

**Decision of the Competition and
Markets Authority
Nortriptyline Tablets
Market Sharing**

Case 50507.2

Addressed to:

Auden Mckenzie (Pharma Division) Limited
Auden Mckenzie Holdings Limited
Accord-UK Limited
King Pharmaceuticals Limited
Praze Consultants Limited

Section 31 Competition Act 1998

4 March 2020

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1. Introduction and executive summary

1.1 This Decision is addressed to:

- (a) Auden Mckenzie (Pharma Division) Limited (company number 03835531) and Auden Mckenzie Holdings Limited (company number 08257942) (**'Auden Mckenzie'**);¹
- (b) Accord-UK Limited (formerly named Actavis UK Limited) (company number 00079585) (**'Accord-UK'**);²
- (c) King Pharmaceuticals Limited (company number IE224619) (**'King Limited'**); and
- (d) Praze Consultants Limited (company number 03758431) (**'Praze'**) (the CMA finds that during the Market Sharing Period,³ King Limited and Praze formed part of the undertaking **'King'**).

These companies (each a **'Party'**, together the **'Addressees'**) are (or were formerly) active in the pharmaceutical sector in the UK.

1.2 Nortriptyline is a prescription-only medicine used for the relief of the symptoms of depression and for the treatment of some cases of neuropathic pain and nocturnal enuresis (bedwetting). It is an unbranded, generic medicine, which at the relevant time⁴ was available in two strengths, 10mg and 25mg, and supplied primarily to the NHS.⁵

1.3 In 2014, King and Auden Mckenzie were the only two UK licensed suppliers of 10mg and 25mg tablets containing nortriptyline (**'Nortriptyline Tablets'**). The only other source of Nortriptyline Tablets in the UK was parallel imports of Paxtibi (25mg Nortriptyline Tablets only) from Spain. The Paxtibi brand was also owned by Auden Mckenzie. Lexon was a wholesaler of Nortriptyline Tablets. It purchased parallel imports of Paxtibi 25mg tablets from Spain and sold them to UK customers. In the first half of 2014, Lexon also purchased

¹ The CMA (defined in paragraph 1.7) finds that during the Market Sharing Period (defined in paragraph 1.7), Auden Mckenzie (Pharma Division) Limited and Auden Mckenzie Holdings Limited formed part of the undertaking 'Auden Mckenzie'.

² The CMA holds Accord-UK liable for the Infringement carried out by Auden Mckenzie by application of the principle of economic continuity.

³ As defined in paragraph 1.7.

⁴ See paragraph 1.7.

⁵ Nortriptyline tablets in 50mg strength were introduced in March 2017.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/552454/Monthly_new_MA_listing_August_2016.pdf.

Nortriptyline Tablets from both King and Auden Mckenzie, at prevailing market prices, which it also sold to UK customers.

- 1.4 Later in 2014, it became clear to Auden Mckenzie and King that Lexon posed a new competitive threat. This threat took one of two forms: either (a) (as King and Auden Mckenzie claim) the threat that Lexon would obtain licences to import a new source of parallel imported nortriptyline covering both strengths of Nortriptyline Tablets, or (b) the threat posed by the joint venture between Lexon and Medreich, which was seeking to obtain new UK licenses to supply Nortriptyline Tablets.
- 1.5 In September 2014, King and Auden Mckenzie, the only two UK licensed competitors in the supply of Nortriptyline Tablets in the UK, began to supply Lexon with Nortriptyline Tablets on strikingly similar terms. King stopped supplying 10mg packs of nortriptyline tablets (**'10 mg packs'** or **'10 mg tablets'**) to Lexon and supplied only 25mg packs of nortriptyline tablets (**'25 mg packs'** or **'25 mg tablets'**), at a price of £4 per pack, restricting the volumes sold to Lexon at 1,600 packs per month (approximately one sixth of the total UK market at the relevant time). Auden Mckenzie stopped supplying 25mg tablets to Lexon and supplied only 10mg tablets, at a price of £4 per pack, restricting the volumes sold to Lexon at 3,400 packs per month (also approximately one sixth of the total UK market at the time). These terms were considerably more favourable to Lexon than the terms of supply at the start of the year.
- 1.6 On 29 May 2015, Actavis plc completed its acquisition of Auden McKenzie.⁶ From June 2015 Auden Mckenzie stopped supplying 10mg packs to Lexon and, for a short period, King took over the supply of 10mg tablets to Lexon (in addition to the 25mg tablets that it was already supplying), on terms that were identical to those on which Auden Mckenzie had supplied Lexon from September 2014 (namely, supply of 3,400 packs per month at £4 per pack).
- 1.7 The Competition and Markets Authority (**'CMA'**) launched its investigation on 17 October 2017. The investigation entailed extensive evidence gathering including inspections, requests for information and witness interviews. Based on this evidence, the CMA has found that from September 2014 until May 2015 (the **'Market Sharing Period'**), Auden Mckenzie and King (together, the **'Parties'**) were party to a

⁶ Actavis plc changed its name to Allergan plc on 15 June 2015.

horizontal agreement relating to the supply of Nortriptyline Tablets to Lexon (the '**Horizontal Agreement**') that had as its object the restriction of competition by:

- (a) Market sharing: Auden Mckenzie would supply Lexon with only 10mg tablets and King would supply Lexon with only 25mg tablets.
- (b) Fixing prices: Auden Mckenzie and King would supply Lexon at a fixed price of £4 per pack.⁷
- (c) Fixing quantities: Auden Mckenzie and King would each supply no more than a fixed quantity of their respective packs of tablets: 3,400 10mg packs in the case of Auden Mckenzie; and 1,600 25mg packs in the case of King. In both cases, the fixed volumes accounted for approximately one sixth of the total market size.⁸

(the '**Infringement**').

- 1.8 The CMA has concluded the Horizontal Agreement had as its object the prevention, restriction or distortion of competition in relation to the supply of Nortriptyline Tablets in the UK, which may have affected trade within the UK and between Member States, in breach of the prohibition imposed by section 2(1) of the Competition Act 1998 (the '**Act**') (the '**Chapter I prohibition**') and Article 101(1) of the Treaty on the Functioning of the European Union ('**TFEU**')⁹ within the United Kingdom ('**UK**') and within the internal market.

⁷ Auden Mckenzie did not implement this element of the Horizontal Agreement after February 2015. However, from March 2015 until May 2015 (inclusive) it continued to supply Lexon only fixed volumes of 10mg packs.

⁸ NHS England Prescription Cost Analysis data ('**PCA data**') records that in May 2014 20,176 packs of 10mg tablets, and 9,636 packs of 25mg tablets, were dispensed. The documents contemporaneous with the Horizontal Agreement also indicate that the Parties understood that these volumes represented approximately one sixth of the market for 10mg and 25mg tablets; the parties used NHS England PCA data to estimate the size of the 10mg tablets market at 20,000 packs and the 25mg tablets market at 10,000 packs: see Document NOR-E8117, spreadsheet concerning Lexon - Auden McKenzie price list June 2014, which was attached to Document NOR-E8116, email from [Auden Mckenzie Senior Employee 3] to [Lexon Generics Buyer] dated 21 May 2014. The NHS England PCA Data only measures the volumes in England; it does not measure the volumes in Scotland, Northern Ireland or Wales. The use of NHS England PCA data will therefore slightly underestimate the size of the nortriptyline market in the UK.

⁹ Under the European Union (Withdrawal Agreement) Act 2020, section 2(1) of the European Communities Act 1972 (under which EU law has effect in the UK's national law) remains in force until the end of the Transition Period (Section 1A, Withdrawal Agreement Act (as introduced by section 1, Withdrawal Agreement Act)). This means that directly applicable EU law, including Articles 101 and 102 TFEU and Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 4.1.2003, p. 1–25, will continue to apply in the UK during the Transition Period.

- 1.9 The CMA has found that the Horizontal Agreement was entered into by King and Auden Mckenzie in order to allow them jointly to respond to a competitive threat posed by Lexon. The evidence does not clearly establish which of the competitive threats posed by Lexon (i.e. bringing to market either a new source of parallel imports or a new product with a UK MA) King and Auden Mckenzie sought to address. However, the CMA does not consider it necessary to reach a definitive conclusion on this point. Regardless of which of the competitive threats the Parties sought to address, the Horizontal Agreement restricted competition by object: competitors should not coordinate their response to a competitive threat or agree to share the burden of neutralising it.
- 1.10 Auden Mckenzie and King each directly participated in the Infringement. Accord-UK acquired Auden Mckenzie's nortriptyline business during the course of 2015. The CMA has found Accord-UK was the economic successor of Auden Mckenzie's nortriptyline business and, accordingly, finds it liable for Auden Mckenzie's illegal conduct.
- 1.11 The CMA has decided to impose financial penalties on King and Accord-UK under section 36 of the Act in respect of the Infringement.

2. The CMA's investigation

A. Commencement of the Investigation

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

B. Evidence gathering and engagement during the Investigation

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

I. King

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

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

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

- (a) [King Director] on 22 March 2018 and 22 November 2018;
- (b) [King Office Manager] on 24 January 2019 [referred to in transcript excerpts as '**[KOM]**']; and

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

- 2.6 The CMA held state of play meetings with King Limited on 5 November 2018 and 5 March 2019.
- 2.7 On 29 March 2019, the CMA expanded the scope of its Investigation to include Praze.

II. Auden Mckenzie

- 2.8 On 10 October 2017, the CMA informed Auden Mckenzie that evidence submitted by Auden Mckenzie as part of the CMA's investigation into suspected excessive and unfair pricing with respect to hydrocortisone tablets conducted under Chapter II CA98 and Article 102 TFEU (**'CMA Case 50277'**), which included information relevant to Nortriptyline Tablets, would be transferred to the case file for this Investigation.
- 2.9 On 12 October 2017, the CMA conducted a search of [Auden Mckenzie Senior Employee 1]'s domestic premises under a warrant granted by the High Court under section 28A of the Act [In transcript excerpts, Auden Mckenzie Senior Employee 1 is referred to as **'[AM SE 1]'**].
- 2.10 On 20 October 2017, the CMA wrote to Teva UK Limited (**'Teva'**)¹⁰ requesting access to Auden Mckenzie material which had been provided previously to the CMA in the context of CMA Case 50277¹¹ (**'the Auden Server Image'**). On 26 October 2017, Teva provided its consent for the CMA to review the Auden Server Image for the purposes of the Investigation.
- 2.11 The CMA required [Auden Mckenzie Senior Employee 1] to provide information and/or documents under section 26 of the Act on 12 October 2017, 4 May 2018 and 18 June 2018.
- 2.12 The CMA conducted compulsory interviews with former Auden Mckenzie [X] employees under section 26A of the Act:

¹⁰ Teva currently owns Auden Mckenzie (see paragraph 3.6(b) below).

¹¹ As part of the CMA's investigation into suspected excessive and unfair pricing with respect to CMA Case 50277, the CMA requested that Auden Mckenzie preserve a copy of the server image which the CMA obtained from Auden Mckenzie's premises (at Mckenzie House, Bury Street, Ruislip Middlesex) from 8 to 11 March 2016, until completion of that investigation.

- (a) [Auden Mckenzie Senior Employee 1] on 14 December 2017 and 11 October 2018;
- (b) [Auden Mckenzie Senior Employee 2] on 10 January 2019; and
- (c) [Auden Mckenzie Senior Employee 3] on 23 May 2018.

2.13 The CMA held state of play meetings with Auden Mckenzie on 13 November 2018 and 5 March 2019.

III. Accord-UK

2.14 On 10 October 2017, the CMA issued a notice under section 27 of the Act that it intended to enter Accord-UK's premises to conduct an inspection on 31 October 2017.

2.15 The CMA required Accord-UK to provide information and/or documents under section 26 of the Act on 10 October 2017, 13 December 2017, 19 July 2018, and 20 March 2019.

2.16 The CMA held state of play meetings with Accord-UK on 12 November 2018 and 12 March 2019.

IV. Other sources of information

Anonymous submission

2.17 In October 2016, the CMA received an anonymous submission which stated that Nortriptyline Tablets had been the subject of anti-competitive arrangements.¹²

Third party evidence

[REDACTED]¹³

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

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

¹² Document NOR-C0001, anonymous submission received October 2016.

¹³ [REDACTED]

2.20 [X], the CMA required [X] to provide information and/or documents under section 26 of the Act.

[X]

2.21 On [X] the CMA conducted a search of [X] business premises under section 28 of the Act.

2.22 The CMA conducted voluntary interviews on 12 October 2017 with [X] and [X] and a compulsory interview under section 26A of the Act on 27 September 2018 with [X].

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

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

[X]

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

2.26 The CMA conducted a voluntary interview with [X] on [X] and a compulsory interview with him under section 26A of the Act on [X].

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

[X]

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

2.29 The CMA conducted voluntary interviews with [X] on [X] and a compulsory interview under section 26A of the Act on [X].

2.30 The CMA conducted a voluntary interview with [X] on 22 January 2019.

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

[REDACTED]

- 2.32 [REDACTED], the CMA conducted an unannounced inspection at the premises of [REDACTED] under section 27 of the Act.
- 2.33 On [REDACTED] and [REDACTED], the CMA required [REDACTED] to provide information and/or documents under section 26 of the Act.
- 2.34 The CMA conducted compulsory interviews with former employees under section 26A of the Act:
- (a) [REDACTED] on [REDACTED]; and
- (b) [REDACTED] on [REDACTED].

Other third parties

- 2.35 During the Investigation, the CMA also obtained information from the following companies and organisations under section 26 of the Act: Amimed Direct Limited, Beachcourse Limited, Blackrock Pharmaceuticals Limited, CD Pharma Limited, David James (Roskar Consulting), Ecosse Pharmaceuticals Limited, Expono Limited, Flamingo Pharma (UK) Limited, Focus Pharmaceuticals Limited, H. Lundbeck A/S, Key Pharmaceuticals Limited, Landmark, Manx Healthcare Limited, the Medicines and Health Products Regulatory Agency ('**MHRA**'), MPT Pharma Limited, the NHS Business Services Authority ('**NHS BSA**'), and Teva.
- 2.36 The CMA conducted a voluntary interview with [REDACTED] on [REDACTED].¹⁴

C. Statement of Objections

- 2.37 On 18 June 2019, the CMA issued a Statement of Objections to King, Auden Mckenzie and Accord-UK in which it proposed to make a decision that they had infringed the Chapter 1 prohibition and Article 101 TFEU.¹⁵

¹⁴ [REDACTED]

¹⁵ The Statement of Objections contained a provisional finding that Accord-UK was the economic successor of Auden Mckenzie's nortriptyline business.

D. Settlement

2.38 On 18 October 2019, the CMA settled the case with King, Auden Mckenzie and Accord-UK after each of the Addressees:

- (a) admitted that it had infringed the Chapter 1 prohibition and Article 101 TFEU in the terms set out in the Statement of Objections dated 18 June 2019, which are now reflected in this Decision;
- (b) agreed to accept a maximum penalty (see section 8); and
- (c) agreed to cooperate in expediting the process for concluding the CMA's investigation.

3. Factual background: Legal and economic context

A. Key companies and individuals

3.1 The key companies referred to in this Decision are King, Auden Mckenzie and Lexon. King and Auden Mckenzie are addressees of this Decision. Details of each of these companies and the key individuals associated with them are set out below.

I. King

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

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

3.4 In May 2014, King Limited entered into an agreement for the supply of services with **Praze** (trading as Kite Consultancy), which is wholly-owned by [King Director]. [King Office Manager] is employed by Praze as the office manager. The corporate and commercial services of King Limited are conducted by Praze on King Limited's behalf.¹⁶ King Limited supplies generic pharmaceutical products to wholesalers and retail pharmacy groups. In addition to Nortriptyline Tablets, King Limited supplied two other pharmaceutical products.¹⁷

II. Auden Mckenzie

3.5 Auden Mckenzie was owned by [X], [X] and [X]. Auden Mckenzie (Pharma Division) Limited was incorporated in 1999. In 2012, Auden Mckenzie Holdings Limited acquired NRIM (subsequently known as Lime Pharma Limited).¹⁸

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

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

¹⁸ NRIM had started selling Nortriptyline Tablets in the UK in January 2011, after acquiring the relevant MA in May 2009.

- 3.6 In May 2015, [X] and [X] sold Auden Mckenzie and its parent company, Auden Mckenzie Holdings Limited, to an American company **Allergan plc**.¹⁹
- (a) Over the period from completion of the sale in June 2015 until September 2015, Allergan plc transferred Auden Mckenzie's business activities and assets, relating to the sale of Nortriptyline Tablets, to **Actavis UK Limited**.²⁰
- (b) In August 2016, Auden Mckenzie (Pharma Division) Limited – a company with no employees or trading activities²¹ – and its parent company Auden Mckenzie Holdings Limited, were sold by Allergan plc to the Israeli company **Teva Pharmaceutical Industries Limited**. Actavis UK Limited was sold to the Indian company **Intas Pharmaceuticals Limited** and its European subsidiary, **Accord Healthcare Limited**, and was renamed **Accord-UK Limited**. Accord-UK currently sells Nortriptyline Tablets in the UK.

III. Lexon

- 3.7 Lexon is a [X] pharmaceuticals business. Since 1 March 2018, it has been a subsidiary of **Lexon UK Holdings Limited**. Lexon UK Holdings Limited is owned by [X] [Here in referred to as '**Lexon Director**'] (22.5%), [X] (21.5%), [X] (13%), [X] (13%), [X] (10%), [X] (10%) and [X] (10%).²²
- 3.8 Lexon entered into a Product Development and Profit Sharing Agreement with Medreich (a company registered in India) on 25 February 2008 ('**the Lexon/Medreich JV**').²³ Under that agreement,

¹⁹ At the time of acquisition, Allergan plc was known as Actavis plc. Actavis plc adopted the name Allergan plc on 15 June 2015 following its acquisition of Allergan in March 2015. See Allergan press release: <https://www.allergan.com/News/Details/2015/06/Actavis%20plc%20is%20now%20Allergan%20plc>.

²⁰ On 3 October 2016, a written Asset Agreement for the transfer of the UK MAs for Nortriptyline held by Lime Pharma Limited to Accord-UK was entered into. For the reasons set out in paragraphs 7.29 to 7.30 below, the CMA does not consider that this factor undermines its conclusion that Accord-UK continued the economic activities of Auden Mckenzie in relation to the supply of Nortriptyline Tablets in the UK before this date.

²¹ Auden Mckenzie's (Pharma Division) Limited's sole income derives from trademarks and royalties for licenses sold by other group entities.

²² Document NOR-C2091, Lexon's response to question 1 of the CMA's section 26 notice dated 11 September 2018.

²³ Document NOR-C0296, Medreich's response to question 5 of the CMA's section 26 notice dated 10 October 2017.

Medreich was responsible for developing MAs and manufacturing a range of pharmaceutical products (including Nortriptyline Tablets). In the event that Lexon and Medreich decided to commercialise any product developed by Medreich, then Lexon committed to procure that product exclusively from Medreich. Lexon was exclusively responsible for negotiating and setting the selling price for onward sales in the UK and elsewhere.²⁴ The agreement provided for the profits on sales to be shared by Lexon and Medreich.²⁵

IV. Key individuals referred to in this Decision

3.9 The key individuals referred to in this Decision are set out in the table below.

Table 1: Key individuals referred to in this Decision

Individual & Company	Role
Auden Mckenzie	
[Auden Mckenzie Senior Employee 1]	[REDACTED] ²⁶
[Auden Mckenzie Senior Employee 3]	[REDACTED] ²⁷
[Auden Mckenzie Senior Employee 2]	[REDACTED] ²⁸
King Limited	
[King Director]	Owner and Managing Director, 1996 to present ²⁹
[King Office Manager]	Company Secretary, 1996 to present ³⁰

²⁴ Clause 4, Product Development and Profit Sharing Agreement. See Document, NOR-C0296 Medreich's response to question 5 of the CMA's section 26 notice dated 10 October 2017.

²⁵ Clause 4, Product Development and Profit Sharing Agreement. See Document NOR-C0296, Medreich's response to question 5 of the CMA's section 26 notice dated 10 October 2017.

²⁶ Document NOR-C1595, transcript of [Auden Mckenzie Senior Employee 1] interview dated 14 December 2017, page 9 lines 15-27 and Document NOR-C2980, Accord's response to the CMA'S section 26 notice dated 20 March 2019.

²⁷ Document NOR-C1977, transcript of [Auden Mckenzie Senior Employee 3] interview dated 23 May 2018, pages 8-10 lines 14-1.

²⁸ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, page 13 lines 17-21 and page 14 line 25.

²⁹ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 8-9 lines 24-12.

³⁰ <https://beta.companieshouse.gov.uk/company/FC019337/officers>.

Individual & Company	Role
[Consultant to King]	Consultant to King, March/May 2014 to February 2018 ³¹
Praze	
[King Director]	Owner and Managing Director, 1994 to present ³²
[King Office Manager]	Office Manager, 1994 to present ³³
Lexon	
[Lexon Director]	Co-owner and Director, October 1995 to present ³⁴
[Lexon Generics Buyer]	Generics Buyer, August 2011 to present ³⁵
[X] NRIM	
[NRIM Director]	[X] former co-owner of NRIM, until November 2012 ³⁶

B. The product: Nortriptyline Tablets

- 3.10 Nortriptyline is a prescription-only medicine used for the relief of symptoms of depression and for the treatment of some cases of neuropathic pain and nocturnal enuresis (bedwetting).³⁷
- 3.11 As it is a prescription-only medicine, nortriptyline must be prescribed to patients by a GP or another qualified healthcare professional.
- 3.12 In the UK, nortriptyline is mainly sold in tablet form.³⁸ Nortriptyline Tablets were sold in 10mg and 25mg packs until March 2017, when the

³¹ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 26-27 lines 23-5. Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 12 lines 5-6. Document NOR-C2911, transcript of [Consultant to King] interview dated 31 January 2019, pages 8-9 lines 16-24 and page 26 lines 14-20.

³² Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 10-11 lines 11-5.

³³ Document NOR-C2884, transcript of [King Office Manager] interview dated 31 January 2019, page 9 lines 11-22.

³⁴ Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018 pages 7-8 lines 24-16.

³⁵ Document NOR-C2729, transcript of [Lexon Generics Buyer] interview dated 22 January 2019 pages 7-8 lines 21-19.

³⁶ <https://beta.companieshouse.gov.uk/company/04447008/filing-history> and [X]

³⁷ For the treatment of depression in adults, the prescribed dose of nortriptyline must not exceed 150mg per day. In the case of neuropathic pain, the dose prescribed initially is 10mg once daily, increased, if necessary to 75mg daily. See <https://bnf.nice.org.uk/drug/nortriptyline.html#interactions>.

³⁸ This includes film-coated tablets. Nortriptyline capsules are also available. See [http://www.mhra.gov.uk/spc-pil/index.htm?subsName=NORTRIPTYLINE HYDROCHLORIDE&pageID=SecondLevel](http://www.mhra.gov.uk/spc-pil/index.htm?subsName=NORTRIPTYLINE%20HYDROCHLORIDE&pageID=SecondLevel).

50mg presentation was introduced.³⁹ The 10mg tablets are the most common strength of Nortriptyline Tablets dispensed, accounting for around 67% of all Nortriptyline Tablets dispensed between 2012 and 2017.⁴⁰

C. The supply of Nortriptyline Tablets in the UK

I. Marketing authorisation holders in the UK

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

3.14 Table 2 lists the companies that have been granted or have acquired MAs to supply Nortriptyline Tablets in the UK, the dates they obtained their MAs and when they started supplying Nortriptyline Tablets in the UK.

Table 2: Companies that have been granted or have acquired MAs to supply Nortriptyline Tablets in the UK

Name of company	Date MAs granted / acquired	Date supply started
King	March 1998 ⁴¹	March 1998 ⁴²
NRIM/Auden Mckenzie ⁴³	May 2009 ⁴⁴	January 2011 ⁴⁵

³⁹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/552454/Monthly_new_MA_listing_August_2016.pdf PCA data indicates that there were no sales of 50mg nortriptyline tablets before March 2017. This is based on CMA analysis of PCA data for England. See <http://www.nhsbsa.nhs.uk/PrescriptionServices/3494.aspx>.

⁴⁰ CMA analysis based on PCA data for England only between January 2012 and December 2017.

⁴¹ This is the date when King acquired the MA for Allegron 10mg and 25mg tablets, the branded version of nortriptyline, from Eli Lilly & Company Limited, the originator.

See <http://www.mhra.gov.uk/home/groups/par/documents/websiteresources/con546117.pdf> (page 5).

⁴² This corresponds with the date when King acquired the MA for Allegron 10mg and 25mg tablets.

⁴³ NRIM was granted an MA to supply Nortriptyline Tablets in May 2009. Auden Mckenzie acquired NRIM, and the MAs for Nortriptyline Tablets in 2012.

⁴⁴ See <https://webarchive.nationalarchives.gov.uk/20140208142435/http://www.mhra.gov.uk/home/groups/l-reg/documents/licensing/con049260.pdf>.

⁴⁵ Document NOR-E4650, NRIM sales volume between January 2011 and December 2011.

Medreich ⁴⁶	March 2015 ⁴⁷	July 2015 ⁴⁸
Alissa	February 2016 ⁴⁹	November 2016 ⁵⁰
Focus Pharmaceuticals Limited	August 2016 ⁵¹	March 2017 ⁵²
Blackrock Pharmaceuticals Limited	October 2016 ⁵³	March 2017 ⁵⁴
Key Pharmaceuticals Limited	May 2017 ⁵⁵	Not marketed ⁵⁶

II. *Parallel importers*

- 3.15 A pharmaceutical product which has been authorised in another EU Member State can also be marketed in the UK under the parallel import licensing scheme, provided that the imported product is not therapeutically different from the version of the product for which a UK MA has been granted.⁵⁷
- 3.16 In order to parallel import a product, companies are required to submit an application to the MHRA for a parallel import licence ('**PLPI**'). PLPIs are granted by the MHRA for a period of five years, subject to renewal.

⁴⁶ The Medreich MA was developed pursuant to the Lexon/Medreich JV (see paragraph 3.8 above).

⁴⁷

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/424805/Granted_marketing_authorisations_March_2015.pdf.

⁴⁸ Document, NOR-C0296, Medreich's response to question 5 of the CMA's section 26 notice dated 10 October 2017.

⁴⁹ See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/506701/Monthly_new_MA_listing_Feb_2016__2_.pdf.

⁵⁰ Document NOR-C1450, Annex 2 of Alissa's response to the CMA's section 26 dated 14 March 2018.

⁵¹ See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/552454/Monthly_new_MA_listing_August_2016.pdf.

⁵² Document NOR-C2027, Focus Pharmaceuticals Limited (UK)'s response to question 1 of the CMA's section 26 notice dated 19 July 2018.

⁵³ See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/571206/Monthly_new_MA_listing_Oct_2016.pdf.

⁵⁴ Document NOR-C1861, Blackrock Pharmaceuticals Limited's response to question 1 of the CMA's section 26 notice dated 19 July 2018.

⁵⁵ See

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/618854/Monthly_new_MA_listing_May_2017.pdf.

⁵⁶ Document NOR-C1845, Key Pharmaceuticals Limited's response to question 1 of the CMA's section 26 notice dated 19 July 2018.

⁵⁷ See <https://www.gov.uk/guidance/medicines-apply-for-a-parallel-import-licence>.

3.17 In the period January 2011 to March 2017, there were several parallel importers of 25mg nortriptyline tablets (including Lexon), which were active to varying degrees and at different times.⁵⁸ There were no parallel imports of 10mg tablets in the same period.

III. Wholesalers

3.18 Wholesalers source Nortriptyline Tablets from suppliers and sell on to pharmacies. In the UK, most pharmaceutical products are distributed through wholesalers to pharmacies.⁵⁹

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

3.20 Between January 2011 and March 2017, Auden Mckenzie supplied over 80% of its Nortriptyline Tablets to AAH. In 2011, almost all (98%) of Auden Mckenzie's supply went to AAH. This had fallen to just over 60% in 2016. On average, just over half of King's supply of Nortriptyline Tablets went to Alliance between January 2011 and March 2017. King's supply to Alliance increased from 42% of King's supply in 2011 to over 80% of King's supply in 2016.⁶¹

IV. Pharmacies

3.21 Pharmacies source Nortriptyline Tablets either directly from a supplier or via a wholesaler.

⁵⁸ These included: B&S Healthcare, Beachcourse, CD Pharma, Ecosse, Expono, Kosei, Landmark, Manx, MPT Pharma, S&M Medical and Amimed.

⁵⁹ CMA, A report on the anticipated acquisition by Celesio AG of Sainsbury's Pharmacy Business 29 July 2016, paragraph 13. See https://assets.publishing.service.gov.uk/media/579b817540f0b64974000014/sainsbury_s-celesio-final-report.pdf.

⁶⁰ [Alissa Director] told the CMA that pharmacy groups such as Day Lewis also have a wholesale operation. See Document NOR-C1988, transcript of [Alissa Director] interview dated 13 March 2018, pages 137-138 lines 21-3.

⁶¹ CMA analysis of the following data: King (NOR-C0261.13 – NOR-C0261.20), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord (NOR-C1932).

- 3.22 The purchase price paid by a pharmacy for Nortriptyline Tablets is determined following negotiation between the pharmacy and the relevant supplier or wholesaler. Pharmacies then receive a payment for the prescriptions they fulfil from the NHS patients' Clinical Commissioning Groups. As explained in more detail in paragraphs 3.37 and 3.38 below, the amount that pharmacies receive is specified in the Drug Tariff (the '**NHS Reimbursement Price**').⁶² As their profit margin is the difference between the NHS Reimbursement Price and the purchase price paid for a product, pharmacies are incentivised to purchase from suppliers/wholesalers at the lowest possible price in order to achieve higher margins.
- 3.23 In 2016/2017 there were 11,699 community pharmacies, of which 4,434 were independent, in the UK.⁶³ The largest pharmacy groups are: Lloyds (a subsidiary of AAH), Boots (a subsidiary of Alliance), Well (a subsidiary of Bestway), Rowlands and Superdrug. In 2015, these pharmacy groups together held around 44% of the retail pharmacy market.⁶⁴ Boots is the largest single chain, with the highest market share.⁶⁵

D. Pricing framework

I. *Branded drug prices - Pharmaceutical Price Regulation Scheme*

- 3.24 Regulation of branded drug prices, under either voluntary schemes or statutory powers, aims to balance the need to provide adequate incentives to innovator companies to develop new drugs against the

⁶² The NHS Reimbursement Price is produced on a monthly basis by NHS Prescription Services. See www.nhsbsa.nhs.uk/prescriptionservices.aspx.

⁶³ Data for England only. General Pharmaceutical Services in England 2007/2008 to 2016/2017. <https://digital.nhs.uk/data-and-information/publications/statistical/general-pharmaceutical-services/general-pharmaceutical-services-england-2007-08-to-2016-17>. Community pharmacies were known as chemists in the past. They are pharmacies that deal directly with people in their local area. Community pharmacy contractors who own five or less pharmacies are known as 'independents'.

⁶⁴ Based on number of pharmacy licences – see CMA, A report on the anticipated acquisition by Celesio AG of Sainsbury's Pharmacy Business 29 July 2016, paragraph 2.8. https://assets.publishing.service.gov.uk/media/579b817540f0b64974000014/sainsbury_s-celesio-final-report.pdf

⁶⁵ CMA, A report on the anticipated acquisition by Celesio AG of Sainsbury's Pharmacy Business 29 July 2016, paragraph 2.8. https://assets.publishing.service.gov.uk/media/579b817540f0b64974000014/sainsbury_s-celesio-final-report.pdf.

need to ensure that the NHS can supply necessary medicines within the constraints of its budget.⁶⁶

- 3.25 A number of voluntary schemes have been agreed with industry bodies pursuant to section 261 of the NHS Act 2006. One of these voluntary schemes is the Pharmaceutical Price Regulation Scheme (**'PPRS'**).
- 3.26 Under the PPRS, a member has freedom, within certain parameters, to set the price of a new drug.⁶⁷ Once the price is set, the PPRS prevents the scheme member from increasing the price except in very limited circumstances.⁶⁸
- 3.27 For a number of years King was a member of the PPRS and sold nortriptyline under the brand-name Allegron. In October 2010, King made the decision to de-brand its nortriptyline product '*given the desire to leave the controlling strictures of the PPRS Scheme (which include the provision of annual financial data and control of profit on brands)*'.⁶⁹

II. Generic drug prices

Generic competition

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

⁶⁶ The PPRS is explicitly designed with the aim of ensuring '*that safe and effective medicines are available on reasonable terms to the National Health Service*' and promoting '*a strong, efficient and profitable pharmaceutical industry*'. 2014 PPRS, page 9, paragraph 1.2.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/675465/The_pharmaceutical_price_regulation_scheme_2014.pdf.

⁶⁷ It is assumed however that prices at launch will be set at a level that is close to their expected value as assessed by the National Institute for Health and Care Excellence (**'NICE'**). NICE assesses the clinical and cost effectiveness of most new medicines launched in the UK market. *The Pharmaceutical Price Regulation Scheme 2014*, Department of Health and Association of the British Pharmaceutical Industry, December 2013, paragraph 7.14.

⁶⁸ To increase its price, the scheme member can either (i) apply to the Department of Health and Social Care (**'DHSC'**) for approval to increase a price or (ii) seek to modulate its prices. It is very rare for a scheme member to seek individual price increases.

⁶⁹ Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.

- 3.29 In the UK, the suppliers of unbranded generic drugs are in principle free to set their prices as they choose. This is based on the assumption that competition will bring down prices, once generic competitors are free to enter the market and compete on price.⁷⁰
- 3.30 In the majority of cases, this is believed to be an effective means of securing value for money for the NHS. For example, the British Generic Manufacturers Association states that:
- ‘Generic medicines make the drugs bill affordable and promote innovation. When an original branded drug loses its patent protection, generic equivalents are launched, typically by many manufacturers. The competition between these manufacturers drives down prices.’⁷¹*
- 3.31 Where a therapeutically equivalent generic product is available, pharmacies are able to dispense either a generic or a branded product against ‘open’ prescriptions that refer to the product’s generic name (rather than to the brand name).
- 3.32 Generic drugs have become a significant feature of the UK pharmaceutical sector. NHS statistics show that by October 2018 the proportion of products dispensed by pharmacy contractors that were generic had reached more than 75%.⁷²
- 3.33 Where drugs are prescribed generically, the amount pharmacies receive is set by the price of the product listed in the Drug Tariff (less any discount⁷³). Subject to any clinical guidance, pharmacies therefore have an incentive to dispense the cheapest medicine available. Generic suppliers will typically therefore compete on price to incentivise

⁷⁰ See <https://www.gov.uk/government/publications/health-service-medical-supplies-costs/health-service-medical-supplies-costs-bill-factsheet>.

⁷¹ British Generics Manufacturers Association About generics available at <http://www.britishgenerics.co.uk/about-generics>.

⁷² Pharmaceutical Services Negotiating Committee, NHS Statistics – Dispensing statistics graphs, available at <http://psnc.org.uk/funding-and-statistics/nhs-statistics/>.

⁷³ See the NHS Act 2006, sections 164 and 165, and the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013/349, Regulation 89. Pharmacies can buy some medicines cheaper than the Drug Tariff Price. As such, the NHS applies a discount to pharmacies’ payments. This discount is often referred to as ‘clawback’ and was designed to share with the NHS the profits pharmacies can make by purchasing medicines at below the price at which they are reimbursed.

pharmacies to dispense their product and win market share from the competing branded and generic suppliers.

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

(a) The European Commission's Pharmaceutical Sector Inquiry found that, in the EU, the price at which generic companies entered the market was, on average, 25% lower than the price of the originator medicines prior to the loss of exclusivity.⁷⁴

(b) Generic entry can also have the effect of decreasing the price of the originator product. In markets where generic entry occurred, average prices dropped by almost 20% one year after the loss of exclusivity and about 25% after two years.⁷⁵ In some cases the decrease was as much as 80-90%.⁷⁶

(c) According to one UK trade association, generic drugs cost between 20% to 90% less than the original price of their brand-name equivalents.⁷⁷

3.35 However, this model of relying on competition to keep prices for generic drugs down can only work where competitors enter the market and compete on price. The markets for some generic drugs do not deliver these benefits: this could be because of market features (such as barriers to entry or expansion or because the market is too small to attract entry) or because of externalities such as anticompetitive collusion.

3.36 Generic markets characterised by low volumes and high barriers to entry are sometimes referred to by industry players as '*niche generics*':

⁷⁴ Pharmaceutical Sector Inquiry Final Report (8 July 2019), Executive Summary section 2.1.2. See http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf.

⁷⁵ Pharmaceutical Sector Inquiry Final Report (8 July 2019) paragraph 212. See http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf.

⁷⁶ Pharmaceutical Sector Inquiry Final Report (8 July 2019) paragraph 212. See http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf.

⁷⁷ British Generics Manufacturers Association, About generics available at <http://www.britishgenerics.co.uk/about-generics>.

- (a) In an interview with the CMA on 14 December 2017, [Auden Mckenzie Senior Employee 1] explained that Auden Mckenzie looked at entering the market for Nortriptyline Tablets and other drugs because they *'were basically niche pharma products which is what we specialised in.'*⁷⁸ He also noted that this business model was the reason that [King Director] had given for first contacting him in 2013: *'[King Director] contacted me, to say that, you know -- the conversation was basically to say, "Look, I don't know anything about you and I've heard that you, you know -- I've heard about your organisation and you're in niche pharmaceuticals"'*.⁷⁹
- (b) While King did not explicitly use the word *'niche'* to describe King's business strategy, it nonetheless made it clear that King's model is to focus on generics in relation to which price competition is weak due to limited threat of entry: *'Kite Consultancy approached Eli Lilly in early 1996 about the potential acquisition of a small portfolio of their products – including Allegron (Nortriptyline 10mg and 25mg tablets). This brand fitted a "template" that Kite Consultancy used to identify brands for potential acquisition, i.e. small and stable (in volume terms) which at the time did not yet face competition from generic suppliers; and where competitors in the same therapeutic area were significantly lower in price (in other words the product had differentiating clinical features which supported its use). (ii) In light of the information above, King Pharmaceuticals expected the brand price, and supply price to remain static. Due to the relatively small volume sales of the product, only limited (if any) generic competition was anticipated.'*⁸⁰

The Drug Tariff

- 3.37 The amount pharmacies receive from the NHS for dispensing generic prescription medicines is set out in the Drug Tariff Medicines listed in Part VIIIA of the Drug Tariff. Prescription medicines fall under one of

⁷⁸ Document NOR-C1595, transcript of [Auden Mckenzie Senior Employee 1] interview dated 14 December 2017, page 124 lines 18-19.

⁷⁹ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, page 13 lines 19-22.

⁸⁰ Document NOR-C0261, response to question 7, King's response to the CMA's section 26 notice dated 20 October 2017.

three categories which determine how the Drug Tariff price is calculated:⁸¹

- (a) Category C – typically applies when a product is only available as a branded product or as a generic product from one or two sources. The price of a drug within Category C is based on a list price for a particular proprietary product, manufacturer or supplier;
- (b) Category A – prices are based on the list price (the supplier's price before customer-specific discounts) of commonly used generics that are typically readily available from several sources. The price of a drug within Category A is set using a weighted average of prices from a basket of two wholesalers and up to two generic manufacturers. There is a minimum requirement that products in Category A are listed either (i) by two wholesalers, or (ii) by one wholesaler and by two manufacturers;⁸²
- (c) Category M – typically applies to commonly used generics that are available from several sources. A drug is eligible for inclusion in Category M if it is a generic which is readily available in the given presentation (i.e. made by more than one Scheme M manufacturer).⁸³ The price of a drug within Category M is set using a weighted average from retrospective sales (net of customer-specific discounts) and volume data supplied to the DHSC by manufacturers who are members of Scheme M. These prices are then adjusted by a formula to ensure that pharmacy contractors retain the profit margin agreed as part of the funding of the community pharmacy contractual framework. The reimbursement price of Category M drugs is calculated by the DHSC and is based on a weighted average of data provided by the Scheme M members.

⁸¹ See NHS Business Services Authority, <https://www.nhsbsa.nhs.uk/pharmacies-gp-practices-and-appliance-contractors/drug-tariff>.

⁸² The four manufacturers and suppliers whose prices are used to calculate Category A prices are AAH, Alliance, Teva and either Actavis or Accord.

⁸³ Scheme M is a voluntary scheme between the Secretary of State and the British Generic Manufacturers Association, as the representative body for the generics industry. It applies to those manufacturers and suppliers of generic medicines for use in the NHS who choose to join it. See Sections 261(2) and 266(6) of the NHS Act 2006, and PAD030, '*Revised long-term arrangements for reimbursement of generic medicines*', paragraph 4.

3.38 From January 2000, Nortriptyline Tablets fell under Category C of the Drug Tariff.⁸⁴ The 10mg tablets moved to Category A in June 2011 and the 25mg tablets moved to Category A in December 2011. Under Category A, the Drug Tariff price for Nortriptyline Tablets was originally calculated as an average of AAH and Alliance’s list prices to pharmacies. From August 2015, Teva’s prices were included and from November 2015 Actavis’ prices also contributed to the calculation. In April 2016, both strengths of Nortriptyline Tablets moved to Category M.⁸⁵

Table 3: Drug Tariff category change

	10mg tablets	25 mg tablets
Category C	January 2000 ⁸⁶	January 2000
Category A	June 2011	December 2011
Category M	April 2016	April 2016

E. Nortriptyline Tablets: market overview

I. Suppliers’ market shares

3.39 Table 4: UK licence holders’ share of supply by volume for the supply of 10mg tablets between January 2011 and March 2017. **Error! Reference source not found.** below lists the market shares of the main suppliers of 10mg tablets for the period January 2011 to March 2017.

Table 4: UK licence holders’ share of supply by volume for the supply of 10mg tablets between January 2011 and March 2017

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

⁸⁴ Document NOR-C1447, Alissa’s response to question 5 of the CMA’s section 26 notice dated 14 March 2018.

⁸⁵ Document NOR-C0929, NHS BSA’s response to question 1 of Annex 1 of the CMA’s section 26 notice dated 13 December 2017.

⁸⁶ Document NOR-C1447, response to question 5, Alissa’s response to the CMA’s section 26 notice dated 14 March 2018.

Jan17- Feb17	20%	30%	39%	12%	-
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Source: CMA analysis based on data submitted by the Addressees and third parties.⁸⁷

Notes:

a) 2017 data - January 2017 to February 2017 only.

b) Lexon/Medreich JV data include Medreich sales to Teva and Medpro, and Lexon sales.

3.40 Table 5 below lists the market shares of the main suppliers of 25mg nortriptyline tablets for the period January 2011 to March 2017. The parallel imports solely comprise imports of Paxtibi which, as explained in paragraph 3.62 below, is an Auden McKenzie product. Auden McKenzie's share of supply of 25mg tablets in the UK in 2014 would be just under 60%, if UK sales of Paxtibi were included.

Table 5: UK licence holders' share of supply by volume for the supply of 25mg nortriptyline tablets between January 2011 and March 2017

	King	NRIM/Auden Mckenzie	Lexon/ Medreich JV	Alissa	Parallel imports
2011	50%	35%	-	-	15%
2012	50%	35%	-	-	16%
2013	41%	35%	-	-	24%
2014	41%	26%	-	-	33%
2015	20%	19%	33%	-	28%
2016	23%	29%	32%	2%	13%
Jan17- Feb17	26%	42%	5%	21%	7%

Source: CMA analysis based on data submitted by the Addressees and third parties.⁸⁸

Notes:

a) To avoid double-counting of volumes, parallel import purchases from outside UK have been used to produce the table.

b) 2017 data - January 2017 to February 2017 only.

c) Lexon/Medreich JV data include Medreich sales to Teva and Medpro, and Lexon sales.

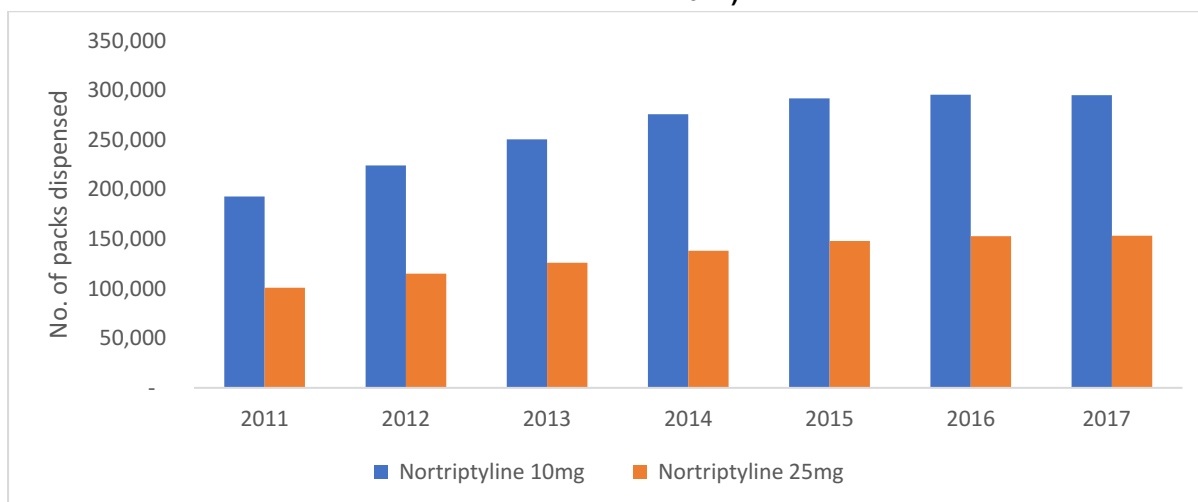
⁸⁷ King (Documents NOR-C0261.13 – NOR-C0261.20), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord (Document NOR-C0949), Lexon/Medreich JV (Document NOR-C3050, NOR-C2092), Alissa (Document NOR-C1450), and for parallel imports (PI): B&S Healthcare (Document NOR-C1939), Beachcourse (Document NOR-C2001.2), CD Pharma (Document NOR-C1866.1) Ecosse (Document NOR-C1948), Expono (Document NOR-C1908), Kosei (Document NOR-C1930), Landmark (Document NOR-C2010), Manx (Document NOR-C1871), MPT Pharma (Document NOR-C1878), S&M Medical (Document NOR-C1945), Amimed (Document NOR-C2067.2), Lexon (Document NOR-C1459).

⁸⁸ King (Document NOR-C0261.22 – NOR-C0261.29), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord (Document NOR-C0949), Lexon/Medreich JV (Document NOR-C3050, NOR-C2092), Alissa (Document NOR-C1450), and for parallel imports (PI): B&S Healthcare (Document NOR-C1939), Beachcourse (Document NOR-C2001.2), CD Pharma (Document NOR-C1866.1) Ecosse (Document NOR-C1948), Expono (Document NOR-C1908), Kosei (Document NOR-C1930), Landmark (Document NOR-C2010), Manx (Document NOR-C1871), MPT Pharma (Document NOR-C1878), S&M Medical (Document NOR-C1945), Amimed (Document NOR-C2067.2), Lexon (Document NOR-C1459).

II. The volume of Nortriptyline Tablets supplied in the UK ⁸⁹

3.41 Nortriptyline Tablets are a homogeneous product and demand is influenced by therapeutic need. Total demand for Nortriptyline Tablets in the UK increased gradually from approximately 193,000 packs in 2011 to approximately 295,500 packs in 2016 for 10mg tablets; and from approximately 101,000 packs in 2011 to approximately 153,000 packs in 2016 for 25mg tablets.⁹⁰

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



Source: CMA analysis of PCA data for the UK.

Notes:

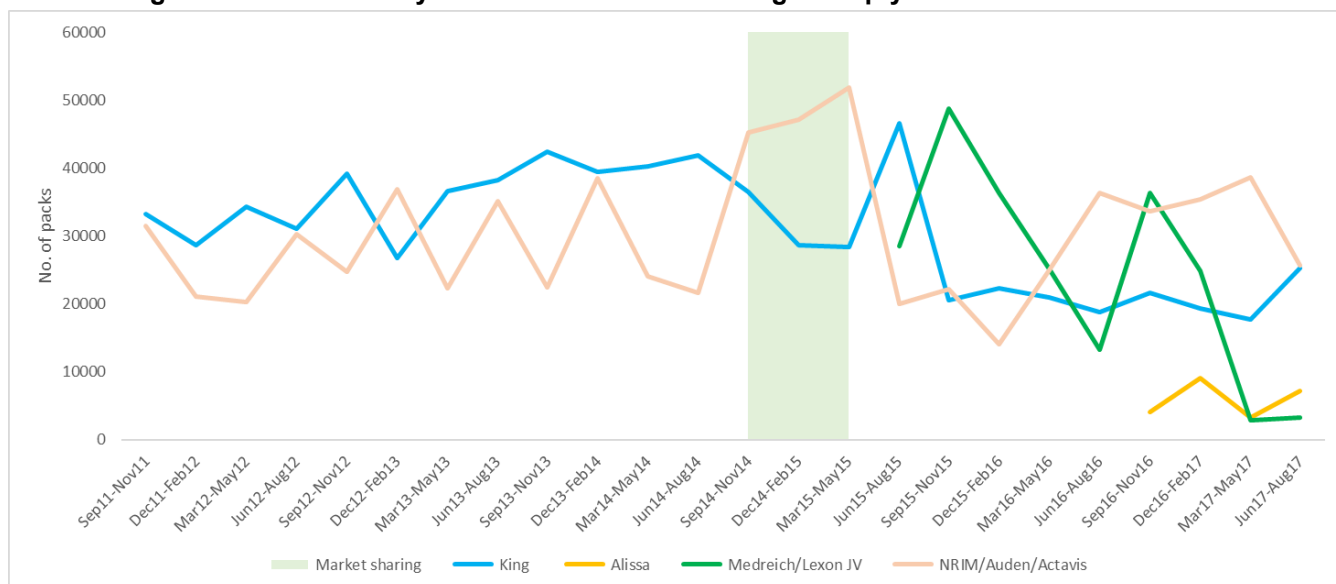
- 1) The data include both branded and unbranded Nortriptyline Tablets.
- 2) NHS data for Scotland were missing from April 2016 onwards and have been therefore estimated.
- 3) Figures for 2017 have been estimated by pro-rating 2017 total volumes.

⁸⁹ The data below include both branded and unbranded versions of Nortriptyline Tablets.

⁹⁰ For England only total demand for Nortriptyline Tablets increased gradually from approximately 12,700 packs in January 2011 to approximately 22,500 packs in March 2017 for 10mg tablets; and from approximately 6,300 packs in January 2011 to approximately 11,000 packs in March 2017 for 25mg nortriptyline tablets.

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

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



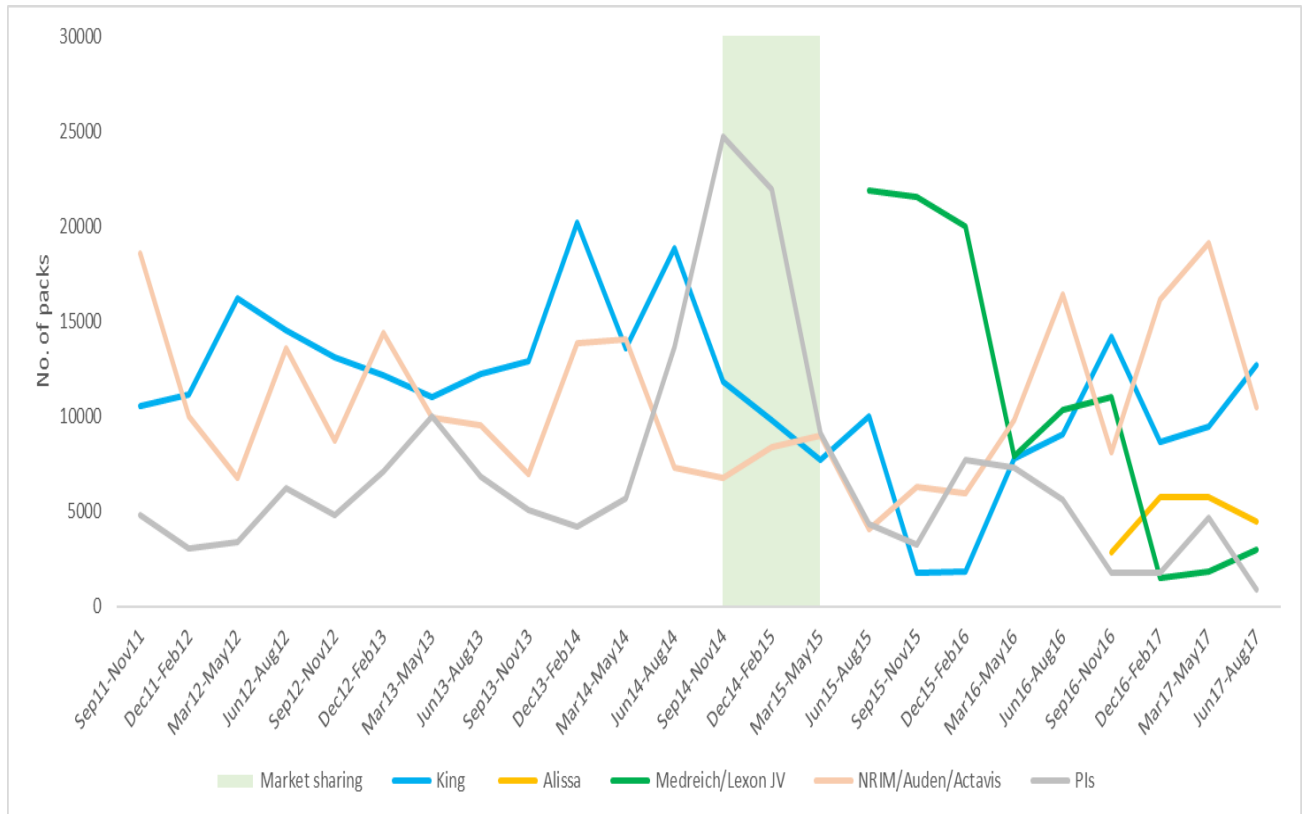
Source: CMA analysis based on data submitted by the Addressees.⁹¹

Notes:

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

⁹¹ King (Documents NOR-C0261.13 – NOR-C0261.20), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord (NOR-C0949), Lexon/Medreich JV (Document NOR-C3050, NOR-C2092), Alissa (Document NOR-C1450).

Figure 3: Three-monthly sales volumes for the 25mg tablets



Source: CMA analysis based on data submitted by the Addressees⁹²

Notes:

- a) Medreich/Lexon JV revenues include sales made by both entities but exclude stock transfers from Medreich to Lexon.
- b) To isolate volumes from outside the UK, for parallel imports total cost of purchases from outside UK have been used to produce the figure.
- c) Lexon parallel imported purchases of nortriptyline have been included in the PI volumes.
- d) Lexon's purchases of nortriptyline from King and Auden Mckenzie, prior to Medreich obtaining its own MA, are included in King's and Auden Mckenzie's sales.

3.43 Three-monthly sales volume data for each of King and Auden Mckenzie is irregular, in part due to the delivery dates and stock holding levels of their main wholesale customers. For much of the period between September 2011 and September 2014, the volumes supplied by King were higher than those supplied by Auden Mckenzie.

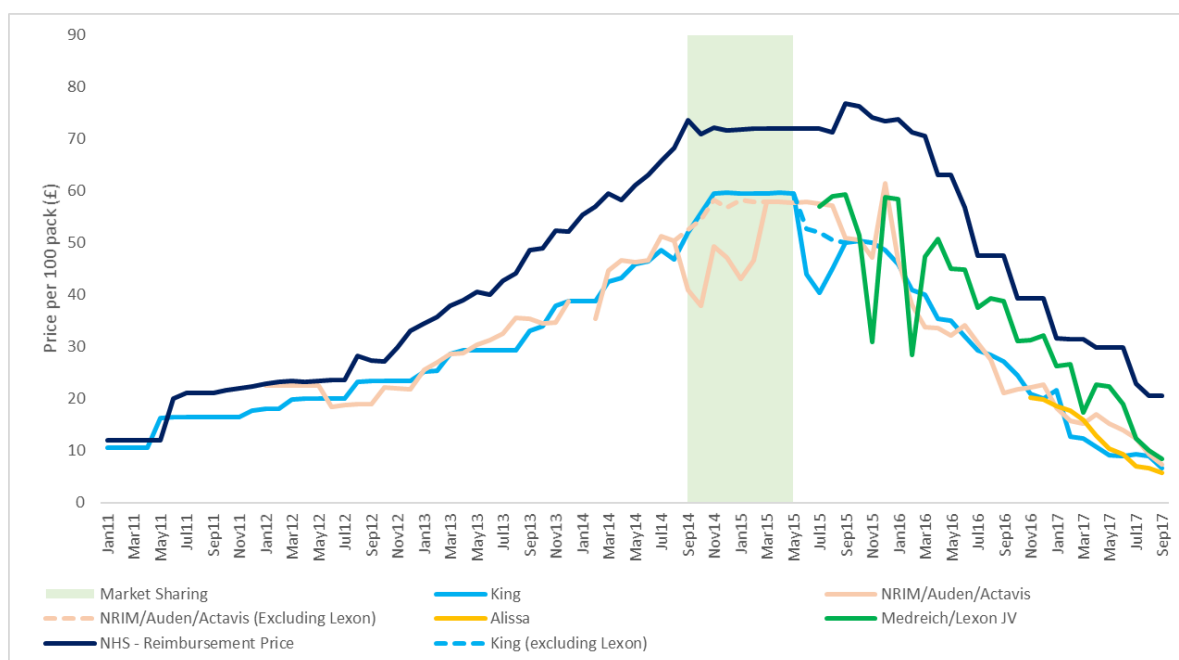
⁹² King (Documents NOR-C0261.13 – NOR-C0261.20), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord (NOR-C0949), Lexon/Medreich JV (Document NOR-C3050, NOR-C2092), Alissa (Document NOR-C1450) and for parallel imports (PI): B&S Healthcare (Document NOR-C1939), Beachcourse (Document NOR-C2001.2), CD Pharma (Document NOR-C1866.1) Ecosse (Document NOR-C1948), Expono (Document NOR-C1908), Kosei (Document NOR-C1930), Landmark (Document NOR-C2010), Manx (Document NOR-C1871), MPT Pharma (Document NOR-C1878), S&M Medical (Document NOR-C1945), Amimed (Document NOR-C2067.2), Lexon (Document NOR-C1459).

3.44 This trend alters from the middle of 2014. For the 10mg tablets, Auden Mckenzie’s quarterly volumes increased by 30,324 packs or 141% between August 2014 and May 2015, while King’s quarterly volumes fell by around 13,460 packs or 32% over the same period. For the 25mg tablets, King’s volumes also fell by almost 60%, from 18,865 packs per quarter in June 2014 to 7,735 packs per quarter by May 2015. Auden Mckenzie’s UK sales volumes of 25 mg tablets also decreased at this time, while parallel imports of the Auden Mckenzie’s owned Paxtibi increase dramatically from 5,701 packs per quarter in March 2014 to peak at 24,708 packs per quarter in September 2014, before falling back again by June 2015.

III. The price of Nortriptyline Tablets supplied in the UK

3.45 Figure 4 and Figure 5 set out the monthly NHS Reimbursement Price paid by the NHS from January 2011 to March 2017 and suppliers’ monthly Average Selling Prices⁹³ (‘ASP’) for Nortriptyline Tablets during the same period.

Figure 4: Monthly ASP by UK MA holders and NHS England Reimbursement Price for the 10mg tablets



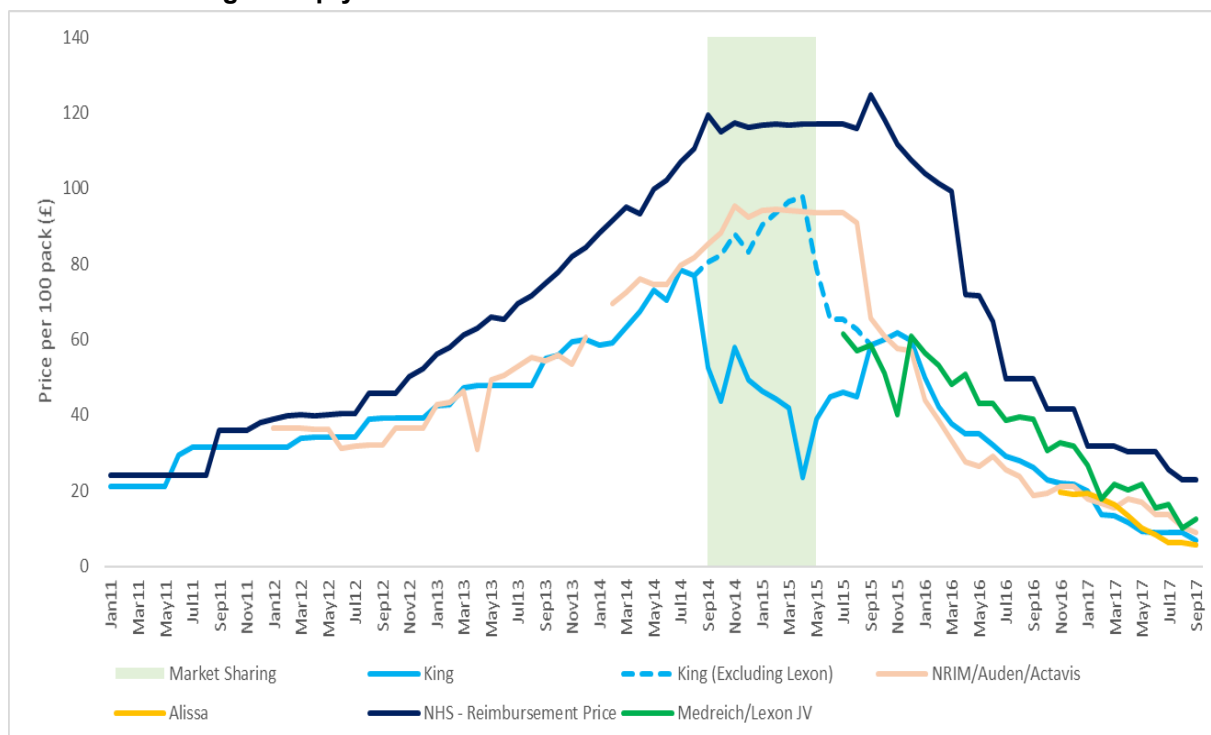
⁹³ Average Selling Price or ‘ASP’ is defined as the gross price per pack for each of the 10mg and 25mg tablets, net of rebates for a defined period of time (for example, an annual ASP is the annual average selling price).

Source: CMA analysis based on data submitted by the Addressees⁹⁴ and PCA data for England.

Notes:

- a) ASPs for NRIM are missing between April 2011 and December 2011.
- b) In January 2014, Auden Mckenzie ASP has been excluded as it was negative (possibly due to stock returns).
- c) NHS Reimbursement Price refers to the branded and unbranded version of 10mg tablets.
- d) Lexon/Medreich JV prices represent Lexon ASPs to wholesalers and pharmacies.

Figure 5: Monthly ASP by UK MA holders and NHS England Reimbursement Price for the 25mg nortriptyline tablets



Source: CMA analysis based on data submitted by the Addressees and PCA data for England.⁹⁵

Notes:

- a) ASPs for NRIM are missing between April 2011 and Dec 2011.
- b) In January 2014, Auden Mckenzie ASP has been excluded as it was negative (possibly due to stock returns)
- c) NHS Reimbursement Price refers to the unbranded and branded version of 25mg tablets.
- d) Lexon/Medreich JV prices represent Lexon ASPs to wholesalers and pharmacies.

3.46 Following King's de-branding in October 2010 and NRIM's entry in January 2011 (see paragraphs 3.14 and 3.27 above and 3.57 below), King and Auden Mckenzie/NRIM's⁹⁶ ASPs for 10mg nortriptyline tablets

⁹⁴ King (Documents NOR-C0261.13 – NOR-C0261.20), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord (NOR-C0949), Lexon/Medreich JV (Document NOR-C1459), Alissa (Document NOR-C1450).

⁹⁵ King (Documents NOR-C0261.22 – NOR-C0261.29), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord (NOR-C0949), Lexon/Medreich JV (Document NOR-C1459), Alissa (Document NOR-C1450).

⁹⁶ NRIM was acquired by Auden Mckenzie in November 2012.

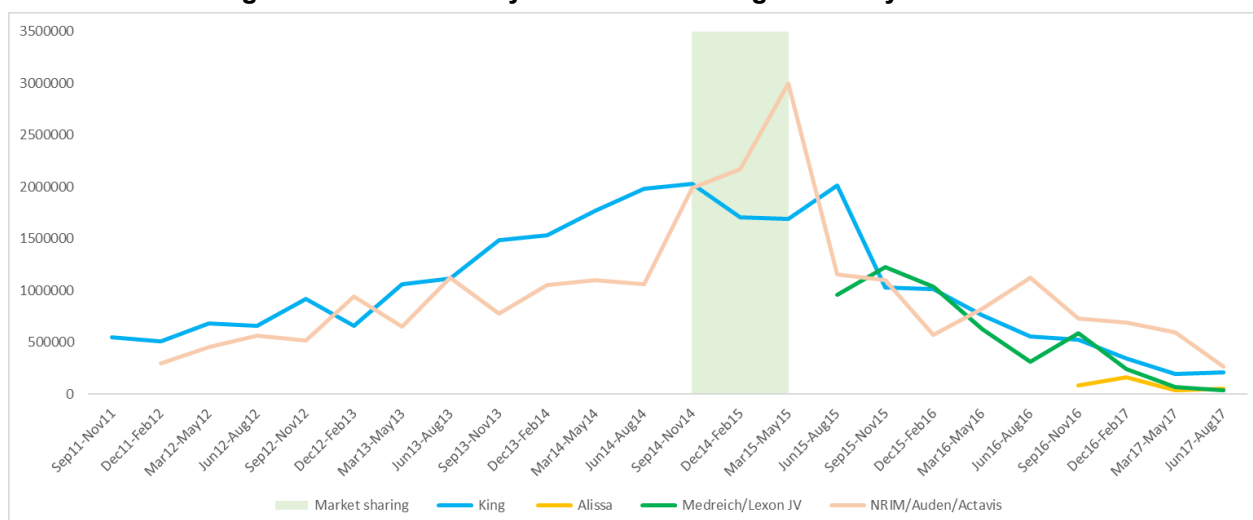
repeatedly increased up to August 2014. Prices remained at that increased level during the Market Sharing Period.

- 3.47 Following the independent entry of the Lexon/Medreich JV in July 2015, the ASP for 10mg tablets started to come down.
- 3.48 Similarly, King and Auden Mckenzie/NRIM's ASP for 25mg tablets increased up to August 2014. Prices remained at that increased level during the Market Sharing Period. Following the independent entry of the Lexon/Medreich JV, the ASP for 25mg tablets started to come down.
- 3.49 The NHS Reimbursement Price for 10mg tablets increased from £12.06 per pack in January 2010 to its peak of £76.77 per pack in September 2015, a 537% increase. For 25mg tablets, the NHS Reimbursement Price increased from £24.02 per pack in January 2010 to £124.63 per pack in September 2015; a 419% increase. From September 2015, the NHS Reimbursement Price has been declining. This coincides with the entry of the product supplied by Lexon/Medreich JV. In March 2017, when Focus Pharmaceuticals Limited entered, the NHS Reimbursement Price was £31.54 and £31.80 per pack for 10mg and 25mg tablets respectively.

IV. *The revenues from sales of Nortriptyline Tablets in the UK*

- 3.50 Figure 6 and Figure 7 below set out suppliers' revenues on a three-monthly basis from sales of Nortriptyline Tablets in the UK between September 2011 and February 2017.

Figure 6: Three-monthly revenues for 10mg tablets by UK MA holders



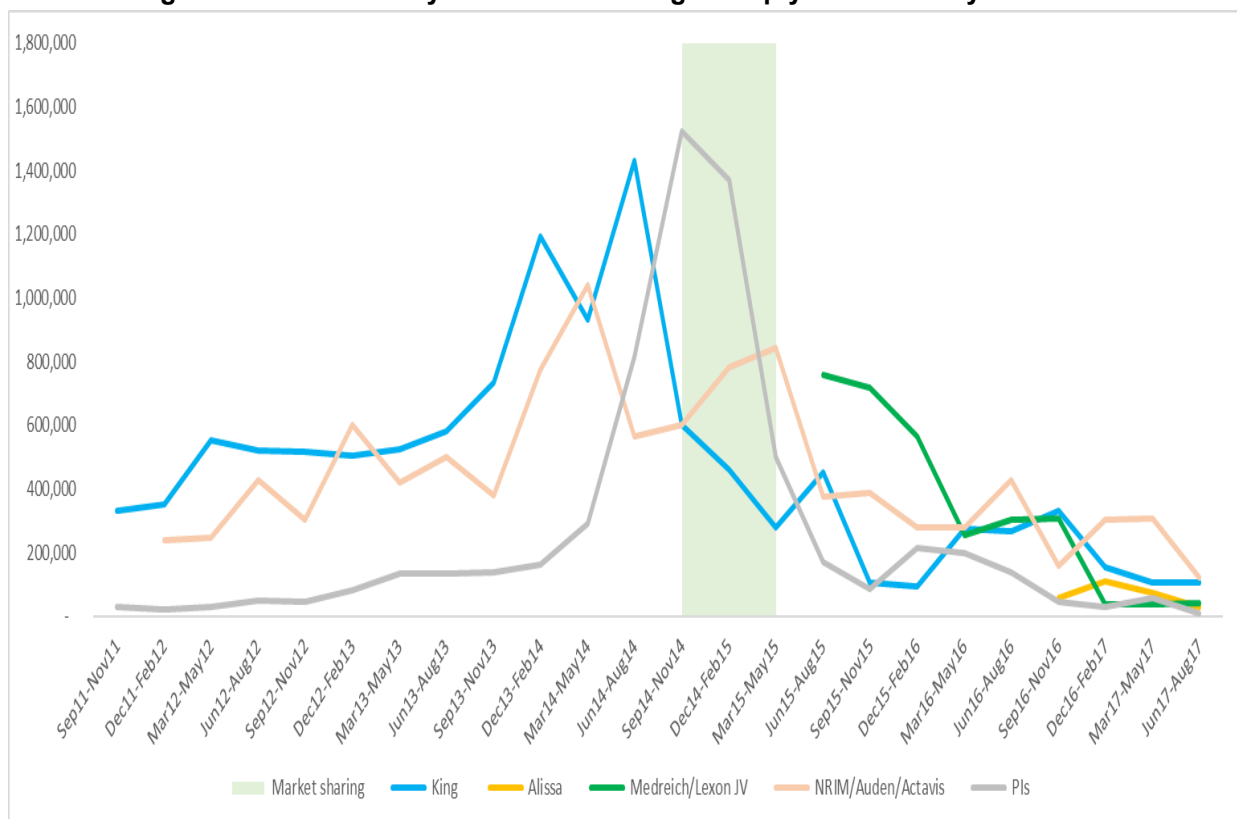
Source: CMA analysis based on data submitted by the Addressees.⁹⁷

Notes:

a) Data for NRIM were not available between April 2011 and December 2011.

b) Medreich/Lexon JV revenues include revenues realised by both entities but exclude stock transfers from Medreich to Lexon.

Figure 7: Three-monthly revenues for 25mg nortriptyline tablets by UK MA holders



Source: CMA analysis based on data submitted by the Addressees.⁹⁸

Notes:

a) Data for NRIM were not available between April 2011 and December 2011.

b) Medreich/Lexon JV revenues include revenues realised by both entities but exclude stock transfers from Medreich to Lexon.

c) To isolate volumes from outside the UK, for parallel imports total cost of purchases from outside UK have been used to produce the chart.

⁹⁷ King (Documents NOR-C0261.13 – NOR-C0261.20), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord (NOR-C0949), Lexon/Medreich JV (Document NOR-C3050, NOR-C2092), Alissa (Document NOR-C1450).

⁹⁸ King (Documents NOR-C0261.13 – NOR-C0261.20), NRIM (NOR-E4650, NOR-E4687), Auden Mckenzie (NOR-E0456, NOR-E1105) Accord (NOR-C0949), Lexon/Medreich JV (Document NOR-C3050, NOR-C2092), Alissa (Document NOR-C1450) and for parallel imports (PI): B&S Healthcare (Document NOR-C1939), Beachcourse (Document NOR-C2001.2), CD Pharma (Document NOR-C1866.1) Ecosse (Document NOR-C1948), Expono (Document NOR-C1908), Kosei (Document NOR-C1930), Landmark (Document NOR-C2010), Manx (Document NOR-C1871), MPT Pharma (Document NOR-C1878), S&M Medical (Document NOR-C1945), Amimed (Document NOR-C2067.2), Lexon (Document NOR-C1459).

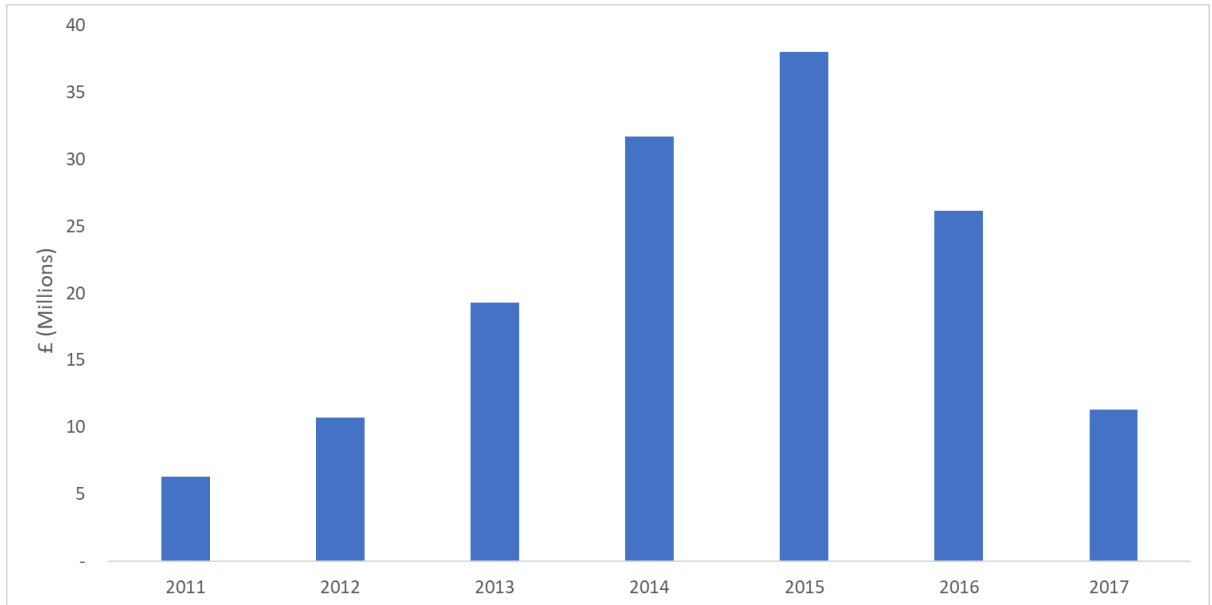
- 3.51 As Auden Mckenzie's ASP increases, Auden Mckenzie's revenue from sales of 10mg tablets increases steadily from £295,728 per quarter in December 2011 to £1.1m per quarter by August 2014, at which point Auden Mckenzie's revenue increased sharply, peaking at £3m a quarter by the end of May 2015, just prior to its sale to Actavis, when its revenue started to decline. Similarly, as King's ASP increased, King's revenue increased steadily from £548,460 per quarter in September 2011 to £1.1m per quarter in August 2013, before peaking at £2m per quarter in September 2014. King's revenues then fell to £1.7m per quarter by May 2015. King's revenues fell, despite King maintaining its ASP, due to a fall in King's volumes of the 10mg tablets over the Market Sharing Period. After a slight recovery in King's revenues between May 2015 and August 2015, King's 10mg tablets revenues started to decline again.
- 3.52 In December 2011, Auden Mckenzie's quarterly revenue from the sale of 25mg tablets was £237,575 per quarter, while King's revenue was £351,448 per quarter. Both King and Auden Mckenzie experienced a steady increase in revenue from sales of the 25mg nortriptyline tablets from the end of 2011 through to November 2013, as their ASPs both increased. Both then experienced a further sharp increase in revenue until January/February 2014. Auden Mckenzie's revenue from the sale of the 25mg tablets peaked at £1m per quarter in May 2014, before reducing. King's revenue peaked in August 2014 at £1.4m per quarter. Auden Mckenzie's revenue increased again between September 2014 and May 2015, while King's revenue continued to decline.
- 3.53 The value of parallel imports of Spanish 25mg Paxtibi tablets (an Auden Mckenzie product sold via its exclusive distributor, Biomed S.L. ('**Biomed**')) increased gradually from just £19,379 per quarter in 2011 to £291,975 per quarter in May 2014. Between May 2014 and September 2015, the value of parallel imports coming into the UK increased significantly, to a peak of £1.5m, before reducing.⁹⁹

⁹⁹ To isolate sales of the Spanish product, the value of parallel imports has been proxied using the total cost of purchases. While the Spanish product is Auden-owned, this is purchased by parallel importers via other companies (e.g. wholesalers, intermediaries). Hence the value of parallel imports may not all be allocated to Auden Mckenzie.

V. NHS spending on Nortriptyline Tablets

3.54 Figure 8 sets out the annual NHS spend on Nortriptyline Tablets in the UK from January 2011 (when NRIM entered) to March 2017. In 2011, NHS total spend on Nortriptyline Tablets was £6.3 million. Spend peaked at £38 million in 2015, falling thereafter to £26.1 million in 2016. While volumes grew by just over 50% over that period, prices increased by around ten times that amount, driving the increase in NHS spending on nortriptyline.

Figure 8: NHS total expenditure – UK



Source: CMA analysis of PCA data for the UK.

Note:

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

F. Key events prior to the Infringement

3.55 King acquired the UK MAs for the branded version of Nortriptyline Tablets (Allegron) from Eli Lilly & Company Limited on 30 March 1998. King was the sole supplier of Nortriptyline Tablets in the UK and was subject to the PPRS until June 2011.¹⁰⁰

¹⁰⁰ Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.

- 3.56 NRIM was granted MAs for Nortriptyline Tablets on 1 May 2009.¹⁰¹
- 3.57 In October 2010, King made the decision to de-brand its Nortriptyline Tablets. King explained that this decision was taken due to *'the desire to leave the controlling strictures of the PPRS Scheme (which include the provision of annual financial data and control of profit on brands)'*.¹⁰² King obtained the MHRA's approval to add the generic name to the MA for both presentations on 19 November 2010¹⁰³ and notified wholesalers of the name change to the generic version of the 10mg and 25mg packs in March 2011 and May 2011 respectively.¹⁰⁴
- 3.58 NRIM started selling Nortriptyline Tablets in the UK in January 2011.¹⁰⁵
- 3.59 King told the CMA that following NRIM's entry, it *'took a decision not to aggressively retain volume business through price discounting and following initial 40% - 50% volume declines [...] sales volumes stabilised'*.¹⁰⁶ At interview, [King Director] was asked about King's response to NRIM taking King's market share on entry. He said: *'You can compete on price in which case [...] the market just disappears, or [...] you just have to suck it and say that's what they've done and that's what happened, so we didn't compete on price'*.¹⁰⁷
- 3.60 Following NRIM's entry, King and NRIM's ASPs for both tablet strengths repeatedly increased.
- 3.61 In November 2012, Auden Mckenzie acquired NRIM (including its MAs for Nortriptyline Tablets in the UK and in other European countries).¹⁰⁸

¹⁰¹ See Table 2: Companies that have been granted or have acquired MAs to supply Nortriptyline Tablets in the UK.

¹⁰² Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.

¹⁰³ Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.

¹⁰⁴ Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.

¹⁰⁵ Document NOR-E4650, NRIM sales volume between January 2011 and December 2011.

¹⁰⁶ Document NOR-C0261, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.

¹⁰⁷ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 49 lines 12-16. See also page 55 lines 5-6: *'I took a commercial decision that we would not try and compete on value'*.

¹⁰⁸ Document NOR-C1749, [Auden Mckenzie Senior Employee 1]'s response to question 1 of the CMA's section 26 notice dated 18 June 2018.

Following the acquisition, both King and Auden Mckenzie's ASPs continued to increase.¹⁰⁹

- 3.62 In 2013, Auden Mckenzie acquired the Spanish licence for 25mg nortriptyline tablets sold under the brand name Paxtibi from the Spanish company, Biomed.¹¹⁰ That year Auden Mckenzie entered into a distribution agreement with Biomed for the supply of Paxtibi in Spain.¹¹¹ Biomed agreed to supply Paxtibi in Spain on Auden Mckenzie's behalf. Paxtibi accounted for all parallel imports coming into the UK between January 2011 and March 2017.
- 3.63 Sales of Paxtibi increased significantly in the UK between 2012 and 2014; from less than 16% of total sales of 25mg tablets in 2012 to 33% in 2014. The price of 25mg tablets was high and rising at this time (see paragraphs 3.45 and 3.48 above) resulting in increasing margins for parallel imports into the UK.
- 3.64 At this time, Lundbeck also marketed Nortriptyline Tablets in thirteen EEA states, under various brand names. However, Lundbeck did not hold (and has never held) a UK import licence or MA for these products. Lundbeck told the CMA that it has not considered applying for UK MAs for its Nortriptyline Tablets, as it has marketed other anti-depressants which in its opinion were better suited to the UK market.¹¹²
- 3.65 In 2014, Lundbeck's ASP across the thirteen EEA countries in which it supplied Nortriptyline Tablets was £4.02 per pack for 10mg tablets, and £6.11 per pack for 25mg tablets. Lundbeck's ASP for 10mg tablets in 2014 was lowest in Norway, where it was £2.42. Lundbeck's ASP for 25mg tablets in 2014 was lowest in Belgium, where it was £2.73 per pack for tablets.¹¹³

¹⁰⁹ The NHS Reimbursement Price for 10mg tablets peaked at £76.77 per pack in September 2015; a 537% increase from the price at the time of NRIM's entry in 2011 (£12.06). For 25mg tablets, the peak was £124.63; a 419% increase from the price at the time of NRIM's entry (£24.02).

¹¹⁰ Document NOR-C1749, [Auden Mckenzie Senior Employee 1]'s response to question 1 of the CMA's section 26 notice dated 18 June 2018.

¹¹¹ Document NOR-C1885, Actavis' response to question 1 of the CMA's section 26 notice dated 29 July 2018. See Distribution Agreement between Auden Mckenzie and Biomed dated 5 August 2013.

¹¹² Document NOR-C2201, Lundbeck's response to the CMA's section 26 notice dated 22 October 2018.

¹¹³ Document NOR-C2203, 'Exhibit 2' of Lundbeck's response to the CMA's section 26 notice dated 22 October 2018.

- 3.66 In mid-2013, when they were both competing in the market for the supply of Nortriptyline Tablets in the UK, [King Director] and [Auden Mckenzie Senior Employee 1] had a meeting.¹¹⁴ The CMA asked both [King Director] and [Auden Mckenzie Senior Employee 1] about the purpose of the meeting; [King Director] told the CMA that they had not discussed Nortriptyline Tablets.¹¹⁵ [Auden Mckenzie Senior Employee 1] said that they discussed whether there could be opportunities for [King Director] to provide consultancy services to Auden Mckenzie, and they discussed issues relating to 'fake' and 'counterfeit' Nortriptyline Tablets entering the UK.¹¹⁶ At interview, [King Office Manager] told the CMA that she was not aware of any problems with counterfeit Nortriptyline Tablets. She told the CMA that had there been an issue relating to counterfeit Nortriptyline Tablets, she would have been aware, as it would represent a regulatory issue which fell within her responsibilities.¹¹⁷
- 3.67 In February 2014, King learned that Medreich was developing a nortriptyline product (as part of its Product Development and Profit Sharing Agreement with Lexon)¹¹⁸ and that it had submitted an application for MAs to the MHRA.¹¹⁹ King was concerned that the launch of a competing Medreich product would have a serious negative impact on its business, and that it would lose 'most probably' 50% of its sales.¹²⁰ [King Director] tried, unsuccessfully, to block the progress of Medreich's MA application for Nortriptyline Tablets.¹²¹

¹¹⁴ Document NOR-C1595, transcript of [Auden Mckenzie Senior Employee 1] interview dated 14 December 2017, page 189.

Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 129 lines 24-27.

Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, pages 13-14 lines 9-8.

¹¹⁵ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 131 lines 16-23.

¹¹⁶ Document NOR-C1595, transcript of [Auden Mckenzie Senior Employee 1] interview dated 14 December 2017, page 189.

Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, pages 13-14 lines 19-20.

¹¹⁷ Document NOR-C2884, transcript of [King Office Manager] interview dated 31 January 2019, page 86-89.

¹¹⁸ Document NOR-C2978, King's response to the CMA's section 26 notice dated 7 March 2019.

¹¹⁹ Document NOR-E1490, email from [King Director] to [Employee of King's broker for the active pharmaceutical ingredient for Nortriptyline Tablets] dated 20 February 2014.

¹²⁰ Document NOR-E1490, email from [King Director] to [Employee of King's broker for the active pharmaceutical ingredient for Nortriptyline Tablets] dated 11 March 2014.

¹²¹ Document NOR-E5715, email from [King Director] to [Employee of King's broker for the active pharmaceutical ingredient for Nortriptyline Tablets] dated 12 February 2014,

- 3.68 On 25 February 2014, [Consultant to King] met with [Lexon Director]. [Consultant to King] was engaged by King on a retainer basis to gather market intelligence and to conduct negotiations with certain of King's key customers.¹²² This contact is recorded in an email from [Consultant to King] to [King Director] and copied to [Lexon Director]. It appears from the email that [Lexon Director] asked [Consultant to King] to pass [King Director] a message regarding Lexon's development of Nortriptyline Tablets:

*'Hi [King Director],
I have seen [Lexon Director] today, who asked me to get in contact with you.
[Lexon Director] has informed me that he is expecting his Nortriptyline licenses to drop at any point, and, wanted to talk to you directly.
Not sure if you had his details but, I have listed below just in case:-
[Lexon Director's] email address]
Tel:- [Lexon Director]'s telephone number]
Regards
[Consultant to King]'.¹²³*

- 3.69 [King Director] told the CMA that he did not contact [Lexon Director] as a result of this email.¹²⁴ [Lexon Director] told the CMA that he could not remember the conversation [Consultant to King] referred to in the email.¹²⁵

Document NOR-E5151, email from [King Director] to [Employee of King's broker for the active pharmaceutical ingredient for Nortriptyline Tablets] dated 14 February 2014, Document NOR-E5718, email from [Employee of King's broker for the active pharmaceutical ingredient for Nortriptyline Tablets] to [King Director] dated 20 February 2014, Document NOR-E5722, email from [King Director] to [Employee of King's broker for the active pharmaceutical ingredient for Nortriptyline Tablets] dated 20 February 2014, Document NOR-E1490, email from [Employee of King's broker for the active pharmaceutical ingredient for Nortriptyline Tablets] to [King Director] dated 13 March 2014, Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 97-98 lines 16-8.

¹²² Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 26-27 lines 23-14; see also Document NOR-C2618 transcript of [King Director] interview dated 22 November 2018, page 12 lines 5-6.

¹²³ Document NOR-E1483, email from [Consultant to King] to [King Director] dated 25 February 2014.

¹²⁴ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 160 lines 16-19.

¹²⁵ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 168-169.

4. Factual background: the Infringement

A. Introduction

4.1 As set out in paragraph 1.6 above, the CMA has concluded that from September 2014 until May 2015, Auden Mckenzie and King entered into an agreement relating to the supply of Nortriptyline Tablets to Lexon, which restricted competition by object and comprised the following three elements (each of which restricted competition by object in and of itself):

- (a) Market sharing: Auden Mckenzie would supply Lexon with only 10mg tablets and King would supply Lexon with only 25mg tablets.
- (b) Fixing prices: Auden Mckenzie and King would supply Lexon at a fixed price of £4 per pack.¹²⁶
- (c) Fixing quantities: Auden Mckenzie and King would each supply no more than a fixed quantity of their respective packs of tablets: 3,400 10mg packs in the case of Auden Mckenzie; and 1,600 25mg packs in the case of King. In both cases, the fixed volumes accounted for approximately one sixth of the total market size.¹²⁷

¹²⁶ Auden Mckenzie did not implement this element of the Horizontal Agreement after February 2015. However, from March 2015 until May 2015 (inclusive) it continued to supply Lexon only fixed volumes of 10mg packs.

¹²⁷ NHS England Prescription Cost Analysis data ('PCA data') records that in May 2014 20,176 packs of 10mg tablets, and 9,636 packs of 25mg tablets, were dispensed. The documents contemporaneous with the Horizontal Agreement also indicate that the Parties understood that these volumes represented approximately one sixth of the market for 10mg and 25mg tablets; the parties used NHS England PCA data to estimate the size of the 10mg tablets market at 20,000 packs and the 25mg tablets market at 10,000 packs: see Document NOR-E8117, spreadsheet concerning Lexon - Auden Mckenzie price list June 2014, which was attached to Document NOR-E8116, email from [Auden Mckenzie Senior Employee 3] to [Lexon Generics Buyer] dated 21 May 2014. The NHS England PCA Data only measures the volumes in England; it does not measure the volumes in Scotland, Northern Ireland or Wales. The use of NHS England PCA data will therefore slightly underestimate the size of the nortriptyline market in the UK.

B. Events prior to the Infringement

I. Auden Mckenzie's supply of Nortriptyline Tablets to Lexon

Background and documentary evidence

- 4.2 Auden Mckenzie and Lexon had a commercial relationship from around June 2011,¹²⁸ under which Lexon purchased a number of pharmaceutical products from Auden Mckenzie.¹²⁹ As part of this pre-existing relationship, [Lexon Director] had regular monthly meetings with [Auden Mckenzie Senior Employee 3].¹³⁰
- 4.3 In or before May 2014, Auden Mckenzie and Lexon entered into discussions regarding the potential for Auden Mckenzie to supply Nortriptyline Tablets to Lexon. As set out in the following paragraphs, the first contemporaneous documents, from early to mid-May 2014, refer to Lexon purchasing Nortriptyline Tablets from Auden Mckenzie at prices of between £45 and £50 for packs of 10mg tablets and £75 and £80 for packs of 25mg tablets (which equated to discounts of 15-20% off the Drug Tariff).
- 4.4 The first documentary evidence relating to a potential supply deal between Auden Mckenzie and Lexon is in the minutes of a Lexon board meeting that took place on 16 May 2014. Those minutes record that, under the agenda item '*Buying*', [Lexon Director] said:

*'Nortriptyline will be launched shortly and will be sold through Auden Mckenzie via a three year deal.'*¹³¹

¹²⁸ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, pages 12-13.

¹²⁹ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 95 line 2.

Document NOR-C1977, transcript of [Auden Mckenzie Senior Employee 3] interview dated 23 May, pages 49-50.

¹³⁰ Document NOR-C1977, transcript of [Auden Mckenzie Senior Employee 3] interview dated 23 May, page 49 lines 1-2.

¹³¹ Document NOR-E8124, Minutes of Lexon Board meeting on 16 May 2014.

[Lexon Director] told the CMA that he believed that the board minutes reflected a miscommunication at the board meeting. He said that Lexon had been negotiating a deal to supply Teva with Nortriptyline Tablets. He said that Lexon had not done a three-year deal with Auden Mckenzie (Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 40). The CMA does not consider that [Lexon Director's] account that the board minutes referred to the deal with Teva can be accurate. The MA for the nortriptyline product developed by Medreich and Lexon was not granted until 26 March 2015. The Own Label Supply agreement between Medreich and Teva commenced in July 2015. The CMA asked both Lexon and Teva to

- 4.5 Later that month, on 21 May 2014, [Auden Mckenzie Senior Employee 3] emailed [Lexon Generics Buyer], copying [Lexon Director], a price list for June 2014.¹³² The price list contained the following remarks relating to Nortriptyline Tablets:
- (a) Against the entry for 10mg tablets was the price £49.51 (a 15% discount from the Drug Tariff)¹³³, and the words '*projected forecasted volume of 4% (800 per month)*'.
 - (b) Against the entry for 25mg tablets was the price £79.20 (a 15% discount from the Drug Tariff Price)¹³⁴, and the words '*projected forecasted volume of 4% (400 per month)*'.
 - (c) The document refers to 42 other products, none of which contain any '*projected forecasted volumes*' or other estimates of Lexon's market share. At interview [Lexon Director] said that Auden Mckenzie had not previously supplied Lexon with Nortriptyline Tablets, which was why the price list entry for Nortriptyline Tablets included a projected forecasted volume.¹³⁵
- 4.6 On 22 May 2014, Lexon placed an order for Nortriptyline Tablets with Auden Mckenzie for 80 packs of 10mg tablets at a price of £46.60 (a 20% discount from the Drug Tariff), and 40 packs of 25mg tablets at a price of £75.54 (a 19% discount from the Drug Tariff).¹³⁶

confirm when Lexon first communicated with Teva about the possibility of it being supplied nortriptyline developed by Lexon and Medreich.[Lexon Director] said that he could not recall the date of the first communication, but that he was sure it was well before Medreich's licence was granted. The earliest written document he could provide recording communication with Teva about a supply arrangement for nortriptyline was an email dated 15 March 2015. Teva provided an internal email from 20 March 2015. In the email, the Teva employee told other Teva employees '*I had a discussion with [Lexon Director]. He has just had his license granted for [nortriptyline] (via Medreich) and could commence supplying us within three months in Medreich label, maybe longer for an own label*' (Document NOR-C2942). The evidence is therefore that Lexon's first communication with Teva about the subsequent supply arrangement for nortriptyline was in March 2015, 10 months after the May 2014 board minutes.

¹³² Document NOR-E8116, email from [Auden Mckenzie Senior Employee 3] to [Lexon Generics Buyer] dated 21 May 2014 and Document NOR-E8117, Auden Mckenzie price list for June 2014.

¹³³ Document NOR-C0929, Annex 1 of NHS BSA's response to question 1 of the CMA's section 26 notice dated 13 December 2017.

¹³⁴ Document NOR-C0929, Annex 1 of NHS BSA's response to question 1 of the CMA's section 26 notice dated 13 December 2017.

¹³⁵ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 45 lines 6-19.

¹³⁶ Document NOR-C2413, Lexon Purchase Order to Auden Mckenzie dated 22 May 2014, and with Lexon reference PO327928.

- 4.7 The first reference in the contemporaneous emails to the new supply 'deal', which was due to come into force in August 2014, is in an email dated 28 May 2014. In that email, [Lexon Director] instructed [X] (a Lexon employee responsible for purchasing parallel imports) that Lexon should continue to import 25mg tablets (i.e. Paxtibi), explaining that '*The deal does not officially start until august*'.¹³⁷ In his third interview with the CMA (on 21 February 2019), [Lexon Director] told the CMA that his reference to '*the deal*' in this email, was a reference to Auden Mckenzie's arrangement with Lexon to supply Nortriptyline Tablets at the significantly reduced price of £4 per pack (i.e. less than a tenth of the price that Lexon had previously paid).¹³⁸
- 4.8 On 30 May 2014, [Lexon Generics Buyer], sent an email to two members of Lexon's sales team,¹³⁹ regarding supply of both strengths of Nortriptyline Tablets by Auden Mckenzie to Lexon. The subject line was '*Nortriptyline 10mg Tabs & Nortriptyline 25mg Tabs - Generic imminent (Auden Mckenzie)*' and the email stated, '*Stock is being located now*'.¹⁴⁰

The Witnesses' accounts of the negotiations between Auden Mckenzie and Lexon

- 4.9 The negotiation of Auden Mckenzie's supply of Nortriptyline Tablets to Lexon was conducted by [Lexon Director], on behalf of Lexon, and [Auden Mckenzie Senior Employee 3] and [Auden Mckenzie Senior Employee 1], on behalf of Auden Mckenzie. These individuals have described the negotiation in interviews conducted by the CMA. Their accounts differ in key respects.

[Lexon Director]

- 4.10 In his first interview (13 March 2018), [Lexon Director] told the CMA that Auden Mckenzie agreed to supply Lexon with Nortriptyline Tablets

¹³⁷ Document NOR-E8118, email exchange between [Lexon Director] and [Employee of Lexon] dated 28 May 2014.

¹³⁸ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 54. At interview [Lexon Director] added that he was not sure why the start date of the arrangement changed from August to September 2014: Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, pages 54-55.

¹³⁹ Document NOR-C2729, transcript of [Lexon Generics Buyer] interview dated 31 January 2019, page 13.

¹⁴⁰ Document NOR-E8120, email from [Lexon Generics Buyer] to [Employee of Lexon] dated 30 May 2014.

at discounted prices in order to compete with the prices at which Lexon could purchase imported Nortriptyline Tablets. [In transcript excerpts, Lexon Director is referred to as '**[LD]**']. [Lexon Director] said that he first discussed the supply arrangement with [Auden Mckenzie Senior Employee 3]:

*'there was a guy called [Auden Mckenzie Senior Employee 3] who worked for Auden Mckenzie who – Auden Mckenzie were selling – offering Lexon their portfolio of products. So whatever the products were, we would buy it as a wholesale customer [...] [Auden Mckenzie Senior Employee 3] would come and visit us as a wholesaler and sell product to us. I'm sure that [Auden Mckenzie Senior Employee 3] was questioning why we weren't buying 25mg of Nortriptyline off [Auden Mckenzie] and I would have said "Well 'cause it's cheaper for us to parallel import it". I would then hazard a guess that [Auden Mckenzie Senior Employee 3] then came back to me and said 'Well what if we supplied you?', so I said 'But if you could do the price, fine.'*¹⁴¹

4.11 In response to a section 26 notice, Lexon told the CMA (on 22 June 2018) that Auden Mckenzie had offered to supply Nortriptyline Tablets (i.e. both 10mg and 25mg tablets) at a low price as a response to Lexon's ability to import Paxtibi from Spain, and not on the basis of a new potential supply source.¹⁴²

4.12 However, in his second interview (2 August 2018), [Lexon Director] commented on the fact that Lexon had been supplied with 10mg tablets as part of the supply arrangements, when the 10mg tablet was not available as a parallel import from Spain. [Lexon Director] said that, in negotiating the discounted price with Auden Mckenzie, he had referred to importing 10mg nortriptyline tablets from a country other than Spain:

CMA: *'and my understanding is that, for a certain period you also received, 10 milligrams [nortriptyline]'*

[LD]: *'10 milligram; yeah'*

CMA: *'That's not a product that's available from Spain'*

[LD]: *'No, I, cheekily I'd referred to -- I think it was in the... oh, there was another country where it was available from. Again, I can't remember the exact country. I would've –'*

¹⁴¹ Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 123-124.

¹⁴² Document NOR-C1729, Lexon's response to the CMA's section 26 notice dated 13 June 2018.

CMA: 'But did you have a licence to import from that country?'
[LD]: 'No, but I could've quite easily in a short period of time applied for one and got one, and, again we've got -- we've, we've -- because manufacturers know that we're involved directly in the, the licensing of importing of, Pls, sometimes we, we, we get deals on the basis that we're going to apply for a licence. It's a white lie sometimes, and if you get away with it you get away with it.'¹⁴³

- 4.13 In relation to the timing of the negotiation between Auden Mckenzie and Lexon, [Lexon Director] confirmed in his third interview that, by 30 May 2014 (i.e. at the time of [Lexon Generics Buyer]'s email referred to in paragraph 4.8 above), Lexon understood that it would be purchasing both 10mg and 25mg tablets from Auden Mckenzie at a price of £4 per pack.¹⁴⁴
- 4.14 At interview, [Lexon Director] told the CMA that the period of time between Lexon entering into the supply arrangement with Auden Mckenzie (May 2014), and Lexon taking its first supply from Auden Mckenzie at £4 per pack (September 2014), would probably have been because Lexon was using both its remaining stock of parallel imported Nortriptyline Tablets, and parallel imports Lexon had already committed to purchase.¹⁴⁵
- 4.15 In relation to Lexon's negotiation of a price of £4, [Lexon Director] referred to the King-Lexon supply arrangements, (which had the same supply price of £4) as having been '*very lucrative*' for Lexon.¹⁴⁶
- 4.16 In the period from June 2013 to May 2014, the average cost to Lexon of purchasing, importing and preparing 25mg Paxtibi for sale in the UK as a pack of 100 tablets, was £34.86. The lowest average cost to

¹⁴³ Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, pages 92-93 lines 19-11.

¹⁴⁴ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, pages 72-73.

¹⁴⁵ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, pages 46, lines 16-18. '*There's a slight gap there which would probably be a case of we're using up any of the parallel imported stock that we've got left or committed to from Europe*'.

¹⁴⁶ Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 15.

Lexon for any given month within the same period was £23.50, in July 2013.¹⁴⁷

[Auden Mckenzie Senior Employee 3]

4.17 In an interview (on 23 May 2018), [Auden Mckenzie Senior Employee 3] told the CMA that he had monthly meetings with [Lexon Director]. [In transcript excerpts, Auden Mckenzie Senior Employee 3 is referred to as '**[AM SE 3]**']. He said that in one of those meetings, [Lexon Director] said that Lexon was going to parallel import Nortriptyline Tablets, unless Auden Mckenzie could supply them at a better price. [Auden Mckenzie Senior Employee 3] said that he passed this information to [Auden Mckenzie Senior Employee 1], and that he '*put [Auden Mckenzie Senior Employee 1] in touch with [Lexon Director], and the next thing [Auden Mckenzie Senior Employee 1] says is, "We need to supply [Lexon Director]"*'.¹⁴⁸ [Auden Mckenzie Senior Employee 3] stated that it was [Auden Mckenzie Senior Employee 1] who agreed to the price of £4 per pack.

CMA: *'Can you tell us a bit more about the terms of supply, then, that were ultimately agreed, in terms of prices and volumes?'*

[AM SE 3]: *'Again, from memory, I can't really remember the volumes. The price would have been a low price compared to what we were selling to the rest of the market, to defend against PI, really'.*

CMA: *'So, we understand it was £4 per pack, roughly from around September 2014 to around February 2015, for the 10 milligram, and we just wanted to understand how Auden was actually able to offer such a low price for that product'.*

[AM SE 3]: *'I don't know. That was [Auden Mckenzie Senior Employee 1]'s decision, to agree to the £4, so' ...*

¹⁴⁷ Document NOR-C1459, Lexon's response to question 10 of the CMA's section 26 notice dated 15 March 2018. Lexon explained that parallel imported nortriptyline is subject to processing. The quoted average cost of parallel imported Nortriptyline includes both the purchase price, and the cost of additional labelling and packaging, labour and licensing (see Document NOR-C2091, response to question 5, Lexon's response to question 5 of the CMA's section 26 notice dated 11 September 2018).

¹⁴⁸ Document NOR-C1977, transcript of [Auden Mckenzie Senior Employee 3] interview dated 23 May 2018, page 50.

- CMA:** *‘Even though [Auden Mckenzie Senior Employee 1] could have sold to other wholesalers at a higher price?’*
- [AM SE 3]:** *‘Again, I can’t answer for [Auden Mckenzie Senior Employee 1], I am afraid.’*
- CMA:** *‘Would you have been concerned that, now that Lexon had the set volume, they might be competing against you for certain customers?’*
- [AM SE 3]:** *‘Well, they had that potential, yes or I think they had their own shops as well; so, maybe it was just for their own usage, I don’t know.’*
- CMA:** *‘Because the price, I think, in the market was around £45 a pack at that time; so you know, less than a tenth of that.’*
- [AM SE 3]:** *‘Yes, this is the nature of PIs, [...]’¹⁴⁹*

[Auden Mckenzie Senior Employee 1]

4.18 In a written response to a section 26 notice (dated 28 June 2018), [Auden Mckenzie Senior Employee 1] told the CMA that he believed negotiations were initiated by [Lexon Director], who contacted him indicating that Lexon could source Nortriptyline Tablets for parallel importation at a cheaper price than Auden Mckenzie was offering to Lexon.¹⁵⁰ He said that [Auden Mckenzie Senior Employee 3] *‘would have been primarily involved in all discussions regarding the Lexon account, reporting back to [him] when necessary’*.¹⁵¹ He said that:

‘In light of the claims made by [Lexon Director], and based on market research conducted by Auden Mckenzie, Auden McKenzie concluded that there was a realistic alternative source of supply of nortriptyline tablets. Auden McKenzie therefore offered to supply Lexon with 10mg nortriptyline tablets at a lower price in order to match or beat the low price [Lexon Director] had

¹⁴⁹ Document NOR-C1977, transcript of [Auden Mckenzie Senior Employee 3] interview dated 23 May 2018, pages 51-52.

¹⁵⁰ Document NOR-C1749, [Auden Mckenzie Senior Employee 1]’s response to question 3 & 4 of the CMA’s section 26 notice of 18 June 2018.

¹⁵¹ Document NOR-C1749, [Auden Mckenzie Senior Employee 1]’s response to question 3 & 4 of the [Auden Mckenzie Senior Employee 1]’s section 26 notice dated 18 June 2018.

*suggested Lexon could obtain in relation to imported products.*¹⁵²

- 4.19 [Auden Mckenzie Senior Employee 1] also described this negotiation with Lexon in his second interview with the CMA (11 October 2018), where he referred to Lexon claiming it could import Nortriptyline Tablets:

*'Lexon had spoken to [Auden Mckenzie Senior Employee 3], and then I think he'd also spoken to me to say that they can source Nortriptyline cheaper from -- from the EU. So, I said, "Okay" I said, "you know, let me, look into this" and I spoke to my regulatory people who I said, "Look, is it possible that Nortriptyline 10 mg and 25 can be brought into the UK?" as these guys were claiming. So, they went back and looked at it and -- and they said to me, you know, "Both strengths are possible because there was --" you know there was a couple of brands. One of them was, Lundbeck which was in a lot of the countries in Europe. And looking at the -- looking at the birth dates and the patent status and all that. And also, you know, looking at the formulations, we feel that it is definitely parallel importable. So, the potential is there for -- for somebody to, you know -- if someone's telling you this, according to what we can see. Yes, it's possible.'*¹⁵³

- 4.20 [Auden Mckenzie Senior Employee 1] went on to note that his 'regulatory people' had not provided any of their conclusions in writing as 'it was a very informally run company'.¹⁵⁴

- 4.21 In the same interview, [Auden Mckenzie Senior Employee 1] said that Auden Mckenzie offered Lexon both 10mg and 25mg tablets, but Lexon only took the 10mg tablets:

CMA:	<i>'[W]hich tablet strength did you end up --'</i>
[AM SE 1]:	<i>'Both'.</i>
CMA:	<i>'-- supplying?'</i>
[AM SE 1]:	<i>'I ended -- I ended up supplying the 10 mg.'</i>

¹⁵² Document NOR-C1749, [Auden Mckenzie Senior Employee 1]'s response to question 3 & 4 of the CMA's section 26 dated 18 June 2018.

¹⁵³ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, pages 36-37.

¹⁵⁴ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, pages 42-43.

CMA: [...] ‘The 10mg. So, when you say “both” what did you mean?’
 [...]

[AM SE 1]: ‘No, I supplied the 10s as well, I said.’

CMA: Who else supplied the 25mg?

[AM SE 1]: ‘I have no idea who it was. Because we originally offered both’.

CMA: ‘Okay.’

[AM SE 1]: ‘We did offer both. And they only took 10.’

CMA: ‘Do you know why?’

[AM SE 1]: ‘I’ve got no idea. I mean, you know, for me, if he ... the less he takes, the better. This -- I mean, if I could actually sell it as -- at some other price.’

CMA: ‘Because of the -- because of the ...’

[AM SE 1]: I -- I never actually asked that question because he wanted ... and this was based on the fact that I had asked my scientific team and they confirmed it.’¹⁵⁵

4.22 [Auden Mckenzie Senior Employee 1] said that Auden Mckenzie agreed to supply Lexon 10mg tablets at a price of £4 per pack on the basis of prices available for 10mg tablets in Europe:

[AM SE 1]: ‘I don’t exactly remember how we came to that because predominantly [Auden Mckenzie Senior Employee 3] was our ... or Lexon was one of his accounts but I do remember roughly us looking into the prices for 10 mg in Europe. Which is what they claimed they could get. And it was somewhere in the region of 6, 7, 8 euros for 100 -- for 100. So, that would bring it down to 2 or 3 euros for about 25. And normally parallel importers would want to make some profit or suppliers would want to make some sort of profit. So, that seemed like

¹⁵⁵ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, pages 37-39.

*a reasonable price and we would still make good margin on it and it should have been acceptable.*¹⁵⁶

4.23 In 2014, Lundbeck's ASP across the thirteen EEA countries in which it supplied Nortriptyline Tablets was £4.02 for 100 10mg tablets, and £6.11 per pack 25mg tablets (see paragraph 3.65 above).¹⁵⁷

[Auden Mckenzie Senior Employee 2]

4.24 [Auden Mckenzie Senior Employee 2] was also asked about the negotiations in an interview with the CMA on 10 January 2019. He said that he did not know how the arrangement for Auden Mckenzie to supply Lexon from September 2014 was negotiated,¹⁵⁸ nor did he recollect ever having dealt with Lexon himself.¹⁵⁹ He said that he would not have had the authority to agree supplying Lexon 10mg tablets at a price of £4 per pack,¹⁶⁰ and that he would have thought that [Auden Mckenzie Senior Employee 3] (who was his junior) would not have had the authority either.¹⁶¹

II. King's supply of Nortriptyline Tablets to Lexon

Background and documentary evidence

4.25 King supplied Lexon with Nortriptyline Tablets at various points prior to the start of the Horizontal Agreement. In 2008, King entered into formal supply agreements for Nortriptyline Tablets with a number of customers including Lexon, under which the customers undertook not to import

¹⁵⁶ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, page 40.

¹⁵⁷ Document NOR-C2203, 'Exhibit 2' of Lundbeck's response to the CMA's section 26 notice dated 22 October 2018.

¹⁵⁸ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, page 55 line 25 and page 56 line 1.

¹⁵⁹ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, page 49 lines 20-25.

¹⁶⁰ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, page 49 lines 2-6.

¹⁶¹ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, pages 59 and 60, lines 26-1.

Paxtibi, in return for King offering reduced prices for its 10mg and 25mg tablets.¹⁶² King terminated these agreements on 30 April 2010.¹⁶³

- 4.26 From March 2013 to August 2014, Lexon regularly purchased Nortriptyline Tablets from King.¹⁶⁴ These purchases were made via King's pre-wholesaler UDG, without contacting King. During this period, King's prices to Lexon for 10mg tablets increased from £27.34 (March 2013) to £48.82 (August 2014) per pack and for 25mg tablets from £47.69 (August 2013) to £79.83 (August 2014) per pack.
- 4.27 There are no documents (which the CMA has seen) that evidence how the supply arrangements between King and Lexon, whereby King would supply Lexon with a restricted volume of 25mg tablets at a price of £4, came about.

The witnesses' and undertakings' accounts of the negotiations that led to King supplying Lexon

- 4.28 Each of [King Director], [Lexon Director] and [Auden Mckenzie Senior Employee 1] have given evidence to the CMA about the events leading up to King's supply to Lexon of a restricted volume of 25mg tablets at a price of £4. The witnesses' accounts differ in key respects.

[King Director]

- 4.29 [King Director]'s account of events was not consistent. In his first interview (22 March 2018), [King Director] did not refer to King having

¹⁶² Document NOR-C0378.1, King's response to question 7 of the CMA's section 26 notice dated 20 October 2017.

Document NOR-C1462, Lexon's response to question 5 of the CMA's section 26 notice dated 15 March 2018. Document NOR-E5120, table detailing King's annual sales of 10mg and 25mg Allegron tablets dated 11 May 2009.

Document NOR-E5118, invoice from King to Lexon for an order of 1000 packs of 10mg Allegron at a price of £5.75 a pack dated 5 May 2009.

Document NOR-E5121, email from [Employee of Lexon] to [King Office Manager] enclosing purchase order for 1000 packs of 10mg Allegron at a price of £5.75, and 1000 packs of 25mg Allegron at a price of £11.45, dated 25 November 2009.

Document NOR-E5123, email from [Employee of Lexon] to [King Office Manager] enclosing purchase order for 1000 packs of 10mg Allegron at a price of £5.75, and 1000 packs of 25mg Allegron at a price of £11.45, dated 12 January 2010.

¹⁶³ Document NOR-E5135, letter from King to Lexon dated 30 April 2010.

Document NOR-C0378.1, King's response to question 9 of the CMA's section 26 notice dated 20 October 2017.

¹⁶⁴ Document NOR-C0261.16 and NOR-C0261.17, annex 13.5 and 13.6 of King's response to question 2 of the CMA's section 26 notice dated 20 October 2017 and Document NOR-C0261.25 and NOR-C0261.26, annex 13.14 and 13.15 of King's response to question 2 of the CMA's section 26 notice dated 20 October 2017.

had any negotiation with [Lexon Director] about the terms of their supply arrangements. When asked why King only supplied 25mg tablets to Lexon, [King Director] described receiving a telephone call from [Auden Mckenzie Senior Employee 1], at a time when they were competitors in the supply of Nortriptyline Tablets, during which they discussed Lexon:

[KD]: *'We [King] supplied them [Lexon] originally with just the 25mgs and then subsequently I think for a month or two with 10[mg] at the same price.'*

CMA: *'Why originally 25 and then subsequently 10?'*

[KD]: *'Because Auden Mckenzie supplied them with the other strength.'*

CMA: *'With the 10mg?'*

[KD]: *'Yes.'*

CMA: *'Why did they do that?'*

[KD]: *'The approach for this came via...[Lexon Director] through to [Auden Mckenzie Senior Employee 1] [~~X~~] and so I was told that they had... he'd identified this credible source of PI product. There is... nobody had actually looked into it properly but the... there is a product by Lundbeck which is essentially similar to ours and that they could have obtained a PLPI for that and if, effectively if they had then that information would then be in the public domain and then there would be not only a PI for the 25mg available from Spain, there would then be a PLPI available from Lundbeck so we agreed to supply the product to effectively equalise what he... the volumes that he wanted.'*

CMA: *'Okay and at least originally King would supply the 25mg and Auden Mckenzie would supply the 10mg to Lexon?'*

[KD]: *'10.'*

[...]

CMA: *'[These arrangements] came about how? '*

[KD]: *'So, [Auden Mckenzie Senior Employee 1] called me and said that this is what's happened.'*

CMA: *'Yes.'*

[KD]: *'So, I agreed to supply.'*

CMA: *'So, [Auden Mckenzie Senior Employee 1] called you said it looks like Lexon are getting a supply of parallel imports of both strengths.'*

[KD]: *'No, no, no. That they could – the difference is that once it becomes in the public domain it's all over because then effectively that's what happened with Paxtibi.'*

CMA: *'How did [Auden Mckenzie Senior Employee 1] become aware of this?'*

[KD]: *'I would imagine that [Lexon Director] must have called him and told him that.'*

CMA: *'Okay.'*

[KD]: *'But that's effectively he called me and said that's what gonna happen.'*

CMA: *'And then who made the arrangements?'*

[KD]: *'So, I set up a... I arranged for pricing to be set up [by King's pre-wholesaler] at UDG, Alloga the product to be supplied.'*

CMA: *'For your product to be supplied to Lexon?'*

[KD]: *'Yes.'*¹⁶⁵

(Emphasis added)

4.30 Later in his first interview (22 March 2018), when asked about his contacts with [Auden Mckenzie Senior Employee 1], [King Director] responded:

*'Obviously we talk... we talk about... talked about supplying Lexon.'*¹⁶⁶

4.31 [King Director] confirmed that he was aware that Auden Mckenzie was supplying Lexon 10mg tablets (see paragraph 4.29 above), however, he denied that he knew the volume of tablets Auden Mckenzie supplied Lexon or the price at which they were supplied:

[KD]: *'[...] I don't know what they... I don't what they... what price they [Auden Mckenzie] supplied at.'*

CMA: *'Thank you.'*

[KD]: *'And I also – I'm... I don't know what ... what volume they supplied but I would presume it's the same volume of product that went... 'cause I said they stopped supplying products I think it was in April or May 2015. I would presume it's the same volume that then I supplied for a period of months.'*¹⁶⁷

¹⁶⁵ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 88-91 lines. 16-2.

¹⁶⁶ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 131.

¹⁶⁷ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 125, lines 15-19.

4.32 In his second interview (22 November 2018), [King Director] gave further detail about the telephone call he had received from [Auden Mckenzie Senior Employee 1] (described in paragraph 4.29 above), stating that he thought it took place in July or August 2014:

*'I had a telephone call from [Auden Mckenzie Senior Employee 1] [X] sometime in 2014 - if you ask me when, I would have said, based on the sales data, it would've been in -- sometime in July or August but I can't remember the date - where he said there was an issue. They'd been contacted by ... he'd been contacted by [Lexon Director] and that they had identified a credible source of the 10 and 25 milligram.'*¹⁶⁸

4.33 As regards his interaction with Lexon, in his second interview with the CMA, [King Director] initially indicated that he had spoken directly with [Lexon Director] and had negotiated terms with him:

CMA: *'And [the volumes King supplied under the King – Lexon arrangement] the 1,600, how was that number fixed, as it -- or even chosen?'*

[KD]: *'We, we -- I spoke to [Lexon Director].'*

CMA: *'[...] did it reflect, this, source of, PI he mentions; [...] Why 1,600, not, you know, 2,000 or 3,000?'*

[KD]: *'Well, he would -- he actually originally wanted -- he originally wanted 2,000 packs a month and I said no. So, we, if you like, bargained; came to a figure. But, as I said in my -- in the previous interview, the key, to me, was to ensure that the parallel import licence was not applied for/obtained, because, if it were applied for and obtained, then this would be the end of the -- effectively, the end of the product in the UK.'*¹⁶⁹

4.34 However, subsequently, in the same interview, [King Director] confirmed that he had no specific recollection of the conversation – or even any definite recollection that a conversation had actually taken place with [Lexon Director]:

¹⁶⁸ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 49, lines 17-23.

¹⁶⁹ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 51-52 lines 18-5.

CMA: *'You do recall the -- I think you said the, the original negotiation [leading to supplies in September 2014]; is that correct?'*

[KD]: *'Yeah.'*

CMA: *'With ...?'*

[KD]: *'[Lexon Director]'*

CMA: *'[Lexon Director].'*

[KD]: *'Well, when I say "remember", I must have spoken to him because we set the price -- we set the pricing up.'*

CMA: *'So, do you actually remember it? Or are you ...? Is this -- can you specifically remember it? Or is this you're, sort of, surmising --'*

[KD]: *'I think it --'*

CMA: *'-- based on the facts that you know?'*

[KD]: *'It's, it's, it's surmising.'*

CMA: *'Right.'*

[KD]: *'I can't -- I can't --'*

CMA: *'So, you don't remember a meeting?'*

[KD]: *'I can't -- I can't, no -- well, I don't think --'*

CMA: *'Or a --'*

[KD]: *'I didn't meet him.'*

CMA: *'So, definitely not a meeting.'*

[KD]: *'But I can't, effectively --'*

CMA: *'A phone call?'*

[KD]: *'We must have had a phone call because, otherwise, the, the, this -- the -- this could not have been set up without some form of communication, and if there isn't communication in writing, then the only way it could've been done is by phone.'*

CMA: *'Right, and do you know if you, you definitely had his phone number back then?'*

[KD]: *'I was given his -- I've asked for his mobile number in the past.'*

CMA: *'And prior to July --'*

[KD]: *'Yes.'*

CMA: *'-- 2015?'*

[KD]: *'And I may even -- I may have even asked, [Auden Mckenzie Senior Employee 1] for it when he called me. I can't remember. You're, you're asking details about telephone conversations over four years ago.'*

CMA: *'So -- but are you saying there was definitely -- you're not saying there is definitely a call, or, or you are?'*

[KD]: *'All I'm saying is I can't -- I can't explain how it -- the volumes would've been agreed -- why I think it was -- why there was a discussion about a volume higher than 1,600 being discussed without there being a telephone conversation with --'*

CMA: *'[Lexon Director]'*

[KD]: *'[Lexon Director]. But if you were to ask me --'*

CMA: *'Is it possible that you came across -- that, that this arrangement occurred some other way through another person?'*

[KD]: *'No.'*

CMA: *'And how do you know it's not possible?'*

[KD]: *'I -- you understand -- I understand what you mean -- is, if I can't remember the conversation, then how can I confirm that it didn't happen another way.'*

CMA: *'Right, so --'*

[KD]: *'And the answer is I cannot confirm that it didn't happen another way if I can't remember --'*

CMA: *'You can't rule it out?'*

[KD]: *'-- accurately the content of that telephone conversation four years ago, if it were a conversation.'¹⁷⁰*

4.35 In his second interview, [King Director] again said that he had no awareness of Auden Mckenzie's terms of business with Lexon:

CMA: *'Okay. Were you aware that he was supplying the 10 milligram at the time?'*

[KD]: *'I was.'*

CMA: *'How did you know that?'*

[KD]: *'Because, when I spoke to [Lexon Director], he said that they'd come to a commercial arrangement with Auden Mckenzie.'*

CMA: *'Okay. So, did you know how much, Lexon was getting from [Auden Mckenzie Senior Employee 1]?'*

[KD]: *'No.'*

CMA: *'Did you know the price?'*

[KD]: *'No.'¹⁷¹*

¹⁷⁰ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 73-76 lines 2-18.

¹⁷¹ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 53-54 lines 25-15.

[Lexon Director]

- 4.36 [Lexon Director]'s evidence regarding the origin of the supply arrangements between King and Lexon was consistent throughout his three interviews with the CMA and two written responses to section 26 notices.
- 4.37 [Lexon Director] stated that negotiations on price and volume for both strengths of Nortriptyline Tablets took place between Auden Mckenzie and Lexon. He said that it was only later, once the terms were agreed, that Auden Mckenzie told Lexon that it should place its orders for 25mg tablets with King. consistently stated that there was no separate negotiation between King and Lexon. He also told the CMA that he found this to be *'very uncommon'*.¹⁷²
- 4.38 In his first interview (on 14 March 2018), [Lexon Director] stated: *'I had no conversation with King about that agreement at all. It was all led by Auden Mckenzie'*.¹⁷³
- 4.39 In his second interview, [Lexon Director] reiterated that Lexon only negotiated with Auden Mckenzie:

[LD]: *'[Auden Mckenzie Senior Employee 3] said, "We, we can do you a deal on the product", which I accepted, but, when they came back to me they said that, one of the strengths would come from [King Director] initially. So, which, which didn't bother me; I was just getting the stock that I'd requested. The—'*

CMA: *'So, Auden said that the stock would come from King?'*

[LD]: *'Yeah. So -- yeah. Yeah. I, I had -- and I, I think that's sort of backed up by the fact that even -- [King Director] didn't even have my mobile number or, or, until a far later date.'*¹⁷⁴ *I had*

¹⁷² Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 49 lines 7 and 8.

¹⁷³ Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 124 lines 19-20.

¹⁷⁴ In fact, it appears that [King Director] had been given [Lexon Director]'s mobile phone number at an earlier date; [Consultant to King] had sent [Lexon Director]'s mobile phone number to [King Director] (copying [Lexon Director]), in an email dated 25 February 2014 (see paragraph 3.68 above).[Lexon Director] may have based his comment that [King Director] did not have his mobile phone number *'until a far later date'*, on a different email from [King Director] to [Lexon Director] , in July 2015, in which [King Director] had asked [Lexon Director] for his

*no communication with him prior to that, apart from a couple of years prior when we'd had a deal beforehand, which, again, I, went through in the previous interview, but that wasn't -- again, that wasn't really direct through him. So, with regards to when the deal started, it would've been instigated by Auden.*¹⁷⁵

4.40 In his third interview (21 February 2019), [Lexon Director] confirmed that he had negotiated only with Auden Mckenzie:

- [LD]:** *'we were buying a combination of parallel imported products and we were buying some bits from here. I was offered an equalisation deal, negotiated it, and then in return for not importing, saying that I wouldn't import, I switched over to supply from them. My, it was all with Auden. It was Auden then said, "Buy this strength from King. You order this from King and this from here." And yeah, no different to that.'*
- CMA:** *'So you didn't speak to King --'*
- [LD]:** *'No.'*
- CMA:** *'-- about this PI --'*
- [LD]:** *'No.'*
- CMA:** *'-- about this deal at all?'*
- [LD]:** *'No.'*
- CMA:** *'You only -- it was all negotiated through Auden?'*
- [LD]:** *'All through -- yeah. All through Auden. Well --'*
- CMA:** *'And -- yeah.'*
- [LD]:** *'I was basically told that -- all the negotiation, all the agreement was done through Auden. And then I was then told after it was all agreed that I should order this strength from King via UDG [sic] and this strength from Auden'*
- CMA:** *'So did you originally assume that you were getting it all from Auden --'*
- [LD]:** *'Yeah.'*
- CMA:** *'-- both strengths?'*
- [LD]:** *'Yeah.'*
- CMA:** *'So in your initial negotiations '*
- [LD]:** *'Well, they approached me for the --'*

mobile phone number. The CMA had shown [Lexon Director] a copy of this email at an earlier point in the interview.

¹⁷⁵ Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, pages 55-56 lines 20-8.

CMA: *'Yeah'*

[LD]: *'-- they said to me --'*

CMA: *"We'll supply you with both."*

[LD]: *'-- "Are you interested in doing a deal?" So my assumption -- it's very uncommon --'*

CMA: *'Yes.'* (Laughs)

[LD]: *'-- that they'd be doing it on behalf of somebody else.'*

CMA: *'Right.'*

[LD]: *'Yeah, I was always under the assumption that it would be through Auden. And then it was only then once all of it was agreed that they said, "You'd order this from here and this from here".*
To me it made no difference; I'd got the price and volume, so that had been agreed. All the negotiations were definitely with Auden.'

[...]

[LD]: *'The negotiation was for both strengths and it was that, it -- the negotiation was for both strengths and the negotiation was fully done with Auden Mckenzie.'*

CMA: *'Yeah.'*

[LD]: *'It was after we'd agreed the pricing and the volume that Auden then said that I was to order the -- I can't remember why. There was something -- I just can't remember what it was.'*

CMA: *'Mm.'*

[LD]: *'But they said that you'd, I was to order the 10 milligram from ... no, sorry. The -- apologies.'*

CMA: *'Yeah.'*

[LD]: *'The 25 milligram from King and the 10 milligram from Auden.'¹⁷⁶*

4.41 When asked about the timing of Auden Mckenzie's direction that Lexon should order the 25mg tablets from King, rather than Auden Mckenzie, [Lexon Director] said:

¹⁷⁶ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, pages 47-49 lines 4-20 and page 51 lines 3-20.

*'I would almost certainly believe it was shortly before we started commencing the ordering, rather than as soon as we'd agreed the deal. Because I do remember being shocked, as I thought, "That was a bit strange". So it must have been at the point when we were saying, "Right, well we'll place purchase orders now". I'm guessing, is the truth.'*¹⁷⁷

- 4.42 [Lexon Director] also made the following comment on the fact that Auden Mckenzie had told Lexon to order the 25mg tablets from King:

*'I didn't even know that [Auden Mckenzie and King] had a relationship. I've never known anything like this before. It's totally off the cuff. I'm not going to dispute that. I can't give you one instance where a manufacturer has said to me, "Buy that strength from there", or "That strength from there", but all of it was, was led via Auden Mckenzie.'*¹⁷⁸

- 4.43 [Lexon Director] told the CMA that, after Auden Mckenzie told him that King would supply 25mg tablets, he would have needed to arrange the logistics of the supply with King:

*'I would have most definitely said, "Well, who do I speak to? I need to speak to somebody because it's a different price. Who do we send the orders to? How's it going to come?'"*¹⁷⁹

- 4.44 The CMA asked [Lexon Director] if he could remember a phone call with [King Director]:

CMA: *'Can you remember -- [...] if there was a phone call with [King Director]?''*

[LD]: *'I can't exactly say that, but I'd be surprised if there wasn't. I think there would have had to be. Because he would have had to agree with Auden that he's going to supply that strength and that volume to me. And would have then spoken to me directly'*

¹⁷⁷ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 59 lines 1-5.

¹⁷⁸ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 93 lines 16-20.

¹⁷⁹ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 92 lines 6-9.

CMA: *'And did he agree with the volumes you had already agreed with Auden?'*

[LD]: *'I, as I said to you earlier all the volumes and everything was, it was agreed with Auden, and Auden just told me to order that volume from there.'*¹⁸⁰

4.45 In relation to the individuals at Auden Mckenzie with whom [Lexon Director] negotiated, in his first interview (14 March 2018), [Lexon Director] said as follows:

[LD]: *'there was a guy who worked in Auden Mckenzie [pause] and I can't remember his name. He was – I think he was their finance man or somebody like that and then I got told that 'We can supply you and you will buy – you buy 20 – I think it was 25mg – I can't remember which way round it was, but one of the strengths we ordered from Auden Mckenzie and they told us that we can't get you in order – "We haven't got enough stock to supply you." ...'*

CMA: *'Mm hm.'*

[LD]: *'... but you – "You deal with King so King will supply you".'*

CMA: *'Okay.'*

[LD]: *'I had no conversation with King about that agreement at all. It was all lead by Auden Mckenzie and I genuinely can't remember the name of the person who – I forgot his name. He used to work for Alliance. I can't remember his name, sorry. But again I'm sure I can find out for you. And so we just started buying product from them.'*¹⁸¹

4.46 Following this interview, the CMA sent a notice under section 26 of the Act requiring Lexon to provide information on the personnel at Auden Mckenzie who led the negotiations. The question and response given were as follows:

CMA written question *'During the interview of [Lexon Director] conducted by the CMA on 14 March 2018, [Lexon Director] explained that the supply arrangement(s) referred to in question 1 (i.e. the supply of Nortriptyline Tablets by King Pharmaceuticals and Auden*

¹⁸⁰ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, pages 92-93 lines 18-8.

¹⁸¹ Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 124.

Mckenzie to Lexon) were led by Auden Mckenzie and in particular someone in 'finance'. Please confirm whether this is correct and the name of the person at Auden Mckenzie that [Lexon Director] was referring to. Please provide evidence which supports your answers.'

Lexon written response (written by [Lexon Director]) *'Communication was through Auden's sales representative, [Auden Mckenzie Senior Employee 3], and orders were placed and had to be authorised by [Auden Mckenzie Senior Employee 2] before they were processed by Auden Mckenzie. I am not sure of his exact title but I believe it was finance related.'*¹⁸²

[Auden Mckenzie Senior Employee 1]

4.47 In his second interview (11 October 2018), [Auden Mckenzie Senior Employee 1] was asked about his contact with [King Director] between their meeting in mid-2013, and the discussions they had in early 2015 [3]. [Auden Mckenzie Senior Employee 1] described a telephone call he had with [King Director], in which they discussed issues relating to parallel importation of Nortriptyline Tablets, and Lexon's claim to be able to supply Nortriptyline Tablets as a parallel import:

[AM SE 1]: *'I was not in touch with him on a regular basis at all. I think, once he'd called me up again about PIs -- again, you know, with regards to counterfeiting and, you know, people alleging that they can supply product and I think he -- he had, mentioned at some point that, he Lexon were there and I said, "Look" I said, "you know, he's spoken to me and I'll -- you know, I'm -- you know, I'm going to deal with him in my way". I didn't discuss with him what -- what I'm doing or what he's doing. I just said, "You know, I'm aware and I'll -- you know -- you know, the guys contacted me and I'll, deal with it".'*

CMA: *'So, did you say someone from Lexon contacted you?'*

[AM SE 1]: *'Correct.'*

¹⁸² Document NOR-C1729, Lexon's response to question 4 of the CMA's section 26 notice of 13 June 2018.

CMA: *'Do you remember who?'*

[AM SE 1]: *'Probably [Lexon Director], I think. Because [Auden Mckenzie Senior Employee 3] used to -- used to deal with him normally. So, he would have either -- either contacted [Auden Mckenzie Senior Employee 3] or me. '*

CMA: *'Is that [Lexon Director] you're referring to?'*

[AM SE 1]: *'Correct.'*

[...]

CMA: *[How was] 'King involved?'*

[AM SE 1]: *'Well, he -- he was not involved. He just said that, you know, there's all this PI's coming around and these guys have got a whole load of PI's.'*

CMA: *'Lexon?'*

[AM SE 1]: *'Yes. Is it counterfeit or not. I said, "Look, he's been in touch and we'll deal with him".'¹⁸³*

4.48 [Auden Mckenzie Senior Employee 1] described his conversation with [King Director] in more detail later in the interview:

CMA: *'What do you recollect now about [King Director] supplying Lexon with 25 mg Nortriptyline?'*

[AM SE 1]: *'I'm trying to think back because, as I said, I had one -- one conversation where I said they've contacted me and I'll deal with it. But I can't remember the exact context, exactly what was said in the conversation.'*

CMA: *'That's very helpful. So, take me back. So, you recollect one conversation between --'*

[AM SE 1]: *'Yes. Where I said that there was -- I've said this earlier on; that there was parallel importation and they've claimed they can -- they can get stock back.'*

CMA: *'They is Lexon?'*

[AM SE 1]: *'Yes.'*

CMA: *'Yes.'*

[AM SE 1]: *'So, I said, "Look, I think they've been in touch and we'll respond to them". '*

CMA: *'So, what do [sic] you recollect is that [King Director] had a discussion with you about Lexon and parallel importation?'*

¹⁸³ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, pages 21-22 lines 10-6 and page 22 lines 14-22.

[AM SE 1]: *'He just said that there is -- there is a parallel importation source.'*

CMA: *[King Director] ?'*

[AM SE 1]: *'Presumably, yes.'*

CMA: *'Yes, yes.'*

[AM SE 1]: *'And Lexon say they have it. And there was this always concern from day 1 about parallel importation and counterfeit. It was a very -- it was a very real issue. So, every time this, kind of, came up there was always a concern for all of us. I said, "Look, as far as I'm concerned they've been in touch. We'll deal with them".'*

CMA: *'Okay.'*¹⁸⁴

C. Events during the Market Sharing Period: September 2014 – May 2015

I. King and Auden Mckenzie's supplies of Nortriptyline Tablets to Lexon

4.49 Table 6 below sets out the volumes of Nortriptyline Tablets supplied by King and Auden Mckenzie to Lexon, together with the prices charged, in the period January 2014 to December 2015. The cells highlighted in pink indicate the period of the Horizontal Agreement between King and Auden Mckenzie (the dark pink shows when prices of both Auden Mckenzie and King were aligned at £4 per pack).

¹⁸⁴ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, pages 63-64 lines 9-24.

Table 6: The volumes of Nortriptyline Tablets supplied by King and Auden Mckenzie to Lexon, together with the prices charged, in the period January 2014 to December 2015

	Auden Mckenzie's supply of Nortriptyline Tablets to Lexon				King's supply of Nortriptyline Tablets to Lexon			
	10mg		25mg		10mg		25mg	
	<i>Volume</i>	<i>Price</i>	<i>Vol.</i>	<i>Price</i>	<i>Volume</i>	<i>Price</i>	<i>Volume</i>	<i>Price</i>
Jan14	-	-	-	-	550	£38.84	350	£59.88
Feb14	-	-	-	-	600	£38.84	350	£59.88
Mar14	-	-	-	-	500	£38.84	350	£59.88
Apr14	-	-	-	-	300	£43.24	-	-
May14	592	£46.60	296	£74.54	860	£44.72	150	£73.02
Jun14	-	-	-	-	-	-	-	-
Jul14	800	£46.43	-	-	1,000	£48.82	50	£79.83
Aug14	-	-	-	-	750	£48.82	400	£79.83
Sep14	3,400	£4.00	-	-	-	-	1,600	£4.00
Oct14	3,400	£4.00	-	-	-	-	2,000	£4.00
Nov14	3,400	£4.00	-	-	-	-	1,200	£4.00
Dec14	3,400	£4.00	-	-	-	-	1,600	£4.00
Jan15	3,400	£4.00	-	-	-	-	1,600	£4.00
Feb15	3,400	£4.00	-	-	-	-	1,600	£4.00
Mar15	3,400	£57.51	-	-	-	-	1,600	£4.00
Apr15	1,700	£57.51	-	-	-	-	1,600	£4.00
May15	3,400	£57.51	-	-	-	-	1,600	£4.00
Jun15	-	-	-	-	3,400	£4.00	1,600	£4.00
Jul15	-	-	-	-	3,400	£4.00	800	£4.00
Aug15	-	-	-	-	1,600	£4.00	800	£4.00
Sep15	-	-	-	-	-	-	-	-
Oct15	-	-	-	-	5	62.10	-	-
Nov15	-	-	-	-	-	-	-	-
Dec15	-	-	-	-	-	-	-	-

Tablet strength

4.50 From September 2014 to the end of May 2015, despite having hitherto regularly supplied both strengths of Nortriptyline Tablets to Lexon, King stopped supplying 10mg tablets to Lexon and supplied only 25mg tablets until the end of May 2015.

4.51 During the same time period, Auden Mckenzie supplied only 10mg tablets to Lexon.

Price

- 4.52 For the first six months of supply (until February 2015 inclusive), both King and Auden Mckenzie supplied their respective tablets at a price of £4 per pack. The price of £4 per pack starting in September 2014 was a significant discount from the prices at which both King and Auden Mckenzie had previously supplied Nortriptyline Tablets to Lexon, or any other party (see Table 6 at paragraph 4.49 above).
- 4.53 Auden Mckenzie's price to Lexon of £4 for 10mg tablets from September 2014 to February 2015 was significantly below the average price at which it sold 10mg nortriptyline tablets to all other customers in that period, which was approximately £56.70.¹⁸⁵ The lowest price at which Auden Mckenzie supplied any customer other than Lexon in that period was £52.50.¹⁸⁶ In his interview with the CMA, [Auden Mckenzie Senior Employee 3] referred to the price of £4 as '*ridiculously low*'.¹⁸⁷
- 4.54 King's price to Lexon of £4 for 25mg tablets from September 2014 to May 2015 was significantly below its average selling price to all other customers, over the same period, which was £85.80.¹⁸⁸ The lowest price at which King supplied any customer other than Lexon in this period was £65.¹⁸⁹ In his second interview, [King Director] told the CMA that the £4 price was '*well below our cost of goods. So, I'm, I'm losing money by selling*'.¹⁹⁰
- 4.55 In order to set up the pricing of £4 per pack, in September 2014, [King Director] sent UDG (King's pre-wholesaler/distributor) a form setting up '*special pricing*' for Lexon (£4 per pack of 25mg tablets).¹⁹¹
- 4.56 As explained above (see section 3D.III), prices for both 10mg and 25mg tablets had increased steadily following NRIM's entry in January

¹⁸⁵ Documents NOR-C0261.17 and NOR-C0261.18, King's response to questions 10 and 11 of the CMA's section 26 notice dated 20 October 2017.

¹⁸⁶ Document NOR-E1105, CMA analysis based on data submitted by Auden Mckenzie.

¹⁸⁷ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, page 47 line 20.

¹⁸⁸ Documents NOR-C0261.26 and NOR-C0261.27, King's response to questions 10 and 11 of the CMA's section 26 notice dated 20 October 2017.

¹⁸⁹ Documents NOR-C0261.26 and Document NOR-C0261.27, King's response to questions 10 and 11 of the CMA's section 26 notice dated 20 October 2017.

¹⁹⁰ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 77, line 15.

¹⁹¹ Document NOR-E5154, price notification form dated 10 September 2014.

2011. During the period of the Horizontal Agreement, Auden Mckenzie's ASP for 10mg tablets for all customers other than Lexon increased from £52.51 in September 2014 to £57.95 in February 2015. Its ASP for 10mg tablets for all customers remained broadly stable between March 2015 and May 2015.¹⁹² Auden Mckenzie's ASP for 25mg tablets for all customers increased from £85.31 in September 2014 to £95.26 in November 2014, before falling back slightly to £93.47 in May 2015. King's ASP for 10mg tablets for all customers increased from £52.06 in September 2014 to £59.66 in December 2014 and maintained the increased level between December 2014 and May 2015. King's ASPs for 25mg tablets for all customers other than Lexon increased sharply from £80.40 in September 2014 to £97.75 in April 2015 before falling in May 2015 (i.e. the last month of the Horizontal Agreement).

- 4.57 Between March and May 2015, King continued to supply Lexon at a price of £4 per pack, but Auden Mckenzie's price to Lexon increased to £57.51. Further details relating to Auden Mckenzie's price increase are set out at paragraph 4.94 below.

Volumes

- 4.58 In September 2014, the first month of the Horizontal Agreement, Auden Mckenzie and King supplied to Lexon 3,400 and 1,600 10mg and 25mg tablets respectively.¹⁹³
- 4.59 In October 2014, Lexon attempted (unsuccessfully) to order more than 3,400 10 mg tablets from Auden Mckenzie. On 13 October 2014, [X], a member of Auden Mckenzie's sales team, emailed [Auden Mckenzie Senior Employee 3], about a Lexon order for Nortriptyline Tablets

¹⁹² Auden Mckenzie stopped supplying 10mg tablets at £4 to Lexon in February 2015, however it continued to supply volumes to Lexon at a price similar to the one offered to other customers between March 2015 and May 2015.

¹⁹³ Document NOR-C0261.26 King's response to questions 10 and 11 of the CMA's section 26 notice dated 20 October 2017. Document NOR-E1105 CMA analysis based on data submitted by Auden Mckenzie. Document NOR-C2414, Lexon Purchase Orders to King via Alloga dated 16 September 2014 with Lexon references PO344403 and PO345701.

saying, *'only 3,400 has been authorised to send instead of the 4,000 they ordered.'*¹⁹⁴

- 4.60 It appears that Lexon also ordered more than 1,600 of the 25mg tablets from King in October 2014. Data from King (see paragraph 4.49 above) shows that King supplied 2,000 25mg tablets to Lexon in October 2014.
- 4.61 On 31 October 2014, [King Office Manager] emailed [King Director] attaching a copy of a Lexon purchase order (for November) for 2,000 packs of 25mg tablets, at a price of £4 per pack. [King Office Manager] said in her covering email *'2,000 again.....'*¹⁹⁵
- 4.62 [King Director] then emailed a copy of the purchase order to [Auden Mckenzie Senior Employee 1] with the covering email: *'For Info Order will not be processed.'*¹⁹⁶
- 4.63 At interview, neither [King Director] nor [Auden Mckenzie Senior Employee 1] was able to provide any explanation as to why [King Director] sent the 31 October 2014 email with a copy of the Lexon purchase order for November to his competitor, [Auden Mckenzie Senior Employee 1], informing him that the order would not be processed:¹⁹⁷

[King Director]:

- CMA** *'So, why did you send this email?'*
- [KD]:** *'I don't know; because it was -- it was filled.'*
- CMA:** *'Why did you send it to [Auden Mckenzie Senior Employee 1]?''*
- [KD]:** *'I don't know.'*
- CMA:** *'And you say, "For info, order will not be processed".'*

¹⁹⁴ Document NOR-E0676, email from [Employee of Auden Mckenzie] to [Auden Mckenzie Senior Employee 3] dated 13 October 2014.

¹⁹⁵ Document NOR-E1513, email from [King Office Manager] to [King Director] dated 31 October 2014. Document NOR-E1514, Lexon Purchase Order to King dated 31 October 2014, attached to document NOR-E1513.

¹⁹⁶ Document NOR-E1516, email attaching Lexon Purchase Order to King dated 31 October 2014, attached to document NOR-E1515.

¹⁹⁷ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 53 lines 12-15. Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 65 lines 8-16. Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, page 66.

[KD]: *'Yeah, well, it was processed.'*
CMA: *'Why would you want to tell [Auden Mckenzie Senior Employee 1] that the order wouldn't be processed?'*
[KD]: *'I don't know.'*
CMA: *'Did you get a response?'*
[KD]: *'Unless you have an email back, I don't know.'*
CMA: *'Did you discuss the purchase order with [Auden Mckenzie Senior Employee 1]?''*
[KD]: *'I, I can't remember.'*¹⁹⁸

[Auden Mckenzie Senior Employee 1]:

CMA: *'[On 31 October 2014 [King Director] sent you a Lexon purchase order].'*
[AM SE 1]: *'Yes.'*
CMA: *'And it's for 2,000 packs of the 25 mg Nortriptyline tablets, price of £4. That is attached. [...].'*
[AM SE 1]: *'Yes.'*
CMA: *'And would UDG be processing the order on behalf of King Pharmaceuticals or on behalf of Auden?'*
[AM SE 1]: *'We didn't use UDG. I don't -- I don't think we ever used them as a -- a, a pre-wholesaler. I would have to check but I don't think we'd ever used them.'*
CMA: *'Okay. So, if UDG was processing the order on behalf of King, why did [King Director] send you a copy of the invoice?'*
[AM SE 1]: *'I can see that he sent it to me. I've got no idea. I don't know why he sent it to me because, as I said, we didn't even supply them the 25.'*
CMA: *'Were you aware that [King Director] was supplying Lexon with 25 mg?'*
[AM SE 1]: *'From this I would have been. I mean, it's -- it's not something in the front of my mind but this obviously suggests so.'*
CMA: *'So, when -- when did you become aware of what King was doing?'*

¹⁹⁸ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 52-53 lines 26-23.

[AM SE 1]: *'Again, four or five years down the line, I can't pinpoint and say it was here, it was then.'*

CMA: *'But what do you recollect without giving a necessary time? What do you recollect? What did you know?'*

[AM SE 1]: *'I mean, from here it's obviously -- it's that they were supplying 25 mg to him. And this has got the details here.'*

CMA: *'Do you recollect anything else?'*

[AM SE 1]: *'I'll have to think back. Not -- not really, no. But I'll keep thinking, you know, about -- about this. This is October 2014. So, again this is the time where I'm in the sale now. '*
[...]

CMA: *'Were you aware of the terms that King was supplying?'*

[AM SE 1]: *'No, I wasn't. I mean, he's obviously said this. I mean, you know, what I would actually like to know, because I don't know but if you look at my inbox, be it Auden, be it here, you will find tens of thousands of emails which I've never even opened. It's the way I work. So, you know, that's a -- that's another big question. I mean, there are always tens of thousands of emails which I have never even opened. I'm not saying that's the case but I'm just saying I do ignore a lot of emails. I just don't open them. And when you have taken my email boxes, you can verify that and check that data.'*

CMA: *'So, why does [King Director] say in his email [...]'*
"Order will not be processed"?''

[AM SE 1]: *'It's obviously something you're going to have to ask him. Could not... I have no idea why he said that.'*

CMA: *'Why -- why would he contact you about this?'*

[AM SE 1]: *'I don't know.'*

CMA: *'You -- you don't know why [King Director] was contacting you?'*

[AM SE 1]: *'I don't know. I mean --'*

CMA: *'It came out of the blue?'*

[AM SE 1]: *'I'm not saying it came out of the blue but, I mean, what would his logic be ... from here, obviously, I'm supplying 10. It's -- it's -- he's supplying 25. So, he's telling me he's not going to supply. So, I don't understand -- or, what effect would that have on me?'*

CMA: 'Would you consider supplying the 25?'

[AM SE 1]: 'I don't think we did. [...] I don't know but I don't think so.'

CMA: 'So, do you recall your reaction when you got this email and purchase order?'

[AM SE 1]: 'I don't know. And again, and as I said, we are four years down the line.'
[...]

CMA: '[Do you know why [King Director] felt he needed to tell you this [?]'

[AM SE 1]: 'I don't know -- I really don't think that we would have supplied. I don't think so anyway.'

CMA: 'You wouldn't have ...?'

[AM SE 1]: 'I don't think we supplied Lexon, so.'¹⁹⁹

4.64 Despite having stated in interview that the relevant order was processed, in response to a section 26 notice (22 March 2019), King confirmed that it did not process this purchase order.²⁰⁰ In fact, the data from King (see paragraph 4.49 above), shows that King only supplied 1,200 25mg packs to Lexon in November, meaning that the average volume supplied across October and November was 1,600 packs. At interview, [King Director] referred to the 2,000 packs King supplied in October 2014, as being '*counterbalanced*' by the 1,200 packs King supplied in November 2014.²⁰¹

4.65 Thereafter, the volumes supplied by Auden Mckenzie and King to Lexon were stable at 3,400 and 1,600 packs respectively until April 2015. In April 2015, Lexon only ordered 1,700 packs of 10mg tablets from Auden Mckenzie (King continued to supply 1,600 packs of 25mg tablets). The CMA asked Lexon why it ordered 1,700 packs of 10mg tablets. [Lexon Director] said: '*The price had gone up but I had certain customer commitments so ordered accordingly*'.²⁰²

4.66 There is documentary evidence of Lexon subsequently attempting to order more than 1,600 packs from King and more than 3,400 packs from Auden Mckenzie but being refused on both occasions. In

¹⁹⁹ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, pages 59-62 lines 17-3, pages 67-68 lines 22-17 and page 68 lines 2-9.

²⁰⁰ Document NOR-C2978, King's response to question 6 of the CMA's section 26 notice dated 7 March 2019.

²⁰¹ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 51.

²⁰² Document NOR-C3015, Lexon's 25 April 2019 response to section 26 notice of 18 April 2019.

December, Lexon tried to order more than 1,600 packs from King, but King refused to supply anything above that amount. This is clear from an email dated, 1 December 2014 from [King Director] to [Lexon Generics Buyer] saying: *'as discussed agreed quantity is 1,600 packs. Please cancel existing order for 1,700 packs and reorder the correct quantity'*.²⁰³ [Lexon Generics Buyer] immediately forwarded [King Director]'s email to [Lexon Director].²⁰⁴

- 4.67 Similarly, in February 2015, Lexon tried to order more than 3,400 packs from Auden Mckenzie but Auden Mckenzie refused to supply the extra packs. On 17 February 2015, [Auden Mckenzie Senior Employee 3] sent an email, with the subject line *'Lexon'*, to a member of Auden Mckenzie's sales team stating *'We have an order for Nortriptyline would you let me know when this will be delivered.'*²⁰⁵
- 4.68 [S<] (another Auden Mckenzie employee) responded on the same day saying *'The quantity for Nortriptyline has been reduced from 4,000 to 3,400. This should be delivered by Thursday.'*²⁰⁶
- 4.69 On 24 November 2014, [King Director] sent the following SMS message to [Auden Mckenzie Senior Employee 1]: *'Can you call today?'*²⁰⁷
- 4.70 [King Director] told the CMA that he could not recall whether he had a telephone call with [Auden Mckenzie Senior Employee 1] on or around 24 November 2014, nor recall what he had intended or expected to discuss with him.²⁰⁸
- 4.71 On 12 January 2015, [Lexon Director] emailed [Auden Mckenzie Senior Employee 3], pressing for the prompt delivery of an order for 10mg

²⁰³ Document NOR-E8173, email from [Lexon Generics Buyer] to [Director Lexon] dated 1 December 2014.

²⁰⁴ Document NOR-E8173, email from [Lexon Generics Buyer] to [Lexon Director] dated 1 December 2014.

²⁰⁵ Document NOR-E0790, email from [Auden Mckenzie Senior Employee 3] to 'sales' (Lexon) dated 17 February 2015.

²⁰⁶ Document NOR-E0790, email from [S<] (Auden Mckenzie) to [Auden Mckenzie Senior Employee 3] dated 17 February 2015.

²⁰⁷ Document NOR-C1614.1, Extract of messages [King Director] exchanged with [Auden Mckenzie Senior Employee 1] via his mobile phone, provided by [King Director] in response to the CMA's section 26 notice dated 26 April 2018.

²⁰⁸ Document NOR-C3048, [King Director]'s response to the CMA's section 26 notice of 2 May 2019.

nortriptyline tablets.²⁰⁹ At interview, [Lexon Director] explained that Auden Mckenzie *'wouldn't process it because of the price, and they'd obviously have to get approval; and then trying to get approval was just becoming difficult.'*²¹⁰

II. Volumes and revenues in the first six months of the Horizontal Agreement

- 4.72 The data on the volumes and revenues earned by King and Auden Mckenzie from sales of both the 10mg and 25mg nortriptyline during the first six months of the Horizontal Agreement provides an insight into the differential impact of the Horizontal Agreement on each of King and Auden Mckenzie.
- 4.73 From September 2014 to February 2015, during the first six months of the Horizontal Agreement, Auden Mckenzie sold 20,400 packs of 10mg tablets to Lexon at £4 a pack; and its overall volumes of the 10 mg tablets increased by 46,801 packs, more than double the volumes in the previous six months, and revenues increased by 92%. This is despite the low priced, fixed quantity supply deal with Lexon. The increase in ASP to other customers, together with the increase in total Auden Mckenzie's volumes supplied, more than offset any reduction in supply price to Lexon as a result of the Horizontal Agreement. Given the relatively fixed size of the UK market for nortriptyline, the increase in Auden Mckenzie's sales volume of the 10 mg tablets, can only have been at the expense of King's sales.
- 4.74 Indeed, over the same period, King's volumes of 10mg tablets did fall by 16,985 packs, or 21%, compared with the previous six months. However, King's total revenues remained roughly the same, as the increase in the ASP offset the effect of the fall in volumes.
- 4.75 King was supplying 25mg tablets to Lexon at £4 per pack over the same period. King's total volumes sold fell by 10,875 packs or 33%, and King's revenues fell by £1.3m or 55%. At the same time, Auden's volumes also fell, although Auden Mckenzie's revenues fell by just £221,421 or 14%. As indicated by [King Director] in his emails to [Auden Mckenzie Senior Employee 1] below (see paragraph 4.133

²⁰⁹ Document NOR-E8178, email from [Lexon Director] to [Auden Mckenzie Senior Employee 3] dated 12 January 2015.

²¹⁰ Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 73 lines 6-8.

below), the fall in King's volumes of the 25mg nortriptyline tablets is likely to have resulted from a fall in sales to its main customer, Alliance. Alliance purchased 13,407 packs of Paxtibi from its vertically integrated parallel importer, Beachcourse, effectively switching away from King's product towards the 25 mg Paxtibi, owned by Auden Mckenzie in Spain.

- 4.76 Over the period of the Horizontal Agreement, Auden Mckenzie's total revenues from all sales of nortriptyline in the UK increased by £1.8m or 47%, while King's total revenues from all sales of nortriptyline fell by £1.3m or 27%.

III. Events in early 2015

- 4.77 A number of relevant events took place during the latter period of the Horizontal Agreement. These are set out below.

Actavis' acquisition of Auden Mckenzie

- 4.78 On 26 January 2015, having been in discussions with Auden Mckenzie since September 2014, Actavis announced publicly that it would acquire Auden Mckenzie for approximately £306 million.²¹¹

The King Spreadsheet

- 4.79 On 30 January 2015,²¹² following a request from [King Director], [King Office Manager] prepared a spreadsheet to calculate a figure for the 'Total Loss' which King had incurred since it started supplying Lexon 25mg tablets at a price of £4 in September 2014 (the '**King Spreadsheet**'). The King Spreadsheet was finalised the following month.²¹³ The estimated loss was £1,017,570.

²¹¹ In September 2014, [an employee of Auden Mckenzie] made a telephone call to [X] of Actavis (Director, Portfolio and Marketing) to ask if Actavis would be interested in opening discussion around the acquisition by Actavis of Auden Mckenzie (Document NOR-C2937, Accord's response to the CMA's section 26 notice of 20 March 2019). Actavis announcement that it would acquire Auden Mckenzie is at the following link: <https://www.allergan.com/news/news/thomson-reuters/actavis-to-acquire-auden-mckenzie-for-306m-gbp>.

²¹² The last working day of January 2015.

²¹³ On the last working day of February 2015. See Document NOR-E5731, spreadsheet provided with King's response to section 26 notice dated 20 October 2017.

The Spanish PI Offer and [King Director]'s demand for payment from [Auden Mckenzie Senior Employee 1]

- 4.80 On 26 February 2015, [X] sent an email to [Lexon Director] with the subject 'Paxtibi' ('**Spanish PI Offer Email**'). The email contained an offer to supply a large volume of 25mg tablets that had been purchased from Auden Mckenzie via its Spanish distributor:

'My name is [X] and I am writing on behalf of [X] of Madrid, Spain. We spoke yesterday by telephone about our offer of Paxtibi 25 mg. We have a large stock of 100,000 units (25 tabs per unit) that we are offering to our clients in the UK. I quoted a price of between 21 and 23 euros but we can reduce this depending on the number of units ordered. [...]

*I would also like to clarify the situation here in Spain with respect to Biomed and Auden McKenzie. We have purchased this stock of Paxtibi from Auden McKenzie through their local distributor, Biomed, and we are exporting this stock to the UK.'*²¹⁴

- 4.81 Twenty minutes later, [Lexon Director] forwarded the Spanish PI Offer Email to [Auden Mckenzie Senior Employee 1].²¹⁵
- 4.82 On 16 March 2015, [Lexon Director] forwarded the Spanish PI Offer Email (see paragraph 4.80 above) to [King Director].²¹⁶
- 4.83 Both [Auden Mckenzie Senior Employee 1] and [King Director] told the CMA that they recalled discussing the Spanish PI Offer Email. [King Director] told the CMA that, after [Lexon Director] forwarded the Spanish PI Offer Email to him, he ([King Director]) had a '*series of somewhat heated conversations*' with [Auden Mckenzie Senior Employee 1].²¹⁷ He said that in these conversations, he accused [Auden Mckenzie Senior Employee 1] of flooding the UK market for Nortriptyline Tablets by selling a large volume of Nortriptyline Tablets in Spain,²¹⁸ in the knowledge that they would subsequently be parallel

²¹⁴ Document NOR-E8194, email from [X] to [Lexon Director] dated 26 February 2015.

²¹⁵ Document NOR-E8194, email from [Lexon Director] to [Auden Mckenzie Senior Employee 1] dated 26 February 2015.

²¹⁶ Document NOR-E8194, email from [Lexon Director] to [King Director] dated 16 March 2015.

²¹⁷ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 134 line 12.

²¹⁸ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 132 lines 10-12.

imported into the UK.²¹⁹ He said he accused [Auden McKenzie Senior Employee 1] of having artificially inflated the profitability of Auden McKenzie, and damaging King's sales as a consequence.²²⁰ [REDACTED].²²¹ [REDACTED]²²², [REDACTED]²²³, [REDACTED].²²⁴

- 4.84 [Auden McKenzie Senior Employee 1] told the CMA that in 2015, [King Director] [REDACTED]

[King Director] got wind somehow of a lot of parallel import coming into the UK. [REDACTED]".²²⁵

- 4.85 [Auden McKenzie Senior Employee 1] told the CMA that he had not done as [King Director] had alleged, [REDACTED]. He said he therefore told [King Director] *'you know, leave it alone. I'll basically look after you. I'll sort this thing out with you'*.²²⁶ When asked by the CMA if [King Director] quoted a figure he was expecting to receive, [Auden McKenzie Senior Employee 1] said *'[References to substantial sums of money] I don't know? And, as I said, I kept leading him on but I -- I didn't do it'*.²²⁷

- 4.86 On 24 March 2015, [King Director] emailed [Employee of Confiance] (Confiance Limited, a Guernsey based financial services company), regarding a payment he expected from a company called [Company A]:

*'[Company A] have been in contact and said that payment has been made.'*²²⁸

- 4.87 [King Director] told the CMA that [Employee of Confiance] worked at an offshore company, with which he had a relationship.²²⁹ He said he

²¹⁹ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 133 lines 2-13.

²²⁰ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 132 lines 10-15.

²²¹. [REDACTED]

²²². [REDACTED]

²²³. [REDACTED]

²²⁴. [REDACTED]

²²⁵ [REDACTED].

²²⁶ Document NOR-C2307, transcript of [Auden McKenzie Senior Employee 1] interview dated 11 October 2018, page 18 line 2.

²²⁷ Document NOR-C2307, transcript of [Auden McKenzie Senior Employee 1] interview dated 11 October 2018, page 105 lines 1-4.

²²⁸ Document NOR-C1614.4, email chain between [Employee of Confiance] to [King Director] regarding payment dated 24 March 2015 to 14 April 2015.

²²⁹ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 111 line 24.

believed that [Company A] was a company owned by [Auden Mckenzie Senior Employee 1], which would be making the [payment of a substantial sum] to which [Auden Mckenzie Senior Employee 1] had agreed.²³⁰

- 4.88 On 14 April 2015, [King Director] forwarded to [Auden Mckenzie Senior Employee 1] a series of emails he had exchanged with [Employee of Confidence] between 24 March 2015 and 14 April 2015, in which [King Director] had been asking [Employee of Confidence] whether the payment from [Company A] had been received.²³¹
- 4.89 [King Director] said that he forwarded his email exchange with [Employee of Confidence] to [Auden Mckenzie Senior Employee 1] because he had not received the payment of [a substantial sum].²³²
- 4.90 Subsequent developments regarding the Spanish PI Offer Email and [King Director]'s demand for payment from [Auden Mckenzie Senior Employee 1] are set out in paragraphs 4.130 to 4.149 below.

The grant of Medreich's MA

- 4.91 On 24 February 2015, Medreich notified [Lexon Director] that its applications for MAs for Nortriptyline Tablets had been '*signed off pharmaceutically by the Assessor on 16.02.2015*'. It went on to state '*[h]opefully we will receive the approval soon*'.²³³ [Lexon Director] responded:

'Great news

Please can we push the button on manufacture as we can make around 250k per month on this but the window is slowly getting slower by the day'.²³⁴

²³⁰ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 118-119 lines 14-13.

²³¹ Document NOR-C1614.4 email chain between [Employee of Confidence] to [King Director] regarding payment dated 24 March 2015 to 14 April 2015.

²³² Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 117-118 line 21-5.

²³³ Document NOR-E8185, email from [X] (Medreich) to [Lexon Director] dated 24 February 2015.

²³⁴ Document NOR-E8185, email from [Lexon Director] to [X] (Medreich) dated 24 February 2015.

4.92 Medreich's MAs for Nortriptyline Tablets were granted on 26 March 2015.²³⁵ It is clear from the documentary evidence that [King Director] was aware of this from at least 16 April 2015. [Consultant to King] forwarded [King Director] an email stating:

*'Not sure if you were aware, that Medreich have been granted a license on Nortriptyline'*²³⁶

4.93 [King Director] forwarded the email notification to [King Office Manager] on the same day, stating:

*'[Lexon Director] did tell me his licence had come thru'*²³⁷

IV. Developments in Auden Mckenzie's and King's supply of Nortriptyline Tablets between March 2015 and May 2015

4.94 As set out in paragraphs 4.49 to 4.51 above, and as shown in the pink shaded rows of Table 6 above, between March 2015 and May 2015 Auden Mckenzie continued to supply only 10mg tablets and King continued to supply only 25mg tablets to Lexon. However, while King continued to supply at a price of £4 per pack, on or before 5 March 2015, Auden Mckenzie increased its supply price for 10mg tablets from £4 per pack to £57.51 per pack, in line with its prices for other customers, and representing a 20% discount off the Drug Tariff.²³⁸

4.95 The increase in price is evidenced in an email dated 5 March 2015 from [Lexon Director] to [Auden Mckenzie Senior Employee 3] saying: *'Order enclosed as discussed Have cancelled the previous one'*. The email attached a purchase order for 3,400 packs of 10mg tablets, at a price of £57.51 per pack.²³⁹

²³⁵

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/424805/Granted_marketing_authorisations_March_2015.pdf.

²³⁶ Document NOR-E1545, email from [King Director] to [King Office Manager] dated 16 April 2015.

²³⁷ Document NOR-E1545, email from [King Director] to [King Office Manager] dated 16 April 2015.

²³⁸ The price was increased no earlier than 19 February 2015, when Lexon submitted an order (PO373992) at the discounted price of £4 per pack which was fulfilled. The average prices at which Auden Mckenzie sold 10mg tablets to customers other than Lexon were £58.09, £57.91 and £57.77 in March, April and May 2015 respectively.

²³⁹ Document NOR-E8192, email from [Lexon Director] to [Auden Mckenzie Senior Employee 3] dated 5 March 2015 and document NOR-E8193, purchase order PO383764 attached to NOR-E8192.

- 4.96 In April 2015, Lexon ordered 1,700 packs of 10mg nortriptyline tablets from Auden Mckenzie. The CMA asked Lexon why it had ordered 1,700 packs, and whether it had tried to order more than 1,700 packs. Lexon told the CMA that it had not tried to order more than 1,700 packs. It said that while Auden Mckenzie's price to Lexon had increased, it had certain customer commitments, and so ordered accordingly.²⁴⁰
- 4.97 On 20 March 2015, [King Director] emailed [Auden Mckenzie Senior Employee 2] referring to a conversation he had had with [Auden Mckenzie Senior Employee 1]. It appears from the penultimate sentence of [King Director]'s email that he had also attached a copy of the February 2014 Spanish PI Offer Email:²⁴¹

[Auden Mckenzie Senior Employee 2]
I spoke to [Auden Mckenzie Senior Employee 1] in Dubai earlier in the week and he thought you might be in a better position to answer a couple of points.
Are you going to supply [Lexon Director] with the 10mg in April? If not we will.
Sales data ex-Biomed have, apparently, been received at your offices. [Auden Mckenzie Senior Employee 1] said he would ask [Employee of Auden Mckenzie] to forward these to me, however, I have yet to receive them.
I am not sure whether you have access to IMS data for Spain and have attached BPI figures for 2012 – 2014.²⁴² There are no single packs so the total volume sales would be 140,000, 195,000 and 231,000 packs in 2012 / 13 / 14, respectively.

²⁴⁰ Document NOR-C3015 Lexon's response to question 2 of the CMA's section 26 notice dated 18 April 2019.

²⁴¹ The CMA only has a copy of email to [King Director], not the original email from [King Director]. In a response dated 14 March 2014 to a section 26 notice dated 7 March 2019, which asked if the email had been deleted (NOR-C2855) King Limited/Praze stated that the email could not be located on King's IT system. In a letter dated 20 March 2019, the CMA asked what explanations there might be for the absence of the email, aside from deletion (NOR-C2893). On 22 March 2019 King Limited/Praze provided a revised response to the 7 March 2019 section 26 notice; other than deletion, King Limited/Praze had no other explanations that might explain why the email exchange could no longer be located on King's IT system (NOR-C2978).

²⁴² IMS was a provider of market information to businesses in the pharmaceutical industry. IMS collected data from different sources to develop data services that it sells to pharmaceutical companies. BPI refers to the British Pharmaceutical Index (BPI), which was an IMS data product measuring the sales of pharmaceutical products to retail pharmacies and dispensing doctors in the UK.

The increase in sales may, in part, be related to the discontinuation of the non-film coated 25mg nortriptyline tablet that was available in Spain, however, it would not explain how anyone could get hold of the volumes outlined in the attached email sent to [Lexon Director].

Perhaps you could give me a call.

[King Director]'.²⁴³

(Emphasis added)

4.98 [Auden Mckenzie Senior Employee 2] responded as follows:

[King Director]

Not aware of anything.

Will find out and revert.

Kind regards

[Auden Mckenzie Senior Employee 2]'.²⁴⁴

4.99 [Auden Mckenzie Senior Employee 1] was asked about these messages in his 11 October 2018 interview with the CMA. He told the CMA that he could not recollect a discussion with [King Director] about the supply of 10mg tablets around the time of [King Director]'s email of 20 March 2015.²⁴⁵

4.100 [King Director] was also asked about these messages. He told the CMA that he was concerned that Auden Mckenzie might not supply Lexon with 10mg tablets, because [§<]. [King Director] said he therefore asked Auden Mckenzie whether it would be supplying Lexon with 10mg tablets as he wanted to ensure that Lexon were not put in a position where they would apply for a licence to import the Lexon PI.²⁴⁶

4.101 [King Director] explained that he had stated in his email '*If not we will*' because he did not want to supply Lexon, if it was being supplied the 10mg tablets from another source:

²⁴³ Document NOR-E0813, email from [King Director] to [Auden Mckenzie Senior Employee 2] dated 20 March 2015.

²⁴⁴ Document NOR-E0813, email from [Auden Mckenzie Senior Employee 2] to [King Director] dated 20 March 2015.

²⁴⁵ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, pages 79-80.

²⁴⁶ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 68 lines 6-15.

CMA: *'Why, you say, "If not, we will". Why is it that your decision, I mean, about whether to supply 10 milligram nortriptyline to Lexon -- you say, "If not, we will". Does that indicate that your decision depends on whether Auden Mckenzie is going to supply the 10 milligram?'*

[KD]: *'It, it do... -- in the sense that what, what I don't want to end up doing is, effectively, supplying product to somebody who's already got the product from another source.'*

CMA: *'Why is that?'*

[KD]: *'Because, effectively, the guy's getting two orders.'*

CMA: *'Yeah, but you'd be selling more nortriptyline, so why would you not want to supply?'*

[KD]: *'But if you look at the pricing, the pricing's well below our cost of goods. So, I'm, I'm losing money by selling. If you like, I have no commercial incentive to sell. My only commercial incentive is to prevent the importation of the product.'²⁴⁷*

4.102 [Auden Mckenzie Senior Employee 2] told the CMA that he could not remember receiving [King Director]'s email of 20 March 2015²⁴⁸, or whether he spoke about it with [Auden Mckenzie Senior Employee 1].²⁴⁹ He said that he did not know how [King Director] knew that Auden Mckenzie might be supplying Lexon with Nortriptyline Tablets in April 2015, although he told the CMA that it would not have been difficult to obtain this information:

'it's not difficult to find out who's supplying who [...] when there are two or three players who, who are supplying the [market]. [...] The buyers always tell you "Oh, we're buying from so and so, if you want to then give us X better price", you know'.²⁵⁰

4.103 Between 27 and 30 March 2015 [Lexon Director] and [Auden Mckenzie Senior Employee 1] exchanged the following text messages:

²⁴⁷ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 76-77 line 24-17.

²⁴⁸ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, page 100 lines 23-25, page 110 lines 4-15.

²⁴⁹ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, page 101 lines 11-15.

²⁵⁰ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, page 112.

27 March 2015 [LD]: *'Hi [Auden Mckenzie Senior Employee 1]
Just had a chat with [King Director]
who said that you had agreed to
continue supply as prior on the 10mg
at the original price
Please confirm
Regards
[Lexon Director]'*

30 March 2015 [AM SE 1]: *'Can only 20% off'.²⁵¹*

4.104 [Lexon Director] told the CMA in his second interview that [Auden Mckenzie Senior Employee 1]'s (reference to '20% off' meant that the price would be a 20% discount off the Drug Tariff.²⁵²

4.105 In his third interview (21 February 2019), [Lexon Director] explained that he had spoken to [King Director] about Auden Mckenzie's supply of 10mg tablets, because he had been unable to get information from Auden Mckenzie:

'I wasn't getting any price or any feedback and I was trying to establish ... my biggest concern was I'd got orders from customers that I've got to fulfil, and if nobody's telling me anything ... so I couldn't get through to anybody and I seem to recall I spoke to [King Director] on the basis that did he know anything? Could he have a chat? Is there something wrong that I don't know about? And then that's what triggered that text effectively.'²⁵³

4.106 [Lexon Director] told the CMA that [King Director] had told him that Auden Mckenzie would supply at the 'original price'. He commented

²⁵¹ Document NOR-E8457.3, text messages between [Lexon Director] and [Auden Mckenzie Senior Employee 1] dated 27 March 2015 and 30 March 2015. In March 2015, the Drug Tariff price for 10mg nortriptyline was £72.06, 20% less than the Drug Tariff was therefore £57.65.

²⁵² Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 69 lines 17-20.

²⁵³ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 105, lines 3-8.

that [Auden Mckenzie Senior Employee 1] was *'saying one thing to [King Director] -- and then another thing to me'*.²⁵⁴

4.107 [Auden Mckenzie Senior Employee 1] told the CMA *'[Lexon Director] is saying he had a chat with [King Director] that I had agreed. I don't think I would have had this conversation with [King Director]'*.²⁵⁵ [Auden Mckenzie Senior Employee 1] also said that he could not recollect having had a conversation with [King Director] about Auden Mckenzie's supply of 10mg tablets to Lexon.²⁵⁶

4.108 [King Director] was presented with [Lexon Director]'s 27 March 2015 text message at his second interview. He said that he could not remember the conversation referred to in [Lexon Director]'s text message (*'Just had a chat with [King Director]'*):

[Lexon Director]'s text message was presented to [King Director]

[KD]: *'Okay. Yeah. So, I've, obviously, spoken to [Lexon Director].'*

CMA: *'Yeah.'*

[KD]: *'Though, I don't -- again, I don't remember the conversation.'*

CMA: *'So, you don't remember what was discussed in that conversation?'*

[KD]: *'No, other than I, I would presume this is post the acquisition of Auden Mckenzie by Actavis.'*

CMA: *'So, this is March 2015.'*

[KD]: *'Yes.'*

CMA: *'So, just to help orientate you, this is a week after the last email, the two emails with [Auden Mckenzie Senior Employee 2] that we're just looking at, the ... This is 27 March and the ones before were 20 March 2015... It says here.'*

[KD]: *'Right, okay.'*

²⁵⁴ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 110, lines 11 – 17.

²⁵⁵ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, page 82 lines 21-23.

²⁵⁶ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, page 85 lines 8-9.

CMA: *'So, why did you -- so, according to [Lexon Director], he had a chat with you about the terms and supply from Auden Mckenzie. So, why would you have been talking to Auden --'*

[KD]: *'Well, I, I --'*

CMA: *'— [Lexon Director] about Auden's supply terms?'*

[KD]: *'I would've been -- I would've been ... if this -- this post dates the acquisition of Auden Mckenzie by Actavis. And again, it comes back to trying to ensure that the, the dea... -- the arrangements that were in place to supply product to ... ensure that Lexon didn't apply for a parallel import license were in place.'*²⁵⁷

4.109 On 30 March 2015, approximately two hours after [Auden Mckenzie Senior Employee 1] had texted [Lexon Director] to inform him he could only supply at 20% off the Drug Tariff, [King Office Manager] sent the following email to [King Director] recording a telephone message from [Lexon Director]:

'[Lexon Director] called he said to tell you that [Auden Mckenzie Senior Employee 1] does not want to do the price so he will order of [sic] us...

If you want to call him he is on his mobile and also on annual leave

*[King Office Manager]'*²⁵⁸

4.110 At interview, [King Director] said he did not remember the email and did not recall any conversation with [Auden Mckenzie Senior Employee 1] happening at all. He said he did not know what [Lexon Director] meant by *'the price'* in the email. He also was not sure whether [Lexon Director] had tried to order 10mg tablets from King at the time and he stated that *'obviously, he [Lexon Director] doesn't order from us because we don't supply them till June [2015]'*.²⁵⁹

4.111 Lexon continued to purchase 10mg tablets from Auden Mckenzie in April and May 2015. King did not supply 10mg tablets to Lexon until June 2015 (see Table 6 at paragraph 4.49 above).

²⁵⁷ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 85 lines 7-11.

²⁵⁸ Document NOR-E1531, email from [King Office Manager] to [King Director] dated 30 March 2015.

²⁵⁹ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 87 lines 19-20.

4.112 At his third interview, the CMA asked [Lexon Director] why Lexon continued to take supply of 10mg tablets from Auden Mckenzie in April and May 2015:

CMA: *'you don't actually [...] start [taking supply of 10mg from King] till June. And, I just wanted to know, ask why?'*

[LD]: *'I'm guessing, because, again, forecast supply chain, [King Director] possibly wouldn't have enough stock, because --'*

CMA: *'Okay.'*

[LD]: *'-- he was planning to have that volume [...] Whether it was it's taken him three months to agree to it or not or set it up or supply chain. It's one of those things [...] So I wouldn't want to order from Auden unless I'd have to.'*

CMA: *'Yeah.'*

[LD]: *'So I'm guessing that it was because [King Director] had said, "Well, I've not forecasted your stocks until then, so I can't really supply you."' 260*

4.113 On 16 April 2015, Lexon placed an order with Alloga, King's distributor/pre-wholesaler, for 1,600 packs of 25mg tablets at £4 per pack.²⁶¹ [King Office Manager] forwarded the order to [King Director] and they exchanged the following emails:

[KOM]: *'Order has arrived – are we still saying no?'*

[KD] *'Fill the order.'*

[KOM]: *'Has something changed again?'*

[KD] *'No why*

1600 packs of the 25 is all that I saw

Did I miss something'

[KOM]: *'You said we were not to fill their order after the phone call I received about the pricing. I will ask UDG to fill order.' 262*

²⁶⁰ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, pages 105-107, lines 27-7.

²⁶¹ Document NOR-E1539, purchase order from Lexon to UDG (King's distributors) dated 14 April 2015.

²⁶² Document NOR-E1549, email exchange between [King Office Manager] and [King Director] dated 26 April 2015.

- 4.114 At interview, [King Director] told the CMA he did not know why [King Office Manager] was querying the order, or what she was referring to when she referred to the phone call about pricing.²⁶³
- 4.115 At interview, [King Office Manager] said that she did not recall the *'phone call I received about pricing'*, or who it was from. She said that she did not know what she had meant by her comment *'has something changed again'*.²⁶⁴
- 4.116 Also, on 16 April 2015, Lexon submitted an order to Auden Mckenzie for 10mg tablets.²⁶⁵ On 21 April 2015, [Lexon Director] texted [Auden Mckenzie Senior Employee 1] to follow up on the order submitted on 16 April 2015:
- 'Can you please get my order approved for shipment ASAP as I am trying to play ball but it's a constant ball ache to get delivery'*.²⁶⁶
- 4.117 [Lexon Director] said in his second interview (2 August 2018) that the meaning of his comment that he was *'trying to play ball'* was a reference to the fact that he was not importing parallel imports.²⁶⁷
- 4.118 On 23 April 2015, Auden Mckenzie fulfilled Lexon's order of 16 April at a price of £57.51.²⁶⁸ The price of £57.51 was 20% less than the March 2015 Drug Tariff of £72.06.²⁶⁹
- 4.119 Auden Mckenzie's last supplies of 10mg tablets to Lexon were made in May 2015.
- 4.120 Actavis completed its acquisition of Auden Mckenzie on 29 May 2015.

²⁶³ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 94.

²⁶⁴ Document NOR-C2884, transcript of [King Office Manager] interview dated 31 January 2019, page 78-79.

²⁶⁵ Document NOR-E0826, email from [Lexon Generics Buyer] to [Auden Mckenzie Senior Employee 3] dated 16 April 2015.

²⁶⁶ Document NOR-E8457.4, text message from [Lexon Director] to [Auden Mckenzie Senior Employee 1] dated 21 April 2015.

²⁶⁷ Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 71 lines 17-18.

²⁶⁸ Document NOR-C2413, Lexon Purchase Order to Auden Mckenzie dated 23 April 2015, and with Lexon reference PO395399.

²⁶⁹ Document NOR-C0929, NHS BSA's response to the CMA's section 26 notice dated 13 December 2017.

D. Events after the Infringement: June 2015 onwards

I. King takes over supplies of 10mg tablets to Lexon

- 4.121 On 3 June 2015, [King Director] emailed [Lexon Director] to confirm that he had instructed UDG to arrange '*special pricing*' for 10mg tablets, in addition to the special pricing that was already in place for 25mg tablets.²⁷⁰
- 4.122 There is no documentary evidence of any negotiation on the terms on which King would supply the 10mg tablets to Lexon from June 2015. In interview [King Director] said that he '*would've had to have approached [Lexon Director] blind and said....what quantities were you getting and at what price*'.²⁷¹ However, [King Director] did not remember any such negotiation taking place.²⁷²
- 4.123 On 11 June 2015, Lexon ordered 3,400 packs of 10mg tablets and 1,600 packs of 25mg tablets from King at a price of £4 per pack. The order for 10mg tablets therefore replicated the terms on which Auden Mckenzie previously supplied Lexon.²⁷³ This order was fulfilled by King.
- 4.124 In July, King again supplied 3,400 10mg tablets to Lexon at £4 per pack, but only supplied half of the previous quantity of 25mg tablets (800 tablets).
- 4.125 King's last supply of Nortriptyline Tablets at the reduced price of £4 per pack was in August 2015, when it supplied 1,600 10mg packs and 800 25mg packs.
- 4.126 The termination of King's supply arrangement with Lexon followed a series of messages and discussions between [King Director] and [Lexon Director] in July and August regarding Medreich's supply of Nortriptyline Tablets to Teva (as part of its Product Development and Profit Sharing Agreement with Lexon) and, more specifically, the prices that Lexon/Medreich was charging to Teva (see from paragraph 4.127 below).

²⁷⁰ Document NOR-E8213, email from [King Director] to [Lexon Director] dated 3 June 2015.

²⁷¹ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 72 lines 1-2.

²⁷² Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 72 line 17.

²⁷³ Document NOR-C2414, Lexon Purchase Orders to King via Alloga dated 11 June 2015 with Lexon references PO408968.

4.127 In one series of text messages exchanged between [King Director] and [Lexon Director] on 5 August 2015, [King Director] referred to the fact that Medreich (Lexon's development partner) were '*producing*' and asked, if that were the case, why Lexon had sent an order to King:

[KD]: *'[Lexon Director]
Teva will supply Bestway/CooP for total demand from
September
Received an order from Lexon. If Medreich are producing,
why?
[King Director]'*

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

[KD]: *'I won't be stuck with stock
Call me when you get a chance.'²⁷⁴*

4.128 Documents from the following days evidence the point at which King refused to continue supplying Lexon at the price of £4 per pack. On 6 August 2015, Lexon submitted an order to King for 1,800 packs of 10mg tablets at a price of £4 per pack.²⁷⁵ The following day, Lexon submitted another order to King for 1,600 packs of 10mg tablets and 800 packs of 25mg tablets, both at a price of £4 per pack.²⁷⁶ On 10 August 2015, [King Director] forwarded Lexon's order of 6 August 2015 to [Lexon Director]. His covering email stated:

*'[Lexon Director]
Agreed for your order last week to be filled, to help you out.
Not happy to fill this.
[King Director]'.²⁷⁷*

²⁷⁴ Document NOR-E8457.1, iMessage from [King Director] to [Lexon Director] dated 5 August 2015. Document NOR-E8457.8, iMessage from [Lexon Director] to [King Director] dated 5 August 2015. Document NOR-E8457.2, iMessage from [King Director] to [Lexon Director] dated 5 August 2015.

²⁷⁵ Document NOR-E5158, Lexon order PO429914 attached to email dated 6 August 2015.

²⁷⁶ Document NOR-C2414, Lexon Purchase Orders to King via Alloga dated 7 August 2015 with Lexon references PO429389.

²⁷⁷ Document NOR-E8230, email exchange between [King Director] and [Lexon Director] dated 10 August 2015.

4.129 Half an hour later, [Lexon Director] replied as follows:

*'No probs
Just spoke to my buyer and he sent this as he under ordered
on the first order
I have asked him to cancel
[Lexon Director]'*²⁷⁸

II. Spanish Parallel Imports, the 2017 Text Messages and [King Director]'s demand for payment from [Auden Mckenzie Senior Employee 1]

4.130 After the period of the Horizontal Agreement, there were various contacts between [Auden Mckenzie Senior Employee 1] and [King Director] relating to the volume of parallel imports coming into the UK market from Spain.

4.131 On 26 June 2015, [Auden Mckenzie Senior Employee 1] forwarded to [King Director] an email he had received from [X<] (Biomed) containing Biomed sales data for 25mg Paxtibi in Spain, from January to May 2015.²⁷⁹

4.132 Later that day, [King Director] replied to [Auden Mckenzie Senior Employee 1]:

'[Auden Mckenzie Senior Employee 1]

How do we know the [Biomed] sales are genuine?

It does not tally with the UK picture where the whole of Boots is being supplied by PI (approx. 8,000 packs of Paxtibi).

Really need a stock reconciliation from the Biomed distributor and a check with batch manufacturing records from the contract manufacturer.

²⁷⁸ Document NOR-E8230, email exchange between [King Director] and [Lexon Director] dated 10 August 2015.

²⁷⁹ Document NOR-E8374, email from [Auden Mckenzie Senior Employee 1] to [King Director] dated 26 June 2015 and Document NOR-E8384, attachment to NOR-E8374.

Would be good to talk if you have time.

*[King Director]'*²⁸⁰

- 4.133 On 6 July 2015, [King Director] emailed [Auden Mckenzie Senior Employee 1]. Attached to the email was a spreadsheet, which [King Director] described in the body of his email as an analysis by Alliance Unichem:²⁸¹

'[Auden Mckenzie Senior Employee 1]

Thanks for the call.

The Spanish sales data forwarded most probably reflect sales in Spain, however, they exclude grey market sales.

As I said Alliance Unichem have done an analysis for the first five months of this year – see attached.

Sales to Boots less than 40 packs per month – historically they were over 2,000.

Similarly, Coop / Bestway were around 800 packs per month and are now 0.

There is, therefore, at least 12,000 of packs of Paxtibi coming in to the UK on a monthly basis.

I am around next week if you want to meet up but I am away the week after.

*[King Director]'*²⁸²

September 2017 – October 2017

- 4.134 Over two years later, on 8-9 September 2017 [King Director] and [Auden Mckenzie Senior Employee 1] exchanged the following text messages (the '**2017 Text Messages**'):

²⁸⁰ Document NOR-E8374, email from [King Director] to [Auden Mckenzie Senior Employee 1] dated 26 June 2015.

²⁸¹ Document NOR-E8373, attachment to [King Director] email to [Auden Mckenzie Senior Employee 1] dated 6 July 2015.

²⁸² Document NOR-E8372, email from [King Director] to [Auden Mckenzie Senior Employee 1] dated 6 July 2015.

[KD]: [Irretrievably deleted message]
 [KD]: [Irretrievably deleted message]
 [AM SE 1]: *Yu need it onshore which is what I need to organise. This matter has nothing to do with [Individual A; an individual who had been involved in the supply of Nortriptyline Tablets]. As you are trying to be smart I'm [sic] will inform the cma'*

[AM SE 1]: *'[X]'*
 [AM SE 1]: *'I have nothing to lose'*
 [KD]: *'Two and a half years since you assured me that a payment would be made and we agreed a figure.'*

[AM SE 1]: *'I will do as my message says'*
 [KD]: *'I think we need to meet/talk. Your proposed plan of action opens up the possibility of the establishment of a cartel/collusion, which has both personal and criminal implications. This would involve not only you and me but also [Individual A] and [Individual B; an individual who had been involved in the supply of Nortriptyline Tablets].'²⁸³*

4.135 The 2017 Text Messages were deleted by both [King Director] and [Auden Mckenzie Senior Employee 1] from their mobile phones before the devices were obtained by the CMA in October 2017.²⁸⁴ The CMA was able to recover metadata from [Auden Mckenzie Senior Employee 1]'s phone which revealed that in total eight texts were sent on 8-9 September 2017. The CMA was also able to recover from [Auden Mckenzie Senior Employee 1]'s mobile device the content of six of the deleted texts (third to eighth texts) but was not able to recover the content of the first two texts in the series. These unrecovered texts were sent by [King Director] to [Auden Mckenzie Senior Employee 1].

²⁸³ Document NOR-E8458.1, text message exchange between [Auden Mckenzie Senior Employee 1] and [King Director] dated 8 September 2017.

²⁸⁴ See further paragraph 4.149 below.

The Background to the 2017 Text Messages

- 4.136 [King Director] and [Auden Mckenzie Senior Employee 1] both told the CMA that the 2017 Text Messages related to the payment [Auden Mckenzie Senior Employee 1] had agreed to make to [King Director] in early 2015, in connection with [King Director]'s accusation that [Auden Mckenzie Senior Employee 1] had sold large volumes of 25mg Paxtibi in Spain (see paragraph 4.83 above).²⁸⁵
- 4.137 [King Director] told the CMA that [Auden Mckenzie Senior Employee 1] did not make the payment he had agreed to in early 2015, and that in retrospect, [Auden Mckenzie Senior Employee 1] had been '*stringing me along*'.²⁸⁶ [Auden Mckenzie Senior Employee 1] told the CMA that he had had no intention of making the payment, and had '*led [King Director] on and on and on for two and a half years*'.²⁸⁷
- 4.138 [King Director] and [Auden Mckenzie Senior Employee 1] both told the CMA that the 2017 Text Messages were triggered by [King Director] involving [Individual A] in their correspondence about the agreed payment. [King Director] said that he had told [Individual A] that [Auden Mckenzie Senior Employee 1] owed him money, to try and '*blacken his reputation [...] [✂]*', and to pressure [Auden Mckenzie Senior Employee 1] into making the payment.²⁸⁸ [Auden Mckenzie Senior Employee 1] referred to [King Director] having sent a message to [Individual A], in order to embarrass him.²⁸⁹
- 4.139 [King Director] referred to the 2017 Text Messages as a '*kiss off*': '*my interpretation was it was a, as I would call it, a kiss off. He was just saying you're not gonna get your money, stop bothering me*'.²⁹⁰

²⁸⁵ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 141 lines 21-22. Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, page 108.

²⁸⁶ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 128 lines 20-21

²⁸⁷ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, page 112 lines 4-5.

²⁸⁸ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 143 lines 6-16.

²⁸⁹ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, page 110, lines 7-9.

²⁹⁰ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018 Page 160 line 3-5.

The meaning of the 2017 Text Messages

4.140 [Auden Mckenzie Senior Employee 1] told the CMA that [X].²⁹¹ He told the CMA that the information he was threatening to tell the CMA (*'As you are trying to be smart I'm [sic] will inform the cma'*), was that [King Director] had met with *'other Nortriptyline licence holders'*:

[AM SE 1]: *'[King Director] was complaining about -- in various emails about his sales dropping. And in one conversation he says, "Look, I have -- I have met up with other Nortriptyline licence holders" because I think subsequently there were other holders in the market [X]. So, I was -- you know, basically I said, "You know, that could be -- that could be -- you know, that could be interesting information for [the CMA] to know". So, I said to him, "If you think you're smart, I can do this" [...]*
*You know, this was not -- it was actually a bit -- it was, kind of, like a playground silly thing, you know, kind of, "If you're going to do this, I'm going to do this to you".'*²⁹²

4.141 [King Director] told the CMA that [Auden Mckenzie Senior Employee 1] knew that he had met with [Lexon Director] and [Alissa Director]. He said that he therefore assumed that [Auden Mckenzie Senior Employee 1] would inform the CMA that there was some sort of collusion between King, Lexon and Alissa.²⁹³ [King Director] said of [Auden Mckenzie Senior Employee 1]'s threat to *'inform the CMA'* that *'I didn't think there was anything there but what I wanted to do was make him back off.'*²⁹⁴ He said that his final message was an *'empty counterthreat'*:

'I was frightened I think is the right expression about that so um I went back to him and tried to basically pull... made a counterthreat which would have pulled in everybody [X] that I knew he had dealings with and I thought that's a bit a [X] thing to do but that's what I did and that's what I went back with something [...] it was

²⁹¹[X].

²⁹² Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, page 113 line 8-18 and pages 114-115 lines 25-1.

²⁹³ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 137, lines 16-20.

²⁹⁴ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 154 lines 9-10.

*an empty threat from my perspective. It was an empty counter-threat.*²⁹⁵

4.142 In his second interview, [Auden McKenzie Senior Employee 1] recollected responding to [King Director]'s iMessage of 9 September:

*'then [King Director] says, "I think we need to talk. Your proposed plan of action opens up the possibility of cartel collusion which has personal and criminal implications. This would involve not only you, me but also [Individual A] and [Individual B]". And I remember saying to him, "You can do what you want" yes, because I don't think that -- you know, after -- I haven't done anything. So, if this is -- if this is -- if this is what you intend to do, do it. And I'll do what I have to do. It all -- it all got very, very ugly.'*²⁹⁶

4.143 On 10 October 2017, the CMA conducted unannounced inspections on a number of pharmaceutical companies.

4.144 On 10 October 2017, at 14:25, [Auden McKenzie Senior Employee 1] called [King Director]. The call had a duration of 2 minutes and 40 seconds.²⁹⁷

4.145 On 11 October 2017, between 07:07 and 07:45, [Auden McKenzie Senior Employee 1] made four telephone calls to [King Director]; one at 07:07, and three more between 07:44 and 07:45. An inspection of [Auden McKenzie Senior Employee 1]'s mobile phone shows that the 07:07 call had a duration of 2 seconds. The first of the three calls between 07:44 and 07:45 had a duration of 16 seconds, the second had a duration of 0 seconds, and the third had a duration of 2 minutes and 20 seconds.²⁹⁸ [King Director]'s mobile phone recorded the second call, at 07:44, as a missed call.²⁹⁹

²⁹⁵ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 149 lines 22-26 and page 150 lines 25-26.

²⁹⁶ Document NOR-C2307, transcript of [Auden McKenzie Senior Employee 1] interview dated 11 October 2018, page 109, lines 1-7.

²⁹⁷ Document NOR-E8458.2, telephone call made by [Auden McKenzie Senior Employee 1] to [King Director] on 10 October 2017.

²⁹⁸ Document NOR-E8458.2, telephone calls made by [Auden McKenzie Senior Employee 1] to [King Director] on 11 October 2017.

²⁹⁹ Document NOR-E8476.1, telephone call made by [Auden McKenzie Senior Employee 1] to [King Director] on 11 October 2017.

4.146 [Auden Mckenzie Senior Employee 1] told the CMA that an employee of another company whose subsidiary had been inspected by the CMA had called him and told him that *'the CMA was all over the place in the UK'*. He said he had also been contacted by an employee of [Individual A], who had asked for details of a lawyer specialising in competition law, following a visit by the CMA to premises. [Auden Mckenzie Senior Employee 1] said that through these contacts, he had become aware of activity by the CMA. He said that due to the proximity in time of his message to [King Director] on 8 September 2017 (*'As you are trying to be smart I'm [sic] will inform the cma'*), he had been concerned that [King Director] would assume that he had contacted the CMA, prompting its activities. He said that he called [King Director] on 10 October 2017 with the purpose of explaining that he had not been in contact with the CMA.³⁰⁰

4.147 [Auden Mckenzie Senior Employee 1] told the CMA that his call with [King Director] on 10 October 2017 was heated, and that he called [King Director] again on 11 October 2017 to provide further reassurance that he had not been in contact with the CMA, and that the CMA's activity had not been prompted by his actions.³⁰¹

4.148 [King Director] described phone calls he had with [Auden Mckenzie Senior Employee 1] around this time, in his first interview:

[KD]: *'Well so what happened... we had these... these texts [the 8-9 September 2017 texts] and then I get a phone call from him on the 10th October ...'*

CMA: *'Of which year?'*

[KD]: *'Last year [2017] saying that he'd received a call from a [...] friend who'd heard that CMA raids were going on. And I went – he said it's nothing to do with me, I went absolutely ballistic as you can imagine cause he'd threatened... he'd threatened to inform the CMA so I didn't... obviously didn't take very kindly to it and I think we had two or three phone calls maybe the same day about the issue.'³⁰²*

³⁰⁰ Document NOR-C3046 [Auden Mckenzie Senior Employee 1]'s response to question 8 of the CMA's section 26 notice dated 2 May 2019.

³⁰¹ Document NOR-C3046 [Auden Mckenzie Senior Employee 1]'s response to the CMA's section 26 notice dated 2 May 2019.

³⁰² Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 138.

4.149 [King Director] told the CMA that he deleted the 2017 Text Messages from his mobile phone, following the telephone calls with [Auden Mckenzie Senior Employee 1] (the CMA obtained the text messages via an inspection of [Auden Mckenzie Senior Employee 1]'s mobile phone).³⁰³ [King Director] told the CMA that he deleted the 2017 Text Messages because he *'didn't want it to be brought up'*.³⁰⁴ He explained that *'I think the whole idea of me um, um threatening [Auden Mckenzie Senior Employee 1] for money – I'm not proud of it so there's a whole series... so that whole episode I just wanted to... to clear.'*³⁰⁵

³⁰³ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 138.

³⁰⁴ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 140 lines 24-25.

³⁰⁵ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 155 lines 13-16.

5. Market definition

- 5.1 When applying the Chapter I prohibition and Article 101(1) TFEU, the CMA is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement in question has as its object or effect the prevention, restriction or distortion of competition.³⁰⁶ In the present case, 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.³⁰⁷
- 5.2 Nonetheless, the CMA has formed a view of the '*relevant market*' purely for the purposes of calculating each of the Addressees' '*relevant turnover*' in the market affected by the Infringement, for the purposes of establishing the level of the financial penalty that the CMA has decided to impose on the Addressees.³⁰⁸
- 5.3 For the purposes of this case, the CMA finds that the '*relevant market*' is no wider than the supply of Nortriptyline Tablets in the UK. The analysis below considers a product dimension and a geographic dimension.³⁰⁹

³⁰⁶ T-62/98 *Volkswagen v Commission* EU:T:2000:180, paragraph 230, and T-29/92 *SPO and Others v Commission* EU:T:1995:34, paragraph 74.

³⁰⁷ See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, in which the CAT held, at 176, that in Chapter I cases '*determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement*'.

³⁰⁸ For the avoidance of doubt, where the term '*relevant market*' is used in this Decision, it must be understood in this context.

³⁰⁹ When defining the relevant market, the CMA applies the so-called hypothetical monopolist test. The hypothetical monopolist test is employed to establish which products are close enough substitutes to be in the relevant market. First, it establishes the closest substitutes to the product that is the focus of the investigation (the '**Focal Product**', which is nortriptyline in this case). Second, it asks whether a hypothetical monopolist of the Focal Product in the geographic area in which the product is sold (the '**Focal Area**') could profitably sustain a small but significant non-transitory increase in price (a '**SSNIP**') above the competitive level. If such an increase would be profitable then the test is complete and the Focal Product is the relevant market. If it would not be profitable then the test is repeated by assuming that the hypothetical monopolist controls both the Focal Product and its closest substitute. That test is repeated until it is profitable for the hypothetical monopolist to sustain a SSNIP.

A. The relevant product market

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

I. Different tablet strengths

5.5 As set out in paragraph 3.12 above, during the Market Sharing Period Nortriptyline Tablets were supplied only in 10mg and 25mg tablet presentations.³¹⁰ In this investigation, the Infringement relates to the supply of both 10mg and 25mg tablets. As such, the CMA does not need to conclude whether 10mg and 25mg tablets each constitute separate '*product markets*' or whether they together constitute a single '*product market*'. This is because the Addressees' relevant turnover for the purposes of the calculation of any financial penalty would be the same under either scenario. Thus, for the purposes of the calculation of the financial penalty, the CMA has considered the Addressees' relevant turnover in the supply of both 10mg and 25mg tablets.

II. Other anti-depressant drugs

5.6 Whilst it is not necessary to reach a definitive view,³¹¹ a product market limited to Nortriptyline Tablets is consistent with Auden Mckenzie's and King's ability to profitably sustain a series of price increases during the period prior to September 2014 and to maintain prices thereafter, until May 2015. The price levels they sustained were significantly above the levels observed following the entry of further suppliers (see Figures 4 and 5 at paragraph 3.45 above), indicating that other anti-depressant drugs did not constrain the price of nortriptyline. After the entry of Lexon/Medreich JV Product, King's and Auden Mckenzie's prices experienced a downward trend with some fluctuations.

³¹⁰ Later, in March 2017, a 50mg presentation was also introduced.

³¹¹ Because, for example, either the Parties are not active in the supply of other anti-depressants, and therefore adding other anti-depressant drugs to the relevant market would make no difference to their relevant turnover, or because considering the '*product market*' affected by the Infringement to be no wider than the supply of Nortriptyline Tablets constitutes a conservative approach for the purpose of calculating relevant turnover.

B. The relevant geographic market

- 5.7 In previous cases in the pharmaceutical sector, the relevant geographic market has consistently been defined as national in scope.³¹² In these cases, relevant factors were (i) the regulatory schemes for authorising and reimbursing medicines across countries; (ii) marketing strategies used by pharmaceutical companies; (iii) doctors' prescribing practices; and (iv) prices.
- 5.8 For the same reasons, it is appropriate to define the relevant geographic market in this case as UK-wide. In particular, the CMA notes that in order to sell Nortriptyline Tablets in the UK, it is necessary to obtain an MA from the MHRA, and an MA covers the whole of the UK.³¹³ In addition, the pricing framework which determines how pharmacies are reimbursed for the dispensing of Nortriptyline Tablets is specific to the UK, but not to other countries (see further paragraphs 3.37 and 3.38 above). These factors are consistent with the market being national in scope.
- 5.9 The CMA concludes that, in light of the above, it is appropriate to define the relevant geographic market in this case as national (UK-wide) in scope.

³¹² See, for example, Case COMP/A.37.507/F3 *AstraZeneca*, Commission decision of 15 June 2005, paragraph 503; and Case CA98/02/2011 *Reckitt Benckiser*, OFT decision of 12 April 2011, paragraphs 4.170 to 4.171.

³¹³ The existence of parallel imports is not inconsistent with the market being national in scope since parallel importers need to obtain a PLPI from the MHRA to sell in the UK.

6. Legal Assessment

A. Introduction

6.1 For the reasons set out below, the CMA has concluded that from September 2014 until May 2015, Auden Mckenzie and King entered into an agreement relating to the supply of Nortriptyline Tablets to Lexon, which restricted competition by object and comprised the following three elements (each of which restricted competition by object in and of itself):

- (a) Market sharing: Auden Mckenzie would supply Lexon with only 10mg tablets and King would supply Lexon with only 25mg tablets.
- (b) Fixing prices: Auden Mckenzie and King would supply Lexon at a fixed price of £4 per pack.³¹⁴
- (c) Fixing quantities: Auden Mckenzie and King would each supply no more than a fixed quantity of their respective packs of tablets: 3,400 10mg packs in the case of Auden Mckenzie; and 1,600 25mg packs in the case of King. In both cases, the fixed volumes accounted for approximately one sixth of the total market size.³¹⁵

B. Key provisions of the UK and EU competition rules

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

³¹⁴ Auden Mckenzie did not implement this element of the Horizontal Agreement after February 2015. However, from March 2015 until May 2015 (inclusive) it continued to supply Lexon only fixed volumes of 10mg packs.

³¹⁵ NHS England Prescription Cost Analysis data ('PCA data') records that in May 2014 20,176 packs of 10mg tablets, and 9,636 packs of 25mg tablets, were dispensed. The documents contemporaneous with the Horizontal Agreement also indicate that the Parties understood that these volumes represented approximately one sixth of the market for 10mg and 25mg tablets; the parties used NHS England PCA data to estimate the size of the 10mg tablets market at 20,000 packs and the 25mg tablets market at 10,000 packs: see Document NOR-E8117, spreadsheet concerning Lexon - Auden Mckenzie price list June 2014, which was attached to Document NOR-E8116, email from [Auden Mckenzie Senior Employee 3] to [Lexon Generics Buyer] dated 21 May 2014. The NHS England PCA Data only measures the volumes in England; it does not measure the volumes in Scotland, Northern Ireland or Wales. The use of NHS England PCA data will therefore slightly underestimate the size of the nortriptyline market in the UK.

- (a) the Chapter I prohibition³¹⁶ prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. This prohibition applies unless an applicable exclusion is satisfied or the agreement, decision or concerted practice in question is exempt in accordance with the provisions of the Act. References to the UK are to the whole or part of the UK.³¹⁷
- (b) Article 101 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between EU Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the EU, unless they are exempt in accordance with Article 101(3) TFEU.

6.3 Under the European Union (Withdrawal Agreement) Act 2020, section 2(1) of the European Communities Act 1972 (under which EU law has effect in the UK's national law) remains in force until the end of the Transition Period.³¹⁸ This means that directly applicable EU law, including Articles 101 and 102 TFEU and Regulation 1/2003³¹⁹ will continue to apply in the UK during the Transition Period.

C. The burden and standard of proof

- 6.4 The burden of proving an infringement of the Chapter I prohibition/Article 101(1) TFEU falls on the CMA. The standard is the balance of probabilities.³²⁰
- 6.5 Once the CMA has established to that standard an infringement of the Chapter I prohibition/Article 101(1) TFEU, the burden is on the

³¹⁶ Section 2 of the Competition Act 1998.

³¹⁷ Section 2(1) and (7) of the Competition Act 1998.

³¹⁸ Section 1A, Withdrawal Agreement Act (as introduced by section 1, Withdrawal Agreement Act).

³¹⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 4.1.2003, p. 1–25.

³²⁰ In *Re S-B (Children)* [2009] UKSC 17 at paragraph 34 the Supreme Court clarified that this standard of proof is not connected to the seriousness of the suspected infringement. See also *Re B (Children)* [2008] UKHL 35 at paragraph 72. The CAT has also expressly accepted the reasoning in this line of case law, see *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14, paragraphs 15 to 16.

undertaking to establish an exemption under section 9 of the Act/Article 101(3) TFEU.

6.6 It is for the CMA to prove an infringement *'by adducing ... precise and coherent evidence demonstrating convincingly the existence of the facts constituting those infringements ... That evidence may consist of direct evidence, taking the form, for example, of a written document ... or, failing that, indirect evidence, for example in the form of conduct'*.³²¹

6.7 But *'it is not necessary for every item of evidence ... to satisfy those criteria [ie precision and coherence] in relation to every aspect of the infringement. It is sufficient if the set of indicia relied on ..., viewed as a whole, meets that requirement'*.³²² The courts have confirmed that *'the evidence must be assessed not in isolation, but as a whole'*³²³ and that *'the evidence must be assessed in its entirety, taking into account all relevant circumstances of fact'*.³²⁴

6.8 The Court of Justice has confirmed that, notwithstanding the burden of proof on the authority to establish an infringement:

'the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the rules on the burden of proof have been satisfied'.³²⁵

6.9 Further, where the CMA *'establishes that the undertaking in question has participated in an anticompetitive measure, it is for that undertaking to provide ... a different explanation for its conduct'*. In particular, where the CMA uncovers documentary evidence of an infringement, *'it is not sufficient for the undertakings concerned to prove circumstances which cast the facts established by the [CMA] in a different light and thus allow another explanation of the facts ... In the presence of*

³²¹ T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, EU:T:2006:265, paragraphs 82 to 83.

³²² See, in the same vein, the Court of Justice in C-613/13 P *Keramag Keramische Werke*, EU:C:2017:49: corroborating documentary evidence should not be required to satisfy, in itself, all the elements to constitute sufficient evidence of an infringement – by imposing that requirement, the General Court *'failed to consider whether the evidence, viewed as a whole, could be mutually supporting'* (paragraph 55).

³²³ T-56/99 *Marlines v Commission*, EU:T:2003:333, paragraph 28. See also C-48/69 *ICI v Commission*, EU:C:1972:70, paragraph 68.

³²⁴ T-141/94 *Thyssen Stahl v Commission*, EU:T:1999:48, paragraph 175.

³²⁵ C-413/08 P *Lafarge v Commission*, EU:C:2010:346, paragraph 30 and the case law cited.

documentary evidence, the burden is on those undertakings not merely to submit another explanation for the facts found by the [CMA] but to challenge the existence of those facts established on the basis of the documents produced by the [CMA].³²⁶

- 6.10 Anti-competitive activity is often by nature illicit – *‘participation in agreements that are prohibited ... is more often than not clandestine and is not governed by any formal rules’*.³²⁷ The Court of Justice has made clear that:

‘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 ... 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’.³²⁸

- 6.11 Approving that statement, the CAT has held: *‘[b]ecause anti-competitive agreements are usually arrived at covertly, the [CMA] may have to rely on circumstantial evidence to establish the facts’*.³²⁹ In fact, *‘even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard’*.³³⁰

- 6.12 An authority is not required to produce express contemporaneous evidence of collusion. In *Hitachi v Commission*, a case involving market sharing, the General Court stated, in addition, that:

³²⁶ T-472/13 *Lundbeck v Commission*, EU:T:2016:449, paragraphs 109 to 112. See also C-89/11 P *E.ON Energie v Commission*, EU:C:2012:738, paragraph 76.

³²⁷ C-68/12 *Protimonopolny urad Slovenskej republiky v Slovenska sporitel'na*, EU:C:2013:71, paragraph 26.

³²⁸ C-204/00 P *Aalborg Portland A/S and Others*, EU:C:2004:6, paragraphs 56 to 57 (emphasis added). The CAT stated in *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, paragraph 96, that these comments apply equally to the OFT. See also C-634/13 P *Total Marketing Services v Commission*, EU:C:2015:614, paragraph 26.

³²⁹ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, paragraph 96.

³³⁰ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, paragraph 206.

'as anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted'.³³¹

- 6.13 In *Sumitomo Metal Industries v Commission*, the Court of Justice upheld the General Court's approach:

*'in practice, the Commission is often obliged to prove the existence of an infringement under conditions which are hardly conducive to that task, in that several years may have elapsed since the time of the events constituting the infringement and a number of the undertakings covered by the investigation have not actively cooperated therein. Whilst it is necessarily incumbent upon the Commission to establish that an illegal market-sharing agreement was concluded ..., it would be excessive also to require it to produce evidence of the specific mechanism by which that object was attained ... Indeed, it would be too easy for an undertaking guilty of an infringement to escape any penalty if it was entitled to base its argument on the vagueness of the information produced regarding the operation of an illegal agreement in circumstances in which the existence and anti-competitive purpose of the agreement had nevertheless been sufficiently established.'*³³²

³³¹ T-112/07 *Hitachi and Others v Commission*, EU:T:2011:342, paragraph 61.

³³² C-403/04 P *Sumitomo Metal Industries v Commission*, EU:C:2007:52, paragraph 50.

- 6.14 The CMA will base its conclusions on the body of available evidence, taken together³³³ and assessed as a whole.³³⁴
- 6.15 When considering the credibility of evidence obtained from witnesses and resolving any conflicts between the '*natural meaning*' of any documentary evidence and witness evidence, the CAT has noted that: '*when considering the credibility of witnesses [it is essential to] always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and the overall probabilities. ...where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance ... in ascertaining the truth*'.³³⁵

D. Legal and economic context

I. Legal framework

- 6.16 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 economic and legal context of which it forms a part. This includes:
- (a) the nature of the goods affected; and

³³³ T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, EU:T:2006:265, paragraphs 82 to 83; C-613/13 P *Keramag Keramische Werke*, EU:C:2017:49, paragraph 55; C-204/00 P *Aalborg Portland A/S and Others*, EU:C:2004:6, paragraphs 56 to 57 (emphasis added). The CAT stated in *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, paragraph 96, that these comments apply equally to the OFT. See also C-403/04 P - *Sumitomo Metal Industries v Commission*, EU:C:2007:52, in which the Court of Justice held that the evidence relied on by the Commission – a series of documentary indicia and market share tables – sufficed to prove the existence of a market exclusion agreement: '*where the Commission has succeeded in gathering documentary evidence in support of the alleged infringement, and where that evidence appears to be sufficient to demonstrate the existence of an agreement of an anti-competitive nature, there is no need to examine the question whether the undertaking concerned had a commercial interest in the agreement*' (paragraph 46).

³³⁴ T-56/99 *Marlines v Commission*, EU:T:2003:333, paragraph 28. See also C-48/69 *ICI v Commission*, EU:C:1972:70, paragraph 68, and T-141/94 *Thyssen Stahl v Commission*, EU:T:1999:48, paragraph 175.

³³⁵ *Tesco v OFT* [2012] CAT 31, paragraph 128, quoting Robert Goff LJ in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1 at 57, (endorsed by the Privy Council in *Grace Shipping v Sharp & Co* [1987] 1 Lloyd's Rep 207 at 215).

(b) the real conditions of the functioning and structure of the market.³³⁶

6.17 The economic and legal context also includes whether the parties are actual or potential competitors at the time of entering into the agreement.³³⁷ Two companies are treated as actual competitors if they are active on the same relevant market.³³⁸

II. The legal and economic context relevant to the Infringement

Nature of the goods affected

6.18 As outlined in paragraph 3.10 above, nortriptyline is an important medicine used in the treatment of depression. The NHS is the main purchaser of nortriptyline in the UK, spending £38m on the drug in 2015. Nortriptyline is an off-patent, unbranded, homogeneous product.

Real conditions of functioning and structure of the market

6.19 Total demand for nortriptyline is primarily driven by the clinical need of the patient. Hence, despite the ASP for Nortriptyline Tablets increasing significantly from 2011 until 2015 (see Figures 4 and 5, paragraph 3.45 above), total demand for Nortriptyline Tablets in the UK continued to increase gradually over that period (see Figure 1, paragraph 3.41 above). As such, overall demand is not very price-sensitive.

6.20 In 2014, there were only two MA holders licensed to supply Nortriptyline Tablets in the UK; King and Auden Mckenzie. Both parties supplied both strengths of Nortriptyline Tablets.

6.21 AAH and Alliance were the two main wholesalers active in the supply of Nortriptyline Tablets to pharmacies. Following NRIM's entry in 2011, NRIM, and subsequently Auden Mckenzie, supplied the majority of its Nortriptyline Tablets to AAH, while King supplied most of its

³³⁶ C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 53, citing C-32/11 *Allianz Hungaria v Commission*, EU:C:2013:160, paragraph 36 and the case law cited. See also C-373/14 P *Toshiba v Commission* EU:C:2016:26, paragraph 27.

³³⁷ See, for example, CMA decision in case CE-9531/11 *Paroxetine*, sections 6.C.vi and vii.

³³⁸ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (the '**Horizontal Guidelines**') OJ 2011 C 11/1, paragraph 10.

Nortriptyline Tablets to Alliance with no switching between the two between July 2011 and October 2016.

- 6.22 During the period of the Horizontal Agreement, King and Auden Mckenzie were the only suppliers of 10mg tablets in the UK. The only alternative source of 25mg tablets was parallel imports of the Auden Mckenzie owned Paxtibi from Spain.³³⁹ Lexon was one of a number of parallel importers of Paxtibi into the UK. The average price paid by parallel importers during the period of the Horizontal Agreement for the equivalent of 100 25mg tablets (the number of tablets in a UK pack) was £60.94. There were no parallel imports of the 10mg tablets, which accounted for two thirds of all Nortriptyline Tablets sold. The supply of Nortriptyline Tablets was therefore highly concentrated and, in the case of the 10mg tablets, duopolistic.
- 6.23 In other European countries, Lundbeck sold Nortriptyline tablets in both 10mg and 25mg packs (the '**Lundbeck Product**'), however, during the period of the Horizontal Agreement, no companies held a PLPI to import the Lundbeck Product to the UK. It appears that a number of parallel importers had explored the possibility of importing the Lundbeck Product and decided against pursuing this strategy:
- (a) BNS Laxmi Holdings had previously obtained a PLPI for the Lundbeck Product, but it cancelled this licence in 2007.³⁴⁰
 - (b) Expono and MPT Pharma told the CMA that they had researched the possibility of importing the Lundbeck Product. However, both said that they had discarded their plans because the Lundbeck Product had different excipients to the version of generic Nortriptyline Tablets licensed in the UK.³⁴¹
 - (c) Quadrant Pharmaceuticals and Interport notified Lundbeck of their intention to import the Lundbeck Product into the UK in 2008 and 2013 respectively, however neither company ultimately did so.

³³⁹ See Table 5 in Section 3.

³⁴⁰ Document NOR-C1938, Laxmi BNS Holding's response to the CMA's section 26 notice dated 19 July 2018.

³⁴¹ Document NOR-C1907, Expono's response to the CMA's section 26 notice dated 19 July 2018. Document NOR-C1877, MPT Pharma's response to the CMA's section 26 notice dated 19 July 2018.

Lundbeck told the CMA that in both cases it assumed that the companies abandoned their plans.³⁴²

(d) In November 2012, Lexon made enquiries to two German companies regarding the price and availability of the 10mg Lundbeck Product.³⁴³ In May 2013, Lexon completed two spreadsheets which examined the commercial potential of importing both the 10mg and 25mg Lundbeck Product from Italy.³⁴⁴ However, Lexon never ultimately attempted to obtain a PLPI to import the Lundbeck Product to the UK.

6.24 As indicated at paragraphs 3.28 and 3.29 above, once a drug is '*genericised*', suppliers are free to set their prices as they choose. As nortriptyline is a commodity, there was the potential for very strong price competition between suppliers. However, there is no evidence of significant price competition between Auden Mckenzie and King before, or during, the Market Sharing Period. Rather, in the period whilst there were two MA holders (i.e. from NRIM's entry in January 2011 to June 2015 (the month after the Horizontal Agreement ended), the price of the 10mg and 25mg tablets increased by 358% and 196% respectively (see paragraphs 3.45 to 3.49 above).

6.25 King commented at interview that price competition was weak. Following NRIM's entry in January 2011, King decided not to try to win back the customer, AAH, which it had lost to NRIM. As [King Director] put it at interview: '*You can compete on price in which case [...] the market just disappears, or [...] you just have to suck it and say that's what they've done and that's what happened, so we didn't compete on price.*'³⁴⁵ When questioned about the purchase of Auden Mckenzie by Actavis, [King Director] agreed that he had anticipated that Actavis would '*compete more aggressively*' than Auden Mckenzie.³⁴⁶

6.26 Overall, competition in the market during the Market Sharing Period was muted. However, the increase in the price and potential margins

³⁴² Document NOR-C2201, Lundbeck's response to the CMA's section 26 notice dated 22 October 2018.

³⁴³ Document NOR-E8036, email exchange between Lexon and Pharmahandel Kohnen GmbH dated 28 November 2012. Document NOR-E8037, email exchange between Lexon and Phoenix Pharma Einkauf GmbH dated 28 November 2012.

³⁴⁴ Document NOR-E8059, '*Sample information Sheet*' for Noritren 25mg tablets from Italy. Document NOR-E8060, '*Sample Information Sheet*' for Noritren 10mg tablets from Italy.

³⁴⁵ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 49 lines 12-16. See also pages 54-55 lines 12-8: '*I took a commercial decision that we would not try and compete on value*'.

³⁴⁶ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 154 lines 21-25.

from the supply of Nortriptyline Tablets in the years leading up to the Market Sharing Period increased the threat of entry and further competition.

- 6.27 In early 2014, prior to the Parties entering into the Horizontal Agreement, a new competitive threat to the Parties in the supply of Nortriptyline Tablets had emerged from Lexon. As set out in paragraphs 6.169 to 6.170 below, this threat may have taken one (or both) of two forms. Either (a) (as the Parties claim) the threat that Lexon would obtain licences to import a new source of parallel imported nortriptyline covering both strengths of Nortriptyline Tablets, or (b) the threat posed by the joint venture between Lexon and Medreich, which was seeking to obtain new UK MAs to supply Nortriptyline Tablets.
- 6.28 The Lexon/Medreich JV obtained MAs for Nortriptyline Tablets in March 2015 (having submitted its applications in June 2013). The Lexon/Medreich JV did not supply its own product until July 2015, meaning it did not supply under its own MAs during the period of the Horizontal Agreement.

King and Auden Mckenzie were actual competitors

- 6.29 King and Auden Mckenzie were both active on the same relevant market during the Market Sharing Period. There is no suggestion that there were any barriers to prevent them from competing against each other. Accordingly, they were actual competitors during the Market Sharing Period.

E. The Horizontal Agreement

I. Legal framework: agreements for the purpose of the Chapter I prohibition/Article 101(1) TFEU

- 6.30 The Chapter I prohibition and Article 101(1) TFEU prohibit agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition and which may affect trade within the UK/between EU Member States.
- 6.31 Such agreements are illegal, unless exempt under section 9 of the Act/Article 101(3) TFEU.

- 6.32 An agreement is ‘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’.³⁴⁷
- 6.33 In order to establish a concurrence of wills ‘it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way’.³⁴⁸
- 6.34 Additionally, the Courts have defined the concept of an agreement as a ‘common understanding’ between the parties - which has the same meaning as ‘concurrence of wills’. For example, in its judgment in *Hitachi*, the General Court held that: ‘the Commission was right to find that the common understanding constituted an agreement between undertakings within the meaning of Article [101](1)’.³⁴⁹
- 6.35 For example, an agreement may be based on a ‘common understanding’ between the parties, which need not be reduced to writing. This is particularly the case when the agreement involves a simple concept such as market sharing, which does not require ongoing interaction between the parties to implement. The General Court has held that:
- ‘the commitment of a group of producers not to enter a market reserved to the other group ... is based on a simple concept which may be implemented easily. Similarly, its implementation does not require, in principle, interaction between the undertakings concerned. Consequently, such a commitment is perfectly capable of existing as an unwritten understanding, which also reduces the likelihood of its discovery’.*³⁵⁰
- 6.36 The fact that a party may have played only a limited part in setting up an agreement, may not be fully committed to its implementation, or may have participated only under pressure from another party, does

³⁴⁷ T-41/96 *Bayer AG v Commission*, EU:T:2000:242, paragraph 69 (upheld on appeal in Joined cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, EU:C:2004:2, paragraphs 96 to 97).

³⁴⁸ T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

³⁴⁹ T-112/07 *Hitachi and Others v Commission*, EU:T:2011:342, paragraph 272.

³⁵⁰ T-112/07 *Hitachi and Others v Commission*, EU:T:2011:342, paragraph 91. See also T-133/07 *Mitsubishi v Commission* EU:T:2011:345, paragraph 186. Upheld on further appeal in C-239/11, C-489/11 and C-498/11 *Siemens and Others v Commission*, EU:C:2013:866.

not mean that it is not party to the agreement.³⁵¹ That a party ‘cheats’ on the agreement also does not absolve it.³⁵² The CAT has confirmed that:

*‘An agreement, in our view, can be constituted by an “understanding” even if there is nothing to prevent either party from going back on, or disregarding, the understanding in question.’*³⁵³

- 6.37 The form of an agreement is unimportant, and in particular it is not necessary that an agreement is formal or legally binding: agreements may include written contracts, oral agreements and ‘morally’ binding ‘gentlemen’s agreements’.³⁵⁴

II. The existence and content of the Horizontal Agreement

Overview

- 6.38 The CMA concludes that during the Market Sharing Period (from September 2014 until May 2015), Auden Mckenzie and King entered into the Horizontal Agreement that had as its object the restriction of competition by:
- (a) Market sharing: Auden Mckenzie would supply Lexon with only 10mg tablets and King would supply Lexon with only 25mg tablets.
 - (b) Fixing prices: Auden Mckenzie and King would each supply Lexon at a fixed price of £4 per pack.
 - (c) Fixing quantities: Auden Mckenzie and King would each supply no more than a fixed quantity of their respective packs of tablets:

³⁵¹ *Agreements and Concerted Practices (OFT401)*, December 2004 (adopted by the CMA Board), paragraph 2.8. See also *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 Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, although the fine was reduced); and *C-49/92 P Commission v Anic Participazioni SpA*, EU:C:1999:356, paragraphs 79-80.

³⁵² *T-141/89 Trefileurope v Commission*, EU:T:1995:62, paragraphs 53-60.

³⁵³ *Argos and Littlewoods v OFT* [2004] CAT 24, paragraph 658.

³⁵⁴ *C-41/69 ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular paragraphs 106 to 114. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 at paragraph 658. See also *Commission Decision 2003/675/EC Video Games, Nintendo Distribution and Omega-Nintendo* [2003] OJ L255/33, paragraph 247.

3,400 10mg packs in the case of Auden Mckenzie; and 1,600 25mg packs in the case of King. In both cases, the fixed volumes accounted for approximately one sixth of the total market size.³⁵⁵

- 6.39 The Horizontal Agreement lasted between at least September 2014 and May 2015 (the Market Sharing Period). King implemented all three elements of the Horizontal Agreement for the entire Market Sharing Period. Auden Mckenzie implemented all three elements for the first six months (from September 2014 to February 2015) and the market sharing and fixed quantities³⁵⁶ for the remaining three months (March 2015 to May 2015).
- 6.40 The terms of the Horizontal Agreement were not recorded in a formal written contract. However, they can be established and inferred from statements made by witnesses at interviews with CMA officials, the contemporaneous documentary evidence and the objective facts.
- 6.41 The evidence upon which the CMA relies in order to prove the existence of the Horizontal Agreement is summarised below:

Evidence regarding the period prior to the Horizontal Agreement

- (a) The witness evidence regarding negotiations with Lexon, in particular:
- (i) [Lexon Director]'s consistent evidence that he did not negotiate with King and that the negotiation for the supply of both strengths of Nortriptyline Tablets (including price and volumes), was '*fully done with Auden Mckenzie*' and that it was only subsequently that Auden Mckenzie told him

³⁵⁵ PCA data records that in May 2014 20,176 packs of 10mg tablets, and 9,636 packs of 25mg tablets, were dispensed. The documents contemporaneous with the Horizontal Agreement also indicate that the Parties understood that these volumes represented approximately one sixth of the market for 10mg and 25mg tablets; the parties used NHS England PCA data to estimate the size of the 10mg tablets market at 20,000 packs and the 25mg tablets market at 10,000 packs: see Document NOR-E8117, spreadsheet concerning Lexon - Auden Mckenzie price list June 2014, which was attached to Document NOR-E8116, email from [Auden Mckenzie Senior Employee 3] to [Lexon Generics Buyer] dated 21 May 2014. The NHS England PCA Data only measures the volumes in England; it does not measure the volumes in Scotland, Northern Ireland or Wales. The use of NHS England PCA data will therefore slightly underestimate the size of the nortriptyline market in the UK.

³⁵⁶ For completeness, in March and May 2015, Auden Mckenzie supplied the fixed quantity of packs under the Horizontal Agreement (i.e. 3,400 packs) to Lexon, however, in April 2015, they supplied Lexon with only 1,700 packs.

that King (Auden Mckenzie's competitor) would supply Lexon with the 25mg tablets;³⁵⁷ and

- (ii) The fact that, when first asked about how the supply arrangements came about, [King Director] failed to mention any negotiation with Lexon, but rather referred to his contact with [Auden Mckenzie Senior Employee 1].³⁵⁸
- (b) The uncontested evidence of contact between [King Director] and [Auden Mckenzie Senior Employee 1] from 2013 onwards, demonstrating that they had the opportunity to come to the Horizontal Agreement, and the admission of both [King Director] and [Auden Mckenzie Senior Employee 1] that they discussed the threat posed by Lexon in summer 2014.
- (c) The contemporaneous documents from the period immediately prior to the Horizontal Agreement, which corroborate [Lexon Director]'s evidence that he agreed a supply arrangement for both strengths of tablets with Auden Mckenzie and the absence of any similar contemporaneous documents recording communications between Lexon and King.

Evidence during and after the Horizontal Agreement

- (d) The Parties' conduct, including the striking similarities in the supply arrangements that both King and Auden Mckenzie had with Lexon during the Market Sharing Period and the fact King took over supplies of 10mg tablets to Lexon (in June 2015) on the same terms as Auden Mckenzie had previously supplied.³⁵⁹
- (e) The emails and text messages demonstrating contacts between King and Auden Mckenzie relating to their supplies of Nortriptyline Tablets to Lexon.
- (f) The 2017 Text Messages exchanged between [Auden Mckenzie Senior Employee 1] and [King Director] which refer to a cartel/collusion involving King and Auden Mckenzie and an

³⁵⁷ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, pages 47-49 lines 4-20 and page 51 lines 3-20.

³⁵⁸ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, and in particular, pages 32-35.

³⁵⁹ See paragraphs 4.121 to 4.129 above.

agreement that [Auden Mckenzie Senior Employee 1] pay [King Director] [a substantial sum], which had been made in March 2015 (i.e. during the Market Sharing Period), and which corroborate the existence of the Horizontal Agreement.

6.42 The paragraphs below consider each of these pieces of evidence in turn and set out how the CMA relies on them to establish and infer the existence of the Horizontal Agreement.

6.43 In assessing the evidence, the CMA has had regard to the fact that anti-competitive activity is often by nature illicit and that participation in agreements that are prohibited is more often than not clandestine and is not governed by any formal rules. The CMA has also had regard to the case law of the Court of Justice and the CAT, which makes clear that:

‘Even if [the CMA] 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...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’.*³⁶⁰

Evidence from the period prior to the Horizontal Agreement

6.44 The CMA has considered witness evidence, including from each of [Lexon Director], [King Director] and [Auden Mckenzie Senior Employee 1], and documentary evidence in determining how the supply arrangements with Lexon in relation to Nortriptyline Tablets came about. Based on this evidence, and the evidence analysed in sections 4C.III to 4C.IV above, the CMA finds that:

(a) Negotiations for both strengths of Nortriptyline Tablets took place between Auden Mckenzie and Lexon in May 2014;

³⁶⁰ See paragraph 6.10 above. Whilst each of the Parties’ vertical agreements with Lexon were not covert, the Horizontal Agreement between Auden Mckenzie and King, which is the subject of this Decision, was entered into covertly and therefore this case law is of direct relevance to its assessment.

- (b) King did not independently negotiate with Lexon with regard to the supplies of Nortriptyline Tablets (of either strength); and
- (c) King and Auden Mckenzie agreed that they would share supplies of Nortriptyline Tablets to Lexon on the terms agreed by Auden Mckenzie with Lexon.

The witness evidence regarding how the supply arrangements with Lexon came about

- 6.45 [Lexon Director], [King Director] and [Auden Mckenzie Senior Employee 1] each gave evidence to the CMA on how the supply arrangements with Lexon came about (see paragraphs 4.9 to 4.48 above). Their respective evidence is mutually irreconcilable on two key points: (i) whether Lexon negotiated the terms of supply for both strengths of tablets only with Auden Mckenzie and was later told that King would be supplying the 25mg tablets or whether Lexon had separate negotiations with each of Auden Mckenzie and King; and (ii) the details of the contact between Auden Mckenzie and King prior to the Horizontal Agreement.
- 6.46 [Lexon Director] said that he did not negotiate with King. He said that from around mid-May 2014 the negotiation for the supply of both strengths of Nortriptyline Tablets (including price and volumes) was done with Auden Mckenzie and it was only later, once the terms were agreed, that Auden Mckenzie informed Lexon that it should place its orders for 25mg tablets with King. [Lexon Director] told the CMA that he found this to be *'very uncommon.'*³⁶¹
- 6.47 [Lexon Director] account remained consistent from his first interview through to his third. In his first interview he stated: *'I had no conversation with King about that agreement at all. It was all lead [sic] by Auden Mckenzie.'*³⁶² In his third interview he elaborated: *'all the negotiation, all the agreement was done through Auden. And then I was then told after it was all agreed that I should order this strength from King via UDG [sic] and this strength from Auden.'*³⁶³ He went on to explain that he believed he had had a call with [King Director] to

³⁶¹ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February, page 49 lines 7-8.

³⁶² Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018 pages 124 lines 19-20.

³⁶³ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February, page 48 lines 7-10.

arrange the logistics of the supply process, but had had no further discussion with him.

6.48 [King Director]'s account of how the terms on which King was to supply Lexon came about was not consistent:

(a) During his first interview (on 22 March 2018), when asked about the establishment of the King-Lexon supply arrangements and how it came about, [King Director] did not refer to any discussions with [Lexon Director], but instead referred to his contact with [Auden Mckenzie Senior Employee 1] in summer 2014 in which they discussed Lexon (see paragraph 4.29 above). His first account was therefore consistent with [Lexon Director]'s recollection of how the King-Lexon supply arrangement had come about.

(b) During his second interview (22 November 2018), [King Director] initially indicated that he had spoken directly with [Lexon Director] and had directly negotiated terms with him and described that negotiation at a high level. However, he went on to say that he had no specific recollection of the conversation – or even any definite recollection that a conversation had actually taken place with [Lexon Director]: *'Well, when I say "remember", I must have spoken to him because we set the price -- we set the pricing up.'*³⁶⁴

6.49 In his second interview, [King Director] initially said he had no awareness of the terms on which Auden Mckenzie supplied Lexon. However, later, when referring to the fact that Actavis had acquired Auden Mckenzie, he described his concern that Actavis: *'could literally take their eye off the ball, not realise how important it was to continue to supply product to a particular customer at a very discounted price'*,³⁶⁵ which shows that he was, at least, aware that Auden Mckenzie supplied at a very low price.

6.50 [Auden Mckenzie Senior Employee 1]'s evidence on how the King-Lexon supply arrangement came about was different to that of [Lexon Director] and [King Director]. He explained in a response to a notice under section 26 of the Act that he recalled being contacted by [Lexon Director] who indicated that Lexon could source Nortriptyline Tablets for parallel importation at a cheaper price than Auden Mckenzie was

³⁶⁴ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 73 lines 13-14.

³⁶⁵ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 69 lines 18-20.

offering to Lexon in the UK. He said that Auden Mckenzie therefore offered to supply Lexon at a lower price in order to match or beat the parallel import price. [Auden Mckenzie Senior Employee 1] went on to explain that Auden Mckenzie initially offered to supply Lexon with both 10mg and 25mg tablets, but that Lexon only wanted to take supply of the 10mg tablets.³⁶⁶ In a subsequent interview, [Auden Mckenzie Senior Employee 1] said that he had '*no idea*' why Lexon only wanted to take supply of the 10mg tablets and that he did not enquire.³⁶⁷ He also initially said that he had '*no idea*' who was supplying Lexon with the 25mg tablets.³⁶⁸

6.51 [Auden Mckenzie Senior Employee 3] told the CMA that he had monthly meetings with [Lexon Director]. He said that in one of those meetings, [Lexon Director] said that Lexon was going to parallel import Nortriptyline Tablets, unless Auden Mckenzie could supply it at a better price.³⁶⁹ [Auden Mckenzie Senior Employee 3] said that he passed this information to [Auden Mckenzie Senior Employee 1], and that he '*put [Auden Mckenzie Senior Employee 1] in touch with [Lexon Director], and the next thing [Auden Mckenzie Senior Employee 1] says is, "We need to supply [Lexon Director]"*'.³⁷⁰ [Auden Mckenzie Senior Employee 3] stated that it was [Auden Mckenzie Senior Employee 1] who agreed to the price of £4 per pack.³⁷¹

6.52 In relation to Auden Mckenzie's contact with King, [Auden Mckenzie Senior Employee 1] admitted to having discussed Lexon with [King Director], but, on his account, [King Director] had called him and the discussion of Lexon was fleeting:

[AM SE 1]: *'I was not in touch with him on a regular basis at all. I think, once he'd called me up again about PIs -- again, you know, with regards to counterfeiting and, you know,*

³⁶⁶ Document NOR-C1749, [Auden Mckenzie Senior Employee 1]'s response to question 3 of the CMA's section 26 notice dated 18 June 2018.

³⁶⁷ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018 page 38 line 18 to page 39 line 4.

³⁶⁸ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018 page 38 line 14.

³⁶⁹ Document NOR-C1977, transcript of [Auden Mckenzie Senior Employee 3] interview dated 23 May 2018 pages 48-49.

³⁷⁰ Document NOR-C1977, transcript of [Auden Mckenzie Senior Employee 3] interview dated 23 May 2018 page 50 lines 2-3.

³⁷¹ Document NOR-C1977, transcript of [Auden Mckenzie Senior Employee 3] interview dated 23 May 2018 page 51 line 18.

people alleging that they can supply product and I think he -- he had, mentioned at some point that, he Lexon were there and I said, "Look" I said, "you know, he's spoken to me and I'll -- you know, I'm -- you know, I'm going to deal with him in my way". I didn't discuss with him what -- what I'm doing or what he's doing. I just said, "You know, I'm aware and I'll -- you know -- you know, the guys contacted me and I'll, deal with it".'

CMA: *'So, did you say someone from Lexon contacted you?'*

[AM SE 1]: *'Correct.'*

CMA: *'Do you remember who?'*

[AM SE 1]: *'Probably [Lexon Director], I think. Because [Auden Mckenzie Senior Employee 3] used to -- used to deal with him normally. So, he would have either -- either contacted [Auden Mckenzie Senior Employee 3] or me.'*

CMA: *'Is that [Lexon Director] you're referring to?'*

[AM SE 1]: *'Correct.'*

[...]

CMA: *'[How was] King involved?'*

[AM SE 1]: *'Well, he -- he was not involved. He just said that, you know, there's all this PI's coming around and these guys have got a whole load of PI's.'*

CMA: *'Lexon?'*

[AM SE 1]: *'Yes. Is it counterfeit or not. I said, "Look, he's been in touch and we'll deal with him".'³⁷²*

Analysis of the witness evidence

6.53 The CMA has considered the competing versions of events with reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities.³⁷³

6.54 The CMA has concluded that negotiations for both strengths of Nortriptyline Tablets took place solely between Auden Mckenzie and Lexon in May 2014. There was then subsequent discussion or contact between [Auden Mckenzie Senior Employee 1] and [King Director], where it was agreed that Auden Mckenzie and King would 'share' the burden of supplying Lexon at low cost. This is how King's supply to

³⁷² Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, pages 21–22 lines 10–22.

³⁷³ See paragraph 6.15 above.

Lexon of a restricted volume of 25mg tablets at a price of £4, came about.

[Lexon Director]'s evidence about how the supply arrangements came about was credible

- 6.55 [Lexon Director] evidence regarding the negotiations was consistent throughout his interactions with the CMA; in three interviews and in response to two notices under section 26 of the Act. His evidence was clear, lucid and detailed.
- 6.56 [Lexon Director] had no obvious motive to conceal the existence of the Horizontal Agreement. Indeed, if there had been two parallel, independent vertical negotiations, then there is no obvious reason why [Lexon Director] would have consistently denied that such negotiations had taken place and fabricated an alternative story.
- 6.57 [Lexon Director]'s evidence is consistent with the documentary evidence and with [King Director]'s initial response when asked about the origin of the supply arrangements between King and Lexon (see paragraph 4.29 above).

[King Director]'s later evidence about how the supply arrangements came about was not credible

- 6.58 The response given by [King Director] in his first interview regarding the negotiations was in key respects consistent with [Lexon Director]'s evidence that the negotiations took place between Auden Mckenzie and Lexon. When questioned about the origin of his supply arrangements with Lexon, [King Director] only referred to a discussion with [Auden Mckenzie Senior Employee 1] and did not give any detail of any contact with [Lexon Director].³⁷⁴
- 6.59 It was only in his second interview that [King Director] suggested that he must have negotiated with [Lexon Director] directly, and said that he recalled [Lexon Director] requesting 2,000 packs of 25mg tablets a

³⁷⁴ See paragraph 4.29 above.

month before being negotiated down to 1,600 packs a month.³⁷⁵
However, he could not recall when or how the negotiations had actually taken place.³⁷⁶

- 6.60 Given the sanctions for breaching competition law, [King Director] had an incentive to downplay the existence of the Horizontal Agreement and to suggest that he had had separate, independent negotiations with Lexon. [King Director] was clearly aware of potential sanctions under competition law even before the launch of this investigation, as evidenced by the 2017 Text Messages, which refer to '*personal and criminal implications*'. His immediate action, upon learning of the possibility of an unannounced inspection by the CMA, (the deletion of the 2017 Text Messages) also casts doubt on his willingness to give a full and frank account of events.
- 6.61 It is also relevant that [King Director]'s first interview took place in March 2018 at a relatively early stage of the CMA's investigation. At this point, the CMA had only told [King Director] that it had grounds to suspect King had entered into anticompetitive agreements in relation to Nortriptyline Tablets with Alissa, Auden Mckenzie, Lexon and Medreich, whereas his second interview took place after a state of play meeting with the CMA in which the CMA explained its provisional thinking on the nature of the Horizontal Agreement in more detail.
- 6.62 Despite the fact that a number of years have passed, if [King Director] had conducted a separate negotiation with [Lexon Director], his lack of recall of any details is not credible, given the highly unusual characteristics of the putative negotiation:
- (a) The King-Lexon supply arrangement was the only supply arrangement whereby King supplied a customer at a price that was below its cost of goods. The arrangement required '*special*' pricing to be set up with King's pre-wholesaler, UDG.
 - (b) The price was very significantly below that charged to all other customers: the next lowest price charged to a customer was £65 per pack.

³⁷⁵ See document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 51-52, lines 23-5.

³⁷⁶ See paragraph 4.34 above.

(c) [King Director] estimated that the supply arrangement with Lexon cost his business £1million in just the first five months (see paragraph 4.72 to 4.79 above).

(d) Apart from King's supply arrangement with Lexon, [King Office Manager] could not recollect King placing a maximum order quota for a specific customer with its pre-wholesaler UDG, aside from where stock shortages existed (which was not the case for Nortriptyline Tablets at that time).³⁷⁷

6.63 If [King Director] had negotiated a deal with [Lexon Director] then the CMA would have expected him to be able to explain, at least in outline, who initiated the contact, between [King Director] and [Lexon Director], and how frequently they had spoken. The CMA would also have expected [King Director] to be able to recall the negotiation with [Lexon Director] in relation to the low price of £4 per pack, the capped volumes and Lexon's interest in only the 25mg tablets, when it had previously been purchasing both 10mg and 25mg tablets. As noted above, there is also a complete absence of contemporaneous documentary evidence of contact between King and Lexon regarding the supply of Nortriptyline Tablets in the period immediately prior to the Horizontal Agreement. For example, there are no emails and no references to, or notes of, calls between Lexon and King at this time.³⁷⁸

6.64 As explained in paragraphs 6.86 to 6.145 below, the accuracy of [King Director]'s evidence is further undermined by the contemporaneous documents from during and after the Market Sharing Period.

6.65 Taking into account [King Director]'s motives, the internal inconsistency in his evidence, the unexpected lack of detail in his recall, and the lack of any relevant supporting documentary evidence, the CMA finds that [King Director]'s assertion that he negotiated directly with Lexon is not credible.

³⁷⁷ Document NOR-C2884, transcript of [King Office Manager] interview dated 31 January 2019, pages 48-51.

³⁷⁸ For completeness, there is one document dated 25 February 2014 in which [Consultant to King] notes that [Lexon Director] had asked to talk to [King Director] (see document NOR-E1483, email from [Consultant to King] to [King Director] dated 25 February 2014). However, [King Director] told the CMA that he did not contact [Lexon Director] as a result of this email (see document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 160 lines 16-19) and [Lexon Director] told the CMA that he could not remember the conversation [Consultant to King] referred to in the email (see Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, pages 168-169).

[Auden Mckenzie Senior Employee 1]'s evidence about how the supply arrangements came about was not credible

- 6.66 The CMA considers that [Auden Mckenzie Senior Employee 1]'s explanations of how the supply arrangements with Lexon came about lack credibility. The CMA also has serious concerns regarding his frankness at interview.
- 6.67 [Auden Mckenzie Senior Employee 1]'s evidence does not appear consistent with the documentary evidence prior to the Horizontal Agreement, which demonstrates that there were contacts between Auden Mckenzie and Lexon regarding the supply of Nortriptyline Tablets (in both strengths), and an absence of any documentary evidence of contacts between with King and Lexon (see paragraph 6.75 below).
- 6.68 [Auden Mckenzie Senior Employee 1]'s evidence is contradicted by [Lexon Director]'s evidence. The evidence of [Lexon Director] is more credible than that of [Auden Mckenzie Senior Employee 1] because [Auden Mckenzie Senior Employee 1] fails to give a plausible explanation (or any explanation at all) as to why Lexon would wish to receive only 10mg tablets from Auden Mckenzie at a very discounted price rather than both 10mg and 25mg tablets. [Auden Mckenzie Senior Employee 1] stated that Auden Mckenzie had offered to supply both strengths of tablet but that '*Lexon only wanted to take supply of the 10mg tablets.*',³⁷⁹ which was better for [Auden Mckenzie Senior Employee 1] because he could sell the other strength at another price. Assuming there was no Horizontal Agreement, given the price levels offered in this deal, Lexon would still have had a very strong commercial incentive to purchase heavily discounted 25mg tablets from Auden Mckenzie even if (unknown to Auden Mckenzie) it could also purchase heavily discounted 25mg tablets from King. The more plausible explanation as to why Lexon only took 10mg tablets from Auden Mckenzie is that provided by [Lexon Director]: Lexon was told to take supplies of 25mg tablets from King.
- 6.69 As is the case for [King Director], [Auden Mckenzie Senior Employee 1] would have motive to deny the existence of the Horizontal Agreement. Further, as [X], [Auden Mckenzie Senior Employee 1] would also

³⁷⁹ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, pages 37-39.

have a motive to downplay his role in the establishment and running of the Horizontal Agreement.

- 6.70 [Auden Mckenzie Senior Employee 1]'s accounts of the negotiations with Lexon and his contact with King is contradicted by both [King Director], who said that [Auden Mckenzie Senior Employee 1] contacted him and made him aware of the threat that Lexon might apply for a PLPI for the Lundbeck product, and [Lexon Director] (see paragraph 4.29 above).
- 6.71 The CMA has considerable doubts as to the credibility of [Auden Mckenzie Senior Employee 1]'s suggestion that he was at a distance from the negotiation of the Auden-Lexon supply arrangements because Lexon was an account which [Auden Mckenzie Senior Employee 3] handled:³⁸⁰
- (a) [Auden Mckenzie Senior Employee 1] said in interview that the contact from Lexon was '*a very real issue*' and '*a concern for all of us*.'³⁸¹
 - (b) [Auden Mckenzie Senior Employee 3] said in interview that it was [Auden Mckenzie Senior Employee 1] who agreed on the £4 per pack price.³⁸² Similarly, [Auden Mckenzie Senior Employee 2] said in interview that pricing at such a discount would have required sign-off by [Auden Mckenzie Senior Employee 1].³⁸³
 - (c) The price Auden Mckenzie charged Lexon for 10mg packs was significantly below those charged to any other customer. The next lowest price charged to a customer was £52.50 per pack. [Auden Mckenzie Senior Employee 2] referred to the £4 per pack as '*ridiculously low*'.³⁸⁴

³⁸⁰ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, page 40, lines 2-5 and page 45, lines 20-23.

³⁸¹ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, page 64 lines 19-21.

³⁸² Document NOR-C1977, transcript of [Auden Mckenzie Senior Employee 3] interview dated 23 May 2018, page 49 lines 11-12.

³⁸³ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, pages 46 – 47.

³⁸⁴ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, page 47 line 20.

(d) Similarly, [Lexon Director] stated that he had frequent difficulty obtaining stock from Auden Mckenzie because of the low price as Auden Mckenzie staff *'wouldn't process it because of the price, and they'd obviously have to get approval; and then trying to get approval was just becoming difficult.'*³⁸⁵ This statement is borne out by the surviving contemporaneous documents.³⁸⁶

6.72 As regards his contact with [King Director], in addition to the fact that it is inconsistent with [King Director]'s evidence, it is surprising that, when asked during his first interview with the CMA on 14 December 2017 about his contact with [King Director], [Auden Mckenzie Senior Employee 1] omitted to mention the 2017 Text Messages that they had exchanged three months earlier and which he had deleted from his phone:

CMA: *'And subsequent to that contact [in 2013], that meeting [³⁸⁷] did you have any ongoing contact with [King Director]?''*

[AM SE 1]: *'He had messaged me a few times I can't remember exactly what they were but I remember a number of messages after [~~X~~] [the sale of Auden Mckenzie]. I can recollect because it just baffled me as to why he was asking me for contacts at Actavis, those kind of things, I can't remember exactly but yes.'*

CMA: *'So did you respond to those contacts?'*

[AM SE 1]: *'I think I must have put him in touch with a person.'*

CMA: *'A person at?'*

[AM SE 1]: *'At, at, at Actavis because I think, I think I ignored it once or twice and he kept persisting so I just put him in touch with a guy and what happened I don't know.'*

CMA: *'Okay.'*

³⁸⁵ Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 73 lines 6-8.

³⁸⁶ Document NOR-E8178, email from [Lexon Director] to [Auden Mckenzie Senior Employee 3] dated 12 January 2015. Document NOR-E8457.4, text message from [Lexon Director] to [Auden Mckenzie Senior Employee 1] dated 21 April 2015.

³⁸⁷ The meeting being referred to by the CMA interviewer is the meeting between [King Director] and [Auden Mckenzie Senior Employee 1] in 2013, described in paragraph 3.66 above.

CMA: *'But the only contact you had [prior to the sale of Auden Mckenzie] [~~X~~] was this meeting that you described?'*

[AM SE 1]: *'Yeah I mean I can't remember individual phone calls, emails but I think I've only met him once.'*

CMA: *'Thank you.'*³⁸⁸

6.73 This omission is particularly striking given that it may be inferred that he must have known that the 2017 Text Messages would have been of potential interest to the CMA – even if they had contained false allegations – given that his immediate reaction on learning of the CMA's unannounced inspections on 10 October 2017 was to inform [King Director] of the unannounced inspection and that it was not him ([Auden Mckenzie Senior Employee 1]) who had informed the CMA of any potential wrongdoing.³⁸⁹

6.74 The CMA also has concerns about the frankness of [Auden Mckenzie Senior Employee 1]'s evidence that he had *'no idea'* which company was supplying Lexon 25mg packs:

(a) [King Director] stated that he entered into the supply arrangements with Lexon as a direct result of the call he had received from [Auden Mckenzie Senior Employee 1] informing him that Lexon could import a Lexon parallel import:

CMA: *'[These arrangements] came about how?'*

[KD]: *'So, [Auden Mckenzie Senior Employee 1] called me and said that this is what's happened.'*

CMA: *'Yes.'*

[KD]: *'So, I agreed to supply.'*³⁹⁰

(b) [Auden Mckenzie Senior Employee 1] agreed that he discussed with [King Director] the threat posed by Lexon (albeit, in his version of events, only fleetingly).

³⁸⁸ Document NOR-C1595, transcript of [Auden Mckenzie Senior Employee 1] interview dated 14 December 2017, pages 190–191 lines 8-8.

³⁸⁹ Document NOR-C3046, [Auden Mckenzie Senior Employee 1]'s response to the CMA's section 26 notice dated 2 May 2019.

³⁹⁰ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 89-90 lines 26-5.

- (c) At the relevant time King was the only MA-holder for Nortriptyline Tablets in the UK other than Auden Mckenzie. The suggestion that [Auden Mckenzie Senior Employee 1] would have had '*no idea*' who might be supplying 25mg tablets seems implausible. When asked the same question, [Auden Mckenzie Senior Employee 2] said:

*'it's not difficult to find out who's supplying who [...] when there are two or three players who, who are supplying the [market]. [...] The buyers always tell you "Oh, we're buying from so and so, if you want to then give us X better price", you know.'*³⁹¹

- 6.75 Given the relevant context, [Auden Mckenzie Senior Employee 1]'s assertion that he did not know and '*never actually asked*' who was supplying the 25mg tablets to Lexon is not credible. This was a very unusual deal in which Auden Mckenzie deliberately sacrificed significant profits. [Auden Mckenzie Senior Employee 1] said he initially offered to supply Lexon both 10mg and 25mg tablets to head off Lexon's threat that it would bring in a new source of Nortriptyline Tablets.³⁹² It follows that, if Lexon did not receive supplies of 25mg tablets, there would have been a risk that Lexon might proceed to bring in the new source (and open '*Pandora's box*'³⁹³). [Auden Mckenzie Senior Employee 1] would therefore have had an incentive to assure himself that Lexon was adequately supplied with 25mg tablets. Although it is true that [Auden Mckenzie Senior Employee 1] would prefer another company to supply Lexon the 25mg tablets ('*the less he takes, the better*'³⁹⁴), this does not mean that he would be content not to know that Lexon was receiving sufficient supplies of 25mg tablets.

- 6.76 It is notable that there are substantial gaps in [Auden Mckenzie Senior Employee 1]'s recall of events, where a clear recall of those events might perhaps have been unhelpful to him, but he is able to provide a

³⁹¹ Document NOR-C2592, transcript of [Auden Mckenzie Senior Employee 2] interview dated 10 January 2019, page 112 lines 12-22.

³⁹² Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, pages 39-40.

Document NOR-C1749, [Auden Mckenzie Senior Employee 1]'s response to question 3 of the CMA's section 26 notice dated 18 June 2018.

³⁹³ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 125 lines 2-3.

³⁹⁴ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, page 38 lines 22-23.

somewhat more detailed account of potentially exculpatory conversations, even though the events occurred at a similar time. For example, [Auden Mckenzie Senior Employee 1] had no recall of the email of 31 October 2014 (*'For info Order will not be processed'*) or of the portions of the messages from March 2015 relating to Auden Mckenzie's supplies of 10mg packs to Lexon (see paragraphs 4.60 and 4.63 above), yet he was able to provide a clear summary of the discussion with [King Director] in summer 2014 (see paragraphs 4.47 to 4.48 above). The *'patchiness'* of his memory, further suggests that his evidence is not reliable and may not have been full and frank.

- 6.77 Taking into account [Auden Mckenzie Senior Employee 1]'s motives, the internal inconsistency in his evidence, the varying detail of his recall and the lack of supporting documentary evidence, the CMA finds [Auden Mckenzie Senior Employee 1]'s evidence that it was Lexon that instigated the arrangement whereby Auden Mckenzie would only supply 10mg tablets unconvincing.

Evidence of contacts between Auden Mckenzie and King prior to the Horizontal Agreement

- 6.78 There is uncontested evidence of contact between [King Director] and [Auden Mckenzie Senior Employee 1] from 2013 onwards including, in particular, the admission by both [King Director] and [Auden Mckenzie Senior Employee 1] that they referred to Lexon in one of their discussions in summer 2014, before the supply from both their companies to Lexon started in September 2014.
- 6.79 There is no written record of what was discussed between [King Director] and [Auden Mckenzie Senior Employee 1] and for the reasons set out at paragraphs 6.65 and 6.77 above, the CMA has reason to doubt the accounts given by [Auden Mckenzie Senior Employee 1] and [King Director] in their witness interviews. However, the evidence of contacts between [King Director] and [Auden Mckenzie Senior Employee 1] demonstrates that [Auden Mckenzie Senior Employee 1] and [King Director] had the opportunity to come to the Horizontal Agreement.

The documentary evidence prior to the Horizontal Agreement

- 6.80 The documentary evidence predating the Horizontal Agreement is consistent with [Lexon Director]'s witness evidence that he negotiated

solely with Auden Mckenzie regarding the supply of both strengths of Nortriptyline Tablets and that Lexon was subsequently informed by Auden Mckenzie that King would supply the 25mg tablets. It undermines the claims made in the witness evidence of [Auden Mckenzie Senior Employee 1] and second interview of [King Director] that the supply arrangements resulted from two separate, vertical negotiations.

6.81 The contemporaneous documents show that Lexon and Auden Mckenzie were negotiating the supply of Nortriptyline Tablets in the summer of 2014:

(a) [Auden Mckenzie Senior Employee 3] sent [Lexon Generics Buyer] and [Lexon Director] the June 2014 Auden-Lexon Price List on 21 May 2014. Notably, this document refers to Auden Mckenzie supplying Lexon with both strengths of Nortriptyline Tablets.³⁹⁵

(b) On 28 May 2014, [Lexon Director] instructed a Lexon employee responsible for purchasing parallel imports that Lexon should continue to import Nortriptyline Tablets, explaining that '*The deal does not officially start until august*'.³⁹⁶ [Lexon Director] told the CMA that his reference to '*the deal*' in this email, was a reference to Auden Mckenzie's arrangement with Lexon to supply Nortriptyline Tablets at a price of £4 per pack.³⁹⁷ He also said that he was not sure why the start date of the arrangement changed from August to September 2014.³⁹⁸

(c) On 30 May 2014, [Lexon Generics Buyer] sent an email to two members of Lexon's sales team,³⁹⁹ with the subject line: '*Nortriptyline 10mg Tabs & Nortriptyline 25mg Tabs - Generic imminent (Auden Mckenzie)*'. The email stated: '*Stock is being located now.*'⁴⁰⁰

6.82 There is a total absence of any contemporaneous documents evidencing communications between King and Lexon in the run up to

³⁹⁵ Document NOR-E8116, email from [Auden Mckenzie Senior Employee 3] to [Lexon Generics Buyer] dated 21 May 2014 and attachment NOR-E8117, spreadsheet concerning Lexon - Auden Mckenzie price list June 2014.

³⁹⁶ Document NOR-E8118, email exchange between [Lexon Director] and [Employee of Lexon] dated 28 May 2014.

³⁹⁷ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 54 line 6.

³⁹⁸ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 55 lines 6-7.

³⁹⁹ Document NOR-C2729, transcript of [Lexon Generics Buyer] interview dated 31 January 2019, page 12-13.

⁴⁰⁰ Document NOR-E8120, email from [Lexon Generics Buyer] to [Employee of Lexon] dated 20 May 2014.

September 2014 regarding either the terms of supply of 25mg tablets, or Lexon's decision to discontinue purchasing 10mg tablets from King. This is despite the CMA having conducted an extensive investigation, including inspections, section 26 requests and interviews, as detailed in section 2B of this Decision. If there had been a vertical negotiation between King and Lexon, one would have expected to have found some such documents.

Conclusion

- 6.83 On the basis of the witness and documentary evidence⁴⁰¹ (summarised at paragraph 6.39 above), the CMA concludes that negotiations for both strengths of Nortriptyline Tablets took place between Auden Mckenzie and Lexon in May 2014, and it was only later, prior to September 2014, that Auden Mckenzie informed Lexon that King would be supplying the 25mg tablets.
- 6.84 It necessarily follows, and the CMA therefore infers, that there must have been a discussion, or some other form of contact between King and Auden Mckenzie, in which they reached the common understanding that they would share supplies of Nortriptyline Tablets to Lexon, with Auden Mckenzie supplying 10mg tablets and King supplying 25mg tablets.
- 6.85 Given that King had no separate negotiation with Lexon regarding the prices or volumes at which it would supply, it also follows that King must have agreed the pricing and volume terms with Auden Mckenzie (as [Lexon Director] said in interview: *'[King Director] would have had to agree with Auden that he's going to supply that strength and that volume to me'*⁴⁰²). In addition, it is implausible that [King Director] would have agreed to supply the relevant volumes of 25mg tablets (approximately one sixth of the total market) at a price of £4 per pack without knowing that [Auden Mckenzie Senior Employee 1] would supply on equivalent terms for the 10mg tablets, because: (a) [King

⁴⁰¹ The CMA relies on the documentary evidence prior to the Horizontal Agreement described at paragraphs 6.80 - 6.82 above and on the evidence from the periods during and after the Horizontal Agreement set out in the sections below which provides evidence of a pre-existing Horizontal Agreement between Auden Mckenzie and King, consistent with the CMA's findings and inference (paragraphs 6.86 to 0 below).

⁴⁰² Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, pages 92-93 lines 23-1.

Director] would have had an interest in knowing that Lexon was adequately supplied with Nortriptyline Tablets at very discounted prices such that [Lexon Director] would not carry out the threat he had made;⁴⁰³ (b) King would have wanted to know Auden Mckenzie's terms of supply to ensure that the cost of supplying King was shared with Auden Mckenzie; and (c) King and Auden Mckenzie would have had a strong incentive to supply no more than the necessary volume of Nortriptyline Tablets needed to placate Lexon and, in order to do so, would have needed to coordinate and disclose to each other what they were supplying to Lexon.⁴⁰⁴

Evidence from the period during and after the Horizontal Agreement

6.86 The evidence from the period of the Horizontal Agreement confirms that there was a pre-existing agreement between Auden Mckenzie and King on the terms set out at paragraph 6.38 above.

The Parties' conduct: the striking similarities in the supply arrangements between King and Lexon, and Auden Mckenzie and Lexon

6.87 The Parties' conduct after entering into the Horizontal Agreement provides evidence of their common understanding that: (i) Auden Mckenzie would only supply 10mg tablets and King would only supply 25mg tablets to Lexon, (ii) the Parties would each supply a restricted volume of product amounting to approximately one sixth of the total market (i.e. 3,400 10mg and 1,600 25mg packs); and (iii) the Parties would supply their respective packs at a fixed price of £4 (albeit that Auden Mckenzie did not implement this element of the agreement for

⁴⁰³ The fact that this would have been a concern is clearly illustrated by the fact that, in March 2015 [King Director] he contacted [Auden Mckenzie Senior Employee 1] because he was concerned that Actavis would not continue to supply Lexon at very discounted prices. This strongly suggests that he knew that, up until that point in time, Lexon was being adequately supplied by Auden.

⁴⁰⁴ As [King Director] explained in the context of the March 2015 texts, he wanted to avoid '*supplying product to somebody who's already got the product from another source. [...] I'm losing money by selling. [...] My only commercial incentive is to prevent the importation of the product.*' This sentiment would have existed equally at the outset of the arrangement in September 2014 as in mid-March 2015. Given King was willing to discuss this matter with Auden Mckenzie in mid-March 2015, it would follow that he was willing to discuss the matter in September 2014 also.

the final three months; see Table 8 below). The Parties' conduct demonstrates their joint intention to that effect.⁴⁰⁵

- 6.88 Table 7 below sets out the volumes of Nortriptyline Tablets supplied by King and Auden Mckenzie to Lexon, together with the prices charged, in the period January 2014 to December 2015. The cells highlighted in pink indicate the period of the Horizontal Agreement (the dark pink shows when prices of both Auden Mckenzie and King were aligned at £4 per pack).⁴⁰⁶

⁴⁰⁵ C-2&3/01 P *BAI and Commission v Bayer*, EU:C:2004:2, paragraph 100: '*the existence of an agreement within the meaning of [Article 101(1)] can be deduced from the conduct of the parties concerned.*' An infringement may be proven by direct evidence and/or indirect evidence, '*for example in the form of conduct*': T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, EU:T:2006:265, paragraphs 82-83.

⁴⁰⁶ Document NOR-C0261.13, Document NOR-C0261.14, Document NOR-C0261.15, Document NOR-C0261.16, Document NOR-C0261.17, Document NOR-C0261.18, Document NOR-C0261.19, Document NOR-C0261.20, Document NOR-C0261.22, Document NOR-C0261.23, Document NOR-C0261.24, Document NOR-C0261.25, Document NOR-C0261.26, Document NOR-C0261.27, Document NOR-C0261.28, Document NOR-C0261.29.

Table 7: Supply of Nortriptyline Tablets to Lexon

	Auden Mckenzie's supply of Nortriptyline Tablets to Lexon				King's supply of Nortriptyline Tablets to Lexon			
	10mg		25mg		10mg		25mg	
	Volume	Price	Volume	Price	Volume	Price	Volume	Price
Jan14	-	-	-	-	550	£38.84	350	£59.88
Feb14	-	-	-	-	600	£38.84	350	£59.88
Mar14	-	-	-	-	500	£38.84	350	£59.88
Apr14	-	-	-	-	300	£43.24	-	-
May14	592	£46.60	296	£74.54	860	£44.72	150	£73.02
Jun14	-	-	-	-	-	-	-	-
Jul14	800	£46.43	-	-	1,000	£48.82	50	£79.83
Aug14	-	-	-	-	750	£48.82	400	£79.83
Sep14	3,400	£4.00	-	-	-	-	1,600	£4.00
Oct14	3,400	£4.00	-	-	-	-	2,000	£4.00
Nov14	3,400	£4.00	-	-	-	-	1,200	£4.00
Dec14	3,400	£4.00	-	-	-	-	1,600	£4.00
Jan15	3,400	£4.00	-	-	-	-	1,600	£4.00
Feb15	3,400	£4.00	-	-	-	-	1,600	£4.00
Mar15	3,400	£57.51	-	-	-	-	1,600	£4.00
Apr15	1,700	£57.51	-	-	-	-	1,600	£4.00
May15	3,400	£57.51	-	-	-	-	1,600	£4.00
Jun15	-	-	-	-	3,400	£4.00	1,600	£4.00
Jul15	-	-	-	-	3,400	£4.00	800	£4.00
Aug15	-	-	-	-	1,600	£4.00	800	£4.00
Sep15	-	-	-	-	-	-	-	-
Oct15	-	-	-	-	5	62.03	-	-
Nov15	-	-	-	-	-	-	-	-
Dec15	-	-	-	-	-	-	-	-

6.89 As a matter of objective fact, there are a series of remarkable similarities in the King-Lexon and Auden-Lexon supply arrangements in that:

- (a) they started at the same time;
- (b) Auden Mckenzie exclusively supplied 10mg tablets and King exclusively supplied 25mg tablets, despite previously having supplied both strengths to their respective customers;

- (c) the volumes were fixed⁴⁰⁷ and account for approximately one sixth of the total market size based on NHS PCA data and the parties' contemporaneous estimates,⁴⁰⁸ despite previously having fluctuated, and despite requests from Lexon to both King and Auden Mckenzie for greater volumes;⁴⁰⁹ and
- (d) the price was identical for the first sixth months at the '*unusually low*' level of £4 per pack, until Auden Mckenzie returned to a price of 20% off the Drug Tariff in March 2015 (following the public announcement of the acquisition by Actavis, see paragraphs 6.99 to 6.119 below).

6.90 After the Horizontal Agreement, when King took over supplies of 10mg tablets in June 2015, it supplied Lexon on the same terms as Auden Mckenzie had previously done.⁴¹⁰

6.91 In the CMA's view these similarities provide evidence of the Horizontal Agreement. The degree of similarity across three different parameters (timing, price, volume) is extremely unlikely to have arisen as a pure coincidence. However, it is readily explained if there was a single negotiation between Lexon and Auden Mckenzie, followed by a Horizontal Agreement between King and Auden Mckenzie, consistent with the evidence of [Lexon Director], [King Director]'s first account of the origin of the supply arrangements, and the contemporaneous documents.

Documentary evidence during the Horizontal Agreement

6.92 The contemporaneous documents prove that horizontal contact between [Auden Mckenzie Senior Employee 1] and [King Director] took

⁴⁰⁷ There were two months during the period of the Horizontal Agreement where King did not supply 1,600 packs of 25mg to Lexon: King supplied Lexon with 2,000 packs of 25mg tablets in October 2014, and 1,200 packs of 25mg tablets in November 2014. The average volume supplied across October and November was therefore 1,600 packs, and at interview, [King Director] referred to the 2,000 packs King supplied in October 2014, as being '*counterbalanced*' by the 1,200 packs King supplied in November 2014 (Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 51-52). There was one month during the period of the Horizontal Agreement in which Auden Mckenzie did not supply 3,400 packs of 10mg tablets to Lexon: in April 2015, Auden Mckenzie supplied 1,700 packs of 10mg tablets. Lexon told the CMA that it had only ordered 1,700 packs of 10mg tablets in April 2015 because '*The price had gone up but I had certain customer commitments so ordered accordingly*'. Document NOR-C3015, Lexon's 25 April 2019 response to section 26 notice of 18 April 2019.

⁴⁰⁸ See paragraph 4.5 above.

⁴⁰⁹ See paragraph 4.66 above.

⁴¹⁰ See paragraph 4.123 above.

place concerning supplies to Lexon and corroborate the existence of the Horizontal Agreement between Auden Mckenzie and King.

The email between King and Auden Mckenzie of 31 October 2014

- 6.93 The first documentary evidence of contact between King and Auden Mckenzie in the period of the Horizontal Agreement is the email dated 31 October 2014 (see paragraphs 4.61 to 4.62 above) between [King Director] and [Auden Mckenzie Senior Employee 1]. The context of that email was that, in October, Lexon had ordered more than 3,400 10mg packs from Auden Mckenzie and more than 1,600 25mg packs from King. Auden Mckenzie had supplied only the agreed 3,400 packs, but King had supplied 2,000 of the 25mg packs (i.e. 400 more than the agreed 1,600 packs). On 31 October, King had received another order, this time for November, for 2,000 25mg tablets (at the agreed price of £4 per pack). [King Office Manager] had emailed the purchase order to [King Director], and in her cover email stated ‘2,000 again.....’.⁴¹¹
- 6.94 Within half an hour of receiving the email from [King Office Manager], [King Director] took the unusual step of immediately emailing this purchase order, which included price and volume details, to his direct competitor, [Auden Mckenzie Senior Employee 1]. In his covering email, [King Director] said: ‘*For Info Order will not be processed.*’⁴¹²
- 6.95 At interview, neither [King Director] nor [Auden Mckenzie Senior Employee 1] was able to provide any explanation as to why [King Director] had sent the 31 October 2014 email to [Auden Mckenzie Senior Employee 1]:⁴¹³
- (a) [Auden Mckenzie Senior Employee 1] professed to be confused by the email: ‘*I don’t know why he sent it to me because, as I said, we didn’t even supply [Lexon] the 25 [mg tablets]*’ and later ‘*I’m supplying 10 [...] he’s supplying 25. So, he’s telling me he’s not*

⁴¹¹ Document NOR-E1513, email from [King Office Manager] to [King Director] dated 31 October 2014. Document NOR-E1514, Lexon Purchase Order to King dated 31 October 2014, attached to document NOR-E1513.

⁴¹² Document NOR-E1516, email attaching Lexon Purchase Order to King dated 31 October 2014, attached to document NOR-E1515.

⁴¹³ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 53-54.

Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 65.

Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, page 66.

going to supply. So, I don't understand.' [Auden Mckenzie Senior Employee 1] went on to suggest that he may not have opened the email.⁴¹⁴

(b) [King Director] did not know why he would have wanted to tell [Auden Mckenzie Senior Employee 1] that he was not going to fulfil the order, nor did he remember if he had discussed the email with [Auden Mckenzie Senior Employee 1]. At interview he professed confusion because he believed that the order for 2,000 packs had in fact been processed. In response to a section 26 notice sent after the interview, [King Director] initially continued to maintain that the relevant order had been processed and stated '*I do not know why that email was sent, as the order was processed*'.⁴¹⁵ However, after the CMA pointed out to him that King's sales data indicated that the order had not been processed, [King Director] sent a revised response to the section 26 notice indicating that the attached order had not in fact been processed and stating '*I do not know or recall why that email was sent*'.⁴¹⁶

6.96 In the CMA's view, the language of the 31 October 2014 email is unambiguous: [King Director] was informing [Auden Mckenzie Senior Employee 1] that he would not supply Lexon the 2,000 packs of 25mg tablets that Lexon had requested.

6.97 Absent the Horizontal Agreement, there is no obvious reason why [King Director] would email [Auden Mckenzie Senior Employee 1] confidential information regarding his terms of supply and his future strategy with a key customer. However, in the context of the pre-existing Horizontal Agreement, the reason for the email is obvious: [Auden Mckenzie Senior Employee 1] already knew King's terms of supply to Lexon, and [King Director] was simply informing him that he would not supply the 2,000 packs that Lexon had requested, as doing so would exceed the

⁴¹⁴ The available metadata does not enable the CMA to confirm whether or not [Auden Mckenzie Senior Employee 1] did in fact open the 31 October 2014 email.

⁴¹⁵ Document NOR-C2855, King's response to the CMA's section 26 notice dated 7 March 2019.

⁴¹⁶ Document NOR-C2893, CMA letter of 20 March 2019 and document NOR-C2978, King's revised response to the CMA's section 26 notice dated 7 March 2019. As stated in paragraph 4.64 above, in fact, King only supplied 1,200 25mg tablets to Lexon in November, meaning that the average volume supplied across October and November was 1600 packs. At interview, [King Director] referred to the 2,000 packs King supplied in October 2014, as being '*counterbalanced*' by the 1,200 packs King supplied in November 2014 (Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 51-52).

quantities that they had agreed that King would supply to Lexon. The 31 October 2014 email is entirely consistent with the existence of the Horizontal Agreement.

- 6.98 As noted above, [Auden Mckenzie Senior Employee 1] suggested at interview that he might not have opened the 31 October 2014 email from [King Director]. The available metadata does not allow the CMA to confirm whether or not the email was in fact opened by [Auden Mckenzie Senior Employee 1]. However, the CMA does not consider that this is the decisive issue when considering whether the 31 October 2014 email is evidence of the Horizontal Agreement. Rather, it is the very fact that [King Director] sent the email (as opposed to whether or not [Auden Mckenzie Senior Employee 1] opened it) which supports the conclusion that there was a Horizontal Agreement. The fact that [King Director] sent [Auden Mckenzie Senior Employee 1] the email indicates that [King Director] believed that [Auden Mckenzie Senior Employee 1] knew that King was supplying 25mg tablets to Lexon and that King had agreed to supply fewer than 2,000 packs of 25mg tablets. This is consistent with [Auden Mckenzie Senior Employee 1] having conducted the negotiation with [Lexon Director] in relation to the terms of supply of both strengths of Nortriptyline Tablets and with the existence of the Horizontal Agreement.

The March 2015 messages between King, Auden Mckenzie and Lexon regarding the supplies of 10mg tablets to Lexon

- 6.99 In March 2015, there was a series of calls and messages involving King, Auden Mckenzie and Lexon, relating to the supply of 10mg tablets to Lexon. The relevant context at the time of these messages was that, on 26 January 2015, Actavis had made a public announcement that it would acquire Auden Mckenzie for approximately £306 million. The acquisition completed on 29 May 2015, so the March messages took place between signing and completion.

20 March 2015 email from [King Director] to [Auden Mckenzie Senior Employee 2]

- 6.100 On 20 March 2015, [King Director] emailed Auden Mckenzie Senior Employee 2] saying: *'I spoke to [Auden Mckenzie Senior Employee 1] in Dubai earlier in the week and he thought you might be in a better position to answer a couple of points. Are you going to supply [Lexon*

*Director] with the 10mg in April? If not we will.*⁴¹⁷ The email also included a discussion of increased sales of nortriptyline in Spain and how that could not explain the volume of parallel imports offered to Lexon.

6.101 [Auden Mckenzie Senior Employee 2] responded as follows:

*'[King Director]
Not aware of anything.
Will find out and revert.
Kind regards
[Auden Mckenzie Senior Employee 2]'*⁴¹⁸

6.102 [King Director] told the CMA that he sent the email because he was concerned that Auden Mckenzie might not continue to supply Lexon with 10mg tablets, [X]. He said he therefore asked Auden Mckenzie whether it would be supplying Lexon with 10mg tablets, as he wanted to ensure that Lexon were not put in a position where they would apply for a licence to import the Lexon parallel imports.⁴¹⁹

6.103 [King Director] explained that the reason for his statement: *'If not we will'* was that he did not want to supply Lexon, if it was being supplied the 10mg tablets from another source:

CMA: *'Why, you say, "If not, we will". Why is it that your decision, I mean, about whether to supply 10 milligram nortriptyline to Lexon -- you say, "If not, we will". Does that indicate that your decision depends on whether Auden Mckenzie is going to supply the 10 milligram?'*

[KD]: *'It, it do... -- in the sense that what, what I don't want to end up doing is, effectively, supplying product to somebody who's already got the product from another source.'*

CMA: *'Why is that?'*

[KD]: *'Because, effectively, the guy's getting two orders.'*

⁴¹⁷ Document NOR-E0813, email from [King Director] to [Auden Mckenzie Senior Employee 2] dated 20 March 2015.

⁴¹⁸ Document NOR-E0813, email from [Auden Mckenzie Senior Employee 2] to [King Director] dated 20 March 2015.

⁴¹⁹ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 68 lines 6-15.

CMA: *'Yeah, but you'd be selling more nortriptyline, so why would you not want to supply?'*

[KD]: *'But if you look at the pricing, the pricing's well below our cost of goods. So, I'm, I'm losing money by selling. If you like, I have no commercial incentive to sell. My only commercial incentive is to prevent the importation of the product.'*⁴²⁰

- 6.104 Despite saying in the message to [Auden Mckenzie Senior Employee 2] that he would supply 10mg tablets to Lexon in April if Auden Mckenzie did not, [King Director] said at interview that he was not aware of Auden Mckenzie's terms of supply at that point in time. He said that *'[he] would've had to have approached blind [Lexon Director] and said ... "What quantities were you getting and at what price?"'*. However, he stated that he had no recollection of this further negotiation.⁴²¹
- 6.105 [Auden Mckenzie Senior Employee 1] said that he had no recollection of any discussion with [King Director] concerning 10mg tablets.⁴²²
- 6.106 The 20 March 2015 email is further evidence of the pre-existing Horizontal Agreement between Auden Mckenzie and King. As a general point, one would not expect to see any horizontal contact between competitors discussing their future sales strategy. Absent the Horizontal Agreement, there is no obvious explanation as to why [King Director] would discuss the supply of 10mg tablets to Lexon with his competitor, Auden Mckenzie, rather than directly with his customer, Lexon.
- 6.107 However, in the context of the Horizontal Agreement, the reason for the email is clear: [King Director] wanted to find out how [Auden Mckenzie Senior Employee 1]'s exit from the market would affect the Horizontal Agreement. It is clear from his email that [King Director] intended to supply Lexon with 10mg packs if, and only if, Auden Mckenzie ceased to do so. In other words, there was conditionality between King's decision to supply Lexon and Auden Mckenzie's decision not to do so. This is consistent with there having been a pre-existing Horizontal

⁴²⁰ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 76–77 lines 24-17.

⁴²¹ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 72.

⁴²² Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2019, page 80 lines 2-14.

Agreement that Auden Mckenzie would supply the 10mg tablets to Lexon and King would not.

6.108 [Auden Mckenzie Senior Employee 1] told the CMA that [King Director]'s query to [Auden Mckenzie Senior Employee 2] of 20 March 2015 (*'Are you going to supply [Lexon Director] with the 10mg in April? If not, we will'*) suggested that [King Director] did not know if Auden Mckenzie was supplying Lexon 10mg tablets.⁴²³ However, the CMA does not consider that this interpretation is correct. It is clear that [King Director] was aware that Auden Mckenzie had, until this point, been supplying the 10mg tablets to Lexon at a *'very discounted price'*.⁴²⁴ As [King Director] himself stated, the reason he asked the question about future supplies, was that he wanted to check whether Auden Mckenzie would continue to sell to Lexon at the reduced price following its acquisition by Actavis.

27 March 2015 text from [Lexon Director] to [Auden Mckenzie Senior Employee 2] and 30 March 2015 email from [King Office Manager] to [King Director]

- 6.109 On 27 March 2015 [Lexon Director] texted [Auden Mckenzie Senior Employee 1] and stated, *'Just had a chat with [King Director] who said that you had agreed to continue supply as prior on the 10mg at the original price Please confirm'*.
- 6.110 On 30 March 2015, [Auden Mckenzie Senior Employee 1] replied to [Lexon Director], stating: *'Can only 20% off'*. [Lexon Director] confirmed in interview that this meant 20% off the Drug Tariff.
- 6.111 Approximately two hours after [Auden Mckenzie Senior Employee 1] texted [Lexon Director] to inform him he could only supply at 20% off the Drug Tariff, [King Office Manager] emailed [King Director] recording a telephone message from [Lexon Director] which stated: *'[Lexon Director] called he said to tell you that [Auden Mckenzie Senior Employee 1] does not want to do the price so he will order of [sic] us'*.

⁴²³ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, page 80 lines 2-8.

⁴²⁴ See paragraph 6.49 above.

- 6.112 [Auden Mckenzie Senior Employee 1] had no recollection of the text messages between [Lexon Director] and him. [Auden Mckenzie Senior Employee 1] said that he did not think he would have had a conversation with [King Director] as suggested in [Lexon Director]'s text message and he could not recollect doing so.⁴²⁵ He also said that he had *'no idea'* why [Lexon Director] would have discussed Auden Mckenzie's supplies with [King Director].
- 6.113 [King Director] was asked about the text messages between [Lexon Director] and [Auden Mckenzie Senior Employee 1] in interview and said as follows:

[Lexon Director]'s text message was presented to [King Director]

[KD]: *'Okay. Yeah. So, I've, obviously, spoken to [Lexon Director].'*

CMA: *'Yeah.'*

[KD]: *'Though, I don't -- again, I don't remember the conversation.'*

CMA: *'So, you don't remember what was discussed in that conversation?'*

[KD]: *'No, other than I, I would presume this is post the acquisition of Auden Mckenzie by Actavis.'*

CMA: *'So, this is March 2015.'*

[KD]: *'Yes.'*

CMA: *'So, just to help orientate you, this is a week after the last email, the two emails with [Auden Mckenzie Senior Employee 2] that we're just looking at, the ... This is 27 March and the ones before were 20 March 2015.'*

[...]

[KD]: *'Right, okay.'*

CMA: *'So, why did you -- so, according to [Lexon Director], he had a chat with you about the terms and supply from Auden Mckenzie. So, why would you have been talking to Auden --'*

[KD]: *'Well, I, I --'*

CMA: *'-- [Lexon Director] about Auden's supply terms?'*

⁴²⁵ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018, page 82 lines 21-23 and page 85 lines 5-8.

[KD]: *'I would've been -- I would've been ... if this -- this post dates the acquisition of Auden Mckenzie by Actavis. And again, it comes back to trying to ensure that the, the dea... -- the arrangements that were in place to supply product to ... ensure that Lexon didn't apply for a parallel import licence were in place.'*⁴²⁶

6.114 [King Director] also did not recall having had any contact with [Auden Mckenzie Senior Employee 1] relating to Auden Mckenzie's supplies of 10mg packs (as [Lexon Director]) text message suggests had happened).

6.115 Although [Lexon Director] text referred to [King Director] saying that [Auden Mckenzie Senior Employee 1] *'had agreed to continue supply as prior on the 10mg at the original price'*, [King Director] maintained that he was not aware of what Auden Mckenzie's terms of supply would have been.

6.116 In relation to the email from [King Office Manager] recording the telephone message from [Lexon Director], [King Director] said he did not remember this email and he did not know what [Lexon Director] meant by *'the price'* in his message. [King Director] was not sure whether [Lexon Director] had tried to order 10mg tablets from King at the time and stated that *'obviously, he doesn't order from us because we don't supply them till June [2015]'*.⁴²⁷

6.117 [Lexon Director] explained in interview that he had spoken to [King Director] about Auden Mckenzie's supply of 10mg tablets, because he had been unable to get information from Auden Mckenzie:

'I wasn't getting the, I wasn't getting any price or any feedback and I was trying to establish ... my biggest concern was I'd got orders from customers that I've got to fulfil, and if nobody's telling me anything ... so, I couldn't get through to anybody and I seem to recall I spoke to [King Director] on the basis that did he, did he know anything? Could he have a chat? Is there

⁴²⁶ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 84-85 lines 2-11.

⁴²⁷ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 87 lines 19-20.

something wrong that I don't know about? And then that's what triggered that text effectively.⁴²⁸

6.118 [Lexon Director] told the CMA that [King Director] had told him that Auden Mckenzie would supply at the '*original price*'. He commented that [Auden Mckenzie Senior Employee 1] was '*saying one thing to [King Director] -- and then another thing to me*'.⁴²⁹

6.119 [Lexon Director] said that, at this point he would have been '*upset with Auden – for suddenly dropping me in it*' (i.e. by increasing the price from £4 per pack to £57.51 per pack) and that he would not have wanted to order from Auden Mckenzie unless he had had to. He said that following his phone call to [King Office Manager] on 30 March 2015 (recorded in [King Office Manager]'s email to [King Director] – see paragraph 4.109 above), he believed that Lexon only started ordering 10mg tablets from King in June 2015, because King needed time to configure its supply chain so that it could fulfil Lexon's order.

The March 2015 messages support the existence of the Horizontal Agreement

6.120 The 27 March 2015 text message from [Lexon Director] to [Auden Mckenzie Senior Employee 1] records a discussion between [Lexon Director] and [King Director] regarding Auden Mckenzie's future supplies of 10mg tablets to Lexon. Absent the Horizontal Agreement, it is entirely unclear why [Lexon Director] would turn to Auden Mckenzie's competitor to find out information about Auden Mckenzie's future sales strategy. The fact that he did so demonstrates that he considered that the nature of [King Director]'s relationship with Auden Mckenzie was such that he would either have knowledge of Auden Mckenzie's plans or could find them out. This is consistent with [Lexon Director]'s witness evidence regarding the negotiation of the King-Lexon and Auden-Lexon supply arrangements.

6.121 The 27 March 2015 text message, together with [Auden Mckenzie Senior Employee 1]'s response of 30 March 2015, and the telephone message from [Lexon Director] to [King Director] of 30 March 2015, establish that [King Director] was aware of the price at which Auden

⁴²⁸ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 105 lines 3-8.

⁴²⁹ Document NOR-C2988, transcript of [Lexon Director] interview dated 21 February 2019, page 110 lines 10-17.

Mckenzie had been supplying 10mg tablets to Lexon. The various references in those communications to Auden Mckenzie's prices: '[King Director] [...] said that you [Auden Mckenzie Senior Employee 1] had agreed to supply as prior at the original price' (emphasis added); '[Lexon Director] called he said to tell you that [Auden Mckenzie Senior Employee 1] does not want to do the price so he will order of [sic] us' (emphasis added) can most readily be explained by the fact that [King Director] already knew that Auden Mckenzie's price was £4 per pack. This is consistent with [King Director]'s comment in interview (as noted in paragraph 6.49 above) which shows his awareness that Auden Mckenzie supplied at a very low price: '*[Actavis] could literally take their eye off the ball, not realise how important it was to continue to supply product to a particular customer at a very discounted price*'.

6.122 The 27 and 30 March 2015 texts also provide evidence that [King Director] and [Auden Mckenzie Senior Employee 1] discussed supplies of 10mg tablets to Lexon. Although [Auden Mckenzie Senior Employee 1] suggested that he did not think he would have had a conversation with [King Director] regarding supplies of 10mg tablets to Lexon, there is no evidence that [Auden Mckenzie Senior Employee 1] was surprised by [Lexon Director] text message (which suggested that [Auden Mckenzie Senior Employee 1] did have such a discussion) or that [Auden Mckenzie Senior Employee 1] refuted [Lexon Director]'s assertion that he had had a discussion with his direct competitor. Rather, these messages directly contradict [Auden Mckenzie Senior Employee 1]'s initial evidence at interview that he had had only limited contact with [King Director] relating to Lexon which was confined to a single discussion in summer 2014 (see paragraphs 4.47 and 4.48 above). It is apparent from the contemporaneous documents that, contrary to [Auden Mckenzie Senior Employee 1]'s evidence, discussion between him and [King Director] concerning supply to Lexon did occur after summer 2014. This suggests that [Auden Mckenzie Senior Employee 1]'s evidence to the contrary is unreliable.

There is no credible alternative explanation for the similarities in the King-Lexon and Auden-Lexon supply agreements and no alternative explanation is supported by the documentary evidence

6.123 The only alternative explanation for the similarities in the King-Lexon and Auden-Lexon supply agreements would be that Lexon had conducted two independent, parallel sets of (vertical) negotiations with King and Auden Mckenzie, each for only one strength of nortriptyline

tablets, and had ended up agreeing to near identical terms, which included very low pricing, with both counterparties. However, the CMA considers that, viewed against the available documents and the witness evidence, such an alternative explanation is not credible.

6.124 The parties told the CMA that they each agreed to supply at a low price to stop Lexon from bringing in a new source of parallel imported nortriptyline.⁴³⁰ However, this explanation does not appear to be credible as, had they each negotiated separately with Lexon to supply only one strength of the tablets, it is unclear how, in the absence of a bilateral contact between Auden Mckenzie and King, they could have been assured that Lexon would not have imported product for the other strength. In fact, [King Director] told the CMA that he had decided to take over the supply of 10mg tablets, when Auden Mckenzie stopped supply in May 2015, because he was concerned that if he did not do so, then Lexon would start to import.⁴³¹ Moreover, [Auden Mckenzie Senior Employee 1] said that Lexon did not want to take 25mg tablets from Auden and that he did not know who was supplying 25mg tablets and had not asked about this.⁴³² Given Lexon's view that the deal was very lucrative,⁴³³ Lexon would have had an incentive to get as much supply of both strengths as possible. Hence, it seems unlikely that Lexon would have had any incentive to turn down the offer of 10mg from Auden Mckenzie, as [Auden Mckenzie Senior Employee 1] suggested in interview.

6.125 In addition, if it were the case, that Lexon had conducted two independent, parallel sets of (vertical) negotiations with King and Auden Mckenzie, one would have expected this version of events to have been borne out by the available documentary evidence and the witnesses' accounts of the negotiations that are said to have taken place. As set out above, this is not the case.

King takes over supplies of 10mg tablets to Lexon

6.126 As noted at paragraph 6.90 above, once the Horizontal Agreement had come to an end in May 2015, King took over supplies of 10mg tablets

⁴³⁰ See paragraphs 4.18 ([Auden Mckenzie Senior Employee 1]'s explanation) and 4.29 ([King Director]'s explanation) above.

⁴³¹ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 78 lines 9-13.

⁴³² Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018 pages 38–39 lines 12-4.

⁴³³ Document NOR-C2086, transcript of [Lexon Director] interview dated 2 August 2018, page 15.

to Lexon at the same price and volume as Auden Mckenzie had previously supplied.

- 6.127 There are no contemporaneous documents evidencing a further negotiation between King and Lexon regarding the terms on which King would supply 10mg tablets.
- 6.128 Despite saying in his message to [Auden Mckenzie Senior Employee 2] of 20 March 2015, that if Auden Mckenzie did not supply 10mg tablets to Lexon in April, King would, [King Director] maintained at interview that he was not aware of Auden Mckenzie's terms of supply at that point in time. He said that '*[he] would've had to have approached blind [Lexon Director] and said ... "What quantities were you getting and at what price?"*'. [King Director] confirmed, however, that he had no recollection of this further negotiation taking place.⁴³⁴ Indeed, less than two hours after learning that [Auden Mckenzie Senior Employee 1] could only supply at the Drug Tariff minus 20%, [Lexon Director] left the 30 March telephone message for [King Director] stating that he would order the 10mg tablets from King, with no reference to needing to negotiate the terms of supply.
- 6.129 The CMA considers that [King Director]'s statement is not credible and that there was no '*blind*' negotiation between King and Lexon. There is no evidence to support the contention that any such negotiation took place. Rather the documentary and witness evidence set out in paragraphs 6.92 to 6.121 support the conclusion that no such negotiation was needed, because it was understood by both King and Lexon that King would supply Lexon on the same terms as Auden Mckenzie had done previously, of which King was aware (see paragraph 6.108 above).

The 2017 Text Messages

- 6.130 On 8 and 9 September 2017, [Auden Mckenzie Senior Employee 1] and [King Director] exchanged a series of eight text messages (the 2017 Text Messages)⁴³⁵ which the CMA considers relate to the

⁴³⁴ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 72.

⁴³⁵ The 2017 Text Messages were deleted by both [King Director] and [Auden Mckenzie Senior Employee 1] from their mobile phones before the devices were obtained by the CMA in October 2017. The CMA was able to recover metadata from [Auden Mckenzie Senior Employee 1]'s phone which revealed that in total eight texts

Horizontal Agreement. As explained in greater detail below, [Auden Mckenzie Senior Employee 1] and [King Director] each deleted the text messages. However, the CMA was able to recover six of the eight deleted messages through forensic measures. The text messages said as follows:

[KD]: [Irretrievably deleted message]
[KD]: [Irretrievably deleted message]
[AM SE1]: *'Yu need it onshore which is what I need to organise. This matter has nothing to do with [Individual A]. As you are trying to be smart I'm [sic] will inform the cma'*
[AM SE1]: [~~✂~~]
[AM SE1]: *'I have nothing to lose'*
[KD]: *'Two and a half years since you assured me that a payment would be made and we agreed a figure.'*
[AM SE1]: *'I will do as my message says'*
[KD]: *'I think we need to meet/talk. Your proposed plan of action opens up the possibility of the establishment of a cartel/collusion, which has both personal and criminal implications. This would involve not only you and me but also [Individual A] and [Individual B].'⁴³⁶*

6.131 The 2017 Text Messages are consistent with the existence of the Horizontal Agreement.

The threat to inform the CMA

6.132 [Auden Mckenzie Senior Employee 1] threatened [King Director] that he would *'inform the cma'*. He did not say what he was planning to inform the CMA about, suggesting that he assumed [King Director] would be aware of what the threat related to. Indeed, in his final message, [King Director] explained that he understood [Auden Mckenzie Senior Employee 1]'s (threat to relate to *'a cartel/collusion'* between [Auden Mckenzie Senior Employee 1] and [King Director].

were sent on 8-9 September 2017. The CMA was also able to recover from [Auden Mckenzie Senior Employee 1]'s mobile device the content of six of the deleted texts (third to eighth texts) but was not able to recover the content of the first two texts in the series. These unrecovered texts were sent by [King Director] to [Auden Mckenzie Senior Employee 1].

⁴³⁶ Document NOR-E8458.1, text message exchange between [Auden Mckenzie Senior Employee 1] and [King Director] dated 8 and 9 September 2017.

6.133 From [King Director]'s use of the phrase '*not only you and me but also [Individual A] and [Individual B]*', the CMA infers that [King Director] was warning [Auden McKenzie Senior Employee 1] that if he were to come to the CMA with allegations of collusion in the market for the supply of nortriptyline, this could involve more people than just the two of them. When asked about the meaning of this part of the text messages in interview, [King Director] described his response as a '*counter-threat*'.⁴³⁷ The implication of his text message is that if [Auden McKenzie Senior Employee 1] were to carry out his threat, it could also implicate [Individual B] and [Individual A] [X].⁴³⁸

6.134 [X]: '*Your proposed plan of action opens up the possibility of the establishment of a cartel\collusion, which has both personal and criminal implications. This would involve not only you and me but also [Individual A] and [Individual B]*'.

The deletion of the 2017 Text Messages

6.135 On 10 October 2017, on learning that the CMA was conducting unannounced inspections, [Auden McKenzie Senior Employee 1] called [King Director] and informed him of the inspections. [Auden McKenzie Senior Employee 1] did not mention the 2017 Text Messages or this conversation with [King Director] during his first interview with the CMA, when asked whether he had any on-going contact with [King Director] after 2013 (see paragraph 6.72 above). In response to a section 26 notice, [Auden McKenzie Senior Employee 1] told the CMA that having learned of the CMA's activities, he was concerned that due to the proximity in time of his messages of 8 September 2017, [King Director] would assume that the CMA's activity had been prompted by him contacting the CMA. He said that the purpose of the 10 October call to [King Director] was to explain that he had not been in contact with the CMA.⁴³⁹ Immediately following that call, [King Director] deleted the 2017 Text Messages from his phone, from which it can be inferred that he considered them to be relevant to a potential competition law

⁴³⁷ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 149 lines 22-26 and page 150 lines 25-26.

⁴³⁸ [X]

⁴³⁹ Document NOR-C3046, [Auden McKenzie Senior Employee 1]'s response to the CMA's section 26 notice of 2 May 2019.

infringement. [Auden Mckenzie Senior Employee 1] told the CMA that he called [King Director] again on 11 October 2017, to provide further reassurance that he had not been in contact with the CMA.⁴⁴⁰

6.136 [Auden Mckenzie Senior Employee 1] also deleted the 2017 Text Messages from his message inbox. He told the CMA that [Auden Mckenzie Senior Employee 1] *considered contact from [King Director] to be akin to harassment and, given the iMessages were of no relevance or importance to [Auden Mckenzie Senior Employee 1]'s ongoing business interests, [Auden Mckenzie Senior Employee 1] had no need or desire to retain them*'.⁴⁴¹

The [substantial sum] agreement

6.137 The text messages also refer to [Auden Mckenzie Senior Employee 1]'s agreement to pay [King Director] a sum of money '*two and a half years*' ago, which would have been around March 2015. [King Director] and [Auden Mckenzie Senior Employee 1] have both confirmed that a promise of payment was made.⁴⁴²

6.138 The witness interviews and the text messages indicate that [King Director] spoke to [Auden Mckenzie Senior Employee 1] during March 2015 and they agreed that [Auden Mckenzie Senior Employee 1] would pay [King Director] [a substantial sum]⁴⁴³ (the '**[substantial sum] agreement**'). In interview, [King Director] stated that he believed these calls were contemporaneous with his email to [Auden Mckenzie Senior Employee 2] of 20 March 2015.⁴⁴⁴ The documentary evidence establishes that they reached agreement on the payment of [a substantial sum] no later than 24 March 2015.⁴⁴⁵

⁴⁴⁰ Document NOR-C3046, [Auden Mckenzie Senior Employee 1]'s response to the CMA's section 26 notice of 2 May 2019.

⁴⁴¹ Document NOR-C3046, [Auden Mckenzie Senior Employee 1]'s response to the CMA's section 26 notice of 2 May 2019.

⁴⁴² See paragraphs 4.83 to 4.85 above.

⁴⁴³ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018 page 136 line 8-14. Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, pages 104–105 lines 14-6.6.

⁴⁴⁴ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, pages 66-67.

⁴⁴⁵ Document NOR-C1614.4, this email chain between [Employee of Confidence] to [King Director] regarding the payment began on 24 March 2015.

- 6.139 Over the course of the following months and years, [King Director] repeatedly chased [Auden Mckenzie Senior Employee 1] for payment of the [substantial sum], but no payment was ever made.⁴⁴⁶
- 6.140 The CMA considers that the [substantial sum] agreement was connected to and further corroborates the existence of the Horizontal Agreement:
- (a) The [substantial sum] agreement was entered into during the period of the operation of the Horizontal Agreement at precisely the time when Auden Mckenzie ceased supplying Lexon 10mg tablets at the heavily discounted price of £4 per pack (i.e. *'two and a half years ago'*; in approximately March 2015).
 - (b) At the time the [substantial sum] agreement was entered into [King Director] and [Auden Mckenzie Senior Employee 1] were in correspondence with each other concerning whether or not Auden Mckenzie would continue to supply 10mg tablets to Lexon.⁴⁴⁷
 - (c) As part of his explanation of the [substantial sum] agreement, [King Director] said that he asked for the payment of [a substantial sum], because he believed King lost around [a substantial sum] as a result of Auden Mckenzie flooding the market with Paxtibi [X]. However, despite being requested to do so by the CMA, King was unable to provide any contemporaneous documents relating to this calculation.⁴⁴⁸
 - (d) Absent any agreement between them, it would be highly unusual for competitors to come to an agreement to make a payment that effectively compensates one for losses caused by the other's independent activity. However, such a payment would not be unusual if there had been a pre-existing horizontal agreement between them involving some form of market sharing. This is consistent with other evidence:

⁴⁴⁶ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 135, lines 6-18, and page 140 line 11-20. Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, page 102 lines 22-23 and page 112 line 15-16.

⁴⁴⁷ See the email from [King Director] to [Auden Mckenzie Senior Employee 2] dated 20 March 2015: *'I spoke to [Auden Mckenzie Senior Employee 1] in Dubai earlier in the week [...] Are you going to supply [Lexon Director] with the 10mg in April? If not we will.'*

⁴⁴⁸ Document NOR-C2978 Response to question 5(a) of the CMA's section 26 notice of 7 March 2019.

- (i) The evidence suggests that the 'burden' of supplying Lexon at £4 per pack had not been borne equally by King and Auden Mckenzie, which would create an incentive for King to seek compensation from Auden Mckenzie. Over the first six months of the Horizontal Agreement, Auden Mckenzie's total revenue from all sales of Nortriptyline Tablets in the UK increased by £1.8m, or 47%, compared to the previous six months, while King's total revenue from all sales of Nortriptyline Tablets fell by £1.3m, or 22%, compared to the previous six months.
- (ii) Further, a contemporaneous document suggests that the [substantial sum] in the [substantial sum] agreement may have been connected to the losses that King suffered from supplying Lexon at £4 per pack.⁴⁴⁹ [redacted]⁴⁵⁰ [redacted].

6.141 King's expectation of a payment and Auden Mckenzie's agreement to make that payment in the circumstances above is consistent with King and Auden Mckenzie having coordinated their response to Lexon's competitive threat, expecting to share the burden approximately equally, and King subsequently discovering that in fact the burden had not been shared as agreed. On balance, it is more plausible that King demanded, and Auden Mckenzie agreed to, the payment because of the unequal impact of a Horizontal Agreement between the two, than the Parties' alternative explanation; namely that King, absent any prior agreement, chose to extort a competitor in relation to its independent and legitimate conduct on the market.

The Parties' explanation of the 2017 Text Messages is not credible

6.142 The Parties argue that the threat to go to the CMA and the [substantial sum] agreement are not connected to, and do not corroborate the existence of, the Horizontal Agreement. The CMA does not consider that this is credible.

6.143 [King Director] and [Auden Mckenzie Senior Employee 1] told the CMA that the information which [Auden Mckenzie Senior Employee 1] was threatening to reveal when he stated that he would '*inform the cma*'

⁴⁴⁹ [redacted]

⁴⁵⁰ [redacted]

was not the existence of the Horizontal Agreement, but that [King Director] had met with other nortriptyline licence holders, [Lexon Director] and [Alissa Director]. [King Director] referred to this as '*almost an empty throw-away*',⁴⁵¹ and that while he did not think he had done anything wrong,⁴⁵² he still regarded it as significant.⁴⁵³ [Auden Mckenzie Senior Employee 1] said that his threat to [King Director] was '*kind of, like a playground silly thing, you know*'.⁴⁵⁴ [King Director] said that he was '*frightened*',⁴⁵⁵ and responded to [Auden Mckenzie Senior Employee 1] with what he described as an empty,⁴⁵⁶ and [X],⁴⁵⁷ counter-threat. The CMA does not consider that this is a plausible explanation of the 2017 text messages for the following reasons:

- (a) [Auden Mckenzie Senior Employee 1]'s initial threat mentions nothing about [King Director]'s relationship with any third parties, so it is unclear how [King Director] was meant to have understood the threat to relate to his relationship with Lexon and Alissa. Rather, as explained at paragraph 6.133 above, it is clear from [King Director]'s response that he understood [Auden Mckenzie Senior Employee 1]'s threat to relate to a '*cartel/collusion*' involving '*not only*' [King Director] and [Auden Mckenzie Senior Employee 1], '*but also*' [Individual B] and [Individual A]. The implication of that final message is that [King Director] understood [Auden Mckenzie Senior Employee 1]'s threat to relate to a '*cartel/collusion*' between himself and [Auden Mckenzie Senior Employee 1], and that in [King Director]'s view, any such CMA investigation could also involve [Individual B] and [Individual A].
- (b) [X]: '*Your proposed plan of action opens up the possibility of the establishment of a cartel/collusion, which has both personal and criminal implications. This would involve not only you and me but also [Individual A] and [Individual B]*'.

⁴⁵¹ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 160 lines 5-7.

⁴⁵² Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 151 lines 22-24.

⁴⁵³ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 151 lines 13-14.

⁴⁵⁴ Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October 2018 page 114 line 26. Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 154 lines 9-10: '*I didn't think there was anything there but what I wanted to do was make him back off*'.

⁴⁵⁵ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 149 line 22.

⁴⁵⁶ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, page 150 line 25-26.

⁴⁵⁷ [X].

- (c) The timing and drafting of the [King Director]'s final message suggests that it was prepared in a deliberate, planned manner. [Auden Mckenzie Senior Employee 1]'s threat was made shortly before 3pm on 8 September 2017. [King Director]'s response was made at 7:44am the following morning (9 September 2017). The text contains three fully formed sentences, is worded carefully, spelt correctly and is punctuated with commas and full stops. Given the lapse of time, and the apparent care in its drafting, it does not appear to have been an 'empty' [redacted] backlash, but rather a deliberate and credible warning. [Auden Mckenzie Senior Employee 1] would have also understood it as such.

6.144 In relation to the [substantial sum] agreement referred to in the 2017 Text Messages, the witnesses argue that this was solely connected to an opportunistic attempt by [King Director] to extort money [redacted]. However, the suggestion that the agreed payment was a case of pure extortion and was not linked to the Horizontal Agreement is not credible:

- (a) [King Director] told the CMA that he did not believe [Auden Mckenzie Senior Employee 1]'s actions were illegal,⁴⁵⁸ and that [Auden Mckenzie Senior Employee 1] was '*entirely within his rights to sell products in Spain*'.⁴⁵⁹ As such, this does not appear to be a credible basis to extort money from a competitor.
- (b) [Auden Mckenzie Senior Employee 1] said that he agreed to make the payment to King ('*I'll sort this thing out with you*'), but that he had never actually intended to pay. He said that it was not true that he had flooded the market with Paxtibi [redacted]. However, if it were factually incorrect [redacted].
- (c) [Auden Mckenzie Senior Employee 1] agreed to make the payment to [King Director] in March 2015, however, [Auden Mckenzie Senior Employee 1] and [King Director] continued to discuss and question the extent to which Paxtibi was available in the UK several months after this. For example, on 26 June 2015, [King Director] emailed [Auden Mckenzie Senior Employee 1] regarding sales data

⁴⁵⁸ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018 page 114 lines 5-7.

⁴⁵⁹ Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018 page 145 lines 3-4.

received from Biomed asking: '*How do we know the [Biomed] sales are genuine? It does not tally with the UK picture where the whole of Boots is being supplied by PI (approx. 8,000 packs of Paxtibi)*'.⁴⁶⁰ If both parties were aware that [Auden Mckenzie Senior Employee 1] had flooded the market with Paxtibi (via Biomed) and had agreed a payment to [King Director] in relation to this action, it would be unusual for [King Director] to continue to question [Auden Mckenzie Senior Employee 1] on whether and how the parallel import product was coming into the market.

(d) [redacted].

(e) [King Director] suggested at interview that he had calculated the cost of the Spanish parallel import to King's business at around [a substantial sum].⁴⁶¹ However, despite being requested to do so by the CMA, King was unable to provide any contemporaneous documents relating to this calculation.⁴⁶²

Conclusion in relation to the 2017 Text Messages

6.145 Overall, the CMA finds that the [substantial sum] agreement and [Auden Mckenzie Senior Employee 1]'s associated threat to '*inform the CMA*' in the 2017 Text Messages was connected to, and corroborates the existence of, the Horizontal Agreement.

Conclusion

6.146 Viewing the evidence in the round, the CMA concludes that King and Auden Mckenzie entered into a Horizontal Agreement under the terms set out at paragraph 6.38 above.

6.147 The CMA concludes that in around May 2014 there was a negotiation between Lexon and Auden Mckenzie pursuant to which Auden Mckenzie agreed to supply both strengths of Nortriptyline Tablets to Lexon at a heavily discounted price. Subsequently, Auden Mckenzie and King entered into the Horizontal Agreement and divided the supply

⁴⁶⁰ Document NOR-E8374, email from [King Director] to [Auden Mckenzie Senior Employee 1] dated 26 June 2015.

⁴⁶¹ Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018 page 114.

⁴⁶² Document NOR-C2978 King's response to question 5(a), King's section 26 Notice of 7 March 2019.

of Nortriptyline Tablets to Lexon. The Horizontal Agreement contained the following terms:

- (a) Market sharing: Auden Mckenzie would supply Lexon with only 10mg tablets and King would supply Lexon with only 25mg tablets.
- (b) Fixing prices: Auden Mckenzie and King would each supply Lexon at a fixed price of £4 per pack.
- (c) Fixing quantities: Auden Mckenzie and King would each supply no more than a fixed quantity of their respective packs of tablets at the fixed price of £4: 3,400 10mg packs in the case of Auden Mckenzie; and 1,600 25mg packs in the case of King. In both cases, the fixed volumes accounted for approximately one sixth of the total market size.⁴⁶³

F. Duration

6.148 The duration of the Infringement is a relevant factor for determining the financial penalties that the CMA will impose following a finding of infringement.

6.149 The CMA has found that the Infringement had a duration of 9 months, that is, from September 2014 to May 2015.

6.150 This period corresponds to the period during which the Horizontal Agreement was implemented by King and Auden Mckenzie. King implemented all three elements of the Horizontal Agreement (market sharing, fixed prices and fixed quantities) for the entire period. Auden Mckenzie implemented the market sharing and fixed quantities for the entire period and it implemented the fixed prices for the first six months of the period (from September 2014 to February 2015).

⁴⁶³ PCA data records that in May 2014 packs of 10mg tablets, and 9,636 packs of 25mg tablets, were dispensed. The documents contemporaneous with the Horizontal Agreement also indicate that the Parties understood that these volumes represented approximately one sixth of the market for 10mg and 25mg tablets; the parties used NHS England PCA data to estimate the size of the 10mg tablets market at 20,000 packs and the 25mg tablets market at 10,000 packs: see Document NOR-E8117, spreadsheet concerning Lexon - Auden Mckenzie price list June 2014, which was attached to Document NOR-E8116, email from [Auden Mckenzie Senior Employee 3] to [Lexon Generics Buyer] dated 21 May 2014. The NHS England PCA Data only measures the volumes in England; it does not measure the volumes in Scotland, Northern Ireland or Wales. The use of NHS England PCA data will therefore slightly under estimate the size of the nortriptyline market in the UK.

G. Restriction of competition by object

I. Legal framework

General

6.151 To come within the Chapter I prohibition and/or the prohibition in Article 101 TFEU, an agreement or concerted practice must have 'as [its] object or effect' the prevention, restriction or distortion of competition within the UK and/or the internal market. It is settled case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition, such that there is no need to examine their effects. That case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.⁴⁶⁴ In *Cartes Bancaires*, the Court of Justice found that the concept of an infringement by object must be interpreted 'restrictively'.⁴⁶⁵

6.152 The term 'object' in both the Chapter I prohibition and the prohibition in Article 101 TFEU refers to the sense of 'aim', 'purpose', or 'objective' of the coordination between undertakings in question.⁴⁶⁶ This is assessed objectively. It is not necessary to establish that the parties jointly intended, subjectively, to pursue an anticompetitive aim – only that they had a common understanding whose terms, assessed objectively, pursue or result in such an aim.⁴⁶⁷

6.153 An agreement or concerted practice may be regarded as having an anticompetitive object even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives. Indeed, the Court of Justice has held that:

⁴⁶⁴ C-373/14 P *Toshiba v Commission*, EU:C:2016:26, paragraph 26; and C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 50.

⁴⁶⁵ C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 58.

⁴⁶⁶ See, for example, respectively: C-56/64 *Consten & Grundig v Commission*, EU:C:1966:41, page 343; C-96/82 *IAZ and Others v Commission*, EU:C:1983:310, paragraph 25; C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643, paragraphs 32- 33.

⁴⁶⁷ T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, EU:T:2006:265, paragraph 77 (upheld on appeal in Joined cases C-501/06 P etc *GlaxoSmithKline Services Unlimited v Commission*, EU:C:2009:610).

*'even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition ... such considerations are irrelevant for the purposes of applying that provision [Article 101 TFEU].'*⁴⁶⁸

6.154 In order to determine whether an agreement or concerted practice reveals a sufficient degree of harm such as to constitute a restriction of competition by object, regard must be had to:

- (a) The legal and economic context of which it forms a part (which is assessed at section 6D of this Decision);
- (b) Its content; and
- (c) Its objectives.⁴⁶⁹

6.155 It is well established that an agreement or concerted practice need not be implemented to fall foul of the prohibition on anti-competitive agreements, including whether it amounts to a restriction of competition by object.⁴⁷⁰ However, evidence of the parties' conduct showing that the agreement or concerted practice was implemented may corroborate the assessment of its content and objectives.⁴⁷¹ Although the parties' subjective intentions are not a necessary factor in determining whether an agreement or concerted practice is restrictive of competition, there is nothing prohibiting a competition authority from taking the parties' subjective intentions into account.⁴⁷²

⁴⁶⁸ C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643, paragraph 21.

⁴⁶⁹ C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 53, citing C-32/11 *Allianz Hungaria v Commission*, EU:C:2013:160, paragraph 36 and the case-law cited. See also C-373/14 P *Toshiba v Commission*, EU:C:2016:26, paragraph 27.

⁴⁷⁰ C-277/87 *Sandoz v Commission*, EU:C:1989:363; *WANO Schwarzpulver*, (1979) OJ L322, 16.11.78, p. 26, [1979] 1 CMLR 403; C-19/77 *Miller v Commission*, EU:C:1978:19, paragraphs 7 to 10. See also COMP/37750 *French Beer*, [2006] 4 CMLR 577, paragraph 9.

⁴⁷¹ C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraphs 81 to 94 and 109. An infringement may be proven by direct evidence and/or indirect evidence, 'for example in the form of conduct': T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, EU:T:2006:265, paragraphs 82 to 83.

⁴⁷² C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 54; and C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 118. See also C-32/11 *Allianz Hungaria v Commission*, EU:C:2013:160, paragraph 37 and the caselaw cited.

Market sharing, price fixing and fixing volumes/production quotas

6.156 The Chapter I prohibition and Article 101(1) TFEU expressly apply in particular to agreements or practices which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment; or
- (c) share markets or sources of supply.

Market sharing

6.157 The Court of Justice has consistently held that market sharing constitutes a particularly serious breach of the competition rules.⁴⁷³

6.158 It has also consistently held that agreements that aim to share markets have, in themselves, an object restrictive of competition, and that such an object cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned.⁴⁷⁴

6.159 The fact that market sharing takes place in relation to supplies to a single customer does not change the fact that it constitutes a restriction of competition by object:

- (a) In *Seamless Steel Tubes*, the risk that Japanese producers would begin selling to British Steel led three European producers to agree to share between them British Steel's requirements for seamless steel tubes.⁴⁷⁵ Accordingly, they each entered into long-term supply contracts with British Steel. Although 3 separate agreements were entered into on separate dates, the latter 2 agreements were the fruit of an agreement made originally by one supplier (Vallourec) and British Steel. Under the arrangement the parties apportioned

⁴⁷³ C-373/14 *Toshiba v Commission*, EU:C:2016:26, paragraph 28; C-449/11 P *Solvay Solexis v Commission*, EU:C:2013:802, paragraph 82; and C-408/12 P *YKK and Others v Commission*, EU:C:2014:2153, paragraph 26 ('*YKK*').

⁴⁷⁴ C-373/14 *Toshiba v Commission*, EU:C:2016:26, paragraph 28; and C-239/11, C-489/11 and C-498/11 *Siemens and Others v Commission*, EU:C:2013:866, paragraph 218.

⁴⁷⁵ Commission Decision of 8 December 1999 (Case IV/E-1/35.860-B) *Seamless Steel Tubes*, OJ 2003 L140/1, recital 147, appeals dismissed save for reductions in the fines due to shorter duration of the cartel: C-403/04 P *Sumitomo Metal Industries v Commission* EU:C:2007:52.

British Steel's requirements of plain-end pipes between the 3 European producers (40% for Vallourec, 30% for Dalmine and 30% for Mannesmann) and prices were set according to a mathematical formula which took account of the sales price British Steel achieved from onward (downstream) sales of threaded pipes. The General Court held that these arrangements were a restriction of competition by object and effect between the 3 European suppliers themselves and between each supplier and British Steel: *'the object and effect of the supply contracts was to substitute a negotiated apportionment of the profits to be obtained from sales of threaded pipes available on the United Kingdom market for the risks of competition, at least between the four European producers.'*⁴⁷⁶ In an appeal of that decision, the Court of Justice has also held that where the evidence establishes the existence of a market sharing agreement *'there is no need to examine the question whether the undertaking concerned had a commercial interest in the agreement.'*⁴⁷⁷

- (b) In *ING Pensii*, companies managing private pension funds entered into agreements to share certain clients. In practice, these agreements only affected less than 1.5% of customers. Nonetheless, the Court of Justice found that *'a finding that an agreement to share clients has an anti-competitive object — in particular a finding that the agreement may have a negative impact on the market — does not depend on the actual number of clients who are in fact shared out but simply on the terms and the objective aims of the agreement, considered in the light of the economic and legal context in which the agreement was concluded'*.⁴⁷⁸

Price fixing

6.160 The Court of Justice has consistently held that price fixing constitutes a serious breach of the competition rules. The General Court has held

⁴⁷⁶ British Steel (which was renamed Corus UK) appealed the Commission's finding of infringement but its appeal was dismissed: T-48/00 *Corus UK v Commission* EU:T:2004:219, paragraph 76.

⁴⁷⁷ C-403/04 P *Sumitomo Metal Industries v Commission* EU:C:2007:52, paragraph 46.

⁴⁷⁸ C-172/14 *ING Pensii v Consiliul Concurenței* EU:C:2015:484, paragraph 55.

that the purpose of Article 101(1)(a) TFEU is to prohibit undertaking from distorting the normal formation of prices on the markets.⁴⁷⁹

6.161 Price-fixing agreements are, by their very nature, restrictive of competition.⁴⁸⁰ There is no requirement on the competition authority to establish an effect on prices: experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.⁴⁸¹ Whether or not there is an actual effect on prices as a result of the price-fixing agreement is irrelevant: a horizontal price-fixing agreement remains a restriction '*by object*' even if the parties can show that it was never observed and had no actual effect in increasing prices.⁴⁸²

Fixing volumes / production quotas

6.162 Agreements between competitors to fix volumes restrict competition by object. Sales quotas were condemned by the Commission in a number of its decisions: *Vitamins (A and E)*,⁴⁸³ *Gas Insulated Switchgear*⁴⁸⁴ and *Animal Feed Phosphates*.⁴⁸⁵ Sales quotas or volume restrictions typically serve to reinforce other restrictions such as price-fixing arrangements or market sharing / customer allocation arrangements.

II. Object of the Horizontal Agreement

6.163 The CMA concludes that, having regard to its legal and economic context, its content and its objectives, the Horizontal Agreement

⁴⁷⁹ T-13/89 *ICI v Commission* EU:T:1992:35, paragraphs 310-311. Appeal on ground of procedural irregularity dismissed: C-200/92 P *ICI v Commission* EU:C:1999:359.

⁴⁸⁰ C-123/83 *Bureau national interprofessionnel du cognac v Guy Clair*, EU:C:1985:33, paragraph 22.

⁴⁸¹ C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 51.

⁴⁸² *GlaxoSmithKline and others v CMA (Paroxetine)* [2018] CAT 4, paragraph 170. See also C-501/06 P *GSK v Commission* EU:C:2009:610, paragraphs 62-64, at paragraph 63 the Court of Justice stated: '*for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price.*'

⁴⁸³ Commission Decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 - Vitamins), [2003] OJ L6/1, 21st November 2001.

⁴⁸⁴ Commission Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.899 - Gas Insulated Switchgear), C(2006) 6762 final, [2008] OJ C5/7, 24th January 2007.

⁴⁸⁵ Commission Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/38.866 - Animal feed phosphates), C(2010) 5004, [2011] OJ C111/15, 20th July 2010.

restricted competition by object. For the reasons set out below, the object of the Horizontal Agreement was to share the supply of Nortriptyline Tablets to Lexon in the UK (such that Auden Mckenzie would supply only 10mg tablets and King would supply only 25mg tablets); to fix the prices of supply to Lexon (for 10mg and 25mg tablets at £4 per pack); and to fix the quantities of supply to Lexon (at no more than 3,400 packs for 10mg tablets and at no more than 1,600 packs for 25mg tablets). Accordingly, the Horizontal Agreement is to be regarded as restrictive of competition by object as by its very nature it is harmful to the proper functioning of normal competition. The agreements between Auden Mckenzie and King on price, volume and product allocation run contrary to the concept inherent in European and UK competition law, according to which each economic operator must determine independently the policy which it intends to adopt on the market.⁴⁸⁶

- 6.164 Section 6D sets out the relevant legal and economic context of the Horizontal Agreement. Section 6E sets out the contents of the Horizontal Agreement (as summarised above).
- 6.165 The CMA concludes that the Horizontal Agreement had an anti-competitive objective. Each of the three elements of the Horizontal Agreement amounts to a breach of the Chapter 1 prohibition and Article 101 TFEU by object in and of itself:
- (a) Market sharing is a clear breach of the Chapter 1 prohibition (see section 2(2)(c) of the Act) and Article 101(1)(c) TFEU, whether by territory, by customer or by product. The Court of Justice has consistently held that agreements that aim to share markets have, in themselves, an object restrictive of competition, and that such an object cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned.⁴⁸⁷ The fact that the market

⁴⁸⁶ C-209/07 *BIDS* ('Irish Beef') EU:C:2008:643, paragraph 34. Absent the Horizontal Agreement, Auden and King would have had to do just that and determine independently how to respond to the new competitive threat posed by Lexon, rather than agreeing product allocation, prices and restricted volumes with their key competitor.

⁴⁸⁷ C-373/14 *Toshiba v Commission*, EU:C:2016:26: paragraph 28; and C-239/11, C-489/11 and C-498/11 *Siemens and Others v Commission*, EU:C:2013:866, paragraph 218.

sharing arrangement concerned only one customer, Lexon, is irrelevant.⁴⁸⁸

- (b) Price fixing is also a clear breach of the Chapter 1 prohibition (see section 2(2)(a) of the Act) and Article 101(1)(a) TFEU. Price-fixing agreements are, by their very nature, restrictive of competition.⁴⁸⁹ Once it is established that there is a horizontal price-fixing agreement, there is no requirement on the CMA to establish that that agreement led to any actual impact on prices.⁴⁹⁰ In any event, the low supply prices which Lexon received did not translate into lower prices to pharmacies, or the NHS. Given the fixed volumes which Lexon received, and the nature of demand which was relatively insensitive to price, one would not expect the low supply price to feed through to lower final prices.⁴⁹¹ Lexon could sell all the product that it received at the prevailing market price. Hence, Lexon simply pocketed a large profit margin: [Lexon Director] described the arrangement as being very '*lucrative*' for Lexon.⁴⁹² Accordingly, the CMA does not consider that the low prices to Lexon can be described as a pro-competitive effect of the Horizontal Agreement.⁴⁹³
- (c) An agreement to adhere to sales quotas, such as that which applied under the Horizontal Agreement, is also a clear '*by object*' restriction of Article 101(1)(b) TFEU and the Chapter 1 prohibition (see section 2(2)(b) of the Act).⁴⁹⁴

⁴⁸⁸ See the discussion of *Seamless Steel Tubes* at paragraph 6.159(a).

⁴⁸⁹ Case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair*, EU:C:1985:33, paragraph 22.

⁴⁹⁰ Case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair*, EU:C:1985:33, paragraph 22. C-67/13 *P Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 51. *GlaxoSmithKline and others v CMA (Paroxetine)* [2018] CAT 4, paragraph 170.

⁴⁹¹ See the CAT's finding in *GlaxoSmithKline and others v CMA (Paroxetine)* [2018] CAT 4, paragraph 303: '[...] *Since under the Agreements the quantities supplied by GSK to the generic companies were capped and total demand was fairly inelastic, we do not accept that the Agreements can properly be regarded as giving rise to any meaningful competitive constraint on GSK.*'

⁴⁹² See paragraph 4.15 above.

⁴⁹³ See paragraph 6.162 above.

⁴⁹⁴ See the Commission's decisional practice cited at paragraph 6.162 above. The Horizontal Agreement is clearly neither a specialisation agreement nor a joint production agreement. The narrowly defined exception to the general prohibition on limitations of production referred to in paragraphs 152 and 162 (first indent) of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ 2011 C 11/1 is therefore clearly inapplicable in this case.

Subjective intentions

6.166 Although the parties' subjective intentions are not a necessary factor in determining whether an agreement is restrictive of competition, those intentions may be taken into account as corroboration of the objective assessment.

6.167 There is no direct evidence available as to the Parties' subjective intentions in entering the Horizontal Agreement. No contemporaneous documents record the Parties' reasons for entering into the arrangement with each other. Moreover, given that King and Auden Mckenzie deny any such agreement existed, they have not put forward any direct explanation of why they entered into the Horizontal Agreement.

6.168 Nonetheless, based on the Parties' explanations of why they entered their vertical supply arrangements with Lexon, the CMA infers that the Horizontal Agreement was entered into by King and Auden Mckenzie in order to allow them jointly to respond to a competitive threat posed by Lexon⁴⁹⁵ which would have increased competition for the supply of nortriptyline into the market. Specifically:

(a) King and Auden Mckenzie agreed the allocation of supply of 10mg and 25mg tablets to provide a straightforward means of sharing the burden of inducing Lexon to refrain from carrying out the threat.⁴⁹⁶

(b) King and Auden Mckenzie agreed that they would supply Lexon their respective strengths of tablet at a price which was sufficiently low (and in quantities which were sufficiently large) to induce Lexon to refrain from carrying out the threat.

(c) By agreeing to supply Lexon at a price that was significantly below the market level, and by agreeing that Lexon would be provided with restricted product volumes, Auden Mckenzie and King ensured

⁴⁹⁵ At interview, [King Director] [Auden Mckenzie Senior Employee 1] and [Lexon Director] all stated that the threat that Lexon posed, and which motivated the King-Lexon and Auden-Lexon Supply Arrangements, was the ability to parallel import Nortriptyline. Document NOR-C2012, transcript of [King Director] interview dated 22 March 2018, pages 88-91 lines 16-2 Document NOR-C2307, transcript of [Auden Mckenzie Senior Employee 1] interview dated 11 October, pages 36-37 lines 14-18. Document NOR-C1660, transcript of [Lexon Director] interview dated 14 March 2018, page 123-124 lines 13-1.

⁴⁹⁶ [King Director] explained his rationale for refraining from supplying 10mg tablets to Lexon in the following terms: *'what I don't want to end up doing is, effectively, supplying product to somebody who's already got the product from another source.'* Document NOR-C2618, transcript of [King Director] interview dated 22 November 2018, page 77 lines 3-4.

that Lexon was not incentivised to undercut prevailing market prices (because it would be unable to increase its market share beyond the allocated volumes) and would retain significant profit margin on the supply of that product.

6.169 The CMA considers that there are two possible threats that Lexon may have posed, namely:

- (a) The threat to parallel import a new source of Nortriptyline Tablets available in both strengths (10mg and 25mg) (the Lundbeck Product) to the UK, reducing the market shares of King and Auden Mckenzie and driving down prices; and
- (b) The threat to enter the UK market with the Lexon/Medreich JV Product, which could reduce the market shares of King and Auden Mckenzie and drive down prices.

6.170 The evidence does not clearly establish whether the subjective intention of King and Auden Mckenzie was to address one or both of these threats. However, the CMA does not consider it necessary to reach a definitive conclusion on the nature of the competitive threat which Lexon posed. Regardless of the precise subjective rationale, the inferences that the CMA makes regarding the Parties' subjective intentions corroborate the CMA's findings regarding the objectives of the Horizontal Agreement at paragraph 6.163 above. Nor do the Parties' subjective intentions affect the CMA's characterisation of the Horizontal Agreement as a by object infringement: competitors should not coordinate their response to a competitive threat or agree to share the burden of neutralising it.

H. Appreciable restriction of competition

I. Legal framework

6.171 An agreement that is restrictive of competition by '*object*' will fall within the Chapter I prohibition or Article 101 TFEU only if it has as its object an appreciable prevention, restriction or distortion of competition.⁴⁹⁷

⁴⁹⁷ It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see C-226/11 *Expedia Inc. v Autorité de la concurrence*

6.172 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.⁴⁹⁸ In accordance with section 60(2) of the Act,⁴⁹⁹ this principle also applies in respect of the Chapter I prohibition and the UK. An agreement that may affect trade within the UK and that has an anti-competitive object therefore constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

II. Assessment

6.173 The CMA has found that the Infringement had the object of preventing, restricting or distorting competition. Given that the effect on trade test is satisfied (see section 6I below), the CMA has found that the Infringement constitutes, by its very nature, an appreciable restriction of competition in the supply of Nortriptyline Tablets in the UK for the purposes of the Chapter I prohibition and Article 101 TFEU prohibition.

6.174 In any event, and in the alternative, the CMA has found that the Infringement had an appreciable impact on competition for the supply of Nortriptyline Tablets within the EU (for the purposes of Article 101 TFEU) and the UK (for the purposes of the Chapter I prohibition). This conclusion is based on the following findings:

- (a) The geographic scope of the Infringement covered the whole of the UK; and
- (b) The suppliers involved in the Infringement; King and Auden Mckenzie, accounted for an 84% share of the UK supply of

and Others, EU:C:2012:795, paragraph 16 citing, among other cases, C-5/69 *Völk v Vervaecke*, EU:C:1969:35, paragraph 5/7. See also *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.15.

⁴⁹⁸ 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.

⁴⁹⁹ Section 60(2) of the Act provides that, when determining a question in relation to the application of Part 1 of the Act (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the European Court in respect of any corresponding question arising in EU law.

Nortriptyline Tablets during the Market Sharing Period.⁵⁰⁰ Their joint sales to Lexon accounted for 12.5% of the market.⁵⁰¹

I. Effect on trade

6.175 For the reasons set out below, the CMA has found that the Infringement was capable of affecting trade both within the UK, and between EU Member States, such that Article 101 TFEU applies as well as the Chapter I prohibition.

I. Effect on trade within the UK

Legal framework

6.176 The Chapter I prohibition applies to agreements between undertakings which may affect trade within the UK, and have as their object or effect the prevention, restriction or distortion of competition within the UK.⁵⁰² For the purposes of the Chapter I prohibition, the UK includes, in relation to an agreement which operates or is intended to operate only in a part of the UK, that part.⁵⁰³

6.177 To infringe the Chapter I prohibition, the conduct does not actually have to affect trade as long as it is capable of doing so.⁵⁰⁴ The concept of effect on trade is also not read as importing a requirement that the effect on trade within the UK should be appreciable.⁵⁰⁵

⁵⁰⁰ CMA analysis of the following documents: King (Documents NOR-C0261.13 – NOR-C0261.20), Auden Mckenzie (NOR-E0456, NOR-E1105) and for parallel imports (PI): B&S Healthcare (Document NOR-C1939, Beachcourse (Document NOR-C2001.2), CD Pharma (Document NOR-C1866.1) Ecosse (Document NOR-C1948), Expono (Document NOR-C1908), Kosei (Document NOR-C1930), Landmark (Document NOR-C2010), Manx (Document NOR-C1871), MPT Pharma (Document NOR-C1878), S&M Medical (Document NOR-C1945), Amimed (Document NOR-C2067.2), Lexon (Document NOR-C1459).

⁵⁰¹ The market share percentage has been calculated using the size of the nortriptyline market, according to the sales data submitted by suppliers, and parallel importers of nortriptyline (See paragraphs 3.39 and 3.40 above), namely:

King (Documents NOR-C0261.13 – NOR-C0261.20), Auden Mckenzie (NOR-E0456, NOR-E1105), and for parallel imports (PI): B&S Healthcare (Document NOR-C1939, Beachcourse (Document NOR-C2001.2), CD Pharma (Document NOR-C1866.1) Ecosse (Document NOR-C1948), Expono (Document NOR-C1908), Kosei (Document NOR-C1930), Landmark (Document NOR-C2010), Manx (Document NOR-C1871), MPT Pharma (Document NOR-C1878), S&M Medical (Document NOR-C1945), Amimed (Document NOR-C2067.2), Lexon (Document NOR-C1459).

⁵⁰² Section 2(1) of the Act.

⁵⁰³ Section 2(7) of the Act.

⁵⁰⁴ See, for example, T-228/97 *Irish Sugar plc v Commission*, EU:T:1999:246, paragraph 170.

⁵⁰⁵ *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 11, paragraphs 459 and 460.

Application to this case

6.178 The Infringement was implemented in the UK and was capable of having an effect on sales of Nortriptyline Tablets in the UK. As indicated in paragraph 6.174 above, the suppliers involved in the Infringement accounted for a significant proportion of sales of Nortriptyline Tablets in the UK and sold to customers located across the UK. Accordingly, the CMA finds that the Infringement may have affected trade in the buying and selling of drugs within the whole or part of the UK.

II. Effect on trade between Member States

Legal framework

6.179 Where the CMA applies national competition law to agreements between undertakings which restrict competition by object where such conduct may have an effect on trade between EU Member States, the CMA must also apply Article 101 TFEU.⁵⁰⁶

6.180 For the purposes of assessing whether trade between EU Member States may be affected, the CMA follows the approach set out in the Commission's Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (the '**Effect on Trade Guidelines**')⁵⁰⁷ and the case law of the European Courts.

6.181 It is not necessary that the conduct actually has or has had an effect on trade between EU Member States. It is sufficient that the conduct is '*capable*' of having an effect, i.e. that it may have a direct or indirect, actual or potential influence on the pattern of trade between at least two EU Member States.⁵⁰⁸ The effect on trade between EU Member States must be appreciable.⁵⁰⁹

6.182 The nature of the relevant products also provides an indication of whether trade between EU Member States is capable of being affected.

⁵⁰⁶ Article 3 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁵⁰⁷ *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (Effect on Trade Guidelines), OJ C 101, 27.4.2004, p. 81 to 96.

⁵⁰⁸ Effect on Trade Guidelines, paragraphs 21 to 26.

⁵⁰⁹ Effect on Trade Guidelines, paragraphs 44 to 49.

An effect on trade between EU Member States is more likely to exist, when by their nature, products are easily traded across borders.⁵¹⁰ Trade between EU Member States may also be affected in cases where the relevant market is national or sub-national.⁵¹¹

6.183 In order for there to be an effect on trade between EU Member States, it is not necessary that trade is reduced. Instead, it is sufficient that an appreciable change is capable of being caused in the pattern of trade between EU Member States and this change can be positive or negative.⁵¹²

Application to this case

6.184 The CMA has found that the Infringement was capable of affecting trade between EU Member States for the following reasons:

- (a) The geographic scope of the Infringement covered the whole of the UK. The UK constitutes a substantial part of the internal market.⁵¹³
- (b) An effect on trade between EU Member States is not confined to cases where a measure results in compartmentalisation of markets through restrictive effects. The potential for the Infringement to increase, or decrease, parallel importation exists because the Parties sought to influence, through the Horizontal Agreement, price competition for Nortriptyline Tablets in the UK. This had the potential to have an effect on price differentials between the prices in the UK and the prices charged in other EU Member States for Nortriptyline Tablets. Consequently, the commercial incentives for importing Nortriptyline Tablets from other EU Member States could have been affected. As a result, the Infringement had the potential to lead to a change in the competitive structure of the single market and therefore it is capable of affecting trade between EU Member States.⁵¹⁴

6.185 Accordingly, the CMA has found that the Infringement was capable of affecting trade between EU Member States.

⁵¹⁰ Effect on Trade Guidelines, paragraph 30.

⁵¹¹ Effect on Trade Guidelines, paragraph 22.

⁵¹² Effect on Trade Guidelines, paragraphs 33 to 35 and 77; Case COMP/F-2/36.693 - *Volkswagen*, Commission decision of 29 June 2001, at paragraph 88.

⁵¹³ See, for example, T-228/97 *Irish Sugar v Commission*, EU:T:1999:246, paragraph 99.

⁵¹⁴ See, for example, C-6/73 *Commercial Solvents v Commission*, EU:C:1974:18, paragraphs 32 and 33.

J. Exclusion or exemption

I. *Legal framework*

Exclusion

6.186 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.⁵¹⁵

Exemption

6.187 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.

6.188 There are four cumulative criteria to be satisfied:

- (a) The agreement contributes to improving production or distribution, or promoting technical or economic progress;
- (b) While allowing consumers a fair share of the resulting benefit;
- (c) The agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and
- (d) The agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

6.189 In considering whether an agreement satisfies the above criteria, the CMA will have regard to the European Commission's Article 101(3) Guidelines⁵¹⁶ and relevant case law.

6.190 Agreements which have as their object the prevention, restriction or distortion of competition are unlikely to benefit from exemption as such

⁵¹⁵ 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.

⁵¹⁶ Commission Notice *Guidelines on the Application of Article 81(3) of the Treaty* [2004] OJ C101/97 (Article 101(3) Guidelines). See also *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 5.5.

restrictions generally fail (at least) the first two conditions: they neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).⁵¹⁷ However, each case ultimately falls to be assessed on its merits.

6.191 Any undertaking claiming the benefit of an exemption bears the burden of proving that the conditions in section 9(1) of the Act/Article 101(3) TFEU are satisfied.⁵¹⁸

II. Application to this case

6.192 The CMA has concluded that none of the relevant exclusions or exemptions apply to the Horizontal Agreement.

6.193 The CMA notes that agreements and concerted practices which have as their object the prevention, restriction or distortion of competition are unlikely to benefit from exemption. The CMA has concluded that the Infringement had an anti-competitive object.

6.194 It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.⁵¹⁹ None of the Addressees have claimed that an exemption should apply in this case.

⁵¹⁷ Article 101(3) Guidelines, paragraph 46 and *Guidelines on Vertical Restraints* [2010] OJ C130/1, paragraph 47.

⁵¹⁸ The Act, section 9(2); *GlaxoSmithKline and others v CMA (Paroxetine)* [2018] CAT 4, paragraph 83.

⁵¹⁹ Article 101(3) Guidelines, see paragraphs 51 to 58; *Guidelines on Vertical Restraints* [2010] OJ C130/1, paragraph 47. See also section 9(2) of the Act.

7. Attribution of liability

A. Legal framework

I. *Personal responsibility for infringement of competition rules*

- 7.1 If an undertaking infringes the competition rules, it falls, under the principle of personal responsibility, to that undertaking to answer for that infringement.⁵²⁰
- 7.2 Given the requirement to impute an infringement to a legal entity or entities on which fines may be imposed and to which an infringement decision is to be addressed, it is necessary to identify one or more legal persons that form part of the undertaking in question.⁵²¹ An infringement decision imposing a fine can be addressed to any legal person forming part of the undertaking who was directly involved in the infringing conduct. Such a directly involved legal person will be liable for the actions of all persons forming part of the undertaking (not just for its own actions). Where there are two or more such directly involved legal persons, those persons will be jointly and severally liable for the actions of all persons forming part of the undertaking (and for the entirety of any financial penalty imposed on the undertaking).⁵²²

II. *Concept of an ‘undertaking’*

- 7.3 Competition law refers to the activities of ‘*undertakings*’. An undertaking is any entity engaged in economic activity, regardless of its legal status and the way in which it is financed.⁵²³ An entity is engaged

⁵²⁰ C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:536, paragraphs 54 to 56.

⁵²¹ C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:536, paragraph 27.

⁵²² *Sainsbury’s Supermarkets Ltd v MasterCard* [2016] CAT 11, paragraph 363(8) and 363(21), citing the Opinion of the Advocate General in C-231/11 P *Commission v Siemens*, EU:C:2013:578, paragraphs 80 to 81. See also T-9/99 *HFB v Commission*, EU:T:2002:70, paragraph 66: ‘*In the absence of a [legal] person at its head to which [...] responsibility could have been imputed for the infringements committed by the various component companies of the group, the Commission was entitled to hold the component companies jointly and severally responsible for all the acts of the group [...].*’

⁵²³ C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:536, paragraph 54 and the case law cited.

in ‘*economic activity*’ where it conducts any activity ‘*of an industrial or commercial nature by offering goods and services on the market*’.⁵²⁴

7.4 In prohibiting undertakings from entering into anti-competitive agreements or abusing dominant positions, competition law ‘*is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement*’.⁵²⁵

7.5 It is thus well established that an undertaking does not correspond to the commonly understood notions of a legal entity or corporate group, for example under English commercial or tax law; and that a single undertaking may comprise one or more legal and/or natural persons.⁵²⁶

7.6 In the context of the Chapter I prohibition and Article 101(1) TFEU, the term ‘undertaking’ therefore ‘must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal’.⁵²⁷

7.7 The Court of Justice has emphasised that:

*‘for the purposes of applying the rules on competition the formal separation between two parties resulting from their separate legal personality is not conclusive, the decisive test being the unity of their conduct on the market.’*⁵²⁸

⁵²⁴ C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

⁵²⁵ T-9/99 *HFB v Commission*, EU:T:2002:70, paragraph 54 and the case law cited.

⁵²⁶ *Sepia Logistics Limited v Office of Fair Trading* [2007] CAT 13, paragraphs 70 to 80 and the case law cited.

⁵²⁷ C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA*, EU:C:2006:784, paragraph 40, citing C-170/83 *Hydrotherm v Commission*, EU:C:1984:271, paragraph 11.

⁵²⁸ C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v CEPSA*, EU:C:2006:784, paragraph 41, referring to C-48/69 *ICI v Commission* EU:C:1972:70, paragraph 140. For example, in *Copper Plumbing Tubes* (European Commission decision of 3 September 2004 relating to Copper Plumbing Tubes (COMP/E-1/38.069)), the Commission found that legal persons within a corporate group formed separate undertakings only for the period in which they were sister companies with separate management boards, operational management and reporting structures and which acted independently by competing against one another on the market. After a restructuring creating a parent-subsidiary relationship, significant overlaps between management boards and coordinated operational management, they formed a single undertaking: see recitals 564 to 566.

- 7.8 The existence of an economic unit comprising separate legal persons such as sister companies may *'be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such a unit'*.⁵²⁹ Such evidence may include:
- (a) The fact that legal persons have common shareholders: this is *'one of the elements capable of establishing the existence of an economic unit'*,⁵³⁰ and
 - (b) Other close economic and management links between family-owned companies.⁵³¹
- 7.9 For example, in *HFB v Commission*, the European Courts upheld the Commission's finding that two separate groups of companies together formed a single undertaking in relation to an anti-competitive agreement on the basis that they were subject to common ownership and control by a single individual, who also represented them both in relation to the infringement:
- (a) The General Court upheld the Commission's finding that two sister companies and their subsidiaries, all ultimately majority owned by a single individual (Mr Henss), formed a single undertaking.
 - (b) The Court dismissed the appellants' argument that these companies could not be an undertaking as they did not have a single parent or financing company. Since the companies *'were, in one form or another, controlled by Mr Henss'* via majority shareholding and/or sole directorships; and since Mr Henss represented those companies at meetings of the cartel directors' club, *'the Commission was entitled to regard the activities within the cartel'* by the four companies *'as being the conduct of a single economic entity, under single control and pursuing a common long-term economic aim.'*⁵³² This was confirmed by the companies' internal documents.⁵³³

⁵²⁹ C-407/08 P *Knauf Gips v Commission*, EU:C:2010:389, paragraph 65.

⁵³⁰ C-407/08 P *Knauf Gips v Commission*, EU:C:2010:389, paragraph 73.

⁵³¹ C-407/08 P *Knauf Gips v Commission*, EU:C:2010:389, paragraphs 66-72.

⁵³² T-9/99 *HFB v Commission*, EU:T:2002:70, paragraphs 55 and 61.

⁵³³ T-9/99 *HFB v Commission*, EU:T:2002:70, paragraph 62.

- (c) There was no need for that undertaking to have legal personality (consistent with the case-law discussed above).

III. Parental liability

- 7.10 The conduct of a subsidiary may be imputed to its parent company where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities.⁵³⁴ This is because, in such a situation, the parent company and its subsidiary form a single economic unit, and therefore a single undertaking for the purposes of the relevant prohibitions.⁵³⁵
- 7.11 Where a parent company owns 100% of a subsidiary which has infringed the competition rules, there is a rebuttable presumption that:
- (a) The parent company is able to exercise ‘*decisive influence*’ over the conduct of its subsidiary; and
 - (b) The parent company does in fact exercise such decisive influence over the conduct of its subsidiary, such that the two entities can be regarded as a single economic unit and thus jointly and severally liable.⁵³⁶
- 7.12 It is for the party in question to rebut the presumption by adducing sufficient evidence to show that its subsidiary acts independently on the market.⁵³⁷ The presumption also applies to situations where the parent company indirectly holds 100% of a subsidiary, for example, via one or more intermediary companies.⁵³⁸

⁵³⁴ C-155/14 P *Evonik Degussa GmbH v Commission*, EU:C:2016:446, paragraph 27 (**‘Evonik Degussa’**), citing joined cases C-93/13 P and C-123/13 P *Commission and Others v Versalis and Others*, EU:C:2015:150, paragraph 40; judgment in C-628/10 P and C 14/11 P, *Alliance One & Others v Commission*, EU:C:2012:479, paragraph 44 citing C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:536, paragraphs 58–59.

⁵³⁵ C-155/14 P *Evonik Degussa GmbH v Commission*, EU:C:2016:446, paragraph 27.

⁵³⁶ C-155/14 P *Evonik Degussa GmbH v Commission*, EU:C:2016:446, paragraph 28 and the case law cited; joined cases C-628/10 P and C-14/11 P *Alliance One & Others v Commission*, EU:C:2012:479, paragraphs 46–48; C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:536, paragraphs 60–61; C-107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 50.

⁵³⁷ *Alliance One*, paragraph 47, citing C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:536, paragraph 61.

⁵³⁸ C-90/09 P *General Química SA and Others v Commission*, EU:C:2011:21, paragraphs 86–87.

IV. *Economic continuity*

7.13 When an entity that has committed an infringement of competition law subsequently sells the assets which contributed to the infringement and withdraws from the market in question, it may be held liable for the infringement if it has not ceased to exist.⁵³⁹

7.14 However, where a business is transferred from one entity (the transferor) to another (the transferee), at a time when transferor and transferee form part of the same undertaking, liability for past behaviour of the transferor may pass to the transferee by application of the principle of economic continuity.⁵⁴⁰

7.15 It is settled case law that a penalty for an infringement committed by the transferred business can be imposed in its entirety on the transferee, in particular where the transferor and transferee *'have been subject to control by the same person within the group and have therefore, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions'*. In *ETI v Commission*, the Grand Chamber of the Court of Justice held that if the transferor and transferee were subject to the control of the same parent entity at the time of their infringing conduct:

*'it would have to be concluded that the principle of personal responsibility does not preclude the penalty for the infringement commenced by [the transferor] and continued by [the transferee] from being imposed in its entirety on [the transferee].'*⁵⁴¹

7.16 The Court of Justice went on to hold:

'in the case of entities answering to the same [parent], where conduct amounting to one and the same infringement of the competition rules was adopted by one entity and subsequently

⁵³⁹ C-49/92 P *Commission v Anic Partecipazioni SpA* EU:C:1999:356, paragraphs 47 to 49 (summarising the CFI judgement, upheld by the CJEU in paragraphs 144 to 145).

⁵⁴⁰ C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* EU:C:2004:6, paragraphs 354 to 360; T-43/02 *Jungbunzlauer v Commission* EU:T:2006:270, paragraphs 132 to 133; T-117/07 and T-121/07 *Areva and Others and Alstom v Commission* EU:T:2011:69, paragraphs 66 to 69.

⁵⁴¹ C-280/06 *ETI and Others* EU:C:2007:775 (judgment of the Grand Chamber), paragraphs 51 (emphasis added). See also C-434/13 P *Commission v Parker Hannifin* EU:C:2014:2456, paragraph 41 ; and C-511/11 P *Versalis v Commission* EU:C:2013:386, paragraph 52.

*continued until it ceased by another entity which succeeded the first, which has not ceased to exist, that second entity may be penalised for the infringement in its entirety if it is established that those two entities were subject to the control of the said [parent].*⁵⁴²

7.17 This principle does not, however, require that the transferee continue the infringement.⁵⁴³ The relevant date for establishing the existence of economic continuity is the date of the transfer of the activities.⁵⁴⁴ There may thus be economic continuity:

(a) Where the transfer of activities took place during the infringement period and structural links between the transferor and the transferee existed during that period,⁵⁴⁵ and/or

(b) Where that transfer took place after the infringement had come to an end, provided that the structural links existed at the time of that transfer.⁵⁴⁶

7.18 The structural links that exist on the date of the transfer must be sufficient for the two entities to be considered to form a single undertaking at that time. The links do not, however:

(a) Need to '*subsist throughout the rest of the infringement period or until the adoption of a decision penalising the infringement*'; or

(b) '*[S]ubsist for a minimum period*'.⁵⁴⁷

7.19 Nor do the structural links have to exist from the start of the infringement period: the principle applies equally to an intragroup transfer after a new parent acquires an infringing business.⁵⁴⁸

⁵⁴² C-280/06 *ETI and Others* EU:C:2007:775 (judgment of the Grand Chamber), paragraph 52.

⁵⁴³ C-204/00 P *Aalborg Portland and Others v Commission*, EU:C:2004:6, paragraphs 350 to 351, and 356 to 360.

⁵⁴⁴ C-280/06 *ETI and Others* EU:C:2007:775, paragraphs 45 and 50; and C-434/13 P *Commission v Parker Hannifin*, EU:C:2014:2456, paragraphs 49 to 52.

⁵⁴⁵ C-280/06 *ETI and Others*, EU:C:2007:775, paragraphs 45 and 50; and C-434/13 P *Commission v Parker Hannifin*, EU:C:2014:2456, paragraph 49.

⁵⁴⁶ C-204/00 P *Aalborg Portland and Others v Commission*, EU:C:2004:6, paragraphs 59, 351, 356 and 357; and C-434/13 P *Commission v Parker Hannifin*, EU:C:2014:2456, paragraph 49.

⁵⁴⁷ C-434/13 P *Commission v Parker Hannifin*, EU:C:2014:2456, paragraphs 51 to 52.

⁵⁴⁸ C-434/13 P *Commission v Parker Hannifin*, EU:C:2014:2456, paragraphs 45 to 55.

- 7.20 The motivation behind the transfer is also not a necessary factor in determining whether the principle should apply:

'The taking into consideration of the economic reasons which led to the creation of a subsidiary, or the objective, in the long- or short-term, of transferring that subsidiary to a third-party undertaking, would introduce into the application of the principle of economic continuity subjective factors which are incompatible with a transparent and predictable application of that principle'.⁵⁴⁹

- 7.21 The transferor and transferee do not need to be identical from an economic point of view: what matters is that the infringing business is transferred and that the transferee continues its economic activities on the relevant market, such that it can be regarded as its '*economic successor*'.⁵⁵⁰ This means that, for the purposes of attribution, '*the undertaking run by [the transferee after the transfer] is the same as that previously run by [the transferor]*'.⁵⁵¹

- 7.22 Equally, the fact that the entity that committed the infringement still exists after the transfer does not preclude imposing a penalty on the entity to which its economic activities were transferred by virtue of the principle of economic continuity (as is clear from the Grand Chamber's judgment quoted above).⁵⁵² The original entity (the transferor) does not need to cease to exist in law⁵⁵³ – it is enough that the transferee has succeeded the transferor as economic actor on the relevant market. This does not require that the transferor has ceased all economic activity, for example, the transferee may be held liable even if the transferor continues economic activity in other markets.⁵⁵⁴ The key

⁵⁴⁹ C-434/13 P *Commission v Parker Hannifin*, EU:C:2014:2456, paragraph 53.

⁵⁵⁰ C-280/06 *ETI v Commission* EU:C:2007:775, paragraphs 45 to 52. The Court of Justice held that the principle of economic continuity could apply where transferor and transferee were subject to the control of the same public authority, notwithstanding the referring court's observation (in paragraph 11) that the transfer of activities '*made a clear break of continuity with the previous model of organisational management*'. See also C-204/00 P *Aalborg Portland v Commission* EU:C:2004:6, paragraph 357.

⁵⁵¹ C-204/00 P *Aalborg Portland and Others v Commission* EU:C:2004:6, paragraph 357.

⁵⁵² C-434/13 P *Commission v Parker Hannifin*, EU:C:2014:2456, paragraphs 51 to 54.

⁵⁵³ See C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P *Aalborg Portland v Commission* EU:C:2004:6, paragraphs 354 to 360; T-43/02 *Jungbunzlauer v Commission* EU:T:2006:270, paragraphs 132 to 133; C-280/06 *ETI v Commission* EU:C:2007:775, paragraphs 48 and 49.

⁵⁵⁴ See, for example, T-43/02 *Jungbunzlauer v Commission*, EU:T:2006:270, in which the transferor, Jungbunzlauer GmbH ('**JG**'), continued producing and marketing citric acid (even setting policy on quantities and

issue is to establish the entity to which the relevant economic activities have been transferred.⁵⁵⁵

V. **Approach in this Decision**

7.23 The CMA has first identified the legal entities directly involved in the Infringement during the relevant period. It has then determined whether liability for the Infringement should be shared with another legal entity, in which case each legal entity's liability will be joint and several. It has then gone on to assess whether liability has transferred to any economic successor, in which case only the economic successor will be held liable.

B. **Assessment**

I. **Application to King Limited and Praze**

7.24 The CMA has decided to hold King Limited and Praze jointly and severally liable for the Infringement which they committed and for the resulting financial penalty which the CMA has decided to impose.

7.25 King Limited and Praze were both directly involved in the Infringement:

(a) King Limited was a party to the Horizontal Agreement with Auden Mckenzie.

(b) Praze was also directly involved in the Infringements for the following reasons:

prices) following the transfer of management activities on the market for citric acid to its sister company Jungbunzlauer AG ('JAG'). This did not prevent JAG being held liable for the conduct of JG prior to the transfer via the application of economic continuity. See especially paragraphs 116 and 124 to 134 of the judgment. See also the Court of Justice's ruling in C-280/06 *ETI v Commission* EU:C:2007:775, paragraph 45: '*ETI [the transferee] continued AAMS' [the transferor] economic activities on the market affected by the cartel. In those circumstances, even though AAMS continued to exist as an economic operator on other markets, ETI could be regarded ... as the economic successor of AAMS*'. In giving this ruling the Court rejected the referring court's suggestion that the fact that the transferor '*still carries on an economic activity that is subject to competition law*' argued against the application of economic continuity, where the transferor no longer carried out commercial activities in the economic sphere concerned (paragraph 11). See also T-134/94 *NMH Stahlwerke GmbH v Commission*, EU:T:1999:44, paragraphs 122-138.

⁵⁵⁵ C-280/06 *ETI v Commission* EU:C:2007:775, paragraphs 45 and 48. ETI was held liable on the basis that it '*continued AAMS's economic activities on the market affected by the cartel.*'

- (i) King Limited has no employees. Pursuant to contractual arrangements between the two companies, King Limited's business was conducted by [King Director] and [King Office Manager] in their capacity as employees of Praze.⁵⁵⁶
- (ii) [King Director] used his Praze email account (@kiteconsultancy) in the furtherance of the Infringement. For example, on 20 March 2015, he sent an email to [Auden Mckenzie Senior Employee 2] from his Praze account: 'Are you going to supply [Lexon Director] with the 10mg in April? If not, we will'.⁵⁵⁷

7.26 The CMA has also found that King Limited and Praze formed a single economic unit, or '*undertaking*', and thus liability for the Infringement is imputed to that undertaking. The two companies can be regarded as a single economic unit on the basis of a body of consistent evidence demonstrating that there was a common controlling shareholder for both companies and strong economic and management links between the companies during the time of the Infringement:

- (a) [King Director] holds a controlling shareholding in both companies.
- (b) [King Director] is a director of both companies. He is the sole director of Praze and one of only two directors of King Limited.
- (c) As noted above, pursuant to contractual arrangements between the companies, [King Director] and [King Office Manager] conducted the day to day management of both companies and used Praze email addresses (@kiteconsultancy) to conduct King Limited's business activities (see paragraph 7.25(b) above).⁵⁵⁸ Since King Limited had no employees it was totally reliant on Praze to conduct its business.

⁵⁵⁶ The corporate and commercial services of King Limited were conducted by Praze on King Limited's behalf under an agreement which they entered into in May 2014.

⁵⁵⁷ Document NOR-E0813, email from [King Director] to [Auden Mckenzie Senior Employee 2] dated 20 March 2015.

⁵⁵⁸ The corporate and commercial services of King Limited were conducted by Praze on King Limited's behalf under an agreement which they entered into in May 2014.

- (d) King Limited and Praze have the same registered office address and share office premises. King Limited's IT system and hardcopy records are located in their shared premises.
- (e) King Limited and Praze have been represented jointly in this investigation by [King Director]. [King Director] said in response to the information request served on King Limited by the CCPC on 12 October 2017 that he was responding in the name of both King Limited and Praze: '*King and Praze wish to cooperate fully with the CMA's Investigation*'.⁵⁵⁹
- (f) Praze conducted only limited consultancy work for entities other than King Limited.⁵⁶⁰

II. Application to Auden Mckenzie

- 7.27 As set out in section 5E, Auden Mckenzie (Pharma Division) Limited was directly involved in the Infringement as a party to the Horizontal Agreement with King. During the Market Sharing Period, Auden Mckenzie Holdings Limited directly held 100% ownership in Auden Mckenzie (Pharma Division) Limited.⁵⁶¹ It can therefore be presumed that Auden Mckenzie Holdings Limited exercised decisive influence over Auden Mckenzie (Pharma Division) Limited during the Market Sharing Period. Auden Mckenzie (Pharma Division) Limited and Auden Mckenzie Holdings Limited are together referred to as Auden Mckenzie.
- 7.28 As explained in section 7B.III, the CMA has decided to hold Accord-UK liable for the infringing acts of Auden Mckenzie, and the resulting financial penalties, as economic successor to Auden Mckenzie (Pharma Division) Limited's nortriptyline business.

⁵⁵⁹ Document NOR-C0040, email from [King Director] to the CMA, dated 12 October 2017.

⁵⁶⁰ During the period of the Infringement, Praze's only other client was [X].

⁵⁶¹ See paragraph 3.6 above.

III. *Application to Accord-UK*

- 7.29 The CMA attributes liability for the infringing actions of Auden Mckenzie during the Market Sharing Period, and liability for the resulting financial penalties, to Accord-UK.⁵⁶²
- 7.30 The CMA's assessment is that Accord-UK succeeded Auden Mckenzie (Pharma Division) Limited as economic actor on the market for the supply of Nortriptyline Tablets in the UK from 1 September 2015, and is therefore liable for Auden Mckenzie (Pharma Division) Limited's prior conduct in relation to the Infringement, in line with settled case law.⁵⁶³
- 7.31 As stated in paragraph 7.27 above:
- (a) Auden Mckenzie (Pharma Division) Limited supplied Nortriptyline Tablets in the UK during the Market Sharing Period;
 - (b) Auden Mckenzie (Pharma Division) Limited directly participated in the Infringement by entering into the Horizontal Agreement with King; and
 - (c) Auden Mckenzie Holdings Limited can be presumed to have exercised decisive influence over Auden Mckenzie (Pharma Division) Limited.
- 7.32 On 29 May 2015, Auden Mckenzie Holdings Limited was acquired by Allergan plc. Allergan plc also wholly-owned Accord-UK. Therefore, from 29 May 2015, Auden Mckenzie (Pharma Division) Limited, Auden Mckenzie Holdings Limited and Accord-UK were under common ownership and control by Allergan plc: the shares in each of Auden Mckenzie (Pharma Division) Limited, Auden Mckenzie Holdings Limited and Accord-UK were indirectly wholly owned by Allergan plc. The *Akzo* presumption therefore applied between Allergan plc and each of Auden Mckenzie Holdings Limited, Auden Mckenzie (Pharma Division) Limited

⁵⁶² See Section 8. The CMA's proposed action. Financial Penalties below on the CMA's proposed approach to imposing penalties for the Agreements.

⁵⁶³ C-280/06 *ETI and Others* EU:C:2007:775 (judgment of the Grand Chamber), paragraphs 48 to 52; C-204/00 P *Aalborg Portland and Others v Commission* EU:C:2004:6, paragraphs 354-360; T-43/02 *Jungbunzlauer v Commission* EU:T:2006:270, paragraphs 132-133; T-117/07 and T-121/07 *Areva and Others and Alstom v Commission* EU:T:2011:69, paragraphs 66-69.

and Accord-UK, such that they formed a single undertaking from 29 May 2015.⁵⁶⁴

7.33 For the following reasons, the CMA has applied the principle of economic continuity to hold Accord-UK liable for the Infringement as economic successor to Auden Mckenzie (Pharma Division) Limited's nortriptyline business, in line with settled case-law:⁵⁶⁵

- (a) Following the sale of Auden Mckenzie Holdings Limited to Allergan plc on 29 May 2015, Auden Mckenzie (Pharma Division) Limited's trading activities, business and assets relating to Nortriptyline Tablets, were transferred to Accord-UK. In other words, Accord-UK continued the economic activities of Auden Mckenzie in relation to the supply of Nortriptyline Tablets in the UK. Existing customers were asked to place orders directly with Accord-UK⁵⁶⁶ from 1 September 2015 onwards. The manufacturing agreement for Nortriptyline Tablets between [] and Auden Mckenzie (dated 7 October 2014) was formally novated in favour of Accord-UK on 15 October 2016.⁵⁶⁷ At the time of transfer, structural links existed between Auden Mckenzie (Pharma Division) Limited (as transferor) and Accord-UK (as transferee): both legal entities were indirectly wholly-owned by (and formed a single undertaking with) Allergan plc.⁵⁶⁸
- (b) Thereafter, Auden Mckenzie (Pharma Division) Limited ceased any economic activity relating to Nortriptyline Tablets: it no longer trades and its sole income derives from trademarks and royalties for branded pharmaceutical products sold by other entities in the

⁵⁶⁴ Document NOR-C2980, response to question 3, Actavis UK's response to the CMA's section 26 notice dated 20 March 2019.

⁵⁶⁵ This well-established principle has been applied in judgments of the European Court of Justice and the General Court, and in European Commission decisions, going back at least 13 years. See, for example, C-204/00 P *Aalborg Portland* (judgment of January 2004). The CMA is required to act consistently with those judgments, and to have regard to those decisions, under section 60 of the Act.

⁵⁶⁶ Then Actavis UK Limited.

⁵⁶⁷ On 3 October 2016, a written Asset Purchase Agreement for the transfer of the UK MAs for Nortriptyline, held by Lime Pharma Ltd, to Accord-UK was entered into. The CMA does not consider that this factor undermines its conclusion that Accord-UK continued the economic activities of Auden Mckenzie in relation to the supply of Nortriptyline Tablets in the UK before this date.

⁵⁶⁸ See paragraph 7.32 above and C-280/06 *ETI and Others* EU:C:2007:775 (judgment of the Grand Chamber), paragraph 52.

group headed by Teva, its current owner.⁵⁶⁹ Its turnover for the year ended 31 December 2018 from this activity was £5.7 million. The senior team involved in the Infringement have all left Auden Mckenzie (Pharma Division) Limited, which no longer has any employees. Its two directors receive no salary.⁵⁷⁰

- (c) A penalty imposed on Auden Mckenzie (Pharma Division) Limited would not deter the appropriate legal entity, and would in any case have little deterrent effect, since Auden Mckenzie (Pharma Division) Limited is no longer economically active on the relevant market.⁵⁷¹
- (d) Unlike Auden Mckenzie (Pharma Division) Limited, Accord-UK remains economically active on the relevant market. The relevant business (the sale of Nortriptyline Tablets in the UK) run by Accord-UK after the transfer is the same in substance as that previously run by Auden Mckenzie (Pharma Division) Limited prior to the transfer.⁵⁷²
- (e) Accord-UK therefore succeeded Auden Mckenzie (Pharma Division) Limited as economic actor on the market for the supply of Nortriptyline Tablets in the UK: it continued Auden Mckenzie (Pharma Division) Limited's economic activities in nortriptyline. As economic successor of Auden Mckenzie (Pharma Division) Limited's nortriptyline business, it should answer for Auden Mckenzie (Pharma Division) Limited's conduct prior to 1 September 2015 (which is the effective date of the transfer of Auden Mckenzie (Pharma Division) Limited's assets to Accord-UK).

7.34 The application of this principle is not affected by the subsequent sale by Allergan plc of Accord-UK and Auden Mckenzie (Pharma Division)

⁵⁶⁹ Document NOR-C2941, response to questions 3 and 4, Teva's response to CMA's section 26 notice dated 20 March 2019.

⁵⁷⁰ According to its latest available accounts (for the year ended 31 December 2017).

⁵⁷¹ The Court of Justice has stated that a '*penalty imposed on an undertaking that continues to exist in law, but has ceased economic activity, is likely to have no deterrent effect*': C-280/06 *ETI v Commission* EU:C:2007:775, paragraph 40. Application of the principle does not require that the transferor has ceased all economic activity; it is enough that the transferee has succeeded it as economic actor on the relevant market. See, for example, T-43/02 *Jungbunzlauer v Commission* EU:T:2006:270, paragraphs 116 and 124-134; and C-280/06 *ETI v Commission* EU:C:2007:775, paragraphs 11 and 45.

⁵⁷² C-204/00 P *Aalborg Portland and Others v Commission* EU:C:2004:6, paragraph 357.

Limited to Teva Pharmaceutical Industries Limited or the divestment of Accord-UK by Teva Pharmaceutical Industries Limited to Intas Pharmaceuticals Limited. The structural links between Accord-UK, Auden Mckenzie (Pharma Division) Limited and Allergan plc need not subsist after the transfer of the Nortriptyline Tablets business.⁵⁷³ The structural links also do not need to exist for any minimum period.⁵⁷⁴

- 7.35 Nor is the application of this principle affected by the fact that the Infringement ended on 28 May 2015: before Accord-UK began selling Nortriptyline Tablets. Economic continuity may equally apply where the transfer of the infringing business took place after the infringement had come to an end, provided that the structural links existed at the time of that transfer.⁵⁷⁵ The principle does not require that the transferee continue the infringement.⁵⁷⁶ Nor does it require that Auden Mckenzie (Pharma Division) Limited has ceased to exist in law,⁵⁷⁷ or ceased all economic activity.⁵⁷⁸
- 7.36 The conditions for the application of the principle of economic continuity are therefore satisfied in this case, and the CMA has applied the principle to hold Accord-UK liable for the Infringement.

⁵⁷³ C-434/13 P *Commission v Parker Hannifin*, EU:C:2014:2456, paragraph 51.

⁵⁷⁴ C-434/13 P *Commission v Parker Hannifin*, EU:C:2014:2456, paragraphs 51-52.

⁵⁷⁵ C-204/00 P *Aalborg Portland and Others v Commission* EU:C:2004:6, paragraphs 59, 351, 356 and 357; and C-434/13 P *Commission v Parker Hannifin* EU:C:2014:2456, paragraph 49.

⁵⁷⁶ C-204/00 P *Aalborg Portland and Others v Commission*, EU:C:2004:6, paragraphs 350-351, 356-360.

⁵⁷⁷ See C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P *Aalborg Portland v Commission* EU:C:2004:6, paragraphs 354-360; T-43/02 *Jungbunzlauer v Commission* EU:T:2006:270, paragraphs 132-133; C-280/06 *ETI v Commission* EU:C:2007:775, paragraphs 48 and 49.

⁵⁷⁸ See footnote 549 above.

8. The CMA's action

A. The CMA's decision

- 8.1 On the basis of the evidence set out in this Decision, the CMA has made a decision that the Addressees have infringed the Chapter I prohibition and Article 101(1) TFEU by participating in the Infringement, which constituted an agreement under which Auden Mckenzie supplied Lexon with only 10mg tablets and King supplied Lexon only the 25mg tablets, at fixed prices and quantities.
- 8.2 The CMA has found that the Infringement had as its object the prevention, restriction or distortion of competition within the UK and/or between EU Member States and may have affected trade within the UK and between EU Member States.
- 8.3 Penalties in respect of the Infringement are imposed on the addressees of the Decision listed in paragraph 1.1 above. The undertakings in question comprise the legal entities that participated in the conduct that is the subject of the Infringement and Accord-UK, which is liable for the Infringement committed by Auden Mckenzie, as the economic successor of Auden Mckenzie (Pharma Division) Limited's nortriptyline business.

B. Directions

- 8.4 The Infringement has ceased. Therefore, it is not necessary to give directions to any party in this case.⁵⁷⁹

C. Financial penalties

I. General

- 8.5 Section 36(1) of the Act provides that on making a decision that an agreement or concerted practice has infringed the Chapter I prohibition

⁵⁷⁹ Section 32(1) of the Act provides that if the CMA has made a decision that an agreement infringes the Chapter I prohibition and Article 101(1) TFEU, it may give to such person(s) as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

or Article 101(1) TFEU, the CMA may require undertakings party to the agreement to pay the CMA a penalty in respect of the infringement. In accordance with section 38(8) of the Act, the CMA must have regard to the guidance on penalties being in force at the time when setting the amount of the penalty (the '**Penalties Guidance**').⁵⁸⁰

- 8.6 The CMA has decided to impose financial penalties in respect of the Infringement and to attribute liability for any such penalties in line with section 7 above. Accordingly, the CMA has decided to impose financial penalties on King and Accord-UK.⁵⁸¹

II. *The CMA's margin of appreciation*

- 8.7 Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '**2000 Order**'),⁵⁸² and (ii) the CMA has had regard to the Penalties Guidance in accordance with section 38(8) of the Act, the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.⁵⁸³

- 8.8 The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.⁵⁸⁴ Rather, the CMA makes its assessment on a case-by-case basis,⁵⁸⁵ having regard to all the relevant circumstances and the twin objectives of the CMA's policy on financial penalties, namely:

⁵⁸⁰ The CMA's guidance as to the appropriate amount of a penalty (CMA73, 18 April 2018).

⁵⁸¹ For the avoidance of doubt, the CMA has decided to attribute liability for the infringing actions of Auden Mckenzie during the period of the Infringement, and liability for the resulting financial penalty, to Accord-UK.

⁵⁸² SI 2000/309, as amended by the Competition Act (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

⁵⁸³ *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

⁵⁸⁴ See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, at [78].

⁵⁸⁵ See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [116] where the CAT noted that '*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*'. See also *Eden Brown and Others v OFT* [2011] CAT 8, at [97] where the CAT observed that '*[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case*'.

- (a) to impose penalties on infringing undertakings which reflect the **seriousness of the infringement**; and
- (b) to ensure that the threat of penalties will **deter** both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.⁵⁸⁶

III. *Small agreements*

- 8.9 Section 39(3) of the Act provides that a party to a ‘*small agreement*’ is immune from financial penalties for infringements of the Chapter I prohibition. A ‘*small agreement*’ is an agreement between undertakings whose combined applicable turnover does not exceed £20 million for the business year ending in the calendar year preceding the one during which the infringement occurred.⁵⁸⁷
- 8.10 The small agreements immunity does not apply in this case as the combined applicable turnover of Auden Mckenzie and King exceeded the relevant threshold. Moreover, this immunity does not apply to infringements of Article 101 TFEU.

IV. *Intention / negligence*

Legal framework

- 8.11 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition and/or Article 101 TFEU only if it is satisfied that the infringement has been committed intentionally or negligently.⁵⁸⁸ However, the CMA is not obliged to specify whether the infringement has been committed intentionally or negligently.⁵⁸⁹
- 8.12 The CAT has defined the terms ‘*intentionally*’ and ‘*negligently*’ as follows:

⁵⁸⁶ Section 36(7A) of the Act and Penalties Guidance, paragraph 1.3.

⁵⁸⁷ Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), Regulation 3. The term ‘applicable turnover’ means the turnover determined in accordance with the Schedule to the Regulations.

⁵⁸⁸ Section 36(3) of the Act.

⁵⁸⁹ *Napp Pharmaceutical Holdings v OFT* [2002] CAT 1, at [453] to [457]. See also *Argos and Littlewoods*, at [221].

'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'.⁵⁹⁰

- 8.13 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'*.⁵⁹¹
- 8.14 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.⁵⁹²

Application to this case

- 8.15 Agreeing with a competitor the terms of supply to a customer, including the products to be supplied, prices and volumes, is inherently anticompetitive, for the reasons set out in paragraphs 6.163 to 6.165. The object of the Horizontal Agreement was to share the supply of Nortriptyline Tablets to Lexon in the UK (such that Auden Mckenzie would supply only 10mg tablets and King would supply only 25mg tablets); to fix the prices of supply to Lexon (for 10mg and 25mg tablets at £4 per pack); and to fix the quantities of supply to Lexon (at no more than 3,400 packs for 10mg tablets and at no more than 1,600 packs for 25mg tablets). Given the clear anticompetitive nature of their conduct,

⁵⁹⁰ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221. This wording was approved by the Court of Appeal in *Ping v CMA* [2020] EWCA Civ 13, paragraph 117.

⁵⁹¹ Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 124.

⁵⁹² See the CJEU's comments in Case C-681/11 *Bundswettbewerbshörde v Schenker & Co. AG*, EU:C:2013:404, paragraph 38: *'the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct'* and paragraph 41 *'It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine.'*

the CMA finds that the Parties must have been aware, or could not have been unaware, that their conduct would result in a restriction or distortion of competition. In the alternative, the Parties ought to have known that their conduct would result in a restriction or distortion of competition. Accordingly, at the very least, the Infringement was committed negligently.

- 8.16 Each Party, as part of its Terms of Settlement, has accepted that it has infringed the Chapter I Prohibition and the prohibition in Article 101(1) TFEU and that it is liable to pay a penalty.⁵⁹³

V. Calculation of penalties

- 8.17 As noted at paragraph 8.5 above, when setting the amount of the penalty, the CMA must have regard to the guidance on penalties in force at that time. The Penalties Guidance establishes a six-step approach for calculating the penalty. The six steps and their application in this case are set out below.
- 8.18 Notwithstanding the fact that the CMA has decided to attribute liability to Accord-UK as the economic successor of Auden McKenzie's nortriptyline business, it is the actions of Auden McKenzie, as the actual participant during the period of the Infringement, that are relevant for the purpose of calculating the penalty for Accord-UK.

Step 1 - starting point

- 8.19 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.⁵⁹⁴

⁵⁹³ In the case of Accord-UK, see the CMA's finding on attribution of liability at paragraph 7.28

⁵⁹⁴ Paragraph 2.4 of the Penalties Guidance.

Relevant turnover

- 8.20 The '*relevant turnover*' is defined in the Penalties Guidance as the turnover of the undertaking in the relevant product and geographic market affected by the infringement in the undertaking's last business year.⁵⁹⁵ The '*last business year*' is the undertaking's financial year preceding the date when the infringement ended.⁵⁹⁶
- 8.21 As explained in paragraphs 5.1 to 5.9 above, the relevant market for these purposes is the supply of Nortriptyline Tablets in the UK. The Infringement ended in May 2015.
- 8.22 King's last financial year preceding May 2015 was the financial year ending 30 April 2015, and its relevant turnover in this period was £10,301,531.
- 8.23 Auden Mckenzie's last financial year preceding May 2015 was the financial year ending 31 March 2015, and its relevant turnover in this period was £9,841,765.

Seriousness of the infringement

- 8.24 When making its assessment of the seriousness of the infringement, the CMA will consider a number of factors.⁵⁹⁷ The CMA will use a starting point towards the upper end of the range for the most serious infringements of competition law; that is, those which are most likely by their very nature to harm competition. In relation to infringements of the Chapter I prohibition and Article 101 TFEU, this includes cartel activities, such as price fixing and market sharing, and other, non-cartel object infringements which are inherently likely to cause significant

⁵⁹⁵ Paragraph 2.11 of the Penalties Guidance. The CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v OFT* and *JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 169 that: '[...] neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty.' The Court of Appeal considered that it was sufficient for the OFT to '*be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement*' (at paragraphs 170 to 173).

⁵⁹⁶ Paragraph 2.11 of the Penalties Guidance.

⁵⁹⁷ In accordance with paragraph 2.8 of the Penalties Guidance, these factors include the nature of the product, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties. The CMA may also take into account other relevant factors.

harm to competition.⁵⁹⁸ The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future. The damage caused to consumers whether directly or indirectly will also be an important consideration. The assessment is made on a case-by-case basis, taking account all the circumstances of the case.⁵⁹⁹

8.25 The starting point for the penalty in this case takes into account the fact that the Infringement was an agreement between competitors to share the market, fix prices, and fix volumes in respect of a specific customer and that the agreement was motivated by a desire to neutralise a competitive threat posed by that customer.⁶⁰⁰ This is a serious infringement, which by its very nature restricted competition.

8.26 The CMA has also taken into account the following factors in assessing the seriousness of the Infringement:

(a) *Market structure*: during the Market Sharing Period, King and Auden Mckenzie's share of supply for the 10mg tablets was 100%. King and Auden Mckenzie's share of supply for the 25mg tablets was approximately two thirds, with the remaining share being held by businesses importing 25mg tablets from Spain, which was ultimately also owned by Auden Mckenzie.

(b) *Coverage of the agreement*: the Horizontal Agreement related to King and Auden Mckenzie's supply to a single customer. The volumes of nortriptyline in relation to which supply terms were agreed represented around one sixth of the total supply of nortriptyline in the UK.

(c) *Potential impact of the agreement*: Although the prices agreed between King and Auden Mckenzie were very low, the benefit of the low price was not passed on by Lexon, to the consumer.⁶⁰¹

8.27 Considering the above factors in the round and having regard to the CMA's past practice in assessing seriousness, the appropriate starting point in this case is 25%.

⁵⁹⁸ Paragraph 2.6 of the Penalties Guidance

⁵⁹⁹ Paragraph 2.8 of the Penalties Guidance.

⁶⁰⁰ See paragraph 6.174 above.

⁶⁰¹ See paragraph 6.163 above.

Step 2 – adjustment for duration

- 8.28 The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement. Where the total duration of an infringement is less than one year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the infringement. In exceptional circumstances, the starting point may be decreased where the duration of the infringement is less than one year.⁶⁰²
- 8.29 The Infringement lasted from September 2014 to May 2015 (9 months). The CMA has accordingly applied a multiplier of 1 to the figures reached for all Addressees at the end of step 1.

Step 3 – adjustment for aggravating and mitigating factors

- 8.30 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are mitigating factors.⁶⁰³ A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.⁶⁰⁴ In the circumstances of this case, the CMA has adjusted the penalty at step 3 to take account of the factors set out below.

Aggravating factor – involvement of directors or senior management

- 8.31 The involvement of directors or senior management in an infringement can be an aggravating factor.⁶⁰⁵
- 8.32 In relation to King, the decision to enter into the Horizontal Agreement and the implementation of the Horizontal Agreement was entirely carried out by [King Director]; its managing director.
- 8.33 In relation to Auden Mckenzie, [Auden Mckenzie Senior Employee 1], [X], had significant involvement in the Infringement, including communicating directly with King in relation to supplying Lexon.
- 8.34 Taking into account the active involvement of [King Director] and [Auden Mckenzie Senior Employee 1] in the Infringement, an uplift of

⁶⁰² Paragraph 2.16 of the Penalties Guidance.

⁶⁰³ Paragraph 2.17 of the Penalties Guidance.

⁶⁰⁴ Paragraphs 2.18 and 2.19 of the Penalties Guidance.

⁶⁰⁵ Paragraph 2.18 of the Penalties Guidance.

15% to the penalties of both King and Accord-UK is appropriate and proportionate in the circumstances of this case.

Mitigating factor – cooperation

- 8.35 The CMA may decrease the penalty at step 3 for cooperation which enables the enforcement process to be concluded more effectively and/or speedily. The Penalties Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion to merit a reduction at step 3).⁶⁰⁶
- 8.36 In this case, all of the Addressees agreed to a more streamlined access to file process, which enabled the CMA to benefit from savings of time and resources. The CMA has decided that a 5% reduction for cooperation is appropriate and proportionate in the circumstances of this case.

Mitigating factor – compliance policy

- 8.37 The CMA may decrease the penalty at step 3 where adequate steps have been taken by an undertaking with a view to ensuring future compliance with competition law.⁶⁰⁷
- 8.38 Following the CMA's investigation and the settlement discussions in the present case, Accord-UK has engaged constructively with the CMA to introduce a number of enhancements to its competition law compliance programme.
- 8.39 The enhancements to compliance activities by Accord-UK demonstrate a clear and unambiguous commitment to competition law compliance, in that it has engaged in appropriate steps relating to risk identification, assessment, mitigation and review.
- 8.40 In particular, the CMA has been provided with evidence that, prior to this Decision, Accord-UK had rolled out an updated competition law compliance policy, held in-person competition law training sessions, taken steps to implement a compulsory online training module on competition law issues, appointed regional compliance officers with

⁶⁰⁶ Paragraph 2.19 of the Penalties Guidance.

⁶⁰⁷ Paragraph 2.19 of the Penalties Guidance.

direct reporting lines to senior staff, introduced a system through which individual employees can confidentially alert senior managers of any competition law compliance concerns they have and made a public statement on its website regarding its commitment to competition law compliance.

- 8.41 Accord-UK will also submit a report to the CMA on its compliance activities every year for the three years after the date of this Decision.
- 8.42 The CMA has decided therefore that it is appropriate to decrease Accord-UK's penalty for the Infringement by 10% to reflect Accord-UK's enhanced compliance activities.

Step 4 – adjustment for specific deterrence and proportionality

- 8.43 The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the undertaking in question will deter it from engaging in anticompetitive practices in the future), or to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.⁶⁰⁸ At step 4, the CMA will assess whether, in its view, the overall penalty is proportionate in the round.⁶⁰⁹ Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.
- 8.44 Increases to the penalty figure at step 4 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of the penalty reached at the end of step 3. The assessment of the need to adjust the penalty will be made on a case-by-case basis for each individual infringing undertaking.⁶¹⁰ In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or excessive having regard to the infringing undertaking's size and financial position and the nature of the infringement.⁶¹¹

⁶⁰⁸ Paragraph 2.20 of the Penalties Guidance.

⁶⁰⁹ Paragraph 2.24 of the Penalties Guidance.

⁶¹⁰ Paragraph 2.21 of the Penalties Guidance.

⁶¹¹ Paragraph 2.23 of the Penalties Guidance.

- 8.45 Where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the infringing activity on competition.⁶¹²
- 8.46 The CMA's consideration of step 4 in calculating each Party's financial penalty is set out below.

King

- 8.47 The penalty for King at the end of step 3 is £2,832,921.
- 8.48 The CMA has decided that a penalty of £2,832,921 is appropriate and sufficient for deterrence in this case, and that no adjustment is necessary at step 4.

Accord-UK

- 8.49 The penalty for Accord-UK at the end of step 3 is £2,460,441.
- 8.50 The CMA has decided that a penalty of £2,460,441 is appropriate and sufficient for deterrence in this case, and that no adjustment is necessary at step 4.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

- 8.51 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.⁶¹³
- 8.52 The CMA has assessed the Addressees' penalties against this threshold:
- (a) No adjustment is necessary in relation to the penalty imposed on Accord-UK.

⁶¹² Paragraph 2.24 of the Penalties Guidance.

⁶¹³ Section 36(8) of the Act, the 2000 Order, as amended, and Paragraph 2.25 of the Penalties Guidance.

(b) The CMA has adjusted King's penalty to ensure that it does not exceed the maximum that the CMA may impose. The adjusted penalty for King is £83,970.

8.53 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another EU Member State in respect of the same agreement or conduct.⁶¹⁴ As there is no such applicable penalty or fine, no adjustment is necessary in this case in that regard.

Step 6 – application of reductions for leniency and settlement

8.54 The CMA will apply a penalty reduction where an undertaking has a leniency agreement with the CMA and/or agrees to settle with the CMA.⁶¹⁵

8.55 Reductions for leniency are not applicable to Accord-UK or King.

8.56 Accord-UK and King expressed a genuine interest and willingness to enter into settlement discussions with the CMA after the CMA issued the Statement of Objections.

8.57 As part of settlement Accord-UK and King admitted the facts and allegations of the Infringement as set out in the Statement of Objections and cooperated with the CMA and expedited the process for concluding the investigation.

8.58 In light of these considerations, the CMA has reduced the financial penalties imposed on each of King and Accord-UK by 10% at step 6.

8.59 Further reduction in light of payment made to the Department of Health and Social Care by Accord-UK and Auden Mckenzie

8.60 In connection with settlement, Auden Mckenzie and Accord-UK agreed to make a joint payment of £1 million to the Department of Health and Social Care and the devolved administrations. The Department of Health and Social Care and devolved administrations have provided an

⁶¹⁴ Paragraph 2.28 of the Penalties Guidance.

⁶¹⁵ Paragraph 2.29 and 2.30 of the Penalties Guidance.

assurance to Auden Mckenzie and Accord-UK that they would offset the payment against any potential future damages action.

8.61 In recognition of this payment, and in the specific circumstances of this case, the CMA has reduced the financial penalty imposed on Accord-UK by 15%.

VI. *Payment of penalty*

8.62 As set out in the table below:

(a) The total penalty imposed on Accord-UK for its involvement in the Infringement is £1,882,238; and

(b) The total penalty imposed on King⁶¹⁶ for its involvement in the Infringement is £75,573.

Step	Description	Accord-UK	King Limited/Praze
	Relevant turnover	£9,841,765	£10,301,531
1	Starting point as a percentage of relevant turnover	25%	25%
2	Adjustment for duration	1	1
3	Adjustment for aggravating or mitigating factors	<i>Aggravating: Director involvement</i>	+15%
		<i>Mitigating: Co-operation</i>	-5%
		<i>Mitigating: Compliance programme</i>	-10%
4	Adjustment for specific deterrence or proportionality	0	0
	Interim penalty at end of step 4	£2,460,441	£2,832,921
5	Adjustment to take account of the statutory maximum penalty	N/A	10% of worldwide turnover
	Interim penalty at end of step 5	£2,460,441	£83,970

⁶¹⁶ King Limited and Praze are jointly and severally liable for the full penalty (£75,573), see paragraph 7.24 above.

6	Leniency discount	N/A	N/A
	Settlement discount	-10%	-10%
	Discount in recognition of payment	-15%	N/A
	Penalty payable	£1,882,238	£75,573

8.63 The penalty will become due to the CMA in its entirety on 5 May 2020⁶¹⁷ and must be paid to the CMA by close of banking business on that date.⁶¹⁸

8.64 SIGNED

[✂]

4 March 2020
Geoff Steadman
Senior Responsible Officer, for and on behalf of the Competition and Markets Authority

⁶¹⁷ The next working day two calendar months from the expected dated of receipt of the Decision.

⁶¹⁸ Details on how to pay the penalty are set out in the letter accompanying this Decision.