

Decision of the Competition and Markets Authority

**Resale price maintenance in
the digital piano and digital
keyboard, and guitar sectors**

© Crown copyright 2020

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-governmentlicence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gov.uk.

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

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 Names have been replaced by a general descriptor of the individual's role.

Contents

1. Introduction and Executive Summary	4
A. Glossary	5
B. People involved and their roles	8
2. Investigation.....	9
3. Facts	14
A. Addressees.....	14
I. The Yamaha undertaking	14
II. The GAK undertaking	15
B. Piano and digital keyboard sector and guitar sector overview	17
I. UK pianos and digital keyboard sector and guitar sector	17
II. Yamaha's involvement in the UK piano and digital keyboard sector and the guitar sector	18
III. Other UK piano, digital keyboard and guitar suppliers	21
IV. UK MI resellers.....	21
V. Yamaha sales and distribution network.....	23
VI. GAK's involvement in the UK piano and digital keyboard sector and guitar sector	26
C. Yamaha Pricing Policy.....	28
I. Introduction and overview.....	28
II. Aims, duration and content.....	32
D. Market Definition.....	50
I. Purpose of and framework for assessing the relevant market.....	50
II. Relevant product market	50
III. Sales through different distribution channels.....	53
IV. Relevant geographic market.....	54
V. Conclusion on market definition	55
4. Legal Assessment.....	56
A. Introduction	56
B. Undertakings	57
I. Key legal principles	57
II. Conclusion on undertakings	58
C. Agreement and/or concerted practice.....	58
I. Key legal principles	58
II. Agreement.....	59
III. Concerted practice	61
IV. Agreement and/or concerted practice between Yamaha and GAK	63
D. Object of Preventing, Restricting or Distorting Competition	93
I. Key legal principles	94
II. Legal Assessment of the Agreement.....	101
E. Appreciable Restriction of Competition.....	105

I.	Key legal principles	106
II.	Legal assessment	106
F.	Effect on Trade between EU Member States	107
I.	Key legal principles	107
II.	Legal assessment	109
G.	Effect on Trade within the UK	113
I.	Key legal principles	113
II.	Legal assessment	114
H.	Exclusion or Exemption	114
I.	Exclusion	114
II.	Block exemption / Parallel exemption	114
III.	Individual exemption	115
I.	Attribution of liability	116
I.	Key legal principles	116
II.	Liability for the Infringement	119
III.	Conclusion on joint and several liability	120
J.	Burden and standard of proof	120
I.	Burden of proof	120
II.	Standard of proof	121
5.	The CMA's Action	122
A.	The CMA's Decision	122
B.	Directions	122
C.	Financial Penalties	123
I.	General	123
	The CMA's margin of appreciation in determining the appropriate penalty	123
II.	Intention/negligence	125
III.	Yamaha	126
IV.	GAK	127
V.	Calculation of Penalties	128
VI.	Payment of penalty	137

1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 This decision (the ‘Decision’) is addressed to Yamaha Music Europe GmbH (‘YME’); and to GAK.co.uk Limited; The Guitar, Amp & Keyboard Centre Limited; and GAK.co.uk (Holdings) Ltd (together ‘GAK’) (YME and GAK are referred to together as the ‘Addressees’).

1.2 By this Decision,¹ the Competition and Markets Authority (the ‘CMA’) decides that:

- YME, through its UK branch, Yamaha Music Europe GmbH (UK) (‘Yamaha UK’) (together ‘Yamaha’) and GAK infringed the prohibition in section 2(1) of the Competition Act 1998 (the ‘Act’) (the ‘Chapter I prohibition’) and/or Article 101 of the Treaty on the Functioning of the European Union (the ‘TFEU’) by entering into an agreement and/or participating in a concerted practice with each other, whereby GAK, one of Yamaha’s resellers in the UK:
 - would not advertise or sell online digital pianos, digital keyboards or guitars supplied to it by Yamaha² (with certain limited exceptions set out in paragraph 3.34) (the ‘Relevant Products’) below a price specified by Yamaha from time to time (the ‘Minimum Price’) under a pricing policy devised by Yamaha (the ‘Yamaha Pricing Policy’);
 - which amounted to resale price maintenance (‘RPM’) in respect of retail sales of the Relevant Products by GAK.
- The agreement and/or concerted practice lasted from 1 March 2013 to 31 March 2017 (the ‘Relevant Period’) (together referred to below as the ‘Infringement’) and:
 - 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/or between EU Member States.

1.3 The CMA has decided to attribute GAK’s liability for the Infringement to GAK.co.uk Limited; The Guitar, Amp & Keyboard Centre Limited; and

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

² This does not include associated accessories, such as stands, adapters, and pedals. Synthesizers are included within the Relevant Products – see further paragraph 3.34 below.

GAK.co.uk (Holdings) Ltd, making these three companies jointly and severally liable for the Infringement.

- 1.4 The CMA has decided to impose a financial penalty on GAK pursuant to section 36(1) of the Act. No financial penalty will be imposed on Yamaha, provided that it continues to co-operate and comply with the conditions of the CMA's leniency policy.

A. Glossary

Term	Definition
Act	Competition Act 1998
Addressees	YME and GAK, as defined in paragraph 1.1
Agreement	The agreement and/or concerted practice between Yamaha and GAK, whereby GAK would not advertise or sell the Relevant Products online below the Minimum Price
Article 101 TFEU	Article 101 of the Treaty on the Functioning of the European Union
B-stock	Products returned by customers or otherwise in sub-optimal condition, or discontinued items
CAT	Competition Appeal Tribunal
Chapter I prohibition	The prohibition imposed by section 2(1) of the Act
CMA	The Competition and Markets Authority
CMA's Rules	The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/58)
Commission	The European Commission
Compliance Directive	Refers to a compliance directive from Yamaha in October 2014 to its sales representatives, instructing them to minimise contact about the Yamaha Pricing Policy by email. Yamaha staff were required to respond to price complaints received stating that resellers were free to set their own prices, whilst in practice continued to implement the Yamaha Pricing Policy with such resellers by phone call or face-to-face.
Court of Justice	The Court of Justice of the European Union (formerly the European Court of Justice)
Decision	This Decision dated 17 July 2020
Draft SO	Draft Statement of Objections issued on 19 March 2020
Effect on Trade Guidelines	Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)
EU	The European Union
European Courts	The General Court and the Court of Justice
General Court	The General Court of the European Union (formerly the Court of First Instance)

Term	Definition
GAK	GAK.co.uk Limited, The Guitar, Amp & Keyboard Centre Limited and GAK.co.uk (Holdings) Ltd (together 'GAK')
GAK.co.uk Limited	GAK.co.uk Limited (company number 04578270)
GAK.co.uk (Holdings) Ltd	GAK.co.uk (Holdings) Ltd (company number 08380738)
The Guitar, Amp & Keyboard Centre Limited	The Guitar, Amp & Keyboard Centre Limited (company number 05663326)
General Court	The General Court of the European Union (formerly the Court of First Instance)
IBISWorld Report	IBISWorld Industry Report G47.591 <i>Musical Instrument Retailers in the UK</i>
Infringement	The infringement of the Chapter I prohibition and/or Article 101 TFEU regarding the Relevant Products, as specified in paragraph 1.2 above
MAP	Minimum advertised price
Mass Market	Sales channels not solely specialised in MI
Mass Market resellers	MI resellers which do not specialise solely in MI, for example large national retailers
MI	Musical Instrument/s
Minimum Price	The minimum price specified by Yamaha from time to time in connection with the Yamaha Pricing Policy. Prior to the introduction of the Purple Book, the Minimum Price was broadly based on a calculation of the Suggested Retail Price (SRP) minus a specified percentage; following the introduction of the Purple Book, the Minimum Price was the YML sales price, listed separately to the YML SRP.
OFT	The Office of Fair Trading, one of the CMA's predecessor organisations
Open Products	This is a term used by Yamaha to describe products freely supplied to all resellers, not just to those forming part of a selective distribution network
Open Resellers	Yamaha resellers who sell only Open Products
Penalties Guidance	CMA's Guidance as to the appropriate amount of penalty (CMA73, April 2018)
Purple Book	A Yamaha manual setting out qualitative criteria
Relevant Period	1 March 2013 to 31 March 2017
Relevant Products	The products covered by the Agreement (digital pianos, digital keyboards, synthesisers and guitars manufactured and/or sold by or on behalf of Yamaha during the Relevant Period, but this does not include associated accessories, such as stands, adapters, and pedals nor does it include these products which were B-stock or end of line/discontinued products). Whenever this term is used, it may also refer to any subset of the products described above.

Term	Definition
RFI to GAK	A request for information to GAK issued as a s.26 Notice
RFI to Yamaha	A request for information to Yamaha
RPM	Resale price maintenance
RRP	Recommended retail price
s.26 Notice	A notice issued under section 26 of the Act
SDA	Selective Distribution Agreement
Selective Product	A Yamaha product sold under an SDA
Selective Reseller	A reseller of Yamaha products operating under an SDA. Such resellers may also sell Open Products
SO	The Statement of Objections dated 29 June 2020
SRP	Suggested Retail Price
SSP	Suggested Selling Price
Street price	Street price was the main terminology for MAP. Previously, Yamaha had used the term 'product training' for MAP
Terms of Settlement	The terms of settlement agreed by the CMA and GAK, as described in Section 2, Investigation, below
TFEU	Treaty on the Functioning of the European Union
UK	The United Kingdom of Great Britain and Northern Ireland
VABER	Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices [2010] (OJ L102/1), known as the Vertical Agreements Block Exemption Regulation
Vertical Guidelines	Commission Guidelines on Vertical Restraints [2010] OJ C130/01
Yamaha	YME and Yamaha UK together
Yamaha Pricing Policy	A policy operated by Yamaha, the purpose of which was to seek to ensure that UK-based Selective Resellers, including GAK, would not advertise or sell the Relevant Products online below the Minimum Price specified by Yamaha from time to time
Yamaha UK	Yamaha Music Europe GmbH (UK), company number FC029516/ BR014498, a UK branch of YME
YME	Yamaha Music Europe GmbH, incorporated in Germany, Registration number HRB 5612 PI, with a UK branch registered at Companies House under company number FC029516/BR014498
YML	Yamaha Music London, that is Yamaha's own retail site and musical retail store located in London
[Reseller 1]	[REDACTED]
[Reseller 2]	[REDACTED]
[Reseller 3]	[REDACTED]
[Reseller 4]	[REDACTED]
[Reseller 5]	[REDACTED]
[Reseller 6]	[REDACTED]

Term	Definition
[Reseller 7]	[REDACTED]
[Reseller 8]	[REDACTED]
[Reseller 9]	[REDACTED]
[Reseller 10]	[REDACTED]
[Reseller 11]	[REDACTED]
[Reseller 12]	[REDACTED]
[Reseller 13]	[REDACTED]
[Reseller 14]	[REDACTED]
[Reseller 15]	[REDACTED]
[Reseller 16]	[REDACTED]
[Reseller 17]	[REDACTED]

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

B. People involved and their roles

Figures 1.1 and 1.2 below set out the names and roles of key Yamaha UK and GAK employees referred to in this Decision.

Figure 1.1: Relevant Yamaha UK employees

Employee	Area of responsibility and dates
[Yamaha Senior Employee 1]	[REDACTED]
[Yamaha Senior Employee 2]	[REDACTED]
[Yamaha Employee 1]	[REDACTED]
[Yamaha Employee 2]	[REDACTED]
[Yamaha Employee 3]	[REDACTED]

Source³

Figure 1.2: Relevant GAK employees

Employee	Area of responsibility and dates
[GAK Senior Employee 1]	[REDACTED]
[GAK Senior Employee 2]	[REDACTED]
[GAK Senior Employee 3]	[REDACTED]
[GAK Employee 1]	[REDACTED]
[GAK Employee 2]	[REDACTED]

Source⁴

³ URN C_YAM01104 (Yamaha response dated 8 August 2018 to RFI dated 30 July 2018, UK Branch Organogram).

⁴ URN C_YAM00378.1 (GAK response dated 23 April 2018 to RFI dated 17 April 2018), URN C_YAM01827.1 (Transcript of interview on 25 September 2019 with [GAK Employee 1], GAK), URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK).

2. INVESTIGATION

- 2.1 On 17 April 2018, the CMA opened a formal investigation under section 25 of the Act into a suspected competition law infringement by Yamaha. The CMA did so having determined that it had reasonable grounds for suspecting that:
- a. Yamaha had infringed the Chapter I prohibition and/or Article 101 TFEU by being involved in anti-competitive agreements and/or concerted practices with at least one UK reseller;
 - b. those arrangements restricted the price at which musical instruments ('MI') supplied by Yamaha were advertised online by the reseller/s; and
 - c. this, in turn, restricted the price at which MI were sold by the reseller/s, making the arrangements a form of RPM.
- 2.2 At the same time, the CMA made an administrative decision to focus the evidence-gathering in this investigation on:
- the period from 1 March 2013 onwards; and
 - pianos and keyboards manufactured and/or sold by Yamaha, excluding accessories.
- 2.3 On 24 May 2019, the CMA expanded the evidence-gathering in the investigation to include guitars manufactured and/or sold by Yamaha during the Relevant Period, excluding accessories.⁵

Leniency

- 2.4 On 21 April 2017, Yamaha applied for a leniency marker in this case. On 24 April 2017, the CMA orally granted a provisional Type A leniency marker to Yamaha.
- 2.5 As part of Yamaha's application for leniency:
- a. Yamaha provided documentary evidence to the CMA on 12 and 23 May 2017, 17 and 25 July 2017, 6 September 2017, 18 October 2017, 1, 2, 5,

⁵ URN C_YAM01390 (CMA RFI to Yamaha dated 24 May 2019), the CMA's RFI to Yamaha on 24 May 2019 included guitars for the first time as part of the Relevant Products as manufactured by and on behalf of YME supplied in the UK.

10 November 2017, 5 January 2018, 8 February 2018, 6 and 15 March 2018, 5 April 2018 and 4 May 2018;

- b. Yamaha provided oral proffers to the CMA on 8 June 2018, 10 June 2019 and 17 June 2019 (proffer 1, proffer 2, and proffer 3 respectively); and
- c. the CMA held meetings with Yamaha on 23 May 2017, 18 October 2017 and 8 February 2018.

2.6 Between 12 April 2018 and 18 March 2020, correspondence took place between Yamaha and the CMA in respect of a provisional Type A leniency marker granted to Yamaha:

- a. The CMA sent a letter to Yamaha confirming that Yamaha holds a provisional Type A leniency marker on 12 April 2018. The CMA sent further letters to Yamaha confirming updates to the provisional Type A leniency marker it holds on 16 April 2018, 10 and 20 December 2019;
- b. Yamaha submitted a cooperation letter, confirming its understanding of the conditions for the grant of leniency, to the CMA on 16 April 2018. Yamaha submitted an updated cooperation letter to the CMA on 29 November 2019;
- c. On 10 March 2020 Yamaha signed a leniency agreement with the CMA confirming its agreement to the conditions on which the CMA was prepared to grant it immunity from penalties in this case. The leniency agreement was signed on behalf of the CMA on 18 March 2020.

Requests for information

2.7 In the course of the investigation, the CMA made a number of requests for information and documents to the Addressees and other parties, including under section 26 of the Act, as follows:

- a. To Yamaha on 30 July 2018, 24 May 2019, 3 February 2020; and Yamaha employees, [Yamaha Employee 2] on 12 September 2019, and [Yamaha Employee 1] on 13 September 2019;
- b. To GAK on 17 April 2018, 4 October 2019, and 18 December 2019;
- c. To 11 other MI resellers⁶ on 17 April 2018.

⁶ [Reseller 2]; [Reseller 4]; [Reseller 5]; [Reseller 7]; [Reseller 8]; [Reseller 9]; [Reseller 10]; [Reseller 11]; [Reseller 15]; [Reseller 13]; and [Reseller 14].

Interviews with Yamaha and GAK

2.8 The CMA conducted several interviews, including:

- a. Voluntary first-account interviews with the following Yamaha employees or former employees: [Yamaha Employee 2] on 30 May 2018, [Yamaha Senior Employee 2] on 5 June 2018, and [Yamaha Employee 1] on 19 September 2018;
- b. Compulsory interviews under section 26A of the Act with the following GAK employees or former employees: [GAK Senior Employee 3] on 13 August 2019, and [GAK Employee 1] on 25 September 2019.

Decision to scope GAK into investigation

- 2.9 On 25 July 2019, the CMA sent a letter to GAK informing GAK of the CMA's provisional decision to expand the scope of its existing investigation under section 25 of the Act to include GAK as a party to the suspected infringement, subject to further evidence review.
- 2.10 On 5 November 2019, the CMA sent a State of Play letter to GAK informing it that, having reviewed the further evidence on the CMA's case file, the CMA's provisional decision to scope GAK into the investigation had not changed.
- 2.11 The State of Play letter from the CMA to GAK of 5 November 2019 further explained that the main reason for the CMA's decision to scope GAK in as a full case party to the investigation (and not to apply Rule 5(3) of the CMA's Rules ('Rule 5(3)'))⁷ arose from the CMA having issued GAK.co.uk Limited with an advisory letter (in October 2015) in respect of conduct similar to the alleged conduct being investigated in this case; and from the CMA's provisional view that GAK did not take effective action to identify and discontinue its participation in the alleged agreement and/or concerted practice with Yamaha following receipt of that advisory letter.
- 2.12 Between 30 July 2019 and 6 March 2020 there were a number of written and oral communications between the CMA and GAK with regard to scoping GAK as a full case party to the investigation.⁸ In addition, the CMA sent a

⁷ The text of Rule 5(3) is: 'Where the CMA considers that an agreement infringes the Chapter I prohibition or the prohibition in Article 101(1) the CMA may address that proposed infringement decision to fewer than all the persons who are or were party to that agreement or are or were engaged in that conduct.'

⁸ This included: an email from GAK to the CMA on 30 July 2019; a telephone call between the CMA and GAK on 1 August 2019; letters from GAK to the CMA on 13 November 2019 and 18 December 2019; a letter from the

letter to Yamaha on 2 August 2019 informing Yamaha of the CMA's decision to scope GAK as a full case party in the investigation.

State of Play contacts with Yamaha and GAK

- 2.13 The CMA provided each of Yamaha and GAK with a State of Play update by way of letter on 5 November 2019.
- 2.14 The CMA held a State of Play meeting with Yamaha on 13 November 2019, and a State of Play meeting with GAK on 4 December 2019.

Settlement

- 2.15 On 11 December 2019, GAK expressed genuine interest and willingness to enter into settlement discussions with the CMA in relation to the investigation.
- 2.16 On 19 March 2020, the CMA issued a draft Statement of Objections (the 'Draft SO') to GAK (and to Yamaha), for the purposes of enabling GAK to determine its position regarding a possible settlement in this case.⁹ On 14 April 2020, GAK confirmed its acceptance in principle of the terms set out in its previous correspondence with the CMA ('the Terms of Settlement'). GAK was given an opportunity to make submissions on manifest factual inaccuracies in the Draft SO. GAK made written submissions on 29 April 2020 and oral submissions at a settlement meeting on 26 May 2020. These submissions were considered and, to the extent relevant, were reflected in the Statement of Objections issued subsequently on 29 June 2020 (the 'SO') (see paragraph 2.18 below).
- 2.17 On 12 June 2020, GAK entered into a settlement agreement with the CMA. It admitted that it had infringed the Chapter I prohibition and/or Article 101 TFEU as set out in the Draft SO and agreed to co-operate in expediting the process for concluding the investigation. The settlement letter signed by GAK and the Terms of Settlement annexed to that letter dated 12 June 2020 set out all the conditions of the agreement. The CMA formally confirmed this settlement in a letter to GAK dated 17 June 2020.

CMA to GAK on 28 November 2019; a letter from GAK to the CMA dated 25 February 2020; and a letter from the CMA to GAK on 7 March 2020.

⁹ According to paragraph 14.14 and footnote 170 of the *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8, January 2019), a business with whom settlement discussions take place will be presented with a Summary Statement of Facts or draft Statement of Objections.

- 2.18 On 29 June 2020, the CMA issued the SO to GAK and Yamaha, in which it made a provisional decision that GAK and Yamaha had infringed the Chapter I prohibition of the Act and/or Article 101 TFEU and set out details of the confirmed settlement.

3. FACTS

A. Addressees

I. The Yamaha undertaking

YME

- 3.1 YME is based in Rellingen, Germany. YME supplies, through its wholesale trade activities, MI and audio-video products. YME's major supplier is its parent company, Yamaha Corporation Japan. It distributes these MI (and audio-video products) through its branches in Europe, including Yamaha UK. YME also operates a retail shop/showroom for musical instruments in London: Yamaha Music London (formerly Chappell of Bond Street) ('YML'). YML also operates a retail website.¹⁰
- 3.2 YME is a private limited company registered at the Local Court of Pinneberg under company number HRB 5612 PI.¹¹
- 3.3 YME had total sales of €608,561,000 in the financial year ended 31 March 2019.¹²
- 3.4 YME's parent company is Yamaha Corporation Japan.¹³ Yamaha Corporation Japan is a global corporation headquartered in Hamamatsu, Japan.¹⁴ Yamaha Corporation Japan reported net sales of 433.0 billion Yen and operating income of 48.8 billion Yen in the 2018 fiscal year.¹⁵

Yamaha UK

- 3.5 Yamaha UK is a registered branch of YME registered at Companies House under number FC029516/BR014498 with its registered business address at Sherbourne Drive, Tilbrook, MK7 8BL.^{16, 17}

¹⁰ URN C_YAM01764 (Yamaha response dated 11 February 2020 to RFI dated 3 February 2020) (2018/2019 Accounts).

¹¹ <https://beta.companieshouse.gov.uk/company/FC029516>.

¹² URN C_YAM01764 (Yamaha response dated 11 February 2020 to RFI dated 3 February 2020) (2018/2019 Accounts).

¹³ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 1.

¹⁴ <https://www.yamaha.com/en/about/profile/>.

¹⁵ https://www.yamaha.com/en/news_release/2018/18050101/pdf/1805010101.pdf

¹⁶ <https://beta.companieshouse.gov.uk/company/FC029516>.

¹⁷ URN C_YAM01579 (Email from Yamaha to CMA dated 19 November 2019).

- 3.6 YME generated sales of €86.267 million in the UK for the year ended 31 March 2019.¹⁸

II. The GAK undertaking

GAK.co.uk (Holdings) Ltd

- 3.7 GAK.co.uk (Holdings) Ltd is a private limited company registered at Companies House under company number 08380738, with its registered business office at 30-34 North Street, Hailsham, East Sussex, BN27 1DW. It was incorporated on 29 January 2013.¹⁹
- 3.8 GAK.co.uk (Holdings) Ltd recorded consolidated group turnover of £22,939,732 for the year ended 30 September 2018.²⁰
- 3.9 Between 2013 and 2016, GAK.co.uk (Holdings) Ltd had one director, Gary Marshall (who was referred to as [X]), and a small management team, including Max McKellar in the role of [X]. Gary Marshall was appointed as a director on 29 January 2013. On 22 January 2016, two of the individuals within the management team, Max McKellar and Ian Stephens, also became directors and [X], Gary Marshall, became [X] of GAK.co.uk (Holdings) Ltd.²¹
- 3.10 The ultimate controller of GAK.co.uk (Holdings) Ltd is Gary Marshall.²²
- 3.11 The Guitar, Amp & Keyboard Centre Limited and GAK.co.uk Limited are wholly-owned subsidiaries of GAK.co.uk (Holdings) Ltd.²³ Gary Marshall is also the ultimate controller of these entities.

¹⁸ URN C_YAM01764 (Yamaha response dated 11 February 2020 to RFI dated 3 February 2020) (2018/2019 Accounts), Appendix IV, page 11.

¹⁹ <https://beta.companieshouse.gov.uk/company/08380738>.

²⁰ URN C_YAM01676 (GAK response dated 13 January 2020 to RFI dated 18 December 2019), question 1.

²¹ URN C_YAM00378 (GAK response dated 25 April 2018 to RFI dated 17 April 2018, cover email response), Section B of Annex 5.

²² <https://beta.companieshouse.gov.uk/company/04578270/persons-with-significant-control>. See also URN C_YAM01848 (GAK response dated 27 February 2020 to RFI dated 17 February 2020) question 1: [X].

²³ URN C_YAM00378 (GAK response dated 25 April 2018 to RFI dated 17 April 2018, cover email response), Section B of Annex 5.

GAK.co.uk Limited

- 3.12 GAK.co.uk Limited is a private limited company registered at Companies House under company number 04578270 with its registered business office at 30-34 North Street, Hailsham, East Sussex, BN27 1DW.
- 3.13 GAK.co.uk Limited had a turnover of £12,749,596 for the year ended 30 September 2018.²⁴
- 3.14 GAK.co.uk Limited's directors are Gary Marshall (appointed 31 October 2002), Max McKellar (appointed 22 January 2016), and Ian Stephens (appointed 22 January 2016).²⁵

The Guitar, Amp & Keyboard Centre Limited

- 3.15 The Guitar, Amp & Keyboard Centre Limited is a private limited company registered at Companies House under company number 05663326, with its registered business office at 30-34 North Street, Hailsham, East Sussex, BN27 1DW.
- 3.16 The Guitar, Amp & Keyboard Centre Limited had a turnover of £20,475,886 for the year ended 30 September 2018.²⁶
- 3.17 The Guitar, Amp & Keyboard Centre Limited's directors are Gary Marshall (appointed 28 December 2005), Max McKellar (appointed 22 January 2016), and Ian Stephens (appointed 22 January 2016).²⁷

Activities of GAK

- 3.18 GAK supplies MI including MI supplied by Yamaha, online and through its store in Brighton.²⁸

²⁴ <https://beta.companieshouse.gov.uk/company/04578270/filing-history>.

²⁵ URN C_YAM00378.1 (GAK response dated 23 April 2018 to RFI dated 17 April 2018), Section B of Annex 5.

²⁶ <https://beta.companieshouse.gov.uk/company/05663326/filing-history>.

²⁷ URN C_YAM00378.1 (GAK response dated 23 April 2018 to RFI dated 17 April 2018), Section B of Annex 5.

²⁸ URN C_YAM00580 (GAK response dated 25 April 2018 to RFI dated 17 April 2018), Annex 5, Section C; and URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)), question 11; and URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)), question 11.

B. Piano and digital keyboard sector and guitar sector overview

3.19 This section provides an overview of those aspects of the piano and digital keyboard sector and guitar sector that are relevant to this investigation.

I. UK pianos and digital keyboard sector and guitar sector

3.20 The market research company, IBISWorld Limited ('IBISWorld') estimates that the MI sector in the UK was worth £428 million in 2019/2020,²⁹ and that keyboards, pianos and organs made up [10-20]% (i.e. £[50-60] million) and guitars and ukuleles also made up [10-20]% (i.e. £[50-60] million) of the MI sector in that period.³⁰

3.21 The UK piano and keyboard sector broadly consists of the supply of the following:

- acoustic pianos;
- digital pianos;
- electric pianos;
- keyboards (also referred to in the MI industry as digital keyboards);
- organs; and
- synthesisers.³¹

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

- electric guitars;
- electric basses;
- acoustic guitars; and
- ukuleles.

²⁹ URN C_YAM02071 (IBISWorld Report, February 2020), pp.3 and 14.

³⁰ URN C_YAM02071 (IBISWorld Report, February 2020), p.14.

³¹ URN C_YAM02071 (IBISWorld Report, February 2020), p.14.

II. Yamaha's involvement in the UK piano and digital keyboard sector and the guitar sector

3.23 Yamaha sells the following MI and MI-related products to UK resellers and directly to customers through YML, through its website and to education customers:

- digital pianos;
- acoustic pianos;
- hybrid pianos;
- portable keyboards;
- synthesisers/stage pianos;
- electric guitars;
- acoustic guitars;
- ukuleles; and
- guitar amplifiers (amps) and guitar effects.³²

3.24 Manufacturers vary in their approach to categorising these instruments. Yamaha included details of synthesisers in response to questions regarding digital keyboards and the CMA has therefore adopted that approach for the purposes of this case. GAK included details of ukuleles in response to questions regarding guitars and the CMA has therefore adopted that approach for the purposes of this case.

3.25 Yamaha also sells the following MI and MI-related products: electronic drums, acoustic drums, so called hi-tech products,³³ products used to transmit or amplify the sounds made by other instruments, band and orchestral instruments (comprising clarinets, trumpets, strings instruments, and percussion instruments).

³² URN C_YAM00025 (Yamaha response dated 2 November 2017); and URN C_YAM01765 (Yamaha response dated 11 February 2020 to RFI dated 3 February 2020, updated market shares); and URN C_YAM00035 (Yamaha 6 March 2018 submission).

³³ Stage pianos; interfaces; apps; tone generators and portable recorders. URN C_YAM00052 (Yamaha response dated 5 April 2018 to RFI dated 29 March 2018).

Pianos and digital keyboards

- 3.26 Digital pianos have 88 keys and emulate the sound of an acoustic piano through digitally sampled and reproduced sound. Digital keyboards usually have fewer than 88 keys and play a wider range of sounds than a digital piano.³⁴ The boundaries between hybrid pianos and digital pianos are nuanced, with potentially high degrees of crossover between them. There is a wide range of configurations across the range of hybrid pianos – a hybrid essentially combines technology and components from digital pianos with features of a traditional acoustic piano.
- 3.27 A portable keyboard usually has 61 keys, giving it a reduced range of notes. Portable keyboards are generally much more lightweight than either digital or hybrid pianos, with lightweight keys (in contrast to the weighted keys of a piano). The boundaries between portable keyboards and digital pianos start to blur when high-end portable keyboards are considered. These portable keyboards typically feature 76 keys and can produce a vast range of high-quality sounds, including piano sounds. At the same time, these high-end keyboards offer a range of effects and options to control and manipulate sounds.
- 3.28 Low to mid-end portable keyboards are different from synthesisers because portable keyboards have built-in speakers, meaning they can play sounds without PA equipment. That is not the case for synthesisers/stage pianos. The control system of a synthesiser is more ‘hi-tech’ than that of a portable keyboard, allowing the user to edit and customise the sounds produced (this difference exists to a lesser extent between stage pianos and portable keyboards).³⁵

Guitars

- 3.29 Electric guitars are solid or semi-hollow wooden stringed instruments with six or more strings and magnetic pickups and are designed for use almost exclusively with a guitar amplifier (therefore typically requiring an external power source).
- 3.30 Electric basses have similar physical features to electric guitars and typically have fewer strings (four, not six), require a different technique to play and have a different sound and musical role to an electric guitar.

³⁴ URN C_YAM00052 (Yamaha response dated 5 April 2018 to RFI dated 29 March 2018), questions 8 and 9.

³⁵ URN C_YAM00052 (Yamaha response dated 5 April 2018 to RFI dated 29 March 2018).

- 3.31 Acoustic guitars are solid wood or laminated stringed instruments designed to transmit sound acoustically, rather than through electric amplification. The string vibration resonates through the instrument itself to create the sound.
- 3.32 Classical guitars are nylon-strung rather than steel-strung guitars.
- 3.33 Ukuleles are small-bodied, acoustic and/or electro-acoustic instruments with four strings, generally constructed of solid and/or laminated woods.³⁶

Relevant Products

- 3.34 The CMA finds that over the course of the Relevant Period the Infringement concerned all pianos, digital keyboards, synthesisers/stage pianos, workstations and guitars (including ukuleles) manufactured and/or supplied by or on behalf of Yamaha in the UK to GAK and retailed by GAK ('the 'Relevant Products'),³⁷ with the exception of the following:
 - a. Products that were sold by Mass Market resellers. Mass Market resellers are described more fully in paragraphs 3.52 and 3.53. Mass Market resellers only sold 'Open' products ('Open Products'). 'Open' is a term used by Yamaha to describe products freely supplied to all resellers, not just resellers authorised under an SDA ('Selective Resellers') (although Open Products can be, and often are, sold by Selective Resellers, as is the case with GAK). Open Products are broadly less sophisticated and expensive than products that can only be sold by Selective Resellers ('Selective Products'). The use of the terms 'Open Products' and 'Selective Products' in the context of this case is considered in more detail at paragraphs 3.48 to 3.50 below;³⁸

³⁶ URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)), question 3.

³⁷ URN C_YAM01109.1 (Yamaha response dated 10 August 2018 to RFI dated 30 July 2018) question B4, provides a list of the piano and digital keyboards which Yamaha supplied to resellers, along with the model numbers and the date when each product was first supplied to the reseller and when it was last available during the Relevant Period. URN C_YAM01416 (Yamaha response dated 6 June 2019 to RFI dated 24 May 2019), question B4, and URN C_YAM01415.1 (Yamaha response dated 6 June to RFI dated 24 May 2019) question B3 and B4 (see 4), provide a list of the guitars which Yamaha supplied to GAK, along with the model numbers and the date when each product was first supplied to GAK and when it was last available during the Relevant Period. Also see URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)), question 8, and URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)), question 8, with regards to the Relevant Products sold by GAK during Relevant Period.

³⁸ Whilst the Yamaha Pricing Policy expressly related to products under Selective distribution (see paragraph 3.84), the CMA considers that products under Open distribution would likely have been affected, and prices artificially inflated by virtue of being part of a similar market place. The CMA notes that in the specific case of GAK, which was a Selective Reseller for the duration of the Relevant Period, and sold both Open Products and

- b. Products sold to education customers, where the customer is identified by the reseller to Yamaha as being an education customer and Yamaha [✂]; and
 - c. Products which were 'B-stock': typically, products returned by customers or otherwise in sub-optimal condition or end-of-line/discontinued items ('B-stock').
- 3.35 The CMA finds that the Relevant Products in this case include both Selective Products and Open Products to the extent that these were sold by a Selective Reseller such as GAK.

III. Other UK piano, digital keyboard and guitar suppliers

- 3.36 Other suppliers of pianos and digital keyboards in the UK include Kawai, Steinway, Casio, Bechstein, Roland, Korg, Akai, Arturia, Elektron, Kurzweil, Moog, Nord Novation, Teenage Engineering and Fazioli.³⁹
- 3.37 Other suppliers of guitars in the UK include Fender, Gibson, Martin, Taylor, Ibanez, Tanglewood, PRS, Takamine, Guild, Faith, ESP, Crafter, Stagg, Cordoba, Dean, Sigma, Eastman.⁴⁰ Yamaha explained that there are several key guitar brands with household names, like Fender, Gibson and Ibanez, and that below these there are several hundred less prominent brands.⁴¹

IV. UK MI resellers

- 3.38 There is a large number of small MI resellers in the UK, most of which only operate from one location. These are typically referred to as 'Independent' resellers.

Selective Products, that GAK and Yamaha did not distinguish between Open Products and Selective Products for the purposes of implementing the Yamaha Pricing Policy (see Section 3.C below). The CMA makes no findings in this regard in respect of Selective Resellers other than GAK.

³⁹ URN C_YAM00025 (Yamaha response dated 2 November 2017), URN C_YAM01765 (Yamaha response dated 11 February 2020 to RFI dated 3 February 2020, updated market shares); and URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)), questions 7 and 9.

⁴⁰ URN C_YAM01765 (Yamaha response dated 11 February 2020 to RFI dated 3 February 2020, updated market shares) and URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)), question 7. The response to question 9 also lists a large number of other suppliers.

⁴¹ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.18, lines 10, 11, 14 and 15.

- 3.39 IBISWorld reports that there were [1,500-2,000] enterprises in the UK MI sector as a whole in the 2019-20 period.⁴² Although four resellers are estimated to have contributed [30-40]% of the total estimated MI retail industry revenue in 2019-20,⁴³ the remainder of the industry is relatively fragmented and does not currently have a '*dominant nationwide chain of musical instrument stores*'.⁴⁴ By 2021, IBISWorld estimated that the number of enterprises in the sector would drop to [1,500-2,000]⁴⁵ with further decreases estimated to take place in the future.
- 3.40 GAK is an independent reseller of MI, including MI manufactured by Yamaha. Its role as a reseller is set out in more detail below at Section 3.B.VI.
- 3.41 In addition to being sold through specialist MI resellers, MI are also sold by larger retail chains that do not specialise solely in MI, for example large national retailers. Yamaha refers to such retailers as 'Mass Market resellers'. These are a form of Open Reseller.⁴⁶
- 3.42 IBISWorld notes that online retailing is increasingly important in the MI sector with online-only resellers posing a competitive threat to traditional bricks-and-mortar MI resellers.⁴⁷ GAK has noted that throughout the Relevant Period there was a shift from traditional bricks-and-mortar shopping to online sales, leading to an increase in website sales across most product categories.⁴⁸
- 3.43 MI resellers compete with each other on several parameters, including price, range, service and location.⁴⁹ Sales are made both online and through traditional bricks-and-mortar stores, many of which also sell online. Lower

⁴² URN C_YAM02071 (IBISWorld Report, February 2020), p.32.

⁴³ URN C_YAM02071 (IBISWorld Report, February 2020), p.20.

⁴⁴ URN C_YAM02071 (IBISWorld Report, February 2020), pp.3, 20 and 24-28). The top four are listed as G4M, S&T Audio, J&A Beare Ltd and Dawsons: GAK noted the following as some of the main resellers of pianos and keyboards: children's and beginner keyboards –YML, [Reseller]; [Reseller 17]; [Reseller 8]; [Reseller 7]; and home and educational keyboards, workstations, digital pianos and synthesisers: YML, [Reseller 17] [Reseller 8]; [Reseller 2]; [Reseller 12]; [Reseller 5]; [Reseller 7]; and the following in relation to guitars: [Reseller 8]; [Reseller 9]; [Reseller 12]; [Reseller 2]; [Reseller 5]; [Reseller 17]. URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)) and URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)), question 4a.

⁴⁵ URN C_YAM02071 (IBISWorld Report, February 2020), p.32.

⁴⁶ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 2.

⁴⁷ URN C_YAM02071 (IBISWorld Report, February 2020), p.8.

⁴⁸ URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)), question 2 and URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)), question 2.

⁴⁹ URN C_YAM02071 (IBISWorld Report, February 2020), p.22.

overheads have allowed online-only stores to offer a wider product range, often at lower prices.⁵⁰

- 3.44 The IBISWorld Report notes that, for the consumer, there are several advantages that bricks-and-mortar MI resellers have over internet-only resellers. These include: the opportunity to test products before buying, more personalised advice, and speed of delivery.⁵¹
- 3.45 However, the IBISWorld Report also states that '*consumers are relatively price conscious, especially when purchasing more expensive products, and will compare prices in different shops to find the lowest price possible*' and that consumers may use bricks-and-mortar stores to try out instruments '*before shopping around online to get the best price.*'⁵²

V. Yamaha sales and distribution network

- 3.46 Yamaha MI products are primarily sold through Yamaha's network of resellers, as well as through Yamaha's own online retail site and store, YML.⁵³ As set out in paragraph 3.49 below, Yamaha has SDAs in place with numerous Selective Resellers, through which it sells Selective Products and, in some cases, Open Products. Open Products are also sold through resellers not authorised as Selective Resellers, including Mass Market resellers.
- 3.47 Yamaha uses the following distribution channels:⁵⁴
- Independent resellers (which may be Selective Resellers or Open Resellers);
 - Mass Market resellers (which are Open Resellers);⁵⁵
 - Upstream distributors;⁵⁶

⁵⁰ URN C_YAM02071 (IBISWorld Report, February 2020), p.5.

⁵¹ URN C_YAM02071 (IBISWorld Report, February 2020), p.9.

⁵² URN C_YAM02071 (IBISWorld Report, February 2020), pp.22 and 23.

⁵³ URN C_YAM00035 (Yamaha 6 March 2018 submission).

⁵⁴ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 2.

⁵⁵ URN C_YAM01304.1 (Transcript of interview on 5 June 2018 with [Yamaha Senior Employee 2], Yamaha), p.8, line 19.

⁵⁶ Upstream distributors only operated on the Mass Market channel, URN C_YAM01304.1 (Transcript of interview on 5 June 2018 with [Yamaha Senior Employee 2], Yamaha), p.26, lines 23-25. Yamaha has indicated how it distributes MI products through [Reseller] which operates like a 'distribution channel' in the Mass Market. In turn [Reseller] would then supply customers such as [Reseller] for a particular kind of customer (e.g. [Reseller] in the past).

- Direct to customers, through YML and, for certain specialist education customers only, Yamaha UK; and
- A specialist channel for sales to education customers, operated by Yamaha UK and certain of its resellers.

Open Products and products sold under an SDA

3.48 Yamaha's Open Products consist of a limited number of entry-level products which anybody with a trade account can buy from Yamaha and for which Yamaha does not specify any minimum stocking requirements. Yamaha's Open Products can be sold on internet platforms such as [Reseller] that do not operate under the terms of an SDA. Dealers that have entered into an SDA with Yamaha can also sell Open Products as part of their overall dealer agreement.

3.49 Yamaha permits Selective Resellers to sell certain Yamaha 'premium' MI, provided that they abide by a number of requirements. Such resellers must:

- operate at least one bricks-and-mortar store;
- meet certain conditions:
 - in respect of bricks-and-mortar and online stores, abide by certain standards as to how premium instruments are stocked, presented and advertised; and
 - in respect of online sales, not sell premium MI on Mass Market internet sales platforms.⁵⁷

3.50 During the Relevant Period there were two versions of SDAs that outlined the standards and requirements imposed on Selective Resellers by Yamaha for the distribution of Selective Products:

- An SDA version that applied from the beginning of the Relevant Period until June 2014;⁵⁸ and
- From July 2014 until the end of the Relevant Period,⁵⁹ an updated version of the SDA that introduced the requirement to meet qualitative criteria set out in a Yamaha manual referred to as the 'Purple Book'.⁶⁰

⁵⁷ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), pp.55-56.

⁵⁸ URN C_YAM01800 (Dealer Agreement between Yamaha and GAK dated 22 March 2007).

⁵⁹ URN C_YAM01801 (Dealer Agreement between Yamaha and GAK dated 18 June 2014).

⁶⁰ See paragraphs 3.105 to 3.111 below for details of the Purple Book.

Independent resellers

- 3.51 Independent resellers are specialist music retailers that principally sell MI, including the Relevant Products and other products sold by Yamaha. These resellers sell direct to consumers in their physical stores and on their websites. They may be Selective Resellers or Open Resellers. GAK is an independent Selective Reseller of Yamaha products, including both Selective Products and Open Products.⁶¹

Mass Market resellers

- 3.52 Mass Market resellers are not MI specialists. They are national retail chains, catalogue companies and national online retailers (e.g. [Reseller], [Reseller] and, during the Relevant Period, [Reseller]), and the distributors which supply them (e.g. [Reseller]). These resellers typically sell both digital keyboards and entry-level digital pianos. Mass Market resellers are not parties to an SDA with Yamaha and only sell Open Products (see further paragraph 3.34 above).⁶²
- 3.53 Yamaha has stated that the Yamaha Pricing Policy did not apply to Mass Market resellers during the Relevant Period.⁶³

Direct-to-customer sales by Yamaha

- 3.54 YML sells directly to customers through its showroom and retail store in London and through its website. If a customer directly approaches Yamaha UK, which has its offices in Tilbrook, to purchase a product, Yamaha UK would re-route these enquiries to YML.⁶⁴

Education – direct-to-customer by Yamaha and by resellers

- 3.55 In some cases, Yamaha also sells the Relevant Products directly to certain specialist education customers (primarily, music colleges, conservatoires and some private schools). YML makes sales to education customers and actively markets to schools.⁶⁵

⁶¹ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 2.

⁶² URN C_YAM01304.1 (Transcript of interview on 5 June 2018 with [Yamaha Senior Employee 2], Yamaha), p.8, lines 19-20, and p.21, line 4 to p.23, line 17.

⁶³ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 2.

⁶⁴ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 2.

⁶⁵ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 2.

- 3.56 As well as supplying directly to education customers, Yamaha may supply education establishments through its resellers, some of whom market themselves as education specialists.⁶⁶ Yamaha explained that it has a sales representative for education, who visits educational establishments on a regular basis. If that establishment is looking to buy a Yamaha product, Yamaha will speak to several Yamaha resellers to try to find the best way to ensure it is a Yamaha product which is purchased. The subsequent purchase may then be between the customer and Yamaha or the reseller.
- 3.57 In addition, Yamaha's sales representatives may [X] to orders of Open Products and Selective Products placed by GAK (and all other resellers except Mass Market resellers, which do not generally supply education customers) for a sale to an education customer. [X].⁶⁷
- 3.58 Yamaha has indicated that the Yamaha Pricing Policy was not intended to apply to sales to education customers.⁶⁸
- 3.59 Further details of GAK's sales to education customers are set out in paragraph 3.62 below.

VI. GAK's involvement in the UK piano and digital keyboard sector and guitar sector

- 3.60 GAK supplies MI, including MI manufactured by Yamaha, online and through its bricks-and-mortar store in Brighton.⁶⁹ Its online sales are made through its website, www.gak.co.uk, formerly www.guitarampkeyboard.com. GAK specialises in guitars, digital pianos and digital keyboards.

⁶⁶ URN C_YAM01304.1 (Transcript of interview on 5 June 2018 with [Yamaha Senior Employee 2], Yamaha), pp.12 and 45.

⁶⁷ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 3.

⁶⁸ However, Yamaha states that it cannot rule out the possibility that an education customer may have placed an order on a Selective Reseller's website for a Relevant Product which was subject to the Yamaha Pricing Policy, in the same way as a non-education customer.

⁶⁹ URN C_YAM00580 (GAK response dated 25 April 2018 to RFI dated 17 April 2018), Annex 5, Section C, URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)), and URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)).

- 3.61 GAK retails a wide range of Yamaha's piano⁷⁰ and digital keyboard products and guitar products.⁷¹
- 3.62 GAK's customers include education customers. GAK explained that there is no difference in the range of products offered to education customers to those on offer online or in its shop. GAK has a dedicated education department that deals specifically with education orders. According to GAK, education customers are typically granted extra education discounts by suppliers due to the limited budgets set by governors or the local education authorities. Suppliers provide further discounts on bulk purchases.⁷²
- 3.63 GAK was a Selective Reseller for Yamaha guitars and Yamaha digital pianos throughout the Relevant Period. In relation to Yamaha digital keyboards, GAK appears to have predominately sold Open Products during this time, and only became authorised by Yamaha as a Selective Reseller for digital keyboards later in 2017, after the end of the Relevant Period.⁷³ Whilst the Yamaha Pricing Policy was largely intended to apply to Selective Products, the evidence in the CMA's possession shows that in reality, GAK, as a Selective Reseller, understood the Yamaha Pricing Policy to apply to all Relevant Products within its dealer agreement, including both Open Products and Selective Products.⁷⁴

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

- 3.64 Internet sales account for a significant, and growing share of MI sales in the UK. IBISWorld estimates that online spending in the MI sector is likely to increase over the five years to 2024/25.⁷⁵

⁷⁰ It does not, however, sell acoustic pianos manufactured by Yamaha or other manufacturers.

⁷¹ URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)) and URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)).

⁷² URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)), question 11.

⁷³ Yamaha stated: *'To the best of Yamaha's recollection, GAK has continuously been a selective Reseller of guitars for over 13 years and of digital pianos since at least Yamaha's 2010/11 financial year. GAK has purchased some selective digital pianos from Yamaha since at least Yamaha's 2011/12 financial year [...] GAK has added further selective Relevant Products, including selective keyboards, to its portfolio after the end of the Relevant Period.'* URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 7.

⁷⁴ See paragraphs 3.84 to 3.85 below, the Yamaha Pricing Policy section, Section 3.C below for further explanation, and Agreement and/or concerted practice section, Section 4.C below for more detailed evidence in each year of the Relevant Period.

⁷⁵ URN C_YAM02071 (IBISWorld Report, February 2020), p.8.

- 3.65 GAK noted that in general throughout the Relevant Period there was a shift from traditional bricks-and-mortar shopping to online, leading to an increase in online sales across most product categories.
- 3.66 The proportion of GAK's annual revenue accounted for by online sales during the Relevant Period averaged [X]% (guitars) and [X]% (pianos and digital keyboards).⁷⁶ Customers seeking to purchase MI may be attracted to online shopping due to a number of factors including a wider range of products, lower prices and the convenience of shopping from home.⁷⁷
- 3.67 While some online sales are made by resellers that also own bricks-and-mortar stores, other resellers are only present online. The latter are able to offer lower prices as they face relatively low operating costs, including lower labour costs.⁷⁸
- 3.68 The CMA considers that the ability to sell or advertise MI at discounted prices on the internet can intensify price competition between resellers (online and/or offline) due to the increased transparency and reduced search costs associated with internet shopping. Greater price competition increases resellers' incentives to act efficiently and pass on cost savings to consumers in the form of lower retail prices.
- 3.69 Therefore, preventing or restricting resellers' ability to determine their own online resale prices is likely to:
- reduce price competition from online sales of pianos and keyboards;
 - reduce downward pressure on the retail price of pianos and keyboards; and
 - thereby potentially lead to higher prices for consumers.

C. Yamaha Pricing Policy

I. Introduction and overview

- 3.70 The CMA finds that over the course of the Relevant Period, Yamaha operated the Yamaha Pricing Policy, the purpose of which was to seek to

⁷⁶ URN C_YAM01849 (GAK response dated 27 February 2020 to RFI dated 17 February 2020), (question 7).

⁷⁷ URN C_YAM02071 (IBISWorld Report, February 2020), p 23.

⁷⁸ URN C_YAM02071 (IBISWorld Report, February 2020), p.29. IBISWorld states that wages in traditional bricks-and-mortar retail stores are typically higher than those paid by online only retailers.

ensure that UK-based Selective Resellers would not advertise or sell the Relevant Products online below the Minimum Price specified by Yamaha from time to time. The CMA finds that Yamaha intended the Yamaha Pricing Policy to apply across its entire UK Selective Reseller network, including to GAK and to all Yamaha MI supplied to Selective Resellers.⁷⁹

- 3.71 As set out in more detail below, the information obtained by the CMA shows that the Yamaha Pricing Policy was implemented in two phases over the Relevant Period:
- a. a pre-Purple Book period from 1 March 2013 to 30 June 2014; and
 - b. a period covered by the Purple Book from 1 July 2014 to 31 March 2017.⁸⁰
- 3.72 Although the implementation of the Yamaha Pricing Policy took place in two phases, that employed different means of benchmarking to set a Minimum Price for the Relevant Products, the CMA finds that the Yamaha Pricing Policy existed for the duration of the Relevant Period.

Evidence base

- 3.73 The CMA has based its findings regarding the Yamaha Pricing Policy principally on contemporaneous evidence including:
- internal Yamaha correspondence relating to the operation and/or enforcement of the Yamaha Pricing Policy (including email);
 - correspondence between Yamaha and GAK; and
 - correspondence between Yamaha and resellers.
- 3.74 Where relevant, the CMA has also relied on:
- information obtained directly from Yamaha or GAK in response to requests for information; and
 - transcripts of interviews with:

⁷⁹ Subject to the exceptions in URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 6.

⁸⁰ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 10.

- a. [Yamaha Senior Employee 2], previously employed as [X], Yamaha, interviewed on 5 June 2018;⁸¹
- b. [Yamaha Employee 2], [X], Yamaha, interviewed on 30 May 2018;⁸²
- c. [GAK Senior Employee 3], [X], GAK, interviewed on 13 August 2019⁸³, with further clarificatory information provided on 18 September 2019;⁸⁴ and
- d. [GAK Employee 1], [X], GAK, interviewed on 25 September 2019⁸⁵, with further clarificatory information provided on 14 February 2020.⁸⁶

Key aspects of the evidence of a Yamaha Pricing Policy

- 3.75 The evidence set out below indicates that the Yamaha Pricing Policy applied throughout the Relevant Period with the aim of ensuring that Relevant Products were not advertised or sold online below the Minimum Price specified by Yamaha. It also indicates that from October 2014 until the end of the Relevant Period, at least some of Yamaha's UK employees appear to have been aware of the potential illegality of implementing the Yamaha Pricing Policy and therefore took steps not to communicate their pricing instructions explicitly to resellers in writing.⁸⁷
- 3.76 From 1 July 2014 until the end of the Relevant Period the nature of the Yamaha Pricing Policy was such that Yamaha's Minimum Prices were clearly displayed on the website of Yamaha UK's retail store, YML, in addition to being available online in the form of price lists relating to the Relevant Products.⁸⁸
- 3.77 The evidence indicates that some resellers, including GAK, had price-matching software so that YML minimum retail prices were automatically adopted as the relevant resellers' online prices. Some resellers, including GAK, had in place so-called 'web rat' pricing software, or, in the case of GAK, an internal price scanner, that they used to identify resellers who were

⁸¹ URN C_YAM01304.1 (Transcript of interview on 5 June 2018 with [Yamaha Senior Employee 2], Yamaha).

⁸² URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha).

⁸³ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK).

⁸⁴ URN C_YAM01710.2 (Clarifications from [GAK Senior Employee 3] dated 18 September 2019).

⁸⁵ URN C_YAM01827.1 (Transcript of interview on 25 September 2019 with [GAK Employee 1], GAK).

⁸⁶ URN C_YAM01827.2 (Clarifications from [GAK Employee 1] dated 14 February 2020).

⁸⁷ See paragraphs 3.131 to 3.133 below.

⁸⁸ See paragraphs 3.100 to 3.101 below.

not following the Yamaha Pricing Policy. Such resellers would then often complain about such deviations to Yamaha.⁸⁹

3.78 The evidence also indicates that there was a credible threat that sanctions would be imposed by Yamaha on Selective Resellers for failure to comply with the Yamaha Pricing Policy and that, irrespective of whether sanctions were imposed, the fear of being sanctioned played an important part in encouraging those Selective Resellers, including GAK, to adhere to the Yamaha Pricing Policy.^{90, 91}

3.79 The evidence described in more detail in the remainder of this section demonstrates the existence of the Yamaha Pricing Policy.

Background to the Yamaha Pricing Policy

3.80 The remainder of this section sets out the relevant factual background to the Yamaha Pricing Policy as indicated by the evidence, including:

- its commercial aims, duration and content;
- its monitoring and enforcement;
- illustrative examples of Yamaha's monitoring and enforcement of the Yamaha Pricing Policy (underlining the widespread application of and adherence to the Yamaha Pricing Policy in relation to all Relevant Products across Yamaha's network of Selective Resellers, including GAK, throughout the Relevant Period);
- Yamaha's and GAK's awareness of the illegality of the Yamaha Pricing Policy;⁹² and
- the consequences for Selective Resellers of non-compliance.

⁸⁹ See paragraphs 3.119 to 3.121, and 4.65 to 4.68 below.

⁹⁰ See paragraphs 3.137 to 3.141 below.

⁹¹ Although the CMA has limited evidence of direct or explicit threats of sanctions from Yamaha to resellers, including GAK, the evidence indicates that sanctions were at least indirectly threatened or implied by Yamaha. GAK stated that on occasion the threat of sanctions from Yamaha was explicit in nature. URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.131, lines 21-26 and p.133, lines 1-18. The CMA notes that, irrespective of the precise nature of what was communicated at the time, the threat of sanctions was present, and communicated by Yamaha in such a way that GAK was clear that sanctions could be applied to resellers for non-adherence to the Yamaha Pricing Policy, and considered these threats to be credible. See for example paragraph 4.47 below.

⁹² See paragraphs 3.131 to 3.135 below.

II. Aims, duration and content

Commercial aims

- 3.81 The evidence indicates that Yamaha's commercial aims for introducing the Yamaha Pricing Policy were at least twofold:
- it was designed to increase the attractiveness to resellers of the Relevant Products (and Yamaha's brand more generally) by enabling Yamaha's UK Selective Resellers, including GAK, to achieve attractive margins, thus encouraging them to stock and sell the Relevant Products; and
 - in doing so, it aimed to help Yamaha secure, maintain and/or improve its UK market position in pianos, digital keyboards, and guitars relative to its competitors.
- 3.82 To achieve these commercial aims, Yamaha applied the Yamaha Pricing Policy to new products as they were introduced.⁹³ The evidence indicates that the origins of the Yamaha Pricing Policy pre-date the Relevant Period. Further evidence is set out below that indicates that the Yamaha Pricing Policy was likely already in place prior to the start of the Relevant Period and continued until the end of the Relevant Period.

Pre-Purple Book period from 1 March 2013 to 30 June 2014

- 3.83 As referred to at paragraphs 3.48 to 3.50 above, Yamaha has in place two types of reseller agreements, one in respect of relatively high-end Selective Products, which are distributed under SDAs with its network of Selective Resellers, and another in respect of Open Products. The evidence suggests that Yamaha introduced a Yamaha Pricing Policy for Selective Resellers in response to dealer concerns about insufficient margins.
- 3.84 This Policy appears to have been expressly aimed at Selective Products within the SDAs. The CMA notes that both Open Products and Selective Products formed part of the same Yamaha dealer agreement, albeit that in relation to Selective Products, Yamaha specified certain additional qualitative requirements for distribution, relating largely to the appearance of the premises, the level of training of sales staff, and the presentation of the

⁹³ This excluded B-stock products, as well as sales by Mass Market resellers and to education customers. In response to a CMA request for information, [Yamaha Employee 1] of Yamaha stated, '*Any communications I made with any Resellers to seek compliance with the Yamaha Pricing Policy were typically made by phone. These communications took place throughout the Relevant Period until the end of March 2017 and covered all new pianos and keyboards in the current range which were sold by selective Resellers.*' URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 8.

products in question. In this regard, the CMA considers that for Selective Resellers no distinction was made, in practical terms, between Open Products and Selective Products for the purposes of implementing the Yamaha Pricing Policy.

- 3.85 In the case of GAK, which was a Selective Reseller, as explained at paragraph 3.63 above, selling both Open Products and Selective Products for the duration of the Relevant Period, the evidence indicates that GAK and Yamaha did not differentiate between Selective Products and Open Products for the purposes of implementing the Yamaha Pricing Policy.⁹⁴ The CMA makes no findings in this regard in respect of any Selective Resellers other than GAK.
- 3.86 The evidence indicates that Yamaha viewed the Yamaha Pricing Policy as a means of providing attractive margins across its reseller network. At interview, [Yamaha Senior Employee 2], previously of Yamaha explained that: *'In 2009, we had good communication levels and always have had with our retailers good relationships, but they have always had a problem with the lack of margin in our business. That has always been a problem. That has been something that they have continually driven us as a manufacturer to try to build a better margin within the business.'*⁹⁵
- 3.87 In the context of Yamaha's SDAs with its resellers, [Yamaha Senior Employee 2] explained that *'the arrangements we have had; in 2009, we had a standard dealer agreement [...] quite simply put, we had 25 per cent standard margin from SRPs, suggested retail price, down to their normal trade price. Underneath that, there were several elements that they could achieve to give them more discount or more benefit, more margin.'*⁹⁶

⁹⁴ See, for example, an email from [GAK Senior Employee 3], of GAK to [Yamaha Employee 2] of Yamaha in which he included a list of other resellers' weblinks and prices for Yamaha MI products and stated, *'please sort before I match tomorrow mate.'* URN C_YAM01360/E_YAM01379 (Email from [GAK Senior Employee 3], GAK to [Yamaha Employee 2], Yamaha dated 6 November 2013). In the list of MI there are several products the CMA understands (by reference to [X] November 2013 URN C_YAM01808) to fall under open distribution, including the PSRE433 portable keyboard, the P105 and YDPS51 digital pianos. See paragraphs 3.48 to 3.49 above for further details. See further example of email from [GAK Senior Employee 3] to [Yamaha Employee 2] '[Reseller 16] difference' – in which he included several pages with weblinks of Yamaha MI. URN PL00453 (Email from [GAK Senior Employee 3], GAK to [Yamaha Employee 2], Yamaha, dated 4 August 2014). The CMA understands (by reference to [X] November 2013 URN C_YAM01808) that this included several open distribution products, including the NPV80, the NP11 and NP31 keyboards, and the P35 and P105 digital pianos. See paragraphs 3.48 to 3.49 above for further details.

⁹⁵ URN C_YAM01304.1 (Transcript of interview on 5 June 2018 with [Yamaha Senior Employee 2], Yamaha), p.20, lines 7-12.

⁹⁶ URN C_YAM01304.1 (Transcript of interview on 5 June 2018 with [Yamaha Senior Employee 2], Yamaha), p.20, lines 20-25.

- 3.88 In response to a CMA request for information, Yamaha explained that in relation to guitars, from at least 16 April 2009, Yamaha used a UK-based reseller, [Reseller 7], as a benchmark to point other Selective Resellers to for minimum pricing of Yamaha products.⁹⁷
- 3.89 Under the Yamaha Pricing Policy as implemented at that time, [Reseller 7's] prices acted as a visible reference point for Yamaha's required advertised online retail price for guitars and Yamaha instructed Selective Resellers to follow the advertised online retail prices on [Reseller 7's] website.⁹⁸
- 3.90 By March 2010, although [Reseller 7] was not classified by Yamaha as a 'key *Electronic Keyboard Dealer*', the Yamaha Pricing Policy was applied to pianos and digital keyboards sold by it to communicate specific price points to Selective Resellers to the extent that they sold the piano and keyboard in question.⁹⁹ The Yamaha Pricing Policy required Selective Resellers not to advertise the products online below the price either specified by Yamaha or calculated from SRP using a formula applied to electric guitars, acoustic guitars, and keyboards and digital pianos.¹⁰⁰
- 3.91 At interview, [Yamaha Senior Employee 2] stated that, in relation to the period between 2010 and 2014, *'when it came to the SRP, we had started talking to dealers about what price they should be selling a product for. That is when we started talking about the [X] or the [X], depending on what the product was.'*¹⁰¹
- 3.92 The evidence indicates that from the beginning of the Relevant Period, the Yamaha Pricing Policy was being implemented by Yamaha for all Selective Resellers across all Relevant Products, a position that was to continue until the end of the Relevant Period. The evidence, consisting of communications between Yamaha and certain of its UK Selective Resellers, indicates that the Yamaha Pricing Policy existed, Selective Resellers were adhering to it and it

⁹⁷ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 14 (a) and (b).

⁹⁸ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 14 (d).

⁹⁹ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 14 (a).

¹⁰⁰ The formulae proposed in 2009 was a. [X]; b. [X]; c. [X]. [Reseller 7] [X]. The formulae changed over time with, for example, the [X]. URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 14(g). See also paragraphs 3.95 to 3.99 below.

¹⁰¹ URN C_YAM01304.1 (Transcript of interview on 5 June 2018 with [Yamaha Senior Employee 2], Yamaha), p.61, lines 8-11

was being monitored and enforced from the beginning of the Relevant Period.

- 3.93 In response to a CMA information request, [Yamaha Employee 1] of Yamaha confirmed that *'The Yamaha Pricing Policy applied to all pianos and keyboards sold by selective Resellers [...] with a particular focus on key, high volume products. This applied throughout the Relevant Period until the end of March 2017,'*¹⁰² and that *'In the case of pianos and keyboards, the Yamaha Pricing Policy was clear to me at the start of the Relevant Period [...]. The Yamaha Pricing Policy in respect of pianos and keyboards was further developed and clarified following a two day sales meeting in January 2013. This was attended by me, [REDACTED]. The sales reps were instructed to discuss the Yamaha Pricing Policy with the Resellers after the meeting and seek their adherence to it.'*¹⁰³
- 3.94 In addition, [Yamaha Employee 2] of Yamaha confirmed *'[t]he Yamaha Pricing Policy applied to all guitars in respect of Resellers in Yamaha's selective distribution network (such Resellers were authorised to sell both open and selective category guitars) until the Yamaha Pricing Policy was withdrawn at the end of March 2017,'*¹⁰⁴ and explained that *'[b]y the start of the Relevant Period, as regards guitars [...] the Yamaha Pricing Policy was established and well understood by Resellers including GAK. The Yamaha Pricing Policy was discussed internally, including with my line manager, the [REDACTED]. My recollection is that the sales reps were made aware of the Yamaha Pricing Policy in sales meetings and on an ongoing basis from phone calls between [REDACTED]. They were aware of the need to maintain the Yamaha Pricing Policy with Resellers, including GAK, throughout the Relevant Period.'*¹⁰⁵
- 3.95 At interview, [Yamaha Employee 2] explained that prior to 2014 YML did not have a retail website. However, [Reseller 7] had created *'the most visible website for the UK'* and, in agreement with Yamaha, displayed a price that was the result of a formula. For the category of products that guitars fell within, this was typically a formula of [REDACTED], although different formulae were used for different product categories and these changed over time.¹⁰⁶ This

¹⁰² URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 2(ii).

¹⁰³ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 1.

¹⁰⁴ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 2(ii).

¹⁰⁵ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 1.

¹⁰⁶ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.40, lines 11-15. See also paragraphs 3.90 and 3.91 above.

was designed to act as an indication to Selective Resellers of the Minimum Price at which they should sell the Relevant Products. As explained at paragraph 3.97 below, this benchmarking was in place until 10 May 2013.

- 3.96 The evidence indicates that Yamaha sales staff suggested to other resellers, upon enquiry, that they should follow the [Reseller 7] price. This effectively informed dealers of what margin they would make on selling the Yamaha product(s) online. In addition to [Reseller 7], Yamaha also referenced the prices advertised by [Reseller 6] an independent reseller of MI, through its website [REDACTED] on occasion.¹⁰⁷
- 3.97 On 10 May 2013, Yamaha ceased to reference the [Reseller 7] website for minimum pricing to other resellers.¹⁰⁸
- 3.98 Yamaha stated that *‘without [Reseller 7] acting as a reference for the exact price, some Resellers did not apply the formula correctly or rounded the price down, rather than up. This led to Resellers undercutting one another as they vied to offer the lowest price.[...] For all Relevant Products, Yamaha made ad hoc attempts to enforce the Yamaha Pricing Policy by instructing Resellers to price at a particular level [...] but with varying degrees of success.’*¹⁰⁹
- 3.99 On 19 March 2014, Yamaha wrote to its dealers informing them that their existing dealer contracts would be terminated as of 30 June 2014 and replaced with a new set of contractual trading terms.¹¹⁰

¹⁰⁷ For example see email from [Yamaha Employee 3], Yamaha, to [GAK Senior Employee 1], GAK, ‘*Re Help with Prices*’ that included a request for GAK to change prices of 10 core products (monitors, loudspeakers and synthesisers) and ‘*to match [Reseller 7] or [Reseller 6]*’ URN E_YAM00004 (Email from [Yamaha Employee 3], Yamaha, to [GAK Senior Employee 1], GAK dated 1 March 2013). See also email from [Yamaha Employee 3] to [Reseller 1 Employee] on 14 January 2014 which states ‘*We are requesting that all key dealers move in line with [Reseller 6] by 5pm this Wednesday to resolve a few issues that have cropped up over the Christmas period [...] We have assurances that [Reseller 16] and GAK will 100% be with us.*’ URN E_YAM01438 (Email from [Yamaha Employee 3], Yamaha, to [Reseller 1 Employee], [Reseller 1], dated 14 January 2014).

¹⁰⁸ [REDACTED].

¹⁰⁹ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 15(a).

¹¹⁰ URN C_YAM01766 (Letter entitled ‘*Our business relationship/our distribution contract – musical instruments (MI)*’ dated 19 March 2014, provided by Yamaha).

Purple Book period from 1 July 2014 to 31 March 2017

YML pricelist as a reference for minimum pricing

- 3.100 The evidence indicates that from 1 July 2014 until the end of the Relevant Period, Yamaha used the YML retail pricelist as a reference point for minimum pricing in order to implement its Yamaha Pricing Policy.¹¹¹ The YML pricelist was available on the YML website, including in a downloadable pdf format, to allow resellers to easily input the retail YML prices into their own databases.¹¹²
- 3.101 In response to a CMA request for information, [Yamaha Employee 2] of Yamaha stated *'we [Yamaha] suggested that the Reseller ought to reference the YML online retail prices as a guide to sustain appropriate margins while giving consideration to the sell through of a product at relevant price points. The current retail prices (as opposed to RRP's) were available in a PDF that could be downloaded on the YML website.'*¹¹³
- 3.102 The CMA understands that a number of resellers, including GAK, used a form of price-matching software that could connect to the YML website and automatically adapt those resellers' online prices to match those of the YML website.¹¹⁴
- 3.103 At interview, [GAK Senior Employee 3] of GAK explained that once Yamaha had invested in YML,¹¹⁵ Yamaha's expectation was that resellers would not price below the YML price, which became the effective reference price. [GAK Senior Employee 3] added that *'it was a big investment for Yamaha to get Yamaha Music London online and they needed to make sure that that is where you went to them. If you wanted to download the price list, you could go to their website and you could actually take a price list off their site; or you can set up links to their site that would enable you to match the prices that they were setting. There were no opportunities to say, "This isn't fair."*¹¹⁶

¹¹¹ Yamaha Music London is a trading style of Yamaha Music Europe GmbH (UK) which Companies House records show was established in the UK on 1 April 2010.

¹¹² URN C_YAM01767 (YML price list as of 1 August 2014 for Drums, Guitars, Synth and Pro Audio products).

¹¹³ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 4(ii).

¹¹⁴ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 4(iii)

¹¹⁵ As noted above at paragraph 3.76 above the relevant date here is 1 July 2014.

¹¹⁶ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.184, lines 16-22.

- 3.104 [GAK Senior Employee 3] told the CMA that ‘we [GAK] *actually invested [...] at our own cost not -- well, cost by Yamaha [in] an online [...] comparison site like tracker [...] That sent our link to their link and if they changed ours will automatically change. Because you're told that that's what everyone's going to be using and you were like, "Okay. That sounds okay if everyone does that."*¹¹⁷

Role of the Purple Book in the Yamaha Pricing Policy

- 3.105 The evidence indicates that from 1 July 2014 to the end of the Relevant Period Yamaha introduced the Purple Book as a means of communicating and enforcing the Yamaha Pricing Policy with its resellers. The Purple Book set out the quality standards that Yamaha resellers operating on SDA terms should adhere to.¹¹⁸ In practice, the Purple Book was used by Yamaha, alongside the YML retail price list which assumed the role of an unofficial pricing benchmark to encourage adherence to the Yamaha Pricing Policy.
- 3.106 In response to a CMA information request, [Yamaha Employee 1] of Yamaha explained ‘[t]he *Purple Book was dual use. On the one hand it was used to require Resellers to meet certain quality requirements e.g. in relation to their stores and websites. The more quality standards they satisfied, the higher their discount on trade purchase prices. On the other hand the Purple Book was used to enforce the Yamaha Pricing Policy by unofficially making price as a measure of quality.*¹¹⁹
- 3.107 In response to a CMA information request, [Yamaha Employee 2] of Yamaha explained that:

‘The Purple Book was a trading agreement that set out different aspects regarding various quality elements that Yamaha expected a Reseller to adhere to. The criteria within the Purple Book were split into several categories for which a Reseller could receive 5x5% discounts (total 25%) on their purchase price of any product. The 5 categories were for shop and website quality, display and presentation, staff training, advertising/promotion of Yamaha product and customer/technical service.

¹¹⁷ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.129, lines 18-26. Yamaha stated in its representations to the CMA on 12 June 2020 that Yamaha did not make any contribution towards GAK’s online comparison tracker, URN C_YAM02139 (Yamaha submission to the CMA dated 12 June 2020).

¹¹⁸ URN E_YAM01565 (Copy of the Yamaha Purple Book dated 7 April 2014).

¹¹⁹ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 4(i).

We [X] received training sessions on the terms of the Purple Book so that we could explain them to the Resellers. In the presentation of Purple Book to Resellers including GAK, in addition to covering the quality requirements, it was suggested that, as a retailer ourselves with the YML retail business, we understand that a quality presentation of the products and the maintenance of the physical and web stores involves significant costs. Therefore, we suggested that the Reseller ought to reference the YML online retail prices as a guide to sustain appropriate margins while giving consideration to the sell through of a product at relevant price points. The current retail prices (as opposed to RRP's) were available in a PDF that could be downloaded on the YML website.

If a Reseller was not following the YML pricing, then the sales team would point out certain elements detailed in the Purple Book regarding quality that the Reseller should resolve. The general guideline was to suggest to the Reseller that the conversation was in no relation to the pricing of product and we were only pointing out elements regarding quality as per the Purple Book. Although in part the Purple Book was genuinely about Resellers adhering to Yamaha's quality requirements, Resellers quickly understood the reference made to pricing and the requirement to not sell online below YML's retail prices or the strong suggestion that they ought not to do so.

My specific role was to introduce the Purple Book terms to a small number of Resellers and I specifically recall delivering the message to GAK personally at their offices in Brighton with [GAK Senior Employee 3] and [GAK Senior Employee 2] in attendance from GAK. [GAK Senior Employee 3] and [GAK Senior Employee 2] quickly caught on that the Purple Book messaging was about pricing. Thereafter, through until early 2017 I would from time to time correspond with GAK (primarily by phone) either to field complaints from GAK about other Resellers not complying with the Yamaha Pricing Policy or to ask GAK to comply with the Yamaha Pricing Policy (usually due to a complaint to me from another Reseller).'¹²⁰

3.108 The evidence indicates that the Yamaha Pricing Policy continued to be implemented until March 2017.¹²¹

¹²⁰ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 4(ii).

¹²¹ See paragraph 3.115 below.

- 3.109 At interview, [Yamaha Employee 2] of Yamaha, explained that in May 2017 [REDACTED] communicated the end of the Pricing Policy [REDACTED].¹²²
- 3.110 [Yamaha Employee 2] explained that, *'what was clearly evident was it was a problem that we [Yamaha] were fixing but we were not creating the problem in the first place. The dealers were the ones who were setting their prices. We were trying to help them, and for whatever reason they just did not want to do it. They did not want to follow the pricing, they wanted to do whatever they were doing, mess around, and, also, it was unworkable. It was not sustainable from our side, and finally, it was blatantly obvious – it was becoming very obvious – that it was illegal as well.'*¹²³
- 3.111 [Yamaha Employee 2] added that *'I think it was obvious beforehand but we [...] felt that still by suggesting – and that is what we were doing; we were suggesting, not insisting – that was kind of okay. It became clear that that was not okay, that was not OK, we had an issue that we needed to retrain not just our sales staff but our management, our directors, on compliant behaviour and that this could not go on. We knew, yes, okay, it was going to damage the business.'*¹²⁴

Content and communication of pricing policy

- 3.112 The following paragraphs outline the CMA's conclusions regarding the content of the Yamaha Pricing Policy and the way in which it was communicated to resellers.
- 3.113 In response to a CMA information request, [Yamaha Employee 2] of Yamaha explained that by far the majority of Yamaha's interactions with resellers were through its sales representatives and that applied equally to communication of the Yamaha Pricing Policy during the Relevant Period until it was withdrawn in March 2017.
- 3.114 [Yamaha Employee 2] explained his role *'My role in communicating the Yamaha Pricing Policy to Resellers, [in relation to guitars], was more ad hoc. It would arise when making visits to our larger Resellers, such as GAK, [REDACTED]. I would also communicate with larger Resellers, including GAK, regarding*

¹²² Yamaha clarified in its representations to the CMA on 12 June 2020 that the [REDACTED] in fact communicated the end of the Yamaha Pricing Policy internally in March 2017, and not May 2017 as stated by [Yamaha Employee 2] at interview. URN C_YAM02139 (Yamaha submission to the CMA dated 12 June 2020).

¹²³ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.67, lines 17-24.

¹²⁴ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.68, lines 2-7.

*the Yamaha Pricing Policy when they escalated a complaint about non-compliance by other Resellers to me or when I needed to step in to secure their compliance with the Yamaha Pricing Policy at a time when that was regarded by Yamaha as particularly important. These communications could have included any guitar products as all guitars were, in theory, subject to the Yamaha Pricing Policy. In practice however, our efforts to secure compliance with the Yamaha Pricing Policy were focused on the biggest selling lines. These products were of greatest importance to Resellers, and in particular, high volume Resellers such as GAK.'*¹²⁵

3.115 [Yamaha Employee 1] of Yamaha explained that, in relation to pianos and keyboards:

*'These communications took place throughout the Relevant Period until the end of March 2017 and covered all new pianos and keyboards in the current range which were sold by selective Resellers [...] In practice our focus would have been to ensure that Resellers priced all key lines in accordance with the Yamaha Pricing Policy. The Yamaha Pricing Policy did not apply to B-stock'¹²⁶ or to end of life/discontinued items.'*¹²⁷

3.116 Even though the Yamaha Pricing Policy does not appear to have been written down, its contents could be easily determined and downloaded by resellers from the price lists which Yamaha had put on YML's website. These price lists:

- specified YML's Suggested Retail Prices including VAT;
- specified YML's Sales Price including VAT;
- in doing so, identified the Minimum Price at or above which resellers were expected to advertise and sell the Relevant Products online; which in turn
- revealed the margin the reseller could expect to make if it followed the Yamaha Pricing Policy.¹²⁸

¹²⁵ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 8.

¹²⁶ At interview [GAK Employee 1] explained 'B Stock [...] Maybe it's been out on demo, something of that nature. So it's not a new product.' URN C_YAM01827.1 (Transcript of interview on 25 September 2019 with [GAK Employee 1], GAK), p.130, lines 13-18.

¹²⁷ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 8.

¹²⁸ URN C_YAM01767 (YML price list as of 1 August 2014 for Drums, Guitars, Synth and Pro Audio products)

The Minimum Price and its communication

3.117 The evidence indicates that Yamaha used a number of terms to refer to the Minimum Price. At interview [Yamaha Employee 2] explained that Yamaha had rarely used the term '*Minimum Advertised Price*' ('MAP') and that '*street price*' was the main terminology for MAP. Previously, Yamaha had used the term '*product training*' for MAP. That was during the period when Yamaha sales staff had suggested to other dealers, upon enquiry, that they should follow the [Reseller 7] online price. [Yamaha Employee 2] confirmed that if Yamaha had had a reference price that it wanted resellers to follow, it would have talked to them about '*product training*' in the [Reseller 7] phase of the Yamaha Pricing Policy, or '*YML price*' in the YML phase or, more recently, '*street price*'.¹²⁹

Monitoring and enforcement of the Yamaha Pricing Policy

Overview

3.118 The evidence indicates that Yamaha sought to monitor and enforce the Yamaha Pricing Policy during the Relevant Period by:

- monitoring resale prices through resellers reporting other resellers for non-adherence to the Yamaha Pricing Policy;¹³⁰
- itself monitoring resellers' prices, including by using price-monitoring software for part of the Relevant Period;¹³¹
- contacting resellers directly, who were found or suspected not to be adhering to the Yamaha Pricing Policy by pricing below the Minimum Price and encouraging them to increase their prices to at least the Minimum Price;¹³²
- threatening sanctions on resellers for not adhering to the Yamaha Pricing Policy.¹³³

¹²⁹ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.73, lines 16-21.

¹³⁰ See paragraph 3.119 to 3.121 below.

¹³¹ See paragraphs 3.122 to 3.130 below.

¹³² See paragraphs 3.132 to 3.137 below.

¹³³ See paragraphs 3.136 to 3.141 below.

Resellers monitoring each other

- 3.119 The evidence shows that resellers proactively policed each other's pricing, regularly emailing complaints and/or links to Yamaha in order to alert Yamaha to other resellers whose prices were under the Minimum Price.
- 3.120 At interview, [Yamaha Employee 2] explained that prior to the end of the Relevant Period if, for example, a dealer would phone up and say, "*Dealer Y is not pricing at the same as [Reseller 7]. What are you gonna do about it?*" and what we [Yamaha] would then do is put a phone call back into the dealer who was at a lower price and say, "*Look, any chance you could put your prices up?*" and they would then say yes or no.¹³⁴ [Yamaha Employee 2] estimated that *'[e]asily 60 per cent or 70 per cent of my working time could be trying to suggest to dealers, "Would you not like to put your prices up?" the dealers would either say, "Yes, we will" or, "No, we will not"'*.¹³⁵
- 3.121 In response to a CMA information request, [Yamaha Employee 1] stated:

*'I recall that GAK, [Reseller], [Reseller] and [Reseller] all had some form of web rat pricing software. These Resellers seemed to me to use this software to identify other Resellers who were not following the Yamaha Pricing Policy and to complain about this to Yamaha, rather than to verify that they themselves were complying with the Yamaha Pricing Policy. I recall receiving links from these Resellers to other Resellers' websites, showing that the prices were below those on the YML price list (which they had identified from their web rats) [...] The Resellers sending these links expected Yamaha to ask the lower priced Reseller to increase their price. Otherwise there was an implied threat that the complaining Reseller would drop their price to match the lower Reseller. To enforce the Yamaha Pricing Policy, we needed visible resellers such as GAK to not price below the YML price, to avoid other Resellers tracking them and resulting in a race to the bottom on price.'*¹³⁶

¹³⁴ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.41, lines 21-24.

¹³⁵ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.42, lines 10-12.

¹³⁶ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 4(iii).

Yamaha monitoring resellers' prices

- 3.122 The evidence indicates that for much of the Relevant Period a web-rat was available within Yamaha and could be used to track and compare reseller prices to the minimum price required under the Yamaha Pricing Policy.
- 3.123 In response to a CMA request for information, Yamaha explained that YME did not produce its own web-rat report but commissioned regular web-rat reports from an entity called MyWebEye (such reports were referred to internally as the '[X] report').¹³⁷
- 3.124 Yamaha UK initially trialled the [X] report between August and October 2011. MyWebEye emailed the report to YME, and YME forwarded the report to Yamaha UK.
- 3.125 YME did not provide the [X] report to Yamaha UK on a regular basis until after [Reseller 7] [X]. According to Yamaha, the [X] report was sent to the UK branch weekly between the following dates:
- Guitars: 16 January 2014 to 30 March 2017;
 - Keyboards: 30 May 2014 to 6 June 2017; and
 - Pianos: 16 December 2015 to 7 June 2017.¹³⁸
- 3.126 At interview, [Yamaha Employee 2] of Yamaha, confirmed that Yamaha's web-rat *'was provided by Yamaha HQ in Germany. I believe they use an outside company to do that [...] It was delivered via email format every Tuesday and simply was a scrape of about 50 different Yamaha products, equally some competitor products on there [...] and it would have all the prices from around about ten different UK dealers.'*¹³⁹
- 3.127 [Yamaha Employee 2] explained the web-rat was used to compare against the minimum prices requested under the Yamaha Pricing Policy and it enabled Yamaha to see which dealers were below a particular price at any one moment in time. It prompted phone calls from Yamaha to those dealers, who for the majority of the time wanted to retain their margins and for the

¹³⁷ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 16.

¹³⁸ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 16.

¹³⁹ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.46, lines 5-12.

most part were very happy to put their prices up.¹⁴⁰ [Yamaha Employee 2] explained that was about ensuring there was relative stability in the market which then gave the dealer stability in their investment.¹⁴¹ He confirmed that YME had, following the end of the Relevant Period, stopped sending web-rat reports as no action was being taken on them.¹⁴²

- 3.128 [Yamaha Employee 1] of Yamaha explained that *'To a large extent, the Resellers self-policed compliance with the Yamaha Pricing Policy. We did receive a spider report called the "[X]"¹⁴³ for digital pianos and keyboards from 2014, but these were broadly irrelevant as they were out of date by the time they reached me. The Resellers' own web rats [...] were more effective at monitoring compliance, as they were run more frequently.'*¹⁴⁴
- 3.129 [Yamaha Employee 1] explained further that *'I recall instances where Yamaha was more pro-active in monitoring compliance, for example post-Christmas, where we would look to reinforce the Yamaha Pricing Policy after the January sales. Similarly, during internal sales meetings we might decide to check the current advertised price of certain models, but we would not spend much time on this and such activity was normally provoked by a Reseller's complaint. This action would have applied across our selective Resellers, including GAK.'*¹⁴⁵
- 3.130 In response to a CMA information request, [Yamaha Employee 2] of Yamaha explained that *'As this document only came once each week, the data was out of date by the time it was received. Other Resellers including GAK had their own web monitoring software and it was typical for the Reseller to email web links to myself and the sales team requesting that action be taken where other Resellers' prices were not compliant with the Yamaha Pricing*

¹⁴⁰ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.44, lines 5-7, *'Generally, yes. I would say that for the majority of the time people wanted to retain their margins and for the most part they were very happy to put their prices up, yes.'*

¹⁴¹ [Yamaha Employee 2] stated at interview, *'the web-rat was to kind of see which people had changed their prices and whether there was a conversation to be had to get them to put the prices back up again [...] it is about us ensuring that there is relative stability in the market, which then gives the dealer stability in his or her investment'*" URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.46, line 22 to p.47, line 5.

¹⁴² [Yamaha Employee 2] stated at interview *'I have not seen a web-rat in a year. It has been about a year, yes, because for a while we were still getting them through and the comedy of it was no one was doing anything with them.'* URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.66, lines 15-17.

¹⁴³ Also known as MyWebEye.

¹⁴⁴ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 6.

¹⁴⁵ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 6.

Policy. It was not the case that individual Resellers were monitored, but instead the market as a whole was being monitored. For the most part, monitoring compliance would be complaint-led – it would be triggered by a series of complaints from Resellers.’¹⁴⁶

Yamaha’s awareness of the illegality of enforcing the Yamaha Pricing Policy

- 3.131 The evidence indicates that Yamaha understood that its interactions with its network of UK Selective Resellers with a view to enforcing the Yamaha Pricing Policy were not legal.
- 3.132 [Yamaha Employee 1] explained that ‘[a]t the end of October 2014 the [Yamaha employee] sent an email to all [relevant Yamaha employees] with some compliance wording. We were instructed to send this wording in response to any emails from Resellers about the Yamaha Pricing Policy, so that discussions about it were taken offline. We continued to apply the Yamaha Pricing Policy by phone and face to face until the Yamaha Pricing Policy was discontinued at the end of March 2017. The compliant email responses were mainly for use by sales reps who had the most day to day contact with Resellers. When a rep received an email from a Reseller about the Yamaha Pricing Policy (e.g. a complaint about another Reseller’s prices), the rep’s role was to call the Reseller to resolve the problem offline, and follow this up with a “compliant” email response.’¹⁴⁷
- 3.133 In support of the above, [Yamaha Employee 2] of Yamaha also stated ‘[t]he Yamaha Pricing Policy would be maintained with a phone call and/or face to face communications with Resellers, alongside the compliant email we sent them. This applied from October 2014 through until early 2017 when we were instructed to cease all discussions with Resellers about retail pricing’.¹⁴⁸ He added that ‘After the Purple Book implementation training we received in 2014, I recall having conversations with the [Yamaha Senior Employees] about how to deal with emails from Resellers complaining about other Resellers’ retail prices. Although most contact with Resellers [✂], I recall that throughout the Relevant Period until the end of March 2017 I had phone calls or face to face communications with Resellers including GAK, reminding them of the Yamaha Pricing Policy. This included when I had also

¹⁴⁶ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 6.

¹⁴⁷ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 3.

¹⁴⁸ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 3(ii).

*sent them the compliant email response. My understanding is that, having been instructed to do so, [X] were also carrying this out.'*¹⁴⁹

GAK's awareness of the illegality of complying with the Yamaha Pricing Policy

3.134 GAK appears to have been aware of the, at least, questionable legality of its communications with Yamaha in relation to the Yamaha Pricing Policy during the Relevant Period. [GAK Senior Employee 3] of GAK explained that *'Yamaha would regularly make statements in email about not controlling GAK's pricing, but contrary expectations were relayed via e.g., phone calls [...] Yamaha's expectation was that GAK would align with Yamaha Music London's pricing. [...] GAK's understanding was that whatever Yamaha said in the email, we were still under the same obligations if we wished to maintain supplies and discount levels.'*^{150, 151}

3.135 The CMA finds that it ought to have been obvious to GAK during the Relevant Period that participating in the Yamaha Pricing Policy would reduce price competition between it and other resellers, leading to higher prices for its customers. Furthermore, from October 2014, Yamaha introduced the practice of sending apparently compliant emails to resellers who contacted Yamaha about the Yamaha Pricing Policy and following these up with a phone call or face-to-face conversation contradicting the email in question. This meant that communication about the Yamaha Pricing Policy was effectively taken offline and did not leave a written record. The CMA finds that the unusual and contradictory nature of these communications could be expected to have increased GAK's sense that it was participating in something that was not a legitimate business practice, the legality of which was, at best, questionable.

Consequences for resellers of non-compliance with the Yamaha Pricing Policy

3.136 The evidence indicates that Yamaha sought to encourage compliance with the Yamaha Pricing Policy by Selective Resellers, including GAK, by means of threatening (at least by implication) sanctions against Selective Resellers who did not comply. Primarily, as set out below, these involved the suggestion that reseller discounts or support might be withdrawn.

3.137 At interview, [Yamaha Employee 2] of Yamaha explained that if dealers decided not to follow the YML website reference price during the Relevant

¹⁴⁹ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 3(iii).

¹⁵⁰ URN C_YAM01710.2 (Clarifications from [GAK Senior Employee 3] dated 18 September 2019), p.4.

¹⁵¹ URN C_YAM01710.2 (Clarifications from [GAK Senior Employee 3] dated 18 September 2019), p.4.

Period, Yamaha would have a conversation with the dealers to understand why they did not want to follow that particular price:

*'It was really just a gentle conversation, "Do you want to follow Yamaha London?" Yes, it was as simple as that, really.'*¹⁵²

*'There was a strong insistence from our side. It started with a suggestion to follow Yamaha Music London, and then there was more of a request to follow Yamaha Music London. Because dealers were asking us, "Well, what margin should I make on this? What price should I sell it for?" it was easier just to steer them towards the Yamaha Music London website and say, "Just follow that."'*¹⁵³

*'The conversations were always very diplomatic, very, "We are making a suggestion to you. Would you like to do this? We can only assume that you do not want to continue to partner in the same way. Is that the case? Do you no longer need that kind of level of support from Yamaha?" and the dealer would either say, "Well, no, I do need the support" -- "Well, okay, you need the support; we need the support from you. Let us work together."'*¹⁵⁴

'I think there was a natural compulsion from our side to want to help the dealers who were perhaps more compliant, for want of a better word, than those who were a bit more against us. So, typically someone who wanted to keep their pricing very stable, there was maybe a natural inclination for us to invest more in their stores, more in their events, more in their online activity, in terms of promotions, than a dealer who was quite simply just discounting all the time, because clearly, in our mind, it made sense that a dealer who needed to retain that margin with stable pricing was looking to reinvest that margin in their business, whereas a dealer who was discounting clearly did not need that margin opportunity in the first place. It is almost like: "Why give somebody lots

¹⁵² URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.37, lines 19-21.

¹⁵³ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.48, lines 19-24.

¹⁵⁴ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.50, lines 4-10.

of discounts if all they are going to do is give it away? They did not need it in the first place.’”¹⁵⁵

3.138 In response to a CMA information request, [Yamaha Employee 2] of Yamaha stated *‘I do not recall any examples where sanctions i.e. reduction of discounts, had been applied to GAK or any other Resellers for not complying with the Yamaha Pricing Policy [...] While we did not impose any sanctions on Resellers who did not comply with the Yamaha Pricing Policy, we were inclined to invest more in compliant Resellers’ stores.’¹⁵⁶*

3.139 Also, in response to a CMA information request, [Yamaha Employee 1] of Yamaha stated that his *‘recollection is that Yamaha only ever implied sanctions but did not follow through. We would imply to Resellers verbally that we might have to think about cutting their margin until they fixed a quality issue, and that if it still wasn’t fixed we would put them on delivery stop, but I do not recall us ever seriously considering following through with this.’¹⁵⁷*

3.140 At interview, [GAK Senior Employee 3] of GAK stated *‘if you were not at the prices, there was always a threat of losing discounts. That you could lose up to 5 per cent of a discount if you [...] were kind of venturing off piste as such. And worse still [...] you wouldn’t actually get stock.’¹⁵⁸*

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

- irrespective of whether sanctions were imposed in response to any failure to adhere to the Yamaha Pricing Policy, such sanctions were at least threatened by Yamaha; and
- such sanctions were perceived as a credible threat by GAK and the fear of being sanctioned played an important part in encouraging GAK to adhere to the Yamaha Pricing Policy.

¹⁵⁵ URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha), p.49, line 15 to p.50, line 1.

¹⁵⁶ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 5.

¹⁵⁷ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 5.

¹⁵⁸ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.131, lines 23-26.

D. Market Definition

3.142 For the reasons set out below, the CMA finds that the Relevant Markets in this case are:

- the supply through resellers of pianos and digital keyboards in the UK (except sales to education customers); and
- the supply through resellers of guitars in the UK (except sales to education customers).

I. Purpose of and framework for assessing the relevant market

3.143 When applying the Chapter I prohibition and Article 101(1) TFEU, the CMA is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement in question has as its object or effect the appreciable prevention, restriction or distortion of competition.¹⁵⁹

3.144 In the present case, the CMA considers that it is not necessary to reach a definitive view on market definition in order to determine whether there is an agreement between undertakings which has as its object the appreciable prevention, restriction or distortion of competition.¹⁶⁰

3.145 Nonetheless, the CMA has formed a sufficient view of the relevant markets in order to calculate GAK's 'relevant turnover' in the markets affected by the Infringement, for the purposes of establishing an effect on trade between Member States and assessing the level of financial penalty that the CMA has decided to impose on GAK.

II. Relevant product market

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

¹⁵⁹ Case T-62/98 *Volkswagen AG v Commission*, EU:T:2000:180, paragraph 230, and Case T-29/92 *SPO and Others v Commission* EU:T:1995:34, paragraph 74.

¹⁶⁰ See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [176] in which the CAT held that in Chapter I cases 'determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement.'

Pianos and digital keyboards

- 3.147 Yamaha supplies pianos and digital keyboards. Within these two product types, Yamaha categorises its products further by product segments as set out in paragraphs 3.23 and 3.26 to 3.28 above.
- 3.148 The piano segments identified by Yamaha are: (i) acoustic pianos; (ii) digital pianos; (iii) hybrid pianos; (iv) portable keyboards; and (v) synthesisers.
- 3.149 Some of the features of these instruments are set out in paragraphs 3.26 to 3.28 above.
- 3.150 GAK categorises the products it sells as: children's keyboards; home and educational keyboards; digital pianos (electric pianos); workstations, modules and synthesisers.¹⁶¹ Separately, GAK provided the following, similar, list of categories: digital pianos; electric pianos; home and education keyboards; home keyboards; synthesisers; and workstations.¹⁶²
- 3.151 The CMA finds that the Yamaha Pricing Policy applied to the full range of pianos and digital keyboards supplied to GAK by Yamaha, including each of the segments identified by Yamaha and listed above, other than acoustic pianos, which GAK did not purchase from Yamaha during the Relevant Period (see paragraphs 3.23 and 3.26 to 3.28 and 3.80 to 3.111 above).¹⁶³
- 3.152 Given that the Yamaha Pricing Policy applied to each of the product segments within both pianos and digital keyboards, all pianos and digital keyboards are focal products. It would make no difference for the calculation of any potential financial penalty if the CMA split the Yamaha products into multiple product markets or aggregated the turnover of all the products into a

¹⁶¹ URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)), question 3a and b. GAK explained that Children's Keyboards (Home and Educational Keyboards) tend to be either 33, 49 or 61 key small lightweight Keyboards some with touch sensitive keys some with light up keys. Home and Educational Keyboards are all touch sensitive and have some form of Educational teaching aid built in that can be used with a phone or tablet, they have recording and playback options on, these are all entry level/beginner models. Higher up they are classed as Workstations or Synthesisers. These are the best models on the market with the highest memory banks, sounds and backing tracks with very large recording and sampling options built in. GAK explained that these are for the professional gigging and recording musician. Digital Pianos (Electric Pianos) can vary from the basic model 88 note fully weighted stage piano that is compact and transportable right up to upright and baby grand copies. They have inbuilt sophisticated speaker systems that react when the lid is lifted or closed some have keys that move, and all allow for backing tracks to be played and for the speaker system to be used as a home entertainment system via Bluetooth playback. Modules are simply a sound box that can be used alongside a midi control keyboard to trigger the sound on the module, and these are found mainly in studios.

¹⁶² URN C_YAM01679 (GAK third RFI response - question 14a (pianos and keyboards)).

¹⁶³ With the exception of products which were 'B-stock' (see paragraph 3.34 above).

single market. Therefore, for the purposes of this Decision, the CMA has not made any finding as to the existence of any narrower product markets and has instead aggregated all of the segments within pianos and digital keyboards in a single product market.

- 3.153 GAK identified a number of demand-side substitutes for the products in the relevant segments. On this basis, the CMA concludes that the relevant product market should include products in the relevant segments which are manufactured by other manufacturers.¹⁶⁴
- 3.154 For the reasons above, it is not necessary for the CMA to evaluate demand- and supply-side substitutability between the product segments identified by Yamaha and GAK.
- 3.155 The CMA finds that the relevant product market for the purpose of this case is the supply of pianos and digital keyboards.

Guitars

- 3.156 Yamaha supplies a range of electric, bass and acoustic guitars. It categorises them into two segments: acoustic and electric.
- 3.157 GAK retails a wide range of guitars which it categorises as follows: acoustic guitars, bass guitars, classical guitars, electric guitars, electro-acoustic guitars and folk instruments, with various models and price ranges. It groups them as follows: acoustic guitars, base guitars, classical guitars, electric guitars; electro-acoustic guitars; ukuleles, and other folk instruments.¹⁶⁵
- 3.158 The CMA finds that the Yamaha Pricing Policy applied to the full range of guitars supplied by Yamaha, including each of the segments identified by Yamaha and listed above, other than ukuleles¹⁶⁶, which GAK did not purchase from Yamaha during the Relevant Period (see paragraphs 3.23 and 3.29 to 3.33 and 3.80 to 3.111 above).¹⁶⁷
- 3.159 Given that the Yamaha Pricing Policy applied to each of the product segments within guitars, all guitars are focal products. It would make no difference for the calculation of any potential financial penalty if the CMA

¹⁶⁴ URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)), question 10.

¹⁶⁵ URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)), question 3a and b.

¹⁶⁶ The Yamaha Pricing Policy applied to guitaleles, which Yamaha did supply to GAK.

¹⁶⁷ With the exception of B-stock products.

separated Yamaha's products into multiple product markets or aggregated the turnover of all the products into a single market. Therefore, for the purposes of this Decision, the CMA has not made any finding as to the existence of any narrower product markets and has instead aggregated all of the segments within guitars in a single product market.

- 3.160 GAK identified a number of demand-side substitutes for the products in the relevant Guitar segments. On this basis, the CMA concludes that the relevant market should include products in the relevant segments which are manufactured by other manufacturers.¹⁶⁸
- 3.161 For the reasons above, it is not necessary for the CMA to evaluate demand- and supply-side substitutability between the product segments identified by Yamaha and GAK.
- 3.162 The CMA finds that the relevant product market for the purpose of this case is the supply of guitars.¹⁶⁹

III. Sales through different distribution channels

- 3.163 As noted at paragraphs 3.46 to 3.47 above, Yamaha supplies its pianos, digital keyboards and guitars through its network of Selective Resellers, and also through Open Resellers. Open Resellers includes, for these purposes, Mass Market resellers, such as Amazon. Yamaha also sells its pianos, digital keyboards and guitars directly to customers through YML (through its website and bricks-and-mortar store). The CMA has considered whether the markets for the supply of pianos and digital keyboards and guitars should be further subdivided by distribution channel.¹⁷⁰
- 3.164 As set out in Section 3.C. *Yamaha Pricing Policy* paragraphs 3.70 to 3.141 above, the evidence shows that the Yamaha Pricing Policy applied to all pianos and digital keyboards and guitars sold by Selective Resellers

¹⁶⁸ URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)), question 10

¹⁶⁹ The CMA notes the Commission decision 16 July 2003 PO/Yamaha (COMP/37.975) and the Commission's approach to the market definition as regards guitars outlined at paragraph 25 of that decision. For the reasons outlined at paragraphs 3.152 to 3.160, however, the CMA has decided to aggregate all of the ranges within electric and acoustic guitars. The CMA has, as noted in 3.155 above, also aggregated all ranges of digital pianos and digital keyboards and has not made any finding as to the existence of any narrower product markets.

¹⁷⁰ As noted above, Yamaha also retails directly to consumers, through YML and Yamaha UK. As the penalty in this case is imposed on GAK rather than Yamaha, it is not necessary for the CMA to conclude on whether direct to consumer sales by manufacturers should be included with the relevant markets. Accordingly, the CMA has adopted a market definition for these purposes which includes only sales through resellers.

(including Selective Products and Open Products, but excluding B-stock and sales to education customers).

- 3.165 The Open Products sold through Open Resellers were the same as the Open Products sold through Selective Resellers and would be regarded as demand-side substitutes. As such, for the purposes of this case, there is no need to further sub-divide the relevant market by distribution channel, that is, there is no need to further sub-divide it into Selective Resellers and Open Resellers. For these purposes, YML is effectively a vertically-integrated Yamaha Selective Reseller.
- 3.166 In relation to sales to education customers, the CMA finds that the Yamaha Pricing Policy does not apply to sales to education establishments. As such, the conditions of competition are likely to differ between the education channel, and the Selective Reseller and Open Reseller channels. For these reasons, for the purposes of this case the CMA has not included the education channel in the relevant product market.
- 3.167 Based on the above, the CMA concludes that for the purposes of this case, the relevant market for pianos and digital keyboards and the market for guitars includes the Selective Reseller and Open Reseller channels.

IV. Relevant geographic market

- 3.168 The CMA has considered whether the market is likely to be narrower or wider than the whole of the UK.
- 3.169 Yamaha divides its UK sales territories into certain regions. However, nothing suggests that these geographic areas are categorised for any reasons other than administrative efficiency. Pricing and product availability appear to be the same across all UK regions. Similarly, GAK's pricing and product availability appear to be the same across all UK regions.
- 3.170 Yamaha's UK sales territories are the North (from Manchester to Scotland), and South (from Birmingham in the Midlands to the South) and Wales.¹⁷¹

¹⁷¹ URN C_YAM01304.1 (Transcript of interview on 5 June 2018 with [Yamaha Senior Employee 2], Yamaha), p.45, line 20.

Yamaha sells MI to customers in the Republic of Ireland and Northern Ireland as well, selling the same products under the same arrangements.¹⁷²

- 3.171 Moreover, the Yamaha Pricing Policy and Yamaha's recommended selling prices, discussed further below, were set for the UK in its entirety.¹⁷³ Therefore, the CMA concludes that for the purpose of this case the relevant geographical market is at least as wide as the UK.
- 3.172 In the light of the primarily UK-based distribution network and adopting a cautious approach, the CMA considers for the purpose of this case that the geographic market is no smaller than the whole of the UK.
- 3.173 This is also consistent with the approach adopted by the European Commission (Commission) in its 2003 decision in relation to vertical price fixing by Yamaha for musical instruments, which found national markets.¹⁷⁴ The Commission found that distribution networks are organised on a country-by-country basis or groups of countries; and differences in taste and traditions are considerable.¹⁷⁵

V. Conclusion on market definition

- 3.174 In view of the foregoing, the CMA finds that the relevant markets in this case are:
- the supply through resellers of pianos and digital keyboards in the UK (except sales to education customers); and
 - the supply through resellers of guitars in the UK (except sales to education customers).

¹⁷² URN C_YAM01304.2 (Transcript of interview on 30 May 2018 with [Yamaha Employee 2], Yamaha). Also see URN C_YAM01304.1 (Transcript of interview on 5 June 2018 with [Yamaha Senior Employee 2], Yamaha), p.18, line 7-11 – the role of Yamaha UK is to look after the sales to its resellers in the UK and Ireland as well, and to handle the marketing across the UK and Ireland.

¹⁷³ In particular, the Yamaha Pricing Policy applied to online sales by Selective Resellers, which could be made to any UK location.

¹⁷⁴ Case COMP/37.975 *PO/Yamaha*.

¹⁷⁵ The Commission also found that for some products' price differences amounted to up to 50%.

4. LEGAL ASSESSMENT

A. Introduction

- 4.1 This Section sets out the CMA's legal assessment of Yamaha's agreement and/or concerted practice with GAK, one of its Selective Resellers, that GAK would not advertise or sell the Relevant Products below a Minimum Price specified by Yamaha from time to time, in accordance with the Yamaha Pricing Policy.
- 4.2 As set out above, the CMA has reasonable grounds for suspecting that UK Selective Resellers in respect of the Relevant Products¹⁷⁶ were subject to the Yamaha Pricing Policy, and that such Selective Resellers generally complied with Yamaha's requests to comply with the Minimum Price.¹⁷⁷
- 4.3 However, for reasons of administrative efficiency, and in accordance with its Prioritisation Principles,¹⁷⁸ the CMA has decided to focus its findings on GAK as one of the numerous Selective Resellers of the Relevant Products.¹⁷⁹ This does not preclude the CMA from taking enforcement action against other resellers in any future cases.
- 4.4 For present purposes, the CMA's findings are made by reference to the following provisions of the UK and EU competition rules:
- Section 2 of the Act prohibits (among other matters) agreements and concerted practices between undertakings which may affect trade within the UK and which have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are excluded or exempt in accordance with the provisions of Part 1 of the Act. References to the UK are to the whole or part of the UK.¹⁸⁰ The prohibition imposed by section 2 of the Act is referred to as 'the Chapter I prohibition'.
 - Article 101(1) TFEU prohibits (among other matters) agreements and concerted practices between undertakings which may affect trade between EU Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the EU, unless they are exempt in accordance with Article 101(3) TFEU.

¹⁷⁶ See paragraphs 3.93 and 3.94 above.

¹⁷⁷ See paragraph 3.96 above.

¹⁷⁸ *Prioritisation principles for the CMA* (CMA16, April 2014).

¹⁷⁹ See paragraph 2.10 above.

¹⁸⁰ Section 2(1) and (7) of the Act.

- Under the European Union (Withdrawal Agreement) Act 2020, section 2(1) of the European Communities Act 1972 (under which EU law has effect in the UK's national law) is 'saved' until the end of the Transition Period.¹⁸¹ This means that directly applicable EU law, including Article 101 TFEU, Regulation 1/2003¹⁸² and the Vertical Agreements Block Exemption Regulation (the 'VABER'),¹⁸³ will continue to apply in the UK during the Transition Period.

4.5 Section 60 of the Act sets out the principle that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law.

4.6 Section 60 of the Act also provides that the CMA must act (so far as is compatible with the provisions of Part I of the Act) with a view to securing that there is no inconsistency with the principles laid down by the TFEU and the European Courts, and any relevant decision of the European Courts.¹⁸⁴ The CMA must, in addition, have regard to any relevant decision or statement of the Commission.¹⁸⁵

B. Undertakings

I. Key legal principles

4.7 For the purposes of the Chapter I prohibition and Article 101 TFEU, the focus is on the activities of an 'undertaking'. The concept of an 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.¹⁸⁶

¹⁸¹ The European Union (Withdrawal) Act 2018, section 1A (as introduced by The European Union Withdrawal Agreement Act 2020, section 1).

¹⁸² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 4.1.2003, pp.1–25.

¹⁸³ Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

¹⁸⁴ The Act, section 60(2) and (4). The 'European Courts' means the Court of Justice (formerly the European Court of Justice) and the General Court ('GC') (formerly the Court of First Instance). See the Act, section 59(1).

¹⁸⁵ The Act, section 60(3). The Court of Justice held that national competition authorities '*may take into account*' guidance contained in non-legally binding Commission Notices (specifically the *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)* [2014] OJ C291/01), but such authorities are not required to do so. See Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraphs 29 and 31.

¹⁸⁶ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, paragraph 21.

4.8 An entity is engaged in 'economic activity' where it conducts any activity '[...] *of an industrial or commercial nature by offering goods and services on the market*'.¹⁸⁷

4.9 The term 'undertaking' also designates an economic unit, even if in law that unit consists of several natural or legal persons.¹⁸⁸

II. Conclusion on undertakings

4.10 Yamaha was (and still is) engaged in the supply of digital keyboards, digital pianos and guitars. GAK was (and still is) engaged in the retail sale of MI and accessories.

4.11 The CMA therefore concludes that both Yamaha and GAK were, and still are, engaged in an economic activity and constitute/d undertakings for the purposes of the Chapter I prohibition and Article 101 TFEU during the Relevant Period and beyond.

C. Agreement and/or concerted practice

4.12 For the reasons set out below, the CMA finds that Yamaha and GAK entered into an agreement and/or concerted practice that GAK would not advertise or sell the Relevant Products below the Minimum Price, in accordance with the Yamaha Pricing Policy.

I. Key legal principles

4.13 The Chapter I prohibition and Article 101 TFEU apply both to 'agreements' and 'concerted practices.' It is not necessary, for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice.¹⁸⁹ The aim of the Chapter I prohibition and Article 101 TFEU is to catch different forms of coordination between undertakings and thereby to prevent undertakings from being able to evade the competition rules simply on account of the form in which they coordinate their conduct.¹⁹⁰

¹⁸⁷ Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

¹⁸⁸ Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 55.

¹⁸⁹ Case C-8/08 *T-Mobile Netherlands BV and Others v NMa*, EU:C:2009:343, paragraph 23 (citing Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 131). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, [206(ii)].

¹⁹⁰ Case C-382/12 P, *MasterCard Inc. v. European Commission*, EU:C:2014:2201, paragraph 63 and the case law cited therein. The unlawful co-ordination between undertakings may, for example, be characterised as a 'concerted practice' during the first phase of an infringement, but may subsequently have solidified into an

II. Agreement

- 4.14 The Chapter I prohibition and Article 101 TFEU catch a wide range of agreements, including oral agreements and ‘gentlemen's agreements’.¹⁹¹ An agreement may be express or implied by the parties, and there is no requirement for it to be formal or legally binding, nor for it to contain any enforcement mechanisms.¹⁹² An agreement may also consist of either an isolated act, or a series of acts, or a course of conduct.¹⁹³
- 4.15 The key question in establishing an agreement is whether there has been ‘a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties’ intention.’¹⁹⁴
- 4.16 The General Court of the European Union (formerly the Court of First Instance; ‘General Court’) has held that: ‘[...] *it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way* [...]’.¹⁹⁵
- 4.17 However, it is not necessary to establish a joint intention to pursue an anti-competitive aim.¹⁹⁶ The fact that a party may have played only a limited part in setting up an agreement, or may not be fully committed to its

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

¹⁹¹ Case C-41/69 *ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular, paragraphs 106–114.

¹⁹² *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, [658]. See also Commission decision 2003/675/EC *Video Games, Nintendo Distribution and Omega-Nintendo* (COMP/35.587 etc) [2003] OJ L255/33, paragraph 247.

¹⁹³ Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 81.

¹⁹⁴ Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, paragraph 69 (upheld on appeal in Joined Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, EU:C:2004:2, paragraphs 96–97).

¹⁹⁵ Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

¹⁹⁶ Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission*, EU:T:2006:265, paragraph 77 (upheld on appeal in Joined Cases C-501/06P etc *GlaxoSmithKline Unlimited v Commission*, EU:C:2009:610).

implementation, or may have participated only under pressure from other parties, does not mean that it is not party to the agreement.¹⁹⁷

4.18 In the absence of an explicit agreement (for example, written down or based on a contract) between the parties to conduct themselves on the market in a specific way, tacit acquiescence by a party to conduct itself in the manner proposed by the other party is sufficient to give rise to an agreement for the purpose of the Chapter I prohibition and Article 101 TFEU.¹⁹⁸

4.19 The Commission's Vertical Guidelines, summarising the relevant case law and citing the judgments of the Court of Justice of the European Union (Court of Justice), describe how to establish tacit acquiescence to a unilateral policy:

*'[...] in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice.'*¹⁹⁹

4.20 The Vertical Guidelines provide examples of when tacit acquiescence may be deduced. Evidence of coercive behaviour or compulsion may point towards tacit acquiescence and is a relevant factor to consider. For instance:

'[...] for vertical agreements, tacit acquiescence may be deduced from the level of coercion exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with

¹⁹⁷ *Agreements and concerted practices* (OFT401 December 2004), adopted by the CMA Board, paragraph 2.8. See also Case T-25/95 *Cimenteries CBR and Others v Commission*, EU:T:2000:77, paragraphs 1389 and 2557 (this judgment was upheld on liability by the Court of Justice in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, although the fine was reduced); and Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraphs 79–80.

¹⁹⁸ Case C-74/04 P *Commission v Volkswagen AG* EU:C:2006:460, paragraph 39; Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, and Commission, *Guidelines on Vertical Restraints* [2010] OJ C130/01 (Vertical Guidelines), paragraph 25(a).

¹⁹⁹ Vertical Guidelines, paragraph 25(a).

*the supplier's unilateral policy if this system allows the supplier to implement in practice its policy.'*²⁰⁰

- 4.21 However, a system of monitoring and penalties may not be necessary in all cases for there to be a concurrence of wills based on tacit acquiescence.²⁰¹
- 4.22 The Chapter I prohibition and Article 101 TFEU apply to agreements irrespective of whether or not they are implemented.²⁰² The fact that a party does not act on or subsequently implement, the agreement at all times does not preclude the finding that an agreement existed.²⁰³ In addition, the fact that a party does not respect the agreement at all times or comes to recognise that it can 'cheat' on the agreement at certain times does not preclude the finding that an agreement existed.²⁰⁴
- 4.23 Likewise, the fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties does not mean that it is not party to the agreement.²⁰⁵
- 4.24 In particular, where an agreement has the object of restricting competition (as described below), parties cannot avoid liability for the resulting infringement by arguing that the agreement was never put into effect.²⁰⁶

III. Concerted practice

- 4.25 The prohibition on concerted practices prohibits, amongst other things, coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly

²⁰⁰ Vertical Guidelines, paragraph 25(a).

²⁰¹ Case C-260/09 P *Activision Blizzard Germany GmbH v Commission*, EU:C:2011:62, paragraph 77.

²⁰² Commission decision of 29 September 2004 *French Beer (Case COMP/C.37.750/B2)*, paragraph 64.

²⁰³ Case 86/82 *Hasselblad v Commission* EU:C:1984 65, paragraph 46; and Case C-277/87 *Sandoz v Commission* EU:C:1990:6, paragraph 3.

²⁰⁴ Case T-141/89 *Tréfileurope v Commission*, EU:T:1995:62 paragraph 85; and Case C-246/86 *Belasco v Commission* EU:C:1989:95 paragraphs 10 to 16.

²⁰⁵ *OFT401*, at paragraph 2.8. See also, for example, Case C-49/92 P *Commission v Anic Partecipazioni SpA* EU:C:1999:356, paragraph 80; Cases T-25/95 *Cimenteries CBR SA v Commission* EU:T:2000:77, paragraphs 1389 and 2557; and Case T-28/99 *Sigma Technologie di Rivestimento Srl v Commission*, EU:T:2002:76, paragraph 40.

²⁰⁶ See, e.g., Case 19/77 *Miller v Commission*, EU:C:1978:19, paragraphs 7-10; *French Beer* [2006] 4 CMLR 577; Case C-277/87 *Sandoz v Commission*, EU:C:1990:6; and Commission decision 78/921/EEC *WANO Schwarzpulver* [1978] OJ L232/26.

substitutes practical cooperation between them for the risks of competition.²⁰⁷

- 4.26 Although the nature and extent of a concerted practice is addressed in the case law primarily in the context of so-called horizontal relationships (that is, between actual or potential competitors), it is also applicable to vertical relationships (that is, between undertakings at different levels of the supply chain).²⁰⁸ The Court of Appeal has observed that:

*'The Chapter I prohibition catches agreements and concerted practices whether between undertakings at different levels or between those at the same level of commercial operation. An agreement between a supplier and a commercial customer, which may be called a vertical agreement, may breach the same prohibition as much as an agreement between competing suppliers of the same product or same type of product, which can be referred to as a horizontal agreement.'*²⁰⁹

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

*'It is [...] plain that an undertaking may be passively party to an infringement of the Chapter I prohibition. That is so, in particular, where it had taken part in a meeting or other contacts, and has done nothing to distance itself from the matters discussed. In those circumstances the undertaking is taken to have tacitly approved of the unlawful initiative, unless it has publicly distanced itself or informed the OFT.'*²¹⁰

²⁰⁷ Cases 48/69 etc *ICI Ltd v Commission*, EU:C:1972:70, paragraph 64. See also Case C-8/08 *T-Mobile Netherlands BV and Others v NMa*, EU:C:2009:343, paragraph 26; *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, [151]–[153]; and Commission decision 82/367/EEC *Hasselblad* (IV/25.757[1982] OJ L161/18 (*Hasselblad*), recital 47, in which the Commission stated (in a vertical context) that: '*[f]or a concerted practice to exist it is sufficient for an independent undertaking knowingly and of its own accord to adjust its behaviour in line with the wishes of another undertaking.*'

²⁰⁸ See, e.g., Case T-43/92 *Dunlop Slazenger International Ltd v Commission*, EU:T:1994:259 paragraph 101 *et seq* (concerted practice between Dunlop Slazenger and certain of its exclusive distributors in respect of various measures to enforce an export ban). See also the Commission decision 2003/675/EC *Video Games, Nintendo Distribution and Omega-Nintendo* (COMP/35.587 etc) [2003] OJ L255/33, paragraphs 323–324 (agreements and/or concerted practices between Nintendo and its independent distributors to restrict parallel trade). Other examples include: Commission decision 72/403/CEE *Pittsburgh Corning Europe* (IV/26894) [1972] OJ L272/35 (where a concerted practice was found between a supplier and a distributor); and Commission decision 88/172/EEC *Konica* (IV/31.503) [1988] OJ L78/34, paragraph 36 (where there was a concerted practice between a supplier and a distributor).

²⁰⁹ *Argos Ltd and Littlewoods Ltd v Office of Fair Trading and JJB Sports plc and Allsports Limited v OFT* [2006] EWCA Civ 1318, [28].

²¹⁰ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, [1043].

IV. Agreement and/or concerted practice between Yamaha and GAK

Yamaha's communication of the Yamaha Pricing Policy

4.28 As set out in Section 3.C. above, the CMA finds that, as part of the Yamaha Pricing Policy, throughout the Relevant Period, Yamaha:

- instructed its Selective Resellers, including GAK, not to advertise or sell the Relevant Products online below the Minimum Price which it adjusted from time to time;²¹¹
- monitored its Selective Resellers' online prices, including those of GAK, via a variety of methods across the Relevant Period;²¹²
- contacted Selective Resellers, including GAK, that offered the Relevant Products for sale online at a price below the Minimum Price from time to time and required that any price below the Minimum Price was amended to comply with the Yamaha Pricing Policy;²¹³ and
- on occasion, threatened sanctions against Selective Resellers that did not comply with the Yamaha Pricing Policy, including GAK.^{214. 215}

Resellers' adherence to the Yamaha Pricing Policy

4.29 The CMA has reasonable grounds for suspecting that UK Selective Resellers covering the Relevant Products were subject to, and generally agreed to adhere to, the Yamaha Pricing Policy.²¹⁶ However, for reasons set out in paragraph 2.11 above, the CMA has chosen to scope one Selective Reseller, namely GAK, as a full party to the Infringement, and to focus its assessment in this regard on whether there was an agreement and/or

²¹¹ See paragraphs 3.112 to 3.116 above.

²¹² See paragraphs 3.119 to 3.130 above.

²¹³ See paragraphs 4.144 to 4.150 below.

²¹⁴ See paragraphs 3.137 to 3.141 above. The CMA notes there may have been occasions when Yamaha applied sanctions to resellers for non-compliance with other contractual obligations, for example, [Yamaha Employee 2] of Yamaha stated '*I do not recall any examples where sanctions i.e. reduction of discounts, had been applied to GAK or any other Resellers for not complying with the Yamaha Pricing Policy. Whilst [a reseller] did have its account frozen in 2013, my recollection is that this was because they were late on their payments.*' URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 5.

²¹⁵ See for example, statements from [GAK Senior Employee 3] at interview: "*the threat was always over you [...] it was made very, very, clear [by Yamaha] that you would either lose 5% of your margin, or you would be refrained from getting stock for up to a period of three months [...] It was threatened to us [...] on a few occasions but [...] when questioned, things were put right, then [...] no that didn't actually happen,*" URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.173, lines 13-26.

²¹⁶ See paragraphs 3.92 to 3.96 above.

concerted practice between Yamaha and GAK that infringed competition law.

- 4.30 Nonetheless, the CMA considers, although it makes no findings with regard to any individual Selective Reseller other than GAK, that the Yamaha Pricing Policy could only be effective in its aim of protecting Selective Resellers' margins²¹⁷ if there was general adherence to it by all or at least a large majority of Selective Resellers selling the Relevant Products.²¹⁸ The CMA considered at the outset of its investigation that it had reasonable grounds to suspect, under section 25 of the Act, that a large number of MI resellers were involved in the suspected arrangements under investigation.
- 4.31 While some Selective Resellers occasionally sold the Relevant Products below the Minimum Price specified by the Yamaha Pricing Policy, the evidence in the CMA's possession indicates that, overall, adherence to the Yamaha Pricing Policy by Selective Resellers was high.²¹⁹
- 4.32 Based on this evidence, the CMA considers that many Selective Resellers are likely to have complied with the Yamaha Pricing Policy. However, the CMA makes no findings in respect of Selective Resellers of the Relevant Products other than GAK.

Background: GAK's relationship with Yamaha

- 4.33 GAK started selling Yamaha's MI products online in 2002.²²⁰ It sells the Relevant Products online via its website, GAK.co.uk.²²¹ In addition to its own website, GAK also sells some of the Relevant Products via third party

²¹⁷ See paragraphs 3.81 to 3.82 above.

²¹⁸ See, for example email of 14 January 2014 from [Yamaha Employee 3] of Yamaha to [Reseller 1 Employee] of [Reseller 1] stating that '[w]e are requesting that all key dealers move in line with [Reseller 6] by 5pm this wednesday [sic] to resolve a few issues that have cropped up over the Christmas period. The majority of your products are completely sorted and I will provide a report in the morning of any that need adjusting [...] We have assurance that [Reseller 16] and GAK will 100% be with us' URN E_YAM01438 (Email from [Yamaha Employee 3], Yamaha, to [Reseller 1 Employee], [Reseller 1] dated 14 January 2014 dated 14 January 2014).

²¹⁹ See, for example, statement from [GAK Senior Employee 3] of GAK at interview: 'you would expect, from what they [Yamaha] told us, that [...] the sanctions that they [Yamaha] would put over you, and made very, very clear [...] would be adhered to, and that other, whether it's one retailer or a group of them would have been told, or restricted, or lost the margins that they could have got [...] there was no choice for anyone.' URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.204, lines 2-11. In addition, when asked at interview whether other resellers generally complied with Yamaha's requests to adhere to the Yamaha Pricing Policy, [GAK Senior Employee 3] stated 'absolutely.' URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.229, line 20.

²²⁰ URN C_YAM00580 (GAK response dated 25 April 2018 to RFI dated 17 April 2018) Section C, Annex 5, question 3(a)(i).

²²¹ URN C_YAM00580 (GAK response dated 25 April 2018 to RFI dated 17 April 2018) Section C, Annex 5, question 3(a)(ii).

marketplaces such as [Reseller], [Reseller] and [Reseller].²²² GAK also sells Yamaha products at its shop in Brighton.²²³

- 4.34 GAK's relationship with Yamaha during the Relevant Period was (and still is) based on an SDA for guitars and digital pianos.²²⁴ For keyboards, GAK largely distributed Open Products for the duration of the Relevant Period, adding Selective Products to its SDA with Yamaha later in 2017, after the end of the Relevant Period.²²⁵
- 4.35 The SDA between Yamaha and GAK does not mention the restrictions which formed the basis of the Yamaha Pricing Policy. The CMA notes, however, that the Purple Book, which was in use from the period covering 1 July 2014 to 31 March 2017, was used alongside the YML pricelists to enforce the Yamaha Pricing Policy by unofficially making price a measure of the quality criteria outlined in the Purple Book.²²⁶

GAK's agreement with the Yamaha Pricing Policy

- 4.36 On the basis of the evidence and the findings of fact below, the CMA concludes that Yamaha entered into an agreement and/or concerted practice with GAK that GAK would not advertise or sell the Relevant Products below the Minimum Price.
- 4.37 This agreement and/or concerted practice was based on the joint understanding that the Yamaha Pricing Policy applied to all or at least the large majority of Yamaha's UK Selective Resellers, and that Yamaha would

²²² URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.73, line 15, p.73, line 25; and p.74, line 3.

²²³ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.14, line 8.

²²⁴ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 7.

²²⁵ URN C_YAM01810 (Yamaha response dated 17 February 2020 to RFI dated 3 February 2020), question 7.

²²⁶ See explanation from [Yamaha Employee 2] of Yamaha: *'If a Reseller was not following the YML pricing, then the sales team would point out certain elements detailed in the Purple Book regarding quality that the Reseller should resolve. The general guideline was to suggest to the Reseller that the conversation was in no relation to the pricing of product and we were only pointing out elements regarding quality as per the Purple Book. Although in part the Purple Book was genuinely about Resellers adhering to Yamaha's quality requirements, Resellers quickly understood the reference made to pricing and the requirement to not sell online below YML's retail prices or the strong suggestion that they ought not to do so.'* URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 4. See further explanation of the Purple Book and YML pricelist in paragraphs 3.100 to 3.107 above.

take steps to ensure that other resellers of the Relevant Products also maintained their prices at or above the Minimum Price.²²⁷

- 4.38 The CMA finds that, in accordance with the Yamaha Pricing Policy, the agreement and/or concerted practice between Yamaha and GAK applied to all Relevant Products throughout the Relevant Period.²²⁸
- 4.39 Evidence from senior Yamaha employees indicates that both parties understood there to be an agreement and/or concerted practice in place between Yamaha and GAK, and that GAK generally adhered to the Yamaha Pricing Policy under this agreement and/or concerted practice for the duration of the Relevant Period.
- 4.40 [Yamaha Employee 2] of Yamaha stated, *'From my dealings with GAK, my recollection is that they participated in and generally adhered to the Yamaha Pricing Policy with regard to guitars throughout the entire Relevant Period, until the Yamaha Pricing Policy was withdrawn at the end of March 2017.'*²²⁹
- 4.41 [Yamaha Employee 1] of Yamaha stated, *'GAK most actively participated in the Yamaha Pricing Policy with regards to digital pianos and portable keyboards from mid-2014, when its digital piano and keyboard sales began to grow, until the end of March 2017 when the Yamaha Pricing Policy was discontinued.'*²³⁰

Yamaha requests that GAK raise its prices in accordance with the Yamaha Pricing Policy and GAK's general compliance with these requests throughout the Relevant Period

- 4.42 The evidence (set out in further detail in paragraphs 4.74 to 4.143 below) indicates that on numerous occasions throughout the Relevant Period,

²²⁷ See for example, statement from [GAK Senior Employee 3] of GAK, when asked at interview about complying with Yamaha's requests for GAK to raise prices in accordance with the Yamaha Pricing Policy: *'When I get emails from them [Yamaha] asking me to do something and I do it, I would like to think that they've probably got the same conversations going out with everyone [...] I'm led to believe that they have'* URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.242, lines 18 to 24.

²²⁸ The CMA notes that for guitars and digital pianos GAK was a Selective Reseller for the duration of the Relevant Period, whereas for keyboards, GAK did not become a Selective Reseller until after the end of the Relevant Period. For reasons outlined in paragraphs 3.83 to 3.85 above, the CMA considers that GAK, as a Yamaha Selective Reseller, understood the Yamaha Pricing Policy to apply to, and adopted it for, all Relevant Products for the duration of the Relevant Period, irrespective of whether these were supplied under Open or Selective distribution.

²²⁹ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 2(i).

²³⁰ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 2(i).

Yamaha instructed GAK orally or via email to increase its online prices to the Minimum Price and that GAK generally complied with these requests, though not always straight away.²³¹

- 4.43 The Yamaha Pricing Policy required GAK to use YML pricelists as a reference for minimum pricing.²³² Senior employees of GAK explained in interview that Yamaha would issue updated YML pricelists regularly throughout the year to GAK and that GAK would import the YML pricelists into the system supporting the GAK website²³³ before sometimes adjusting prices to match lower-priced competitors, noting that Yamaha would then potentially raise the price discrepancy with GAK.²³⁴
- 4.44 Senior employees of GAK explained in interview that GAK was regularly contacted by Yamaha in relation to such price discrepancies with the Yamaha Pricing Policy, sometimes daily, and that communications tended to

²³¹ For example, see statement from [Yamaha Employee 2]: *'when GAK were asked to bring their prices in line with the required price, the sales reps would monitor their compliance by constantly refreshing the GAK website and seeing if the prices changed. However, with over 2000 Yamaha products on the Pro side on GAK's website, even if some guitars were priced in line with the requirement, others were missed out and would usually prompt further complaints from other Resellers'* URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 6.

²³² See Policy Section, Section 3.C. above.

²³³ In the early part of the Relevant Period, the importation of YML pricelists into the GAK website was done manually by employees at GAK. Senior employees at GAK explained in interview that, in the months following the introduction of the Purple Book, GAK acquired price-matching software that would automatically price-match GAK's online prices to YML website prices. See statement from [GAK Senior Employee 3]: *'we used [...] a price scanner [...] that would link our [GAK] listings to Yamaha Music London [...] anything that was active on our site [...] we would [...] match our product code to theirs and [...] the scanner would bring in the YML price. It would show what our price was and if there was a movement you could just click the button and it would change all of our prices to theirs.'* URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.152, line 26 to p.153, line 6.

²³⁴ At interview [GAK Employee 1] of GAK advised *'we [GAK] would always like prefer it if it [the YML pricelist] was in a spreadsheet, because it was easier to import into our system [...] the quickest way to do it overall would be to take the price list, inject it into the system [...] work out what your margin was, look at the thing, and then go through and price match [...] we would run like a price scan of loads of competitors and [...] then that would go through, and it would pull our [...] selling prices down in line with whoever were the cheapest person was out there.'* URN C_YAM01827.1 (Transcript of interview on 25 September 2019 with [GAK Employee 1], GAK), p.71, line 1 to p.72, line 3. When asked how Yamaha would react if there was a gap between the Yamaha price and the price GAK opted to go to, [GAK Employee 1] stated *'they [Yamaha] potentially would get in touch with someone and say, "Oh, there's a load of prices out here, compared with what we're ..." So, yeah, we'd be like, "Yeah, well, we're matching the competition."*' URN C_YAM01827.1 (Transcript of interview on 25 September 2019 with [GAK Employee 1], GAK), p.72, line 26 to p.73, line 3.

be oral (mostly by telephone) but would occasionally also take place by email.^{235, 236}

- 4.45 [GAK Senior Employee 3] of GAK confirmed that GAK usually changed its online prices in response to Yamaha's instructions for fear of sanctions.²³⁷ Notwithstanding GAK's occasional 'cheating' by lowering its prices below the Minimum Price (as further outlined in paragraphs 4.61 to 4.64 below), the evidence in the CMA's possession indicates that in general GAK did adhere to the Yamaha Pricing Policy.²³⁸

Fear of sanctions in case of non-compliance with the Yamaha Pricing Policy on GAK's part throughout the Relevant Period

- 4.46 In interview, [GAK Senior Employee 3] and [GAK Employee 1], respectively current and former employees of GAK, stated that although they could not recall any sanctions for non-compliance with the Yamaha Pricing Policy having actually been imposed on GAK, there had always been concerns about the potential application of such sanctions.

- 4.47 [GAK Senior Employee 3] stated:

*'the threat was always over you as to when [...] they [Yamaha] changed to the new terms of the YML feature [...] it was made very, very clear that you would either lose 5% of your margin, or you would be refrained from getting stock for up to a period of three months [...] It was threatened to us [...] on a few occasions but [...] when questioned, things were put right, then [...] no that didn't actually happen.'*²³⁹

- 4.48 [GAK Employee 1] stated:

²³⁵ See statement from [Yamaha Employee 2]: 'Sometimes I would have several phone conversations with [GAK Senior Employee 3] during a week, and then have no contact with him for a few months. Even though I know [GAK Senior Employee 3] well, face to face meetings were usually confined to [X] during a calendar year and generally [X].' URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 7. In addition, see statement at interview from [GAK Senior Employee 3]: "the phone calls were very very frequent [...] could be daily [...] it would be someone at Yamaha to point out [...] that something might have changed, or something's not right somewhere down the line." URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.230, line 23 to p.231, line 15.

²³⁶ Communication by email was increasingly rare following the introduction by Yamaha in October 2014 of the Compliance Directive, instructing Yamaha sales representatives to minimise contact about advertised prices by email. See paragraphs 4.69 to 4.72 below.

²³⁷ See paragraphs 3.137 to 3.141 above.

²³⁸ See paragraphs 4.36 to 4.41 above and detailed evidence by year in paragraphs 4.74 to 4.143 below.

²³⁹ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.173, lines 13 to 26.

*'The companies like this [Yamaha], for example, would have made attempts to do something like this. "Oh, we're going to take the discount away." Nobody would bother and everyone would just carry on doing what they were doing. [...] I'm not aware of any example where anything happened to anyone ever [...] so it was almost like empty threats. That's the – that's the way it felt from – from our standpoint.'*²⁴⁰

- 4.49 When asked if he could be sure whether it was empty or real threats, [GAK Employee 1] stated *'No, absolutely not.'*²⁴¹ In reference to this statement, [GAK Employee 1] later clarified: *'if a company like Yamaha tells you they're cutting dealers, you take it seriously. However, if you look around at the pricing in the market and nobody else is taking it seriously, you compete; this is what GAK did.'*²⁴²
- 4.50 [GAK Employee 1's] comments align with the evidence set out in paragraphs 4.61 to 4.64 below that GAK did occasionally 'cheat,' that is, lowered its price for the Relevant Products to below the Minimum Price either to match a lower-priced competitor, or even when none of its competitors had first done so. Nevertheless, taking account of [GAK Employee 1's] comments that he could not be sure whether Yamaha's threat of sanctions was an empty threat, and [GAK Senior Employee 3's] statement in paragraph 4.47 above, the CMA considers that the fear of sanctions in the case of GAK's non-compliance remained credible throughout the Relevant Period.
- 4.51 Senior Yamaha employees explained that the threat of sanctions was not necessarily expressed in direct terms, but rather that the enforcement of the Yamaha Pricing Policy was largely communicated indirectly through use of the Purple Book. This was done by Yamaha employees referring to quality criteria in the Purple Book that resellers understood to be an indirect reference to the Yamaha Pricing Policy. [Yamaha Employee 2] of Yamaha stated:

'If a Reseller was not following the YML pricing, then the sales team would point out certain elements detailed in the Purple Book regarding quality that the Reseller should resolve. The general guideline was to suggest to the Reseller that the conversation was in no relation to the pricing of product and we were only pointing out elements regarding quality as per

²⁴⁰ URN C_YAM01827.1 (Transcript of interview on 25 September 2019 with [GAK Employee 1], GAK), p.116, line 19 to p.117, line 17.

²⁴¹ URN C_YAM01827.1 (Transcript of interview on 25 September 2019 with [GAK Employee 1], GAK), p.117, line 26.

²⁴² URN C_YAM01827.2 (Clarifications from [GAK Employee 1] dated 14 February 2020), p.4.

*the Purple Book. Although in part the Purple Book was genuinely about Resellers adhering to Yamaha's quality requirements, Resellers quickly understood the reference made to pricing and the requirement to not sell online below YML's retail prices or the strong suggestion that they ought not to do so.'*²⁴³

4.52 [Yamaha Employee 1] of Yamaha stated:

*'The Purple Book was dual use. On the one hand it was used to require Resellers to meet certain quality standards e.g. in relation to their stores and websites. The more quality standards they satisfied, the higher their discount on trade purchase prices. On the other hand the Purple Book was used to enforce the Yamaha Pricing Policy by unofficially making price as a measure of quality.'*²⁴⁴

4.53 In GAK's view, there was a clear understanding that there might be repercussions if GAK did not adhere to the Yamaha Pricing Policy. In particular, GAK stated it had been concerned about:

- Yamaha reducing the level of discount that GAK would qualify for (thereby increasing the trade price it paid); and/or
- Yamaha restricting the level of stock it would supply to GAK.²⁴⁵

4.54 In an internal email sent by [GAK Senior Employee 3] to staff at GAK on 7 July 2014, [GAK Senior Employee 3] communicated a clear understanding of the danger of sanctions by Yamaha, should GAK fail to comply with the Yamaha Pricing Policy:

*'Please can no one change any Yamaha pricing online, we are now matched to the [YML] website and to keep our full 25% margin plus retro we have to stay inline [...] They [Yamaha] are cutting accounts this week and will take 5% off every dealer if they do not commit to the 5 Yamaha rules.'*²⁴⁶

²⁴³ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 4.

²⁴⁴ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 4(i).

²⁴⁵ See statement from [GAK Senior Employee 3] at interview, 'if you were not at the prices, there was always a threat of [...] losing discounts. That you could lose up to 5 per cent of a discount if you [...] were kind of venturing off piste as such. And worse still [...] you wouldn't actually get stock.' URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.131, lines 23-26.

²⁴⁶ URN E_YAM00045/C_YAM02637 (Email from [GAK Senior Employee 3], GAK to GAK staff dated 7 July 2014).

Threats of sanctions from Yamaha against GAK during the Relevant Period

- 4.55 The evidence indicates that most of the time, Yamaha staff adopted an ‘ask’ rather than a ‘compel’ attitude towards enforcing the Yamaha Pricing Policy towards GAK. The evidence indicates that sanctions against GAK were threatened (at least by implication) by Yamaha, and remained credible throughout the Relevant Period. However, sanctions were never actually imposed, perhaps in view of GAK’s general adherence to Yamaha’s requests to raise its prices in accordance with the Yamaha Pricing Policy.²⁴⁷

Evidence indicating an understanding between Yamaha and GAK throughout the Relevant Period that GAK may price below the Minimum Price temporarily to match other resellers of the Relevant Products

- 4.56 The evidence (set out in detail below) shows that there were instances when GAK openly referred to its intention to lower its prices for the Relevant Products because another reseller was not adhering to the Yamaha Pricing Policy.

- 4.57 [Yamaha Employee 1] of Yamaha stated in response to a CMA request for information that:

‘GAK used monitoring software to track the advertised price across the market and would ask us to bring non-compliant Resellers’ prices up and threaten to or actually lower their own prices to match the non-compliant Resellers if we did not.’²⁴⁸

- 4.58 This shows that there was an understanding between Yamaha and GAK that resellers (including GAK) might drop their prices below the Minimum Price temporarily to match a competitor’s lower price/s. While this was not expressly advised, and GAK considered there was an understanding that GAK should not lower its prices,²⁴⁹ Yamaha demonstrated an understanding

²⁴⁷ See for example, statements from [GAK Senior Employee 3] at interview: *‘the threat was always over you [...] it was made very, very, clear [by Yamaha] that you would either lose 5% of your margin, or you would be refrained from getting stock for up to a period of three months [...] It was threatened to us [...] on a few occasions but [...] when questioned, things were put right, then [...] no that didn’t actually happen’*, URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.173, lines 13-26.

²⁴⁸ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 5.

²⁴⁹ [GAK Senior Employee 3] stated at interview, *‘Well as, [...] at the time [...] the conversations that we had with Yamaha are, “Do not match; do not move from your suggested prices. If you see people that are lower [...] Let us know and we can sort those out.”’* URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.212, lines 15-21.

that this might be required as a temporary measure where competitors were not adhering to the Yamaha Pricing Policy.

- 4.59 [GAK Senior Employee 3] of GAK described the position as follows at interview:

*'If they [Yamaha] couldn't sort a price; if they couldn't [...] get through to the area manager that looks after that account, or if they couldn't make contact with that reseller, they would then say "We haven't got a timeframe for this to be sorted [...] how many have you got; do you want us to take them back?" [...] even to the point of, "Well, if you do have to go to that price as price protection"'*²⁵⁰

- 4.60 [GAK Senior Employee 3] confirmed that GAK would regularly check its competitors' prices. He also said that when GAK found a competitor advertising one or more of the Relevant Products below the Minimum Price, GAK would often match it, or threaten to match it, at least temporarily,²⁵¹ pending rectification by Yamaha of the non-compliance with the Yamaha Pricing Policy by GAK's competitors. Yamaha would achieve this by ensuring that prices of those Relevant Products returned to at least the Minimum Price.²⁵²

Occasional 'cheating' by GAK during the Relevant Period no impediment to a finding of an agreement and/or concerted practice with Yamaha UK

- 4.61 Some of the evidence suggests that GAK did not fully comply with Yamaha's requests and/or instructions at all times. On occasion throughout the Relevant Period, GAK 'cheated' on the Minimum Price, that is, it lowered its price for the Relevant Products to below the Minimum Price even when none of its competitors had first done so.

²⁵⁰ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.252, lines 19-24. Yamaha stated in its representations made to the CMA on 12 June 2020 that it did not offer price protection on resale prices, and that protection was only available on trade (i.e. wholesale) prices with credit sometimes offered to resellers when Yamaha had subsequently lowered trade prices. URN C_YAM02139 (Yamaha submission to the CMA dated 12 June 2020).

²⁵¹ For example, see [GAK Senior Employee 3's] statement at interview '[Yamaha Employee 2] expects that if there's someone that is cheaper, then we [GAK] may well move down to the price they're at.' URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.213, lines 15-16.

²⁵² For example, see [Yamaha Employee 2] statement, 'unless I speak to the Resellers listed and resolve their price, GAK would drop their price to match the other Resellers, which could then create a cascade effect and Resellers who follow GAK would then match too.' URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 9.

4.62 [Yamaha Employee 1] of Yamaha stated that:

*'While GAK was quick to complain about other Resellers not adhering to the Yamaha Pricing Policy, it was also quick to take advantage of not adhering itself. I recall one weekend where they had dropped their prices to maximise sales until the [Yamaha] reps came back to work on Monday morning. I asked GAK on the Monday to make sure they adhered to the Yamaha Pricing Policy'.*²⁵³

4.63 Senior GAK employees confirmed at interview that GAK tended to revert to the Minimum Price when 'caught', for fear of sanctions.²⁵⁴ This indicates that GAK did consider there to be an agreement and/or concerted practice between it and Yamaha that it would generally implement the Yamaha Pricing Policy. However, based on the totality of the evidence in the CMA's possession (see further evidence detailed by year in paragraphs 4.74 to 4.143), GAK's 'cheating' appears to have happened from time to time, and in general GAK did adhere to the Yamaha Pricing Policy.

4.64 From a legal point of view, GAK's non-compliance in part and/or its 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.²⁵⁵

GAK monitoring and reporting other resellers who did not comply with the Yamaha Pricing Policy during the Relevant Period

4.65 As set out above, during the Relevant Period GAK was actively watching its competitors' online pricing. On numerous occasions during the Relevant Period, GAK reported other resellers to Yamaha for advertising or selling the Relevant Products online below the Minimum Price. In the CMA's view, this too confirms that GAK understood there to be an agreement and/or concerted practice in relation to the Yamaha Pricing Policy which meant that

²⁵³ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 5.

²⁵⁴ At interview, [GAK Senior Employee 3] of GAK stated: *'Well, if they [Yamaha] highlighted products to us [GAK] where we were out and if the threat was that you [...] won't be seeing anymore [sic] of those, or you won't see them for the time, and you're going to lose a bit of discount as well, the only thing you can do is, "Okay, I'm sorry, we haven't gone to your latest price list. We'll [...] obviously do that to make sure that we maximise the margins that you're going to be able to offer us."*' URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.136, lines 6-11.

²⁵⁵ Furthermore, the CMA finds that the evidence of 'cheating' is offset by the volume and quality of evidence (set out in detail below) indicating that GAK 'agreed' with the Yamaha Pricing Policy and that at any given time during the Relevant Period, GAK was generally supportive of, and agreed to abide by, or acquiesced in, the Yamaha Pricing Policy for the majority of Relevant Products.

it would not advertise or sell the Relevant Products below the Minimum Price.

4.66 Senior GAK employees told the CMA that GAK matched resellers' prices on a daily basis.²⁵⁶ This was done by comparing reseller prices on [X] against the YML pricelist, which GAK price-scanning software would automatically match to.²⁵⁷ GAK would then email Yamaha with pricing information for other resellers with the expectation that Yamaha would follow-up with the relevant reseller.

4.67 At interview, [GAK Senior Employee 3] of GAK acknowledged GAK's policing of the Yamaha Pricing Policy with other resellers:

*'If [...] you could report other people because you can say, "Look, we've done what you've asked us. You've [...] asked us for that [...] you've got to be fair for us, it's got to be fair for everyone, are you aware that these others are not doing that". Now, whether they want to have conversations about that is entirely up to them, but [...] you would be told, "Well, they won't get the stock or they've lost the discount."'*²⁵⁸

4.68 In fact, the evidence indicates that GAK was particularly active in policing the Yamaha Pricing Policy. [Yamaha Employee 1] of Yamaha stated: *'GAK were particularly enthusiastic about monitoring the market – they held a lot of stock and complained when their sales volume dropped because they perceived we were not as robust at monitoring the Yamaha Pricing Policy as we had said we would be.'*²⁵⁹

Evidence indicating the continuation of GAK's adherence to the Yamaha Pricing Policy following the Yamaha 2014 Compliance Directive

4.69 As set out in paragraphs 4.114 to 4.120, after October 2014 Yamaha implemented a new 'compliance directive' ('Compliance Directive') instructing Yamaha sales representatives to minimise contact about the Yamaha Pricing Policy by email. From October 2014 the documentary evidence of the agreement and/or concerted practice between Yamaha and

²⁵⁶ See statement from [GAK Employee 1] of GAK: *'we [GAK] would monitor, and match prices on a daily basis.'* URN C_YAM01827.1 (Transcript of interview on 25 September 2019 with [GAK Employee 1], GAK), p.145, lines 8-9.

²⁵⁷ [GAK Senior Employee 3] stated at interview *'my individual sales staff would be looking [...] at [X] [...]. But our tracker would be looking at YML.'* URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.155, lines 13-21.

²⁵⁸ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.132, lines 6-12.

²⁵⁹ URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 6.

GAK therefore becomes sparser as communications between Yamaha and GAK about reseller pricing were predominantly carried on by telephone rather than by email.

- 4.70 The evidence shows that, from at least October 2014, Yamaha began to respond to GAK's complaints about other resellers' non-adherence to the Yamaha Pricing Policy with emails which contained legally-reviewed messaging stating that Yamaha would not discuss pricing, and providing a telephone number, appearing to suggest that the recipient might want to call.
- 4.71 Senior Yamaha and GAK employees confirmed that the agreement and/or concerted practice between Yamaha and GAK continued via oral communications, predominantly by telephone, and that GAK continued to participate in and generally adhere to the Yamaha Pricing Policy.^{260, 261}
- 4.72 The evidence shows that GAK's participation in, and general adherence to the Yamaha Pricing Policy continued until the withdrawal of the YML pricelist and Purple Book by Yamaha at the end of the Relevant Period.

Detailed evidence by year supporting a finding of agreement and/or concerted practice between GAK and Yamaha UK throughout the Relevant Period

- 4.73 As outlined in paragraphs 4.39 to 4.41, the evidence indicates an awareness on the part of both Yamaha and GAK that there was a Yamaha Pricing Policy in place during the Relevant Period. The following section sets out evidence for each year during the Relevant Period which supports the CMA's finding that there was an agreement and/or concerted practice

²⁶⁰ For example, [Yamaha Employee 1] of Yamaha stated: 'When a rep received an email from a Reseller about the Yamaha Pricing Policy (e.g. a complaint about another Reseller's prices), the rep's role was to call the Reseller to resolve the problem offline and follow this up with a "compliant" email response. [X] if a sales rep was on holiday or if the Reseller felt the sales rep was not achieving the desired outcome. From time to time, [X] and I do recall having verbal conversations about the Yamaha Pricing Policy with [GAK Senior Employee 3] and [GAK Employee 1] at GAK by phone and face to face.' URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 3.

²⁶¹ See for example [GAK Senior Employee 3] of GAK statement at interview, 'I do recall that they [Yamaha] still wanted you [resellers] to look at YML and use that as the base [Minimum Price benchmark].' URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.325, lines 12-13. And, in reference to the period after October 2014, 'that [the Yamaha Pricing Policy] would have been definitely communicated by either a phone call or the next time he [Yamaha Employee 3] came [...] in to see us [GAK] in the business.' When asked if it was fair to say that the Yamaha email responses pretended to say one thing, but the communications between Yamaha and GAK over the phone and in person were different, [GAK Senior Employee 3] confirmed 'Yeah.' URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.327, lines 16-26.

between Yamaha UK and GAK that GAK would adhere to the Yamaha Pricing Policy throughout the Relevant Period.

2013

- 4.74 The CMA finds that the evidence set out below indicates that there was an agreement and/or concerted practice between Yamaha and GAK that GAK would adhere to the Yamaha Pricing Policy throughout 2013.

GAK's agreement with and general adherence to the Yamaha Pricing Policy

- 4.75 For example, on 1 March 2013, [Yamaha Employee 3] of Yamaha emailed [GAK Senior Employee 1] of GAK with the subject line '*Help with prices*', requesting that GAK look at ten Yamaha MI products and '*to match [Reseller 7] or [Reseller 6]*', stating '[GAK Employee 2] *sorted the guitars today*.'²⁶² The CMA considers this reference to [GAK Employee 2] having 'sorted' the guitars, to mean that GAK had raised its guitar prices to comply with the Yamaha Pricing Policy earlier that day.
- 4.76 [GAK Senior Employee 1] forwarded [Yamaha Employee 3's] email to [GAK Employee 1] of GAK on 1 March 2013, to which [GAK Employee 1] responded on 2 March 2013 with '*/// [sic] sort today mate, no bother*.'²⁶³
- 4.77 [GAK Employee 1] explained at interview, '*my interpretation is, [Yamaha Employee 3's] been asked to look at key prices. They've looked at ours and we're cheap on a load of stuff, in their opinion [...] So he's said we're cheap on core products. And he's asked us to, to match [Reseller 7] or [Reseller 6], because maybe they're not cheap*.'²⁶⁴
- 4.78 The CMA considers this shows GAK's adherence to a request from Yamaha to raise its prices in line with the Yamaha Pricing Policy by matching other resellers, confirming it would 'sort' the prices (subsequent to Yamaha confirming GAK had already 'sorted' guitar prices earlier that day).
- 4.79 As another example, on 25 November 2013, [Yamaha Employee 2] of Yamaha emailed a list of Yamaha MI products to [GAK Senior Employee 3] of GAK with accompanying prices under the heading '*to solve*' and asked

²⁶² URN E_YAM00007 (Email from [Yamaha Employee 3], Yamaha to [GAK Senior Employee 1], GAK dated 1 March 2013).

²⁶³ URN E_YAM00007 (Email from GAK [Senior Employee 1], GAK to [GAK Employee 1], GAK dated 2 March 2013).

²⁶⁴ URN C_YAM01827.1 (Transcript of interview on 25 September 2019 with [GAK Employee 1], GAK), p.79 lines 16-23.

*'Can you solve the following by Weds am please. Of course others are being asked to do the same.'*²⁶⁵

- 4.80 On 27 November 2013 [GAK Senior Employee 3] responded to [Yamaha Employee 2] stating *'Done - I will check [Reseller 16] and [Reseller 8] tonight they need to be in line to [sic] - ALL GAK PRICES SHOULD NOW BE IN LINE.'*²⁶⁶
- 4.81 [GAK Senior Employee 3] explained at interview, in reference to this email, that *'This is typically a email that's come through from [Yamaha Employee 2], where [Yamaha Employee 2's] trying to make sure that everyone is up at the agreed price list that Yamaha issued.'*²⁶⁷
- 4.82 [Yamaha Employee 2] explained in reference to this email, *'The expectation would have been for GAK to increase their prices to comply with the Yamaha Pricing Policy. GAK would have expected us to contact the Resellers listed in my initial email to [GAK Senior Employee 3] and his response [...] asking them to also comply with the Yamaha Pricing Policy.'*²⁶⁸
- 4.83 In the CMA's view this also shows that GAK agreed to a request from Yamaha to 'solve' or raise its prices to come in line with the Yamaha Pricing Policy. This also shows GAK's participation in policing and reporting non-compliant resellers to Yamaha. The CMA concludes that GAK therefore had a shared understanding and expectation with Yamaha that Yamaha was implementing the Yamaha Pricing Policy across resellers and would act upon information from GAK.

GAK monitoring and reporting other resellers

- 4.84 Further evidence in 2013 demonstrates GAK's daily policing and reporting of other resellers to Yamaha. For example, on 6 November 2013, [GAK Senior Employee 3] of GAK emailed [Yamaha Employee 2] of Yamaha a list of

²⁶⁵ URN C_YAM00981.3/C_YAM03551 (Email from [Yamaha Employee 2], Yamaha to [GAK Senior Employee 3], GAK, dated 25 November 2013).

²⁶⁶ URN C_YAM00981.3/C_YAM03551 (Email from [GAK Senior Employee 3], GAK to [Yamaha Employee 2], Yamaha dated 27 November 2013).

²⁶⁷ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.217, lines 7-9.

²⁶⁸ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 10.

other resellers' weblinks and prices for Yamaha MI products and stated, *'please sort before I match tomorrow mate.'*²⁶⁹

4.85 [Yamaha Employee 2] forwarded [GAK Senior Employee 3's] email on the same day to several Yamaha personnel and stated *'top priority please...if we don't solve quickly GAK will track and then the slippery slope will kick in.'*²⁷⁰

4.86 In response to a CMA request for information, [Yamaha Employee 2] stated in reference to this email:

*'By sending this email to me, [GAK Senior Employee 3] was pointing out a number of products for which certain Resellers were advertising below what the price should have been according to the Yamaha Pricing Policy. [GAK Senior Employee 3] was therefore suggesting that unless I speak to the Resellers listed and resolve their price, GAK would drop their price to match the other Resellers, which could then create a cascade effect and Resellers who follow GAK would then match too. The "slippery slope" comment, refers to the fact that once some of the larger more visible online Resellers (e.g. GAK) reduce their prices, many other Resellers who follow these retailers will also reduce their prices.'*²⁷¹

4.87 A statement made by [GAK Senior Employee 3] at interview, with reference to the above email exchange, supports [Yamaha Employee 2's] explanation: *'[Yamaha Employee 2] expects that if there's someone that is cheaper, then we [GAK] may well move down to the price that they're at.'*²⁷²

4.88 The CMA considers that this shows GAK's participation in the Yamaha Pricing Policy, with a clear expectation that Yamaha would act on information received from GAK to implement the Yamaha Pricing Policy across resellers, and that GAK would drop its price to match its competitors, should Yamaha fail to do so.

²⁶⁹ URN C_YAM01360/E_YAM01379 (Email from [GAK Senior Employee 3], GAK to [Yamaha Employee 2], Yamaha dated 6 November 2013).

²⁷⁰ URN C_YAM01360/E_YAM01379 (Email from [Yamaha Employee 2], Yamaha to Yamaha staff dated 6 November 2013).

²⁷¹ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 9.

²⁷² URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.213, lines 15-16.

2014

- 4.89 The evidence set out below indicates that that there was an agreement and/or concerted practice between Yamaha and GAK that GAK would adhere to the Yamaha Pricing Policy throughout 2014.

GAK's agreement with and general adherence to the Yamaha Pricing Policy

- 4.90 The evidence for 2014 also shows that GAK generally adhered to the Yamaha Pricing Policy and that GAK continued to comply with requests by Yamaha to bring its prices into line with the Yamaha Pricing Policy.
- 4.91 For example, on 14 January 2014, [Yamaha Employee 3] of Yamaha sent an email to [Employee] of [Reseller 1] stating *'We are requesting that all key dealers move in line with [Reseller 6] by 5pm this Wednesday to resolve a few issues that have cropped up over the Christmas period. The majority of your products are completely sorted and I will provide a report in the morning of any that need adjusting [...] We have assurance that [Reseller 16] and GAK will 100% be with us on this.'*²⁷³
- 4.92 This evidence shows that GAK provided some form of commitment to Yamaha that it would adhere to the Yamaha Pricing Policy and move its prices in line with a specified reseller, as Yamaha was requesting of other resellers.

GAK monitoring and reporting other resellers

- 4.93 As in 2013, the evidence for 2014 indicates GAK's continuation of daily policing and active and regularly reporting of other resellers' non-adherence to the Yamaha Pricing Policy.
- 4.94 For example, on 16 January 2014, [GAK Employee 1] of GAK emailed [Yamaha Employee 2] of Yamaha stating:
- 'Hi [Yamaha Employee 2]. We adjusted our marketing accordingly yesterday. Still a few stragglers which will need cleaning up, [Reseller], [Reseller 16] [...] There's a query on the guitar pricing also, [GAK Employee 2], from our guitar department was saying that the suggested*

²⁷³ URN E_YAM01438 (Email from [Yamaha Employee 3], Yamaha, to [Reseller 1 Employee], [Reseller 1] dated 14 January 2014).

prices were different to what other people had moved to. Could you take a look for us?’²⁷⁴

4.95 At interview [GAK Employee 1] explained, in reference to ‘there’s still a few stragglers’ that this would *‘indicate that that was related to pricing and we’re saying, “These guys haven’t gone in with the particular price list that you’ve [Yamaha has] asked us to go with.”’²⁷⁵*

4.96 On 30 January 2014, [GAK Senior Employee 3] of GAK emailed [Yamaha Employee 2] of Yamaha some weblinks to other resellers’ Yamaha guitar listings stating *‘[w]e went to street yesterday and have hardly sold anything since doing this, if everyone else isn’t at street by the morning we will have to match.’²⁷⁶*

4.97 At interview [GAK Senior Employee 3] explained in reference to this email:

‘I will send this email pointing out this isn’t fair; you’ve [Yamaha], you’ve issued this; I’ve done this [adhered to the Yamaha Pricing Policy]; but these other dealers either haven’t listened to you, haven’t had the emails, or you’re not interested in that, but as a consumer, you will go -- you want to save as much money as you can.’²⁷⁷

4.98 The evidence shows GAK’s continued adherence to requests from Yamaha to price in line with the Yamaha Pricing Policy (or ‘go to street’) as well as a clear understanding from GAK that there was a Yamaha Pricing Policy that all resellers should be adhering to, and an expectation that Yamaha would bring any non-compliant resellers in line with the Yamaha Pricing Policy.

GAK’s agreement with and adherence to the Yamaha Pricing Policy as regards the YML pricelist and Purple Book

4.99 As outlined in paragraphs 3.105 to 3.111, the evidence indicates that Yamaha introduced the Purple Book in July 2014 and thereafter required its Selective Resellers, including GAK, to price match the YML website for all MI listings, including Relevant Products. The evidence shows that this prompted GAK to introduce price-matching software that would automatically price-match GAK’s online prices to the YML website (in addition to the price-

²⁷⁴ URN C_YAM00988.1/C_YAM03552 (Email from [GAK Employee 1], GAK to [Yamaha Employee 2], Yamaha dated 16 January 2014).

²⁷⁵ URN C_YAM01827.1 (Transcript of interview on 25 September 2019 with [GAK Employee 1], GAK), p.100, line 9-12.

²⁷⁶ URN C_YAM01001.1 (Email from [GAK Senior Employee 3], GAK to [Yamaha Employee 2], Yamaha dated 30 January 2014).

²⁷⁷ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.238, lines 6-10.

scanning software GAK already had in place, which GAK explained was to track the prices of GAK's biggest competitors).

4.100 At interview, [GAK Senior Employee 3] of GAK outlined, in reference to price-matching YML: *'we actually invested [...] at our own cost not -- well, cost by Yamaha [...] an online [...] comparison site like tracker [...] That sent our link to their link and if they changed ours will automatically change. Because you're told that that's what everyone's going to be using and you were like, "Okay. That sounds okay if everyone does that"'*²⁷⁸ and *'I can't recall the exact date but I think it was late 2014 start of 2015'*²⁷⁹ and that it continued until *'a lot of things changed in, in 2017.'*²⁸⁰

4.101 In 2014, following Yamaha's introduction of the requirement to match YML pricelists, GAK bought and used software to track, and at the touch of a button to match, YML's prices for all MI listings on its website, including Relevant Products.²⁸¹ This evidence indicates that GAK agreed to match YML's prices in order to comply with the Yamaha Pricing Policy, given GAK's understanding that it might face sanctions were it not to comply.

4.102 On 7 July 2014, [GAK Senior Employee 3] of GAK emailed other GAK employees, including [GAK Senior Employee 2] and [GAK Senior Employee 1] with a message entitled *'Yamaha pricing IMPORTANT'* stating the following:

*'Please can no one change any Yamaha pricing online, we are now matched to the [YML] website and to keep our full 25% margin plus retro we have to stay inline [...] They [Yamaha] are cutting accounts this week and will take 5% off every dealer if they do not commit to the 5 Yamaha rules.'*²⁸²

4.103 At interview [GAK Senior Employee 3], in reference to this email, clarified:

'That was a direct conversation saying that, "If you didn't do that [adhere to the YML pricelist], you, you wouldn't get your retros or your margin" [...] again, what was made clear to me was that Yamaha would be cutting

²⁷⁸ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.129, lines 18-26.

²⁷⁹ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.160, lines 18-19.

²⁸⁰ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.161, line 1.

²⁸¹ See paragraphs 4.65 to 4.68 above.

²⁸² URN E_YAM00045/C_YAM02637 (Email from [GAK Senior Employee 3], GAK to GAK staff dated 7 July 2014).

*accounts and will take 5% off every dealer if they did not commit to the five new Yamaha rules outlined in the Purple Book.'*²⁸³

- 4.104 A further example shows GAK's understanding that it should remain in line with the YML pricelist, or potentially face sanctions from Yamaha. On 31 July 2014, [GAK Senior Employee 3] of GAK emailed [GAK Senior Employee 1], copying in [GAK Senior Employee 2], both also of GAK with a message entitled '*Yamaha pricing from today*' – in which he stated:

*'We have to go live with the YML prices today so we are in line for this evening or we will lose discount and risk the account being put on stop. Please do not change the prices from today onwards. I am going to spend a lot time tonight and tomorrow monitoring other prices and reporting so they [Yamaha] can take action.'*²⁸⁴

- 4.105 The CMA finds that the evidence not only demonstrates GAK's adherence to the Yamaha Pricing Policy, and a fear of potential sanctions for non-adherence, but also demonstrates an understanding on GAK's part that the Yamaha Pricing Policy applied across all of Yamaha's UK MI resellers. The CMA also finds that this evidence indicates GAK's active policing of the Yamaha Pricing Policy and that GAK was accustomed to reporting instances of other resellers' non-adherence to it (on this point see also paragraphs 4.109 to 4.113 below).

- 4.106 An example of the use of the Purple Book as a means of communicating with and/or enforcing the Yamaha Pricing Policy in respect of GAK can be seen in an email of 15 September 2014 from [Yamaha Employee 2] of Yamaha to [Yamaha Employee 3] of Yamaha '*URGENT action required*' – in which he asks '*Can you check these listings with some urgency for PB [Purple Book] infringements please?*' and includes several links to resellers' websites, including GAK. [Yamaha Employee 3] responded to [Yamaha Employee 2] on the same day with '*GAK are PB compliant now.*'²⁸⁵

- 4.107 In response to an information request, [Yamaha Employee 2] explained in relation to this email correspondence that:

'I emailed [Yamaha Employee 3] to ask GAK to increase their prices. From recollection, [Yamaha Employee 3] would have checked the guitars

²⁸³ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.256, lines 22-26.

²⁸⁴ URN E_YAM00064/C_YAM02656 (Email from [GAK Senior Employee 3], GAK, to GAK staff dated 31 July 2014).

²⁸⁵ URN C_YAM01034 (Email from [Yamaha Employee 3], Yamaha to [Yamaha Employee 2], Yamaha, dated 15 September 2014).

*in the links on both GAK's website and GAK's physical store for any quality issues as defined in the Purple Book and would have then called GAK. While [Yamaha Employee 3's] conversation with GAK would suggest to them that we had a quality issue with the guitars, they would understand that we are asking them to adjust their prices to comply with the Yamaha Pricing Policy. It is my recollection that GAK always understood these Purple Book requests and were quick to respond and participate in the Yamaha Pricing Policy.'*²⁸⁶

- 4.108 The CMA finds that the Purple Book was used by Yamaha as a means of indirectly implementing the Yamaha Pricing Policy in respect of GAK. The CMA considers that GAK understood Purple Book conversations and requests as an instruction from Yamaha to adhere to the Yamaha Pricing Policy, with which GAK generally complied.

GAK's monitoring and reporting of other resellers

- 4.109 There are further examples of GAK's continued daily policing and reporting of other non-compliant resellers later in 2014. For example, on 4 August 2014 [GAK Senior Employee 3] of GAK emailed [Yamaha Employee 2] of Yamaha with the subject line '[Reseller 16] *difference*.'
- ²⁸⁷
- This email comprised of several pages with weblinks to the other resellers' Yamaha MI listings and GAK's associated prices.
- 4.110 At interview, [GAK Senior Employee 3] explained, '*I'm highlighting the fact that we are at the agreed YML price [...] but the [Reseller 16] prices wouldn't have been anywhere near that*'²⁸⁸ and '*if they're [Yamaha is] saying to us, "You can't get the stock or you lose discounts" I would expect the same thing to happen to another retailer, absolutely.*'²⁸⁹
- 4.111 On the same day [GAK Senior Employee 3] of GAK sent a separate email to [Yamaha Employee 2] of Yamaha with the subject line '[Reseller 9]'
- ²⁹⁰
- in

²⁸⁶ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 11.

²⁸⁷ URN PL00453 (Email from [GAK Senior Employee 3], GAK to [Yamaha Employee 2], Yamaha, dated 4 August 2014).

²⁸⁸ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.298, line 23 to p.299, line 2.

²⁸⁹ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.301, lines 1-3.

²⁹⁰ URN C_YAM01020 (Email from [GAK Senior Employee 3], GAK to [Yamaha Employee 2], Yamaha, dated 4 August 2014).

which he included two weblinks to an electric guitar supplied by Yamaha on [Reseller 9's] website and YML's website.

- 4.112 At interview [GAK Senior Employee 3] explained, in relation to this email, that:

*'Our sales are down. There are still others in the UK that are not close to the YML prices [...] And a request -- and actually, there's a link there to what the Yamaha Music London price should be [...] This is a very big -- well, [Reseller 9] that absolutely should have had the capability to go to the YML prices.'*²⁹¹

- 4.113 This evidence demonstrates that GAK understood that the Yamaha Pricing Policy applied across all of Yamaha's UK MI resellers and that GAK was active in policing and reporting other resellers' non-adherence to the Yamaha Pricing Policy to Yamaha in the expectation that Yamaha would bring such resellers' prices into line with the Yamaha Pricing Policy.

GAK's continued agreement with and adherence to the Yamaha Pricing Policy following the Yamaha 2014 Compliance Directive

- 4.114 The evidence indicates that in October 2014 Yamaha introduced the Compliance Directive across its sales teams²⁹² aiming to minimise contact with resellers, including GAK, about advertised prices by email while it continued to implement the Yamaha Pricing Policy by phone or in person.
- 4.115 The CMA notes the email evidence from late 2014 onwards is less abundant. However, in the context of the Compliance Directive that aimed to cease or limit email communications between Yamaha and resellers on the Yamaha Pricing Policy, this is not unexpected. In support of this, the evidence suggests that Yamaha did implement the Compliance Directive across resellers, including GAK.
- 4.116 For example, on 25 November 2014, [GAK Employee 2] of GAK emailed [Yamaha Employee 3] of Yamaha '*Fwd: Yamaha Price Check*' - in which he stated '*Hi [Yamaha Employee 3], we've found a fair few prices we're being undercut on online. Can you let us know what you reckon to these?*'²⁹³ and

²⁹¹ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.302, line 26 to p.303, line 12.

²⁹² As outlined in paragraphs 4.69 to 4.72 above.

²⁹³ URN C_YAM01068 (Email from [GAK Employee 2], GAK, to [Yamaha Employee 3], Yamaha, dated 25 November 2014).

attached an email with a number of weblinks to other resellers' Yamaha guitar listings.

- 4.117 [Yamaha Employee 3] replied on the same day with '*I am not sure what the goal is in sharing these links. However, we are confident that you are fully aware that there is no possibility for Yamaha to be involved in pricing matters as our dealers are free to sell at a price that they determine. If there are other issues to be discussed please feel free to call me on [...]*',²⁹⁴
- 4.118 At interview, [GAK Senior Employee 3] of GAK explained, in relation to this email '*what [Yamaha Employee 3's] done is [...] quite clearly put his phone number on there. Why [...] would he need to put his phone number there [...] if he's probably not wanting you to lift the phone and, hello, "What are you talking about?"*', and when asked how GAK came to an understanding that despite these types of email responses it was still required to adhere to the Yamaha Pricing Policy, [GAK Senior Employee 3] stated '*That would have been definitely communicated by either a phone call or the next time he came [...] in to see us in the business.*'²⁹⁵
- 4.119 [GAK Senior Employee 3] further added '*I do recall that they [Yamaha] still wanted you [resellers] to look at YML and use that as the base [Minimum Price benchmark].*'²⁹⁶
- 4.120 The CMA considers that this email together with [GAK Senior Employee 3's] interview statements demonstrates the Yamaha Compliance Directive being implemented. An email response giving an appearance of compliance was sent by Yamaha in response to a complaint received from GAK, it nevertheless being understood that GAK would continue to adhere to the Yamaha Pricing Policy. The CMA notes the inclusion of [Yamaha Employee 3] statement '*please feel free to call me,*' which [GAK Senior Employee 3] at interview (see above, paragraph 4.118 above) was viewed by GAK as a signal to call Yamaha to discuss the Yamaha Pricing Policy orally, without leaving a written email record.

²⁹⁴ URN C_YAM01068 (Email from [Yamaha Employee 3], Yamaha, to [GAK Employee 2], GAK, dated 25 November 2014).

²⁹⁵ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.327, lines 3-17.

²⁹⁶ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.325, lines 12-13.

2015

- 4.121 The evidence set out below indicates that that there was an agreement and/or concerted practice between Yamaha and GAK that GAK would adhere to the Yamaha Pricing Policy throughout 2015.
- 4.122 The CMA considers that the evidence for 2015 indicates that GAK, in general, continued to participate in and adhere to the Yamaha Pricing Policy, notwithstanding the introduction of apparently compliant email responses sent by Yamaha to GAK that seemed to contradict the approach of the Yamaha Pricing Policy. The CMA finds that apparently compliant wording such as that quoted in paragraph 4.117 was produced by Yamaha to give the appearance of compliance with the law, while nonetheless enabling Yamaha to continue to seek GAK's adherence to the Yamaha Pricing Policy by means of telephone calls and personal meetings.

GAK's monitoring and reporting of other resellers

- 4.123 As in previous years, there are further examples of GAK's continued frequent policing and reporting of other non-compliant resellers. For example, on 13 May 2015, [GAK Senior Employee 3] of GAK emailed [Yamaha Employee 2] of Yamaha with the subject line 'look' and included a list of other resellers' weblinks to, and prices for, Yamaha MI products. [Yamaha Employee 2] replied on 14 May 2015 stating '*Thank you for your email, although I must make clear that Yamaha does not operate any kind of price maintenance. However, thank you for your time on the phone high lighting [sic] the current exchange rate between UK and EU retailers.*'²⁹⁷ GAK's terse and somewhat cryptic (when read in isolation) email suggests that GAK was also prepared to 'go along' with Yamaha's deliberately opaque email communication style. The CMA finds that this is because GAK was aware of the at least questionable legality of the arrangements in question.

- 4.124 In response to a CMA request for information [Yamaha Employee 2] stated:

'The purpose of the email was to point out to us that these Resellers are selling guitars below Yamaha Pricing Policy's minimum prices and probably below GAK's current online retail price. I don't recall specifically what action was taken, but I believe it would have been a phone call to [GAK Senior Employee 3] shortly afterwards telling him that we would sort

²⁹⁷ URN C_YAM01072 (Email from [Yamaha Employee 2], Yamaha, to [GAK Senior Employee 3], GAK, dated 14 May 2015).

*it out. [GAK Senior Employee 3] would usually respond asking me what I was going to do about it and when I would take action.'*²⁹⁸

4.125 From the context, the CMA finds that 'sort it out' refers to Yamaha contacting the non-compliant resellers to ask them to adhere to the Yamaha Pricing Policy.

4.126 As another example, on 21 October 2015 [GAK Senior Employee 3] of GAK emailed [Yamaha Employee 2] and [Yamaha Employee 3], both of Yamaha, with the subject line '*Tomorrows meeting*' – in which he stated '*Hi [Yamaha Employee 2], please cast your eyes over the below*'²⁹⁹ and included weblinks to other resellers' Yamaha MI listings. [Yamaha Employee 2] responded on the same day '*As per previous emails please not [sic] Yamaha does not have any kind of Yamaha Pricing Policy and resellers are free to set their own re sales prices.*'³⁰⁰

4.127 In response to a CMA request for information, [Yamaha Employee 2] stated in relation to this email that:

*'As the email contains web links to other Resellers, my understanding was that [GAK Senior Employee 3] was asking if we will take action regarding these other Resellers i.e., will we ask them to comply with the Yamaha Pricing Policy. From recollection, it is likely that we would have contacted the other Resellers and requested they adjust their prices to comply with the Yamaha Pricing Policy. I would have also called [GAK Senior Employee 3] and asked him to stop sending these emails.'*³⁰¹

4.128 This evidence demonstrates GAK's continued participation in the Yamaha Pricing Policy, notwithstanding the content of Yamaha's email responses that were calculated to create a façade of compliance. This is supported by [GAK Senior Employee 3's] statement at interview, that '*at that point their*

²⁹⁸ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 12.

²⁹⁹ URN C_YAM01074 (Email from [GAK Senior Employee 3], GAK to [Yamaha Employee 2], Yamaha, dated 21 October 2015).

³⁰⁰ URN C_YAM01074 (Email from [Yamaha Employee 2], Yamaha to [GAK Senior Employee 3], GAK, dated 21 October 2015).

³⁰¹ URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 13. GAK stated in its representations to the CMA on 11 June 2020 that [GAK Senior Employee 3] does not recall receiving any phone call from [Yamaha Employee 2] asking him to stop sending emails with product listings from other Resellers. URN C_YAM02129 (Email from GAK to CMA, dated 11 June 2020).

[Yamaha's] *expectations* [of adherence to the Pricing Policy] *hadn't changed, but they weren't by email certainly wanting to receive anything.*'³⁰²

- 4.129 The CMA concludes that GAK continued to police and report other non-compliant resellers, and that GAK continued to participate in and adhere to the Yamaha Pricing Policy primarily via oral communications throughout 2015.

GAK's continued agreement with and adherence to the Yamaha Pricing Policy following receipt of the CMA advisory letter in October 2015

- 4.130 As outlined in paragraph 2.11 above, on 21 October 2015 the CMA sent an advisory letter to GAK in respect of conduct similar to the conduct investigated in this case. The evidence shows that following receipt of the CMA's advisory letter, GAK did not take effective action to discontinue its participation in and adherence to the Yamaha Pricing Policy. On the contrary, the evidence indicates that GAK continued its participation in, adherence to, and policing of the Yamaha Pricing Policy through 2015, into 2016 and beyond.

2016

- 4.131 The evidence set out below indicates that that there continued to be an agreement and/or concerted practice between Yamaha and GAK, that GAK would adhere to the Yamaha Pricing Policy throughout 2016.

GAK's agreement with and adherence to the Yamaha Pricing Policy

- 4.132 As an example of the continuation of the Infringement, on 4 January 2016, [GAK Senior Employee 1] of GAK sent an internal email to [GAK Senior Employee 2], copied to [GAK Senior Employee 3], both also of GAK, stating, in reference to a digital piano '[Reseller] at £369 mate [...] *Were you told to put price up?*'³⁰³ [GAK Senior Employee 2] replied on the same day with '*I noticed [GAK Senior Employee 3] put it up to £425 yesterday so [Yamaha Employee 2] may have called him [GAK Senior Employee 3] but I think at £369 we're losing [sic] money after the Amazon fees.*'³⁰⁴

³⁰² URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.337, lines 11-12.

³⁰³ URN E_YAM00085 (Email from [GAK Senior Employee 1], GAK, to [GAK Senior Employee 2], GAK, dated 4 January 2016).

³⁰⁴ URN E_YAM00086 (Email from [GAK Senior Employee 2], GAK, to [GAK Senior Employee 1], GAK, dated 4 January 2016).

- 4.133 The CMA considers that that this email exchange, in which [GAK Senior Employee 2] suggests that the GAK price may have been increased as a result of a request from Yamaha, indicates a continued understanding between Yamaha and GAK that the Yamaha Pricing Policy was still in place in 2016, and that GAK continued to be willing to raise its prices to at least the Minimum Price when asked by Yamaha.

GAK's monitoring and reporting of other resellers

- 4.134 As an example of GAK's continued daily monitoring and reporting of other resellers, on 19 January 2016, [GAK Employee 1] of GAK sent an internal email to [GAK Senior Employee 3] with the subject line '*One for [Yamaha Employee 2]?*' and included a weblink to another reseller's piano listing. [GAK Senior Employee 3] responded the same day with, '*Reported though [Yamaha Employee 2] is @ NAMM³⁰⁵ I'd hope [Yamaha Employee 2] puts a call in with someone to sort this.*'³⁰⁶

- 4.135 At interview [GAK Senior Employee 3] explained in relation to this email:

*'[T]hey're [the other reseller] not sticking to anything [...] that Yamaha would've stated at the time [...] It is the start -- the start of a new year; are we, are we going to the suggested streets or are we not [...] I would've thought over previous years that [Yamaha Employee 2] would do the same thing as what [Yamaha Employee 2] historically has done: [Yamaha Employee 2] would send that to one of the reps that looks after [the other reseller].'*³⁰⁷

- 4.136 The CMA considers this to be an example of GAK's contemporaneous understanding that the Yamaha Pricing Policy was still in force, GAK's continued participation in the Yamaha Pricing Policy, and GAK's continued policing and reporting of other resellers not adhering to the Yamaha Pricing Policy.
- 4.137 Further examples of GAK's continued policing and monitoring of non-compliant resellers can be seen in emails of 24 November 2016. [GAK Senior Employee 3] of GAK emailed [Yamaha Employee 1] of Yamaha with

³⁰⁵ NAMM refers to the National Association of Music Merchants, and in this context is taken to mean the annual NAMM trade show.

³⁰⁶ URN E_YAM00094/C_YAM02686 (Email from [GAK Senior Employee 3], GAK, to [GAK Employee 1], GAK, dated 19 January 2016).

³⁰⁷ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.366, line 24 to p.368, line 4.

the subject line '*Black Friday Piano Sale*'³⁰⁸ and included a screenshot of another reseller's Yamaha MI product listings and sale prices. On the same day, [GAK Senior Employee 3] sent another email to [Yamaha Employee 1] and [Yamaha Employee 2] also of Yamaha with the subject line '*Black Friday Sale*'³⁰⁹ – in which he included a screenshot of another reseller's Yamaha MI sale.

- 4.138 In response to a CMA request for information, [Yamaha Employee 1] of Yamaha explained that the purpose of GAK sending these emails was to complain about other resellers not adhering to the Yamaha Pricing Policy with the expectation that Yamaha would contact the non-compliant resellers to ask them to comply. [Yamaha Employee 1] recalled that this was done in light of Yamaha having given a specific instruction to resellers that year not to include Yamaha MI products in Black Friday promotions.^{310, 311}

2017

- 4.139 The evidence set out below indicates that that there continued to be an agreement and/or concerted practice between Yamaha and GAK that GAK would adhere to the Yamaha Pricing Policy until the YML pricelist and Purple Book were withdrawn by Yamaha in early 2017.

Cessation of the Yamaha Pricing Policy

- 4.140 At interview, [GAK Senior Employee 3] of GAK, when asked if he could recall when Yamaha ceased the requirement for resellers to price-match with YML responded '*2017 August.*'³¹² When asked about the cessation of '*the practice that was more focused round what the Purple Book implicitly*

³⁰⁸ URN E_YAM00214 (Email from [GAK Senior Employee 3], GAK to [Yamaha Employee 1], Yamaha, dated 24 November 2016).

³⁰⁹ URN E_YAM00213 (Email from [GAK Senior Employee 3], GAK to [Yamaha Employee 1], Yamaha, dated 24 November 2016).

³¹⁰ [Yamaha Employee 1] of Yamaha stated, '*GAK is pointing out that [Reseller] has a Black Friday promotion which means it is not adhering to the Yamaha Pricing Policy. Yamaha had also issued a specific instruction that year that Resellers should not include Yamaha products in Black Friday promotions. GAK is asking Yamaha to contact [Reseller] and ask it to remove all references to Yamaha products from its Black Friday promotion and comply with the Yamaha Pricing Policy.*' URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 9.

³¹¹ See also statement from [Yamaha Employee 1] of Yamaha, '*GAK is complaining about [Reseller] Black Friday promotion and that it will result in [Reseller] discounting Yamaha products below the requirements of the Yamaha Pricing Policy. [Reseller], like all other Resellers, would have been aware that Yamaha had asked Resellers not to include Yamaha products in Black Friday promotions in that year. GAK is asking Yamaha to contact [Reseller] and ask it to exclude Yamaha products from its offer.*' URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 10.

³¹² URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.144, line 24.

*required people to do,' [GAK Senior Employee 3] stated 'Yeah, that's gone as well [...] there was a meeting with Yamaha's new pricing structure and bits and pieces with us in August 2017 and -- and things changed quite dramatically.'*³¹³

- 4.141 [GAK Senior Employee 3] of GAK also stated '*They [Yamaha] made it very clear from that moment onwards that, "Your buying is there, and it's entirely up to you what you set it [the retail price] out for", and they -- they just said, "Your market will dictate where this is going to be", and it was complete -- it was the biggest change in the way that Yamaha have worked with us, ever, at [...] the start of 2017 -- August 2017.*'³¹⁴
- 4.142 In response to CMA requests for information, [Yamaha Employee 2] and [Yamaha Employee 1], both of Yamaha, stated that the Yamaha Pricing Policy was withdrawn at the end of March 2017, and that GAK's participation in and adherence to the Yamaha Pricing Policy continued up until this point.³¹⁵
- 4.143 Given the above statements from [GAK Senior Employee 3], [Yamaha Employee 2] and [Yamaha Employee 1], the CMA considers that the agreement and/or concerted practice was in place and being implemented by Yamaha and GAK until 31 March 2017.

Conclusion on the agreement and/or concerted practice between Yamaha and GAK

- 4.144 In view of the foregoing, the CMA concludes that, throughout the Relevant Period:
- Yamaha instructed GAK on numerous occasions to follow the Yamaha Pricing Policy with regard to the Relevant Products. This tended to

³¹³ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.145, lines 3-6.

³¹⁴ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.383, line 23 to p.384, line 3.

³¹⁵ [Yamaha Employee 2] stated, '*From my dealings with GAK, my recollection is that they participated in and generally adhered to the Yamaha Pricing Policy with regard to guitars throughout the entire Relevant Period, until the Yamaha Pricing Policy was withdrawn at the end of March 2017.*' URN C_YAM01516 ([Yamaha Employee 2], Yamaha, response dated 23 September 2019 to RFI dated 12 September 2019), question 2(i). [Yamaha Employee 1] stated that, '*From my recollection, GAK's participation in the Yamaha Pricing Policy for portable keyboards and digital pianos began once it was authorised to be a selective Reseller for these products. It is also my recollection that GAK most actively participated in the Yamaha Pricing Policy with regards to digital pianos and portable keyboards from mid-2014, when its digital piano and keyboard sales began to grow, until the end of March 2017 when the Yamaha Pricing Policy was discontinued.*' URN C_YAM01522 ([Yamaha Employee 1], Yamaha, response dated 25 September 2019 to RFI dated 13 September 2019), question 2(i).

happen when GAK had been caught matching another reseller's lower prices or occasionally when GAK was 'cheating'.

- GAK told Yamaha on numerous occasions that it had been adhering to the Yamaha Pricing Policy as instructed and the evidence indicates that it did generally raise its prices to at least the Minimum Price at Yamaha's request, albeit not always immediately.
- GAK was concerned that advertising or selling the Relevant Products online below the Minimum Price might result in the application of sanctions, such as it not receiving the maximum amount of discount available to it, or the stock it had ordered. Although neither Yamaha nor GAK staff could recall receiving any such sanctions for non-compliance with the Yamaha Pricing Policy, the evidence indicates there was at least a credible threat of sanctions being imposed on GAK by Yamaha, which GAK took seriously and which affected its behaviour on the market.³¹⁶
- On multiple occasions throughout the Relevant Period, GAK reported other resellers to Yamaha for selling the Relevant Products online at a price below the Minimum Price. The CMA concludes from this that there was a shared understanding between GAK and Yamaha that the Yamaha Pricing Policy would apply to all or at least the large majority of Selective Resellers, including GAK.

4.145 The CMA has taken into account the context of the arrangements between Yamaha and GAK, including the evidence that employees of Yamaha were aware of the potential illegality of enforcing/agreeing the Yamaha Pricing Policy with Selective Resellers, including GAK, and were careful not to communicate pricing instructions in writing, particularly following the introduction of the Compliance Directive in 2014.³¹⁷ In addition, the nature of the Yamaha Pricing Policy was such that Yamaha rarely needed to contact GAK about it (in writing or otherwise) when GAK was complying with it, because it was based on the YML pricelist for the majority of the Relevant Period, as far as pricing for individual Relevant Products was concerned. This limited the need for written or oral communication about the Yamaha Pricing Policy (and therefore the amount of written evidence relating to it).

4.146 In light of the above, the CMA finds a concurrence of wills between GAK and Yamaha that GAK would not advertise or sell the Relevant Products online

³¹⁶ See for example, statements from [GAK Senior Employee 3] at interview: *"the threat was always over you [...] it was made very, very, clear [by Yamaha] that you would either lose 5% of your margin, or you would be refrained from getting stock for up to a period of three months [...] It was threatened to us [...] on a few occasions but [...] when questioned, things were put right, then [...] no that didn't actually happen,"* URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.173, lines 13-26.

³¹⁷ See paragraphs 4.114 to 4.120 above.

below the Minimum Price during the Relevant Period. In particular, the CMA finds that:

- Yamaha instructed GAK not to advertise or sell the Relevant Products online below the Minimum Price, with the credible threat (at least implicit) of adverse consequences for GAK if it failed to comply; and
- GAK:
 - understood the instructions from Yamaha and the potential consequences if it did not comply; and
 - in practice, agreed to abide by and/or implemented Yamaha's instructions not to advertise or sell the Relevant Products online below the Minimum Price, including making price adjustments when instructed to do so by Yamaha.

4.147 The CMA concludes that this constitutes an agreement for the purposes of the Chapter I prohibition and/or Article 101 TFEU.

4.148 In the alternative, the CMA finds that the arrangements identified above constituted at least a concerted practice between Yamaha and GAK, on the basis that GAK knew Yamaha's wishes as regards to the Yamaha Pricing Policy and adjusted its online advertising and pricing behaviour as a result, thereby knowingly substituting practical cooperation for the risks of price competition between it and other resellers. The CMA considers that this constitutes a concerted practice for the purposes of the Chapter I prohibition and/or Article 101 TFEU.

4.149 In the remainder of this Decision, the agreement and/or concerted practice between Yamaha and GAK that GAK would not advertise or sell the Relevant Products online below the Minimum Price will be referred to simply as the 'Agreement'.

4.150 The CMA finds that the duration of the Agreement was four years and one month: from 1 March 2013 to 31 March 2017.

D. Object of Preventing, Restricting or Distorting Competition

4.151 For the reasons set out below, the CMA finds that the Agreement had as its object the prevention, restriction or distortion of competition.

I. Key legal principles

General

- 4.152 The Chapter I prohibition and Article 101 TFEU prohibit agreements and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition.
- 4.153 The term ‘object’ in both prohibitions refers to the sense of ‘aim’, ‘purpose’, or ‘objective’, of the coordination between undertakings in question.³¹⁸
- 4.154 Where an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement has had, or would have, any anti-competitive effects in order to establish an infringement.³¹⁹
- 4.155 The Court of Justice has held that object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.³²⁰ The Court of Justice has characterised as the ‘*essential legal criterion*’ for a finding of anti-competitive object that the coordination between undertakings ‘*reveals in itself a sufficient degree of harm to competition*’ such that there is no need to examine its effects.³²¹
- 4.156 In order to determine whether an agreement reveals a sufficient degree of harm such as to constitute a restriction of competition ‘by object’, regard must be had to:
- the content of its provisions;
 - its objectives; and

³¹⁸ See, for example, respectively: Case 56/64 *Consten & Grundig v Commission*, EU:C:1966:41, p.343 (‘... [s]ince the agreement thus aims at isolating the French market [...] it is therefore such as to distort competition [...]’); Case 96/82 *IAZ and Others v Commission*, EU:C:1983:310, paragraph 25; Case C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643, paragraphs 32–33.

³¹⁹ See, for example, Case C-8/08 *T-Mobile Netherlands BV and Others v NMa*, EU:C:2009:343, paragraphs 28–30 and the case law cited therein, and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, [269].

³²⁰ Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 50; affirmed in Case C-373/14 P *Toshiba v Commission*, EU:C:2016:26, paragraph 26.

³²¹ Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraphs 49 and 57. See also Case C-373/14 P *Toshiba v Commission*, EU:C:2016:26, paragraph 26.

- the economic and legal context of which it forms a part.³²²
- 4.157 Although the parties' subjective intention is not a necessary factor in determining whether an agreement is restrictive of competition, there is nothing prohibiting that factor from being taken into account.³²³
- 4.158 An agreement may be regarded as having an anti-competitive object even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives.³²⁴

Resale Price Maintenance

- 4.159 Article 101(1)(a) TFEU and section 2(2)(a) of the Act expressly prohibit agreements and/or concerted practices which '*directly or indirectly fix purchase or selling prices*'.
- 4.160 RPM is defined in the Vertical Guidelines as '*agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer*.'³²⁵ RPM has been found consistently in EU and national decisional practice (including the UK) to constitute a restriction of competition by object.³²⁶ The Court of Justice has also held that the

³²² Case C-67/13 *P Grouperment des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 53 and Case C-373/14 *P Toshiba v Commission*, EU:C:2016:26, paragraph 26. According to the Court of Justice in Case C-67/13 *P Grouperment des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraphs 53 and 78, in determining that context, it is also necessary to take into consideration all relevant aspects of the context, having regard in particular to the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.

³²³ Case C-67/13 *P Grouperment des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 54; affirmed in Case C-286/13 *P Dole v Commission*, EU:C:2015:184, paragraph 118.

³²⁴ Case C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643, paragraph 21. See also *Ping Europe Limited v CMA* [2018] CAT 13 (Ping), paragraphs 101-105, where the CAT confirmed that its approach follows that set out by the Court of Justice in, e.g., Case C-67/13 *P Grouperment des Cartes Bancaires v Commission*, EU:C:2014:2204. More specifically, the CAT stated that '*the Tribunal approaches the issue of object infringement on the basis that an agreement revealing a sufficient degree of harm to competition may be deemed to be a restriction of competition "by object" irrespective of the actual, subjective aims of the parties involved, even if those aims are legitimate.*'

³²⁵ Vertical Guidelines, paragraph 48

³²⁶ See cases further below in this section, including cases such as: Commission decision 73/322/EEC *Deutsche Phillips* (IV/27.010) [1973] OJ L293/40; Commission decision 77/66/EEC *GERO-fabriek* (IV/24.510) [1977] OJ L16/8; Commission decision 80/1333/EEC *Hennessy-Henkell* (IV/26.912) [1980] OJ L383/13; Commission decision 97/123/EC *Novalliance/Systemform* (IV/35.679) [1997] OJ L47/11; Commission decision 2001/135/EC *Nathan-Bricolux* (COMP.F.1/36.516) [2001] OJ L 54/1, paras 86–90; in *Volkswagen II*, Commission decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4, annulled on appeal Case T-208/01 *Volkswagen AG v Commission* EU:T:2003:326 and Case C-74/04 *P Commission v Volkswagen AG*, EU:C:2006:460; *CD prices*, Commission Press Release IP/01/1212, 17 August 2001; Commission decision 16 July 2003 *PO/Yamaha* (COMP/37.975). See also CMA decision of 24 May 2016 *Commercial refrigeration* (CE/9856-14); CMA decision of 10 May 2016 in Case CE/9857-14 *Online resale price maintenance in the bathroom fittings sector*; *HUSKY*, Czech NCA decision of 28 January 2011, upheld on appeal by Brno Regional Court judgment of 26 April 2012;

imposition of fixed or minimum resale prices on distributors is restrictive of competition by object.³²⁷

- 4.161 The European Courts have established that it is not unlawful for a supplier to impose a maximum resale price or to recommend a particular resale price.³²⁸ However, describing a price as a 'recommended' retail price does not prevent this from amounting to *de facto* RPM, if the reseller does not remain genuinely free to determine its resale price (for example, if there is pressure or coercion exerted by the supplier to adhere to the recommended price).³²⁹
- 4.162 The Court of Justice has confirmed that '*it is necessary to ascertain whether such a retail price is not, in reality, fixed by indirect or concealed means, such as the fixing of the margin of the [reseller],*³³⁰ *threats, intimidation, warnings, penalties or incentives*'.³³¹ This would include, for example, threats to delay or suspend deliveries or to terminate supply in the event that the retailer does not observe a given price level.³³² Other measures include the

Young Digital Planet, Polish NCA decision of 30 October 2012; *Hyundai Motor Vehicles*, Bulgarian NCA decision of 6 November 2012; *Vila*, Danish NCA settlement decision of 30 October 2013; *Pioneer v Bundeswettbewerbsbehörde*, Austrian Cartel Court rulings of March–June 2014; *Witt Hvidevarer*, Danish NCA settlement of 10 July 2014; and decision by the Austrian Competition Authority against *Samsung Electronics Austria GmbH* of 4 November 2015 (BWB/K-396); and decision by the Polish Competition Authority against Termet S.A. of 19 December 2016 (RKT-08/2016). See to this effect also the Commission Staff Working document 'Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice', revised version of 03/06/2015, paragraph 3.4. (http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex_en.pdf).

³²⁷ See Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284, paragraph 44, where the Court of Justice held that '*provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of [Article 101 (1)] which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty*'. Vertical Guidelines, paragraphs 223–229. See also Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102/1 (VABER), recital 10.

³²⁸ See, e.g., Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504, paragraph 4.

³²⁹ Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504; and Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485. See also VABER, Article 4(a); and Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41, paragraph 25.

³³⁰ Vertical Guidelines, paragraph 48.

³³¹ Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485, paragraph 71. See also Case C-260/07 *Pedro IV Servicios SL v Total España SA*, EU:C:2009:215, paragraph 80; and Commission decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4 (which includes warnings against deep discounting).

³³² Vertical Guidelines, paragraph 48. See also Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65; and Commission decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4.

withdrawal of credit facilities, prevailing on other dealers not to supply³³³ and threatened legal action, pressuring telephone calls and letters.³³⁴

- 4.163 RPM can be achieved not only directly, for example via a contractual provision that directly sets a fixed or minimum resale price,³³⁵ but also indirectly.³³⁶ As previously stated, whether or not there is indirect RPM in any particular case will depend on whether the ability of resellers to determine their resale prices has genuinely been restricted.³³⁷
- 4.164 Lastly, RPM can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of an automated price-monitoring system or the obligation on resellers to report other members of the distribution network who deviate from the standard price level.³³⁸ However, the use of such measures does not, in itself, constitute RPM.³³⁹

Price advertising, advertising and other similar restrictions

- 4.165 Restrictions on advertising prices below a certain level have in the past sometimes been found to lead to *de facto* RPM. The Commission has considered the application of Article 101(1) TFEU to advertising restrictions imposed by manufacturers in supply agreements in a number of investigations. The OFT also concluded that advertising restrictions can

³³³ Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65.

³³⁴ See Commission decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4. In paragraphs 44-55 of its decision, the Commission noted various measures taken to enforce 'price discipline' among dealers, including threats of legal action against dealers offering discounts, dealers reporting discounts to Volkswagen and telephone calls and letters from Volkswagen demanding that discounts and promotions be ceased. The decision was overturned on appeal to the General Court due to the Commission's flawed assessment of whether or not there was an agreement between Volkswagen and its dealers. However, the Commission's analysis of RPM remains relevant and this case confirms that recommended retail prices could involve unlawful RPM.

³³⁵ Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284; Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, EU:C:1987:418; Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, EU:C:1988:183; Commission decision of 16 July 2003 *PO/Yamaha* (COMP/37.975); *Agreements between Lladro Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

³³⁶ See Vertical Guidelines, paragraph 48.

³³⁷ Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504; and VABER, Article 4(a).

³³⁸ Vertical Guidelines, paragraph 48. See to this effect also Commission decisions of 24 July 2018 in Case AT.40181 – *Philips*, paragraph 64: ('Price monitoring and adjustment software programmes multiply the impact of price interventions. Consequently, by closely monitoring the resale prices of its retailers and intervening with lowest-pricing retailers to get their prices increased, Philips France's Consumer Lifestyle business could avoid online price "erosion" across, potentially, its entire (online) retail network.');

Commission decision of 24 July 2018 in Case AT.40182 *Pioneer*, paragraph 155; and Commission decision of 24 July 2018 in Case AT.40469 *Denon & Marantz*, paragraph 95.

³³⁹ Vertical Guidelines, paragraph 48.

restrict retailers' ability to determine their own sale prices in a previous decision.³⁴⁰

4.166 The relevant restrictions have taken different forms in different cases, including:

- guidelines issued to retailers requiring them to use the supplier's recommended list prices;³⁴¹
- a contractual requirement not to produce advertising material which includes prices different from the supplier's price list without the supplier's approval;³⁴²
- a contractual requirement to withdraw and not to repeat advertisements to which the supplier objected in writing (where there was evidence that this was being used to exclude dealers who were offering low prices from the supplier's distribution network);³⁴³
- a contractual requirement (agreed between members of a trade association) requiring them to display the supplier's list price and prohibiting any public announcement of rebates on those prices;³⁴⁴ and
- a prohibition on dealers mentioning discounts or price reductions in any advertising materials, advertisements or promotional campaigns.³⁴⁵

4.167 The *Hasselblad*³⁴⁶ and *Yamaha Europa*³⁴⁷ decisions stress the importance of price advertising in terms of communicating with customers and in encouraging price competition.

4.168 In *Yamaha Europa*,³⁴⁸ the Commission objected to restrictions contained in selective distribution agreements on dealers advertising prices which were different to Yamaha's list prices. In particular, the Commission was concerned by advertising restrictions which formed part of a wider policy by

³⁴⁰ *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003. See also *Trade associations, professions and self-regulating bodies* (OFT 408, December 2004), adopted by the CMA Board, paragraph 3.14.

³⁴¹ Commission decision 16 July 2003 *PO/Yamaha* (COMP/37.975). *Infra*.

³⁴² *Ibid*.

³⁴³ Commission decision 82/367/EEC *Hasselblad* (IV/25.757) [1982] OJ L161/18; upheld on appeal in Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65. *Infra*.

³⁴⁴ Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and others v Commission* EU:C:1975:160.

³⁴⁵ *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

³⁴⁶ Commission decision 82/367/EEC *Hasselblad* (IV/25.757) [1982] OJ L161/18.

³⁴⁷ Commission decision 16 July 2003 *PO/Yamaha* (COMP/37.975).

³⁴⁸ *Ibid*.

Yamaha Europa to enforce RPM in a number of territories including the Netherlands and Italy. Yamaha Europa placed restrictions on its dealers in the Netherlands and Italy preventing them from advertising prices below Yamaha Europa's recommended retail prices.

- 4.169 The Dutch dealer contracts (described as 'guidelines') prohibited dealers from advertising prices which differed from Yamaha Europa's list prices. The Commission stated that:

*[Yamaha Europa's guidelines] clearly prevented the dealer from announcing either within or outside the shop a price other than the one established in the price list. Even if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the customer the price it fixed and that such discounts, if the dealer was still willing to offer them, could not be communicated in a way contrary to the guidelines. [...] [The circular sent to Dutch dealers] constitutes a restriction of the dealer's ability to determine its sales prices. This practice has the object of fixing the maximum level of discounts and, as a consequence, the minimum level of resale prices, thereby restricting or distorting price competition.'*³⁴⁹

- 4.170 Meanwhile, the distribution agreement with dealers in Italy prohibited dealers from publishing '*in whichever form*' prices which differed from Yamaha Europa's official price lists. The dealers were also prohibited from reproducing advertising material and price lists which were different to Yamaha Europa's official price lists. The Commission found that

*'the dealers' freedom to set prices is strictly limited. Dealers cannot attract clients by advertising prices that differ from the "published prices" of [Yamaha Europa], nor by indicating prices in their shops different from those indicated by [Yamaha Europa].'*³⁵⁰

- 4.171 The Commission concluded that Yamaha Europa's agreements had the object of influencing resale prices, thereby restricting or distorting price competition.

³⁴⁹ *Ibid*, paragraphs 125–126.

³⁵⁰ *Ibid*, paragraphs 133–135.

- 4.172 In *Groupeement des Fabricants de Papiers Peints de Belgique*, the Court of Justice equated a prohibition on announcing rebates with ‘a system of fixing selling prices’.³⁵¹
- 4.173 In both *Yamaha Europa* and *Groupeement des Fabricants de Papiers Peints de Belgique*, it was accepted that the possibility of resellers being able to grant discounts did not prevent the restriction from infringing Article 101(1) TFEU. In *Yamaha Europa*, the Commission stated that ‘[e]ven if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the customer the price it fixed and that such discounts, if the dealer was still willing to offer them, could not be communicated in a way contrary to the guidelines.’³⁵²
- 4.174 In *Hasselblad*,³⁵³ the Commission condemned a selective distribution agreement which allowed the manufacturer to prohibit adverts by a dealer containing statements that it ‘can match any other retailer’s selling prices’. In addition to prohibiting particular adverts, Hasselblad had also threatened to withdraw credit facilities from dealers who did not treat prices in its retail price list as minimum selling prices and had terminated a UK dealership which had advertised its products at discounted prices. The Commission found that Hasselblad’s contractual right to prohibit adverts restricted competition within the meaning of Article 101(1) for the following reason:
- ‘This extensive right of intervention enables Hasselblad (GB) to prevent actively competing and price-cutting dealers [...] from advertising their activities, the more so as Hasselblad (GB) is not required to give any justification for its censorship measures.’³⁵⁴
- 4.175 The Commission concluded that Hasselblad’s distribution policy (including Hasselblad’s right to prohibit adverts) ‘interferes with the freedom of the authorised dealers to fix their prices, using the dealers’ fear of termination of the Dealer Agreement as a means of hindering price competition between authorised dealers’.³⁵⁵ The Commission considered that Hasselblad’s use of its dealer agreements (including the advertising restrictions) ‘as a means to influence retail prices’, amounted to a restriction of competition under Article

³⁵¹ Case 73/74 *Groupeement des Fabricants de Papiers Peints de Belgique and others v Commission*, EU:C:1975:160.

³⁵² Commission decision 16 July 2003 *PO/Yamaha* (COMP/37.975), paragraph 125.

³⁵³ Commission decision 82/367/EEC *Hasselblad* (IV/25.757) [1982] OJ L161/18.

³⁵⁴ *Ibid*, paragraph 60.

³⁵⁵ *Ibid*, paragraph 66.

101(1) TFEU. On appeal,³⁵⁶ the Court of Justice found that the Commission had been right to conclude that the advertising restriction constituted an infringement of Article 101(1) TFEU.³⁵⁷

4.176 In *Lladró*,³⁵⁸ the OFT noted that the advertising of resale prices, including discounts, promotes price transparency between retailers and provides a significant incentive for retailers to compete on price. Provisions restricting a retailer's freedom to inform potential customers of discounts which are being offered removes a key incentive for, and constitute an obstacle to, price competition between retailers. The OFT concluded in *Lladró* that the '*obvious consequence*' of price advertising restrictions is to restrict retailers' ability to determine their own sale prices and that '*any such provision has as its object the prevention, restriction or distortion of competition*.'³⁵⁹

4.177 Further, in *Commercial refrigeration*³⁶⁰ the CMA found that a policy that prevented resellers from advertising the supplier's products below a minimum advertised price ('MAP') set out in the supplier's MAP policy constituted *de facto* RPM as, in the legal and economic context in which it operated, it genuinely restricted in practice the ability of the resellers to determine their online sales price for the relevant products at a price below the MAP.³⁶¹

II. Legal Assessment of the Agreement

4.178 For the reasons set out below, the CMA finds that the object of the Agreement was to prevent, restrict or distort competition through RPM and it was therefore, by its very nature, harmful to the proper functioning of normal

³⁵⁶ Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65, paragraph 43.

³⁵⁷ On the assessment of advertising restrictions, more specifically 'MAP' (minimum advertised pricing), under EU competition law, please also see the European Parliament 'Notice to Members' regarding 'Petition No 2383/2014 by Norbert Perstinger (Austrian), on the introduction of the Minimum Advertised Price (MAP) in the European Union'.

³⁵⁸ *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, CP/0809-01, 31 March 2003.

³⁵⁹ *Ibid*, paragraph 70.

³⁶⁰ CMA decision of 24 May 2016 in Case CE/9856-14 *Online resale price maintenance in the commercial refrigeration sector*. The CMA found that the MAP policy constituted RPM because, by restricting the price at which its goods were advertised online, the policy prevented dealers from deciding the resale price for those goods. The CMA found that there was a clear link between the advertised price and the resale price when goods are purchased online.

³⁶¹ *Ibid*. in particular, see paragraphs 6.43.2-6.43.3. In making this finding the CMA noted, in particular, that where customers buy the products online (i.e. 'click-to-buy' sales), the advertised price is typically the price paid by the customer, that is, the sales price and, also, that the MAP policy was reinforced by measures to identify resellers who priced below the MAP combined with actual or threatened sanctions for advertising prices below the MAP.

competition. This finding is based on an assessment of the Agreement's content and objectives as well as the legal and economic context in which it operated.

Content of the Agreement

4.179 As set out above, the CMA finds that:

- The Agreement between Yamaha and GAK stipulated that GAK would not advertise or sell the Relevant Products online below the Minimum Price in accordance with the Yamaha Pricing Policy;³⁶²
- GAK's commitment to adhere to the Yamaha Pricing Policy was reinforced by measures on Yamaha's and other resellers' part to monitor the market and identify resellers who advertised or sold the Relevant Products online below the Minimum Price, including by way of using auto tracking software (in case of resellers) and, a web-rat report (the "[X] report") by Yamaha;³⁶³ and
- The Yamaha Pricing Policy was also reinforced by a credible threat of sanctions if GAK did not work with Yamaha. More specifically, GAK was concerned that, if it advertised the Relevant Products online below the Minimum Price in breach of the Yamaha Pricing Policy, it risked Yamaha adjusting the level of discount that would be applied to GAK's account, and/or restrictions in the level of stock Yamaha would supply to GAK.³⁶⁴ The evidence suggests that sanctions were never actually imposed on GAK, but that GAK regarded them as a credible threat.³⁶⁵

4.180 The CMA considers that even insofar as the Agreement related to the price at which GAK could **advertise** the Relevant Products online (in terms of requiring adherence to a MAP), in practice it also restricted the ability of GAK to **sell** the Relevant Products online at a price below the Minimum Price. This is because where a customer bought the Relevant Products from GAK online (i.e. '*click-to-buy*' sales), the advertised price was typically the price paid by the customer for the Relevant Products, that is, the sales price. Even in circumstances where a customer was able to obtain a discount by

³⁶² See paragraphs 3.112 to 3.116 above.

³⁶³ See paragraphs 3.119 to 3.130 above.

³⁶⁴ See paragraph 4.53 above.

³⁶⁵ See paragraphs 4.54 to 4.55 above.

telephoning GAK, that discount would still be applied by reference to, and be influenced by, the MAP.³⁶⁶

- 4.181 As set out above, the CMA concludes that the restrictions on GAK setting its own online resale price for the Relevant Products applied to the sale of Relevant Products by GAK (sold individually).
- 4.182 On the basis of the above, the CMA finds that the Agreement amounted to RPM in respect of online sales of the Relevant Products by GAK.
- 4.183 Both at the EU and the national level (including the UK), RPM has consistently been found to have the object of preventing, restricting or distorting competition.³⁶⁷

Objectives of the Agreement

- 4.184 The CMA finds that the main objective of the Agreement (and the Yamaha Pricing Policy more generally) was to fix a Minimum Price at which GAK (and other Selective Resellers adhering to the Yamaha Pricing Policy) would sell the Relevant Products online. The totality of the evidence in the CMA's possession shows that the aim of this was to:

- reduce downward pressure on online prices of the Relevant Products; and³⁶⁸

³⁶⁶ GAK states that it sells only a small percentage of the Relevant Products which it sells online at a price below the price initially displayed on screen (for example on the basis of occasional voucher code schemes). GAK states that at the time of the RFI response, it did not have any live voucher codes running. It began offering vouchers in 2016. URN C_YAM00580 (GAK response dated 25 April 2018 to RFI dated 17 April 2018), Section C, Annex 5, question 4. In response to a clarificatory request to GAK concerning its response to the April 2018 RFI, GAK confirmed that its estimate of the proportion of Relevant Products sold below the price advertised online was small, specifically between 1 May 2016 (when online discount vouchers became active on GAK's website) and 31 March 2017, online voucher codes were applied to circa [X] of the online orders made in that period. Of the online orders containing at least one Relevant Product, a maximum of circa [X] code applied. GAK also offered call for best price discounts. During the period 18 May 2016 to 31 March 2017, GAK had [X] non-web sales (bundles and education orders excluded) containing one or more of the Relevant Products, of which [X] had a total sales value lower than the live website price at the time. URN C_YAM01848 (GAK response dated 27 February 2020 to RFI dated 17 February 2020).

³⁶⁷ See to this effect, for example, the Commission decisions of 24 July 2018 in cases AT.40465 (*Asus*), paragraph 107; AT.40469 (*Denon & Marantz*), paragraphs 93 *et seq*; AT.40181 (*Philips*), paragraph 61 and AT.40182 (*Pioneer*), paragraph 152.

³⁶⁸ See paragraph 3.69 above.

- reduce online price competition between GAK and other Selective Resellers of the Relevant Products who adhered to the Yamaha Pricing Policy;³⁶⁹

thereby protecting or improving the margins of Selective Resellers of the Relevant Products who adhered to the Yamaha Pricing Policy, including GAK.³⁷⁰

4.185 The CMA concludes that, in the absence of the Agreement, GAK would have been able to determine independently its online price for the Relevant Products. In this way, it would have had the freedom to attract and win customers by using the internet to signal to customers the existence of a price advantage over its competitors. This could be expected to have greatly increased the scope for price competition between GAK and its competitors.

4.186 As set out in paragraph 3.81 above, the evidence demonstrates that Yamaha's rationale for introducing the Yamaha Pricing Policy, which formed the basis for the Agreement with GAK, was at least twofold:

- to increase the attractiveness of the Relevant Products (and Yamaha's brand more generally) by enabling its UK Selective Resellers to achieve attractive margins, thus encouraging them to stock and sell the Relevant Products; and
- in doing so, to help Yamaha secure, maintain and/or improve its UK market position in digital pianos, digital keyboards, and guitars relative to its main competitors.

4.187 The evidence indicates that Yamaha was aware that the implementation of the Yamaha Pricing Policy (the basis for the Agreement) was, at least, of questionable legality.³⁷¹ Various documents on the CMA's file suggest that wherever possible, Yamaha carefully avoided putting instructions to resellers (including GAK) or threats regarding potential sanctions in writing. This was particularly notable following the introduction of the Yamaha Compliance Directive across its sales teams in October 2014, whereby Yamaha sales representatives were instructed to minimise contact about advertised prices by email and were required to send an apparently compliant email in response to any price complaints received, stating that resellers were free to set their own prices. In practice this would then be followed-up by a phone

³⁶⁹ See paragraph 3.69 above.

³⁷⁰ See paragraphs 4.30 above.

³⁷¹ See paragraphs 3.131 to 3.133 above.

call to discuss the Yamaha Pricing Policy offline, so as to avoid any written communications.³⁷²

- 4.188 The CMA considers that this awareness of the potential illegality of the Yamaha Pricing Policy further supports its conclusion that the Agreement had the object of preventing, restricting or distorting competition through RPM in the supply of the Relevant Products in the UK.

Legal and economic context of the Agreement

- 4.189 Section 3.B. above provides an overview of the UK digital piano, keyboard and guitar sector. In reaching its finding that the Agreement had the object of preventing, restricting or distorting competition, the CMA has had regard to the actual context in which the Agreement operated, including:

- the goods affected by it;³⁷³
- the conditions of the functioning and structure of the market;³⁷⁴ and
- the relevant legal and economic context.³⁷⁵

- 4.190 The CMA considers that the legal and economic context in which digital pianos, keyboards, and guitars are supplied means that a restriction on the price at which the Relevant Products can be advertised or sold online restricts competition by its very nature. This is based, among other factors, on the ever-increasing importance of the internet as a retail channel, and product pricing as one of the main factors based on which resellers compete.

Conclusion on the object of the Agreement

- 4.191 For the reasons set out above, the CMA concludes that the Agreement had as its object the prevention, restriction or distortion of competition (through the application of RPM) in the supply of the Relevant Products within the UK.

E. Appreciable Restriction of Competition

- 4.192 For the reasons set out below, the CMA finds that the Agreement appreciably prevented, restricted or distorted competition for the supply of digital pianos, keyboards, and guitars within the UK (for the purposes of the

³⁷² See paragraphs 3.131 to 3.135 above.

³⁷³ See Section 3.B.III. above.

³⁷⁴ See Section 3.B.V. and Section 3.B.VI. above.

³⁷⁵ See Section 3.B. above.

Chapter I prohibition) and within the EU (for the purposes of Article 101 TFEU).

I. Key legal principles

- 4.193 An agreement that is restrictive of competition will only fall within the Chapter I prohibition or Article 101 TFEU if its effect on competition is appreciable.³⁷⁶
- 4.194 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.³⁷⁷ In accordance with section 60 of the Act, this principle applies equally in respect of the Chapter I prohibition (taking account of the relevant differences between Article 101 TFEU and the Chapter I prohibition): accordingly, an agreement that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction of competition.³⁷⁸

II. Legal assessment

- 4.195 As set out above, the CMA has concluded that the Agreement had the object of preventing, restricting or distorting competition (see paragraph 4.191 above). Given that the Agreement was also capable of affecting trade within the UK (see paragraph 4.215 below), the CMA finds that the Agreement constituted, by its very nature, an appreciable restriction of competition in respect of the Relevant Products for the purposes of the Chapter I prohibition and Article 101 TFEU.

³⁷⁶ It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 16 citing, among other cases, Case 5/69 *Völk v Vervaecke*, EU:C:1969:35, paragraph 7. See also *OFT401*, paragraph 2.15.

³⁷⁷ Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 37; and Commission Notice on agreements of minor importance [2014] OJ C291/01, paragraphs 2 and 13.

³⁷⁸ See, for example, *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch) paragraphs 148 *et seq.*

F. Effect on Trade between EU Member States

4.196 For the reasons set out below, the CMA finds that the Agreement satisfies the requisite test for an effect on trade between EU Member States within the meaning of Article 101 TFEU.

I. Key legal principles

4.197 Article 101 TFEU applies where an agreement or concerted practice may affect trade between EU Member States appreciably.³⁷⁹

4.198 In order that trade may be affected by an agreement, *'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that [the] agreement [...] may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'*.³⁸⁰

4.199 When assessing whether an agreement may affect trade between Member States, the CMA will have regard to the approach set out in the Commission's 'Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty' (the 'Effect on Trade Guidelines').³⁸¹

4.200 The assessment of whether an agreement is capable of affecting trade between Member States involves consideration of various factors which, taken individually, may not be decisive.³⁸² These factors include the nature of the agreement, the nature of the products covered by the agreement, the position and importance of the undertakings concerned and the economic and legal context of the agreement.³⁸³

4.201 According to the Effect on Trade Guidelines, agreements relating to tradable products whereby undertakings engage in RPM and which cover the whole of a Member State may have direct effects on trade between Member States

³⁷⁹ Case 22/71 *Béguelin Import Co. v S.A.G.L. Import Export*, EU:C:1971:113, paragraph 16.

³⁸⁰ Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH*, EU:C:1966:38, p.249.

³⁸¹ *OFT401*, paragraph 2.23, and *Effect on Trade Guidelines* (i.e. and Commission Notice, *Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty* [2004] OJ C101/07 (Effect on Trade Guidelines)).

³⁸² *Effect on Trade Guidelines*, paragraph 28, citing Case C-250/92 *Gottrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvarereselskab AmbA*, EU:C:1994:413, paragraph 54.

³⁸³ *Effect on Trade Guidelines*, paragraphs 28 and 32.

by increasing imports from other Member States and by decreasing exports from the Member State in question.³⁸⁴

4.202 The assessment of whether an agreement has an ‘appreciable’ effect on trade between Member States similarly depends on various factors and the circumstances of each case.³⁸⁵ For example, the stronger the market position of the undertakings concerned, the more likely it is that an agreement that is capable of affecting trade between Member States can be held to do so appreciably.³⁸⁶

4.203 There are no general quantitative rules covering all categories of agreements indicating when trade between Member States is capable of being appreciably affected.³⁸⁷ However, the Commission holds the view that, in principle, agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions (the ‘NAAT rule’) are met:

- the aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5%; and
- in the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro.³⁸⁸

4.204 If an agreement does not fall within the criteria set out above, a case-by-case analysis is necessary, as not falling within the criteria does not imply that the arrangements in question are automatically capable of appreciably affecting trade between Member States.³⁸⁹ This needs to take into account,

³⁸⁴ Effect on Trade Guidelines, paragraph 88. Agreements involving RPM may also affect patterns of trade in much the same way as horizontal cartels. To the extent that the price resulting from RPM is higher than that prevailing in other Member States, this price level is only sustainable if imports from other Member States can be controlled.

³⁸⁵ Effect on Trade Guidelines, paragraph 45.

³⁸⁶ Effect on Trade Guidelines, paragraph 45.

³⁸⁷ Effect on Trade Guidelines, paragraph 46.

³⁸⁸ Effect on Trade Guidelines, paragraph 52. This turnover is to be ‘*calculated on the basis of total Community sales excluding tax during the previous financial year by the undertaking concerned, of the products covered by the agreement (the contract products)*’. - Effect on Trade Guidelines, paragraph 54. This ‘negative’ rebuttable presumption even applies ‘*where during two successive calendar years [this] turnover threshold is not exceeded by more than 10% and [this] market threshold is not exceeded by more than two percentage points*’. - Effect on Trade Guidelines, paragraph 52. The NAAT rule applies ‘*irrespective of the nature of the restrictions contained in an agreement, including restrictions that have been identified as hardcore restrictions in Commission block exemption regulations and guidelines*.’ – Effect on Trade Guidelines, paragraph 50.

³⁸⁹ Effect on Trade Guidelines, paragraph 51. However, where an agreement by its very nature is capable of affecting trade between Member States, there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement exceeds 40 million euro. According to the Effect on Trade Guidelines, in the case of such agreements, it can also often be presumed that

among other things, the market position of the undertakings concerned, the nature of the agreement and the nature of the products covered.³⁹⁰

II. Legal assessment

- 4.205 The CMA finds that the Agreement had the potential to appreciably affect trade between EU Member States. The CMA has based its finding on the following assessment.

Agreement capable of affecting trade between Member States

- 4.206 As set out above, based on the evidence the Agreement restricted the price at which GAK could sell the Relevant Products (tradable products) online to customers in the UK and potentially beyond and therefore led to RPM.³⁹¹ Pursuant to the Effect on Trade Guidelines, agreements involving RPM which cover the whole of a Member State may have direct effects on trade between Member States by increasing imports from other Member States and by decreasing exports from the Member State in question.³⁹² Based on this, the CMA concludes that the Agreement was capable of affecting trade between Member States.

Appreciability

- 4.207 The CMA finds that the appreciability criterion, which is part of the effect on trade test, is also met in this case.
- 4.208 The CMA considers that the rebuttable presumption that the Agreement was **not** capable of appreciably affecting trade between Member States does not apply since the cumulative criteria of the NAAT rule³⁹³ are not met in this case.
- 4.209 Specifically, in relation to digital pianos and digital keyboards:

such effects are appreciable when the market share of the parties exceeds 5% - Effect on Trade Guidelines, paragraph 53.

³⁹⁰ Effect on Trade Guidelines, paragraph 45.

³⁹¹ See paragraph 4.182 above.

³⁹² Effect on Trade Guidelines, paragraph 88.

³⁹³ Set out in paragraph 4.203 above

- while the turnover limb of the NAAT test³⁹⁴ is met;³⁹⁵
- the market share threshold³⁹⁶ is not met since Yamaha's market share in the (upstream) market for the supply of digital pianos and digital keyboards through UK resellers was at least [%] %³⁹⁷ in 2016/17 and was unlikely to be significantly different in 2015/16 and therefore exceeded 5%.³⁹⁸

4.210 Specifically, in relation to guitars:

- while the turnover limb of the NAAT test is met;³⁹⁹

³⁹⁴ Aggregate annual Community turnover of the supplier in the products covered by the agreement not exceeding 40 million euro.

³⁹⁵ The CMA notes that YME's total sales for 2015/16 were €577.011million, URN C_YAM01761 (Q4_YME Statutory Audit Report FY 2015_2016). However, the CMA concludes that the correct interpretation of this test is that only the value of sales of the digital pianos and digital keyboards from Yamaha to GAK should be taken into account, as only this represents turnover related to the 'products covered by' the Agreement. The total value of digital keyboards and digital pianos supplied to GAK by Yamaha (for resale) in 2015/16 was £[%] (excluding VAT), see URN C_YAM01100 (Yamaha response dated 8 August 2018 to RFI dated 30 July 2018). The CMA notes that this turnover information includes both products and related accessory items, and accordingly, by including accessories overestimates the turnover. Even if, on the basis of a more liberal interpretation, in calculating the relevant turnover, regard was had to the entirety of Yamaha's turnover in digital pianos and digital keyboards in the UK (as the turnover in the type of products covered by the Agreement), in 2016/17 the relevant turnover would be no more than £[%] (this includes pianos (excluding acoustic pianos) and synthesisers). It also includes education sales and accordingly overestimates the turnover, URN C_YAM00042 (Market share MI UK - Update for CMA 14 March 2018, 2015/16 and 2016/17). The evidence indicates that the turnover threshold would also not have been exceeded in 2015/16 based on Yamaha's turnover in relation to the Relevant Products for the top 20 Yamaha resellers in total, see URN C_YAM01100 (Yamaha response dated 8 August 2018 to RFI dated 30 July 2018).

³⁹⁶ (Aggregate) market share of the parties not exceeding 5% on any relevant market affected by the Agreement.

³⁹⁷ The CMA has based this [%] % figure on the following assumptions: (1) Yamaha's 2016/17 turnover in the piano and keyboard products was £[%], excluding value added tax, URN C_YAM00042 (Market share MI UK - Update for CMA 14 March 2018, 2015/16 and 2016/17); (2) the total revenue of the retail sale of the piano, keyboard and organ market in the UK for 2016/17 was £[50-60] million (URN C_YAM01834 (IBISWorld Report, March 2019), p.13. This [%] % figure is an underestimate of Yamaha's market share because the £[%] revenue figure provided by Yamaha relates to its sales of Relevant Products to resellers, whereas the £[50-60] million IBISWorld Report revenue figure related to sales to end-customers and would therefore include a resale margin, which the upstream Yamaha figure does not. Separately, Yamaha's assessment of its market shares indicates that in 2016/17 it had the following shares in relation to the following segments: pianos: [%] %; digital pianos: [%] %; portable keyboards: [%] %; and synthesisers/Hi-tech: [%] % (see URN C_YAM00042 (Market share MI UK - Update for CMA 14 March 2018, 2015/16 and 2016/17)). YME's UK turnover for 2015/16 was not materially different, indicating the threshold was likely to have been exceeded in that year also (URN C_YAM01761 (2015) accounts, page 65 of the PDF). This is without prejudice to the CMA's conclusion on the relevant market as set out at paragraphs 3.147 to 3.155 above.

³⁹⁸ The CMA finds that the rebuttable positive presumption of an effect on trade (see footnote 392 above) does not apply in this case, either. Based on paragraph 88 of the *Effect on Trade Guidelines*, RPM agreements covering the whole of a Member State (as in this case) 'may be capable of affecting trade between Member States', but are not, by their 'very nature' capable of affecting trade.

³⁹⁹ As noted above, the CMA finds that the correct interpretation of this test is that only the value of sales of the guitar products from Yamaha to GAK should be taken into account, as only this represents turnover related to the 'products covered by' the Agreement. The total value of guitars supplied to GAK by Yamaha (for resale) in 2016/17 was £[%] (excluding VAT) (see URN C_YAM01415.1 (Yamaha response dated 6 June to RFI dated 24 May 2019)). In relation to 2015/16, GAK's entire turnover in relation to all manufacturers' products was £[%] million, indicating that this threshold was not met in 2015/16 either (see GAK.co.uk (Holdings) Ltd's accounts for

- the market share threshold is not met since GAK's market share in the (downstream) market for the resale of guitars in the UK was [X] [X]% in [X] and therefore exceeded 5%.⁴⁰⁰

4.211 The factors set out below underpin the CMA's finding that the Agreement was potentially capable of having an appreciable effect on trade between Member States:

- the turnover and market position of the undertaking concerned: while GAK may not hold the highest market share in guitars in the UK, it holds a significant proportion. The CMA estimates GAK's share of supply to be at least [X]%;⁴⁰¹
- in relation to pianos and keyboards, GAK was a top 20 reseller of Yamaha digital pianos, portable keyboards and synthesisers during at least 2017-18.⁴⁰² The CMA estimates Yamaha's share of supply to be at least [X]%, making it the biggest supplier of pianos and keyboards in the UK.
- GAK became one of the top 10 resellers of Yamaha products in the UK from some time in the 2015-16 financial year;⁴⁰³
- the CMA has been provided with evidence GAK would sell the Relevant Products to consumers who approached them from other EU Member States;⁴⁰⁴
- there is also evidence that a number of resellers based in other EU Member States were selling the Relevant Products to customers located

the year ended 30 September 2016. (<https://beta.companieshouse.gov.uk/company/08380738/filing-history>). Even if, on the basis of a more liberal interpretation, in calculating the relevant turnover, regard was had to the entirety of Yamaha's turnover in guitars in the UK (as the turnover in the type of products covered by the Agreement), in 2015/16 the relevant turnover would be no more than £[X]. It also includes education sales and accordingly overestimates the turnover – URN C_YAM00042 (Market share MI UK - Update for CMA 14 March 2018, 2015/16 and 2016/17).

⁴⁰⁰ The CMA has based this [X]% figure on the following assumptions: (1) GAK's 2015-16 turnover in guitars was £[X], excluding value added tax, URN C_YAM01855 (GAK response dated 28 February 2020 to RFI dated 21 February 2020) and education sales of £[X] and £[X] URN C_YAM01678 (GAK response to 18 December RFI (question 14 (a))); (2) the total revenue of the retail sale of guitars in the UK for 2015-16 was £[X] ([X]% of total revenue in 2015-16 in the sector (£[X])). URN C_YAM01834 (IBISWorld Report, March 2019), p.30, URN C_YAM01949 IBISWorld Report, December 2017, and URN C_YAM02141 IBISWorld Report March 2016), p.3.

⁴⁰¹ Please see footnote 400 above for how this market share figure has been calculated.

⁴⁰² URN C_YAM01100 (Yamaha response dated 8 August 2018 to RFI dated 30 July 2018), confirmation that GAK was a top 20 reseller of the Relevant Piano and Keyboard Products during at least 2017-18.

⁴⁰³ URN C_YAM00025 (Yamaha response dated 2 November 2017).

⁴⁰⁴ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.69, lines 10-21. 'Well, if they, click on GAK.co.uk and they're prepared to do the exchange and pay in pounds, and it's going to cost them money, it is still feasible, then, yes, we will ship. We, we, you know, we do that. It's getting more regular now, but it's very, very small percentage of what business that we do. It's 2 per cent of what we do.'

in other EU Member States, including the UK, such as [Reseller 17], in [X], and [Reseller 3], in [X];⁴⁰⁵

- GAK noted that in general throughout the Relevant Period there was a shift from traditional bricks-and-mortar shopping to online shopping across most product categories. This increased the scope for cross-border competition from large European retailers like [Reseller 17]. An example of another reseller taking advantage of those opportunities is provided by the [X] acquisition of UK retailer [Reseller 7] by [Reseller], which thereby increased its presence on the UK market.⁴⁰⁶
- GAK has identified one of these resellers, namely [Reseller 17], as one of its main competitors, both in relation to pianos and keyboards and guitars.⁴⁰⁷
- some UK resellers complained about these resellers in other EU Member States undercutting their own UK prices;
- the Agreement related to online commerce which, by its nature, was likely to reach consumers in other EU Member States; and
- the products that were the subject of the Agreement could be easily traded across borders as there were no significant cross-border barriers, in particular when sold through resellers online. The Commission has

⁴⁰⁵ URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), p.285, line 25 to p.290, line 23. '[Reseller 17], being such a big retailer, not only would not have a UK shop, they would be able to point customers to UK stores to go in and get the pre-sales advice, knowing that they would be at an advantage using the exchange rate, but they would also apply a country 1 factor discount on top of any pricing [...]we had once a customer come to us who has bought something from [Reseller 17] and they walked into the store to expect to get post-sales service from us free of charge, having bought it from [Reseller 17]. [Reseller 17] were shipping things into the UK with only a two pin European plug, not a three pin. It was -- it was, you know -- there are very few English speakers working in [X] on the phone. We couldn't match [Reseller 17] [...] So [Reseller 3] are [...] another European dealer that are based in [X]. There was a known problem between [them and [Reseller 17] fighting for territory sales, even though they weren't based in those territories. Which, if you go onto [X] and you see [...] retailers from outside of the UK being able to sell at considerably lower prices than UK shops, the consumer either is going to go into the UK shops, try the product out and not buy it and buy it from Europe, It's not a UK product.'

⁴⁰⁶ URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)), and URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)), question 2.

⁴⁰⁷ URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)) and URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)), question 4a. GAK noted [Reseller 17] as one of its main competitors in the resale of pianos and keyboards (both children's and beginner keyboards and home and educational keyboards, workstations, digital pianos and synthesisers) and of guitars.

previously found evidence of competition across borders in the EEA in relation to musical instruments.^{408, 409}

G. Effect on Trade within the UK

4.212 For the reasons set out below, the CMA finds that the Agreement satisfies the test for an effect on trade within the UK.

I. Key legal principles

4.213 The Chapter I prohibition applies to agreements and concerted practices which may affect trade within the UK.⁴¹⁰ As set out in its guidance on *Agreements and concerted practices*, the CMA considers that in practice it is very unlikely that an agreement which appreciably restricts competition within the UK does not also affect trade within the UK. So, in applying the Chapter I prohibition the CMA's focus will be on the effect that an agreement has on competition.⁴¹¹

4.214 On whether the effect on trade within the UK must be appreciable, the CAT has held that there is no need to import into the Act the rule of 'appreciability' under EU law. The CAT's reasoning for this is that in EU law the requirement of an appreciable effect on trade is a jurisdictional rule, the essential purpose of which is to demarcate the fields of EU law and UK domestic law respectively. According to the CAT, there is therefore no need to import this concept into domestic competition law.⁴¹²

⁴⁰⁸ For example, in its *Yamaha Europa* decision, the Commission found that, as evidenced by Yamaha Europa, many dealers were engaged in substantial cross-border sales to end-users and that this demonstrated that the transport costs were not necessarily an obstacle and that dealers had the resources and administrative capabilities necessary to engage in cross-border sales activities. - Commission decision 16 July 2003 *PO/Yamaha* (COMP/37.975), paragraph 94.

⁴⁰⁹ Although there are factors indicating that manufacturers compete to supply digital pianos and keyboards across borders within the EEA, in the CMA finds that the available evidence is not sufficiently comprehensive or compelling to define a market wider than the UK.

⁴¹⁰ The UK includes any part of the UK in which an agreement operates or is intended to operate, section 2(7) of the Act. As is the case in respect of Article 101 TFEU, it is not necessary to show that an agreement has had an actual impact on trade – it is sufficient to establish that the agreement is capable of having such an effect: joined cases T-202/98 etc *Tate & Lyle plc and Others v Commission*, EU:T:2001:185, paragraph 78.

⁴¹¹ *OFT401*, paragraph 2.25.

⁴¹² *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11, [459–461]. In a subsequent case (*North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 [48–51] and [62]), the CAT held that, although there had been some criticism of the CAT's decision in *Aberdeen Journals*, it was not necessary to reach a conclusion on the question whether the appreciability requirement extends to the effect on UK trade test as, at least in that case, there was a close nexus between appreciable effect on competition and appreciable effect on trade within the UK, in that if one was satisfied, the other was likely to be so. For completeness, it should be mentioned that the High Court has doubted whether the CAT was correct on this point in two cases, namely *P&S Amusements Ltd v Valley House Leisure Ltd* [2006] EWHC 1510 (Ch), paragraphs 21, 22 and 34 and *Pirtek (UK) Ltd v Joinplace Ltd* [2010] EWHC 1641 (Ch), paragraphs 61–67.

II. Legal assessment

- 4.215 The CMA finds that the Agreement may have affected trade within the UK or a part of the UK. This is because the pricing restriction imposed by the Agreement applied to GAK's online prices, in relation to products which are traded throughout the UK and beyond. The pricing restriction therefore potentially affected customers wishing to purchase the Relevant Products from GAK throughout the whole of the UK and possibly beyond.
- 4.216 Furthermore, as set out in paragraph 4.195 above, the CMA has concluded that the Agreement led to an appreciable restriction of competition. This restriction had its main effect in the UK as the vast majority of GAK's sales over the Relevant Period were to UK customers. This means that the criterion set out in the CMA's guidance on 'Agreements and concerted practices' is also met.⁴¹³
- 4.217 On this basis, the CMA concludes that the Agreement satisfies the test for an effect on trade within the UK.

H. Exclusion or Exemption

I. Exclusion

- 4.218 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.⁴¹⁴
- 4.219 The CMA finds that none of the relevant exclusions applies to the Agreement.

II. Block exemption / Parallel exemption

- 4.220 An agreement is exempt from Article 101(1) TFEU if it falls within a category of agreement which is exempt by virtue of a block exemption regulation.
- 4.221 Similarly, pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation.⁴¹⁵

⁴¹³ See paragraph 4.213 above.

⁴¹⁴ 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.

⁴¹⁵ This is the case irrespective of whether or not it affects trade between EU Member States.

- 4.222 It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.⁴¹⁶
- 4.223 Vertical agreements that restrict competition may be exempt from the Chapter I prohibition/Article 101(1) TFEU if they fall within the VABER.⁴¹⁷ The VABER exempts such agreements where the relevant market shares of the supplier and the buyer each do not exceed 30%, unless the agreement contains one of the so-called ‘hardcore’ restrictions in Article 4 of the VABER.⁴¹⁸
- 4.224 Article 4(a) of the VABER provides that the exemption provided for in Article 2 of the VABER does not apply to those agreements which directly or indirectly have as their object *‘the restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered, by any of the parties.’*
- 4.225 As set out above, the CMA concludes that the Agreement restricted GAK’s (that is, the buyer’s) ability to sell the Relevant Products online below the Minimum Price. Therefore, the Agreement restricted GAK’s (the buyer’s) ability to determine its sale price, and amounted to RPM.⁴¹⁹ The CMA therefore finds that Article 4(a) of the VABER is engaged in the present case such that the block exemption provided for in Article 2 of the VABER does not apply to the Agreement. It follows that the Agreement is not exempt from the application of the Chapter I prohibition (by virtue of section 10 of the Act) or Article 101(1) TFEU.

III. Individual exemption

- 4.226 Agreements which satisfy the criteria set out in section 9 of the Act/Article 101(3) TFEU are exempt from the Chapter I prohibition/Article 101(1) TFEU.
- 4.227 There are four cumulative criteria to be satisfied:
- the agreement contributes to improving production or distribution, or promoting technical or economic progress;

⁴¹⁶ See by analogy section 9(2) of the Act.

⁴¹⁷ Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

⁴¹⁸ See Articles 2–4 of the VABER.

⁴¹⁹ See paragraph 4.191 above.

- while allowing consumers a fair share of the resulting benefit;
- the agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and
- the agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

4.228 In considering whether an agreement satisfies the criteria set out in section 9 of the Act/Article 101(3) TFEU, the CMA will have regard to the Commission's Article 101(3) Guidelines.⁴²⁰

4.229 The CMA notes that agreements which have as their object the prevention, restriction or distortion of competition, are unlikely to benefit from individual exemption as such restrictions generally fail (at least) the first two conditions for exemption: they neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).⁴²¹ However, each case ultimately falls to be assessed on its merits.

4.230 It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.⁴²²

I. Attribution of liability

I. Key legal principles

4.231 For each party that the CMA finds to have infringed the Chapter I prohibition and/or Article 101 TFEU, the CMA will first identify the legal entity that was directly involved in the infringement. It will then determine whether liability for the infringement should be shared with any other legal entity, in which case each legal entity's liability will be joint and several on the basis that all form part of the same undertaking.

4.232 Companies belonging to the same corporate group will often constitute a single undertaking within the meaning of the Chapter I prohibition/Article 101 TFEU, allowing the conduct of a subsidiary to be attributed to the parent

⁴²⁰ Commission Notice, *Guidelines on the Application of Article 81(3) of the Treaty* [2004] OJ C101/97 (Article 101(3) Guidelines). See also *OFT401*, paragraph 5.5.

⁴²¹ Article 101(3) Guidelines, paragraph 46 and Vertical Guidelines, paragraph 47.

⁴²² Article 101(3) Guidelines, paragraphs 51–58; Vertical Guidelines, paragraph 47. See also the Act section 9(2).

company. A parent company may be held jointly and severally liable for an infringement committed by a subsidiary company where, at the time of the infringement, the parent company was able to and did exercise decisive influence over the conduct of the subsidiary, so that the two form part of a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU.⁴²³

4.233 According to settled case law, in the specific case where a parent company has a 100% shareholding in a subsidiary that has infringed the competition rules: (i) the parent company is able to exercise decisive influence over the conduct of the subsidiary; and (ii) there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary.⁴²⁴

4.234 In those circumstances, it is sufficient for the CMA to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises decisive influence over the commercial policy of the subsidiary. The CMA will then be able to regard the parent company as jointly and severally liable for the payment of any fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.⁴²⁵

4.235 As to the interpretation of ‘*decisive influence*’, the CAT noted in *Durkan*⁴²⁶ that such influence may be indirect and can be established even where the parent does not interfere in the day-to-day business of the subsidiary or where the influence is not reflected in instructions or guidelines emanating from the parent to the subsidiary. Instead, one must look generally at the relationship between the two entities, and the factors to which regard may be

⁴²³ Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraphs 60–61; and Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130. See also Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 50.

⁴²⁴ Case T-517/09 *Alstom v Commission*, EU:T:2014:999, paragraph 55; Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 60. Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130; and Case T-325/01 *DaimlerChrysler AG v Commission*, EU:T:2005:322, paragraphs 217–221. This principle was confirmed again by the General Court in its judgment of 12 July 2018, Case T-419/14 *The Goldman Sachs Group v Commission*, EU:T:2018:445, paragraph 44.

⁴²⁵ See Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 61 and Case T-419/14 *The Goldman Sachs Group v Commission*, EU:T:2018:445, paragraph 45.

⁴²⁶ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011], CAT, 6.

had when considering the issue of decisive influence '*are not limited to commercial conduct but cover a wide range.*'⁴²⁷

- 4.236 In examining whether a parent company has the ability to exercise decisive influence over the market conduct of its subsidiary, account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to its parent company and, therefore, of the economic reality.⁴²⁸
- 4.237 The actual exercise of decisive influence is assessed on the basis of factual evidence including, in particular, through an analysis of the management powers that the parent companies have over the subsidiary.⁴²⁹ The actual exercise of decisive influence can be shown directly by the parent's specific instructions or rights of co-determination of commercial policy and can also be inferred indirectly from the totality of the economic, organisational and legal links between the parent company and the relevant subsidiary.⁴³⁰ Influence over aspects such as corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters are relevant even if each of those factors taken in isolation does not have sufficient probative value.⁴³¹
- 4.238 The actual exercise of decisive influence by the parent company over the subsidiary may be deduced from any, or a combination, of the following non-exhaustive factors:
- a. board composition and board representation by the parents on the board of the subsidiary;⁴³²
 - b. overlapping senior management;⁴³³

⁴²⁷ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011], CAT 6, [22].

⁴²⁸ See Joined Cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce Inc. v Commission and Commission v Fresh Del Monte Produce Inc.*, EU:C:2015:416, paragraph 76. See also Case C-440/11 P *European Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV*, EU:C:2013:514, paragraph 66; and Case T-45/10 *GEA Group AG v Commission*, EU:T:2015:507, paragraph 133.

⁴²⁹ Case T-77/08 *The Dow Chemical Company v Commission*, EU:T:2012:47 confirmed on appeal Case C-179/12 *The Dow Chemical Company v Commission*, EU:C:2013:605.

⁴³⁰ Case T-314/01 *Avebe v Commission*, EU:T:2006:266, paragraph 136 and case-law cited; Case T-77/08 *The Dow Chemical Company v Commission*, EU:T:2012:47 paragraph 77; *Durkan Holdings Limited and Others v Office of Fair Trading* [2011], CAT 6, [19]–[22].

⁴³¹ Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 183.

⁴³² Case T-399/09 *Holding Slovenske elektrarne d.o.o. v Commission*, EU:T:2013:647, paragraph 38.

⁴³³ Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 184.

- c. the business relationship between the parent company and the subsidiary;⁴³⁴
- d. presence of the parent company in the same business sector;⁴³⁵
- e. sole representation by the parent company in the administrative proceedings;⁴³⁶
- f. parent and subsidiary presenting themselves to the outside world as forming part of the same group, such as references in the annual reports, description of being part of the same group;⁴³⁷ and
- g. the level of control over the important elements of the business strategy of the subsidiary, the level of integration of the subsidiary into the parent company's corporate structure and how far the parent company, through representatives on the board of the subsidiary, was involved in the running of the subsidiary.⁴³⁸

II. Liability for the Infringement

GAK

- 4.239 The CMA finds that the legal entities that were directly involved in the Infringement throughout the Relevant Period were GAK.co.uk Limited, The Guitar, Amp & Keyboard Centre Limited, and GAK.co.uk (Holdings) Ltd.
- 4.240 For the purposes of the Chapter I prohibition and/or Article 101 TFEU, the three companies are taken together and considered a single economic unit. Accordingly, the CMA finds GAK.co.uk Limited; The Guitar, Amp & Keyboard Centre Limited; and GAK.co.uk (Holdings) Ltd liable for the Infringement for the entire Relevant Period.
- 4.241 To the extent that GAK.co.uk (Holdings) Ltd could be considered the parent company of GAK.co.uk Limited and The Guitar, Amp & Keyboard Centre Limited, based on the legal principles set out in paragraphs 4.231 to 4.238 above, the CMA considers that GAK.co.uk (Holdings) Ltd was able to and did exercise decisive influence over the conduct of GAK.co.uk Limited and

⁴³⁴ Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 184.

⁴³⁵ Commission decision 2007/691/EC *Fittings* (COMP/F/38.121) [2007] OJ L283/63.

⁴³⁶ Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission*, EU:C:2000:630.

⁴³⁷ Case T-399/09 *Holding Slovenske elektrarne d.o.o. v Commission*, EU:T:2013:647, paragraphs 33–36 and 62–66.

⁴³⁸ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011], CAT 6, [31].

that The Guitar, Amp and Keyboard Centre Limited throughout the Relevant Period.

Yamaha

- 4.242 The CMA finds that the legal entity that was directly involved in, and therefore liable for, the Infringement throughout the Relevant Period was YME, acting through its UK branch, Yamaha UK.
- 4.243 As outlined in paragraph 1.2, Yamaha UK is a registered branch of YME. As such the CMA has identified YME, acting through its branch Yamaha UK, as being directly involved, and therefore the legal entity that is liable for the Infringement.

III. Conclusion on joint and several liability

GAK

- 4.244 In the light of the above, the CMA concludes that GAK.co.uk Limited; The Guitar, Amp & Keyboard Centre Limited; and GAK.co.uk (Holdings) Ltd formed a single economic unit for the purposes of the Chapter I prohibition and/or Article 101 TFEU throughout the Relevant Period. GAK.co.uk Limited; The Guitar, Amp & Keyboard Centre Limited; and GAK.co.uk (Holdings) Ltd are therefore jointly and severally liable for the payment of any fine imposed in relation to the Infringement.

J. Burden and standard of proof

I. Burden of proof

- 4.245 The burden of proving an infringement of the Chapter I prohibition/Article 101 TFEU lies with the CMA.⁴³⁹
- 4.246 This burden does not preclude the CMA from relying, where appropriate, on inferences or evidential presumptions. In *Napp*, the CAT stated:

‘That approach does not in our view preclude the Director,⁴⁴⁰ in discharging the burden of proof, from relying, in certain circumstances,

⁴³⁹ *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [95] and [100]. See also *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, [164] and [928]–[931]; and *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31, [88].

⁴⁴⁰ References to the ‘Director’ are to the former Director General of Fair Trading (‘DGFT’). The post of DGFT was abolished under the Enterprise Act 2002 and the functions of the DGFT were transferred to the OFT. From 1

[on] *inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example [...] that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged.*'⁴⁴¹

4.247 The CMA finds that it has discharged its burden of proof in this case.

II. Standard of proof

4.248 The CMA is required to demonstrate that an infringement has occurred on the balance of probabilities, which is the civil standard of proof.⁴⁴² The CAT clarified in the *Replica Football Kit* appeals that '*[t]he standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.*'⁴⁴³

4.249 The Supreme Court has further clarified that this standard of proof is not connected to the seriousness of the suspected infringement.⁴⁴⁴ The CAT has also expressly accepted the reasoning in this line of case law.⁴⁴⁵

4.250 The CMA concludes that this standard of proof has been met in relation to the Infringement.

April 2014 the OFT's competition and certain consumer functions were transferred to the CMA by virtue of the Enterprise and Regulatory Reform Act 2013.

⁴⁴¹ *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [110]. Along similar lines, the Court of Justice in *Aalborg* stated: '56. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.' Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v. Commission*, EU:C:2004:6.

⁴⁴² *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31 [88].

⁴⁴³ *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, [204]. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, [164]–[166].

⁴⁴⁴ *Re S-B (Children)* [2009] UKSC 17 [34]. See also *Re B (Children)* [2008] UKHL 35 [72].

⁴⁴⁵ *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 [15]–[16].

5. THE CMA'S ACTION

A. The CMA's Decision

5.1 On the basis of the evidence set out in this Decision, the CMA decides that Yamaha infringed the Chapter I prohibition and/or Article 101 TFEU by entering into an agreement and/or participating in a concerted practice with GAK:

- that GAK would not advertise or sell the Relevant Products below the Minimum Price;
- which amounted to RPM in respect of sales of the Relevant Products by GAK.

5.2 The CMA finds that this agreement and/or concerted practice:

- had as its object the prevention, restriction or distortion of competition within the UK and/or between EU Member States;
- may have affected trade within the UK and/or between EU Member States; and
- lasted from 1 March 2013 to 31 March 2017.

5.3 The CMA has decided to attribute liability for the Infringement to:

- GAK.co.uk Limited; The Guitar, Amp & Keyboard Centre Limited; and GAK.co.uk (Holdings) Ltd as jointly and severally liable for the Infringement; and
- YME, through its branch Yamaha UK, as the legal entity that is liable for the Infringement.

5.4 The remainder of this Section sets out the enforcement action the CMA is taking.

B. Directions

5.5 The CMA concludes that the Infringement has ceased. Therefore, it is not necessary to give directions to any party in this case.⁴⁴⁶

⁴⁴⁶ Section 32(1) of the Act provides that if the CMA has made a decision that an agreement infringes the Chapter I prohibition and Article 101(1) TFEU, it may give to such person(s) as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

C. Financial Penalties

I. General

- 5.6 Section 36(1) of the Act provides that on making a decision that an agreement⁴⁴⁷ has infringed the Chapter I prohibition or Article 101(1) TFEU, the CMA may require an undertaking which is a party to the agreement concerned to pay the CMA a penalty in respect of the infringement.

GAK

- 5.7 As set out above, the CMA finds GAK.co.uk Limited; The Guitar, Amp & Keyboard Centre Limited; and GAK.co.uk (Holdings) Ltd (which are part of the same single economic entity) jointly and severally liable for the Infringement. Therefore, the CMA considers that it would be appropriate to impose a financial penalty for the Infringement jointly and severally on GAK.co.uk Limited; The Guitar, Amp & Keyboard Centre Limited; and GAK.co.uk (Holdings) Ltd. The penalty is calculated in accordance with the CMA's published guidance⁴⁴⁸ and relevant legislation.⁴⁴⁹

Yamaha

- 5.8 As set out above, the CMA finds YME liable for the Infringement. Pursuant to the terms of the immunity agreement between YME and the CMA (dated 18 March 2020), no financial penalty will be imposed on YME, conditional on its continuing to meet the requirements of the CMA's leniency policy.⁴⁵⁰ Consequently, the CMA does not need to calculate the level of any financial penalty that could have been applied to YME had immunity not been granted to it.⁴⁵¹

The CMA's margin of appreciation in determining the appropriate penalty

- 5.9 Provided the penalties the CMA imposes in a particular case are:

⁴⁴⁷ Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.

⁴⁴⁸ *CMA's guidance as to the appropriate amount of a penalty* (CMA73, 18 April 2018) ('Penalties Guidance').

⁴⁴⁹ The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) and the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

⁴⁵⁰ See the Leniency Guidance.

⁴⁵¹ This approach is in line with the CMA's Leniency Guidance, paragraph 9.5.

- a. within the range of penalties permitted by section 36(8) of the Act⁴⁵² and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000)⁴⁵³; and
- b. the CMA has had regard to its guidance as to the appropriate amount of a penalty (i.e. the Penalties Guidance)⁴⁵⁴ 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.⁴⁵⁵

- 5.10 The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.⁴⁵⁶ Rather, the CMA makes its assessment on a case-by-case basis,⁴⁵⁷ having regard to all relevant circumstances and the twin objectives of its policy on financial penalties.
- 5.11 In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will have regard to the seriousness of the infringement and the need to deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.⁴⁵⁸

Small agreements

- 5.12 Section 39 of the Act (which provides for limited immunity from penalties in relation to the Chapter I prohibition) does not apply to the present case on the basis that the applicable turnover of YME alone exceeded the relevant threshold,⁴⁵⁹ and, in any event, the Infringement amounts, in the CMA's

⁴⁵² Section 36(8) of the Act reads: 'No penalty fixed by the [OFT] under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State).'

⁴⁵³ SI 2000/309, as amended by the Competition Act (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

⁴⁵⁴ Penalties Guidance, paragraph 1.10.

⁴⁵⁵ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, [102].

⁴⁵⁶ See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, [78].

⁴⁵⁷ Penalties Guidance, paragraphs 2.5 and 2.8. See, for example, *Kier Group and Others v OFT* [2011] CAT 3, [116] where the CAT noted that 'other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent'.

⁴⁵⁸ The Act, section 36(7A); Penalties Guidance, paragraphs 1.3-1.4

⁴⁵⁹ Regulation 3 of the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI/2000/262) provides that the category of agreements for which no penalty may be imposed under section 39 of the Competition Act comprises 'all agreements between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million'. The combined applicable turnover of the Addressees in the business years ending in 2012 – 2016 exceeded £20 million. See YME's accounts: C-YAM02199 (2011/12), p.6; C-YAM02200 (2012/13), p.6; URN C_YAM01759 (2013/14); URN C_YAM01760 (2014/15); URN C_YAM01761 (2015/16).

view, to a ‘price fixing agreement’ within the meaning of section 39(9) of the Act.⁴⁶⁰ Moreover, section 39 of the Act does not apply in respect of infringements of Article 101 TFEU.

II. Intention/negligence

5.13 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition and/or Article 101 TFEU if it is satisfied that the infringement has been committed intentionally or negligently.⁴⁶¹ However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent for the purposes of determining whether it may exercise its discretion to impose a penalty.⁴⁶²

5.14 The CAT has defined the terms ‘intentionally’ and ‘negligently’ as follows:

*‘[...] an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition’.*⁴⁶³

5.15 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’.*⁴⁶⁴

5.16 The intention or negligence relates to the facts, not the law. Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.⁴⁶⁵

⁴⁶⁰ A ‘price fixing agreement’ within the meaning of section 39(9) of the Act is ‘an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates’. By virtue of section 39(1)(b) of the Act, such an agreement is excluded from the benefit of the limited immunity from penalties provided by section 39 of the Act.

⁴⁶¹ Section 36(3) of the Act.

⁴⁶² *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [453]–[457]; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [221].

⁴⁶³ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [221].

⁴⁶⁴ Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 124.

⁴⁶⁵ See Case C-681/11 *Bundeszweibewerbsbehörde v Schenker & Co. AG*, EU:C:2013:404, paragraph 38.

- 5.17 As set out in previous decisions, the CMA takes the view that the circumstances in which the CMA might find that an infringement has been committed intentionally include situations in which the agreement or conduct in question has as its object the restriction of competition.⁴⁶⁶
- 5.18 In establishing whether or not there is intention, the CMA may consider internal documents generated by the undertakings in question. For the purposes of this case, the case team has taken into account evidence of deliberate concealment of an agreement or practice by Yamaha, with the complicity of GAK, as strong evidence of an intentional infringement.⁴⁶⁷
- 5.19 For the reasons given at Section 4.D, paragraphs 4.151 to 4.191 above, the CMA considers that the Infringement had as its object the prevention, restriction or distortion of competition.

III. Yamaha

- 5.20 In the light of the evidence set out above, ‘Yamaha’s awareness of the illegality of enforcing the Yamaha Pricing Policy’⁴⁶⁸ and Section 4.C.IV. ‘Agreement and/or concerted practice between Yamaha and GAK’,⁴⁶⁹ the CMA considers that Yamaha was aware of the anti-competitive nature of its conduct.
- 5.21 This evidence includes:
- a. evidence of Yamaha’s attempts to minimise written records of the Yamaha Pricing Policy, which formed the basis of the Infringement, most notably after the Compliance Directive came into force in October 2014;⁴⁷⁰

⁴⁶⁶ Previous CMA decisions where the CMA has concluded that the circumstances in which the CMA might find that an infringement has been committed intentionally include situations in which the agreement or conduct in question has as its object the restriction of competition: CMA decision of 3 May 2017 in Case 50343 *Online resale price maintenance in the light fittings sector*, paragraph 5.14; CMA decision of 10 May 2016 in Case CE/9857-14 *Online resale price maintenance in the bathroom fittings sector*, paragraph 7.16; CMA decision of 24 May 2016 in Case CE/9856-14 *Online resale price maintenance in the commercial refrigeration sector*, paragraph 7.19.

⁴⁶⁷ See paragraphs 3.131 to 3.135 above.

⁴⁶⁸ See paragraphs 3.131 to 3.133 above.

⁴⁶⁹ See paragraphs 4.28 to 4.150 above.

⁴⁷⁰ See paragraphs 4.69 to 4.72, and 4.114 to 4.120 above.

- b. evidence which indicated that Yamaha staff were, in fact aware of the possible illegality of the Yamaha Pricing Policy;⁴⁷¹
 - c. the fact that RPM is a well-established competition law infringement⁴⁷² and Yamaha ought to have known that restricting GAK's freedom to determine its own resale prices would reduce price competition between GAK and other resellers; and
 - d. the CMA finding that the Infringement had as its object the prevention, restriction or distortion of competition,⁴⁷³ which further indicates that it was committed intentionally.
- 5.22 On this basis the CMA concludes that Yamaha committed the Infringement intentionally, or, at the very least, negligently. As outlined in paragraph 5.8 above, Yamaha has been granted full immunity from any financial penalty, conditional on its continuing to meet the requirements of the CMA's leniency policy,⁴⁷⁴ and therefore no imposition of a penalty is applicable in this case.

IV. GAK

- 5.23 In the light of the evidence set out above, 'GAK's awareness of the illegality of complying with the Yamaha Pricing Policy'⁴⁷⁵ and Section 4.C.IV above 'Agreement and/or concerted practice between Yamaha and GAK',⁴⁷⁶ the CMA considers that GAK was aware, or could not have been unaware, of the likely anti-competitive nature of its conduct.
- 5.24 The evidence includes:
- a. evidence of GAK's awareness of Yamaha's attempts to minimise written records of the Yamaha Pricing Policy, which formed the basis of the Infringement, most notably after the Yamaha Compliance Directive came into force in October 2014;⁴⁷⁷ and

⁴⁷¹ See paragraphs 3.131 to 3.133 above.

⁴⁷² See paragraphs 4.151 to 4.191 above.

⁴⁷³ See paragraphs 4.151 to 4.191 above.

⁴⁷⁴ See the Leniency Guidance.

⁴⁷⁵ See paragraphs 3.133 to 3.135 above.

⁴⁷⁶ See paragraphs 4.28 to 4.150 above.

⁴⁷⁷ See paragraphs 4.69 to 4.72, and 4.144 to 4.120 above.

- b. the fact that RPM is a well-established competition law infringement⁴⁷⁸ and at the very least GAK ought to have known that the Infringement would reduce price competition between GAK and other resellers.

5.25 The CMA considers that, although Yamaha as the manufacturer was the key implementer of the Yamaha Pricing Policy, GAK as an active participant in the Yamaha Pricing Policy must have been aware, or could not have been unaware, of the likely illegality of its conduct. On this basis, the CMA finds that GAK committed the Infringement intentionally or, at the very least, negligently and that the conditions for imposing a fine on GAK.co.uk Limited; The Guitar, Amp & Keyboard Centre Limited; and GAK.co.uk (Holdings) Ltd are therefore met.

V. Calculation of Penalties

5.26 The Penalties Guidance sets out a six-step approach for calculating the penalty. In determining the amount of the penalty in this case the CMA has considered in detail GAK's representations on the draft penalty calculation in the context of settlement discussions.

Step 1 – the starting point

5.27 The starting point for determining the level of financial penalty that will be imposed on an undertaking is calculated having regard to (i) the seriousness of the infringement and the need for general deterrence, and (ii) the relevant turnover of the undertaking.⁴⁷⁹

5.28 In this case, the CMA has decided to apply a starting point percentage of 19% to a relevant turnover of £[REDACTED], leading to a starting point of £[REDACTED] based on the considerations set out below.

Seriousness of the Infringement and need for general deterrence

5.29 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.⁴⁸⁰

⁴⁷⁸ See paragraphs 4.151 to 4.191 above.

⁴⁷⁹ The Penalties Guidance, paragraphs 2.3 to 2.10.

⁴⁸⁰ The Penalties Guidance, paragraph 2.4.

- 5.30 In making this case-specific assessment, the CMA will first take into account how likely it is for the type of infringement at issue to, by its nature, harm competition.⁴⁸¹ As set out in the Penalties Guidance, the CMA will generally use a starting point between 21% and 30% of the relevant turnover for the most serious types of infringement. In relation to infringements of the Chapter I prohibition and/or Article 101, this includes cartel activities, such as price-fixing and market-sharing and other, non-cartel object infringements which are inherently likely to cause significant harm to competition.⁴⁸²
- 5.31 At the second stage, the CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of the specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately to consumers.⁴⁸³
- 5.32 Finally, the CMA will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence.⁴⁸⁴

Nature of the infringement

- 5.33 RPM is a serious by object infringement of the Chapter I prohibition and Article 101 TFEU. However, it is generally less serious than horizontal price-fixing, market-sharing and other cartel activities, which would ordinarily attract a starting point towards the upper end of the 21% to 30% range.⁴⁸⁵

Specific circumstances relevant to the extent and likelihood of harm to competition in this case

- 5.34 The relevant specific circumstances in this case were:
- a. *Yamaha's relative importance in the marketplace and as a supplier to GAK:* Yamaha's market share in the (upstream) market for the supply of pianos and digital keyboards through UK resellers was at least [X] %⁴⁸⁶ in 2016/17, making it the largest supplier in the UK. This means that it is and was a particularly important supplier for GAK. Yamaha's share of supply in guitars was at the relevant time and remains approximately [X] %.⁴⁸⁷ Guitars accounted for a substantial part of GAK's sales, so it

⁴⁸¹ The Penalties Guidance, paragraph 2.5.

⁴⁸² The Penalties Guidance, paragraph 2.6.

⁴⁸³ The Penalties Guidance, paragraph 2.8.

⁴⁸⁴ The Penalties Guidance, paragraph 2.9.

⁴⁸⁵ The Penalties Guidance, paragraph 2.6. See also CMA decision of 3 May 2017 in Case 50343 *Online resale price maintenance in the light fittings sector*, paragraph 5.25.

⁴⁸⁶ See footnote 397 above.

⁴⁸⁷ URN C_YAM00042 (Market share MI UK - Update for CMA 14 March 2018, 2015/16 and 2016/17).

was important to GAK that it stock a range of guitars, including Yamaha guitars. The CMA estimates GAK's share of supply in guitars to be at least [X]%;⁴⁸⁸

- b. *The Yamaha Pricing Policy had a wide reach*, as Yamaha sought to enforce it across its UK network of Selective Resellers.
- Yamaha sought to enforce the Yamaha Pricing Policy both by monitoring prices through Selective Resellers (including GAK), monitoring other Selective Resellers and by itself monitoring prices through use of price-monitoring software for at least part of the Relevant Period.⁴⁸⁹
 - Yamaha intended the Yamaha Pricing Policy to apply across its entire UK Selective Reseller network.⁴⁹⁰
 - That there was a credible threat that sanctions would be imposed by Yamaha on Selective Resellers for failure to comply with the Yamaha Pricing Policy and that, irrespective of whether sanctions were imposed, the fear of being sanctioned played an important part in encouraging Selective Resellers, including GAK, to adhere to the Yamaha Pricing Policy.⁴⁹¹
- c. *GAK's role in making the Yamaha Pricing Policy more widespread and effective*: The use of price monitoring software by GAK, along with evidence of GAK reporting non-compliance by other resellers with the Yamaha Pricing Policy to Yamaha (so-called 'ratting'), made the Yamaha Pricing Policy more widespread and more effective.⁴⁹² GAK appears to have been aware of the, at least, questionable legality of its communications with Yamaha in relation to the Yamaha Pricing Policy during the Relevant Period.⁴⁹³
- d. *A significant proportion of the sales by GAK were affected*: GAK has noted that throughout the Relevant Period there was a shift from traditional bricks-and-mortar shopping to online sales, leading to an

⁴⁸⁸ See footnote 400 above for how this market share figure has been calculated.

⁴⁸⁹ See paragraph 3.118 above.

⁴⁹⁰ See paragraph 3.92 above.

⁴⁹¹ See paragraph 3.78 above.

⁴⁹² See paragraph 3.77 above.

⁴⁹³ See paragraphs 3.134 to 3.135 above.

increase in website sales across most product categories.⁴⁹⁴ The proportion of GAK's annual revenue accounted for by online sales during the Relevant Period averaged [X]% (guitars) and [X]% (pianos and digital keyboards).⁴⁹⁵ The CMA considers that the ability to sell or advertise goods at discounted prices on the internet can intensify price competition between resellers (online and/or offline) due to the increased transparency and reduced search costs from internet shopping.⁴⁹⁶

General deterrence

- 5.35 In setting the starting point at 19%, the CMA has also taken into account the need to deter other undertakings from engaging in similar infringements in the future. In particular, the CMA notes the high prevalence of RPM-related letters on the register of warning and advisory letters issued by the CMA in recent years, including in 2018 and 2019.⁴⁹⁷

Relevant turnover

- 5.36 The 'relevant turnover' is defined as the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year.⁴⁹⁸ The 'last business year' is the financial year preceding the date when the infringement ended.⁴⁹⁹
- 5.37 In this case, the relevant turnover from the supply by GAK through online and offline sales of digital pianos, digital keyboards and guitars (excluding sales to education customers) was £[X] for the financial year 2015/2016.⁵⁰⁰

⁴⁹⁴ URN C_YAM01698 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 (guitars)), question 2 and URN C_YAM01699 (GAK response dated 20 January 2020 to RFI dated 18 December 2019 RFI (pianos and keyboards)), question 2.

⁴⁹⁵ URN C_YAM01849 (GAK response dated 27 February 2020 to RFI dated 17 February 2020), (question 7). See paragraph 3.66 above.

⁴⁹⁶ See paragraph 3.68 above.

⁴⁹⁷ See register of Warning letters issued by the CMA and register of Advisory letters issued by the CMA.

⁴⁹⁸ The Penalties Guidance, paragraph 2.11. The CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v OFT and JJB Sports plc and Allsports Limited v OFT* [2006] EWCA Civ 1318, [169], that: '[...] neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty.' 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).

⁴⁹⁹ The Penalties Guidance, paragraph 2.11.

⁵⁰⁰ GAK's response dated 28 February 2020, question 2, to the CMA's s26 Notice dated 21 February 2020: URN C_YAM01855. GAK's financial information by product type as stated in GAK's response dated 13 January 2020, question 14a to CMA's s26 Notice dated 18 December 2019: URN C_YAM01678 (guitars) and URN C_YAM01679 (pianos and keyboards). GAK's financial information by product type as stated in GAK's response

Step 2 – adjustment for duration

- 5.38 The starting point under step 1 may be increased or, in particular circumstances, decreased to take into account the duration of the infringement.⁵⁰¹ Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional cases decide to round up the part year to a full year.⁵⁰²
- 5.39 In this case, the CMA applied a multiplier of 4.25 years to the starting point to reflect the finding that the duration of the Infringement, which lasted from 1 March 2013 to 31 March 2017 (4 years and 1 month).

Step 3 – adjustment for aggravating and mitigating factors

- 5.40 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.⁵⁰³ In the circumstances of this case, the CMA considers it appropriate to adjust the penalty at step 3 to take account of the factors set out below.

Aggravating factor: involvement of directors or senior management

- 5.41 The involvement of directors or senior management in an infringement can be an aggravating factor.⁵⁰⁴
- 5.42 Three of GAK's senior employees ([GAK Senior Employee 1], [GAK Senior Employee 2] and [GAK Senior Employee 3]) were involved in the Infringement. All were at least aware of GAK's adherence to the Yamaha Pricing Policy throughout the Relevant Period, and one, namely [GAK Senior Employee 3], was closely involved in the Infringement. [GAK Senior Employee 3]:
- gave instructions to GAK staff in relation to the implementation of the Yamaha Pricing Policy;⁵⁰⁵ and

dated 13 January 2020, question 14b to CMA's s26 Notice dated 18 December 2019: URN C_YAM01680 and URN C_YAM01681.

⁵⁰¹ The Penalties Guidance, paragraph 2.16.

⁵⁰² The Penalties Guidance, paragraph 2.16.

⁵⁰³ The Penalties Guidance, paragraph 2.17. A non-exhaustive list of aggravating and mitigating factors is set out in paragraphs 2.18 and 2.19 of the Penalties Guidance.

⁵⁰⁴ The Penalties Guidance, paragraph 2.18.

⁵⁰⁵ See for example paragraphs 4.102 to 4.104 above.

- was directly involved in monitoring and reporting other resellers' non-compliance with the Yamaha Pricing Policy to Yamaha.⁵⁰⁶

5.43 Given the nature and impact of the involvement of the three GAK senior employees, and most notably [GAK Senior Employee 3], the CMA considers it appropriate to apply an uplift of 15% to the penalty for director or senior management involvement.

Aggravating factor: failure to comply following receipt of an advisory letter

5.44 As outlined in paragraph 2.11 above, the CMA issued GAK with an advisory letter in October 2015 in respect of suspected conduct similar to the conduct investigated in this case. The evidence shows that following receipt of the CMA's advisory letter, GAK did not take effective action to address the concerns set out in that letter and did not discontinue its participation in the Yamaha Pricing Policy. GAK continued to participate in, adhere to, and police the Yamaha Pricing Policy through 2015, into 2016 and beyond.⁵⁰⁷

5.45 The CMA therefore considers it appropriate to apply an uplift of 15% to the penalty for failure to comply following receipt of an advisory letter.

Mitigating factor: adequate steps having been taken to ensure compliance with competition law

5.46 The CMA may decrease the penalty at step 3 where an undertaking can show that adequate steps have been taken to ensure compliance with competition law.⁵⁰⁸

5.47 The CMA considers it appropriate to grant GAK a 10% discount as, following the CMA's investigation and settlement discussions, GAK has now taken adequate steps with a view to ensuring future compliance with competition law, such as providing competition compliance training to staff, including senior managers and sales staff.

5.48 GAK has now provided details of a comprehensive new competition law compliance programme. This includes appropriate steps relating to

⁵⁰⁶ See for example paragraphs 4.84 to 4.88.

⁵⁰⁷ See paragraphs 4.130 to 4.143 above.

⁵⁰⁸ The Penalties Guidance, paragraph 2.19 and footnote 33. To qualify, an undertaking has to provide evidence of adequate steps taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation, from the top down, together with appropriate steps relating to competition compliance risk identification, risk assessment, risk mitigation and review activities. The CMA will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount to the penalty of up to 10%.

competition law risk identification, assessment, mitigation and review, to which GAK senior management has fully and publicly committed.⁵⁰⁹

- 5.49 The CMA concludes that GAK has provided sufficient evidence of compliance activities which demonstrate a clear and unambiguous commitment to future competition law compliance throughout the organisation from the top down to warrant a reduction in penalty.
- 5.50 In terms of its public commitment, GAK has published a statement regarding its commitment to competition law compliance.⁵¹⁰ GAK has also committed to submitting a report to the CMA on GAK's competition law compliance activities every year, for the next three years.

Mitigating factor: cooperation

- 5.51 The CMA considers it appropriate to grant GAK a 5% discount for cooperation. This is to reflect GAK's voluntary cooperation, in particular the significant information volunteered unprompted by [GAK Senior Employee 3] at interview that added significant value to the case.⁵¹¹ This went over and above what would normally be required or expected in the context of the statutory obligations associated with an interview undertaken under section 26A of the Act, and enabled the enforcement process to be concluded more speedily and efficiently, in particular by providing sufficient evidence so that no further interviews with GAK employees were necessary.
- 5.52 The CMA has taken account, in the round, of the above considerations and also GAK's responsiveness (and generally helpful approach) during the investigation.

Step 4 – adjustment for specific deterrence and proportionality

- 5.53 At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round.⁵¹² The penalty may be adjusted either to:
- a. increase it to achieve specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future); or

⁵⁰⁹ GAK submitted various representations in relation to compliance between 18 December 2019 and 14 April 2020. GAK confirmed that GAK senior management had approved and committed to implementing to the compliance steps detailed in its submissions.

⁵¹⁰ https://www.gak.co.uk/en/GAK_and_Competition_Law

⁵¹¹ See URN C_YAM01710.1 (Transcript of interview on 13 August 2019 with [GAK Senior Employee 3], GAK), and URN C_YAM01710.2 (Clarifications from [GAK Senior Employee 3], dated 18 September 2019).

⁵¹² The Penalties Guidance, paragraph 2.24.

- b. reduce it to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking at the time the penalty is being imposed as well as any other relevant circumstances of the case.⁵¹³

- 5.54 Taking all the relevant circumstances of this case into account, on balance, the CMA has applied a reduction of [85-95]% in this case.
- 5.55 In carrying out its step 4 assessment, the CMA has had regard to GAK's size and financial position, the nature of the infringement and the impact of the undertaking's infringing activity on competition.⁵¹⁴ In particular, the CMA has had regard to (a) GAK's role as a participant rather than the initiator of the Yamaha Pricing Policy, and (b) to the fact that the relevant turnover on which the penalty was based was that of a reseller and not that of a supplier, and therefore included the products of suppliers other than Yamaha which were unaffected by the Infringement. In these circumstances the Relevant Products (those supplied by Yamaha) accounted for only a small proportion of the relevant turnover. The penalty for the Infringement after step 3 is £[X]. In the light of GAK's financial indicators, the CMA considers that a proportionality reduction at step 4 is required in this case. This is to ensure that the penalty is proportionate for this form of conduct in the specific circumstances of the case, and in light of GAK's financial size and position. The CMA has therefore applied a reduction of [85-95]% at step 4.
- 5.56 The CMA considers that the resultant penalty is appropriate and sufficient for deterrence purposes without being disproportionate or excessive.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

- 5.57 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.⁵¹⁵ The CMA has assessed the penalty against this threshold. The

⁵¹³ The CMA will generally consider three-year averages for profits and turnover: the Penalties Guidance, paragraph 2.20. In this case, the CMA has considered a range of financial indicators in this regard, based on the last three years' worth of published accounting information and information provided by GAK at the time of calculating the penalty. Those financial indicators included relevant turnover, worldwide turnover, operating profit, profit after tax, net assets, and dividends.

⁵¹⁴ The Penalties Guidance, paragraph 2.20.

⁵¹⁵ Section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by the Competition Act (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259). See also the Penalties Guidance, paragraph 2.25. The business year on the basis of which worldwide turnover is determined will be the one preceding the date on which the decision of the CMA is taken or, if figures are not available for that business year, the one immediately preceding it.

assessment has not led to the need for any reduction of the penalty at step 5 of the penalty calculation.

- 5.58 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the Commission, or by a court or other body in another Member State of the EU in respect of the same agreement or conduct.⁵¹⁶ As neither the Commission nor any body in another Member State has imposed a penalty on GAK, no adjustments to avoid double jeopardy were necessary.

Step 6 – application of reduction for settlement

- 5.59 The CMA will apply a penalty reduction where an undertaking agrees to settle with the CMA, which will involve, among other things, the undertaking admitting its participation in the infringement.⁵¹⁷
- 5.60 In this case, the CMA considers it appropriate to grant GAK a 20% discount to reflect the fact that GAK has admitted the Infringement and agreed to cooperate in expediting the process for concluding the Investigation. This discount is granted on condition that GAK continues to comply with the continuing requirements of settlement as set out in the settlement agreements between each of GAK.co.uk Limited; The Guitar, Amp & Keyboard Centre Limited; and GAK.co.uk (Holdings) Ltd, and the CMA.

Penalty

- 5.61 The following table sets out a summary of the penalty calculation and the penalty that the CMA requires GAK to pay in relation to the Infringement.

Figure 5.1: Summary table of the penalty calculation

Step	Description		Adjustment	Figure
	Relevant turnover		-	£[X]
1	Starting point as a percentage of relevant turnover		x 19%	£[X]
2	Adjustment for duration		x 4.25	£[X]
3	Adjustment for aggravating and mitigating factors	<i>Aggravating: Senior manager involvement</i>	+ 15%	+ £[X]
		<i>Aggravating: Advisory letter</i>	+ 15%	
		<i>Mitigation: Compliance</i>	- 10%	- £[X]
		<i>Mitigation: Cooperation</i>	- 5%	- £[X]
	Total Adjustment		+ 15%	+ £[X]
4	Adjustment for specific deterrence and proportionality		- [85-95]%	- £[X]

⁵¹⁶ The Penalties Guidance, paragraph 2.28.

⁵¹⁷ The Penalties Guidance, paragraph 2.30.

Step	Description	Adjustment	Figure
	Maximum Penalty after Step 4		£348,681
5	Adjustment to prevent statutory maximum being exceeded	N/A	N/A
6	Settlement discount	-20%	- £69,736
	Maximum penalty payable for the infringement		£278,945

VI. Payment of penalty

5.62 In light of the above, the CMA requires GAK to pay a penalty of £278,945. The individual figures in the summary table at Figure 5.1 above are rounded to the nearest pound sterling.

5.63 The CMA requires GAK to pay £278,945 to the CMA by close of banking business in England and Wales on 18 September 2020⁵¹⁸ at the latest.⁵¹⁹ If that date (18 September 2020) has passed and:

- the period during which an appeal against the imposition, or amount, of that penalty may be made has expired without an appeal having been made, or
- such an appeal has been made and determined,

the CMA may commence proceedings to recover from GAK any amount payable under the penalty notice which remains outstanding, as a civil debt due to the CMA.⁵²⁰

SIGNED: [✂]

17 July 2020

Ann Pope

Senior Director of Antitrust Enforcement

for and on behalf of the Competition and Markets Authority

⁵¹⁸ The next working day two calendar months from the expected receipt of the Decision.

⁵¹⁹ Details on how to pay the penalty are set out in the letter to GAK accompanying this Decision.

⁵²⁰ Section 37(1) of the Act.