporting of MI Resellers not adhering to the Korg Pricing Policy**

- 4.177 There are examples in 2016 of [Reseller 1] emailing Korg UK at least one other MI Reseller's weblink for a Relevant Product proactively (as compared to doing so reactively – as set at e.g. paragraphs 4.152 and 4.157 above).
- 4.178 On 24 February 2016 at 4:17pm, [Reseller 1 Employee 5] sent [Korg Employee 8] five other MI Resellers' weblinks for Korg's Kaossilator Pro+, a Relevant Product.<sup>444</sup>
- 4.179 On 20 July 2016 at 4:56pm, [Reseller 1 Employee 5] sent [Korg Employee 8] six other MI Resellers' weblinks for Korg's NanoKontrol, a Relevant Product.<sup>445</sup>
- 4.180 On 24 October 2016 at 10:23am, [Reseller 1 Employee 5] sent [Korg Employee 8] of Korg UK seven other MI Resellers' weblinks for Korg's Volca FM.<sup>446</sup>
- 4.181 The additional examples set out above show that [Reseller 1] understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.

**[Reseller 1] was allowed to price below the Minimum Price temporarily to match other MI Resellers of the Relevant Products**

- 4.182 There are examples in 2016, set out below, of [Reseller 1] sending Korg UK another MI Reseller's weblink for a Relevant Product around the time of [Reseller 1] reducing its pricing to match a rival.

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1 Employee 5] Interview), p.183, line 23 to p.187, line 11. See also [Reseller 1 Employee 2]'s similar submission: URN C\_KOR02336 ([Reseller 1 Employee 2] reply dated 30 January 2020 to a s.26 Notice), pp.3–4/question 4.

<sup>444</sup> URN ER\_KOR01423 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 24 February 2016). [Reseller 1 Employee 1] had sent [Reseller 1 Employee 5] these links at 3:39pm: see URN ER\_KOR01422 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 24 February 2016). Five days earlier, [Reseller 1] similarly sent Korg two other resellers' weblinks for this Relevant Product (URN ER\_KOR01424 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 19 February 2016)). A week earlier, [Reseller 1] increased its pricing on this Relevant Product: URN C\_KOR02091 ([Reseller 1] Data: KOPRO+), £299.00 at 16/02/2016 12:04.

<sup>445</sup> URN ER\_KOR01571 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 20 July 2016). [Reseller 1 Employee 1] had sent [Reseller 1 Employee 5] these weblinks at 4:55pm: URN ER\_KOR01574 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 20 July 2016). This was about a week after [Reseller 1], similarly, sent Korg some other resellers' weblinks for (just after [Reseller 1] increased its pricing on) this Relevant Product: see URN C\_KOR02108 ([Reseller 1] Data: Nanokontrol ST), £113.00 at 12/07/2016 15:37; URN ER\_KOR01573 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 12 July 2016).

<sup>446</sup> URN ER\_KOR01579 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 24 October 2016). [Reseller 1 Employee 1] had sent [Reseller 1 Employee 5] these links at 10:20am: see URN ER\_KOR01580 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 24 October 2016). This was about five days after [Reseller 1] increased its pricing on this Relevant Product: see Annex C, paragraph C14 below.

- 4.183 On 7 March 2016 at 12:21pm, [Reseller 1 Employee 1] sent a weblink of another MI Reseller ([Reseller]) for Korg's Microkorg, a Relevant Product, commenting '*3rd time*', to [Reseller 1 Employee 5] – who replied '*Match please*' at 12:21pm.<sup>447</sup> At 12:22pm, [Reseller 1 Employee 5] reduced [Reseller 1]'s Microkorg pricing to match [Reseller].<sup>448</sup> [Reseller 1] had also sent Korg UK the Microkorg weblink of [Reseller] twice in the weeks before this.<sup>449</sup> At 12:22pm, [Reseller 1 Employee 5] sent Korg UK's [Korg Employee 8] the other MI Reseller's weblink, commenting '*3rd time*'. At 3:19pm, [Korg Employee 8] replied '*Understood*'.<sup>450</sup> [Reseller 1 Employee 5] indicated in such circumstances, he would inform Korg UK he was '*adjusting our price to the market*' as a '*justification of what we were doing*'.<sup>451</sup> In interview, [Korg Employee 8] submitted that even if his reply indicated that Korg UK would contact [Reseller] about its pricing, he may not have done so.<sup>452</sup>
- 4.184 A similar pattern of events occurred on 21 March 2016<sup>453</sup> and 29 March 2016.<sup>454</sup>
- 4.185 The CMA concludes from this that there was an understanding between Korg UK and [Reseller 1] that [Reseller 1] was allowed to price below the Minimum Price temporarily, to match another MI Reseller's lower price – provided that [Reseller 1]'s

<sup>447</sup> URN ER\_KOR01503 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 7 March 2016).

<sup>448</sup> This followed [Reseller 1] increasing its pricing on this Relevant Product, to the Minimum Price, on 16 February 2016 (see paragraph 4.148 above). While maintaining that pricing, [Reseller 1] recorded three times a [Reseller] price of £270.00, i.e. below the Minimum Price – then [Reseller 1] reduced its pricing to match: URN C\_KOR02104 ([Reseller 1] Data: Microkorg), entries showing £270.00 at 19/02/2016 16:25, 29/02/2016 10:34, and 07/03/2016 at both 12:20 and 12:22 (NB code '4' denotes [Reseller] prices: URN C\_KOR02133 (Competitor codes & names)).

<sup>449</sup> URN ER\_KOR01499 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 19 February 2016); URN ER\_KOR01763 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 19 February 2016); URN ER\_KOR01502 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 29 February 2016); URN ER\_KOR01615 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 29 February 2016).

<sup>450</sup> URN ER\_KOR01760 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 7 March 2016). The CMA notes that one possible interpretation is that [Korg Employee 8] was signalling Korg UK's approval of [Reseller 1]'s price reduction, in the circumstances, such that this may have been an agreed exception to (or part of) the Korg Pricing Policy.

<sup>451</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.95, lines 13–15.

<sup>452</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.166, line 9 to p.167, line 7.

<sup>453</sup> On 21 March 2016 at 5:09pm, [Reseller 1 Employee 1] sent four other resellers' weblinks for Korg's Volca Keys, commenting '*3rd time*', to [Reseller 1 Employee 5] who replied '*Match please*' at 5:18pm: URN ER\_KOR01775 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 21 March 2016). At 5:18pm, [Reseller 1 Employee 5] sent [Reseller]'s Volca Keys weblink to [Korg Employee 8], with no further comment (URN ER\_KOR01796 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 21 March 2016)), having also sent Korg UK that same weblink a week before (URN ER\_KOR01795 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 14 March 2016)). At 5:19pm, [Reseller 1 Employee 1] reduced [Reseller 1]'s Volca Keys pricing to match [Reseller]; this followed [Reseller 1] increasing its pricing on this Relevant Product, to the Minimum Price, on 16 February 2016 (see paragraph 4.148 above). While maintaining that pricing, [Reseller 1] recorded three times a [Reseller] price of £108.00, i.e. below the Minimum Price, then [Reseller 1] reduced its pricing to match: URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), entries showing £108.00 at 07/03/2016 16:11, 14/03/2016 14:31, and 21/03/2016 at both 17:09 and 17:19 (NB code '10' denotes [Reseller] prices: URN C\_KOR02133 (Competitor codes & names)).

<sup>454</sup> On 29 March 2016 at 12:49pm, [Reseller 1 Employee 1] sent three other resellers' weblinks for Korg's Electribe Sampler ESX2, commenting '*3rd time [Reseller]*', to [Reseller 1 Employee 5] who replied '*Match please*' at 12:50pm: URN ER\_KOR01666 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 29 March 2016). At 12:51pm [Reseller 1 Employee 5] sent [Reseller]'s ESX2 weblink to [Korg Employee 8], with no further comment: URN ER\_KOR01385 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 29 March 2016). At 12:53pm, [Reseller 1 Employee 1] reduced [Reseller 1]'s ESX2 pricing to match [Reseller]; this followed [Reseller 1] increasing its pricing on this Relevant Product, to the Minimum Price, on 16 February 2016 (see paragraph 4.148 above). While maintaining that pricing, [Reseller 1] recorded three times a [Reseller] price of £339.00, i.e. below the Minimum Price – then [Reseller 1] reduced its pricing to match: URN C\_KOR02189 ([Reseller 1] Data: ESX2-BK), entries showing £339.00 at 14/03/2016 12:52, 21/03/2016 12:26, and 29/03/2016 at both 12:47 and 12:53 (NB code '46' denotes [Reseller] prices: URN C\_KOR02133 (Competitor codes & names)).

pricing increased again once the other MI Reseller raised its price. Based on the evidence in the CMA's possession, this was normally limited to a small subset of the Relevant Products, focussed on different products over time.

### **[Reseller 1]'s occasional non-compliance no impediment to finding an agreement and/or concerted practice with Korg UK**

- 4.186 There is also at least one example in 2016 of [Reseller 1] reducing its pricing to match a rival, at least temporarily, in relation to which the CMA has seen no evidence of any contact between Korg UK and [Reseller 1] about the intended price match. On 14 March 2016, [Reseller 1 Employee 1] sent [Reseller 1 Employee 5] five other MI Resellers' weblinks for Korg's Kaossilator Pro+ (a Relevant Product), commenting '*3rd time*'. At 4:46pm, [Reseller 1 Employee 5] replied '*Match please*',<sup>455</sup> and [Reseller 1 Employee 1] reduced [Reseller 1]'s Kaossilator Pro+ pricing, to match [Reseller].<sup>456</sup> While the CMA has no evidence of any relevant contact between [Reseller 1] and Korg UK around this time, [Reseller 1]'s pricing matched [Reseller] only temporarily, reverting to the Minimum Price on 18 April 2016: see Annex C, paragraph C8 below.
- 4.187 The CMA further considers that, in any event, [Reseller 1]'s non-compliance in part with the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>457</sup>

## 2017

- 4.188 The evidence for 2017 continues to show that [Reseller 1] agreed with, or at least knowingly went along with, the Korg Pricing Policy. More specifically, it shows:
- [Reseller 1] agreeing to raise its pricing to the Minimum Price in relation to Relevant Products, on request from Korg UK;
  - [Reseller 1] monitoring, and reporting to Korg UK, other MI Resellers not adhering to the Korg Pricing Policy (at the time of [Reseller 1] agreeing to raise its pricing to the Minimum Price, on request from Korg UK);

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<sup>455</sup> URN ER\_KOR01420 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 14 March 2016). This followed [Reseller 1] increasing its pricing on this Relevant Product, to the Minimum Price, on 16 February 2016 (see paragraph 4.148 above). While maintaining that pricing, [Reseller 1] recorded three times a [Reseller] price of £239.00, i.e. below the Minimum Price – then [Reseller 1] reduced its pricing to match: URN C\_KOR02091 ([Reseller 1] Data: KOPRO+), entries showing £239.00 at 19/02/2016 16:11, 24/02/2016 15:38, and 14/03/2016 at both 16:32 and 16:46 (NB code '4' denotes [Reseller] prices: URN C\_KOR02133 (Competitor codes & names)).

<sup>456</sup> This followed [Reseller 1] increasing its pricing on this Relevant Product, to the Minimum Price, on 16 February 2016 (see paragraph 4.148 above). While maintaining that pricing, [Reseller 1] recorded three times a [Reseller] price of £339.00, i.e. below the Minimum Price – then [Reseller 1] reduced its pricing to match. See, in the data at URN C\_KOR02189 ([Reseller 1] Data: ESX2-BK), £339.00 at 14/03/2016 12:52, 21/03/2016 12:26, and 29/03/2016 at both 12:47 and 12:53 (NB code '46' denotes [Reseller] prices: URN C\_KOR02133 (Competitor codes & names)).

<sup>457</sup> Further, in the CMA's view, the evidence of 'cheating' is offset by the volume and quality of evidence (set out in this Decision) showing that [Reseller 1] 'agreed' with the Korg Pricing Policy and, throughout the Relevant Period, [Reseller 1] generally was supportive of, and agreed to abide by, or acquiesced in, the Korg Pricing Policy.

- [Reseller 1] understood that the Korg Pricing Policy prohibited any Bundle including a Relevant Product if the Bundle's total price meant pricing the Relevant Product, in effect, below the Minimum Price;
- [Reseller 1] was allowed to price below the Minimum Price temporarily to match other MI Resellers of the Relevant Products; and
- [Reseller 1]'s occasional non-compliance with the Korg Pricing Policy (albeit this is no impediment to finding an agreement and/or concerted practice with Korg UK).

**[Reseller 1] agreeing to raise its pricing to the Minimum Price on request from Korg UK (and monitoring and reporting of other MI Resellers not adhering to the Korg Pricing Policy)**

- 4.189 On 14 February 2017 at 9:56am, Korg UK's [Korg Employee 8] sent [Reseller 1 Employee 5] a price list, stating '*[t]his is live now, I have attached a Pricelist with the difference in price for you to make it easier*'. On 16 February 2017 at 3:47pm, [Reseller 1 Employee 5] sent this to [Reseller 1 Employee 1], asking [Reseller 1 Employee 1] to '*adjust the [code 181] based on the purple and red prices*'.<sup>458</sup> By 4:28pm, [Reseller 1 Employee 1] had increased [Reseller 1]'s pricing for 24 Relevant Products, to the Minimum Price.<sup>459</sup>
- 4.190 On 10 March 2017, Korg UK staff exchanged messages about [Reseller 1]'s pricing.<sup>460</sup> Korg UK's [Korg Employee 2] wrote '*[Reseller 1] still out on Electribes 339 and 390 [...] Volca fm, [Volca] sample, [Volca] keys, ms20mini, koproplus, ko2s,*

<sup>458</sup> URN ER\_KOR01401 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 16 February 2017); URN ER\_KOR01401.A (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017).

<sup>459</sup> URN C\_KOR02088 ([Reseller 1] Data: EMX-BL), £399.00 at 16/02/2017 16:06 and 16:28; URN C\_KOR02089 ([Reseller 1] Data: ESX-RD), £399.00 at 16/02/2017 16:06; URN C\_KOR02090 ([Reseller 1] Data: KO2S), £129.00 at 16/02/2017 16:09; URN C\_KOR02100 ([Reseller 1] Data: KRMini), £70.00 at 16/02/2017 16:11; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'MICROKEY2-25AIR', £82.00 at 16/02/2017 16:13; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'WDXGLOBAL', £459.00 at 16/02/2017 16:15; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'CH-01', £99.00 at 16/02/2017 16:15; URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH), £549.00 at 16/02/2017 16:17; URN C\_KOR02190 ([Reseller 1] Data: MS20Mini-BK), £549.00 at 16/02/2017 16:17; URN C\_KOR02103 ([Reseller 1] Data: Microkorg XL+), £415.00 at 16/02/2017 16:18; URN C\_KOR02104 ([Reseller 1] Data: Microkorg), £329.00 at 16/02/2017 16:19; URN C\_KOR02102 ([Reseller 1] Data: Microkorg S), £415.00 at 16/02/2017 16:19; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'RK100S-WH', £625.00 at 16/02/2017 16:20; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'RK100S-BK', £625.00 at 16/02/2017 16:20; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'RK100S-RD', £625.00 at 16/02/2017 16:21; URN C\_KOR02086 ([Reseller 1] Data: ARP Odyssey Rev.3 Black&Orange), £665.00 at 16/02/2017 16:22; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'SQ-1', £99.00 at 16/02/2017 16:24; URN C\_KOR02113 ([Reseller 1] Data: Volca Bass), £139.00 at 16/02/2017 16:25; URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), £139.00 at 16/02/2017 16:25; URN C\_KOR02114 ([Reseller 1] Data: Volca Beats), £139.00 at 16/02/2017 16:26; URN C\_KOR02117 ([Reseller 1] Data: Volca Sample), £139.00 at 16/02/2017 16:26; URN C\_KOR02115 ([Reseller 1] Data: Volca FM), £139.00 at 16/02/2017 16:27; URN C\_KOR02099 ([Reseller 1] Data: Volca Sample OKGo), £139.00 at 16/02/2017 16:27; URN C\_KOR02105 ([Reseller 1] Data: Mini-KP2S), £129.00 at 16/02/2017 16:28. Each increased price was ascribed to '*[code 44]*' (see footnote 382 above) – and matched Korg UK's '*SSP inc. VAT @20%*' in the pricelist at footnote 458 above.

<sup>460</sup> URN C\_KOR00909 (WhatsApp messages of [Korg Employee 4], [Korg Employee 2], [Korg Employee 8], [Korg Employee 15] and [Korg Senior Employee 1] on 10 March 2017), also quoted in paragraphs 4.191–4.193 below.

*microkorg, odyssey all below ssp* 😊<sup>461</sup> and *'[t]hey have several prices wrong'*. [Korg Employee 2] told the CMA that this denoted that [Reseller 1]'s prices on all of those Relevant Products differed from Korg UK's 'SSP', and that he would have learned about this from *'Google and [Reseller 1]'s web site'* and *'information from colleagues'*.<sup>462</sup> Later that day, [Korg Senior Employee 1] of Korg UK asked: *'Was [Reseller 1] the start of this? I quickly looked this morning and it seemed OK but I didn't check every product. How many of these dealers could we contact before the end of the day?'*, then *'can we get some screenshots?'* at 3:57pm.

- 4.191 At 3:58pm that day, [Korg Employee 2] replied *'[t]he spider doesn't track the red and blue version electribes needs an update'*. At 4:47pm, Korg UK's [Korg Employee 8] asked *'Need me to call [Reseller 1]?'*. [Korg Employee 2] replied *'[u]p to [Korg Senior Employee 1] in view of the meeting this week'*, at 4:51pm.<sup>463</sup> [Korg Senior Employee 1] replied at 4:57pm, *'I think it's worth a quick call to see if it's a mistake...'* 😊<sup>464</sup>, and at 4:58pm *'[o]f course [Korg Employee 8], only if convenient... conscious you're on holiday...'*. At 5:01pm, [Korg Employee 8] wrote *'2 bstock items and 1 new wrong. I'll call now'*. Between 5:02pm and 5:05pm, [Korg Employee 2] cited prices on various Relevant Products, including *'Plugkey bk [a Relevant Product] at 81'*, then wrote *'[i]t feels insulting'*. Korg UK's [Korg Employee 15] added *'Odyssey [a Relevant Product] is at £650'* at 5:07pm. At 5:15pm, Korg UK's [Korg Senior Employee 3] texted [Korg Employee 8]: *'sorry that you have been roped in to [Reseller 1] on a day off. Do you need me to call [Reseller 1 Employee 3]?'*. At 5:16pm, [Korg Employee 8] replied: *'No probs. I'm on to [Reseller 1 Employee 5] now thanks'*.<sup>465</sup>
- 4.192 Around the same time, on 10 March 2017 between 5:11pm and 5:18pm, [Reseller 1 Employee 5] increased [Reseller 1]'s pricing for 10 of the 12 Relevant Products mentioned in paragraphs 4.190 and 4.191 above to the Minimum Price (the *'Electribes'* having model numbers EMX2-BL and ESX2-RD).<sup>466</sup> Korg UK staff

<sup>461</sup> For one definition (amongst others) of this emoji, see e.g. <https://emojipedia.org/zipper-mouth-face/> (accessed on 26 June 2020).

<sup>462</sup> URN C\_KOR02332 ([Korg Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.2/question 4.

<sup>463</sup> [Korg Employee 8] told the CMA that this *'meeting'* was probably at [3<] and attended by him and e.g. [Korg Senior Employee 1]: URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.278, lines 11–25. Korg UK and [Reseller 1] each submitted that such a meeting took place on 8 March 2017, at which [Korg Senior Employee 3] and [Korg Senior Employee 1] were introduced to [Reseller 1], as new management. [Korg Senior Employee 3] also recalled discussing e.g. *'SDA requirements for [3<]'*: URN C\_KOR02431 (Korg reply dated 10 February 2020 to a s.26 Notice: Attachment regarding Question 4), pp.2–3; URN C\_KOR02423 ([Reseller 1] reply dated 10 February 2020 to a s.26 Notice), p.3.

<sup>464</sup> For one definition (amongst others) of this emoji, see e.g. <https://emojipedia.org/smiling-face-with-smiling-eyes/> (accessed on 26 June 2020).

<sup>465</sup> URN C\_KOR02320 (Text messages of [Korg Employee 8] and [Korg Senior Employee 3] on 10 March 2017).

<sup>466</sup> URN C\_KOR02086 ([Reseller 1] Data: ARP Odyssey Rev.3 Black&Orange), £665.00 at 10/03/2017 17:11; URN C\_KOR02088 ([Reseller 1] Data: EMX-BL), £399.00 at 10/03/2017 17:12; URN C\_KOR02089 ([Reseller 1] Data: ESX-RD), £399.00 at 10/03/2017 17:12; URN C\_KOR02117 ([Reseller 1] Data: Volca Sample), £139.00 at 10/03/2017 17:13; URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), £139.00 at 10/03/2017 17:14; URN C\_KOR02190 ([Reseller 1] Data: MS20Mini-BK), £549.00 at 10/03/2017 17:15; URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH), £549.00 at 10/03/2017 17:15; URN C\_KOR02091 ([Reseller 1] Data: KOPRO+), £330.00 at 10/03/2017 17:17; URN C\_KOR02104 ([Reseller 1] Data: Microkorg), £329.00 at 10/03/2017 17:18; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'PLUGKEY-BK', £90.00 at 10/03/2017 17:18. As regards the other two Relevant Products mentioned in paragraph 4.190 above, URN C\_KOR02115 ([Reseller 1] Data: Volca FM) contains no entries between

continued to exchange messages about [Reseller 1] prices.<sup>467</sup> At 5:20pm, [Korg Employee 8] wrote *'All the listed above are being resolved. I will speak to them again on Monday. Every price was a track against either [Reseller], [Reseller]. [Reseller]? and [Reseller]. It will at least be right for the weekend now.'* When asked if this denoted *'an example of a reseller agreeing ...with Korg, to raise its prices to SSP'* (i.e. the Minimum Price, in this instance) and if [Reseller 1]'s pricing would have stayed for that weekend at or around SSP, Korg UK's [Korg Employee 15] respectively replied *'Yes, I would say so, yeah'* and *'Yes, yes'*.<sup>468</sup>

- 4.193 On 10 March 2017 at 5:21pm, [Korg Employee 2] of Korg UK wrote *'[...] they were going to start making human business decisions 😊'*.<sup>469</sup> [Korg Employee 8] told the CMA that this referred to [Reseller 1] turning off software which had been automatically tracking and matching the prices of other MI Resellers or at least no longer allowing the software to determine [Reseller 1]'s pricing automatically.<sup>470</sup>
- 4.194 On 14 March 2017, Korg UK staff exchanged messages about the pricing of resellers including [Reseller 1].<sup>471</sup> [Korg Employee 8] asked *'...have [Reseller] moved first?'*. [Korg Employee 2] replied *'Seems to be the case.'* [Korg Employee 15] replied *'[Reseller 1] and [Reseller] the same'*, then *'[Reseller] back to 525'* and *'They followed [Reseller 1]'*. [Korg Employee 15] told the CMA that this recorded [Reseller] having reduced a price to match [Reseller 1] (possibly on Korg's Minilogue, a Relevant Product) then increased that price to a level which he had requested verbally.<sup>472</sup> At 9:12am, [Korg Employee 8] wrote *'I'll ask them the question'*. [Korg Employee 8] explained that this referred to him contacting [Reseller 1], possibly with the goal of [Reseller 1] re-pricing to SSP (i.e. the Minimum Price, in this instance).<sup>473</sup> At 9:12am, [Korg Employee 8] sent [Reseller 1 Employee 5] a [Reseller 1] weblink for Korg's Minilogue, in an email titled *'Thank [sic]'*.<sup>474</sup> At 9:15am, [Reseller 1 Employee 5] increased [Reseller 1]'s Minilogue pricing to the Minimum Price.<sup>475</sup> At 9:25am, [Korg Employee 15] asked *'have [Reseller 1] moved back?'*. At 9:27am, [Korg Employee 8] replied *'Thy [sic] are now'*.

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09/03/2017 09:50 and 11/03/2017 13:01, and URN C\_KOR02090 ([Reseller 1] Data: KO2S) contains no entries between 09/03/2017 09:39 and 11/03/2017 12:53. Each increased price was ascribed to *'[code 44]'* (see footnote 382 above) and matched *'SSP inc. VAT@20%'* in URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017).

<sup>467</sup> Messages exchanged within Korg that are cited in this paragraph are those referred to footnote 460 above.

<sup>468</sup> URN C\_KOR01957 (Transcript of the [Korg Employee 15] Interview), p.293, line 21 to p.295 line 3.

<sup>469</sup> This message cited was part of those referred to footnote 460 above. For one definition (amongst others) of the emoji cited in this paragraph, see e.g. <https://emojipedia.org/smiling-face-with-smiling-eyes/> (accessed on 26 June 2020).

<sup>470</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.276, line 20 to p.277, line 6.

<sup>471</sup> URN C\_KOR00911 (WhatsApp messages of [Korg Employee 2], [Korg Employee 8] and [Korg Employee 15] on 14 March 2017).

<sup>472</sup> URN C\_KOR01957 (Transcript of the [Korg Employee 15] Interview), p.298, line 4 to p.301, line 5.

<sup>473</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.284, lines 5–19; p.286, line 12 to p.288, line 19.

<sup>474</sup> URN ER\_KOR01361 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 14 March 2017).

<sup>475</sup> URN C\_KOR02106 ([Reseller 1] Data: Minilogue), £525.00 at 14/03/2017 09:15. The increased price was ascribed to *'[code 44]'* (see footnote 382 above) and matched *'SSP inc. VAT @20%'* in URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017).

- 4.195 On 3 April 2017 at 11:40pm, Korg UK's [Korg Employee 8] sent an email to [Reseller 1 Employee 5] entitled '*Back in stock*', comprising only a [Reseller 1] weblink for Korg's MS20Mini (White), a Relevant Product.<sup>476</sup> [Reseller 1 Employee 5] explained to the CMA three aspects of this email. First, he viewed [Korg Employee 8] as saying "*It's coming into stock but, your price is not correct. So [...] can you put up the price for a pound?*" [sic] – i.e. from £548.00 to £549.00. Second, he explained that '*we had some stocks that we haven't received and he was, sort of, saying, you know, "If you want them, put up the price"*'. Third, [Reseller 1 Employee 5] increased [Reseller 1]'s MS20Mini pricing due to [Korg Employee 8]'s '*request*'.<sup>477</sup> This accords with [Reseller 1 Employee 5] having increased [Reseller 1]'s pricing for Korg's MS20Mini (White) and MS20Mini (Black), to the Minimum Price, on 4 April 2017 at 8:31am.<sup>478</sup> On 5 April 2017 at 9:52am, [Korg Employee 8] informed certain colleagues that '*[Reseller 1] matched ms20mini wh to the [Reseller] b stock. Correcting now.*'<sup>479</sup>
- 4.196 On 24 May 2017 at 11:25am, Korg UK's [Korg Employee 15] messaged Korg UK's [Korg Employee 8]: '*Issue with ms20 [a Relevant Product] seems to be [Reseller 1] at £455*'. At 11:55am, [Korg Employee 8] replied '*Microkorg [a Relevant Product] done with my guys mate*'.<sup>480</sup> At 11:46am, [Reseller 1 Employee 5] had increased [Reseller 1]'s pricing to the Minimum Price for both Relevant Products cited in these messages.<sup>481</sup>
- 4.197 On 7 June 2017 at 9:56am, [Reseller 1 Employee 5] increased [Reseller 1]'s pricing for Korg's Volca Beats, a Relevant Product, to the Minimum Price.<sup>482</sup> At 9:59am, [Reseller 1 Employee 5] sent [Korg Employee 8] three other MI Resellers' Volca Beats weblinks.<sup>483</sup>
- 4.198 The events set out in paragraph 4.197 above are similar to those in the evidence set out (e.g. at paragraphs 4.136 to 4.137) above. They follow a pattern of [Reseller 1] receiving from Korg UK what it considered to be requests to increase [Reseller 1]'s pricing to the Minimum Price, and [Reseller 1] then reporting to Korg UK other MI Resellers' pricing below the Minimum Price. The CMA concludes, therefore, that

<sup>476</sup> URN ER\_KOR01300 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 3 April 2017).

<sup>477</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.139, line 20 to p.141, line 8.

<sup>478</sup> URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH), £549.00 at 04/04/2017 08:31; URN C\_KOR02190 ([Reseller 1] Data: MS20Mini-BK), £549.00 at 04/04/2017 08:31. Each increased price was ascribed to '*[code 44]*' (see footnote 382 above) and matched '*SSP inc. VAT @20%*' in URN C\_KOR01942 (KORG Confidential UK Trade Price List - Updated 30 March 2017).

<sup>479</sup> URN C\_KOR00920 (WhatsApp messages of [Korg Employee 8], [Korg Employee 2] and [Korg Employee 15] on 5 April 2017). Text in square brackets added by the CMA.

<sup>480</sup> URN C\_KOR02570 (WhatsApp messages of [Korg Employee 15] and [Korg Employee 8] on 24 May 2017). Text in square brackets added by the CMA.

<sup>481</sup> URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH), £549.00 at 24/05/2017 11:36; URN C\_KOR02190 ([Reseller 1] Data: MS20Mini-BK), £549.00 at 24/05/2017 11:36; URN C\_KOR02104 ([Reseller 1] Data: Microkorg), £329.00 at 24/05/2017 11:46. Each increased price was ascribed to '*[code 44]*' and matched '*SSP inc. VAT @20%*' in URN C\_KOR01944 (KORG Confidential UK Trade Price List - May 17th 2017). Text in square brackets added by the CMA.

<sup>482</sup> URN C\_KOR02114 ([Reseller 1] Data: Volca Beats), £139.00 at 07/06/2017 09:56. The increased price was ascribed to '*[code 44]*' (see footnote 382 above) and matched '*SSP inc. VAT @20%*' in URN C\_KOR01944 (KORG Confidential UK Trade Price List - May 17th 2017).

<sup>483</sup> URN ER\_KOR01803 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 7 June 2017).



these events show that, on this occasion, [Reseller 1] (i) agreed to increase its pricing to the Minimum Price following a request from Korg UK to do so, then (ii) reported to Korg UK other MI Resellers' non-adherence to the Korg Pricing Policy. The CMA concludes that these events also show that [Reseller 1] understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.

- 4.199 On 10 July 2017, Korg UK staff exchanged messages about [Reseller 1]'s pricing.<sup>484</sup> At 10:51am, [Korg Employee 8] circulated a screenshot of [Reseller 1]'s online listing for Korg's Monologue (Black), a Relevant Product. [Korg Senior Employee 3] replied *'Have we had any contact with them about this – they are free to set but is this a typo?'*. [Korg Employee 8] later wrote *'Not managed to reach [Reseller 1 Employee 5] but will keep trying. They have emailed saying they can't see certain items on the portal so they must know. I'll message once I've made contact though'*. At 3:32pm and 3:35pm, [Korg Senior Employee 3] wrote *'we need to see [Reseller 1]'*, to explain that the Korg Charter had now been introduced, and *'[Korg Employee 8], will you discuss with [Korg Senior Employee 1] pls'*.<sup>485</sup>
- 4.200 At 3:44pm and 3:45pm that day, [Korg Employee 8] wrote *'Yes will do'* and *'[Reseller 1] sorting price now. It was a match to [Reseller] at 6am this morning which he can not [sic] find himself but the "system" did.'*<sup>486</sup> [Korg Senior Employee 3] replied *'thanks [Korg Employee 8]. Bloody trackers!'*. [Korg Employee 8] told the CMA that he likely learned that [Reseller 1] would increase its pricing to SSP (or street) (the Minimum Price) from email or telephone contact with [Reseller 1].<sup>487</sup> At 3:50pm, [Reseller 1 Employee 5] increased [Reseller 1]'s pricing for Korg's Monologue (Black), to the Minimum Price.<sup>488</sup>
- 4.201 On 11–12 December 2017, Korg UK staff exchanged messages about the pricing of resellers including [Reseller 1].<sup>489</sup> On 11 December 2017 at 10:47am, Korg UK's [Korg Employee 8] asked *'Do we need to look at Minilogue [a Relevant Product]? Currently at £472. It would need a uk/Europe if we are going to do it'*. [Korg Employee 8] told the CMA that he was *'saying do we need to have a conversation with dealers about getting them to change their prices on a Minilogue'*.<sup>490</sup> On 12

<sup>484</sup> URN C\_KOR02600 (WhatsApp messages of [Korg Senior Employee 3] and [Korg Employee 8] on 10 July 2017), also quoted in paragraph 4.200 below.

<sup>485</sup> This denoted [Korg Senior Employee 1] of Korg UK: URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.320, line 1. Text in square brackets added by the CMA.

<sup>486</sup> The time reference accords with a submission that [Reseller 1]'s software *'grabbed at 6.00 am [...] and then applied on the system afterwards'* other retailer's prices: URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.148, lines 4–12.

<sup>487</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.320, line 8 to p.321, line 17.

<sup>488</sup> URN C\_KOR02092 ([Reseller 1] Data: Monologue-BK), £299.00 at 10/07/2017 15:50. The increased price was ascribed to *'[code 44]'* (see footnote 382 above) and matched *'SSP inc 20% VAT'* in URN C\_KOR01946 (KORG Confidential UK Trade Price List - 7th July 2017).

<sup>489</sup> For all messages cited in paragraphs 4.201–4.202, see URN C\_KOR02613 (WhatsApp messages of [Korg Employee 8], [Korg Senior Employee 1], [Korg Senior Employee 3] and others on 11–12 December 2017). Text in square brackets added by the CMA.

<sup>490</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.349, lines 4–7.



December 2017 at 10:21am, Korg UK's [Korg Senior Employee 1] asked '*Should we try on Minilogue?*'. At 10:32am, [Korg Employee 8] replied '*I'm torn [...] it's only [Reseller] who have complained*'. At 12:14pm, [Korg Senior Employee 3] of Korg UK wrote '*Guys, I think with just a few days left until Xmas, we have to let it be. Also [Competitor], [Competitor], [Competitor] are all hands off so we don't want to be the ones with our heads over the parapet!! I agree with [Korg Employee 2] [of Korg UK] that we reset in the new year*'.

- 4.202 On 12 December 2017 at 12:54pm, Korg UK's [Korg Employee 15] wrote '*[Reseller 1] now 449 on minilogue*'. At 12:56pm and 12:59pm respectively, [Korg Employee 8] wrote '*I'll call now*' and '*[Reseller] at £449. [Reseller 1] followed.*' [Korg Employee 15] asked '*Have you managed to get [Reseller 1] to change?*'. At 1:01pm, [Korg Employee 8] replied '*They will show the change at 4*'. [Korg Employee 8] told the CMA that [Reseller 1] would have told him, likely by telephone, '*it'll be done*' at 4pm.<sup>491</sup> At 4:11pm, [Reseller 1 Employee 5] increased [Reseller 1]'s price for the Minilogue from £449.00 to £472.00.<sup>492</sup>
- 4.203 In light of the evidence set out in paragraphs 4.201 and 4.202 above, and [Korg Employee 8]'s submissions to the effect that Korg UK sometimes required MI Resellers to price a 'street' price which was lower than SSP (see paragraph 4.171 above), in this instance the CMA's view is that the Minimum Price was a 'street' price of £472.00, even though this was below Korg UK's '*UK SSP inc VAT*'.<sup>493</sup> The CMA therefore concludes that Korg UK requested [Reseller 1] to increase its pricing to the Minimum Price, and [Reseller 1] agreed to do so.
- 4.204 Additional examples of [Reseller 1] agreeing, in 2017, to raise its pricing to the Minimum Price on request are set out in Annex C, paragraphs C15 to C25 below.

**[Reseller 1]'s understanding that the Korg Pricing Policy prohibited any Bundle including a Relevant Product if the Bundle's total price meant pricing the Relevant Product, in effect, below the Minimum Price**

- 4.205 On 22 February 2017, [Korg Employee 8] of Korg UK sent [Reseller 1 Employee 5] an email entitled '*bundle*', comprising a [Reseller 1] weblink and five question marks.<sup>494</sup> [Korg Employee 8] told the CMA that Korg UK actively monitored Bundles advertised by MI Resellers, as Korg UK did not permit high-quality Korg products to be bundled with low-quality non-Korg products. However, in this instance, he was not sure that he was querying the quality or compatibility of the (non-Korg) 'deck saver' accessory.<sup>495</sup> Given this, and paragraphs 3.74 to 3.78 (and 4.174 to 4.176) above, the CMA concludes that this example also shows that [Reseller 1]

<sup>491</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.351, lines 19–23.

<sup>492</sup> URN C\_KOR02106 ([Reseller 1] Data: Minilogue), £472.00 at 12/12/2017 16:11. The increased price was ascribed to '*[code 44]*' (see footnote 382 above).

<sup>493</sup> £545.00, for Korg's Minilogue: URN C\_KOR01949 (KORG Confidential UK Trade Price List - 7th July 2017).

<sup>494</sup> URN ER\_KOR01452 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 22 February 2017).

<sup>495</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.251, line 8 to p.253, line 1.

understood that the Korg Pricing Policy prohibited any Bundle including a Relevant Product if the Bundle's total price meant the Relevant Product was, in effect, at a discount to the Minimum Price and so took steps to adhere to the Korg Pricing Policy.

**[Reseller 1] was allowed to price below the Minimum Price temporarily to match other MI Resellers of the Relevant Products**

- 4.206 There are examples in 2017, set out below, of [Reseller 1] sending Korg UK another MI Reseller's weblink for a Relevant Product around the time of [Reseller 1] reducing its pricing to match a rival.
- 4.207 On 25 January 2017 at 2:57pm, Korg UK's [Korg Employee 8] sent [Reseller 1 Employee 5], in an email titled '*Any reason?*' copied to [Reseller 1 Employee 3], a [Reseller 1] weblink for Korg's Minilogue.<sup>496</sup> At 3:24pm, [Reseller 1 Employee 3] replied '*Reaction to [Reseller]... I can see it's a B-stock by clicking on the page, although Google shopping doesn't seem to recognise B-stocks. It may be worth mentioning to [Reseller]*'.<sup>497</sup> At 3:19pm, [Reseller 1]'s website price for Korg's Minilogue was increased slightly by [Reseller 1 Employee 3], but was not increased to Korg UK's '*RRP...*'/'*SSP...*' until 24 February 2017.<sup>498</sup>
- 4.208 On 6 October 2017, [Reseller 1]'s website price for Korg's MS20Mini (White), a Relevant Product, was reduced to match a '*Competitor*' and remained below Korg UK's '*RRP...*'/'*SSP...*', tracking the prices of six other MI Resellers, for seven weeks.<sup>499</sup> On 24 November 2017 at 12:59pm, [Reseller 1 Employee 5] sent Korg UK's [Korg Employee 8] seven other MI Resellers' weblinks for Korg's MS20Mini (White).<sup>500</sup> On 30 November 2017, [Reseller 1]'s website price for Korg's MS20Mini (White) was increased slightly to match a '*Competitor*', but was not increased to Korg UK's '*RRP...*'/'*SSP...*' for a further three months.<sup>501</sup>
- 4.209 The CMA concludes from this that there was an understanding between Korg UK and [Reseller 1] that [Reseller 1] was allowed to price below the Minimum Price

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<sup>496</sup> URN ER\_KOR01248 (Email from [Korg Employee 8] to [Reseller 1 Employee 5], copying [Reseller 1 Employee 3], on 25 January 2017).

<sup>497</sup> URN ER\_KOR01656 (Email from [Reseller 1 Employee 3] to [Korg Employee 8] and [Reseller 1 Employee 5] on 25 January 2017).

<sup>498</sup> URN C\_KOR02106 ([Reseller 1] Data: Minilogue), £423.22 at 25/01/2017 15:19; this data shows that after 25 January 2017 [Reseller 1]'s website price did not exceed £469.00 until an increase to £525.00 on 24 February 2017: Annex C, paragraph C18 below. £525.00 was the '*RRP Ex VAT*' listed in URN C\_KOR01939 (KORG Confidential UK Trade Price List - November 1st 2016), and the '*SSP inc. VAT @20%*' listed in URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017), for Korg's Minilogue.

<sup>499</sup> URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH), £546.00 at 06/10/2017 16:34 and entries up to and including £421.49 at 24/11/2017 10:20 ascribed to code '46', which denotes [Reseller]: see URN C\_KOR02133 (Competitor codes & names). £549.00 was the '*UK SSP inc VAT*': see footnote 501 below.

<sup>500</sup> URN ER\_KOR01830 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 24 November 2017). The weblinks comprised two eBay listings, plus listings from the resellers [Reseller], [Reseller], [Reseller], [Reseller] and [Reseller].

<sup>501</sup> URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH), £449.00 at 30/11/2017 10:34; this data shows that after 30 November 2017 [Reseller 1]'s website price did not exceed £449.00 until an increase to £549.00 on 14 March 2018: see paragraph 4.213 below. £549.00 was the '*UK SSP inc VAT*'/'*SSP inc. VAT @20%*' listed in each of URN C\_KOR01948 (KORG 17-10-04 Trade Price List) and URN C\_KOR01950 (KORG UK Trade Pricing dated 22 February 2018) for Korg's MS20 Mini (White).

temporarily, to match another MI Reseller's lower price – provided that [Reseller 1]'s pricing increased again once the other MI Reseller raised its price. Based on the evidence in the CMA's possession, this was normally limited to a small subset of the Relevant Products, focussed on different products over time.

**[Reseller 1]'s occasional non-compliance no impediment to finding an agreement and/or concerted practice with Korg UK**

- 4.210 There is also at least one example in 2017 of [Reseller 1] reducing its pricing to match a rival, at least temporarily, in relation to which the CMA has seen no evidence of any contact between Korg UK and [Reseller 1] about the intended price match. On 16 June 2017 [Reseller 1] increased its pricing for Korg's Monologue (Black), a Relevant Product, to the Minimum Price (see Annex C, paragraph C25 below), then [Reseller 1] reduced that pricing to match two MI Resellers between 2 July 2017 and 10 July 2017.<sup>502</sup> While the CMA has no evidence of any relevant contact between [Reseller 1] and Korg UK around this time which might explain the reason for [Reseller 1]'s actions, [Reseller 1]'s pricing matched these two MI Resellers only temporarily, and then reverted to the Minimum Price on 10 July 2017: see paragraph 4.200 above.
- 4.211 The CMA further considers that, in any event, [Reseller 1]'s non-compliance in part with the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>503</sup>

**2018**

- 4.212 The evidence for 2018 continues to show that [Reseller 1] agreed with the Korg Pricing Policy. More specifically, it shows:
- [Reseller 1] agreeing to raise its pricing to the Minimum Price in relation to Relevant Products, on request from Korg UK;
  - [Reseller 1] monitoring, and reporting to Korg UK, other MI Resellers not adhering to the Korg Pricing Policy (at the time of [Reseller 1] agreeing to raise its pricing to the Minimum Price, on request from Korg UK); and
  - [Reseller 1]'s occasional non-compliance with the Korg Pricing Policy (albeit this is no impediment to finding an agreement and/or concerted practice with Korg UK).

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<sup>502</sup> URN C\_KOR02092 ([Reseller 1] Data: Monologue-BK), entries showing £276.00 at 02/07/2017 16:45, 03/07/2017 16:31, 04/07/2017 18:25, 05/07/2017 18:12, 06/07/2017 12:08, 07/07/2017 15:22, 08/07/2017 12:06, showing £229.00 at 09/07/2017 12:25 (NB code '15' and code '43' denote, respectively, the prices of [Reseller] and [Reseller]: URN C\_KOR02133 (Competitor codes & names)) and £299.00 at 10/07/2017 15:50 (which was ascribed to '[code 44]').

<sup>503</sup> Further, in the CMA's view, the evidence of 'cheating' is offset by the volume and quality of evidence (set out in this Decision) showing that [Reseller 1] 'agreed' with the Korg Pricing Policy and that throughout the Relevant Period, [Reseller 1] was generally supportive of, and agreed to abide by, or acquiesced in, the Korg Pricing Policy.

**[Reseller 1] agreeing to raise its pricing to the Minimum Price on request from Korg UK (and monitoring and reporting of other MI Resellers not adhering to the Korg Pricing Policy)**

- 4.213 On 14 March 2018 at 10:27am, [Reseller 1 Employee 5] sent Korg UK's [Korg Employee 8] an email titled '*MS20 Mini*', a Relevant Product, stating '*I think you were misinformed about this. Here are the links found on eBay*'. The '*links*' listed appear to relate to eBay listings for Korg's MS20Mini (White),<sup>504</sup> but do not indicate clearly whether they related to listings of [Reseller 1] and/or any other MI Reseller. Between 4:14pm and 4:33pm, [Reseller 1 Employee 5] increased [Reseller 1]'s pricing for 13 Relevant Products to the Minimum Price, including Korg's MS20Mini (White).<sup>505</sup>
- 4.214 Given the totality of evidence in this case, in the CMA's view, the fact of [Reseller 1 Employee 5] having increased [Reseller 1]'s pricing on 14 March 2018 shows that [Reseller 1] agreed to increase its pricing to the Minimum Price following a request from Korg UK to do so. Further, the CMA concludes that these events also show that [Reseller 1] understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.<sup>506</sup>
- 4.215 On 5 April 2018, between 4:47pm and 5:14pm, [Reseller 1 Employee 5] increased [Reseller 1]'s pricing for seven Relevant Products, to the Minimum Price,<sup>507</sup> and sent [Korg Employee 8] other MI Resellers' weblinks for those seven Relevant Products.<sup>508</sup>
- 4.216 The events set in paragraph 4.215 above are similar to those in the evidence set out above (e.g. at paragraphs 4.136 to 4.137 above). They follow a pattern of [Reseller

<sup>504</sup> URN C\_KOR02375.B (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 14 March 2018).

<sup>505</sup> URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH), £549.00 at 14/03/2018 16:14; URN C\_KOR02106 ([Reseller 1] Data: Minilogue), £545.00 at 14/03/2018 16:15; URN C\_KOR02103 ([Reseller 1] Data: Microkorg XL+), £429.00 at 14/03/2018 16:19; URN C\_KOR02089 ([Reseller 1] Data: ESX-RD), £389.00 at 14/03/2018 16:24; URN C\_KOR02097 ([Reseller 1] Data: Volca Kick), £145.00 at 14/03/2018 16:26; URN C\_KOR02115 ([Reseller 1] Data: Volca FM), £145.00 at 14/03/2018 16:26; URN C\_KOR02113 ([Reseller 1] Data: Volca Bass), £145.00 at 14/03/2018 16:28; URN C\_KOR02114 ([Reseller 1] Data: Volca Beats), £145.00 at 14/03/2018 16:30; URN C\_KOR02095 ([Reseller 1] Data: Monologue-RD), £260.00 at 14/03/2018 16:31; URN C\_KOR02093 ([Reseller 1] Data: Monologue-BL), £260.00 at 14/03/2018 16:32; URN C\_KOR02092 ([Reseller 1] Data: Monologue-BK), £260.00 at 14/03/2018 16:32; URN C\_KOR02094 ([Reseller 1] Data: Monologue-GD), £260.00 at 14/03/2018 16:32; URN C\_KOR02096 ([Reseller 1] Data: Monologue-SL), £260.00 at 14/03/2018 16:33. Each increased price was ascribed to '*[code 44]*' (see footnote 382 above) and matched '*UK SSP inc VAT*' in URN C\_KOR01950 (KORG UK Trade Pricing dated 22 February 2018).

<sup>506</sup> The CMA also considers that [Reseller 1] may have sent Korg UK the '*links*' to flag other MI Resellers not adhering to the Korg Pricing Policy. However, even if this were not the case, it would not alter the CMA's view on this point.

<sup>507</sup> URN C\_KOR02104 ([Reseller 1] Data: Microkorg), £345.00 at 05/04/2018 16:47; URN C\_KOR02113 ([Reseller 1] Data: Volca Bass), £145.00 at 05/04/2018 16:52; URN C\_KOR02114 ([Reseller 1] Data: Volca Beats), £145.00 at 05/04/2018 16:56; URN C\_KOR02115 ([Reseller 1] Data: Volca FM), £145.00 at 05/04/2018 17:01; URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), £145.00 at 05/04/2018 17:05; URN C\_KOR02097 ([Reseller 1] Data: Volca Kick), £145.00 at 05/04/2018 17:07; URN C\_KOR02117 ([Reseller 1] Data: Volca Sample), £145.00 at 05/04/2018 17:14. Each increased price was ascribed to '*[code 44]*' (see footnote 382 above) and matched '*UK SSP inc VAT*' in URN C\_KOR01950 (KORG UK Trade Pricing dated 22 February 2018).

<sup>508</sup> URN C\_KOR02375.A (Email from [Reseller 1 Employee 5] on 5 April 2018); URN C\_KOR02375.C (Email from [Reseller 1 Employee 5] on 5 April 2018); URN C\_KOR02375.D (Email from [Reseller 1 Employee 5] on 5 April 2018); URN C\_KOR02375.E (Email from [Reseller 1 Employee 5] on 5 April 2018); URN C\_KOR02375.F (Email from [Reseller 1 Employee 5] on 5 April 2018); URN C\_KOR02375.G (Email from [Reseller 1 Employee 5] on 5 April 2018); URN C\_KOR02375.H (Email from [Reseller 1 Employee 5] on 5 April 2018).

1] receiving from Korg UK what [Reseller 1] considered to be requests to increase its pricing to the Minimum Price, and [Reseller 1] then reporting to Korg UK other MI Resellers' pricing below the Minimum Price. The CMA concludes, therefore, that these events show that, on this occasion, [Reseller 1] (i) agreed to increase its pricing to the Minimum Price following a request from Korg UK to do so, then (ii) reported to Korg UK other MI Resellers' non-adherence to the Korg Pricing Policy. The CMA concludes that these events also show that [Reseller 1] understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.

### **[Reseller 1]'s occasional non-compliance no impediment to finding an agreement and/or concerted practice with Korg UK**

- 4.217 There is also at least one example in 2018 of [Reseller 1] reducing its pricing to match a rival, at least temporarily, in relation to which the CMA has seen no evidence of any contact between Korg UK and [Reseller 1] about the intended price match. [Reseller 1] increased its pricing on 14 March 2018 for Korg's Volca FM, a Relevant Product to the Minimum Price (see paragraph 4.213 above), then reduced this pricing to match another MI Reseller between 29 March 2018 and 5 April 2018.<sup>509</sup> While the CMA has seen no evidence of any relevant contact between [Reseller 1] and Korg UK around this time, [Reseller 1]'s pricing matched this MI Reseller only temporarily, reverting to the Minimum Price on 5 April 2018: see paragraph 4.215 above.
- 4.218 The CMA further considers that, in any event, [Reseller 1]'s non-compliance in part with the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>510</sup>

### **The CMA's view**

- 4.219 Based on the evidence set out above, the CMA concludes that, throughout the Relevant Period:
- a. [Reseller 1] generally complied with the Korg Pricing Policy, due to a credible fear of sanctions for non-compliance;
  - b. [Reseller 1] generally complied with the Korg Pricing Policy due to a credible fear of sanctions for non-compliance, as set out more fully at Part 0. above, paragraphs 4.96 to 4.126 above and Annex A;

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<sup>509</sup> URN C\_KOR02115 ([Reseller 1] Data: Volca FM), entries showing £124.80 at 29/03/2018 13:58 and at 30/03/2018 14:20 (NB code '43' denotes the prices of [Reseller]: URN C\_KOR02133 (Competitor codes & names)) and showing £145.00 at 05/04/2018 17:01 (which was ascribed to '[code 44]').

<sup>510</sup> Further, in the CMA's view, the evidence of 'cheating' is offset by the volume and quality of evidence (set out in this Decision) showing that [Reseller 1] 'agreed' with the Korg Pricing Policy and that throughout the Relevant Period, [Reseller 1] was generally supportive of, and agreed to abide by, or acquiesced in, the Korg Pricing Policy.

- c. Korg UK monitored [Reseller 1]'s pricing and requested [Reseller 1] on numerous occasions to follow the Korg Pricing Policy with regard to [Reseller 1]'s advertising and selling online of the Relevant Products (this tended to happen when Korg UK issued a new price list or when [Reseller 1] had been caught matching another MI Reseller's lower prices, at least temporarily);
- d. on numerous occasions [Reseller 1] increased its pricing (albeit not always immediately) for Relevant Products to at least the Minimum Price, on Korg UK's request;
- e. on at least a few occasions, in response to a request from Korg UK to increase its pricing of the Relevant Products to the Minimum Price, [Reseller 1] stated that its pricing was already at the Minimum Price, in accordance with the Korg Pricing Policy; and
- f. on numerous occasions [Reseller 1] reported to Korg UK other MI Resellers advertising or selling the Relevant Products online at prices below the Minimum Price (which further confirms that there was an understanding between [Reseller 1] and Korg UK that the Korg Pricing Policy applied to all or at least the vast majority of Korg UK's MI Resellers, including [Reseller 1]).

4.220 The CMA has taken into account the context of the arrangements between Korg UK and [Reseller 1], Korg UK's awareness of competition law and potential illegality, including how Korg UK's staff operated under a culture of concealment and tried not to generate an evidence trail of potentially incriminating written records in relation to the Korg Pricing Policy (see paragraphs 3.147 to 3.162 above).

4.221 In addition, the nature of the Korg Pricing Policy was such that Korg UK rarely needed to contact [Reseller 1] about it (in writing or otherwise), when [Reseller 1] was complying with it because it was based on price lists insofar as pricing for individual Relevant Products was concerned. This limited the need for written or oral communication about the Korg Pricing Policy (and therefore the amount of written evidence relating to it).

4.222 In the light of the above, the CMA finds a concurrence of wills between [Reseller 1] and Korg UK that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price during the Relevant Period. In particular, the CMA finds that:

- a. Korg UK requested [Reseller 1] not to advertise or sell the Relevant Products online below the Minimum Price, with the credible threat of sanctions if [Reseller 1] failed to comply;
- b. [Reseller 1] understood the requests from Korg UK and the potential consequences if [Reseller 1] did not comply; and

- c. [Reseller 1], in practice, agreed to abide by and/or implemented Korg UK's requests not to advertise or sell the Relevant Products online below the Minimum Price, including making price adjustments when instructed to do so by Korg UK.

- 4.223 In the CMA's view, this constitutes an agreement for the purposes of the Chapter I prohibition and/or Article 101 TFEU.
- 4.224 In the alternative, the CMA finds that the arrangements identified above constituted at least a concerted practice between Korg UK and [Reseller 1], on the basis that [Reseller 1] knew Korg UK's wishes as regards the Korg Pricing Policy and [Reseller 1] adjusted its online advertising and selling pricing behaviour as a result, thereby knowingly substituting practical cooperation for the risks of price competition between it and other MI Resellers.
- 4.225 In the remainder of this Decision, the agreement and/or concerted practice between Korg UK and [Reseller 1] that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price will be referred to simply as the 'Agreement'.
- 4.226 The CMA finds that the duration of the Agreement was at least 2 years, 10 months and 9 days (from 9 June 2015 to 17 April 2018).

#### **D. Object of Preventing, Restricting or Distorting Competition**

- 4.227 For the reasons set out below, the CMA finds that the Agreement had as its object the prevention, restriction or distortion of competition.

#### **I. Key legal principles**

##### ***General***

- 4.228 The Chapter I prohibition and Article 101 TFEU prohibit agreements and concerted practices between undertakings which have as their object the prevention, restriction or distortion of competition.
- 4.229 The term 'object' in both prohibitions refers to the sense of 'aim', 'purpose', or 'objective', of the coordination between undertakings in question.<sup>511</sup>

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<sup>511</sup> See, for example, respectively: Case 56/64 *Consten & Gründig v Commission*, EU:C:1966:41, p.343 ('...[s]ince the agreement thus aims at isolating the French market... it is therefore such as to distort competition...'); Case 96/82 *IAZ and Others v Commission*, EU:C:1983:310, paragraph 25; Case C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643, paragraphs 32–33.

- 4.230 Where an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement has had, or would have, any anti-competitive effects in order to establish an infringement.<sup>512</sup>
- 4.231 The Court of Justice has held that object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.<sup>513</sup> The Court of Justice has characterised as the ‘*essential legal criterion*’ for a finding of anti-competitive object that the coordination between undertakings ‘*reveals in itself a sufficient degree of harm to competition*’ such that there is no need to examine its effects.<sup>514</sup>
- 4.232 In order to determine whether an agreement reveals a sufficient degree of harm such as to constitute a restriction of competition ‘by object’, regard must be had to:
- the content of its provisions;
  - its objectives; and
  - the economic and legal context of which it forms a part.<sup>515</sup>
- 4.233 Although the parties’ subjective intention is not a necessary factor in determining whether an agreement is restrictive of competition, there is nothing prohibiting that factor from being taken into account.<sup>516</sup>
- 4.234 An agreement may be regarded as having an anti-competitive object even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives.<sup>517</sup>

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<sup>512</sup> See, for example, Case C-8/08 *T-Mobile Netherlands BV and Others v NMa*, EU:C:2009:343, paragraphs 28–30 and the case law cited therein, and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, [269].

<sup>513</sup> Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 50; affirmed in Case C-373/14 P *Toshiba v Commission*, EU:C:2016:26, paragraph 26.

<sup>514</sup> Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraphs 49 and 57. See also Case C-373/14 P *Toshiba v Commission*, EU:C:2016:26, paragraph 26.

<sup>515</sup> Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 53 and Case C-373/14 P *Toshiba v Commission*, EU:C:2016:26, paragraph 26. According to the Court of Justice in Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraphs 53 and 78, in determining that context, it is also necessary to take into consideration all relevant aspects of the context, having regard in particular to the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.

<sup>516</sup> Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 54; affirmed in Case C-286/13 P *Dole v Commission*, EU:C:2015:184, paragraph 118.

<sup>517</sup> Case C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643, paragraph 21. See also *Ping Europe Limited v CMA* [2018] CAT 13, [101]–[105], where the CAT confirmed that its approach follows that set out by the Court of Justice in, e.g., Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, EU:C:2014:2204. More specifically, the CAT stated that ‘*the Tribunal approaches the issue of object infringement on the basis that an agreement revealing a sufficient degree of harm to competition may be deemed to be a restriction of competition “by object” irrespective of the actual, subjective aims of the parties involved, even if those aims are legitimate.*’



## RPM – Resale Price Maintenance

- 4.235 Article 101(1)(a) TFEU and section 2(2)(a) of the Act expressly prohibit agreements and/or concerted practices which ‘*directly or indirectly fix purchase or selling prices.*’
- 4.236 RPM is defined in the Vertical Guidelines as ‘*agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer.*’<sup>518</sup> RPM has been found consistently in EU and national decisional practice (including in the UK) to constitute a restriction of competition by object.<sup>519</sup> The Court of Justice has also held that the imposition of fixed or minimum resale prices on distributors is restrictive of competition by object.<sup>520</sup>
- 4.237 The European Courts have established that it is not unlawful for a supplier to impose a maximum resale price or to recommend a particular resale price.<sup>521</sup> However, describing a price as a ‘recommended’ retail price does not prevent this from amounting to *de facto* RPM, if the reseller does not remain genuinely free to determine its resale price (for example, if there is pressure or coercion exerted by the supplier to adhere to the recommended price).<sup>522</sup>
- 4.238 The Court of Justice has confirmed that ‘*it is necessary to ascertain whether such a retail price is not, in reality, fixed by indirect or concealed means, such as the fixing of the margin of the [...] [reseller],*<sup>523</sup> *threats, intimidation, warnings, penalties or*

<sup>518</sup> Vertical Guidelines, paragraph 48.

<sup>519</sup> See cases further below in this section, including cases such as: Commission decision 73/322/EEC *Deutsche Phillips* (IV/27.010) [1973] OJ L293/40; Commission decision 77/66/EEC *GERO-fabriek* (IV/24.510) [1977] OJ L16/8; Commission decision 80/1333/EEC *Hennessy-Henkell* (IV/26.912) [1980] OJ L383/13; Commission decision 97/123/EC *Novalliance/Systemform* (IV/35.679) [1997] OJ L47/11; Commission decision 2001/135/EC *Nathan-Bricolux* (COMP.F.1/36.516) [2001] OJ L54/1, paragraphs 86–90; in *Volkswagen II*, Commission decision 2001/711/EC *Volkswagen* (COMP.F-2/36.693) [2001] OJ L262/4, annulled on appeal Case T-208/01 *Volkswagen AG v Commission*, EU:T:2003:326 and Case C-74/04 P *Commission v Volkswagen AG*, EU:C:2006:460; *CD prices*, Commission Press Release IP/01/1212, 17 August 2001; Commission decision of 16 July 2003 *PO/Yamaha* (COMP/37.975) (*Yamaha*). See also: CMA decision of 24 May 2016 in Case CE/9856-14 *Online resale price maintenance in the commercial refrigeration sector*; CMA decision of 10 May 2016 in Case CE/9857-14 *Online resale price maintenance in the bathroom fittings sector*; *HUSKY*, Czech NCA decision of 28 January 2011, upheld on appeal by Brno Regional Court judgment of 26 April 2012; *Young Digital Planet*, Polish NCA decision of 30 October 2012; *Hyundai Motor Vehicles*, Bulgarian NCA decision of 6 November 2012; *Vila*, Danish NCA settlement decision of 30 October 2013; *Pioneer v Bundeswettbewerbsbehörde*, Austrian Cartel Court rulings of March–June 2014; *Witt Hvidevarer*, Danish NCA settlement of 10 July 2014; decision by the Austrian Competition Authority against *Samsung Electronics Austria GmbH* of 4 November 2015 (BWB/K-396); and decision by the Polish Competition Authority against *Termet S.A.* of 19 December 2016 (RKT-08/2016). See to this effect also the Commission Staff Working document ‘*Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice*’, revised version of 03/06/2015, paragraph 3.4.

<sup>520</sup> See Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284, paragraph 44, where the Court of Justice held that ‘*provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of [Article 101 (1)] which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty.*’ Vertical Guidelines, paragraphs 223–229. See also Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102/1 (VABER), recital 10.

<sup>521</sup> See, e.g., Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504, paragraph 4.

<sup>522</sup> Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504; and Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485. See also VABER, Article 4(a); and Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41, paragraph 25.

<sup>523</sup> Vertical Guidelines, paragraph 48.

*incentives*'.<sup>524</sup> This would include, for example, threats to delay or suspend deliveries or to terminate supply in the event that the retailer does not observe a given price level.<sup>525</sup> Other measures include the withdrawal of credit facilities, prevailing on other dealers not to supply<sup>526</sup> and threatened legal action, pressuring telephone calls and letters.<sup>527</sup>

- 4.239 RPM can be achieved not only directly, for example, via a contractual provision that directly sets a fixed or minimum resale price,<sup>528</sup> but also indirectly.<sup>529</sup> As previously stated, whether or not there is indirect RPM in any particular case will depend on whether the ability of resellers to determine their resale prices has genuinely been restricted.<sup>530</sup>
- 4.240 Lastly, RPM can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of an automated price-monitoring system or the obligation on resellers to report other members of the distribution network who deviate from the standard price level.<sup>531</sup> However, the use of such measures does not, in itself, constitute RPM.<sup>532</sup>

### ***Price advertising, advertising and other similar restrictions***

- 4.241 Restrictions on advertising prices below a certain level have in the past been found to lead to *de facto* RPM. The Commission has considered the application of Article 101(1) TFEU to advertising restrictions imposed by manufacturers in supply agreements in a number of investigations. The OFT has also concluded that

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<sup>524</sup> Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485, paragraph 71. See also Case C-260/07 *Pedro IV Servicios SL v Total España SA*, EU:C:2009:215, paragraph 80; and Commission decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4 (which includes warnings against deep discounting).

<sup>525</sup> Vertical Guidelines, paragraph 48. See also Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65; and Commission decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4.

<sup>526</sup> Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65.

<sup>527</sup> See Commission decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4. In paragraphs 44–55 of its decision, the Commission noted various measures taken to enforce 'price discipline' among dealers, including threats of legal action against dealers offering discounts, dealers reporting discounts to Volkswagen and telephone calls and letters from Volkswagen demanding that discounts and promotions be ceased. The decision was overturned on appeal to the General Court due to the Commission's flawed assessment of whether or not there was an agreement between Volkswagen and its dealers. However, the Commission's analysis of RPM remains relevant and this case confirms that recommended retail prices could involve unlawful RPM.

<sup>528</sup> Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284; Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, EU:C:1987:418; Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, EU:C:1988:183; *Yamaha; Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

<sup>529</sup> Vertical Guidelines, paragraph 48.

<sup>530</sup> Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504; and VABER, Article 4(a).

<sup>531</sup> Vertical Guidelines, paragraph 48. See to this effect also Commission decision of 24 July 2018 in Case AT.40181 *Philips*, paragraph 64: ('Price monitoring and adjustment software programmes multiply the impact of price interventions. Consequently, by closely monitoring the resale prices of its retailers and intervening with lowest-pricing retailers to get their prices increased, Philips France's Consumer Lifestyle business could avoid online price "erosion" across, potentially, its entire (online) retail network.');

<sup>532</sup> Vertical Guidelines, paragraph 48.

advertising restrictions can restrict retailers' ability to determine their own sale prices in a previous decision.<sup>533</sup>

4.242 The relevant restrictions have taken different forms in different cases, including:

- guidelines issued to retailers requiring them to use in shops or outside the supplier's recommended list prices;<sup>534</sup>
- a contractual requirement not to produce advertising material which includes prices different from the supplier's price list without the supplier's approval;<sup>535</sup>
- a contractual requirement to withdraw and not to repeat advertisements to which the supplier objected in writing (where there was evidence that this was being used to exclude dealers who were offering low prices from the supplier's distribution network);<sup>536</sup>
- a contractual requirement (agreed between members of a trade association) requiring them to display the supplier's list price and prohibiting any public announcement of rebates on those prices;<sup>537</sup> and
- a prohibition on dealers mentioning discounts or price reductions in any advertising materials, advertisements or promotional campaigns.<sup>538</sup>

4.243 The *Hasselblad* and *Yamaha* decisions stress the importance of price advertising in terms of communicating with consumers and in encouraging price competition.

4.244 In *Yamaha*, the Commission objected to restrictions contained in selective distribution agreements on dealers advertising prices which were different to Yamaha's list prices. In particular, the Commission was concerned by advertising restrictions which formed part of a wider policy by Yamaha to enforce RPM in a number of territories including the Netherlands and Italy. Yamaha placed restrictions on its dealers in the Netherlands and Italy preventing them from advertising prices below Yamaha's recommended retail prices. The Dutch dealer contracts (described as 'guidelines') prohibited dealers from advertising prices which differed from Yamaha's list prices. The Commission stated that: *'[Yamaha's guidelines] clearly prevented the dealer from announcing either within or outside the shop a price other than the one established in the price list. Even if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the customer the price it fixed and that such discounts, if the dealer was still willing to*

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<sup>533</sup> *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003. See also *Trade associations, professions and self-regulating bodies* (OFT408, December 2004), adopted by the CMA Board, paragraph 3.14.

<sup>534</sup> *Yamaha. Infra.*

<sup>535</sup> *Ibid.*

<sup>536</sup> *Hasselblad* upheld on appeal in Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65.

<sup>537</sup> Case 73/74 *Groupeement des Fabricants de Papiers Peints de Belgique and others v Commission*, EU:C:1975:160.

<sup>538</sup> *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

*offer them, could not be communicated in a way contrary to the guidelines. [...] [The circular sent to Dutch dealers] constitutes a restriction of the dealer's ability to determine its sales prices. This practice has the object of fixing the maximum level of discounts and, as a consequence, the minimum level of resale prices, thereby restricting or distorting price competition.*<sup>539</sup>

- 4.245 Meanwhile, the distribution agreement with dealers in Italy prohibited dealers from publishing '*in whichever form*' prices which differed from Yamaha's official price lists. The dealers were also prohibited from reproducing advertising material and price lists which were different to Yamaha's official price lists. The Commission found that '*[...] the dealers' freedom to set prices is strictly limited. Dealers cannot attract clients by advertising prices that differ from the "published prices" of [Yamaha], nor by indicating prices in their shops different from those indicated by [Yamaha].*'<sup>540</sup>
- 4.246 The Commission concluded that Yamaha's agreements had the object of influencing resale prices, thereby restricting or distorting price competition.
- 4.247 In *Groupeement des Fabricants de Papiers Peints de Belgique*, the Court of Justice equated a prohibition on announcing rebates with '*a system of fixing selling prices*'.<sup>541</sup>
- 4.248 In both *Yamaha* and *Groupeement des Fabricants de Papiers Peints de Belgique*, it was accepted that the possibility of resellers being able to grant discounts did not prevent the restriction from infringing Article 101(1) TFEU. In *Yamaha*, the Commission stated of the restrictions that '*[e]ven if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the customer the price it fixed and that such discounts, if the dealer was still willing to offer them, could not be communicated in a way contrary to the guidelines.*'<sup>542</sup>
- 4.249 In *Hasselblad*, the Commission condemned a selective distribution agreement which allowed the manufacturer to prohibit adverts by a dealer containing statements that it '*can match any other retailer's selling prices*'. In addition to prohibiting particular adverts, Hasselblad had also threatened to withdraw credit facilities from dealers who did not treat prices in its retail price list as minimum selling prices and had terminated a UK dealership which had advertised its products at discounted prices. The Commission found that Hasselblad's contractual right to prohibit adverts restricted competition within the meaning of Article 101(1) for the following reason: '*This extensive right of intervention enables Hasselblad (GB) to prevent actively competing and price-cutting dealers [...] from advertising their activities, the more so*

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<sup>539</sup> *Yamaha*, paragraphs 125–126.

<sup>540</sup> *Ibid*, paragraphs 133–135.

<sup>541</sup> Case 73/74 *Groupeement des Fabricants de Papiers Peints de Belgique and others v Commission*, EU:C:1975:160.

<sup>542</sup> *Yamaha*, paragraph 125.

as *Hasselblad (GB)* is not required to give any justification for its censorship measures.<sup>543</sup>

- 4.250 The Commission concluded that Hasselblad's distribution policy (including Hasselblad's right to prohibit adverts) '*interferes with the freedom of the authorised dealers to fix their prices, using the dealers' fear of termination of the Dealer Agreement as a means of hindering price competition between authorised dealers*'.<sup>544</sup> The Commission considered that Hasselblad's use of its dealer agreements (including the advertising restrictions) '*as a means to influence retail prices*', amounted to a restriction of competition under Article 101(1) TFEU. On appeal<sup>545</sup> the Court of Justice found that the Commission had been right to conclude that the advertising restriction constituted an infringement of Article 101(1) TFEU.<sup>546</sup>
- 4.251 In *Lladró*, the OFT noted that the advertising of resale prices, including discounts, promotes price transparency between retailers and provides a significant incentive for retailers to compete on price. Provisions restricting a retailer's freedom to inform potential customers of discounts which are being offered removes a key incentive for, and constitute an obstacle to, price competition between retailers. The OFT concluded in *Lladró* that the '*obvious consequence*' of price advertising restrictions is to restrict retailers' ability to determine their own sale prices and that '*any such provision has as its object the prevention, restriction or distortion of competition*'.<sup>547</sup>
- 4.252 Further, in *Commercial refrigeration*<sup>548</sup> the CMA found that a policy which prevented resellers from advertising the supplier's products below a minimum advertised price (MAP) set out in the supplier's MAP policy constituted *de facto* RPM as in the legal and economic context in which it operated, it genuinely restricted in practice the ability of the resellers to determine their online sales price for the relevant products at a price below the MAP.<sup>549</sup>

## II. Legal Assessment of the Agreement

- 4.253 For the reasons set out below, the CMA finds that the object of the Agreement was to prevent, restrict or distort competition through RPM and it was therefore, by its

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<sup>543</sup> *Hasselblad* upheld on appeal in Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65, paragraph 60.

<sup>544</sup> *Ibid*, paragraph 66.

<sup>545</sup> Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65, paragraph 43.

<sup>546</sup> On the assessment of advertising restrictions, more specifically 'MAP' (minimum advertised pricing), under EU competition law, please also see the European Parliament '*Notice to Members*' regarding '*Petition No 2383/2014 by Norbert Perstinger (Austrian), on the introduction of the Minimum Advertised Price (MAP) in the European Union*'.

<sup>547</sup> *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003, paragraph 70.

<sup>548</sup> CMA decision of 24 May 2016 in Case CE/9856-14 *Online resale price maintenance in the commercial refrigeration sector*. The CMA found that the MAP policy constituted RPM because, by restricting the price at which its goods were advertised online, the policy prevented dealers from deciding the resale price for those goods. The CMA found that there was a clear link between the advertised price and the resale price when goods are purchased online.

<sup>549</sup> *Ibid*, in particular, see paragraphs 6.43.2–6.43.3. In making this finding the CMA noted, in particular, that where customers buy the products online (i.e. '*click-to-buy*' sales), the advertised price is typically the price paid by the customer, that is, the sales price and, also, that the MAP policy was reinforced by measures to identify resellers who priced below the MAP combined with actual or threatened sanctions for advertising prices below the MAP.

very nature, harmful to the proper functioning of normal competition. This finding is based on an assessment, set out below, of the Agreement's content and objectives as well as the legal and economic context in which it operated.

### **Content of the Agreement**

4.254 As set out above, in the CMA's view:

- the Agreement between Korg UK and [Reseller 1] stipulated that [Reseller 1] would not advertise or sell the Relevant Products online below the Minimum Price in accordance with the Korg Pricing Policy.<sup>550</sup>
- [Reseller 1]'s commitment to adhere to the Korg Pricing Policy was reinforced by measures – on the parts of Korg UK, [Reseller 1] and other MI Resellers – to monitor the market and identify MI Resellers who advertised or sold the Relevant Products online below the Minimum Price, including:
  - by way of MI Resellers (including [Reseller 1]) using automated price-monitoring and price-tracking software from time to time; and
  - Korg UK using various software and apps from time to time (e.g. the automated real-time Price Alerts, and the periodic Price Reports) to monitor MI Resellers' pricing;<sup>551</sup>
- it was also reinforced by a credible threat of sanctions by Korg UK for non-compliance with the Korg Pricing Policy. As set out at Part 0. above and paragraphs 4.96 to 4.126 above and Annex A, Korg UK threatened [Reseller 1] with certain sanctions (e.g. termination of its account with Korg UK), and imposed certain sanctions on [Reseller 1] (e.g. temporary restrictions of [Reseller 1]'s access to certain Relevant Products) for [Reseller 1]'s non-adherence with the Korg Pricing Policy. Such threats were significant to [Reseller 1]'s business: for example, [Reseller 1] described the Relevant Products as '*must stock*' (see paragraph 4.40 above).

4.255 The CMA concludes that even insofar as the Agreement related to the price at which [Reseller 1] could **advertise** the Relevant Products online (in terms of requiring adherence to a MAP), it restricted in practice the ability of [Reseller 1] to **sell** the Relevant Products online at a price below the Minimum Price. This is because where a consumer bought the Relevant Products from [Reseller 1] online (i.e. '*click-to-buy*' sales), the advertised price was typically the price paid by the consumer for the Relevant Products, that is, the sales price.<sup>552</sup>

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<sup>550</sup> See paragraphs 4.1 and 4.12 above.

<sup>551</sup> See paragraphs 3.91–3.104 above. See also URN C\_KOR01218 (Korg reply dated 10 June 2019 to a s.26 Notice). In his interview, [Korg Senior Employee 3] stated, '*[w]hen I joined, the Orange Spider was in place, and that was monitoring prices, yes.*' URN C\_KOR01964 (Transcript of the [Korg Senior Employee 3] Second Interview), p.65, lines 21–22.

<sup>552</sup> On average only [15-25]% of [Reseller 1]'s online sales of MI were not at the price initially advertised: URN C\_KOR02067 ([Reseller 1] reply dated 3 October 2019 to a s.26 Notice), response to question 5(b).

- 4.256 As set out at paragraphs 3.74 to 3.78 above, the CMA concludes that the restrictions on [Reseller 1] setting its own online resale price for the Relevant Products applied to the sale by [Reseller 1] of Relevant Products – whether sold separately or, for at least part of the Relevant Period, as part of a Bundle.
- 4.257 On the basis of the above the CMA finds that the Agreement amounted to RPM in respect of online sales of the Relevant Products by [Reseller 1].
- 4.258 Both at the EU and the national level (including in the UK), RPM has consistently been found to have the object of preventing, restricting or distorting competition.<sup>553</sup>

### ***Objectives of the Agreement***

- 4.259 In the CMA's view, the main objective of the Agreement (and the Korg Pricing Policy more generally) was to fix a Minimum Price at which [Reseller 1] (and other MI Resellers adhering to the Korg Pricing Policy) would sell the Relevant Products online. The totality of the evidence in the CMA's possession shows that the aim of this was to:

- reduce downward pressure on online prices of the Relevant Products;<sup>554</sup>
- reduce online price competition between [Reseller 1] and other MI Resellers of the Relevant Products who adhered to the Korg Pricing Policy;<sup>555</sup> and
- stabilise prices within the UK, including in respect of MI Resellers based in other EU Member States selling into the UK,<sup>556</sup>

thereby protecting or improving the margins of MI Resellers of the Relevant Products who adhered to the Korg Pricing Policy, including [Reseller 1].<sup>557</sup>

- 4.260 The CMA concludes that, in the absence of the Agreement, [Reseller 1] would have been able to determine independently its online resale prices for the Relevant Products. In this way, [Reseller 1] would have had the freedom to attract and win custom (including by using the internet) by signalling to consumers the existence of a price advantage over [Reseller 1]'s competitors. This would have greatly increased the scope for price competition between [Reseller 1] and its competitors.

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<sup>553</sup> See to this effect, e.g.: the Commission decision of 24 July 2018 in Case AT.40465 *Asus* (e.g. at paragraph 107); the Commission decision of 24 July 2018 in Case AT.40469 *Denon & Marantz* (e.g. at paragraph 93 *et seq.*); the Commission decision of 24 July 2018 in Case AT.40181 *Philips* (e.g. at paragraph 61) and the Commission decision of 24 July 2018 in Case AT.40182 *Pioneer* (e.g. at paragraph 152).

<sup>554</sup> See paragraph 3.39 above.

<sup>555</sup> See paragraph 3.39 above.

<sup>556</sup> See paragraphs 3.50–3.53 above.

<sup>557</sup> See paragraphs 3.48–3.49 above.

4.261 As set out in paragraph 3.46 above the evidence shows that Korg UK's rationale for introducing the Korg Pricing Policy, which formed the basis for the Agreement with [Reseller 1] was at least twofold:

- it was designed to enable Korg UK's MI Resellers to achieve attractive margins through the maintenance of high and stable retail pricing, thus increasing the attractiveness of the Korg brand and encouraging MI Resellers to stock and sell the Relevant Products (and Korg products in general);<sup>558</sup> and
- in doing so, it aimed to help Korg UK secure, maintain and/or improve its UK market position in the Relevant Products relative to its competitors, in particular by maintaining the brand value of the Relevant Products.<sup>559</sup>

4.262 As set out in Part 3.C.IV. above, the evidence shows that Korg UK staff were very familiar with competition law, and were aware of the potential illegality of the Korg Pricing Policy (the basis for the Agreement). For example, [Korg Senior Employee 3] noted a need to '*stop this before we find ourselves being fined 10% of each distributors [sic] turnover for the past 10 years*'.<sup>560</sup> To that end, Korg UK was aware that the Korg Pricing Policy would lead to potentially illegal restrictions on price. For example, [Korg Senior Employee 3] admit that he feared '*[w]e were straying very close to the line, or over the line when it comes to being involved in any type of pricing conversation*' (see paragraph 4.71 above). Accordingly, Korg UK also operated under a culture of concealment and tried not to generate an evidence trail of potentially incriminating written records relating to the Korg Pricing Policy (see paragraphs 3.147 to 3.162 above), including in relation to any sanctions in relation to [Reseller 1].

4.263 The CMA finds that this 'subjective' awareness of the Korg Pricing Policy's necessary consequences further supports its conclusion that the Agreement had the object of preventing, restricting or distorting competition through RPM in the supply of the Relevant Products in the UK.

### **Legal and economic context of the Agreement**

4.264 Part 3.B. above provides an overview of the UK synthesizers and hi-tech equipment sector. In reaching its finding that the Agreement had the object of preventing,

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<sup>558</sup> URN EY\_KOR00882 (Note titled '*The Situation / Background*' dated 12 January 2017). This note, believed to be drafted by [Korg Senior Employee 3], stated that '*Price war got worse in last 6 months due to [Reseller], [Reseller] and [Reseller] fighting each other for market share without growing the market*' and that price instability was causing '*customer confusion due to wide range of prices*.' The note referred to a need to protect Korg's '*brand and company reputation by taking a stronger position*' as '*international internet traders are growing their own brand whilst damaging our brands*.' See also URN EY\_KOR00899 (Email from [Korg Senior Employee 5] to various recipients on 9 February 2017): '*NO DEALER IS BIGGER THAN OUR BRANDS OF KORG [...] we will not let anyone or anything play games with our brand*.'

<sup>559</sup> URN EY\_KOR00074 (Korg UK Business Commentary dated 4 June 2014), p.1, mentions Korg wanting to '*improve the quality and quantity of our coverage of the UK dealers*' and to '*grow our business*.' It sets out Korg's objective '*to avoid our brands being involved in European price wars between [Reseller], [Reseller], [Mass Reseller], [Reseller] and [Reseller]*'.

<sup>560</sup> URN C\_KOR00962 (Note of [Korg Senior Employee 3] titled '*[Korg Senior Employee 5] Conversation*' dated 17 December 2017).



restricting or distorting competition, the CMA has had regard to the actual context in which the Agreement operated, including:

- the goods affected by the Agreement (see Parts 3.B.I. and 3.B.II. above);
- the conditions of the functioning and structure of the market (see Parts 3.B.III. and 3.B.V. above); and
- the relevant legal and economic context (see Part 3.B. above).

4.265 The CMA considers that the legal and economic context in which synthesizers and hi-tech equipment are supplied means that a restriction on the price at which the Relevant Products can be advertised or sold online restricts competition by its very nature. This is based, among other factors, on the ever-increasing importance of the internet as a retail channel, and the fact that product pricing is one of the main factors on which MI Resellers compete.

### ***Conclusion on the object of the Agreement***

4.266 For the reasons set out above, the CMA finds that the Agreement had as its object the prevention, restriction or distortion of competition (through RPM) in the supply of the Relevant Products within the UK.

### **E. Appreciable Restriction of Competition**

4.267 For the reasons set out below, the CMA finds that the Agreement appreciably prevented, restricted or distorted competition for the supply of synthesizers and hi-tech equipment within the EU (for the purposes of Article 101 TFEU) and the UK (for the purposes of the Chapter I prohibition).

### **I. Key legal principles**

4.268 An agreement that is restrictive of competition by 'object' will only fall within the Chapter I prohibition or Article 101 TFEU if its effect on competition is appreciable.<sup>561</sup>

4.269 The Court of Justice has clarified that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.<sup>562</sup> In accordance with section 60 of the Act, this principle applies equally in respect of the Chapter I prohibition (taking account of the relevant differences

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<sup>561</sup> It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 16 citing, among other cases, Case 5/69 *Völk v Vervaecke*, EU:C:1969:35, paragraph 7. See also *OFT401*, paragraph 2.15.

<sup>562</sup> Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 37; and Commission Notice on agreements of minor importance [2014] OJ C291/01, paragraphs 2 and 13.

between Article 101 TFEU and the Chapter I prohibition): accordingly, an agreement that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.<sup>563</sup>

## **II. Legal assessment**

4.270 As set out above, the CMA concludes that the Agreement had the object of preventing, restricting or distorting competition (see paragraph 4.266 above). Given that (in the CMA's view) the Agreement was also capable of affecting trade within the UK (see paragraph 4.288 below), the CMA finds that the Agreement constituted, by its very nature, an appreciable restriction of competition in the retail sale of synthesizers and hi-tech equipment for the purposes of the Chapter I prohibition and Article 101 TFEU.

### **F. Effect on Trade between EU Member States**

4.271 For the reasons set out below, the CMA finds that the Agreement satisfies the requisite test for an effect on trade between EU Member States within the meaning of Article 101 TFEU.

### **I. Key legal principles**

4.272 Article 101 TFEU applies where an agreement or concerted practice may affect trade between EU Member States appreciably.<sup>564</sup>

4.273 In order that trade may be affected by an agreement, '*it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement [...] may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States*'.<sup>565</sup>

4.274 When assessing whether an agreement may affect trade between Member States, the CMA will have regard to the approach set out in the Commission's guidelines on the effect on trade concept contained in Articles 101 and 102 TFEU (Effect on Trade Guidelines).<sup>566</sup>

4.275 The assessment of whether an agreement is capable of affecting trade between Member States involves consideration of various factors which, taken individually, may not be decisive.<sup>567</sup> These factors include the nature of the agreement, the

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<sup>563</sup> See, for example, *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraph 148 *et seq.*

<sup>564</sup> Case 22/71 *Béguelin Import Co. v S.A.G.L. Import Export*, EU:C:1971:113, paragraph 16.

<sup>565</sup> Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38, p.249.

<sup>566</sup> *OFT401*, paragraph 2.23, and Effect on Trade Guidelines (i.e. Commission Notice, *Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty* [2004] OJ C101/07).

<sup>567</sup> Effect on Trade Guidelines, paragraph 28, citing Case C-250/92 *Gottrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA*, EU:C:1994:413, paragraph 54.

nature of the products covered by the agreement, the position and importance of the undertakings concerned and the economic and legal context of the agreement.<sup>568</sup>

- 4.276 According to the Effect on Trade Guidelines, agreements relating to tradable products whereby undertakings engage in RPM and which cover the whole of a Member State may have direct effects on trade between Member States by increasing imports from other Member States and by decreasing exports from the Member State in question.<sup>569</sup>
- 4.277 The assessment of whether an agreement has an ‘appreciable’ effect on trade between Member States similarly depends on various factors and the circumstances of each case.<sup>570</sup> For example, the stronger the market position of the undertakings concerned, the more likely it is that an agreement that is capable of affecting trade between Member States can be held to do so appreciably.<sup>571</sup>
- 4.278 There are no general quantitative rules covering all categories of agreements indicating when trade between Member States is capable of being appreciably affected.<sup>572</sup> However, the Commission holds the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions (the ‘NAAT rule’) are met:
- the aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5%; and
  - in the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro.<sup>573</sup>
- 4.279 If an agreement does not fall within the criteria set out above, a case by case analysis is necessary.<sup>574</sup> This needs to take into account, for example, the market

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<sup>568</sup> Effect on Trade Guidelines, paragraphs 28 and 32.

<sup>569</sup> Effect on Trade Guidelines, paragraph 88. Agreements involving RPM may also affect patterns of trade in much the same way as horizontal cartels. To the extent that the price resulting from RPM is higher than that prevailing in other Member States, this price level is only sustainable if imports from other Member States can be controlled.

<sup>570</sup> Effect on Trade Guidelines, paragraph 45.

<sup>571</sup> Effect on Trade Guidelines, paragraph 45.

<sup>572</sup> Effect on Trade Guidelines, paragraph 46.

<sup>573</sup> Effect on Trade Guidelines, paragraph 52. This turnover is to be calculated on the basis of total Community sales excluding tax during the previous financial year by the undertaking concerned, of the products covered by the agreement (the contract products): Effect on Trade Guidelines, paragraph 54. This ‘negative’ rebuttable presumption even applies where during two successive calendar years this turnover threshold is not exceeded by more than 10% and this market threshold is not exceeded by more than two percentage points: Effect on Trade Guidelines, paragraph 52. According to the Effect on Trade Guidelines, the NAAT rule applies irrespective of the nature of the restrictions contained in an agreement, including so-called ‘hardcore restrictions’: Effect on Trade Guidelines, paragraph 50.

<sup>574</sup> Effect on Trade Guidelines, paragraph 51. However, where an agreement by its very nature is capable of affecting trade between Member States, there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement exceeds 40 million euro. According to the Effect on Trade Guidelines, in the case of such agreements, it can also often be presumed that such effects are appreciable when the market share of the parties exceeds 5%: Effect on Trade Guidelines, paragraph 53.

position of the undertakings concerned, the nature of the agreement and the nature of the products covered.<sup>575</sup>

## **II. Legal assessment**

- 4.280 The CMA finds that the Agreement was capable of appreciably affecting trade between EU Member States. The CMA has based its finding on the following assessment.

### ***Agreement capable of affecting trade between Member States***

- 4.281 As set out above, in the CMA's view, the Agreement restricted the price at which [Reseller 1] could sell the Relevant Products (tradable products) online to consumers in the UK and potentially beyond and therefore led to RPM.<sup>576</sup> Pursuant to the Effect on Trade Guidelines, agreements involving RPM which cover the whole of a Member State may have direct effects on trade between Member States by increasing imports from other Member States and by decreasing exports from the Member State in question.<sup>577</sup> Based on this, the CMA concludes that the Agreement was capable of affecting trade between Member States.

### ***Appreciability***

- 4.282 In the CMA's view, the appreciability criterion, which is part of the effect on trade test, is also met in this case.
- 4.283 The CMA concludes that the negative rebuttable presumption that the Agreement was not capable of appreciably affecting trade between Member States does not apply since the cumulative criteria of the NAAT rule are not met in this case. While the turnover limb of the NAAT test<sup>578</sup> is met,<sup>579</sup> the market share threshold<sup>580</sup> is not met

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<sup>575</sup> Effect on Trade Guidelines, paragraph 45.

<sup>576</sup> To the extent that consumers based in other EU Member States purchased directly from [Reseller 1's websites], the Agreement could have affected the prices paid.

<sup>577</sup> Effect on Trade Guidelines, paragraph 88.

<sup>578</sup> Aggregate annual Community turnover of the supplier in the products covered by the agreement not exceeding 40 million euro.

<sup>579</sup> In the CMA's view, the correct interpretation of this test is that only the value of sales of the Relevant Products from Korg UK to [Reseller 1] is to be taken into account, as only this represents turnover related to the 'products covered by' the Agreement. The total value of synthesizers and hi-tech equipment supplied to [Reseller 1] by Korg UK (for resale) in Korg UK's FYE 31 March 2018 was £[100,000-200,000]. See URN C\_KOR01153 (Follow-up Korg reply dated 29 April 2019 to a s.26 Notice), attachment 3 and URN C\_KOR02561 (Korg update dated 9 March 2020 to a s.26 Notice, attachment 1). Even if, on the basis of a more liberal interpretation, in calculating the relevant turnover, regard was had to the entirety of Korg UK's turnover in the Relevant Products sold via the MI Reseller channel in the UK (as the turnover in the type of products covered by the agreement), in 2017/2018 the relevant turnover would be no more than £[2,000,000-3,000,000], URN C\_KOR01153 (Follow-up Korg reply dated 29 April 2019 to a s.26 Notice), attachment 3.

<sup>580</sup> (Aggregate) market share of the parties not exceeding 5% on any relevant market affected by the agreement.

since Korg UK's market share in the (upstream) market for the supply of synthesizers and hi-tech equipment was around [5-10]%<sup>581</sup> in 2017/2018 therefore exceeded 5%.

4.284 The factors set out below underpin the CMA's finding that the Agreement was potentially capable of having an appreciable effect on trade between Member States.

- The turnover and market position of the undertaking concerned: while Korg UK does not hold the highest market share in the market for the supply of synthesizers and hi-tech equipment in the UK, nonetheless the CMA estimates Korg UK's share of the supply was around [5-10]%.<sup>582</sup>
- Korg UK supplies the Relevant Products to MI Resellers not just in the UK, but also the Republic of Ireland (see e.g. paragraph 3.233 above).
- The CMA has been provided with evidence that, during the Relevant Period:
  - [Reseller 1] proactively sold the Relevant Products to consumers in EU Member States other than the UK;<sup>583</sup>
  - at least one other MI Reseller sold the Relevant Products to consumers in (and who approached them from) EU Member States other than the UK.<sup>584</sup>
- There is evidence of MI Resellers based in one EU Member State selling the Relevant Products to consumers located in other EU Member States, including the UK.

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<sup>581</sup> The CMA does not have any exact market share or market value figures for the (upstream) market for the supply of synthesizers and hi-tech equipment to UK resellers. The CMA has based this approximate [5-10]% figure on the following assumptions: (1) Korg UK's FYE 31 March 2018 turnover (from 1 April 2017 to 31 March 2018) in the Relevant Products through its MI Reseller and Mass Reseller channels was £[<] (URN C\_KOR01153 (Follow-up Korg reply dated 29 April 2019 to a s.26 Notice), attachment 3); and (2) the total estimated revenue of the retail sales of synthesizers and hi-tech equipment in the UK for 2017/18 was £[30,000,000-40,000,000] (URN C\_KOR01538 (Music Industries Association draft statistics attached to follow-up Korg reply dated 19 July 2019 to a s.26 Notice)).

<sup>582</sup> Please see footnote 581 above for how this market share figure has been calculated. Korg UK submitted that it was unable to estimate, with any confidence or at all, whether Korg UK had a share or above or below 7% in the supply synthesizers and hi-tech equipment in 2017 and or 2018. Korg UK submitted copies of certain third party-sourced data, collated by the Music Industries Association: URN C\_KOR01538 (Music Industries Association draft statistics attached to follow-up Korg reply dated 19 July 2019 to a s.26 Notice). Korg UK submitted that shares could in theory be calculated based on this data, but had certain queries regarding the source for (and categorisation within) that data: URN C\_KOR01537 (Follow-up Korg reply dated 19 July 2019 to a s.26 Notice). In this Decision, the CMA refers to market shares based on an analysis of that data.

<sup>583</sup> [Reseller 1] advertises the Relevant Products online, via websites including the [<]-language [Reseller 1's website]: see e.g. footnote 297 above. In addition, in the three [Reseller 1] financial years completed during the Relevant Period, [Reseller 1] achieved a range of [15-25]% of its total turnover (including, but not limited to, its sales of the Relevant Products) from [outside of the UK]: URN C\_KOR02354 ([Reseller 1 Financial Statements for FYE] 2015), URN C\_KOR02355 ([Reseller 1 Financial Statements for FYE] 2016) and URN C\_KOR02356 ([Reseller 1 Financial Statements for FYE] 2017), in each case at p.15 (as printed).

<sup>584</sup> For example, [Korg Senior Employee 3] submitted that Korg UK contacted [Reseller] at least once about its pricing in [<] (and may, on occasion, have contacted [Reseller] about its pricing in [<]): URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.225, line 13 to p.226, line 7 – referring to URN C\_KOR02613 (WhatsApp messages of [Korg Employee 8], [Korg Senior Employee 1], [Korg Senior Employee 3] and others on 11–12 December 2017).

- Some UK-based MI Resellers complained that their pricing in the UK was being undercut by MI Resellers in other EU Member States (e.g. [Reseller] selling into the UK) – and *vice versa* (e.g. [Reseller] selling into [X]).<sup>585</sup>
- On at least one occasion, Korg UK ensured that a MI Reseller based in an EU Member State other than the UK was contacted about its pricing in the UK.<sup>586</sup>
- The Agreement related to online commerce which, by its nature, is likely to reach consumers in other EU Member States.
- The products that were the subject of the Agreement could be easily traded across borders as there were no significant cross-border barriers, in particular when sold through resellers online.<sup>587</sup> In addition, the Commission has previously found evidence of competition across borders in the EEA in relation to musical instruments.<sup>588</sup>

## G. Effect on Trade within the UK

4.285 For the reasons set out below, the CMA finds that the Agreement satisfies the test for an effect on trade within the UK.

## I. Key legal principles

4.286 The Chapter I prohibition applies to agreements and concerted practices which may affect trade within the UK.<sup>589</sup> As set out in its guidance on agreements and concerted practices, the CMA considers that in practice it is very unlikely that an agreement which appreciably restricts competition within the United Kingdom does not also

<sup>585</sup> See e.g. references to a 'request from [Distributor] this morning regarding [Reseller] in [X] on Hitech products', and to [Reseller] referring to '[Reseller] [...] selling at a lesser margin than UK dealers' in URN EY\_KOR00697 (Email exchange between [Korg Employee 5], [Korg Employee 7] and [Korg Senior Employee 3] on 6 September 2016), and to [Reseller] having 'cited issues with pricing stability across our brands... in particular [Reseller], [Reseller] and [Reseller]' in URN EY\_KOR00779 (Email from [Korg Senior Employee 3] to [Korg Senior Employee 2] on 19 October 2016).

<sup>586</sup> See e.g. URN C\_KOR00919 (WhatsApp messages of [Korg Senior Employee 3], [Korg Employee 15] and [Korg Employee 2] on 31 March 2017 and 3 April 2017): [Korg Senior Employee 3] wrote 'can we check if any dealers are following [Reseller], especially [Reseller] on volcas and Krome if we're coming down on [Reseller], our dealers have to be clean', and [Korg Employee 2] replied 'The [Reseller] issue was triggered by them following [Reseller]'s sterling page. [Reseller] have agreed to reset before Messe [i.e. a trade event]'. [Korg Senior Employee 3] told the CMA that [Reseller] may have been contacted via e.g. [Korg Senior Employee 5] (Korg Inc.) and/or Korg Inc.'s local distributor: see URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), e.g. at p.204, line 14 to p.206, line 15 – and at p.207, line 21 to p.208, line 3. Note also submissions that Korg UK may not have contacted directly resellers based outside of the UK on a regular basis: see footnote 737 and footnote 739 below.

<sup>587</sup> Although there are factors indicating that manufacturers compete to supply synthesizers and hi-tech equipment across borders within the EEA, in the CMA's view, the available evidence is not sufficiently comprehensive or compelling to define a market wider than the UK.

<sup>588</sup> For example, in its *Yamaha* decision, the Commission found that, as evidenced by Yamaha, many dealers were engaged in substantial cross-border sales to end-users and that this showed that the transport costs were not necessarily an obstacle and that dealers had the resources and administrative capabilities necessary to engage in cross-border sales activities. *Yamaha*, paragraph 94.

<sup>589</sup> The UK includes any part of the UK in which an agreement operates or is intended to operate: section 2(7) of the Act. As is the case in respect of Article 101 TFEU, it is not necessary to show that an agreement has had an actual impact on trade – it is sufficient to establish that the agreement is capable of having such an effect: *Joined Cases T-202/98 etc Tate & Lyle plc and Others v Commission*, EU:T:2001:185, paragraph 78.

affect trade within the United Kingdom. So, in applying the Chapter I prohibition the CMA's focus will be on the effect that an agreement has on competition.<sup>590</sup>

- 4.287 On whether the effect on trade within the UK must be appreciable, the CAT has held that there is no need to import into the Act the rule of 'appreciability' under EU law. The CAT's reasoning for this is that in EU law the requirement of an appreciable effect on trade is a jurisdictional rule the essential purpose of which is to demarcate the fields of EU law and UK domestic law respectively. According to the CAT, there is therefore no need to import this concept into domestic competition law.<sup>591</sup>

## **II. Legal assessment**

- 4.288 The CMA finds that the Agreement may have affected trade within the UK or a part of the UK. This is because the pricing restriction imposed by the Agreement applied to [Reseller 1]'s online prices, in relation to products which are traded throughout the UK and beyond. The pricing restriction therefore potentially affected consumers wishing to purchase the Relevant Products from [Reseller 1] throughout the whole of the UK and possibly beyond.
- 4.289 On this basis, the CMA concludes that the Agreement satisfies the test for an effect on trade within the UK.

## **H. Exclusion or Exemption**

### **I. Exclusion**

- 4.290 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.<sup>592</sup>
- 4.291 The CMA finds that none of the relevant exclusions applies to the Agreement.

## **II. Block exemption / Parallel exemption**

- 4.292 An agreement is exempt from Article 101(1) TFEU if it falls within a category of agreement which is exempt by virtue of a block exemption regulation.

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<sup>590</sup> *OFT401*, paragraph 2.25.

<sup>591</sup> *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11, [459]–[461]. In a subsequent case (*North Midland Construction plc v Office of Fair Trading* [2011] CAT 14, [48]–[51] and [62]), the CAT held that, although there had been some criticism of the CAT's decision in *Aberdeen Journals*, it was not necessary to reach a conclusion on the question whether the appreciability requirement extends to the effect on UK trade test as, at least in that case, there was a close nexus between appreciable effect on competition and appreciable effect on trade within the UK, in that if one was satisfied, the other was likely to be so. For completeness, it should be mentioned that the High Court has doubted whether the CAT was correct on this point in two cases: namely *P&S Amusements Ltd v Valley House Leisure Ltd* [2006] EWHC 1510 (Ch), paragraphs 21, 22 and 34, and *Pirtek (UK) Ltd v Joinplace Ltd* [2010] EWHC 1641 (Ch), paragraphs 61–67.

<sup>592</sup> 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.

- 4.293 Similarly, pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition provided that it falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation.<sup>593</sup>
- 4.294 It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.<sup>594</sup> Neither Korg, nor [Reseller 1], made any submissions on this point.
- 4.295 Vertical agreements that restrict competition may be exempt from the Chapter I prohibition/Article 101(1) TFEU if they fall within the Vertical Agreements Block Exemption Regulation (the VABER).<sup>595</sup> The VABER exempts such agreements where the relevant market shares of the supplier and the buyer each do not exceed 30%, unless the agreement contains one of the so-called ‘hardcore’ restrictions in Article 4 of the VABER.<sup>596</sup>
- 4.296 Article 4(a) of the VABER provides that the exemption set out in Article 2 of the VABER does not apply to those agreements which directly or indirectly have as their object *‘the restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered, by any of the parties’*.
- 4.297 As set out above, in the CMA’s view, the Agreement restricted [Reseller 1]’s (that is, the buyer’s) ability to sell the Relevant Products online below the Minimum Price. Therefore, the Agreement restricted the ability of [Reseller 1] (i.e. the buyer) to determine its sale price (i.e. it amounted to RPM).<sup>597</sup> The CMA therefore finds that Article 4(a) of the VABER is engaged in this case such that the block exemption provided for in Article 2 of the VABER does not apply to the Agreement. It follows that the Agreement is not exempt from the application of the Chapter I prohibition (by virtue of section 10 of the Act) or from the application of Article 101(1) TFEU.

### III. Individual exemption

- 4.298 Agreements which satisfy the criteria set out in section 9 of the Act/Article 101(3) TFEU are exempt from the Chapter I prohibition/Article 101(1) TFEU.
- 4.299 There are four cumulative criteria to be satisfied:
- the agreement contributes to improving production or distribution, or promoting technical or economic progress;

<sup>593</sup> This is the case irrespective of whether or not it affects trade between EU Member States.

<sup>594</sup> See by analogy section 9(2) of the Act.

<sup>595</sup> Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

<sup>596</sup> See Articles 2–4 of the VABER.

<sup>597</sup> See paragraph 4.266 above.



- while allowing consumers a fair share of the resulting benefit;
- the agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and
- the agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

4.300 In considering whether an agreement satisfies the criteria set out in section 9 of the Act/Article 101(3) TFEU, the CMA will have regard to the Commission's Article 101(3) Guidelines.<sup>598</sup>

4.301 The CMA notes that agreements which have as their object the prevention, restriction or distortion of competition, are unlikely to benefit from individual exemption as such restrictions generally fail (at least) the first two conditions for exemption: they neither create objective economic benefits, nor benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).<sup>599</sup> However, each case ultimately falls to be assessed on its merits.

4.302 It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.<sup>600</sup> Neither Korg, nor [Reseller 1], made any submissions on this point.

## **I. Attribution of liability**

### **I. Key legal principles**

4.303 For each party that the CMA finds to have infringed the Chapter I prohibition and/or Article 101 TFEU, the CMA will first identify the legal entity that was directly involved in the infringement. It will then determine whether liability for the infringement should be shared with any other legal entity, in which case each legal entity's liability will be joint and several on the basis that all form part of the same undertaking.

4.304 Companies belonging to the same corporate group will often constitute a single undertaking within the meaning of the Chapter I prohibition/Article 101 TFEU allowing the conduct of a subsidiary to be attributed to the parent company. A parent company may be held jointly and severally liable for an infringement committed by a subsidiary company where, at the time of the infringement, the parent company was able to and did exercise decisive influence over the conduct of the subsidiary, so that

<sup>598</sup> Commission Notice, *Guidelines on the Application of Article 81(3) of the Treaty* [2004] OJ C101/97 (Article 101(3) Guidelines). See also *OFT401*, paragraph 5.5.

<sup>599</sup> Article 101(3) Guidelines, paragraph 46 and Vertical Guidelines, paragraph 47.

<sup>600</sup> Article 101(3) Guidelines, see paragraphs 51–58; Vertical Guidelines, paragraph 47. See also the Act, section 9(2).

the two form part of a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU.<sup>601</sup>

- 4.305 According to settled case law, in the specific case where a parent company has a 100% shareholding in a subsidiary that has infringed the competition rules: (i) the parent company is able to exercise decisive influence over the conduct of the subsidiary; and (ii) there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary.<sup>602</sup>
- 4.306 In those circumstances, it is sufficient for the CMA to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises decisive influence over the commercial policy of the subsidiary. The CMA will then be able to regard the parent company as jointly and severally liable for the payment of any fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.<sup>603</sup>
- 4.307 As to the interpretation of '*decisive influence*', the CAT noted in *Durkan* that such influence may be indirect and can be established even where the parent does not interfere in the day-to-day business of the subsidiary or where the influence is not reflected in instructions or guidelines emanating from the parent to the subsidiary. Instead, one must look generally at the relationship between the two entities, and the factors to which regard may be had when considering the issue of decisive influence '*are not limited to commercial conduct but cover a wide range*'.<sup>604</sup>
- 4.308 In examining whether a parent company has the ability to exercise decisive influence over the market conduct of its subsidiary, account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to its parent company and, therefore, of the economic reality.<sup>605</sup>
- 4.309 The actual exercise of decisive influence is assessed on the basis of factual evidence including, in particular, through an analysis of the management powers that

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<sup>601</sup> Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraphs 60–61; and Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130. See also Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 50.

<sup>602</sup> Case T-517/09 *Alstom v Commission*, EU:T:2014:999, paragraph 55; Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 60; Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130; and Case T-325/01 *DaimlerChrysler AG v Commission*, EU:T:2005:322, paragraphs 217–221. This principle was confirmed again by the General Court in its judgment of 12 July 2018, Case T-419/14 *The Goldman Sachs Group v Commission*, EU:T:2018:445, paragraph 44.

<sup>603</sup> See Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 61, and Case T-419/14 *The Goldman Sachs Group v Commission*, EU:T:2018:445, paragraph 45.

<sup>604</sup> *Durkan Holdings Limited and Others v Office of Fair Trading* [2011], CAT 6, [22].

<sup>605</sup> See Joined Cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce Inc. v Commission and Commission v Fresh Del Monte Produce Inc.*, EU:C:2015:416, paragraph 76. See also Case C-440/11 P *European Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV*, EU:C:2013:514, paragraph 66; and Case T-45/10 *GEA Group AG v Commission*, EU:T:2015:507, paragraph 133.

the parent companies have over the subsidiary.<sup>606</sup> The actual exercise of decisive influence can be shown directly by the parent's specific instructions or rights of co-determination of commercial policy, and also can be inferred indirectly from the totality of the economic, organisational and legal links between the parent company and the relevant subsidiary.<sup>607</sup> Influence over aspects such as corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters are relevant even if each of those factors taken in isolation does not have sufficient probative value.<sup>608</sup>

4.310 The actual exercise of decisive influence by a parent company over a subsidiary may be deduced from any, or a combination, of the following non-exhaustive factors:

- board composition and board representation by the parent on the board of the subsidiary;<sup>609</sup>
- overlapping senior management;<sup>610</sup>
- the business relationship between the parent company and the subsidiary;<sup>611</sup>
- presence of the parent company in the same business sector;<sup>612</sup>
- sole representation by the parent company in the administrative proceedings;<sup>613</sup>
- parent and subsidiary presenting themselves to the outside world as forming part of the same group, such as references in the annual reports, description of being part of the same group;<sup>614</sup> and
- the level of control over the important elements of the business strategy of the subsidiary, the level of integration of the subsidiary into the parent company's corporate structure and how far the parent company, through representatives on the board of the subsidiary, was involved in the running of the subsidiary.<sup>615</sup>

## II. Liability for the Infringement

4.311 The legal entity that was directly involved in the Infringement throughout the Relevant Period was Korg UK. Accordingly, the CMA finds Korg UK liable for the Infringement.

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<sup>606</sup> Case T-77/08 *The Dow Chemical Company v Commission*, EU:T:2012:47 confirmed on appeal Case C-179/12 *The Dow Chemical Company v Commission*, EU:C:2013:605.

<sup>607</sup> Case T-314/01 *Avebe v Commission*, EU:T:2006:266, paragraph 136 and case law cited; Case T-77/08 *The Dow Chemical Company v Commission*, EU:T:2012:47, paragraph 77; *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, [19]–[22].

<sup>608</sup> Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 183.

<sup>609</sup> Case T-399/09 *Holding Slovenske elektrarne d.o.o. v Commission*, EU:T:2013:647, paragraph 38.

<sup>610</sup> Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 184.

<sup>611</sup> Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 184.

<sup>612</sup> Commission decision 2007/691/EC *Fittings* (COMP/F/38.121) [2007] OJ L283/63.

<sup>613</sup> Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission*, EU:C:2000:630.

<sup>614</sup> Case T-399/09 *Holding Slovenske elektrarne d.o.o. v Commission*, EU:T:2013:647, paragraphs 33–36 and 62–66.

<sup>615</sup> *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, [31].

- 4.312 Korg UK was 100% owned directly by Korg Inc. throughout the Relevant Period (see paragraph 3.4 above).
- 4.313 Based on the legal principles set out in paragraph 4.305 above, this means that: (i) Korg Inc. was able to exercise decisive influence over the conduct of Korg UK throughout the Relevant Period; and (ii) there is a rebuttable presumption that Korg Inc. did in fact exercise decisive influence over the conduct of Korg UK.

### **III. Conclusion on joint and several liability**

- 4.314 In the light of the above, the CMA concludes that Korg UK and its ultimate parent company, Korg Inc., formed a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU throughout the Relevant Period. Korg Inc. and Korg UK are therefore jointly and severally liable for the payment of any fine imposed in relation to the Infringement.

## **J. Burden and standard of proof**

### **I. Burden of proof**

- 4.315 The burden of proving an infringement of the Chapter I prohibition/Article 101 TFEU lies with the CMA.<sup>616</sup> 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,<sup>617</sup> 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.’<sup>618</sup>*
- 4.316 The CMA finds that it has discharged its burden of proof in this case.

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<sup>616</sup> *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [95] and [100]. See also *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, [164] and [928]–[931]; and *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31, [88].

<sup>617</sup> 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.

<sup>618</sup> *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [110]. Along similar lines, the Court of Justice in *Aalborg* stated: *‘Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.’* Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v. Commission*, EU:C:2004:6.

## II. Standard of proof

- 4.317 The CMA is required to show that an infringement has occurred on the balance of probabilities which is the civil standard of proof.<sup>619</sup> The CAT clarified in the *Replica Football Kit* appeals that:<sup>620</sup> *'[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.'*
- 4.318 The Supreme Court has further clarified that this standard of proof is not connected to the seriousness of the suspected infringement.<sup>621</sup> The CAT has also expressly accepted the reasoning in this line of case law.<sup>622</sup>
- 4.319 The CMA finds that this standard of proof has been met in relation to the Infringement.

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<sup>619</sup> *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31, [88].

<sup>620</sup> *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, [204]. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, [164]–[166].

<sup>621</sup> *Re S-B (Children)* [2009] UKSC 17 [34]. See also *Re B (Children)* [2008] UKHL 35, [72].

<sup>622</sup> *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14, [15]–[16].

## **5. THE CMA'S ACTION**

### **A. The CMA's Decision**

5.1 On the basis of the evidence set out in this Decision, the CMA has concluded that Korg UK infringed the Chapter I prohibition and/or Article 101 TFEU by entering into an agreement and/or participating in a concerted practice with [Reseller 1]:

- that [Reseller 1] would not advertise or sell online the Relevant Products below the Minimum Price;
- which amounted to RPM in respect of online sales of the Relevant Products by [Reseller 1].

5.2 The CMA finds that this agreement and/or concerted practice:

- had as its object the prevention, restriction or distortion of competition within the UK and/or between EU Member States;
- may have affected trade within the UK and/or between EU Member States; and
- lasted from 9 June 2015 to 17 April 2018.

5.3 The CMA has decided to also attribute liability for Korg UK's Infringement to Korg UK's ultimate parent company, Korg Inc., making Korg UK and Korg Inc. jointly and severally liable for the Infringement.

### **B. Directions**

5.4 The CMA concludes that the Infringement has ceased, and therefore that it is not necessary to give directions to any party in this case.<sup>623</sup>

### **C. Financial Penalties**

#### **I. General**

5.5 Section 36(1) of the Act provides that, on making a decision that an agreement<sup>624</sup> has infringed the Chapter I prohibition or Article 101(1) TFEU, the CMA may require an undertaking which is a party to the agreement concerned to pay the CMA a penalty in respect of the infringement.

5.6 As set out above, the CMA finds Korg UK and Korg Inc. (which are both part of the same single economic unit) jointly and severally liable for the Infringement.

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<sup>623</sup> Section 32(1) of the Act provides that if the CMA has made a decision that an agreement infringes the Chapter I prohibition or the prohibition in 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.

<sup>624</sup> Or, as appropriate, a concerted practice or decision by an association of undertakings: see the Act, section 2(5).

Therefore, in the CMA's view it is appropriate to impose a financial penalty for the Infringement jointly and severally on Korg UK and Korg Inc.

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

5.7 Provided that:

- a. the penalties the CMA imposes in a particular case are within the range of penalties permitted by section 36(8) of the Act<sup>625</sup> and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309);<sup>626</sup> and
- b. the CMA has had regard to its guidance as to the appropriate amount of a penalty<sup>627</sup> 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.<sup>628</sup>

5.8 The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.<sup>629</sup> Rather, the CMA makes its assessment on a case-by-case basis,<sup>630</sup> having regard to all relevant circumstances and the twin objectives of its policy on financial penalties.

5.9 In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will have regard to the seriousness of the infringement and the need to deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.<sup>631</sup>

### **Small agreements**

5.10 Section 39 of the Act (which provides for limited immunity from penalties in relation to the Chapter I prohibition) does not apply in this case. This is on the basis that: (a) the combined applicable turnover of Korg UK and [Reseller 1] exceeded the relevant threshold;<sup>632</sup> and (b) in any event, the Infringement amounts to a 'price fixing

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<sup>625</sup> Section 36(8) of the Act reads: 'No penalty fixed by the [OFT] under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State).'

<sup>626</sup> As amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

<sup>627</sup> *Guidance as to the appropriate amount of a penalty* (CMA73, April 2018) (Penalties Guidance), paragraph 1.10.

<sup>628</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, [102].

<sup>629</sup> See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, [78].

<sup>630</sup> The Penalties Guidance, paragraphs 2.5 and 2.8. See, for example, *Kier Group and Others v OFT* [2011] CAT 3, [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'.

<sup>631</sup> The Act, section 36(7A); the Penalties Guidance, paragraphs 1.3–1.4.

<sup>632</sup> The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), Regulation 3, provides that the category of agreements for which no penalty may be imposed under section 39 of the Act comprises 'all agreements between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million'. The combined

agreement' within the meaning of section 39(9) of the Act.<sup>633</sup> Moreover, section 39 of the Act does not apply in respect of infringements of Article 101 TFEU.

## II. Intention/negligence

- 5.11 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition and/or Article 101 TFEU if it is satisfied that the infringement has been committed intentionally or negligently.<sup>634</sup> However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent for the purposes of determining whether it may exercise its discretion to impose a penalty.<sup>635</sup>
- 5.12 The CAT has defined the terms 'intentionally' and 'negligently' as follows: *'[...] an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition'*.<sup>636</sup>
- 5.13 This is consistent with the approach taken by the Court of Justice, which has confirmed: *'the question whether the infringements were committed intentionally or negligently [...] is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty'*.<sup>637</sup>
- 5.14 The intention or negligence relates to the facts, not the law. Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.<sup>638</sup>

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applicable turnover of Korg UK and [Reseller 1] exceeded £20 million in each of their respective financial years ending in the calendar years 2014, 2015, 2016 and 2017. See, for example, turnover reported in the following (NB all pages are as numbered as printed on document footers): URN C\_KOR02358 (Korg UK Report and Financial Statements for the year ended 31 March 2014), p.8; URN C\_KOR02359 (Korg UK Report and Financial Statements for the year ended 31 March 2015), p.8; URN C\_KOR02360 (Korg UK Report and Financial Statements for the year ended 31 March 2016), p.7; URN C\_KOR02361 (Korg UK Report and Financial Statements for the year ended 31 March 2017), p.7; URN C\_KOR02353 ([Reseller 1 Financial Statements for FYE] 2014), p.8; URN C\_KOR02354 ([Reseller 1 Financial Statements for FYE] 2015), p.8; URN C\_KOR02355 ([Reseller 1 Financial Statements for FYE] 2016), p.8; URN C\_KOR02356 ([Reseller 1 Financial Statements for FYE] 2017), p.8.

<sup>633</sup> A 'price fixing agreement' within the meaning of section 39(1) of the Act is *'an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates'*. By virtue of section 39(1)(b) of the Act, such an agreement is excluded from the benefit of the limited immunity from penalties provided by section 39 of the Act.

<sup>634</sup> Section 36(3) of the Act.

<sup>635</sup> *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [453]–[457]; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [221].

<sup>636</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [221]. See also *Ping Europe Limited v CMA* [2020] EWCA Civ 13, paragraph 117.

<sup>637</sup> Case C-280/08 P *Deutsche Telekom v Commission*, EU:C:2010:603, paragraph 124.

<sup>638</sup> Case C-681/11 *Bundeswettbewerbshörde v Schenker & Co. AG*, EU:C:2013:404, paragraph 38. See also *Ping Europe Limited v CMA* [2020] EWCA Civ 13, paragraph 117.



- 5.15 As set out in previous decisions, the CMA takes the view that the circumstances in which the CMA might find that an infringement has been committed intentionally include situations in which the agreement or conduct in question has as its object the restriction of competition.<sup>639</sup>
- 5.16 In establishing whether or not there was intention, the CMA may also have regard to numerous other factors, including documents generated by the undertaking/s in question and witness evidence.
- 5.17 The CMA concludes that there is strong evidence that Korg UK must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. This includes:
- a. evidence which shows that Korg UK staff were, in fact, aware of the potential illegality of the Korg Pricing Policy – which formed the basis of the Infringement (see paragraphs 3.132 to 3.146 above);
  - b. evidence of Korg UK staff having operated under a culture of concealment and tried to avoid generating an evidence trail of potentially incriminating written records related to the Korg Pricing Policy, which formed the basis for the Infringement – e.g. seeking to use increasingly more secure and encrypted forms of written communication, ‘code’ to discuss pricing issues and deleting communications in order to avoid the detection of potential illegality (see paragraphs 3.147 to 3.162 above);
  - c. the fact that RPM is a well-established competition law infringement and Korg UK ought to have known that restricting [Reseller 1]’s freedom to determine its own resale prices online would reduce price competition between [Reseller 1] and other MI Resellers (see e.g. paragraphs 3.132 to 3.146 above);
  - d. evidence which shows that Korg UK ought to have known that restricting [Reseller 1]’s freedom to determine its own resale prices online would reduce price competition between [Reseller 1] and other MI Resellers – in particular, given that that RPM is a well-established competition law infringement and that Korg UK staff were, in fact, aware of competition law (see paragraphs 3.122 to 3.131 above); and

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<sup>639</sup> See e.g.: CMA decision of 10 May 2016 in Case CE/9857-14 *Online resale price maintenance in the bathroom fittings sector*, paragraph 7.16; CMA decision of 24 May 2016 in Case CE/9856-14 *Online resale price maintenance in the commercial refrigeration sector*, paragraph 7.19; CMA decision of 3 May 2017 in Case 50343 *Online resale price maintenance in the light fittings sector*, paragraph 5.14; CMA decision of 1 August 2019 in Case 50565-2 *Online resale price maintenance in the digital piano and digital keyboard sector*, paragraph 5.18; CMA decision of 22 January 2020 in Case 50565-3 *Online resale price maintenance in the guitar sector*, paragraph 5.16.

e. finally, the fact that, in the CMA's view, the Infringement had as its object the prevention, restriction or distortion of competition (see Part 4.D., and paragraphs 4.253 to 4.266, above) supports a view that it was committed intentionally.<sup>640</sup>

5.18 The CMA therefore finds that Korg UK committed the Infringement intentionally.<sup>641</sup> This same evidence would also be sufficient to support a finding by the CMA that Korg UK committed the Infringement, at the very least, negligently. The CMA finds that the conditions for imposing a penalty on Korg are therefore met.

### III. Calculation of Penalties

5.19 The Penalties Guidance sets out a six-step approach for calculating the penalty. In determining the amount of the penalty in this case the CMA has considered in detail Korg's representations on the draft penalty calculation pursuant to settlement discussions.

#### ***Step 1 – the starting point***

5.20 The starting point for determining the level of financial penalty that will be imposed on an undertaking is calculated having regard to (i) the seriousness of the infringement and the need for general deterrence, and (ii) the relevant turnover of the undertaking.<sup>642</sup>

5.21 In this case, the CMA has decided to apply a starting point percentage of 19% to a relevant turnover of £[>], leading to a starting point of £[>] based on the considerations set out below.

#### **Seriousness of the Infringement and need for general deterrence**

5.22 The CMA will apply a starting point of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers). In applying the starting point, the CMA will also reflect the need to deter the infringing undertaking and other undertakings generally from engaging in that type of infringement in the future.<sup>643</sup>

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<sup>640</sup> Previous CMA decisions in which the CMA has concluded that the circumstances in which the CMA might find that an infringement has been committed intentionally include situations in which the agreement or conduct in question has as its object the restriction of competition: CMA decision of 10 May 2016 in Case CE/9857-14 *Online resale price maintenance in the bathroom fittings sector*, paragraph 7.16; CMA decision of 24 May 2016 in Case CE/9856-14 *Online resale price maintenance in the commercial refrigeration sector*, paragraph 7.19; CMA decision of 3 May 2017 in Case 50343 *Online resale price maintenance in the light fittings sector*, paragraph 5.14; CMA decision of 16 April 2019 in Case 50481 *Design, construction and fit-out services*, paragraph 6.10; and CMA decision of 23 October 2019 in Case 50299 *Supply of productions to the construction industry (pre-cast concrete drainage products)*, paragraphs 6.14 and 6.16.

<sup>641</sup> See paragraph 5.13 above.

<sup>642</sup> The Penalties Guidance, paragraphs 2.3–2.10.

<sup>643</sup> The Penalties Guidance, paragraph 2.4.

- 5.23 In making this case-specific assessment, the CMA will first take into account how likely it is for the type of infringement at issue to, by its nature, harm competition.<sup>644</sup> As set out in the Penalties Guidance, the CMA will generally use a starting point between 21% and 30% of the relevant turnover for the most serious types of infringement. In relation to infringements of the Chapter I prohibition and/or Article 101, this includes cartel activities, such as price-fixing and market-sharing and other, non-cartel object infringements which are inherently likely to cause significant harm to competition.<sup>645</sup>
- 5.24 At the second stage, the CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of the specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately to consumers.<sup>646</sup>
- 5.25 Finally, the CMA will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence.<sup>647</sup>

### **Nature of the infringement**

- 5.26 RPM is a serious by object infringement of the Chapter I prohibition and Article 101 TFEU. However, it is generally less serious than horizontal price-fixing, market-sharing and other cartel activities, which would ordinarily attract a starting point towards the upper end of the 21% to 30% range.<sup>648</sup>

### **Specific circumstances relevant to the extent and likelihood of harm to competition in this case**

- 5.27 The relevant specific circumstances in this case were:
- a. *The nature of the product, including the nature and extent of demand for the product.* Evidence obtained from the 12 Resellers shows that, on average, almost 40% of MI sales are online.<sup>649</sup> Indeed, the vast majority ([68-85]%) of [Reseller 1]'s MI sales are made online, at the price initially advertised to the consumer.<sup>650</sup> The CMA considers that the ability to sell or advertise goods at discounted prices on the internet can intensify price competition between resellers (online and/or

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<sup>644</sup> The Penalties Guidance, paragraph 2.5.

<sup>645</sup> The Penalties Guidance, paragraph 2.6.

<sup>646</sup> The Penalties Guidance, paragraph 2.8.

<sup>647</sup> The Penalties Guidance, paragraph 2.9.

<sup>648</sup> The Penalties Guidance, paragraph 2.6. See also CMA decision of 3 May 2017 in Case 50343 *Online resale price maintenance in the light fittings sector*, paragraph 5.25.

<sup>649</sup> See paragraph 3.35 above.

<sup>650</sup> Calculation based on multiplying minima and maxima in relation to the proportions of: (a) [Reseller 1]'s online sales of MI that were at the price initially advertised (see URN C\_KOR02067 ([Reseller 1] reply dated 3 October 2019 to a s.26 Notice), response to question 5(b)); and (b) [Reseller 1]'s sales of all MI in each of its last five financial years that were made online (URN C\_KOR02423 ([Reseller 1] reply dated 10 February 2020 to a s.26 Notice), p.1/question C.3).

offline) due to the increased transparency and reduced search costs from internet shopping.<sup>651</sup>

- b. *The structure of the market including the market share of Korg UK.* There are several competitors to Korg UK in the supply of synthesizers and hi-tech equipment in the UK, including Yamaha, Roland, Nord and Novation.<sup>652</sup> However, Korg UK is a major supplier of the Relevant Products, particularly of synthesizers – and especially so from [Reseller 1]’s perspective.<sup>653</sup> Korg UK’s share of supply is around [5-10]%.<sup>654</sup>
- c. *The market coverage of the Infringement.* The Infringement covered all of the Relevant Products sold online by [Reseller 1].<sup>655</sup> It had a clear effect on [Reseller 1], with Korg UK seeking to prevent or restrict [Reseller 1]’s ability to determine its own online retail prices for the Relevant Products. The evidence shows 180 increases in [Reseller 1]’s online pricing for Relevant Products, on 35 different dates, after requests from Korg UK.<sup>656</sup>
- d. *The actual or potential effect of the Infringement on competitors and third parties.* The CMA considered the following factors in particular.
  - i. The Infringement would likely have had a wider effect in the market: reducing downward pressure on the retail price of the Relevant Products more widely, including through the Mass Reseller channel.<sup>657</sup> The evidence shows that when setting their own prices, MI Resellers used each other’s prices as a reference point.<sup>658</sup> This view is supported by the fact that many of Korg UK’s resellers used price-monitoring software to keep track of their competitors’ online prices, therefore amplifying the effect of the Infringement.<sup>659</sup> [Reseller 1] was ‘*sort of the number one dealer*’ about which Korg UK’s MI Resellers would complain,<sup>660</sup> so many other resellers would likely have reacted to [Reseller 1] increasing its pricing to the Minimum Price, by raising their own pricing.
  - ii. Korg UK’s own monitoring of online retail pricing, including via automated price-monitoring software called Orange Spider, ensured that it was able to detect price changes (and MI Resellers’ compliance with the Korg Pricing Policy) more easily and quickly than would otherwise have been

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<sup>651</sup> See paragraphs 3.37–3.38 above.

<sup>652</sup> See paragraph 3.17 above.

<sup>653</sup> See paragraphs 4.40–4.41 above.

<sup>654</sup> See footnotes 581 and 582 above.

<sup>655</sup> See e.g. paragraph 3.224 (and footnote 253) above.

<sup>656</sup> See footnote 338 above.

<sup>657</sup> As set out in paragraph 3.72 above, the evidence shows that the Korg Pricing Policy did not apply directly to (but may have indirectly affected) Korg UK’s Mass Reseller channel.

<sup>658</sup> See Part 3.C.V. above and Part 4.C.IV. above.

<sup>659</sup> See paragraphs 3.86–3.90 above.

<sup>660</sup> See paragraph 4.49 above.

the case. In particular, the CMA considers that Korg UK monitoring the marketplace in real-time would have greatly facilitated enforcement, and increased the impact, of the Korg Pricing Policy.<sup>661</sup>

### **General deterrence**

- 5.28 In setting the starting point at 19%, the CMA has also taken into account the need to deter other undertakings from engaging in similar infringements in the future. In particular, the CMA notes the high prevalence of RPM-related letters on the register of warning and advisory letters issued by the CMA in recent years, including in 2018 and 2019.<sup>662</sup>

### **Relevant turnover**

- 5.29 The 'relevant turnover' is defined 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.<sup>663</sup> The 'last business year' is the financial year preceding the date when the infringement ended.<sup>664</sup>
- 5.30 In this case, the relevant turnover of Korg UK from the supply of synthesizers and hi-tech equipment in the UK through both the MI Reseller and Mass Reseller channels was £[3<] for the financial year ending 31 March 2018.<sup>665</sup>

### **Step 2 – adjustment for duration**

- 5.31 The starting point under step 1 may be increased, or, in particular circumstances, decreased to take into account the duration of the infringement. Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional cases decide to round up the part year to a full year.<sup>666</sup>
- 5.32 In this case, the CMA applied a multiplier of 3.0 years to the starting point to reflect the finding that the duration of the Infringement, which lasted from 9 June 2015 to 17 April 2018 (2 years, 10 months and 9 days).

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<sup>661</sup> See paragraphs 3.91–3.104 above. At least until January 2017, Korg UK's software produced real-time notifications on particular MI Resellers pricing below the Minimum Price.

<sup>662</sup> See registers of Warning letters and Advisory letters issued by the CMA at <https://www.gov.uk/government/publications/competition-law-warning-and-advisory-letters-register> (accessed on 26 June 2020).

<sup>663</sup> The Penalties Guidance, paragraph 2.11. The CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading and JJB Sports plc and Allsports Limited v OFT* [2006] EWCA Civ 1318, [169], that: '[...] neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty.' At [170]–[173], the Court of Appeal considered that it was sufficient for the OFT to 'be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement'.

<sup>664</sup> The Penalties Guidance, paragraph 2.11.

<sup>665</sup> URN C\_KOR01153 (Follow-up Korg reply dated 29 April 2019 to a s.26 Notice), attachment 3.

<sup>666</sup> The Penalties Guidance, paragraph 2.16.

### **Step 3 – adjustment for aggravating and mitigating factors**

5.33 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or decreased where there are mitigating factors.<sup>667</sup> In the circumstances of this case, the CMA considers it is appropriate to adjust the penalty at step 3 to take account of the factors set out below.

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

5.34 The involvement of directors or senior management in an infringement can be an aggravating factor.<sup>668</sup>

5.35 Two Korg UK senior managers ([Korg Senior Employee 2] and [Korg Senior Employee 3]) were involved in the Infringement.

5.36 Korg UK's [Korg Senior Employee 3] was closely involved in the Infringement. He:

- gave instructions to other Korg UK staff in relation to the implementation and enforcement of the Korg Pricing Policy;<sup>669</sup>
- was directly involved in communications with MI Resellers in relation to the Korg Pricing Policy;<sup>670</sup> and
- played a key role in deciding Korg UK's approach to [Reseller 1]'s account, and told another MI Reseller that [Reseller 1]'s account would be closed.<sup>671</sup>

5.37 Korg UK's [Korg Senior Employee 2] knew of, and was somewhat involved in, the Infringement. He:

- was aware of the conduct giving rise to the Infringement, and discussed concerns about it with Korg UK's lawyers;<sup>672</sup>
- instructed Korg UK staff to purposely delete an entire WhatsApp group mainly used for internal discussions of retailer pricing and related contacts with retailers (including in relation to [Reseller 1]) because of the potentially illegal nature of its content;<sup>673</sup> and

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<sup>667</sup> The Penalties Guidance, paragraph 2.17. A non-exhaustive list of aggravating and mitigating factors is set out in paragraphs 2.18 and 2.19 of the Penalties Guidance.

<sup>668</sup> The Penalties Guidance, paragraph 2.18.

<sup>669</sup> See e.g. paragraphs 3.182–3.184, 3.205, 3.215, 4.191 and 4.199 above.

<sup>670</sup> See e.g. paragraphs 3.110.a. and 3.213– 3.214 above.

<sup>671</sup> Annex A, paragraphs A2, A4–A7, A9, A11–A12, A14–A17 below set out [Korg Senior Employee 3]'s direct involvement in Korg UK's consideration of closing [Reseller 1]'s account for reasons including its pricing of Relevant Products below the Minimum Price.

<sup>672</sup> See paragraphs 3.133–3.134 and 3.142 above.

<sup>673</sup> See paragraph 3.161 above. Examples of WhatsApp discussions involving [Reseller 1] are set out at e.g. paragraphs 4.59.c., 4.99 and 4.167 above.

- supported the potential closure of [Reseller 1]'s account, by way of sanction.<sup>674</sup>

5.38 Given the nature and impact of the involvement of [Korg Senior Employee 2] and [Korg Senior Employee 3], the CMA considers it appropriate to apply an uplift of 10% to the penalty for director and senior management involvement.

Aggravating factor: committing the infringement intentionally

5.39 The fact that an infringement was committed intentionally rather than negligently can be an aggravating factor.<sup>675</sup>

5.40 The CAT has determined that 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.<sup>676</sup> As set out in paragraph 5.17 above, there is a large body of evidence showing that Korg UK must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition.

5.41 The CMA therefore considers it appropriate to apply an uplift of 10% to Korg's penalty, for committing the Infringement intentionally.

Mitigating factor: adequate steps having been taken to ensure competition law compliance

5.42 The CMA may decrease the penalty at step 3 where an undertaking can show that adequate steps have been taken to ensure compliance with competition law.<sup>677</sup>

5.43 The CMA considers it appropriate to grant Korg a 10% discount as, pursuant to this investigation and settlement discussions, Korg has now taken adequate steps with a view to ensuring future compliance with competition law, such as providing competition compliance training to staff, including senior managers and all sales staff.

5.44 Korg has now provided details of a comprehensive new competition law compliance programme. This includes appropriate steps relating to competition law risk

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<sup>674</sup> See e.g. paragraphs A16 and A17 below.

<sup>675</sup> The Penalties Guidance, paragraph 2.18 and footnote 31.

<sup>676</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [221]. See also: *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [456]: '*...an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition... It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without it being necessary to show that the undertaking also knew that it was infringing the Chapter I or Chapter II prohibition.*'

<sup>677</sup> The Penalties Guidance, paragraph 2.19 and footnote 33. To qualify, an undertaking has to provide evidence of adequate steps taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation (from the top down) together with appropriate steps relating to competition compliance risk identification, risk assessment, risk mitigation and review activities. The CMA will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount to the penalty of up to 10%.

identification, assessment, mitigation and review, to which Korg UK's senior leadership team has fully and publicly committed.<sup>678</sup>

- 5.45 The CMA concludes that Korg has provided sufficient evidence of compliance activities which demonstrate a clear and unambiguous commitment to future competition law compliance throughout the organisation (from the top down) to warrant a reduction in penalty.
- 5.46 In terms of its public commitment, Korg has published statements regarding its commitment to competition law compliance.<sup>679</sup> Korg has also committed to submitting a report to the CMA on Korg's competition law compliance activities every year, for the next three years.

#### Mitigating factor: cooperation

- 5.47 The CMA considers it appropriate to grant Korg a 5% discount for cooperation. This is to reflect Korg's voluntary cooperation, which included:
- a. facilitating CMA document review, both onsite and subsequently at the CMA (e.g. having cooperated to enable a trial use by the CMA of a predictive coding model, which in this case accelerated the review of around 4,000 documents);<sup>680</sup>
  - b. making certain voluntary submissions to the CMA, notably one including market data based on which the CMA calculated the market share cited in the SO (and at footnotes 581 and 582 above);
  - c. making two Korg UK employees available to the CMA, for a total of four voluntary interviews; and
  - d. translating from Japanese, at Korg's expense, the relevant parts of the audited accounts and five sets of financial figures, relating to Korg Inc.<sup>681</sup>
- 5.48 Korg's cooperation enabled the enforcement process to be concluded more speedily and efficiently.
- 5.49 The CMA has taken account of, in the round, all the above considerations and also Korg's responsiveness (and generally helpful approach) during the investigation.

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<sup>678</sup> Korg submitted various representations in relation to compliance between 25 September 2019 and 7 May 2020. On 7 May 2020, Korg confirmed that Korg UK's senior leadership team had approved and committed to implementing to the compliance steps detailed in Korg's submissions. See also paragraph 2.16 above.

<sup>679</sup> <https://www.korg.com/uk/corporate/compliance/> and <https://shop.korg.co.uk/index.php/competition-law-compliance-policy> (both accessed on 26 June 2020).

<sup>680</sup> Predictive coding describes the process whereby software is 'trained' to help identify information that may be 'relevant' to an investigation. See <https://www.gov.uk/government/speeches/the-future-of-competition-enforcement-in-the-uk>. Korg's cooperation included further prompt acceptance of the appropriate confidence level for the application of the predictive coding model in the circumstances of this particular case.

<sup>681</sup> URN C\_KOR02383 ('Attachment 4' to Korg reply dated 7 February 2020 to a s.26 Notice); URN C\_KOR02381 ('Attachment 2' to Korg reply dated 7 February 2020 to a s.26 Notice); URN C\_KOR02380 ('Attachment 1' to Korg reply dated 7 February 2020 to a s.26 Notice); URN C\_KOR01143 ('Financial table' attached to Korg's reply dated 4 April 2019 to a s.26 Notice); URN C\_KOR01144 ('Financial information' attached to Korg's reply dated 4 April 2019 to a s.26 Notice).



#### **Step 4 – adjustment for specific deterrence and proportionality**

- 5.50 At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round.<sup>682</sup> The penalty may be adjusted either to:
- a. increase it to achieve specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future); or
  - b. decrease it to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking at the time the penalty is being imposed as well as any other relevant circumstances of the case.<sup>683</sup>
- 5.51 Taking all the relevant circumstances of this case into account, on balance, the CMA does not consider that an uplift for specific deterrence is appropriate in this case.
- 5.52 In carrying out its step 4 assessment, the CMA has had regard to Korg's size and financial position, the nature of the infringement and the impact of the undertaking's infringing activity on competition.<sup>684</sup>
- 5.53 The penalty for the Infringement after step 3 is £1,880,884. In the light of Korg's financial indicators, the CMA does not consider that a proportionality reduction or a deterrence uplift at step 4 is required in this case. The CMA considers that the penalty is appropriate and sufficient for deterrence purposes without being disproportionate or excessive.

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

- 5.54 The CMA may not impose a penalty for an infringement that exceeds 10% of an undertaking's '*applicable turnover*', that is the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision.<sup>685</sup> The CMA has assessed the penalty against this threshold. The assessment has not led to the need for any reduction of the penalty at step 5 of the penalty calculation.

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<sup>682</sup> The Penalties Guidance, paragraph 2.24.

<sup>683</sup> The CMA will generally consider three-year averages for profits and turnover: the Penalties Guidance, paragraph 2.20. In this case, the CMA has considered a range of financial indicators in this regard, based on the last three years' worth of published accounting information and information provided by Korg at the time of calculating the penalty. Those financial indicators included relevant turnover, worldwide turnover, operating profit, profit after tax, net assets, and dividends.

<sup>684</sup> The Penalties Guidance, paragraph 2.20.

<sup>685</sup> Section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by the Competition Act (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259). See also the Penalties Guidance, paragraph 2.25. The business year on the basis of which worldwide turnover is determined will be the one preceding the date on which the decision of the CMA is taken or, if figures are not available for that business year, the one immediately preceding it.

- 5.55 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the Commission, or by a court or other body in another Member State of the EU in respect of the same agreement or conduct.<sup>686</sup> As neither the Commission nor any body in another Member State has imposed a penalty in this case, no adjustments to avoid double jeopardy were necessary.

***Step 6 – application of reduction for settlement***

- 5.56 The CMA will apply a penalty reduction where an undertaking agrees to settle with the CMA, which will involve, among other things, the undertaking admitting its participation in the infringement.<sup>687</sup>
- 5.57 In this case, the CMA considers it appropriate to grant Korg a 20% discount to reflect the fact that Korg has admitted the Infringement and agreed to cooperate in expediting the process for concluding the Investigation. This discount is granted on condition that Korg continues to comply with the continuing requirements of settlement as set out in the settlement agreements between each of Korg UK and Korg Inc. and the CMA.

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<sup>686</sup> The Penalties Guidance, paragraph 2.28.

<sup>687</sup> The Penalties Guidance, paragraph 2.30.

## Penalty

5.58 The following table sets out a summary of the penalty calculation and the penalty that the CMA requires Korg to pay in relation to the Infringement.

**Figure 5.1: Summary table of the penalty calculation**

Step	Description	Adjustment	Figure
1	<b>Relevant turnover</b>	-	£[X]
	Starting point as a percentage of relevant turnover	x 19%	£[X]
2	Adjustment for duration	x 3.0	£[X]
3	Adjustment for aggravating and mitigating factors	<i>Aggravating: Director involvement</i>	+ 10%
		<i>Aggravating: Intentionally committed</i>	+ 10%
		<i>Mitigating: Steps ensure compliance</i>	- 10%
		<i>Mitigating: Cooperation</i>	-5%
		Total adjustment	+5%
4	Adjustment for specific deterrence and proportionality	0%	£1,880,884
	<b>Maximum penalty after step 4</b>		<b>£1,880,884</b>
5	Adjustment to prevent statutory maximum being exceeded	N/A	N/A
6	Settlement discount	-20%	-£376,177
	<b>Maximum penalty payable for the Infringement</b>		<b>£1,504,707</b>

## IV. Payment of penalty

5.59 In light of the above, the CMA requires Korg to pay a penalty of £1,504,707. The individual figures in the summary table at Figure 5.1 above are rounded to the nearest pound sterling.

5.60 The CMA requires Korg to pay £1,504,707 to the CMA by close of banking business in England and Wales on 1 September 2020<sup>688</sup> at the latest.<sup>689</sup> If that date (1 September 2020) has passed and:

- the period during which an appeal against the imposition, or amount, of that penalty may be made has expired without an appeal having been made, or
- such an appeal has been made and determined,

<sup>688</sup> The next working day two calendar months from the expected receipt of the Decision.

<sup>689</sup> Details on how to pay the penalty are set out in the letter accompanying this Decision.

the CMA may commence proceedings to recover from Korg any amount payable under the penalty notice which remains outstanding, as a civil debt due to the CMA.<sup>690</sup>

**SIGNED:**

**29 June 2020**

**Ann Pope**

**Senior Director of Antitrust Enforcement**

**for and on behalf of the Competition and Markets Authority**

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<sup>690</sup> Section 37(1) of the Act.

## **Annex A: CMA's review of the evidence in relation to whether Korg UK threatened to terminate [Reseller 1]'s account**

### **Overview of this Annex**

- A1 The CMA sets out in this Annex A, in relation to whether Korg UK threatened to terminate [Reseller 1]'s account because [Reseller 1] was not adhering to the Korg Pricing Policy:
- Korg UK's evidence indicating that consideration of termination was only linked to [a certain condition in Korg UK's SDA];
  - Korg UK's evidence indicating that consideration of termination was actually linked to factors other than [a certain condition in Korg UK's SDA];
  - [Reseller 1]'s evidence that, while there were discussions concerning [a certain condition in Korg UK's SDA], it also understood that its account had been threatened with closure if it did not adhere to the Korg Pricing Policy; and
  - the CMA's conclusions on whether Korg UK threatened [Reseller 1] with closure of its account because it did not adhere to the Korg Pricing Policy.

### ***Korg UK's evidence indicating that its consideration of termination was only linked to [a certain condition in Korg UK's SDA]***

- A2 Korg UK's [Korg Senior Employee 3] told the CMA that Korg UK's consideration of termination was triggered by [X]. Korg UK submitted that this occurred [in early 2017].<sup>691</sup>
- A3 In interview, [Korg Employee 8] of Korg UK described how the issue of whether to 'close' [Reseller 1] on the basis of [a certain condition in Korg UK's SDA] was considered, and in particular whether [X] met the conditions of Korg UK's SDA.<sup>692</sup>
- A4 Korg UK submitted that it met [Reseller 1] at [X] on 8 March 2017, at that meeting [Korg Senior Employee 3] recalled discussing e.g. 'SDA requirements for [X]'. Korg UK staff [X], and introduced [Reseller 1] to [Korg Senior Employee 3] and Korg UK's [Korg Senior Employee 1] for the first time.<sup>693</sup>

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<sup>691</sup> URN C\_KOR02431 (Korg reply dated 10 February 2020 to a s.26 Notice: Attachment regarding Question 4), pp.2–3.  
URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.230, line 24 to p.231, line 12; p.235, line 17 to p.237, line 5: '[Reseller] and [Reseller] were both pushing us, as to why were we supplying [Reseller 1] because they didn't match the criteria laid out in our selective distribution agreement [...] you need to [X]. [...] [Reseller] had [X], to find that [X]'. See also, in relation to [Korg Senior Employee 3] 'being put under pressure by [Reseller]' around the same time, paragraph A11 below.

<sup>692</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.129, line 4 to p.133, line 13.

<sup>693</sup> URN C\_KOR02431 (Korg reply dated 10 February 2020 to a s.26 Notice: Attachment regarding Question 4), p.2.

- A5 Some four months after that meeting in March 2017,<sup>694</sup> on 10 July 2017, [Korg Senior Employee 3] told certain colleagues: *'I think we need to see [Reseller 1] and explain that as we've now introduced [sic] the charter we need to address the issues on [X] product - [X] otherwise we'll have to restrict to [X] [...] [Korg Employee 8], will you discuss with [Korg Senior Employee 1] pls'*.<sup>695</sup>
- A6 On 12 July 2017 [Korg Employee 8] of Korg UK arranged a meeting at [X] on 13 July 2017 at 1pm.<sup>696</sup> Korg UK submitted that this was *'to discuss and identify if [Reseller 1] could overcome'* Korg UK's view *'that [X]; it fundamentally failed to meet SDA requirements'*.<sup>697</sup> [Korg Employee 8] added that he and three colleagues favoured closing [Reseller 1]'s account on a *'no reasons given'* basis, but Korg UK's [Korg Senior Employee 2] and [Korg Senior Employee 3] *'wanted to have the conversation about [a certain condition in Korg UK's SDA] with [Reseller 1] [...]'* so the *[condition in Korg UK's SDA] discussion took place'*.<sup>698</sup>
- A7 Korg UK has made various submissions to the effect that Korg UK staff never threatened [Reseller 1] with termination. For example, [Korg Senior Employee 3] of Korg UK told the CMA that *'[W]e could've shut [Reseller 1] down for all the right reasons [...] We don't have to give any reason; we can just close the dealer down. However, we never did that and we didn't even go and see them to talk about it'*.<sup>699</sup>

***Korg UK's evidence indicating that its consideration of termination was actually linked to factors other than [a certain condition in Korg UK's SDA]***

- A8 The CMA notes certain evidence from Korg UK indicating that Korg UK's reason for seriously considering termination of [Reseller 1]'s account was not just linked to [X] (a legitimate reason for termination under the SDA) but also due to [Reseller 1]'s pricing below the Minimum Price (and related complaints).
- A9 The evidence shows that Korg UK considered terminating of [Reseller 1]'s account as early as on 31 January 2017, on the grounds that [X] breached Korg UK's SDA. However, even at this time doubts were raised within Korg UK that [Reseller 1]'s account could be terminated legitimately on this basis. For example, [Korg Senior Employee 1] wrote in an internal Korg UK email to [Korg Senior Employee 3] on 31

<sup>694</sup> A similar meeting appears to have taken place on 30 May 2017: see paragraphs A10 and A19 below.

<sup>695</sup> URN C\_KOR02600 (WhatsApp messages of [Korg Senior Employee 3] and [Korg Employee 8] on 10 July 2017). See paragraphs 4.199 and 4.200 above. '[Korg Senior Employee 1]' denoted Korg UK's [Korg Senior Employee 1]: URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.320, line 1. Text in square brackets added by the CMA.

<sup>696</sup> URN C\_KOR02394 (Email from [Korg Employee 8] to [Reseller 1 Employee 3] and [Reseller 1 Employee 5] on 12 July 2017).

<sup>697</sup> URN C\_KOR02431 (Korg reply dated 10 February 2020 to a s.26 Notice: Attachment regarding Question 4), p.4.

<sup>698</sup> URN C\_KOR02453 ([Korg Employee 8] Interview - Clarifications and corrections table dated 14 February 2020) against 'Page' 335, 'Line' 22. In relation to the *'no reasons given'* basis, see paragraph A9 below and footnote 700 below.

<sup>699</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.302, lines 5–7; p.231, lines 8–12; p.233, lines 10–15. For completeness, the CMA notes that [Korg Employee 8] also submitted that [Reseller 1] *'had a habit of'* advertising [X]. Korg UK deemed this a breach of Korg's SDA, so [Korg Employee 8] sometimes contacted [Reseller 1] about this: URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.83, lines 2–12; p.84, lines 4–14. However, the evidence does not indicate that this motivated Korg UK's consideration of terminating [Reseller 1].

January 2017: '[...] from what I can see, [Reseller 1] have [X]. In light of this, I presume our best option to terminate their SDA is as per article 12, i.e. without any giving any reason or justification for our decision'.<sup>700</sup>

- A10 Korg UK submitted that it also met [Reseller 1] at [X] on 30 May 2017. [Korg Employee 8] noted at the time that he and [Korg Senior Employee 1] met with [Reseller 1] staff 'to go through the charter in detail. [Reseller 1 Employee 3] and [Reseller 1 Employee 5] keen to increase marketing activity and were happy to have the correct stock on display ready to demo.'<sup>701</sup>
- A11 The CMA further notes certain communications that Korg UK was having with another MI Reseller ([Reseller]), about matters including [Reseller 1], such as those recorded in the emails from July 2017 set out below. These emails accord with [Korg Senior Employee 3]'s submissions about 'being put under pressure by [Reseller]', in relation to [Reseller 1]'s pricing.<sup>702</sup>
- On [X] July 2017 [Employee of Reseller] wrote to [Employee of Reseller]: 'The new Korg charter comes in to [sic] effect this Friday. I am with them all day on Friday so it will get better then. [Reseller 1] will no longer be a dealer'.<sup>703</sup>
  - On [X] July 2017 [Employee of Reseller] asked [Employee of Reseller] and [Employee of Reseller] '[Reseller 1] seem to be pulling Korg [prices] down, do you know if there's a plan there?'. [Employee of Reseller] replied later that day: 'Yes the new charter goes live tomorrow and I am with [Korg Senior Employee 3], [Korg Senior Employee 2] and [Korg Senior Employee 1] all day. [Reseller 1] had not signed the agreement [...] if it's not done by tomorrow then they will no longer have access to the stock and will be forced to remove it from the site. Let's take a look tomorrow and I'll find out more when I'm with them in the afternoon.'<sup>704</sup>
  - On [X] July 2017 [Employee of Reseller] asked [Korg Employee 8], in an email titled '[Reseller 1]': 'Any news on these? Did they sign up or will they go away?'.<sup>705</sup>
  - On [X] July 2017 [Employee of Reseller] told [Employee of Reseller] and [Employee of Reseller] that he met Korg's '[Korg Senior Employee 5] who is serious about this being sorted so lets [sic] give them time to sort out the dealers

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<sup>700</sup> URN EY\_KOR00890 (Email from [Korg Senior Employee 1] to [Korg Senior Employee 3] on 31 January 2017). Article 12 of Korg's SDA stated that [Reseller 1] or Korg UK '...may terminate the Agreement at any time, without having to justify its decision'.

<sup>701</sup> URN C\_KOR02431 (Korg reply dated 10 February 2020 to a s.26 Notice: Attachment regarding Question 4), p.3.

<sup>702</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.231, lines 6–7; p.236, line 15 to p.237, line 5.

<sup>703</sup> URN ER\_KOR00946 (Email from [Employee of Reseller] to [Employee of Reseller] on [X] July 2017).

<sup>704</sup> URN ER\_KOR00948 (Email from [Employee of Reseller] to [Employee of Reseller] and [Employee of Reseller] on [X] July 2017). The CMA considers that this email refers to '[Korg Senior Employee 3]' of Korg UK and '[Korg Senior Employee 1]' of Korg UK.

<sup>705</sup> URN ER\_KOR00950 (Email from [Employee of Reseller] to [Korg Employee 8] on [X] July 2017).

*that are cheaper not getting stock any more - this I am told is what is going to happen...'.<sup>706</sup>*

- A12 The CMA also notes that [Korg Senior Employee 3]'s email of 10 July 2017 about a 'need to see' [Reseller 1] (see paragraph A5 above) followed soon after an exchange of messages within Korg UK about [Reseller 1]'s pricing for a Relevant Product and [Reseller 1]'s inability to see some other Relevant Products on Korg UK's dealer portal.
- A13 [Korg Employee 8] of Korg UK recalled that after the meeting on 13 July 2017 at [§<] *'it was decided that because they had [§<] [...] they were okay to continue to trade'.<sup>707</sup>* He was therefore 'confused' by a message indicating that *'a final decision hadn't been made'* as at 13 September 2017.<sup>708</sup> On that date, despite [Korg Employee 8]'s recollection that Korg UK now considered [Reseller 1] to comply with Korg UK's SDA, Korg UK staff again discussed on WhatsApp closing [Reseller 1]'s account – as set out in paragraph A14 below.
- A14 This discussion followed Korg UK staff circulating on 13 September 2017 a screenshot showing [Reseller 1] to be the lowest priced reseller on five Relevant Products. [Korg Employee 8] asked certain colleagues: *'would you like me to break radio silence with [Reseller 1]?'.* [Korg Senior Employee 3] replied: *'No [Korg Employee 8]. We have a procedure which we are following and we definitely shouldn't approach them regarding pricing. I spoke to [Employee of Reseller] the other day and said that this will take time following the legal channels. You can let other dealers know and at some point we can write to our dealers and tell them not to transship to [Reseller 1] as they are no longer able to access [§<] products.'<sup>709</sup>* Korg UK submitted that this referred to possible termination and there was a risk that this could appear linked to [Reseller 1]'s pricing below the Minimum Price (see paragraph 3.138 above).
- A15 [Korg Senior Employee 3] described his suggestion of 13 September 2017 as hypothetical.<sup>710</sup> [Korg Employee 8] did not recall telling any dealer about potentially

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<sup>706</sup> URN ER\_KOR00960 (Email from [Employee of Reseller] to [Employee of Reseller] and [Employee of Reseller] on [§<] July 2017).

<sup>707</sup> This also appears to have been [Reseller 1]'s understanding: see paragraph A20 below.

<sup>708</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.343, lines 3–28, referring to URN C\_KOR00939 (see paragraph A14 (and footnote 709) below).

<sup>709</sup> URN C\_KOR00939 (WhatsApp messages of [Korg Employee 8] and [Korg Senior Employee 3] on 13 September 2017).

<sup>710</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.231, lines 12–24. [Korg Senior Employee 3] explained that brands such as Pioneer, *'were closing a dealer and then writing [...] to all the dealers, saying, "Do not trans ship to these people"'*. The CMA notes that Pioneer was fined for RPM in 2018, for having e.g. (i) tried to prevent retailers from selling cross-border and discourage parallel trade, as this could have had a downward effect on prices, and (ii) refused to supply blacklisted retailers: Commission decision of 24 July 2018 in Case AT.40182 *Pioneer* (e.g. at recitals (33) and (102)). The CMA does not however consider [Korg Senior Employee 3]'s analogy to Pioneer to show conclusively that Korg UK was engaging in RPM: [Reseller] told [Korg Senior Employee 3] in May 2017 that Pioneer had *'recently shut [Reseller]'*, and [Korg Senior Employee 5] indicated this was about *'official supply chains'* and did not mention price: see URN EY\_KOR00939 (Email messages between [Korg Senior Employee 3], [Korg Senior Employee 6], [Korg Senior Employee 5] and [Korg Senior Employee 2] dated 3–4 May 2017), p.3.



terminating [Reseller 1].<sup>711</sup> However, [Korg Senior Employee 3] clearly wrote that he told '[Employee at Reseller]' (a rival to [Reseller 1]) about potentially closing [Reseller 1]'s account. Further, given this exchange and the communications between Korg UK and [Reseller] in July 2017 (see paragraph A11 above), the CMA concludes that at this point Korg UK's serious consideration of terminating [Reseller 1] was clearly linked to [Reseller 1] pricing below the Minimum Price.

- A16 [Korg Employee 8] submitted that [Korg Senior Employee 3] and [Korg Senior Employee 2] wanted to terminate [Reseller 1]'s account, so Korg UK was taking legal advice accordingly. [Korg Employee 8] couldn't say if this was due to [Reseller 1]'s *'pricing policy because I don't know if that's what it was [...] I know that's heavily implied.'*<sup>712</sup>
- A17 In addition, Korg UK perceived there to be a risk that any termination could seem linked to [Reseller 1]'s pricing below the Minimum Price (which, in turn, risked breaching competition law). [Korg Employee 8] explained that termination did not take place due to this risk, indicating that [Korg Senior Employee 2] and [Korg Senior Employee 3] *'wanted to use that part of our SDA that allowed us to just close them down, on the basis that it was taking up an awful lot of our time having conversations [...] [Korg Senior Employee 1] was concerned that doing that, given the circumstances of regular conversation, how bad that actually looks.'*<sup>713</sup>
- A18 The CMA concludes that the evidence above shows that Korg UK considered terminating [Reseller 1]'s account at least partly due to [Reseller 1] having priced below the Minimum Price. Indeed, that point was clearly intimated to and understood by [Reseller], one of [Reseller 1]'s competitors. The CMA further concludes that, in all likelihood, Korg UK's consideration of termination of [Reseller 1]'s account was also communicated to [Reseller 1]. This, in turn, lends further credibility to [Reseller 1]'s submissions below.

***[Reseller 1]'s evidence that, while there were discussions concerning [a certain condition in Korg UK's SDA], it also understood that its account had been threatened with closure if it did not adhere to the Korg Pricing Policy***

- A19 Submissions by [Reseller 1] and its staff support some aspects of the Korg UK submissions set out above. For example, [Reseller 1] submitted that Korg UK [X] in March, May and July 2017, to discuss issues such as the [X]. [Reseller 1] also

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<sup>711</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.345, line 14 to p.346, line 1.

<sup>712</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.328, line 1 to p.339, line 7.

<sup>713</sup> URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.300, lines 20–26; p.328, line 18; p.335, lines 18–23; p.337 lines 10–15. [Korg Employee 8] likewise described feeling *'incredibly fed up with repeatedly having conversations and it would be easier not to have them'*: see p.328, lines 9–19. Text in square brackets added by the CMA.

submitted that at the meeting on 30 May 2017 several items were discussed, including [X].<sup>714</sup>

- A20 [Reseller 1] staff submitted that such issues were discussed on 13 July 2017, due to *'a new management approach by Korg, including the issuing of the "Korg Charter".'* [Reseller 1 Employee 2] submitted that his colleague [Reseller 1 Employee 3] had relayed that *'the continuation of [Reseller 1]'s account with Korg was dependent on making' changes to [X] requested by Korg UK in the meeting on 13 July 2017.*<sup>715</sup> [Reseller 1 Employee 3] recalled in relation to this meeting that while Korg UK had *'not specifically indicated consequences [...] I believe they would have taken away any extra discounts we receive [X].'* He and [Reseller 1 Employee 2] submitted that [Reseller 1] *'made all the changes requested by Korg, to ensure the continuation of the account.'*<sup>716</sup>
- A21 However, the CMA notes that [Reseller 1]'s recollection of the meeting on 13 July 2017 also differs from that of Korg UK. For example, [Reseller 1 Employee 2] understood – *'[b]ased on a conversation with [Reseller 1 Employee 3]'* – that *'at the 13 July 2017 meeting attended by [Reseller 1 Employee 3] and [Reseller 1 Employee 5], the representatives from Korg stated that following recommended retail prices was a necessary requirement for dealers'.*<sup>717</sup>
- A22 [Reseller 1 Employee 5] made submissions broadly similarly to those of [Reseller 1 Employee 2] about the content of one or two meetings with Korg UK in this period. [Reseller 1 Employee 5] submitted that Korg UK, around that time, intimated that *'price was very important' and 'representation is very important online'.* He said that he perceived a risk of Korg UK closing [Reseller 1]'s account, partly due to personnel changes: *'the former management [...] did not put as much pressure as the new management in terms of price'.*<sup>718</sup>
- A23 In the light of the above, the CMA concludes that [Reseller 1] considered termination of its account to be a credible threat if [Reseller 1] did not adhere to the Korg Pricing Policy.

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<sup>714</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), pp.1–2/question 1; URN C\_KOR02423 ([Reseller 1] reply dated 10 February 2020 to a s.26 Notice), pp.3–4.

<sup>715</sup> URN C\_KOR02336 ([Reseller 1 Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.1/question 1. On those changes, see URN C\_KOR02428 (Email from [Reseller 1 Employee 2] to [Reseller 1 Employee 3] and [Reseller 1 Employee 5] on 18 July 2017).

<sup>716</sup> URN C\_KOR02336 ([Reseller 1 Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.1; URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), questions 1–2.

<sup>717</sup> URN C\_KOR02336 ([Reseller 1 Employee 2] reply dated 30 January 2020 to a s.26 Notice), p.3/question 3 (paragraph (iv)). [Reseller 1 Employee 3] submitted that at the meeting Korg UK may have implied that [Reseller 1] was *'selling new & unopened products cheaper as B-stock as a way to sell products for less than Korg's recommended retail prices'*: URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.3, question 2.

<sup>718</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.77, line 14 to p.79, line 19. Within these pages, '[X]' refers to [Korg Senior Employee 1] (URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.146, lines 19–23) – and the CMA concludes that the meetings referred to in these pages align with those described above in March 2017 and July 2017.

### ***CMA's conclusions on the evidence***

A24 Based on the evidence set out above, the CMA concludes that:

- Korg UK considered terminating [Reseller 1]'s account, for reasons including both [a certain condition in Korg UK's SDA] and its pricing of Relevant Products below the Minimum Price;
- [Reseller 1] understood that Korg UK was considering terminating [Reseller 1]'s account for reasons including both [a certain condition in Korg UK's SDA] and its pricing of Relevant Products below the Minimum Price; and
- while Korg UK did not in fact terminate [Reseller 1]'s account due to [Reseller 1]'s pricing of Relevant Products below the Minimum Price, [Reseller 1] considered termination to be a credible threat if [Reseller 1] did not adhere to the Korg Pricing Policy.

## **Annex B: Additional, quantitative evidence concerning [Reseller 1]’s compliance with the Korg Pricing Policy**

### ***Introduction***

- B1 Certain quantitative evidence, in the form of historical pricing data, complements the evidence set out in Part 4.C.IV. above, Annex A and Annex C of [Reseller 1]’s compliance with Korg UK requests to increase [Reseller 1]’s online pricing for the Relevant Products to the Minimum Price during the Relevant Period.<sup>719</sup> In this Annex, the CMA sets out:
- an explanation of that historical pricing data, and the CMA’s approach to it; and
  - the CMA’s views based on that historical pricing data.
- B2 In the CMA’s view, the historical pricing data provided by [Reseller 1]:
- records various instances of Korg UK requesting [Reseller 1] to increase its online pricing for Relevant Products to the Minimum Price during the Relevant Period;
  - provides, in relation to those instances, an indication of the extent to which – and the variety of circumstances in which – [Reseller 1] complied with such requests from Korg UK (or, conversely, did not comply with such requests); and
  - shows that [Reseller 1] complied with the Korg Pricing Policy by, for example, having implemented 180 increases in its online pricing for the Relevant Products, on 35 different dates, in the Relevant Period.

### ***Historical pricing data provided by [Reseller 1]***

- B3 [Reseller 1]’s systems include records of each price that [Reseller 1] considered adopting (e.g. a price advertised by another reseller), and each price [Reseller 1] decided to adopt on its own websites and eBay channel. [Reseller 1] sometimes considered a price and decided to adopt it, and on other occasions considered a price but decided not to adopt it. Each price that [Reseller 1] considered adopting was logged as a ‘*Comp Price*’, and ascribed to a ‘*Competitor*’.
- B4 [Reseller 1] provided records detailing prices that it adopted, and each ‘*Comp Price*’ that it considered adopting, on 37 Relevant Products ([Reseller 1] Data).<sup>720</sup>

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<sup>719</sup> The CMA has considered this historical pricing data notwithstanding the CMA’s view that this data is not necessary – given the other relevant evidence set out in Part 4.C.IV. above, Annex A and Annex C of this Decision – to prove an infringement of the Chapter I prohibition/Article 101 TFEU in this case.

<sup>720</sup> URN C\_KOR02084 ([Reseller 1] Data: ARP Odyssey Rev.1); URN C\_KOR02085 ([Reseller 1] Data: ARP Odyssey Rev.2); URN C\_KOR02086 ([Reseller 1] Data: ARP Odyssey Rev.3 Black&Orange); URN C\_KOR02087 ([Reseller 1] Data: ARP Odyssey Rev.3 Black); URN C\_KOR02088 ([Reseller 1] Data: EMX-BL); URN C\_KOR02089 ([Reseller 1] Data: ESX-

B5 At the CMA's request [Reseller 1] submitted historical data of one sample increase in its pricing to the Minimum Price ascribed to a particular '*Competitor*' code, namely '[code 44]', for each of 26 additional Relevant Products ([Reseller 1] Additional Data).<sup>721</sup>

***The 'Competitor' codes recorded within [Reseller 1]'s historical pricing data***

B6 Within the [Reseller 1] Data and the [Reseller 1] Additional Data (together, the '[Reseller 1] Historical Data'), each price that [Reseller 1] at least considered adopting was logged as a '*Comp Price*', and ascribed a '*Competitor*' code. The original data on [Reseller 1]'s systems recorded the full name of each '*Competitor*', but within the [Reseller 1] Historical Data provided to the CMA these were anonymised using numbered codes. [Reseller 1] explained subsequently how it had anonymised each '*Competitor*' code, and how all '*Competitor*' codes within the [Reseller 1] Historical Data referred to rival resellers – except:<sup>722</sup>

- the '*Competitor*' anonymised as code 44, which referred to '[code 44]' (i.e. '[Reseller 1]'); and
- the '*Competitor*' anonymised as code 181, which referred to '[code 181]'.

B7 As set out at paragraph 4.76 above, [Reseller 1] submitted that on occasion it implemented '*[m]annual over-rides*' – e.g. due to a '*[r]equest from supplier*' (such as Korg UK) – to revert to the Minimum Price after [Reseller 1] had lowered its pricing to match a '*Comp Price*'. For the reasons set out below, the CMA concludes that a '*Comp Price*' ascribed to '[code 44]/code 44 in the [Reseller 1] Historical Data or '[code 181]' in the [Reseller 1] Data denotes the Minimum Price to which Korg UK requested [Reseller 1] increase its pricing for the Relevant Products.

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RD); URN C\_KOR02090 ([Reseller 1] Data: KO2S); URN C\_KOR02091 ([Reseller 1] Data: KOPRO+); URN C\_KOR02092 ([Reseller 1] Data: Monologue-BK); URN C\_KOR02093 ([Reseller 1] Data: Monologue-BL); URN C\_KOR02094 ([Reseller 1] Data: Monologue-GD); URN C\_KOR02095 ([Reseller 1] Data: Monologue-RD); URN C\_KOR02096 ([Reseller 1] Data: Monologue-SL); URN C\_KOR02097 ([Reseller 1] Data: Volca Kick); URN C\_KOR02098 ([Reseller 1] Data: Volca Mix); URN C\_KOR02099 ([Reseller 1] Data: Volca Sample OKGo); URN C\_KOR02100 ([Reseller 1] Data: KRMini); URN C\_KOR02101 ([Reseller 1] Data: Microkey2-37), which [Reseller 1] confirmed that – despite its original title – related to Korg's Microkey2-37 (not the Microkey2-37Air); URN C\_KOR02559 (Email from [Reseller 1] to the CMA on 8 March 2020); URN C\_KOR02102 ([Reseller 1] Data: Microkorg S); URN C\_KOR02103 ([Reseller 1] Data: Microkorg XL+); URN C\_KOR02104 ([Reseller 1] Data: Microkorg); URN C\_KOR02105 ([Reseller 1] Data: Mini-KP2S); URN C\_KOR02106 ([Reseller 1] Data: Minilogue); URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH); URN C\_KOR02108 ([Reseller 1] Data: Nanokontrol ST); URN C\_KOR02109 ([Reseller 1] Data: NanoPAD2-BK); URN C\_KOR02110 ([Reseller 1] Data: NanoPAD2-WH); URN C\_KOR02111 ([Reseller 1] Data: Taktile25); URN C\_KOR02112 ([Reseller 1] Data: TaktileTR49); URN C\_KOR02113 ([Reseller 1] Data: Volca Bass); URN C\_KOR02114 ([Reseller 1] Data: Volca Beats); URN C\_KOR02115 ([Reseller 1] Data: Volca FM); URN C\_KOR02116 ([Reseller 1] Data: Volca Keys); URN C\_KOR02117 ([Reseller 1] Data: Volca Sample); URN C\_KOR02188 ([Reseller 1] Data: EMX2-BK); URN C\_KOR02189 ([Reseller 1] Data: ESX2-BK); URN C\_KOR02190 ([Reseller 1] Data: MS20Mini-BK).

<sup>721</sup> URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), pp.6–7, entries relating to: 'CH-01'; 'KAOSSDJ'; 'KINGKORG'; 'KP3PLUS'; 'KROSS-61'; 'MICROKEY-25'; 'MICROKEY-61'; 'MICROKEY2-25AIR'; 'MICROKEY2-49'; 'MICROKEY2-49AIR'; 'MICROKEY2-61'; 'MICROKEY2-61AIR'; 'MONOTRON-DELAY'; 'MONOTRON-DUO'; 'Nanokey2-BK'; 'Nanokey2-WH'; 'NANOKONTROL2-WH'; 'PADKONTROL-BK'; 'PLUGKEY-BK'; 'RK100S-BK'; 'RK100S-RD'; 'RK100S-WH'; 'SQ-1'; 'TAKTILE49'; 'TAKTILE-TR25'; 'WDXGLOBAL'.

<sup>722</sup> URN C\_KOR02133 (Competitor codes & names); URN C\_KOR02138 (Email from [Reseller 1] to CMA on 11 October 2019).

'Competitor' code 44 / '[code 44]' / '[Reseller 1]'

- B8 Based on the below, the CMA concludes that each '*Comp Price*' ascribed to '[code 44]/code 44' in the [Reseller 1] Data denotes the Minimum Price to which Korg UK requested [Reseller 1] increase its pricing for the Relevant Products.
- B9 The [Reseller 1] Data records 241 prices that, during the Relevant Period, [Reseller 1] both considered adopting for 37 Relevant Products, and which were ascribed to '[Reseller 1]' ('[code 44]', for short) in the '*Competitor*' column. '[code 44]' was anonymised to code 44 within the [Reseller 1] Data.
- B10 On 10 October 2019, [Reseller 1] submitted copies of 620 emails to the CMA in response to a s.26 Notice. The CMA observed a correlation between the timing of increases in [Reseller 1]'s pricing to the Minimum Price for Relevant Products ascribed to '[code 44]' in the [Reseller 1] Data and between the timing of email contact between Korg UK and [Reseller 1] in relation to those Relevant Products (based on evidence including these 620 emails).
- B11 On 15 November 2019, the CMA requested further information from [Reseller 1] about 168 indicative increases in [Reseller 1]'s pricing to the Minimum Price on certain Relevant Products. [Reseller 1] submitted that 75 of these 168 price increases were related to various emails, between [Reseller 1] and Korg UK, of which [Reseller 1] had provided copies to the CMA on 10 October 2019.<sup>723</sup>
- B12 Also on 15 November 2019, the CMA requested details from [Reseller 1] of a sample increase in [Reseller 1]'s pricing, to the Minimum Price, on various Relevant Products ascribed to '[code 44]/code 44'. [Reseller 1] submitted details of such a sample increase on each of 26 additional Relevant Products, in the form of the [Reseller 1] Additional Data (see paragraph B5 above). The CMA observed a correlation between the timing of the 20 or so additional increases in [Reseller 1]'s pricing to Minimum Price for Relevant Products ascribed to '[code 44]' in the [Reseller 1] Data and the timing of email contact between Korg UK and [Reseller 1] in relation to those Relevant Products.

'Competitor' code 181 / '[code 181]'

- B13 Based on the below, the CMA concludes that each '*Comp Price*' ascribed to '[code 181]' in the [Reseller 1] Data denotes the Minimum Price to which Korg UK requested [Reseller 1] increase its pricing for the Relevant Products.
- B14 The [Reseller 1] Data records 58 '*Comp Price*' prices that, during the Relevant Period, [Reseller 1] both considered adopting for 37 Relevant Products and ascribed

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<sup>723</sup> CMA analysis of the column titled 'PRICE INCREASE(S) RELATED TO ITEM' in URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), pp.1–5. The CMA considers that this number may not have been any higher than 75 for at least two potential reasons. First, [Reseller 1] may have been no longer able to access copies of all relevant emails. Second, the CMA notes the possibility that other such price increases may have been related to telephone calls (not emails) from Korg UK.

to '[code 181]' in the 'Competitor' column. '[code 181]' was anonymised to code 181 within the [Reseller 1] Data.

B15 [Reseller 1 Employee 5] used the term '[code 181]' in two different contexts.<sup>724</sup>

- [Reseller 1 Employee 5] explained one context: to '*reset or set a [code 181]*' meant [Reseller 1] amending its pricing, to match either the RRP, or a '*launch price*', advised by the relevant manufacturer.<sup>725</sup> [Reseller 1 Employee 5] added that '[code 181]' references in this context '*most of the time*' concerned amending pricing to the relevant manufacturer's RRP. In effect, [Reseller 1 Employee 5] was describing the process of temporarily pausing price monitoring and tracking activities using [Reseller 1]'s '[code 181]' capabilities, as part of [Reseller 1]'s adherence to the Korg Pricing Policy.
- [Reseller 1 Employee 5] also explained a second context: [Reseller 1] logged '[code 181]' against a price to which it was '*asked to put up*' its pricing by a manufacturer such as Korg UK, but [Reseller 1] decided '*just to leave it for now*', i.e. not adjust [Reseller 1]'s pricing.<sup>726</sup> In effect, [Reseller 1 Employee 5] described occasions where [Reseller 1] decided not to comply, however temporarily, with the Korg Pricing Policy.

***[Reseller 1]'s historical pricing data: Additional evidence of [Reseller 1]'s compliance (or, conversely, non-compliance) with the Korg Pricing Policy***

B16 Based on the below, the CMA concludes that:

- over 85% of prices ascribed to '[code 44]' in the [Reseller 1] Data (213 of 241) were recorded in circumstances showing [Reseller 1]'s compliance with the Korg Pricing Policy, by agreeing to a Korg UK request to increase [Reseller 1]'s pricing for a Relevant Product to the Minimum Price;
- 66% of prices ascribed to '[code 181]' in the [Reseller 1] Data (38 of 58) were recorded in circumstances showing [Reseller 1]'s non-compliance with the Korg Pricing Policy, i.e. not agreeing to a Korg UK request to increase [Reseller 1]'s pricing for a Relevant Product to the Minimum Price; and
- [Reseller 1] complied with 77% of Korg UK requests to increase [Reseller 1]'s pricing for a Relevant Product to the Minimum Price recorded by [Reseller 1], and did not comply with another 19% of such requests (the evidence in relation to compliance being mixed, in the CMA's view, on the remaining 4% of such requests).

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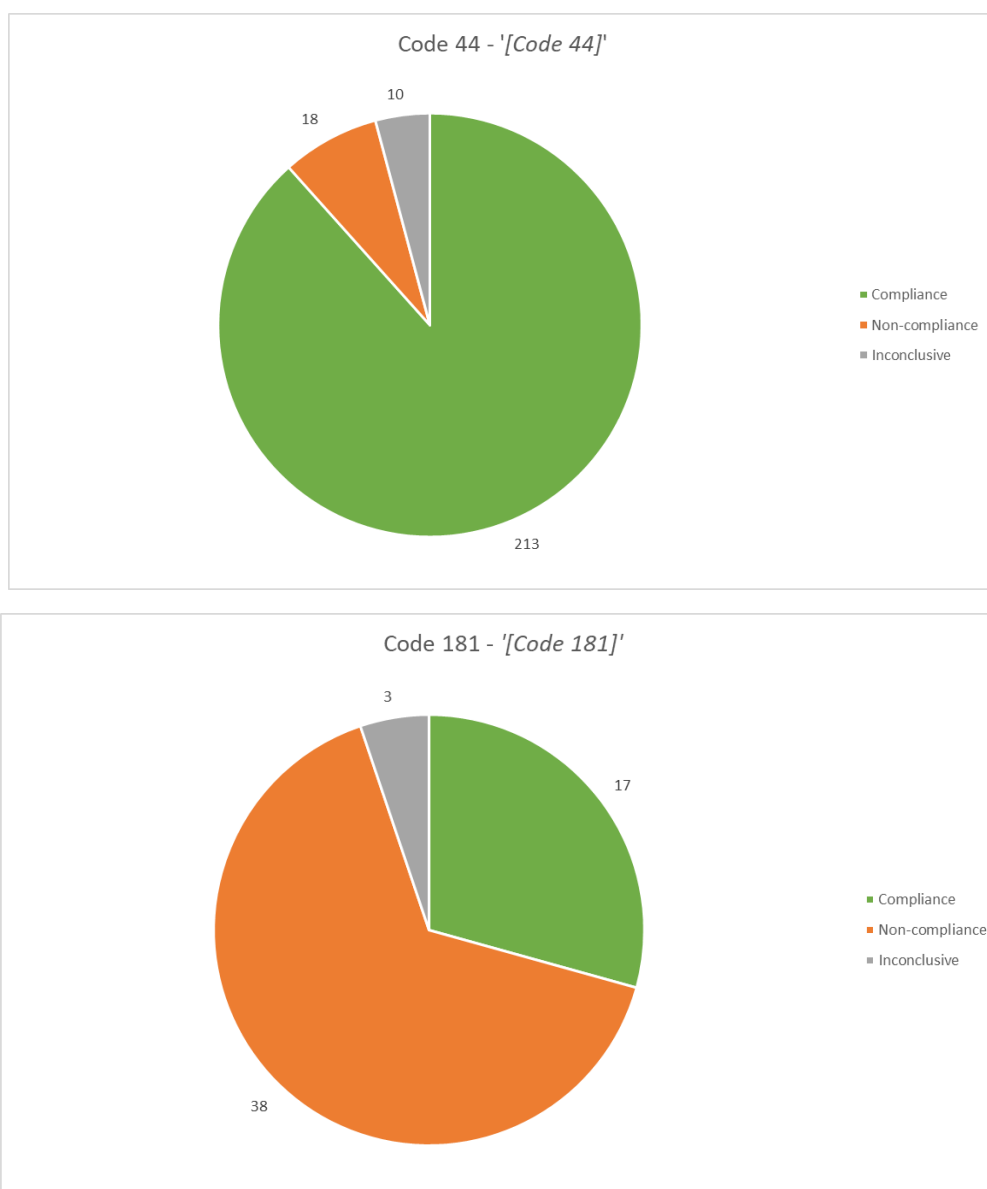
<sup>724</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.41, lines 5–15; p.42, line 10 to p.43, line 10; p.59, lines 16–18; p.60, lines 23–26; p.64, lines 1–3.

<sup>725</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.41, lines 5–15; p.59, lines 16–18; p.60, line 23 to p.61, line 2.

<sup>726</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.42, line 5 to p.43, line 10.

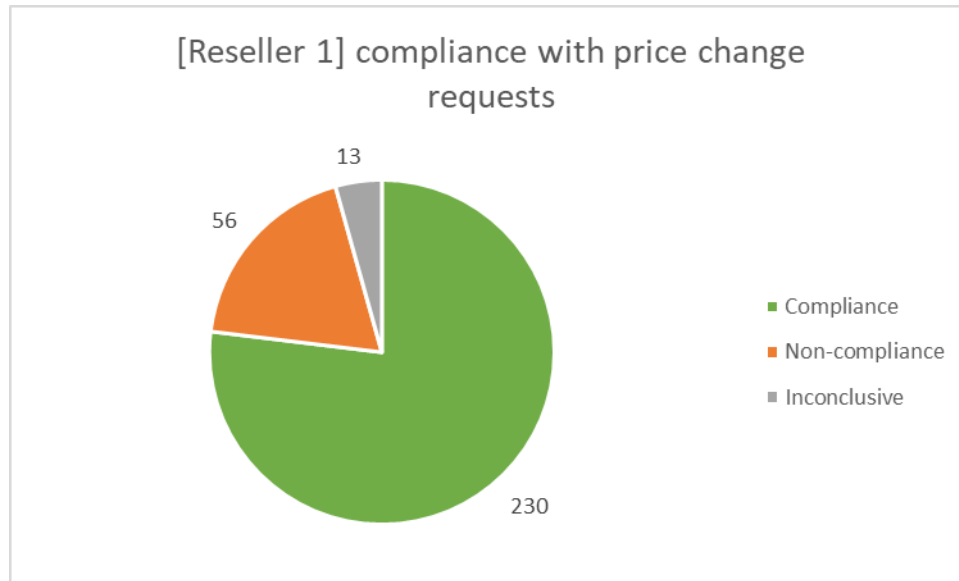
- B17 Set out below, by way of a high-level overview, at Figure B1 and Figure B2 are two illustrations of both the CMA's analysis of the circumstances in which prices were ascribed to '[code 44]' and '[code 181]' within the [Reseller 1] Data – and the CMA's views on whether or not these denote [Reseller 1]'s compliance with the Korg Pricing Policy.
- B18 Below Figure B1 and Figure B2, the CMA sets out further details in relation to the its analysis of the circumstances in which prices were ascribed to '[code 44]' and '[code 181]' within the [Reseller 1] Data, and the CMA's views on whether or not these denote [Reseller 1]'s compliance with the Korg Pricing Policy.

**Figure B1: Extent of compliance in relation to each of '[code 44]' and '[code 181]'**





**Figure B2: Extent of compliance in relation to '[code 44]' and '[code 181]' (combined)**



B19 Set out at Figure B3 below is the CMA's analysis of the circumstances in which prices were ascribed to '[code 44]' within the [Reseller 1] Data – and the CMA's views on whether or not these denote [Reseller 1]'s compliance with the Korg Pricing Policy.

**Figure B3: '[code 44]' – CMA analysis of circumstances noted in the [Reseller 1] Data**

Table row	[Reseller 1] pricing before '[code 44]' code was entered	[Reseller 1] pricing upon '[code 44]' code being entered	No. prices recorded	Counted as
a.	Below the Minimum Price (in the form of a price set out on a Korg UK price list)	Increased to the Minimum Price (in the form of a price set out on a Korg UK price list)	187	Compliance
b.	Below the Minimum Price (in the form of a price set out on a Korg UK price list)	Increased to the Minimum Price (in the form of a ' <i>Street Price</i> ' below Korg UK's ' <i>RRP Ex VAT</i> ' etc.)	2	Compliance <sup>727</sup>
c.	Below the Minimum Price (in the form of a price set out on a Korg UK price list)	Increased, but not to the Minimum Price (as set out on a Korg UK price list) and no evidence of ' <i>Street Price</i> ' below Korg UK's ' <i>RRP Ex VAT</i> ' etc.	1	Mixed – inconclusive
d.	Matched the Minimum Price (in the form of a price set out on a Korg UK price list) following an increase in [Reseller 1]'s pricing ascribed to '[code 44]'	Matched the Minimum Price (in the form of a price set out on a Korg UK price list)	20	Compliance <sup>728</sup>

<sup>727</sup> See paragraphs 4.168–4.171 and 4.201–4.203 above.

<sup>728</sup> In 13 of these instances, the Minimum Price before the '[code 44]' code was entered equalled the Minimum Price when the '[code 44]' code was entered. In the other instances, [Reseller 1]'s pricing matched the Minimum Price before the '[code 44]' code was entered and then [Reseller 1]'s pricing was increased to match a new, higher Minimum Price when the '[code 44]' code was entered.

Table row	[Reseller 1] pricing before '[code 44]' code was entered	[Reseller 1] pricing upon '[code 44]' code being entered	No. prices recorded	Counted as
e.	Matched the Minimum Price (in the form of a price set out on a Korg UK price list) following an increase in [Reseller 1]'s pricing ascribed to any code other than '[code 44]'	Matched the Minimum Price (in the form of a price set out on a Korg UK price list)	9	Mixed – inconclusive
f.	Below the Minimum Price (in the form of a price set out on a Korg UK price list)	Remained at same level, below the Minimum Price (in the form of a price set out on a Korg UK price list)	17	Non-compliance
g.	Above, below or matching the Minimum Price (in the form of a price set out on a Korg UK price list)	Decreased, to below (or further below) the Minimum Price (in the form of a price set out on a Korg UK price list)	1	Non-compliance
h.	N/A - No prior record of any price for Relevant Product	Matched the Minimum Price (in the form of a price set out on a Korg UK price list)	4	Compliance
<b>TOTAL</b>			<b>241</b>	

B20 Set out at Figure B4 below is the CMA's analysis of the circumstances in which prices were ascribed to '[code 181]' within the [Reseller 1] Data, and the CMA's views as to that whether or not these denote [Reseller 1]'s compliance with the Korg Pricing Policy.

**Figure B4: '[code 181]' – CMA analysis of circumstances noted in the [Reseller 1] Data**

Table row	[Reseller 1] pricing before '[code 181]' code was entered	[Reseller 1] pricing upon '[code 181]' code being entered	No. prices recorded	Counted as
a.	Below the Minimum Price (in the form of a price set out on a Korg UK price list)	Increased to the Minimum Price (in the form of a price set out on a Korg UK price list)	0	Compliance
b.	Below the Minimum Price (in the form of a price set out on a Korg UK price list)	Increased, but not to the Minimum Price (as set out on a Korg UK price list) and no evidence of ' <i>Street Price</i> ' below Korg UK's ' <i>RRP Ex VAT</i> ' etc.	3	Mixed – inconclusive
c.	Matched the Minimum Price (in the form of a price set out on a Korg UK price list)	Matched the Minimum Price (in the form of a price set out on a Korg UK price list)	15	Compliance
d.	N/A - No prior record of any price for Relevant Product	First record of any price for Relevant Product; matched the Minimum Price (in the form of a price set out on a Korg UK price list)	2	Compliance
e.	Below the Minimum Price (in the form of a price set out on a Korg UK price list)	Remained at same level, below the Minimum Price (in the form of a price set out on a Korg UK price list)	37	Non-compliance
f.	Above, below or matching the Minimum Price (in the form of a price set out on a Korg UK price list)	Decreased, to below (or further below) the Minimum Price (in the form of a price set out on a Korg UK price list)	1	Non-compliance
<b>TOTAL</b>			<b>58</b>	

- B21 Of the 189 increases in [Reseller 1]’s pricing to the Minimum Price for Relevant Products which [Reseller 1] ascribed to ‘[code 44]’, details of 180 such increases (on 35 different dates) in the Relevant Period are set out in this Decision. Given the totality of the evidence set out in this Decision, the CMA concludes that at least these 180 price increases were due to [Reseller 1] agreeing to a Korg UK request (by telephone or email) to increase [Reseller 1]’s pricing to the Minimum Price on Relevant Products, in line with the Korg Pricing Policy.
- B22 Moreover, the 180 price increases detailed in this Decision are only illustrative of, and may understate, the number of occasions on which [Reseller 1] complied with Korg UK requests to increase [Reseller 1]’s online pricing for a Relevant Product to the Minimum Price in the Relevant Period. This is for reasons such as those set out below.
- The [Reseller 1] Data is not an exhaustive overview of [Reseller 1]’s pricing during the Relevant Period: it contains price data for only 37 Relevant Products. At least 70 more Relevant Products were marketed by Korg UK via MI Resellers such as [Reseller 1] during the Relevant Period.<sup>729</sup> However, the CMA also notes that [Reseller 1] did not stock [X] (see paragraph 4.39.a. above).
  - The [Reseller 1] Additional Data is, likewise, not an exhaustive overview of [Reseller 1]’s pricing in the Relevant Period: it details, for each of 26 additional Relevant Products, a single sample price increase which [Reseller 1] (submitted) was related to an email between [Reseller 1] and Korg UK. The CMA has not requested a fuller set of pricing data on these 26 additional Relevant Products – so [Reseller 1] may have increased its pricing to the Minimum Price for these Relevant Products many more times than the one time noted in the [Reseller 1] Additional Data.
  - Fifteen entries were ascribed to ‘[code 181]’ against [Reseller 1] pricing that was already at the Minimum Price before the ‘[code 181]’ entry (and which remained, after the ‘[code 181]’ entry) at the Minimum Price (see Figure B4 above, at row c.)
- B23 Clearly, the [Reseller 1] Data also shows a number of examples of [Reseller 1]’s (sometimes temporary) non-compliance during the Relevant Period with a Korg UK request to increase [Reseller 1]’s online pricing for a Relevant Product to the Minimum Price.
- B24 For example, 17 of the entries ascribed to ‘[code 44]’ within the [Reseller 1] Data related to instances where [Reseller 1]’s pricing for the Relevant Product at issue was below the Minimum Price before the entry of ‘[code 44]’, and remained

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<sup>729</sup> CMA analysis of URN C\_KOR01558 (Spreadsheet - Korg reply dated 24 June 2019 to a s.26 Notice)/question 3 (attachment titled ‘2019.07.05 Sales volumes and revenues’) indicates that 78 Relevant Products not covered in the [Reseller 1] Data would have been available to Korg UK’s resellers between 9 June 2015 and 17 April 2018.

unchanged (and below the Minimum Price), upon the entry of '[code 44]' (see Figure B3 above, at row f.).<sup>730</sup>

- B25 The CMA notes that some '[code 181]' entries in the [Reseller 1] Data show instances of [Reseller 1]'s non-compliance with the Korg Pricing Policy. On some occasions [Reseller 1]'s non-compliance with the Korg Pricing Policy appears to have been only very temporary (e.g. two days) while other occasions may have involved a much longer period of non-compliance (e.g. eight months) – as shown by the examples below.
- Sometimes the '[code 181]' code appears in the [Reseller 1] Data shortly before a price increase ascribed to '[code 44]'. For example, on Korg's KRMINI (a Relevant Product) [Reseller 1] logged Korg's 'SSP inc. VAT @20%' price against '[code 181]' at 10:03am on 14 February 2017 – seven minutes after [Reseller 1] received an email from [Korg Employee 8] – then two days later logged a price increase to that 'SSP inc. VAT @20%' price, and ascribed that increase in [Reseller 1]'s pricing to '[code 44]'.<sup>731</sup> In these circumstances, entries of this code may denote only very temporary non-compliance with the Korg Pricing Policy by [Reseller 1].
  - In other circumstances, the '[code 181]' code may denote the start of a much longer period of non-compliance by [Reseller 1]. For example, [Reseller 1] logged a '[code 181]' code on Korg's NanoPad2 (Black), a Relevant Product, on 14 February 2017 – but no increase in [Reseller 1]'s pricing ascribed to '[code 44]' followed this (and, irrespective of the code entered, [Reseller 1] did not increase its pricing to Korg's RRP/SSP on this Relevant Product until 29 July 2017).<sup>732</sup>

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<sup>730</sup> The CMA notes that all 17 of these entries were made on one date during the Relevant Period: 23 September 2015.

<sup>731</sup> See paragraph 4.189 above, and the entries in URN C\_KOR02100 ([Reseller 1] Data: KRMINI) at 14/02/2017 10:03, 15/02/2017 15:05 and 16/02/2017 16:11.

<sup>732</sup> See URN C\_KOR02109 ([Reseller 1] Data: NanoPAD2-BK), from the entry of £46.00 at 14/02/2017 10:25 through to the entry of £46.00 at 29/07/2017 15:45.

## **Annex C: Additional examples, in 2016 and 2017, of [Reseller 1] agreeing to raise its pricing to the Minimum Price on request from Korg UK**

### ***Overview of this Annex***

- C1 Set out below in this Annex C is further evidence in relation to 2016 (in addition to that set out at paragraphs 4.148 to 4.172 above) and 2017 (in addition to that set out at paragraphs 4.189 to 4.203 above) which supports the CMA's finding that there was an agreement and/or concerted practice between Korg UK and [Reseller 1] that [Reseller 1] would adhere to the Korg Pricing Policy. In particular, the CMA sets out below the evidence relating to:
- contact between Korg UK and [Reseller 1] in relation to [Reseller 1]'s retail pricing;<sup>733</sup>
  - [Reseller 1] increasing its pricing, following such contact – in particular to the Minimum Price for the Relevant Products, as advised by Korg UK; and
  - [Reseller 1] monitoring, and reporting to Korg UK, other MI Resellers not adhering to the Korg Pricing Policy.

### ***Additional examples, in 2016, of [Reseller 1] agreeing to raise its pricing to the Minimum Price on request from Korg UK (and monitoring and reporting of other MI Resellers not adhering to the Korg Pricing Policy)***

- C2 The CMA sets out below further examples from 2016 which show that [Reseller 1]:
- understood there to be an agreement and/or concerted practice with Korg UK, in relation to the Korg Pricing Policy, which meant that [Reseller 1] (and other MI Resellers) would not advertise or sell the Relevant Products online below the Minimum Price; and
  - adhered to the Korg Pricing Policy and expected that Korg UK would follow up with (or 'sort') other MI Resellers' pricing if [Reseller 1] had reported their advertised pricing online as being below the Minimum Price to Korg UK.
- C3 On 16 March 2016 at 4:22pm, Korg UK's [Korg Employee 8] sent an email to [Reseller 1 Employee 5] titled '*Volca Sample*', a Relevant Product, stating: '*Do you*

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<sup>733</sup> [Reseller 1] sells the Relevant Products online via its own websites, and eBay. [Reseller 1] adopted sometimes the same pricing, and sometimes different pricing, as between its own websites, and eBay (see paragraph 4.37 above). In the [Reseller 1] Data, '*[Reseller 1]*' and '*eBay*' entries denote the pricing adopted by [Reseller 1] on its own websites and eBay respectively. In this Annex C (and Part 4.C.IV. above), 'pricing' may refer to any price(s) adopted by [Reseller 1] on its own websites and/or its eBay channel.

know who it was?'.<sup>734</sup> At 4:31pm, [Reseller 1 Employee 1] increased [Reseller 1]'s Volca Sample pricing to the Minimum Price.<sup>735</sup>

- C4 [Reseller 1 Employee 5] explained these events on 16 March 2016 to the CMA as follows.<sup>736</sup> Korg UK asked [Reseller 1] to increase its retail pricing to the Minimum Price and identify which other MI Resellers [Reseller 1] had previously price-matched. [Reseller 1 Employee 5] did so as his '*understanding*' was that Korg UK ('*or Korg EU or on the continent*')<sup>737</sup> would contact those resellers, to ensure that they adhered to the Korg Pricing Policy.
- C5 This is consistent with [Reseller 1 Employee 5] having sent Korg UK's [Korg Employee 8] three other MI Resellers' weblinks for the Volca Sample on 16 March 2016 at 4:39pm, and [Korg Employee 8]'s reply at 4:44pm ('*Being dealt with now as no margin there*').<sup>738</sup> [Korg Employee 8] told the CMA that, despite his reply, he may not have contacted other MI Resellers, for example if they were based outside of the UK.<sup>739</sup> Nonetheless, the CMA concludes that by reporting other MI Resellers' non-adherence to the Korg Pricing Policy, [Reseller 1] was again showing that it understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.
- C6 On 17 March 2016 at 11:22am, Korg UK's [Korg Employee 8] sent [Reseller 1 Employee 5] and [Reseller 1 Employee 3] an email titled '*Arp odyssey*', a Relevant Product, commenting only '*Regards*'. At 11:23am, [Reseller 1 Employee 5] sent this to [Reseller 1 Employee 1], asking [Reseller 1 Employee 1] to '*set up the [code 181] and send me links*'.<sup>740</sup> At 11:24am, [Reseller 1 Employee 1] increased [Reseller 1]'s pricing on an Odyssey model to the Minimum Price.<sup>741</sup>
- C7 On 18 April 2016 at 11:25am, Korg UK's [Korg Employee 8] sent [Reseller 1 Employee 3] (copying [Reseller 1 Employee 5]) a [Reseller 1] weblink for Korg's Kaossilator Pro+, stating '*Aware of other issues and will sort*'. At 11:35am, [Reseller 1 Employee 5] sent this to [Reseller 1 Employee 1], asking [Reseller 1 Employee 1]

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<sup>734</sup> URN ER\_KOR01350 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 16 March 2016).

<sup>735</sup> URN C\_KOR02117 ([Reseller 1] Data: Volca Sample), £129.00 at 16/03/2016 16:31. The increased price was ascribed to '[code 44]' (see footnote 382 above) – and matched Korg UK's '*RRP Ex VAT*' in the pricelist at footnote 394 above.

<sup>736</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.169, line 12 to p.170, line 16.

<sup>737</sup> [Reseller 1 Employee 5] also submitted that Korg UK seemed to find it harder to influence resellers based outside of the UK, e.g. [Reseller] and [Reseller] (both featured in the email at footnote 734 above/footnote 738 below): URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.170, line 12 to p.172, line 5.

<sup>738</sup> URN ER\_KOR01350 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 16 March 2016).

<sup>739</sup> For example, because '*these are European retailers that we don't have any direct contact with*': URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.174, line 3 to p.175, line 7.

<sup>740</sup> URN ER\_KOR01650 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 17 March 2016). This also records that [Reseller 1 Employee 1] sent [Reseller 1 Employee 5] another reseller's weblink for an Odyssey model at 11:27am on the same day. However, the CMA has seen no evidence that [Reseller 1 Employee 5] sent that to Korg UK.

<sup>741</sup> URN C\_KOR02086 ([Reseller 1] Data: ARP Odyssey Rev.3 Black&Orange), £795.00 at 17/03/2016 11:24. The increased price was ascribed to '[code 44]' (see footnote 382 above) – and matched Korg UK's '*RRP Ex VAT*' in the pricelist at footnote 394 above.

to 'look into this'.<sup>742</sup> [Reseller 1 Employee 3] told the CMA that he '*understood this to mean*' that [Korg Employee 8] '*was aware that other shops were selling the Korg Kaossilator Pro Dynamic cheaper than Korg wanted but he still wanted [Reseller 1] to raise the retail price*'.<sup>743</sup> At 11:40am, [Reseller 1 Employee 1] increased [Reseller 1]'s pricing for the Kaossilator Pro+, a Relevant Product, to the Minimum Price.<sup>744</sup>

- C8 After the price increase set out above, on 18 April 2016 at 11:47am, [Reseller 1 Employee 5] sent three other MI Resellers' weblinks for Korg's Kaossilator Pro+, a Relevant Product, to [Korg Employee 8].<sup>745</sup> The CMA concludes that by reporting other MI Resellers' non-adherence to the Korg Pricing Policy, [Reseller 1] was again showing that it understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.
- C9 On 18 May 2016 at 11:19am, Korg UK's [Korg Employee 8] wrote to [Reseller 1 Employee 3]: '*[w]e need the changes to be done by tomorrow please. Europe have had the same Pricelist over so it should allow a better margin.*' [Reseller 1 Employee 3] replied '*we received the pricelist although you will need speak to [Reseller 1 Employee 5] regarding any changes*'. [Korg Employee 8] sent this to [Reseller 1 Employee 5], stating '*I was just making sure that you had received the new pricelist*' and that Korg UK was '*pushing Europe to be done by tomorrow at the latest so if you could do the same id [sic] be grateful.*' At 11:41am, [Reseller 1 Employee 5] replied '*[w]e'll adjust tomorrow*'.<sup>746</sup> At 11:42am, [Reseller 1 Employee 5] sent to [Reseller 1 Employee 1] an email dated 16 May 2016 concerning a Korg UK pricelist, asking [Reseller 1 Employee 1] to '*adjust our Korg prices tomorrow as late as possible*'. On 19 May 2016 between 4:38pm and 5:27pm [Reseller 1 Employee 1] increased [Reseller 1]'s pricing for 21 Relevant Products,<sup>747</sup> to the Minimum Price, then replied

<sup>742</sup> URN ER\_KOR01755 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 18 April 2016).

<sup>743</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.6, question 6(a).

<sup>744</sup> URN C\_KOR02091 ([Reseller 1] Data: KOPRO+), £299.00 at 18/04/2016 11:40. The increased price was ascribed to '[code 44]' (see footnote 382 above) – and matched Korg UK's 'RRP Ex VAT' in URN C\_KOR01930 (KORG Confidential UK Trade Price List - updated April 4th 2016).

<sup>745</sup> URN ER\_KOR01312 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 18 April 2016). [Reseller 1 Employee 1] had sent [Reseller 1 Employee 5] these weblinks at 11:41am: URN ER\_KOR01755 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 18 April 2016).

<sup>746</sup> URN ER\_KOR01756 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 18 May 2016).

<sup>747</sup> URN C\_KOR02086 ([Reseller 1] Data: ARP Odyssey Rev.3 Black&Orange), £795.00 at 19/05/2016 16:38; URN C\_KOR02090 ([Reseller 1] Data: KO2S), £113.00 at 19/05/2016 16:45; URN C\_KOR02100 ([Reseller 1] Data: KRMini), £60.00 at 19/05/2016 16:46; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'MICROKEY2-49AIR', £130.00 at 19/05/2016 16:54; URN C\_KOR02104 ([Reseller 1] Data: Microkorg), £299.00 at 19/05/2016 16:57; URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH), £469.00 at 19/05/2016 17:02; URN C\_KOR02190 ([Reseller 1] Data: MS20Mini-BK), £469.00 at 19/05/2016 17:02; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'Nanokey2-BK', £37.00 at 19/05/2016 17:03; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'Nanokey2-WH' £37.00 at 19/05/2016 17:03; URN C\_KOR02110 ([Reseller 1] Data: NanoPAD2-WH), £42.00 at 19/05/2016 17:04; URN C\_KOR02109 ([Reseller 1] Data: NanoPAD2-BK), £42.00 at 19/05/2016 17:04; URN C\_KOR02111 ([Reseller 1] Data: Taktile25), £120.00 at 19/05/2016 17:13; URN C\_KOR02112 ([Reseller 1] Data: TaktileTR49), £265.00 at 19/05/2016 17:15; URN C\_KOR02113 ([Reseller 1] Data: Volca Bass), £120.00 at 19/05/2016 17:15; URN C\_KOR02114 ([Reseller 1] Data: Volca Beats), £120.00 at 19/05/2016 17:16; URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), £120.00 at 19/05/2016 17:16; URN C\_KOR02117 ([Reseller 1] Data: Volca Sample), £129.00 at 19/05/2016 17:16; URN C\_KOR02099 ([Reseller 1] Data: Volca Sample OKGo), £129.00 at 19/05/2016 17:17; URN C\_KOR02106 ([Reseller 1] Data: Minilogue), £469.00 at 19/05/2016 17:27; URN C\_KOR02147

'Prices updated' to [Reseller 1 Employee 5] at 5:38pm.<sup>748</sup> On 20 May 2016 [Korg Employee 8] sent [Reseller 1 Employee 5] an email titled 'New price list', writing 'Thanks [Reseller 1 Employee 5]. Brilliant work. I'm working on the stragglers now!'.<sup>749</sup>

- C10 On 3 August 2016 at 5:35pm, [Korg Employee 8] of Korg UK sent [Reseller 1 Employee 5] an email titled 'Ms20mini', a Relevant Product, with no body text. At 8:35am on 4 August 2016 [Reseller 1 Employee 5] replied, listing nine other MI Resellers' weblinks for Korg's MS20Mini.<sup>750</sup> [Reseller 1 Employee 5] explained that Korg UK was flagging that [Reseller 1] wasn't 'at the right price', so he wanted to report 'nine companies undercutting that price'.<sup>751</sup> Nonetheless, on 4 August 2016 at 8:34am [Reseller 1 Employee 5] increased [Reseller 1]'s pricing for Korg's MS20Mini (Black) and MS20Mini (White) to the Minimum Price.<sup>752</sup>
- C11 On 12 August 2016 at 11:02am, [Korg Employee 8] sent a [Reseller 1] weblink for Korg's Odyssey, a Relevant Product, to [Reseller 1 Employee 5].<sup>753</sup> At 11:14am, [Reseller 1 Employee 5] increased [Reseller 1]'s pricing on that Odyssey model, to the Minimum Price.<sup>754</sup>
- C12 On 30 August 2016 at 12:19pm [Korg Employee 8] sent [Reseller 1 Employee 3] a [Reseller 1] weblink for Korg's Minilogue, a Relevant Product. At 12:23pm, [Reseller 1 Employee 3] increased [Reseller 1]'s Minilogue pricing to the Minimum Price,<sup>755</sup> then replied 'Sorted' at 12:24pm.<sup>756</sup> [Reseller 1 Employee 3] told the CMA that he was informing [Korg Employee 8] 'that I had carried out his demand & put the price up', and that he increased [Reseller 1]'s pricing 'because Korg's [Korg Employee 8] had pressurised me to do so. It is likely that there had been a phone call from him beforehand but I don't recall.'<sup>757</sup>

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([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'NANOKONTROL2-WH', £42.00 at 19/05/2016 17:29; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'PADKONTROL-BK', £155.00 at 19/05/2016 17:30. Each increased price was ascribed to '[code 44]' (see footnote 382 above) – and matched Korg UK's 'RRP Ex VAT' in URN ER\_KOR01396.A (KORG Confidential UK Trade Price List - May 2016) (as attached to URN ER\_KOR01396 (Email from [Korg Employee 8] to [Reseller 1 Employee 3] on 16 May 2016)).

<sup>748</sup> URN ER\_KOR01373 (Email from [Reseller 1 Employee 1] to [Reseller 1 Employee 5] on 19 May 2016).

<sup>749</sup> At 10:44am [Reseller 1 Employee 5] sent this on to [Reseller 1 Employee 1], stating 'Please match anyone in a week. Cheers': see URN ER\_KOR01311 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 20 May 2016).

<sup>750</sup> URN ER\_KOR01336 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 4 August 2016).

<sup>751</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.174, line 15 to p.177, line 5.

<sup>752</sup> URN C\_KOR02190 ([Reseller 1] Data: MS20Mini-BK), £499.00 at 04/08/2016 08:34; URN C\_KOR02107 ([Reseller 1] Data: MS20Mini-WH), £499.00 at 04/08/2016 08:34. Each increased price was ascribed to '[code 44]' (see footnote 382 above) – and matched Korg UK's 'RRP Ex VAT' in URN C\_KOR01933 (KORG Confidential UK Main dealer Trade Price List - August 2016).

<sup>753</sup> URN ER\_KOR01352 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 12 August 2016).

<sup>754</sup> URN C\_KOR02086 ([Reseller 1] Data: ARP Odyssey Rev.3 Black&Orange), £830.00 at 12/08/2016 11:14. The increased price was ascribed to '[code 44]' (see footnote 382 above) – and matched Korg UK's 'RRP Ex VAT' in URN C\_KOR01933 (KORG Confidential UK Main dealer Trade Price List - August 2016).

<sup>755</sup> URN C\_KOR02106 ([Reseller 1] Data: Minilogue), £499.00 at 30/08/2016 12:23. The increased price was ascribed to '[code 44]' (see footnote 382 above) – and matched Korg UK's 'RRP Ex VAT' in URN C\_KOR01933 (KORG Confidential UK Main dealer Trade Price List - August 2016).

<sup>756</sup> URN ER\_KOR01230 (Email from [Reseller 1 Employee 3] to [Korg Employee 8] on 30 August 2016).

<sup>757</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), pp.7–8/question 9.



- C13 On 5 September 2016 at 2:04pm, [Korg Employee 8] of Korg UK sent a [Reseller 1] weblink for Korg's Odyssey, a Relevant Product, under the subject '*Thanks*', to [Reseller 1 Employee 5]. At 2:05pm, [Reseller 1 Employee 5] replied '*Cheers*',<sup>758</sup> and increased [Reseller 1]'s pricing on that Odyssey model, to the Minimum Price.<sup>759</sup>
- C14 On 17 October 2016 Korg UK issued a price list to MI Resellers such as [Reseller 1].<sup>760</sup> On 18 October 2016 at 10:54am [Reseller 1 Employee 5] increased [Reseller 1]'s pricing for Korg's Volca FM, a Relevant Product, to the Minimum Price.<sup>761</sup> On 19 October 2016 at 10:55am [Reseller 1 Employee 5] asked [Reseller 1 Employee 1] to '*adjust the [code 181] on the Volcas*'.<sup>762</sup> By 11:04am, [Reseller 1 Employee 1] had increased [Reseller 1]'s pricing for five Relevant Products in the Volca range, to the Minimum Price.<sup>763</sup>

***Additional examples, in 2017, of [Reseller 1] agreeing to raise its pricing to the Minimum Price on request from Korg UK (and monitoring and reporting other MI Resellers not adhering to the Korg Pricing Policy)***

- C15 The CMA sets out below further examples from 2017 which show that [Reseller 1]:
- understood there to be an agreement and/or concerted practice with Korg UK, in relation to the Korg Pricing Policy, which meant that [Reseller 1] (and other MI Resellers) would not advertise or sell the Relevant Products online below the Minimum Price; and
  - adhered to the Korg Pricing Policy and expected that Korg UK would follow up with (or 'sort') other MI Resellers' pricing if [Reseller 1] had reported their advertised pricing online as being below the Minimum Price to Korg UK.
- C16 On 19 January 2017 at 5:27am, Korg UK's [Korg Employee 8] sent [Reseller 1 Employee 5], in an email titled '*Thanks*' copied to [Reseller 1 Employee 3], a [Reseller

<sup>758</sup> URN ER\_KOR01627 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 5 September 2016).

<sup>759</sup> URN C\_KOR02086 ([Reseller 1] Data: ARP Odyssey Rev.3 Black&Orange), £830.00 at 05/09/2016 14:05. The increased price was ascribed to '*[code 44]*' (see footnote 382 above) and matched '*RRP Ex VAT*' in URN C\_KOR01933 (KORG Confidential UK Main dealer Trade Price List - August 2016).

<sup>760</sup> URN ER\_KOR01496 (Email forwarded from [Reseller 1 Employee 3] to [Reseller 1 Employee 5] on 17 October 2016).

<sup>761</sup> URN C\_KOR02115 ([Reseller 1] Data: Volca FM), £137.00 at 18/10/2016 10:54. The increased price was ascribed to '*[code 44]*' (see footnote 382 above) and matched '*RRP Ex VAT*' in URN C\_KOR01936 (KORG Confidential UK Main dealer Trade Price List - October 18th 2016).

<sup>762</sup> URN ER\_KOR01778 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 19 October 2016).

<sup>763</sup> URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), £129.00 at 19/10/2016 11:02; URN C\_KOR02113 ([Reseller 1] Data: Volca Bass), £129.00 at 19/10/2016 11:03; URN C\_KOR02114 ([Reseller 1] Data: Volca Beats), £129.00 at 19/10/2016 11:03; URN C\_KOR02117 ([Reseller 1] Data: Volca Sample), £137.00 at 19/10/2016 11:04; URN C\_KOR02099 ([Reseller 1] Data: Volca Sample OKGo), £137.00 at 19/10/2016 11:04. Each increased price was ascribed to '*[code 44]*' (see footnote 382 above) and matched '*RRP Ex VAT*' in URN C\_KOR01936 (KORG Confidential UK Main dealer Trade Price List - October 18th 2016).

1] weblink for Korg's Microkorg, a Relevant Product.<sup>764</sup> At 9:16am, [Reseller 1 Employee 5] increased [Reseller 1]'s Microkorg pricing, to the Minimum Price.<sup>765</sup>

- C17 On 17 February 2017 at 9:11am, [Korg Employee 8] sent [Reseller 1 Employee 5] an email titled '*Electribes*' (which may refer to several different Relevant Products). No text was in the body of this email. At 9:15am, [Reseller 1 Employee 5] replied '*[a]ll's good*', then set out eight other MI Resellers' weblinks for Korg's Electribe Sampler ESX2 (Red) and Electribe EMX2 (Blue).<sup>766</sup> The CMA concludes that sending Korg UK other MI Resellers' weblinks was intended to report other MI Resellers' non-adherence to the Korg Pricing Policy. The CMA concludes that by reporting other MI Resellers' non-adherence to the Korg Pricing Policy, [Reseller 1] was again showing that it understood there to be an agreement and/or concerted practice in relation to the Korg Pricing Policy which meant that it (and other MI Resellers) would not sell or advertise the Relevant Products below the Minimum Price.
- C18 On 24 February 2017 at 4:40pm, [Korg Employee 8] emailed [Reseller 1 Employee 5] (copying [Reseller 1 Employee 3]) a [Reseller 1] weblink for Korg's Minilogue, a Relevant Product.<sup>767</sup> At 4:44pm, [Reseller 1 Employee 5] increased [Reseller 1]'s Minilogue pricing to the Minimum Price.<sup>768</sup> Nonetheless, at 4:52pm, [Korg Employee 8] sent Korg UK's [Korg Employee 2] an email titled '*sad face*' (in text; not emoji), comprising only [Reseller 1]'s weblink for Korg's Minilogue. At 5:05pm, [Korg Employee 2] replied '*Please forward this on my behalf*', with an image of a bomb.<sup>769</sup> These emails were exchanged within Korg UK notwithstanding the increase in [Reseller 1]'s Minilogue pricing as '*[Reseller 1]'s listings can take some time to update online*'.<sup>770</sup>
- C19 On 2 March 2017 at 1:55pm and 1:57pm, respectively, Korg UK's [Korg Employee 8] sent [Reseller 1 Employee 5] [Reseller 1] weblinks for Korg's Kaossilator Pro+ and Korg's Nanokontrol Studio Mobile (both Relevant Products).<sup>771</sup> At 1:58pm and

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<sup>764</sup> URN ER\_KOR01326 (Email from [Korg Employee 8] to [Reseller 1 Employee 5], copying [Reseller 1 Employee 3], on 19 January 2017).

<sup>765</sup> URN C\_KOR02104 ([Reseller 1] Data: Microkorg), £315.00 at 19/01/2017 09:16. The increased price was ascribed to '*[code 44]*' (see footnote 382 above) and matched '*RRP Ex VAT*' in URN C\_KOR01939 (KORG Confidential UK Trade Price List - November 1st 2016).

<sup>766</sup> URN ER\_KOR01358 (Email from [Reseller 1 Employee 5] to [Korg Employee 8] on 17 February 2017). The CMA considers that the '*All's good*' remark may have related to the fact that the first two increases in [Reseller 1]'s pricing the day before (i.e. 16 February 2017) set out at paragraph 4.189 above were on Korg's Electribe EMX2 and Electribe Sampler ESX2.

<sup>767</sup> URN ER\_KOR01367 (Email from [Korg Employee 8] to [Reseller 1 Employee 5], copying [Reseller 1 Employee 3], on 24 February 2017).

<sup>768</sup> URN C\_KOR02106 ([Reseller 1] Data: Minilogue), £525.00 at 24/02/2017 16:44. The increased price was ascribed to '*[code 44]*' (see footnote 382 above) and matched '*SSP inc. VAT @20%*' in URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017).

<sup>769</sup> URN EY\_KOR01274 (Email from [Korg Employee 8] to [Korg Employee 2] on 24 February 2017). The version downloadable by the CMA featured the text '*{Image result for bomb picture}*' – and not e.g. the emoji featured at paragraph C21 below.

<sup>770</sup> URN C\_KOR02387 ([Reseller 1 Employee 3] reply dated 7 February 2020 to a s.26 Notice), p.7/question 7(c).

<sup>771</sup> URN ER\_KOR01328 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 2 March 2017); URN ER\_KOR01322 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 2 March 2017).

2:01pm, [Reseller 1 Employee 5] increased [Reseller 1]'s respective pricing for both Relevant Products, to the Minimum Price.<sup>772</sup>

- C20 On 13 March 2017 at 12:49pm, [Korg Employee 2] of Korg UK asked various Korg UK colleagues 'Any luck' in connection with the pricing of several MI Resellers, including [Reseller 1], for Korg's Microkorg XL+ (a Relevant Product). At 12:53pm, [Korg Employee 8] replied 'Yep. And [Reseller 1] sorting too.'<sup>773</sup> At 12:54pm, [Korg Employee 8] sent [Reseller 1 Employee 5] a [Reseller 1] weblink for Korg's Microkorg XL+.<sup>774</sup> At 12:57pm, [Reseller 1 Employee 5] increased [Reseller 1]'s Microkorg XL+ pricing, to the Minimum Price.<sup>775</sup>
- C21 On 21 March 2017, Korg UK staff exchanged messages about [Reseller 1]'s pricing of specific Relevant Products.<sup>776</sup> At 3:37pm, [Korg Employee 4] of Korg UK stated, '[Reseller 1] Volca bass £129'. At 3:48pm, [Korg Employee 8] of Korg UK replied 'Called [Reseller 1]. All monologue were at £269 too 🧨'.<sup>777</sup> Between 8:37am and 8:40am the next day, [Reseller 1 Employee 5] increased [Reseller 1]'s pricing for 8 Relevant Products (including Korg's Volca Bass and Monologue), to the Minimum Price.<sup>778</sup>
- C22 On 23 March 2017 at 9:42am, Korg UK's [Korg Employee 8] sent [Reseller 1 Employee 5], in an email titled 'Thanks' with no body text, a [Reseller 1] weblink for a Relevant Product, i.e. Korg's Taktile TR49.<sup>779</sup> At 9:45am, [Reseller 1 Employee 5] increased [Reseller 1]'s Taktile TR49 pricing, to the Minimum Price.<sup>780</sup> At 9:56am, Korg UK's [Korg Senior Employee 3] told [Korg Employee 8] 'Hi [Korg Employee 8],

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<sup>772</sup> URN C\_KOR02091 ([Reseller 1] Data: KOPRO+), £330.00 at 02/03/2017 13:58 ([Reseller 1] held this price for four hours, when it was dropped to follow the pricing of a rival MI Reseller); URN C\_KOR02108 ([Reseller 1] Data: Nanokontrol ST), £124.00 at 02/03/2017 14:01. Each increased price was ascribed to '[code 44]' (see footnote 382 above) and matched 'SSP inc. VAT @20%' in URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017).

<sup>773</sup> URN C\_KOR00910 (WhatsApp messages of [Korg Employee 2] and [Korg Employee 8] on 13 March 2017).

<sup>774</sup> URN ER\_KOR01331 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 13 March 2017).

<sup>775</sup> URN C\_KOR02103 ([Reseller 1] Data: Microkorg XL+), £415.00 at 13/03/2017 12:57. The increased price was ascribed to '[code 44]' (see footnote 382 above) and matched 'SSP inc. VAT @20%' in URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017).

<sup>776</sup> URN C\_KOR00914 (WhatsApp messages of [Korg Senior Employee 3], [Korg Employee 4] and [Korg Employee 15] on 21 March 2017).

<sup>777</sup> For one definition (amongst others) of this emoji, see e.g. <https://emojipedia.org/bomb/> (accessed on 26 June 2020).

<sup>778</sup> URN C\_KOR02115 ([Reseller 1] Data: Volca FM), £139.00 at 22/03/2017 08:37; URN C\_KOR02099 ([Reseller 1] Data: Volca Sample OKGo), £139.00 at 22/03/2017 08:37; URN C\_KOR02113 ([Reseller 1] Data: Volca Bass), £139.00 at 22/03/2017 08:38; URN C\_KOR02114 ([Reseller 1] Data: Volca Beats), £139.00 at 22/03/2017 08:38; URN C\_KOR02094 ([Reseller 1] Data: Monologue-GD), £299.00 at 22/03/2017 08:39; URN C\_KOR02096 ([Reseller 1] Data: Monologue-SL), £299.00 at 22/03/2017 08:39; URN C\_KOR02095 ([Reseller 1] Data: Monologue-RD), £299.00 at 22/03/2017 08:40; URN C\_KOR02093 ([Reseller 1] Data: Monologue-BL), £299.00 at 22/03/2017 08:40. Each increased price was ascribed to '[code 44]' (see footnote 382 above) and matched 'SSP inc. VAT @20%' in URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017). '[code 44]' was also recorded against [Reseller 1] pricing on 2 other Relevant Products which already matched, at that time, Korg's 'SSP inc. VAT @20%': URN C\_KOR02097 ([Reseller 1] Data: Volca Kick), £139.00 at 22/03/2017 08:36; URN C\_KOR02092 ([Reseller 1] Data: Monologue-BK), £299.00 at 22/03/2017 08:40.

<sup>779</sup> URN ER\_KOR01324 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 23 March 2017).

<sup>780</sup> URN C\_KOR02112 ([Reseller 1] Data: TaktileTR49), £280.00 at 23/03/2017 09:45. The increased price was ascribed to '[code 44]' (see footnote 382 above) and matched 'SSP inc. VAT @20%' in URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017).

*[Reseller 1] at £218 for taktile triton should be £280.* [Korg Employee 8] replied at 9:58am, *'No probs. Spoke with [Reseller 1 Employee 5] and he is sorting now.'*<sup>781</sup>

- C23 On 27 March 2017 at 3:29pm, Korg UK's [Korg Employee 8] sent [Reseller 1 Employee 5] an email, with no title or body other than a [Reseller 1] weblink for Korg's Volca Keys (a Relevant Product).<sup>782</sup> [Reseller 1 Employee 5] told the CMA that this was about *'putting the price up'*, i.e. to the Minimum Price.<sup>783</sup> At 3:36pm, [Reseller 1 Employee 5] increased [Reseller 1]'s Volca Keys pricing to the Minimum Price.<sup>784</sup>
- C24 On 21 April 2017 Korg UK staff exchanged messages about the pricing of MI Resellers including [Reseller 1].<sup>785</sup> At 9:21am, [Korg Employee 4] reported two prices shown by [Reseller]. At 9:22am, Korg UK's [Korg Senior Employee 1] wrote *'It's Friday...can I suggest we make a call to any dealer here saying that they do have the opportunity to make more money on these lines if they choose to and say that we won't call them again on the subject.'* At 9:24am and 9:25am, [Korg Employee 4] wrote *'[Reseller 1] microkorg XL+ £369 microkorg £310'* (both Relevant Products) and *'[t]hings are starting to slip'*. At 10:17am, Korg UK's [Korg Employee 8] wrote *'[Reseller 1], [Reseller], [Reseller] and [Reseller] all spoken with'*. Korg UK's [Korg Senior Employee 3] told the CMA that this denoted Korg UK having contacted these MI Resellers, to have the sort of conversation suggested earlier by [Korg Senior Employee 1]. [Korg Senior Employee 3] added that such conversations may have occurred on a Friday for *'a period of time'* when the Korg Charter was launched, as *'dealers tended to phone up'* that day, to ask *"What's happening for the weekend?"*.<sup>786</sup> At 11:51am [Reseller 1 Employee 5] asked, in an email titled *'Korg'*, [Reseller 1 Employee 1] to *'reset the [code 181] for the products we discussed'*. By 1:03pm, [Reseller 1 Employee 1] had increased [Reseller 1]'s pricing for Korg's Microkorg XL, Microkorg and 10 other Relevant Products, to the Minimum Price.<sup>787</sup>

<sup>781</sup> URN C\_KOR02264 (WhatsApp messages of [Korg Senior Employee 3] and [Korg Employee 8] on 23 March 2017). [Korg Employee 8] told the CMA that his reply meant that he had *'let [Reseller 1] know the information'*: URN C\_KOR02497 (Transcript of the [Korg Employee 8] Interview), p.307, line 12 to p.309, line 21. Text in square brackets added by the CMA.

<sup>782</sup> URN ER\_KOR01389 (Email from [Korg Employee 8] to [Reseller 1 Employee 5] on 27 March 2017).

<sup>783</sup> URN C\_KOR02479 (Transcript of the [Reseller 1 Employee 5] Interview), p.137, lines 13–17.

<sup>784</sup> URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), £139.00 at 27/03/2017 15:36. The increased price was ascribed to *'[code 44]'* (see footnote 382 above) and matched *'SSP inc. VAT @20%'* in URN C\_KOR01940 (KORG Confidential UK Main Dealer Trade Price List - February 14th 2017).

<sup>785</sup> URN C\_KOR02602 (WhatsApp messages of [Korg Employee 4], [Korg Employee 8] and others on 21–22 April 2017).

<sup>786</sup> URN C\_KOR01966 (Transcript of the [Korg Senior Employee 3] Third Interview), p.211, line 10 to p.212, line 9.

<sup>787</sup> URN ER\_KOR01767 (Email from [Reseller 1 Employee 5] to [Reseller 1 Employee 1] on 21 April 2017). URN C\_KOR02103 ([Reseller 1] Data: Microkorg XL+), £415.00 at 21/04/2017 12:49; URN C\_KOR02091 ([Reseller 1] Data: KOPRO+), £330.00 at 21/04/2017 12:51; URN C\_KOR02104 ([Reseller 1] Data: Microkorg), £329.00 at 21/04/2017 12:52; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.7 at 'TAKTILE-TR25', £207.00 at 21/04/2017 12:56; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6 at 'MICROKEY2-61AIR', £165.00 at 21/04/2017 12:57; URN C\_KOR02147 ([Reseller 1] reply dated 21 November 2019 to a s.26 Notice), p.6, at 'KAOSSDJ', £159.00 at 21/04/2017 12:58; URN C\_KOR02113 ([Reseller 1] Data: Volca Bass), £139.00 at 21/04/2017 13:02; URN C\_KOR02115 ([Reseller 1] Data: Volca FM), £139.00 at 21/04/2017 13:02; URN C\_KOR02099 ([Reseller 1] Data: Volca Sample OKGo), £139.00 at 21/04/2017 13:03; URN C\_KOR02116 ([Reseller 1] Data: Volca Keys), £139.00 at 21/04/2017 13:03. Each increased price was ascribed to *'[code 44]'* (see footnote 382 above) and matched *'SSP inc. VAT @20%'* in URN C\_KOR01942 (KORG Confidential UK Trade Price List - Updated 30 March 2017). *'[code 44]'* was also recorded against [Reseller 1] pricing on 2 other Relevant Products which already matched Korg's *'SSP inc. VAT @20%'* – following price increases implemented by [Reseller 1 Employee 5] a few hours earlier: URN C\_KOR02114

C25 On 16 June 2017, Korg UK staff exchanged messages about [Reseller 1]'s pricing.<sup>788</sup> [Korg Employee 15] wrote '*[Reseller 1] 276 on monologue*', a Relevant Product. At 1:50pm, [Korg Employee 8] replied '*[Reseller 1] sorting now*'. At 2:20pm, [Reseller 1 Employee 5] increased [Reseller 1]'s pricing on Korg's Monologue (Black) to the Minimum Price.<sup>789</sup>

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([Reseller 1] Data: Volca Beats), £139.00 at 21/04/2017 10:32 (and 21/04/2017 13:01); URN C\_KOR02117 ([Reseller 1] Data: Volca Sample), £139.00 at 21/04/2017 12:40 (and 21/04/2017 13:03).

<sup>788</sup> URN C\_KOR02261 (WhatsApp messages of [Korg Employee 15] and [Korg Employee 8] on 16 June 2017).

<sup>789</sup> URN C\_KOR02092 ([Reseller 1] Data: Monologue-BK), £299.00 at 16/06/2017 14:20. The increased price was ascribed to '*[code 44]*' (see footnote 382 above) and matched '*SSP inc. VAT @ 20%*' in URN C\_KOR01944 (KORG Confidential UK Trade Price List - May 17th 2017).