Decision of the Competition and Markets Authority

Competition Act 1998
Roofing materials
Case 50477

4 November 2020

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 [✂].

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

CONTENTS

1. Introduction and Executive Summary

1.1 By this decision (the '**Decision**'), the Competition and Markets Authority (the '**CMA**') has concluded that the persons listed at paragraph 1.2 have infringed the prohibition imposed by section 2(1) (the '**Chapter I prohibition**') of the Competition Act 1998 (the '**Act**') and/or Article 101(1) of the Treaty on the Functioning of the European Union (the '**TFEU**').[1]

1.2 This Decision is addressed to:

(a) Associated Lead Mills Limited ('**ALM**'), Royston Sheet Lead Limited (formerly known as Jamestown Metals Limited) ('**JML**') and their parent company International Metal Industries Limited (together '**IMI**'); and

(b) H.J. Enthoven Limited (trading as BLM British Lead) ('**BLM**') and its parent company Eco-Bat Technologies Limited (together '**Eco-Bat**').

1.3 The CMA has found that IMI and Eco-Bat (each a '**Party**', together '**the Parties**') entered into four agreement(s) and/or concerted practice(s), each of which had as its object the prevention, restriction or distortion of competition in relation to the supply of rolled (milled) lead (hereinafter referred to as '**Rolled Lead**') within the UK and/or within the internal market. The CMA has found that the July 2016 Infringement (as defined at paragraph 1.4), may have affected trade within the UK, in breach of the Chapter I prohibition, and that the October 2015 Infringement, the August 2016 Infringement and the April 2017 Infringement (as defined at paragraph 1.4), may have affected trade within the UK and between Member States, in breach of the Chapter I prohibition and Article 101(1) of the TFEU.

1.4 More specifically, the CMA has found that:

(a) the '**October 2015 Infringement**' as described at paragraphs 3.56 to 3.73 below constitutes an agreement and/or concerted practice between ALM/JML[2] and BLM not to supply CBG[3] (by withdrawing or otherwise refusing to supply CBG); this was underpinned by an exchange of commercially sensitive information regarding their strategies towards CBG.

[1] 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. This means that directly applicable EU law, including Articles 101 and 102 TFEU and Regulation 1/2003, will continue to apply in the UK during the Transition Period.

[2] As defined at paragraph 3.14.

[3] As defined at paragraph 2.35.

(b) the '**July 2016 Infringement**' as described at paragraphs 3.74 to 3.108 below, constitutes an agreement and/or concerted practice between ALM/JML and BLM to share the market through the allocation of a particular customer by way of a non-aggression pact and/or to fix prices in relation to that customer. The conduct includes an exchange of commercially sensitive pricing information;

(c) the '**August 2016 Infringement**' as described at paragraphs 3.109 to 3.134 below constitutes an agreement and/or concerted practice between ALM/JML and BLM to share the market by way of a non-aggression pact and/or to fix prices. The conduct also includes an exchange of information regarding competitively sensitive market and pricing strategy; and

(d) the '**April 2017 Infringement**' as described at paragraphs 3.135 to 3.152 below constitutes a concerted practice between ALM/JML and BLM to fix prices through the alignment of BLM's and ALM/JML's prices in respect of certain buying group customers. This was effected by way of a unilateral disclosure of commercially sensitive pricing information from BLM to ALM/JML

(each an **'Infringement'**, together the '**Infringements**').

1.5 The CMA has imposed financial penalties on the Parties under section 36 of the Act in respect of the Infringements.

2. The Investigation

2.1 This section provides an overview of the investigatory steps taken during the course of the CMA's investigation.

2.2 [✂].

2.3 On 11 July 2017, the CMA opened a formal investigation under section 25 of the Act, having determined that it had reasonable grounds for suspecting that the Parties, Calder Industrial Metals Limited ('**Calder**') and [Party D] had infringed the Chapter I prohibition and/or Article 101 of the TFEU.

Inspections

2.4 On 11 and 12 July 2017, the CMA carried out inspections at the premises of ALM, BLM, Calder and [Party D] under the power of warrants issued pursuant to section 28 of the Act (the '**July Inspections**').

2.5 The evidence obtained during the July Inspections led to further lines of enquiry. The CMA therefore carried out further inspections at the premises of BLM and Calder on 4 December 2017 under the power of warrants issued pursuant to section 28 of the Act (the '**December Inspections**').

2.6 The CMA also carried out inspections under section 27 of the Act at ALM's premises on 5 September 2018, and at BLM's premises on 6 September 2018. The latter inspection was followed up with a meeting at the offices of BLM's legal advisers on 4 October 2018, during which certain additional documents were made available.

[✂]

2.7 [✂] an additional mobile phone operated by [Director, BLM], [✂] at BLM (the '**Second Phone**').

Requests for information

2.8 In the course of the investigation, the CMA made requests for information and documents to the Parties under section 26 of the Act as follows:

- to 2iM on 11 July 2017, 26 June 2018, 17 August 2018, 26 November 2018, 18 February 2019;
- to Eco-Bat on 15 June 2018, 14 August 2018;
- to both Parties on 30 October 2018 and 17 December 2019.

2.9 The Parties also voluntarily provided information to the CMA during the course of the investigation.

2.10 The CMA also acquired information from third parties and from Calder (under section 26 of the Act) when it was within the scope of the investigation.

Interviews

2.11 [✂].

2.12 The CMA conducted voluntary interviews with the following individuals from ALM and JML on 13 June 2018:

- [Director A, ALM/JML], [✂];
- [Director B, ALM/JML], [✂];
- [Director C, ALM/JML], [✂].

2.13 The CMA conducted a voluntary interview with the following individual from BLM on 7 September 2018:

- [Senior Employee, BLM], [✂].

2.14 The CMA conducted a compulsory interview under section 26A of the Act with the following individual from BLM on 29 June 2018:

- [Director, BLM], [✂].

2.15 On 2 July 2019, BLM provided a draft witness statement from [Director, BLM] to the CMA. This led the CMA to conduct a further compulsory interview under section 26A of the Act with [Director, BLM] on 25 September 2019.

2.16 Having reviewed [Director, BLM]'s draft witness statement and second interview, the CMA decided not to seek a signed witness statement from [Director, BLM]. This decision resulted from concerns about the credibility of his account, as described at paragraphs 2.36 to 2.38 below.

2.17 The CMA also conducted voluntary interviews with individuals from Calder while it was within the scope of its investigation.

Scope

2.18 In July 2018, the CMA decided to discontinue its investigation into the conduct of [Party D].

Later stages of the investigation

2.19 The CMA provided formal updates on the investigation on 19 December 2017 and 2 August 2018. The CMA held 'state of play' meetings with ALM/JML, BLM and Calder between 24 September and 1 October 2018. The CMA also provided ALM/JML, BLM and Calder with informal updates throughout the investigation.

The Statement of Objections

2.20 On 27 March 2019, the CMA issued a Statement of Objections ('**SO**'),[4] which gave notice to the Parties and Calder (with its parent company Calder Group Holdings Limited, or '**Calder Group**') that it proposed to make a decision that 2iM,[5] Eco-Bat and Calder Group (each an **'SO Party'**, together the **'SO Parties**') had entered into a single, continuous infringement constituting an agreement and/or a concerted practice in breach of the Chapter I prohibition and Article 101 TFEU ('**the SO Alleged Infringement**').

2.21 The SO Parties provided written representations on the SO in August 2019.[6] 2iM and Calder Group made oral representations in September 2019.[7] Eco-Bat waived its right to an oral hearing.

Rescoping following the SO

2.22 Following the CMA's review of the oral and written representations made by the SO Parties on the SO and further evidence and information that had been received since the SO was issued, the CMA revised certain parts of the SO. The changes included a revised provisional view that there was not a single, continuous infringement but rather four individual infringements. As the CMA considered this revision to constitute a material change in the nature of the proposed findings described in the SO, the CMA informed the SO Parties during 'state of play' meetings on 27 and 28 November 2019 that it proposed to issue a Supplementary Statement of Objections ('**SSO**').

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[4] The Statement of Objections was issued under section 31 of the Competition Act 1998 and Rules 5 and 6 of SI 2014/458 *The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014* ('**CMA Rules**').
[5] The SO was addressed to ALM, JML and International Industrial Metals Limited (together '2iM'). At that time, International Industrial Metals Limited was the parent company of ALM and JML. Following a corporate restructure, the parent company of ALM and JML is now International Metal Industries Limited. As explained in Section 5 of this Decision, the CMA finds that International Metal Industries Limited is the economic successor of International Industrial Metals Limited for the purpose of attributing liability for the Chapter I prohibition and Article 101 TFEU.
[6] URN 3971, URN 3923 and URN 3797.
[7] 2iM's oral hearing was held on 24 September 2019; Calder Group's oral hearing was held on 23 September 2019.

Settlement

2.23 On 1 May 2020, the CMA entered into settlement agreements with the Parties on the basis of a draft SSO and a draft penalty calculation which had been provided to them on 24 April 2020. In the settlement agreements, each of Eco-Bat and IMI:

(a) admitted that it had infringed the Chapter I prohibition and/or Article 101(1) TFEU in the terms set out in the draft SSO;

(b) agreed to accept a maximum penalty; and

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

The Supplementary Statement of Objections

2.24 The CMA issued an SSO to IMI, Eco-Bat and Calder Group on 12 June 2020[8] and provided them with an opportunity to make representations on the matters contained in it.[9] In addition to the Infringements, the SSO also provisionally found that the October 2015 Infringement had been extended in November 2016 to include Calder Group.

2.25 Calder provided written and oral representations on the SSO, as well as additional witness evidence, in July 2020.[10] In line with the terms of their settlement agreements, IMI and Eco-Bat provided written representations limited to identifying manifest factual inaccuracies in the SSO.

Issue of the NGFA Decision

2.26 In September 2020, the CMA issued and sought representations on a proposed no grounds for action decision which explained that the CMA was minded to close its case in respect of its provisional findings regarding the events of November 2016 on the basis that there were no longer grounds for action by the CMA.

2.27 On 21 October 2020, the CMA issued a final no grounds for action decision finding that:

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[8] The SSO was issued under section 31 of the Act and in accordance with Rules 5 and 6 of the CMA Rules.
[9] Pursuant to paragraphs 12.26 to 12.28 of *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), available at www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.
[10] URN 4641 and URN 4744.

(a) Based on the available evidence (including the additional witness evidence provided by Calder in July 2020), it was not possible to prove, to the requisite legal standard that the October 2015 Infringement had extended to Calder in November 2016; and

(b) further investigatory steps would be unlikely to produce evidence of the requisite legal standard to substantiate the proposed findings in the SSO in relation to the events of November 2016.

2.28 As a result, the CMA found there were no grounds for action in relation to the events of November 2016. The CMA therefore closed its investigation against Calder Group and issued a revised draft penalty calculation to Eco-Bat and IMI.

Treatment of witness evidence

2.29 The following paragraphs set out the CMA's assessment of certain witness and interview evidence which is particularly relevant to the Infringements.

2.30 As noted above at paragraphs 2.11 to 2.15, the CMA interviewed a number of individuals directly or indirectly involved in the Infringements. Additionally, the Parties presented further accounts from some of these individuals to the CMA after the SO had been issued.

2.31 While witness and interview evidence can be subjective in nature, the CMA does not consider that it would be appropriate to exclude or ignore clearly relevant accounts of matters relating to the Infringements. Accordingly, the CMA has set out in the Decision relevant details of each individual's account of the events surrounding the Infringements, along with an assessment of the credibility or otherwise of the account.

2.32 In line with the case law on the evaluation of oral evidence (see further section 5D on the burden and standard of proof below),[11] the CMA has considered the probative value of each individual's account, bearing in mind the role of the individual; the extent to which the individual was a direct witness to the conduct in question; the consistency of the individual's account both internally and throughout the investigation process; and whether the account given is against the interests of the individual (or of the relevant company, if the individual is a representative of a company or otherwise expected to act in the company's interests). The CMA has also considered the extent to which each individual's account is corroborated by and consistent with other evidence in assessing its reliability and weight.

[11] See in particular paragraph 5.17.

[Director A, CBG]

2.33 [✂], [Director A, CBG] [✂] has provided two witness statements to the CMA.

2.34 The parties have made representations on the accuracy and credibility of [Director A, CBG]'s evidence.[12] The CMA acknowledges that [Director A, CBG]'s evidence has been inaccurate in certain respects, for example where he has misremembered the dates of certain events. [✂].

2.35 [Director A, CBG] has [✂] provided the CMA with information [✂], concerning his [✂] dealings as part of the Contractor Buying Group ('**CBG**')[13] with the Parties and customers, as well as explanations on general features of the market for Rolled Lead. Having acknowledged the inaccuracies in [Director A, CBG]'s evidence in respect of events [✂], the CMA has placed limited weight on his account of [✂] events and relied on his evidence only where it is supported by contemporaneous documentary and/or other witness evidence. In any event, [Director A, CBG] was not a direct witness of the key events of the Infringements and accordingly his account serves as background and context to the CMA's findings.

[Director, BLM]

2.36 As set out in paragraphs 2.14 to 2.16, the CMA is now in possession of three accounts from [Director, BLM] in the form of two interview transcripts and a draft witness statement provided by BLM's legal advisers.

2.37 In his first interview, [Director, BLM] told the CMA that he was unable to recall the majority of the events relating to the Infringements. Where he did provide explanations, the CMA did not find them credible. In his draft witness statement and second interview, he provided a lengthy account of events he had previously said he was unable to recall.[14] He explained this change by saying that the documents relied upon by the CMA in the SO had assisted his recollection.[15] However, the CMA found that the account he gave in his second interview was not entirely consistent with the contents of his draft witness statement.

2.38 Because of inconsistencies among the two interviews and the draft witness statement, the CMA does not consider [Director, BLM] a completely reliable

[12] URN 3971 and URN 3797.

[13] During the time of the Infringements, CBG comprised CBG Ltd and Contractor Buying Group Ltd, a trading and dormant company respectively. CBG Ltd has since been renamed Commercial Buyers Group Limited (see https://beta.companieshouse.gov.uk/company/09534833), while Contractor Buying Group Ltd was dissolved on 28 March 2017 (see https://beta.companieshouse.gov.uk/company/09534872).

[14] See for example paragraphs 3.85 to 3.88.

[15] Transcript of CMA interview with [Director, BLM] dated 25 September 2019, pages 4 to 5 (URN 4033).

witness. In view of this, the CMA has placed limited weight on his account, and relied on his evidence only where his account is supported by contemporaneous documentary evidence. Where this is the case, the CMA considers it more likely than not that [Director, BLM]'s version of events is credible.

[Director A, ALM/JML]

2.39 As set out at paragraph 2.12, [Director A, ALM/JML] was voluntarily interviewed by the CMA. He also submitted a witness statement as part of ALM/JML's representations on the SO.

2.40 [Director A, ALM/JML]'s witness statement acknowledges one part of the CMA's provisional findings in the SO, noting that it was difficult for him to recall some of the events in question and that seeing the supporting documents and analysis assisted his recollection.[16] Otherwise, he stands by his account at interview and disputes the CMA's findings.[17]

2.41 As explained in Section 3 of this Decision, the CMA considers that certain parts of [Director A, ALM/JML]'s account lack credibility, primarily because they are contradicted by the documentary evidence or are internally inconsistent. Further, the CMA considers that he has sought, incorrectly, to minimise his responsibility for ALM/JML's role in the Infringements, in particular by describing himself in his witness statement as the 'unsolicited recipient' of information from [Director, BLM].[18]

[Director B, ALM/JML]

2.42 As noted at paragraph 2.12 above, [Director B, ALM/JML] was voluntarily interviewed by the CMA. He has not submitted a witness statement to date.

2.43 [Director B, ALM/JML] was the recipient of information in two of the Infringements, neither of which he could recall when questioned by the CMA. He suggested a possible explanation in relation to one text message, noting that he could not be sure that it was correct. The CMA considers that this suggested explanation lacks credibility and is not corroborated by contemporaneous documentary evidence.

[16] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 6.3 (URN 3966).
[17] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraphs 7.2, 8.2 and 10.1 (URN 3966).
[18] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraphs 6.5, 7.2 and 10.1 (URN 3966).

3. Facts

A. Parties under investigation

Companies associated with IMI

Associated Lead Mills Limited

3.1 Associated Lead Mills Limited ('**ALM**') is a private limited company registered in England and Wales, with company number 03382580. Its registered address is Unit B, Bingley Road, Hoddesdon, Hertfordshire, EN11 0NX.[19]

3.2 ALM was incorporated on 6 June 1997 under the name Wirechain Limited. It changed its name to Associated Lead Mills Limited on 8 October 1997.[20]

3.3 ALM's principal activity is the distribution of metal.[21]

3.4 ALM was indirectly owned by International Industrial Metals Limited throughout the period of its involvement in the Infringements:[22]

(a) ALM is, and has been throughout the period of its involvement in the Infringements, wholly owned by Envirolead Distribution Limited,[23] an intermediary parent company;[24]

(b) Envirolead Distribution Limited is, and has been throughout the period of ALM's involvement in the Infringements, wholly owned by Envirolead Midco Limited,[25] a holding company for the trade of its subsidiaries;[26]

(c) Envirolead Midco Limited was wholly owned by International Industrial Metals Limited throughout the period of ALM's involvement in the Infringements.[27]

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[19] ALM Annual Report and Financial Statements for the year ended 31 December 2019.
[20] Certificate of Incorporation on Change of Name dated 8 October 1997.
[21] ALM Annual Report and Financial Statements for the year ended 31 December 2019.
[22] ALM Annual Report and Financial Statements for the year ended 31 December 2014.
[23] ALM Annual Returns dated 6 July 2015 and 29 June 2016; ALM Confirmation Statements dated 29 June 2017, 29 June 2018, 29 June 2019 and 29 June 2020.
[24] Envirolead Distribution Limited Annual Report and Financial Statements for the year ended 31 December 2019.
[25] Envirolead Distribution Limited Annual Return dated 14 August 2015; Envirolead Distribution Limited Confirmation Statements dated 14 August 2016, 14 August 2017, 14 August 2018, 14 August 2019 and 14 August 2020.
[26] Envirolead Midco Limited Annual Report and Financial Statements for the year ended 31 December 2019.
[27] Envirolead Midco Limited Annual Report dated 13 August 2015; Envirolead Midco Limited Confirmation Statements dated 13 August 2016, 13 August 2017 and 13 August 2018.

3.5 The current directors of ALM are [individual] and [individual].[28]

3.6 [Individual] was a director of ALM from [✂] to [✂].[29] From [✂] onwards, he has been a director of International Industrial Metals Limited.[30] [✂].

3.7 [Individual] is the [✂] of both International Industrial Metals Limited[31] and International Metal Industries Limited.[32] He has also been a director of Royston Sheet Lead Limited since [✂].[33]

Royston Sheet Lead Limited

3.8 Royston Sheet Lead Limited is a private limited company registered in England and Wales, with company number 03031508. Its registered address is Tavistock House South, Tavistock Square, London, WC1H 9LG.[34]

3.9 Royston Sheet Lead Limited was incorporated on 10 March 1995 under the name Jamestown Metals Limited. It changed its name to Royston Sheet Lead Limited on 31 May 2019.[35] Given that the company was known as Jamestown Metals Limited during the period of its involvement in the Infringements, it is referred to in the Decision as Jamestown Metals Limited ('**JML**').

3.10 JML's principal activity is that of metal distribution merchant.[36]

3.11 JML was indirectly owned by International Industrial Metals Limited throughout the period of its involvement in the Infringements:[37]

- JML is, and has been throughout the period of its involvement in the Infringements, wholly owned by Envirolead Distribution Limited,[38] an intermediary parent company;[39]

[28] ALM Annual Report and Financial Statements for the year ended 31 December 2019.
[29] ALM notice of Appointment of a Director, [✂]; ALM notice of Termination of a Director Appointment, [✂].
[30] International Industrial Metals Limited Application to register a company, 11 August 2014.
[31] Listed on Companies House as [✂] of both the shares and voting rights in International Industrial Metals Limited.
[32] URN 4362.
[33] JML notice of Appointment of Director dated [✂].
[34] JML Annual Report and Financial Statements for the year ended 31 December 2019.
[35] Certificate of Incorporation on Change of Name dated 31 May 2019.
[36] JML Annual Report and Financial Statements for the year ended 31 December 2019.
[37] JML Annual Report and Financial Statements for the year ended 31 December 2014.
[38] JML Annual Return dated 31 December 2015; JML Confirmation Statements dated 31 December 2016, 31 December 2017, 31 December 2018 and 31 December 2019.
[39] Envirolead Distribution Limited Annual Report and Financial Statements for the year ended 31 December 2017.

- Envirolead Distribution Limited is, and has been throughout the period of JML's involvement in the Infringements, wholly owned by Envirolead Midco Limited,[40] a holding company for the trade of its subsidiaries;[41]

- Envirolead Midco Limited was wholly owned by International Industrial Metals Limited throughout the period of JML's involvement in the Infringements.[42]

3.12 The current directors of JML are [individual], [individual] and [individual].[43] [Individual] has been a director of JML [✂], while [individual] and [individual] were appointed on [✂][44] and [✂][45] respectively. [Individual] was a director [✂], having been appointed in [✂] and having resigned on [✂].[46]

3.13 The evidence shows that [individual] (director of International Industrial Metals Limited as of [✂]) became involved in the strategy and decision-making processes affecting JML's day to day business in 2014, when ALM and JML became part of International Industrial Metals Limited.

Relationship between ALM and JML

3.14 When assessing the involvement of ALM and/or JML, it is not always clear whether certain key individuals were acting on behalf of ALM or JML (or both). In such instances, the CMA has referred to them both jointly as '**ALM/JML**'. As set out at paragraph 5.224, although ALM and JML are separate legal entities, the CMA has found that they form a single undertaking (together with their parent company) for the purpose of liability for the Infringements.

International Industrial Metals Limited

3.15 International Industrial Metals Limited is a private limited company registered in England and Wales, with company number 09168596. Its registered

[40] Envirolead Distribution Limited Annual Return dated 14 August 2015; Envirolead Distribution Limited Confirmation Statements dated 14 August 2016, 14 August 2017, 14 August 2018, 14 August 2019 and 14 August 2020.
[41] Envirolead Midco Limited Annual Report and Financial Statements for the year ended 31 December 2019.
[42] Envirolead Midco Limited Annual Report dated 13 August 2015; Envirolead Midco Limited Confirmation Statements dated 13 August 2016, 13 August 2017 and 13 August 2018.
[43] JML Annual Report and Financial Statements for the year ended 31 December 2019.
[44] JML notice of Appointment of a Director filed on [✂].
[45] JML notice of Appointment of a Director filed on [✂].
[46] JML notice of Termination of a Director filed on [✂].

address is Faulkner House, Victoria Street, St. Albans, Hertfordshire, AL1 3SE.[47]

3.16 International Industrial Metals Limited was incorporated on 11 August 2014 under the name of Envirolead Topco Limited, [48] and changed its name to International Industrial Metals Limited on 30 October 2014.[49] Its principal activity was that of a holding company for the trade of its subsidiaries, which include metal recycling, processing and distribution together with the manufacture and distribution of radiators.[50]

3.17 International Industrial Metals Limited's directors are, [✂], [individual], [individual] and [individual].[51]

3.18 International Industrial Metals Limited is owned by a group of shareholders, of which the majority shareholder is LSF VIII Pine Investments Limited, a private equity investment vehicle operated by Lone Star Funds.[52]

Change in ownership of ALM/JML

3.19 On 6 February 2020, certain subsidiaries of International Industrial Metals Limited, including ALM and JML, were sold to International Metal Industries Limited by way of a pre-pack share transfer. None of the assets of ALM or JML were divested during this process.[53]

3.20 [Individual] is the [✂] director and shareholder of International Metal Industries Limited.[54]

3.21 International Industrial Metals Limited has not carried on any economic activity since 6 February 2020,[55] and was made the subject of a winding up order on 1 April 2020.[56]

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[47] International Industrial Metals Limited Annual Report and Financial Statements for the year ended 31 December 2017.
[48] International Industrial Metals Limited Certificate of Incorporated dated 11 August 2014.
[49] International Industrial Metals Limited Notice of Change of Name by Resolution dated 10 October 2014.
[50] International Industrial Metals Limited Annual Report and Financial Statements for the year ended 31 December 2017.
[51] International Industrial Metals Limited Annual Return dated 11 August 2015; International Industrial Metals Limited Confirmation Statements dated 11 August 2016, 11 August 2017, 11 August 2018 and 11 August 2019.
[52] International Industrial Metals Limited Annual Return dated 11 August 2015; International Industrial Metals Limited Confirmation Statements dated 11 August 2016, 11 August 2017, 11 August 2018 and 11 August 2019.
[53] URN 4362.
[54] URN 4362.
[55] URN 4362.
[56] International Industrial Metals Limited Order for Winding Up dated 1 April 2020.

Companies associated with Eco-Bat

H.J. Enthoven Limited

3.22 H.J. Enthoven Limited (trading as BLM British Lead) ('**BLM**'), is a private limited company registered in England and Wales with company number 02821551. Its registered address is Darley Dale Smelter, South Darley, Matlock, Derbyshire DE4 2LP.[57]

3.23 The company was incorporated under the name Multiglen Limited on 18 May 1993,[58] and changed its name to H.J. Enthoven Limited on 18 November 1993.[59]

3.24 Its principal activity is to operate as smelters, refiners, manufacturers and marketers of lead and lead products. It trades on a divisional basis under the names 'H J Enthoven & Sons', 'British Lead Mills', 'BLM British Lead' and 'Ecobat Logistics UK'.[60]

3.25 BLM is, and has been throughout the period of its involvement in the Infringements, indirectly owned by Eco-Bat Technologies Limited:

- BLM is, and has been throughout the period of its involvement in the Infringements, wholly owned by H.J.E Limited,[61] a holding company;[62]
- H.J.E Limited is, and has been throughout the period of its involvement in the Infringements, wholly owned by Eco-Bat Technologies Limited.[63]

3.26 The current directors of BLM are [individual], [individual], [individual], [individual] and [individual].

3.27 [Individual] was a director of BLM between [✂] and [✂].[64] [✂].

[57] HJ Enthoven Report and Financial Statements for the year ending 31 December 2019.
[58] Statutory Declaration of compliance with requirements on application for registration of a company, filed 12 November 1993.
[59] Certificate of Incorporation on Change of Name, 18 November 1993.
[60] HJ Enthoven Report and Financial Statements for the year ending 31 December 2019.
[61] HJ Enthoven Annual Return dated 26 May 2016; Confirmation Statements dated 26 May 2017, 26 May 2018, 28 May 2019 and 28 May 2020.
[62] HJE Limited Reports and Financial Statements dated 31 December 2019.
[63] HJE Limited Annual Return dated 26 July 2017, and Confirmation Statements dated 26 July 2016, 26 July 2017, 26 July 2018, 26 July 2019 and 26 July 2020.
[64] HJ Enthoven Notice of Appointment of Director filed [✂]; HJ Enthoven Notice of Termination of a Director appointment filed [✂].

Eco-Bat Technologies Limited

3.28 Eco-Bat Technologies Limited is a private limited company registered in England and Wales, with company number 02901883. Its registered office is Cowley Lodge, South Darley, Matlock, Derbyshire, DE4 2LE.[65]

3.29 Eco-Bat Technologies Limited was incorporated on 23 February 1994 under the name Rustweld Limited.[66] It subsequently changed its name to Quexco Limited on 18 April 1994;[67] to Eco-Bat Technologies plc on 9 June 1997 (at which point it was re-registered as a public company);[68] and to Eco-Bat Technologies Limited on 2 December 2002 (at which point it was re-registered as a private limited company).[69]

3.30 Under the heading 'Principal activities and review of the business' in its 2018 annual report, Eco-Bat Technologies Limited is described as being '*the parent company for a group of companies (the Group) whose core activities are the smelting, refining, manufacturing and marketing of lead and lead products, with significant additional revenue streams from a diverse range of other metals and products*'.[70]

3.31 The ultimate holding company of Eco-Bat Technologies Limited is EBT NewCo LLC.[71]

3.32 The current directors of Eco-Bat Technologies Limited are [individual], [individual], [individual], [individual], [individual], [individual], [individual], [individual], [individual], [individual] and [individual].

B. The industry

3.33 The Parties are two of the three principal manufacturers and suppliers of Rolled Lead in the UK. Rolled Lead is a water-resistant and durable material used in roofing and cladding, particularly in the refurbishment of historic buildings. Overall demand for Rolled Lead is declining due to the availability of alternative products.[72] [Director B, ALM/JML] described the market to the

[65] Eco-Bat Annual Reports and Financial Statements for the year ending 31 December 2019.
[66] Eco-Bat Certificate of Incorporation dated 23 February 1994.
[67] Eco-Bat Certificate of Incorporation on Change of Name dated 18 April 1994.
[68] Eco-Bat Certificate of Incorporation on Change of Name and Re-Registration of a Private Company as a Public Company dated 9 June 1997.
[69] Eco-Bat Certificate of Incorporation on Re-Registration of a Public Company as a Private Company dated 2 December 2002.
[70] Eco-Bat Annual Reports and Financial Statements for the year ending 31 December 2018, page 2.
[71] URN 4268.
[72] Transcript of CMA Interview with [Director B, ALM/JML] on 13 June 2018, page 14 lines 2 to 16 (URN 1414).

CMA as a 'sunset industry', which had reduced from a peak of 140,000 tonnes down to around 50,000 tonnes.[73]

3.34 The Parties generally sell to builders' merchants, who in turn supply contractors.[74] In some cases, merchants purchase from more than one Party, including contractual arrangements for 'primary' and 'secondary' supply from different Parties. In other cases, merchants have longstanding contractual or informal relationships with one Party.

3.35 The merchants are divided into 'majors' (national chains, representing about 30 to 40% of the market), buying groups and independents. Prices are set with reference to the London Metal Exchange ('**LME**') price on the 25th of each month:

(a) annual contracts are negotiated with the majors and larger buying groups based on a fixed margin per tonne over the LME price, with price adjustments to reflect changes to the LME price made on the 25th of each month (or the nearest working day);

(b) smaller merchants typically purchase on demand, often in smaller quantities priced per kilogram rather than per tonne, and are notified of changes to the prices at which they can purchase on the 25th of each month (or the nearest working day).

3.36 The product supplied in the market is homogeneous. Moreover, this is a market where there is a high degree of transparency. First, there is a degree of price transparency given that LME pricing is widely available and, as set out at paragraph 3.35, the Parties typically set their prices as a fixed margin over the LME price. The Parties also appear to receive regular feedback from customers as to competitors' prices.[75] Second, as set out in greater detail below, there is a significant amount of contact amongst participants in the market, in part arising from cross-supply relationships and trade association memberships. In particular, the three principal suppliers of rolled lead in the UK were the only members of the LSA, a trade association for UK manufacturers and suppliers of lead sheet conforming to the British Standard EN12588, during the period in which the Infringements took place.[76]

[73] Transcript of CMA interview with [Director B, ALM/JML] dated 13 June 2018, page 14 (URN 1414).

[74] See, for example, Transcript of CMA Interview of [Director A, ALM/JML] dated 13 June 2018, page 41 lines 8 to 11; page 42 lines 4 to 22 (URN 1420).

[75] Transcript of CMA interview with [Director A, ALM/JML] dated 13 June 2018, page 46 (URN 1420).

[76] The members during this period were Calder, BLM, JML and Metal Processors Limited, an Irish sister company of Calder. See for example LSA Resolution of adoption of Articles of Association filed 30 June 2015.

C. Conduct relevant to the Infringements

Key individuals

3.37 The following table lists the names of key individuals referred to in this section.

Business	Key individual	Position(s) during the period of the Infringements
ALM/JML	[Director A, ALM/JML]	[✂]
	[Director B, ALM/JML]	[✂]
	[Director C, ALM/JML]	[✂]
	[Senior Employee, ALM/JML]	[✂]
BLM	[Director, BLM]	[✂]
	[Senior Employee, BLM]	[✂]

Background to the Infringements

BLM's strategy up to mid-2015

3.38 In 2013, Eco-Bat Technologies Limited instructed BLM to engage in a new strategy of offering lower prices to try to attract business, including from major customers traditionally supplied by ALM, JML and Calder.[77] This appears to have resulted from the decision of [Large Merchant Customer A] to move from being supplied by ALM, JML and BLM to a single arrangement with ALM and JML.[78] [79]

[77] Transcript of CMA Interview with [Director, BLM] dated 29 June 2018, pages 70-71; pages 74-75 (URN 1417).
[78] URN 0576.
[79] [Director, BLM] told the CMA that the change in strategy began in 2014 (Transcript of CMA interview with [Director, BLM] dated 29 June 2018, page 70 (URN 1417)). In contrast, [Senior Employee, BLM] told the CMA that it began in 2013 and resulted from Eco-Bat wanting to compensate for the loss of business to [Large Merchant Customer A] (Transcript of CMA interview with [Senior Employee. BLM] dated 7 September 2018, pages 15-16 (URN 1755)). This is consistent with [Director, BLM]'s email (URN 0644) in which he stated that [Director A, Eco-Bat] becoming aware of losing the [Large Merchant Customer A] business in 2013 was almost certainly the trigger for '*the price war that decimated our profits in 2014 and 2015*'. In view of this, it appears that [Director, BLM] mis-recalled the timing when describing these events in his interview with the CMA.

3.39 In mid-2015, BLM recognised that the strategy it had adopted in 2013 had resulted in lower margins without increasing the volumes it supplied.[80] On 17 August 2015, BLM increased its prices by £150 per tonne, having issued a price increase notification to customers stating that although lead prices had recently fallen, there had been increases in the costs of raw material over the last few years.[81] The CMA has not identified any evidence that this price increase resulted from coordination; indeed, in an email of 16 July 2015, [Director, BLM] stated that '*if the competition were to go for our throats and grab too much, we would obviously have to cut prices back again to counter them'*.[82]

3.40 The decision to raise prices in order to increase margins did not necessarily imply an end to BLM's strategy of seeking new customers. In an email of 27 May 2015, [Director A, Eco-Bat] stated that the *'overall objective'* of BLM's new strategy was to *'grow profitable sales'*.[83] In contrast, however, in September 2015 [Director, BLM] stated in an internal BLM email:

> '*Our problem is that the Yanks* [Eco-Bat's American shareholders] *(and apparently* [First name of Director A, Eco-Bat]*)* [presumed to be [Director A, Eco-Bat]] *don't get the fact that a fundamental part of our strategy is that we stop picking fights with the competition so that (we hope) they are less likely* [to] *attack our core customer base as they too try to return to profitability. I fear the yanks will see this as anti-competitive rather than common sense'*.[84]

3.41 The CMA considers, therefore, that by September 2015 BLM had rejected the strategy of seeking new customers, contrary to the views of Eco-Bat and its American shareholders. This rejection is illustrated by [Director, BLM]'s statement that BLM would '*stop picking fights with the competition*'. From then on, contacts between ALM/JML and BLM increased (as set out at paragraph 3.43).

Significant and regular contact between the Parties

3.42 As stated above, there was significant contact between the Parties throughout the period of their involvement in the Infringements. Despite some possible legitimate commercial reasons for some of the contacts, other contacts

[80] Transcript of CMA interview of [Senior Employee, BLM] dated 7 September 2018, page 17 (URN 1755); Transcript of CMA interview of [Director, BLM] dated 29 June 2018, pages 70-71 (URN 1417).
[81] URN 1111.
[82] URN 3154.
[83] URN 3153.
[84] URN 0621.

involved anti-competitive conduct between competitors (including the exchange of commercially sensitive information).[85] There is also evidence of concealment of contact.

Volume of contacts

3.43 Forensic extractions of the mobile phones of [Director A, ALM/JML] and [Director, BLM] have identified significant levels of contact between them.

3.44 [Director A, ALM/JML] exchanged 256 calls with [Director, BLM] between September 2014 (the earliest date from which call data was available in the forensic extraction) and July 2017 (the date of the CMA's first inspections).[86] 138 of these calls had a duration of more than 30 seconds. By way of comparison, there were only two calls between September 2014 and October 2015, namely at a time when BLM's strategy was generally more competitive (see paragraphs 3.38 to 3.41). The significant volume of calls between [Director A, ALM/JML] and [Director, BLM] largely coincides with the period during which ALM/JML and BLM engaged in the Infringements.

Legitimate commercial reasons for contacts

3.45 As noted above, some of the contacts between the Parties may be explained as being for legitimate commercial reasons. For example, the Parties were both members of the LSA during the period of the Infringements.[87] According to [✂], the Parties attended monthly LSA meetings. [✂], the usual attendees were [Representative, Calder], [Director, BLM], [Director A, ALM/JML] and [Director B, ALM/JML], [✂].[88] JML resigned its LSA membership in March 2017 and has now left the association, which has since been rebranded as a training academy.[89]

3.46 Additionally, the Parties were members of the European Lead Sheet Industry Association ('**ELSIA**'), a Europe-wide association for the lead sheet industry, during the period of the Infringements.[90]

3.47 [Director A, ALM/JML] and [Director, BLM] both told the CMA at interview that the volume of calls between them reflected discussions regarding LSA

[85] See for example the sections '25-26 July 2016', '8-9 August 2016' and '25 April 2017' below.
[86] URN 1212 and URN 1214.
[87] JML was a member but ALM was not.
[88] [Senior Employee, BLM] also attended the meetings. [✂].
[89] LSA Resolution to adopt or alter Memorandum and Articles of 9 March 2018, available from Companies House.
[90] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 11.1.2 (URN 3966); Transcript of CMA interview of [Director, BLM] on 29 June 2018, page 34 (URN 1417).

matters.[91] [Director, BLM] has since submitted that he had an 'open dialogue' with employees at ALM, which occasionally included discussion of prices and customers.[92] However, [Director A, ALM/JML] has maintained his position that the calls related to LSA business, ELSIA business and cross-sales.[93]

3.48 The CMA considers that the volume and timing of contacts between [Director A, ALM/JML] and [Director, BLM] are such that they cannot be satisfactorily explained by legitimate purposes (for reasons set out further in the paragraphs that follow). Moreover, as explained below, at least some of the contact between the Parties related to the Infringements.

3.49 In particular, as stated at paragraph 3.44 above, there were only two calls between [Director A, ALM/JML] and [Director, BLM] between September 2014 and October 2015, a period of 13 months. In the following 22 months (October 2015 to July 2017), they exchanged 254 calls. Both JML and BLM were members of the LSA and ELSIA during this entire period, so this does not provide an explanation as to why the volume of calls between [Director A, ALM/JML] and [Director, BLM] increased so significantly from October 2015. On the other hand, as per the evidence set out in paragraph 3.56 below, the first evidence the CMA has of BLM's active involvement in the Infringements relates to events that took place in October 2015.

3.50 Although the CMA does not have any contemporary record of the content of the calls between [Director, BLM] and [Director A, ALM/JML], the CMA has not identified any plausible reason why the volume of calls between them should have increased so significantly from October 2015 if these calls all related to the legitimate reasons described above. Moreover, the communications described below, in relation to the Infringements, provide further evidence that at least some of the telephone calls between [Director A, ALM/JML] and [Director, BLM] had an anti-competitive objective. In fact, the clustering of the calls around the Infringements is indicative that those calls were more likely than not related to the Infringements and not to other legitimate reasons.

3.51 Additionally, the CMA considers that the Parties' membership of the LSA and ELSIA does not necessarily mean that all contact relating to these organisations, or taking place under the auspices of these organisations, was legitimate.

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[91] Transcript of CMA interview with [Director A, ALM/JML] dated 13 June 2018, page 96 to page 100 (URN 1420); Transcript of CMA interview of [Director, BLM] on 29 June 2018, page 28 to page 31 (URN 1417).
[92] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 25 (URN 3166).
[93] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 11.1 (URN 3966).

Evidence of concealment

3.52 Between 1 December 2016 and the launch of the CMA's investigation, [Director, BLM] operated a Second Phone[94] to contact individuals from ALM/JML, Calder and [✂].[95] During this time he continued to operate his primary business mobile phone ('**Primary Phone**') for all other calls and text messages.

3.53 The CMA considers that [Director, BLM] operated the Second Phone with the intention of concealing participation in the Infringements:

(a) The data show that on 1 December 2016, the date on which the Second Phone was activated,[96] [Director, BLM] called his Primary Phone,[97] followed by [Director A, ALM/JML][98] and [Director B, ALM/JML].[99] From this point on, there is no record of [Director A, ALM/JML] having any further contact with [Director, BLM] via his Primary Phone.[100]

(b) [Director, BLM]'s statements to the CMA regarding the Second Phone were inconsistent. When asked by the CMA's investigators to produce the Second Phone during the December Inspections, he stated that Eco-Bat had instructed him to use his personal phone (which was a reference to the Second Phone) when conducting LSA business, because using his Primary Phone for this purpose could lead to competition issues.[101] However, this suggestion was at odds with Eco-Bat's compliance policy, which required individuals to record clear details of any contact with competitors (see sub-paragraph *(e)* below). At his first interview with the CMA, [Director, BLM] said that he did not recognise his earlier statement and had not been given such an instruction by Eco-Bat.[102] He also stated that the Second Phone was his personal phone and he did not know why he had used it in addition to his Primary Phone. When asked how he decided which phone to use, he replied that he found it hard to rationalise the logic he had used.[103] In his draft witness statement, he conceded that

[94] The CMA's evidence relating to the Second Phone comprises the forensic extraction of [Director A, ALM/JML]'s phone, which includes calls and text messages exchanged with the Second Phone; [✂]; a forensic extraction of the Second Phone, which was seized by the CMA in December 2017; and the witness evidence of [Director, BLM] and others.
[95] [✂].
[96] URN 1841.
[97] URN 1231, page 2.
[98] URN 1214, page 2.
[99] URN 1826, page 1.
[100] URN 1212.
[101] Witness Statement of [Officer A, CMA] dated 14 December 2017, paragraph 10 (URN 1758).
[102] Transcript of CMA interview with [Director, BLM] dated 29 June 2018, pages 18-19 (URN 1417).
[103] Transcript of CMA interview with [Director, BLM] dated 29 June 2018, pages 17-18 (URN 1417).

he used the Second Phone for the purpose of concealing communications with his competitors and to avoid the 'hassle' of recording and reporting all such communications to Eco-Bat.[104]

(c) While there is some evidence suggesting that [Director, BLM] did use the Second Phone in relation to legitimate LSA business (for example text messages to arrange a meeting on 23 March 2017[105] correspond with evidence showing that the individuals in question met to discuss LSA business on that date),[106] certain of the text messages and calls associated with the Second Phone (described at paragraph 3.135) do not appear to relate to legitimate LSA business. Further, occasionally transacting legitimate LSA business using the Second Phone is not incompatible with the primary motivation being to conceal contact relating to the Infringements, particularly given that several of the key individuals involved in the Infringements were also involved in LSA business.

(d) [Director, BLM] received an email from Eco-Bat Human Resources on 23 November 2016 requesting that he complete a competition compliance training course within the following 15 days.[107] He activated the Second Phone seven days later, on 1 December 2016.[108] The CMA infers that [Director, BLM] may have decided to start using his Second Phone after being made aware or reminded, during the competition compliance training course, of the potential consequences of communicating with competitors. In his draft witness statement, [Director, BLM] stated that this may have influenced his decision to use a Second Phone.[109]

(e) During the inspections of July 2017, the CMA found a copy of an Eco-Bat 'Competition Policy Compliance' document in [Director, BLM]'s work area.[110] This document includes the following advice about contact with competitors at trade forums and conferences: '*If there is a legitimate need to meet or discuss with a competitor, you should ensure that an agenda for the discussion is always prepared and provided in advance, and that you have notes of the discussion that was held*'.[111] Based on this and the fact that [Director, BLM] had undertaken competition compliance training as recently as November or December 2016, [Director, BLM] should have been aware that communicating with competitors via a Second Phone

[104] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 64 (URN 3166).
[105] URN 1214, page 10 and URN 1242, page 5.
[106] URN 0517.
[107] URN 2180.
[108] URN 1841.
[109] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 64 (URN 3166).
[110] Witness Statement of [Officer B, CMA] dated 11 September 2017, paragraph 16 (URN 0266).
[111] URN 0077, paragraph 9.

would raise potential competition compliance issues and was not in keeping with Eco-Bat policy.

The Infringements

3.54 The Infringements are as follows:

(a) The October 2015 Infringement: calls and text messages between [Director A, ALM/JML] and [Director, BLM], evidencing an agreement and/or concerted practice not to supply CBG (either by refraining from or by withdrawing supply); this was underpinned by an exchange of commercially sensitive information regarding ALM/JML's and BLM's strategy towards CBG.

(b) the July 2016 Infringement: calls and text messages between [Director A, ALM/JML] and [Director, BLM], evidencing an agreement and/or concerted practice to share the market through the allocation of a particular customer between them by way of a non-aggression pact and/or to fix prices in relation to that particular customer. The conduct includes an exchange of commercially sensitive pricing information;

(c) the August 2016 Infringement: calls between [Director A, ALM/JML] and [Director, BLM], subsequently described in a text message from [Director A, ALM/JML] to [Director B, ALM/JML], evidencing an agreement and/or concerted practice to share the market by way of a non-aggression pact and/or to fix prices. The conduct also includes the exchange of information regarding competitively sensitive market and pricing strategy;

(d) the April 2017 Infringement: text message from [Director, BLM] to [Director A, ALM/JML] evidencing a concerted practice to fix prices through the alignment of BLM's and ALM/JML's prices in respect of certain buying group customers. This was effected by way of a unilateral disclosure of commercially sensitive pricing information from BLM to ALM/JML.

3.55 The Infringements are described in more detail below.

The October 2015 Infringement

3.56 On 13 October 2015, [Director A, ALM/JML] and [Director, BLM] exchanged several calls and a text message (described below). The CMA considers that these communications evidence conduct between ALM/JML and BLM involving coordinating to refuse supply to CBG, a new business set up by [Director A, CBG] [✂]. The following paragraphs set out details relevant to

understanding the context of the communications between [Director A, ALM/JML] and [Director, BLM].

3.57 CBG's business model involved brokering deals with contractors, to be supplied via a merchant customer of the relevant Party.[112] As explained at paragraph 3.34, the Parties operate a 'merchant-only' policy, and do not generally deal directly with contractors. However, [Director A, CBG] had good relationships with many contractors,[113] [✂]. While ALM/JML decided not to deal with CBG, [Senior Employee, BLM] and [Employee, BLM] agreed to open a BLM account for CBG.[114]

3.58 On 13 October 2015, [Director, BLM] and [Director A, ALM/JML] exchanged two telephone calls:[115]

(a) At 11:30, [Director, BLM] rang [Director A, ALM/JML] (call duration 14 seconds)

(b) At 11:34, [Director A, ALM/JML] rang [Director, BLM] (call duration eight minutes 34 seconds)

3.59 On the same day, [Director, BLM] received four emails regarding CBG:

(a) At 13:19, [Director, BLM] received an email from his personal assistant stating that [Director A, CBG] wished to speak to him;[116]

(b) At 13:23, [Senior Employee, BLM] forwarded to [Director, BLM] an email from [Director A, CBG] asking to have a conversation with [Senior Employee, BLM] and [Director, BLM] about the most appropriate route to market; [117]

(c) At 13:23, [Senior Employee, BLM] forwarded to [Director, BLM] an email from [Director A, CBG] asking if there were any major contractors CBG should avoid contacting for the moment; [118]

(d) At 14:22, [Senior Employee, BLM] forwarded to [Director, BLM] an email from [Director A, CBG] warning that some of the contractors he intended to contact were '*large "political" users*', and that he wanted to speak to

[112] [✂].
[113] [✂].
[114] Witness statement of [Senior Employee, BLM] dated 1 March 2019, paragraph 12 (URN 3094) and URN 2123.
[115] URN 1212, page 2.
[116] URN 1253.
[117] URN 1255.
[118] URN 1254.

[Director, BLM] '*about the political implications of my actions as he may have immediate concerns'*.[119]

3.60 At 16:55 on 13 October 2015, [Director, BLM] sent [Director A, ALM/JML] a text message stating '*Sorted. Supply withdrawn'*. [120]

3.61 On 14 October 2015, [Director, BLM] requested that CBG's account with BLM be suspended.[121] BLM also cancelled a 15-tonne order that had been created for CBG on 12 October 2015 in relation to [Contractor A],[122] a contractor who typically purchased from ALM/JML via a merchant.[123]

3.62 When interviewed by the CMA, [Director A, ALM/JML] stated that he could not remember the context of the text message but speculated that it might be related to ALM/JML purchasing expansion joints from BLM. He recalled a situation in which BLM had offered a direct sale to a contractor whom ALM/JML was supplying through a merchant. He had raised the point that BLM had undercut the price at which it sold expansion joints to ALM/JML.[124] In this context, [Director, BLM]'s text message would be BLM withdrawing the sale to the relevant contractor. Following a request for information from the CMA regarding any potential BLM withdrawal of supply of expansion joints (either by closing an account or cancelling an order) during the week of 12-16 October 2015, however, BLM was not able to identify any information or documents to suggest that it had withdrawn supply of expansion joints during that period.[125]

3.63 Following the issue of the SO, [Director A, ALM/JML] accepted that his suggested explanation was mistaken and that the text message of

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[119] URN 1256.

[120] This text message had been deleted from [Director A, ALM/JML]'s mobile telephone. It was recovered as part of the CMA's forensic extraction using specialist digital forensic tools - see pages 12 and 13 in conjunction with the Report Key on page 3 (URN 1213). The message was not stored on [Director, BLM]'s phone as the available data on the device only extended back to October 2016.

[121] URN 2123.

[122] Document headed 'Request 1' (URN 1810). BLM confirmed in a letter of 1 October 2018 (URN 1811) that this order was created for CBG on 12 October 2015 and subsequently cancelled on 14 October 2015. The CMA infers that this contact related to [Director A, CBG]'s dealings with [Contractor A] given that (i) the document 'Request 1' (URN 1810) refers to '[Contractor A]' under 'Special Ownership', (ii) [Director A, CBG] requested BLM set up a contract for [Contractor A] (albeit for 17.5 tonnes, rather than 15 tonnes as indicated on the BLM sales ledger) by email on 9 October 2015 (email of 9 October 2015 at 15:34 from [Director A, CBG] to [Senior Employee, BLM] – URN 1837), and (iii) [Director A, CBG] confirmed to [Contractor A] on 12 October 2015 that the contract had been set up (email of 12 October 2015 at 11:57 from [Director A, CBG] to [Contact, Contractor A] – URN 1836) – the same date as the contract at 'Request 1' (URN 1810).

[123] Email of 14 October 2015 at 17:05 from [Contact, Contractor A] to [Director A, CBG] refers to [Contractor A]'s '*longstanding relationship with ALM*' (URN 1836).

[124] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, pages 28-29 (URN 1420).

[125] URN 2121, pages 4-5.

13 October 2015 *'may well'* have related to BLM's withdrawal of supplies to CBG.[126] He further believed that the two telephone calls earlier that day (see paragraph 3.58) also related to [Director A, CBG]. He recalled that [Director, BLM] had just discovered that CBG was seeking to source lead. [Director A, ALM/JML] submits that he would have explained CBG's plan to supply contractors directly and that ALM/JML was not prepared to supply CBG. However, he submits that he did not tell [Director, BLM] not to supply CBG and that the text message of 13 October 2015 was unsolicited.[127]

3.64 The CMA considers that [Director A, ALM/JML] telling [Director, BLM] that ALM/JML was not prepared to supply CBG constitutes a disclosure of commercially sensitive information about ALM/JML's strategy with regard to CBG. The CMA has not identified any evidence to suggest that BLM publicly distanced itself from this information.

3.65 During his first interview with the CMA, [Director, BLM] stated that, having reviewed the emails described at paragraph 3.59, he thought that the text message '*almost certainly*'[128] related to BLM's supply arrangements with CBG. He stated that he had been unaware that BLM had been dealing with [Director A, CBG] or CBG until he received these emails. On learning of the arrangement, he was concerned that BLM supplying CBG would not add value to BLM's business and risked alienating key customers. However, he could not recall sending the text message to [Director A, ALM/JML] and was unable to explain why he had felt it necessary to tell a competitor about BLM's supply arrangements.[129]

3.66 In his draft witness statement, [Director, BLM] changed his position and stated that he had initiated communications with [Director A, ALM/JML] in order to coordinate closing the CBG account. He described a mutual recognition that both parties would be undermined by CBG diverting the route to market.[130] In his second interview, he explained that this was because CBG's plans to target the largest contractors with direct sales would be likely to cause a backlash from large merchant customers such as [Large Merchant Customer B] or [Large Merchant Customer C].[131] He also stated that the decision to close the account was not by agreement with [Director A, ALM/JML], but that he kept [Director A, ALM/JML] informed (via the text message of 13 October 2015) for fear of a 'backlash'; he believed that there would be an 'attack' or

[126] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 6.3 (URN 3966).
[127] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 6.4 (URN 3966).
[128] Transcript of CMA Interview with [Director, BLM] dated 29 June 2018, page 11 (URN 1417).
[129] Transcript of CMA Interview with [Director, BLM] dated 29 June 2018, pages 8-11 (URN 1417).
[130] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 54 (URN 3166).
[131] Transcript of CMA interview with [Director, BLM] dated 25 September 2019, pages 65 to 67 (URN 4033).

'retribution' from ALM/JML if BLM were seen to be supporting [Director A, CBG].[132]

3.67 [Director A, CBG] told the CMA that his emails to [Senior Employee, BLM] of 13 October 2015 arose from a concern that ALM/JML might retaliate against BLM if CBG approached contractors supplied by ALM/JML merchants and offered to broker sales directly through BLM. The purpose of the emails had been to make sure that BLM was comfortable with his approach until he had established his new business in the market. [Director A, CBG] had not had any response by email, but [Director, BLM] had later rung him to close his account. [Director A, CBG] could not recall the precise dates but thought it could have been shortly after his emails of 13 October 2015.[133] BLM was unable to provide the CMA with telephone records for [Director, BLM]'s Primary Phone from October 2015,[134] so the CMA has not been able to verify the precise timing of this call.

3.68 [Senior Employee, BLM] who, with [Employee, BLM], had handled CBG's account with BLM told the CMA that agreeing to supply CBG had been a mistake, and that he had initially been under the impression that CBG would identify contractors who could be supplied through a builders' merchant rather than directly by BLM.[135] He was also told that CBG had accounts set up with ALM and Calder, leading him to the conclusion that BLM should also supply CBG because otherwise it would be '*handing business to […] competitors'*.[136] He met [Director A, CBG] and [Director B, CBG] on 6 October 2015 and in the following days he was, in his words, '*bombarded*' with telephone calls from [Director A, CBG]. He also became concerned that allowing CBG to supply BLM products directly to contractors would alienate BLM's merchant customers. On 13 October 2015 (by which time [Senior Employee, BLM] had stopped answering [Director A, CBG]'s telephone calls), [Senior Employee, BLM] spoke to [Director, BLM] about the situation. [Director, BLM] responded that [Senior Employee, BLM] should never have agreed to supply CBG, and that he would tell [Director A, CBG] that BLM could not agree to CBG brokering direct sales with contractors.[137] However, as set out at paragraph 3.59, [Director A, CBG] told the CMA that his business model involved arranging for contractors to be supplied through a merchant customer of the relevant Party, rather than brokering direct sales with contractors.

[132] Transcript of CMA interview with [Director, BLM] dated 25 September 2019, pages 67 to 68 (URN 4033).
[133] Witness statement of [Director A, CBG] dated 6 December 2018, paragraphs 7 to 10 (URN 1832).
[134] URN 1724, page 2.
[135] Witness statement of [Senior Employee, BLM] dated 1 March 2019, paragraph 12 (URN 3094).
[136] Transcript of CMA interview with [Senior Employee, BLM] dated 7 September 2018 (URN 1755).
[137] Witness statement of [Senior Employee, BLM] dated 1 March 2019, paragraphs 9 to 15 (URN 3094).

3.69 The CMA has found that the text message of 13 October 2015 related to the coordination that preceded BLM's decision to withdraw supply from CBG, following a previous discussion between ALM/JML and BLM. The word '*sorted'* in the text message implies a prior conversation, and the fact that no other information was provided in the text message suggests that [Director, BLM] expected [Director A, ALM/JML] to understand the context. The CMA considers that this was because [Director, BLM] and [Director A, ALM/JML] had discussed the matter in their telephone calls earlier that day. Moreover, use of the word *'sorted'*, along with the fact that [Director, BLM] informed [Director A, ALM/JML] that supply had been withdrawn, indicated that ALM/JML had an interest in whether BLM supplied CBG and that the matter had been discussed previously (see paragraph 3.60 above).

3.70 The CMA considers that ALM/JML had an interest in BLM withdrawing supply to CBG because of the potential for CBG to disrupt the market, in particular by diverting contractors from being supplied by ALM/JML merchant customers to being supplied through BLM merchants. Indeed, the cancelled order described at paragraph 3.61 was intended for [Contractor A], a contractor who typically purchased from a merchant customer of ALM/JML. Accordingly, the CMA considers that, once ALM/JML had learned that CBG was seeking to supply BLM lead, ALM/JML would have been concerned that such an arrangement would lead to it losing sales. Further, the CMA considers that BLM had an interest in supporting ALM/JML in order to prevent any retaliation if ALM/JML lost sales as a result of BLM supplying CBG. This is consistent with the explanation [Director, BLM] gave for updating [Director A, ALM/JML] once he had arranged to withdraw supply from CBG. Finally, [Director, BLM]'s explanation of not wanting to upset merchant customers by supporting an intermediary who dealt directly with contractors (paragraph 3.66) would also apply to ALM/JML; both parties had an incentive to avoid upsetting their existing customers by supplying an intermediary.

3.71 Moreover, [Senior Employee, BLM]'s statement that he believed BLM would be '*handing business to competitors'* if it did not also supply CBG (paragraph 3.68) suggests a motivation for coordinating on the decision not to supply CBG rather than taking such a decision unilaterally. By coordinating, BLM could make the decision to withdraw supply from CBG in the knowledge that ALM/JML did not intend to supply CBG itself. This reduced the risk that CBG would remain active in the market and provide business for BLM's competitors.

3.72 The CMA notes that the main point on which the evidence of [Director, BLM] and [Director A, ALM/JML] diverges from the CMA's analysis in the SO regarding the events of 13 October 2015 is whether, or the extent to which,

[Director, BLM]'s decision to close CBG's account was by arrangement with [Director A, ALM/JML]:

(a) [Director A, ALM/JML] submits that he explained CBG's business model to [Director, BLM] and that ALM/JML was not prepared to supply CBG but did not tell him that BLM should not supply CBG.[138] In this scenario, [Director, BLM]'s text message to [Director A, ALM/JML] related to CBG but was unsolicited.[139]

(b) [Director, BLM] describes having made the decision to withdraw supply from CBG unilaterally but informing [Director A, ALM/JML] of the outcome in order to prevent retaliation by ALM/JML. [140] In this regard, the CMA notes several other instances in [Director, BLM]'s draft witness statement to suggest that he expected retaliatory behaviour from ALM/JML in certain circumstances.[141]

3.73 Having considered this evidence, the CMA has concluded that BLM's decision to withdraw supply from CBG was the result of co-ordination between ALM/JML and BLM. The CMA does not find it credible that [Director, BLM] would have found it necessary or appropriate to inform [Director A, ALM/JML] of his decision to withdraw supply from CBG if their telephone conversation had been limited to a factual discussion of [Director A, CBG]'s business model. Rather, the CMA considers it more likely than not that [Director, BLM] and [Director A, ALM/JML] reached an agreement or understanding that neither party should supply CBG. As part of reaching that agreement or understanding, both parties disclosed to each other their respective strategic decisions with respect to refraining from/withdrawing supplies to CBG, and ALM/JML sought to influence BLM not to supply CBG in the future.

The July 2016 Infringement

3.74 On 25 and 26 July 2016, [Director A, ALM/JML] and [Director, BLM] exchanged several calls and text messages (described below). The CMA has found that these communications evidence an Infringement between ALM/JML and BLM in which they shared the market through the allocation of a particular customer by way of a non-aggression pact and/or fixing prices in relation to that customer. The conduct included an exchange of commercially

[138] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraphs 6.4 and 6.5 (URN 3966).
[139] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 6.5 (URN 3966).
[140] Transcript of CMA interview with [Director, BLM] dated 25 September 2019, pages 67 to 68 (URN 4033).
[141] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraphs 45, 52.2, 55, 57 (URN 3166).

sensitive pricing information. The following paragraphs set out details of the communications and events relevant to understanding their context.

3.75 On 25 July 2016, [Director A, ALM/JML] and [Director, BLM] communicated as follows:[142]

(a) At 12:08, [Director, BLM] rang [Director A, ALM/JML] (missed call);

(b) At 12:14, [Director, BLM] sent [Director A, ALM/JML] a text message: '*Call me if you can please';*[143]

(c) At 12:56, [Director A, ALM/JML] rang [Director, BLM] (call duration three minutes 58 seconds);

(d) At 13:03, [Director A, ALM/JML] rang [Director, BLM] again (call duration one minute 19 seconds).

3.76 On 25 July 2016 at 16:21, BLM sent an 'eFax message' to a customer named [Merchant Customer D]. The message contained a generic price increase notification stating that BLM's prices would increase by £180 per tonne at 8am on 1 August 2016.[144] As explained at paragraph 3.79 below, this increased BLM's price to [Merchant Customer D] from £1920 to £2100 per tonne. [Merchant Customer D] is a longstanding customer of ALM; in 2015, for example, [Merchant Customer D] made purchases amounting to [✂] from ALM, making it ALM's [✂] largest independent customer (out of [✂]) by revenue that year.[145]

3.77 On 26 July 2016, [Director A, ALM/JML] and [Director, BLM] communicated as follows:[146]

(a) At 07:24, [Director A, ALM/JML] rang [Director, BLM] (call duration two minutes 32 seconds);

(b) At 07:28, [Director A, ALM/JML] rang [Director, BLM] again (call duration one minute six seconds);

(c) At 07:36, [Director, BLM] rang [Director A, ALM/JML] (missed call);

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[142] URN 1212, page 12.

[143] The text message from [Director, BLM] to [Director A, ALM/JML] had been deleted from [Director A, ALM/JML]'s mobile telephone. It was recovered as part of the CMA's forensic extraction using specialist digital forensic tools (see pages 12 and 13 in conjunction with the Report Key on page 3 - URN 1213). The message was not stored on [Director, BLM]'s phone as the available data on the device only extended back to October 2016.

[144] URN 1257 and URN 1258.

[145] URN 1753.

[146] URN 1212, pages 12 and 13.

(d) At 07:38, [Director, BLM] sent [Director A, ALM/JML] the following text message: '*My apologies, we have a f.. Up but will retrieve the situation this morning and definitely not take orders from your guys*';

(e) At 07:41, [Director, BLM] sent [Director A, ALM/JML] a further text message: '*[Shortened name of Merchant Customer D] up from 1.92 to 2.10 today*'.[147]

3.78 On the same day, [Director A, ALM/JML] forwarded both messages internally:

(a) At 07:44, he forwarded the message about [Shortened name of Merchant Customer D] (paragraph 3.77(e)) to [Senior Employee, ALM/JML], [✂];[148]

(b) Then, at 12:31, he sent [Director B, ALM/JML] a message as follows: *'Sent from [Nickname for Director, BLM]:-* [149] *My apologies, we have a f.. Up but will retrieve the situation this morning and definitely not take orders from your guys'*.[150]

3.79 At 08:39 on 26 July 2016, BLM's price to [Merchant Customer D] was updated in BLM's computer system from £1920 to £2010 per tonne. It was updated again six minutes later, at 08:45, from £2010 to £2100 per tonne.[151] BLM told the CMA that the first update was likely to have been a clerical error, which was corrected by the second update.[152]

3.80 The numbers in [Director, BLM]'s second text message of 26 July 2016 ('*[Shortened name of Merchant Customer D] up from 1.92 to 2.10 today*') are consistent with the prices on BLM's computer system; £1920 and £2100 per tonne are equivalent to £1.92 and £2.10 respectively per kilogram.[153] This is also consistent with BLM's price increase notification to [Merchant Customer D] (described at paragraph 3.76); an increase of £180 per tonne equates to

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[147] The two text messages from [Director, BLM] to [Director A, ALM/JML] had been deleted from [Director A, ALM/JML]'s mobile telephone. They were recovered as part of the CMA's forensic extraction using specialist digital forensic tools - see pages 12 and 13 in conjunction with the Report Key on page 3 (URN 1213). The messages were not stored on [Director, BLM]'s phone as the available data on the device only extended back to October 2016.

[148] URN 1223, page 20.

[149] [Director A, ALM/JML] explained to the CMA that he and [Director B, ALM/JML] referred to [Director, BLM] as '[Nickname for Director, BLM]' – Transcript of CMA interview with [Director A, ALM/JML] dated 13 June 2018, pages 19-20 (URN 1420).

[150] URN 1211, page 19.

[151] URN 1768. This was a system audit log file showing BLM's prices to [Merchant Customer D] between July and September 2016. It was produced by BLM in response to a notice issued by the CMA under Section 27 of the Act (see Witness Statement of [Officer C, CMA], paragraphs 16b and 26 – URN 1846).

[152] Witness statement of [Senior Employee, BLM] dated 1 March 2019, paragraph 18 (URN 3094).

[153] The Parties variously referred to prices per tonne and kilogram depending on the context.

£0.18 per kilogram, which is consistent with a price increase from £1.92 to £2.10.

3.81 BLM told the CMA that its usual practice when notifying customers of price increases on the 25th of the month was to implement price increases on the first day of the following month, but to implement price decreases immediately after notification.[154] This is consistent with BLM's price increase notification to [Merchant Customer D] (paragraph 3.76), which stated that the price increase would take effect on 1 August 2016.

3.82 However, the effect of the system update described at paragraph 3.79 was to implement the price increase to [Merchant Customer D] on 26 July 2016, rather than the first day of the following month. This is consistent with [Director, BLM]'s second text message of that date: *'[Shortened name of Merchant Customer D] up from 1.92 to 2.10* ***today****'* [emphasis added].

3.83 The CMA's view is therefore that [Director, BLM]'s second text message of 26 July 2016 (*'[Shortened name of Merchant Customer D] up from 1.92 to 2.10 today'*) referred to BLM changing [Merchant Customer D]'s price in advance of the scheduled price increase.

3.84 The fact that [Director, BLM] communicated this to [Director A, ALM/JML], and that [Merchant Customer D] is a significant ALM customer, suggests that this was the context of [Director, BLM]'s first text message of 26 July 2016 ('*My apologies, we have a f.. Up but will retrieve the situation this morning and definitely not take orders from your guys*'). The *'f.. Up'* was related to BLM's existing price to [Merchant Customer D] and [Director, BLM] '*retrieved*' the situation by implementing the price increase six days early.

3.85 During his first interview, [Director, BLM] told the CMA that he could not recollect the text messages described at paragraph 3.77 and did not know who '[Shortened name of Merchant Customer D]' might be.[155] Similarly, [Director B, ALM/JML] did not recall receiving the message [Director A, ALM/JML] had forwarded to him (see paragraph 3.78) or any context in which it might be interpreted.[156]

3.86 In his draft witness statement, [Director, BLM] stated that the two telephone calls he received on 26 July 2016 from [Director A, ALM/JML], related to BLM's price to [Merchant Customer D]. [Director, BLM] noted that [Director A, ALM/JML] would often ring him to mention specific customers who had been visited by BLM. In this case, [Director, BLM] determined that the price to

[154] Witness Statement of [Senior Employee, BLM] dated 1 March 2019, paragraph 34 (URN 3094).
[155] Transcript of CMA Interview with [Director, BLM] dated 29 June 2018, page 13 (URN 1417).
[156] Transcript of CMA interview with [Director B, ALM/JML] dated 13 June 2018, page 19 to page 21 (URN 1414).

[Merchant Customer D] was an error and would be perceived by ALM as an aggressive act. His text message to [Director A, ALM/JML] acknowledged the pricing error and communicated BLM's corrected prices to [Merchant Customer D].[157]

3.87 [Director, BLM] also noted that on the same day (26 July 2016), he received an email from [Senior Employee, BLM] advising him that ALM had offered a competitive price to [Merchant Customer A], a valued BLM customer.[158] [Director, BLM] suspected that this was retaliation by ALM for BLM's price to [Merchant Customer D].[159]

3.88 During his second interview, [Director, BLM] admitted that whilst being confused as to who [Merchant Customer D] was and not recalling the episode, he could understand the basis on which he acted.[160] [Director, BLM] explained that [Director A, ALM/JML] had a '*paranoia*' that BLM would reignite the price war and hence mistook episodes such as the [Merchant Customer D] one as BLM going '*on the attack again*'.[161]

3.89 During his interview with the CMA, [Director A, ALM/JML] provided the CMA with a lengthy explanation of the two text messages of 26 July 2016.[162] In relation to the first text message ('*My apologies, we have a f.. Up but will retrieve the situation this morning and definitely not take orders from your guys*'), he stated that he could not be sure but believed it related to ALM/JML's purchases of 2.4m lead from BLM. He claimed that ALM/JML does not have the capability to manufacture 2.4m lead and therefore regularly contacts both BLM and Calder for prices to purchase from them. He believed that the text message exchange had arisen because BLM had recently told him, in the context of a quote for 2.4m lead, that it was about to implement a price increase to account for fluctuations in the LME price. ALM/JML subsequently received feedback from various customers that BLM had implemented an increase, but that certain merchants in the Anglian region had not been notified of a price increase. [Director A, ALM/JML] then rang [Director, BLM] and told him that he would receive a lot of orders from merchants in the Anglian region if it kept to its current prices.[163] In this

[157] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 55 (URN 3166).
[158] Transcript of CMA Interview with [Director, BLM] dated 25 September 2019, page 8 line 8 (URN 4033).
[159] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 56 (URN 3166) and its exhibit [✂]24 (URN 3197).
[160] Transcript of CMA Interview with [Director, BLM] dated 25 September 2019, page 51 (URN 4033).
[161] Transcript of CMA Interview with [Director, BLM] dated 25 September 2019, page 50 (URN 4033).
[162] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, pages 44 to 60 (URN 1420).
[163] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, page 45 (URN 1420).

context, [Director A, ALM/JML] explained [Director, BLM]'s message as follows:

- The '*f… Up'* was BLM's mistake in not raising its prices to Anglian merchants;[164]

- The reference to not taking orders from '*your guys'* meant that BLM would not accept any purchase orders from ALM/JML.[165]

3.90 With regard to the second text message of 26 July 2016 ('*[Shortened name of Merchant Customer D] up from 1.92 to 2.10 today'*), [Director A, ALM/JML] said that he did not know why [Director, BLM] had sent the message. He did not think it related to the previous text message from [Director, BLM] because the business in question, which [Director A, ALM/JML] identified as [Merchant Customer B], was not one of the businesses from which [Director A, ALM/JML] had received feedback on BLM prices. [Director A, ALM/JML] believed [Merchant Customer B] purchased 2.4m lead directly from BLM. [Director A, ALM/JML] confirmed that he had forwarded the message to [Senior Employee, ALM/JML] because he thought it would be useful inside information. He did not think he had spoken to either [Senior Employee, ALM/JML] or [Director, BLM] about the message afterwards and had not told anyone else at ALM/JML where he had received the information. He regarded receiving the text message from BLM as no different from receiving feedback from [Merchant Customer B] on BLM prices, which he said happened regularly.[166]

3.91 When asked at interview about the eFax message described at paragraph 3.76,[167] [Director A, ALM/JML] stated that the recipient of the eFax was [Merchant Customer D], whereas he believed that the text message from [Director, BLM] had related to [Merchant Customer B]. It had never occurred to him that [Director, BLM]'s message might have related to [Merchant Customer D], because the issue had been with the Anglian region and [Merchant Customer D] is based in [✂].[168] He stood by this account in his witness statement, although noting that there was a limit to what he could say about the meaning of what he described as unsolicited text messages from [Director, BLM]. He accepted that [Director, BLM]'s text message was

[164] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, pages 46-55 (URN 1420).
[165] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, pages 54-55 (URN 1420).
[166] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, pages 60-62 (URN 1420).
[167] [Director A, ALM/JML] had previously seen the message because it was forwarded by [Director, Merchant Customer D] to [Employee A, ALM/JML], who in turn forwarded it to [Director A, ALM/JML] and other individuals at ALM/JML (URN 1257).
[168] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, page 60 to page 67 (URN 1420).

inappropriate but argued that he was an unsolicited recipient and that the provision of pricing information was a unilateral act by BLM.[169]

3.92 The CMA does not accept [Director A, ALM/JML]'s explanation of the text messages as credible for the reasons set out in the following paragraphs.

3.93 Certain points of the explanation itself do not appear to be plausible. For example, it is not clear why, if the mistake BLM had made (the '*f… Up*') was failing to increase its prices to Anglian merchants, there was any need for BLM to refuse purchase orders from ALM/JML.

3.94 It also seems implausible that [Director A, ALM/JML] would have forwarded the message from [Director, BLM] ('*[Shortened name of Merchant Customer D] up from 1.92 to 2.10 today*') to [Senior Employee, ALM/JML] without any further discussion. Without additional context, it seems unlikely that [Senior Employee, ALM/JML] would have known that the message was intended to convey inside information about BLM's prices.[170]

3.95 As noted at paragraph 3.79, BLM's computer system shows that its price to [Merchant Customer D] increased from £1920 to £2100 per tonne (£1.92 to £2.10 per kilogram), in line with the figures quoted in [Director, BLM]'s text message. This is also confirmed by BLM price lists from June and July 2016, which show that BLM's prices to [Merchant Customer D] increased from £1920 per tonne in June 2016[171] to £2100 in July 2016.[172] In comparison, BLM's prices to [Merchant Customer B] increased from £1870[173] to £2050[174] in the same period. This shows that the text message related to [Merchant Customer D] rather than [Merchant Customer B].

3.96 The CMA asked BLM to provide internal and external documents relating to price increases or decreases to Rolled Lead customers between June and October 2016. These documents did not contain any evidence of a delay or discrepancy to Anglian customers in the relevant period. Additionally, the documents and explanations provided by BLM do not suggest a system whereby price notifications to a single region might be delayed. For example, it appears that BLM's system includes notifying customers of price increases by fax; BLM provided a list headed 'Price Change – Fax Customers', albeit from September 2018, giving details of customers to be notified by fax.[175] The list is broadly organised in alphabetical order, rather than by region, making it

[169] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 7.2 (URN 3966).
[170] Further detail on the involvement of additional ALM/JML staff is set out at paragraphs 3.104 to 3.106.
[171] URN 1442, page 6.
[172] URN 1443, page 6.
[173] URN 1442, page 4.
[174] URN 1443, page 4.
[175] URN 1425.

unlikely that an error would result in a single region being omitted from any general notification. The CMA's investigators were advised by BLM that this system had been in operation in 2016 (and indeed the price notification described at paragraph 3.76 would suggest that this was the case).

3.97 Accordingly, there is no evidence to suggest that the text messages at paragraph 3.77 were related to a failure to notify Anglian merchants of BLM's price increase. The CMA's view is therefore that [Director A, ALM/JML]'s explanation of the text messages of 26 July 2016 is incorrect.

3.98 [Director A, ALM/JML] further submits that the calls he exchanged with [Director, BLM] on 26 July 2016 were not about [Merchant Customer D] but instead related to the prices of goods supplied by BLM to ALM/JML (which had increased after the EU referendum).[176] However, BLM has informed the CMA that it has not made any sales to JML since November 2011 or to ALM since September 2013.[177] In view of this, the CMA does not find it credible that the telephone calls exchanged between [Director, BLM] and [Director A, ALM/JML] related to cross-supply of material between the two undertakings. The CMA also notes [Director, BLM]'s account in his second interview that [Director A, ALM/JML] had never enquired about quotes for a supply of material.[178]

3.99 Although BLM did increase its price to [Merchant Customer D] from £1.92 to £2.10 per kilogram on 26 July 2016, ALM's price to [Merchant Customer D] at this time was between £1.77 and £1.80 per kilogram.[179] On this basis, it is unclear why BLM's original price of £1.92 per kilogram would have resulted in BLM '*taking orders from your* [ALM/JML's] *guys*'. One possibility is that the slow delivery times ALM/JML experienced in August 2016 (described further at paragraph 3.118 below) had already begun to cause problems, leading [Merchant Customer D] to consider purchasing BLM product before the price increase of £0.18 per kilogram had been implemented. Alternatively (or in conjunction with ALM/JML's slow delivery times), BLM's lower price of £1.92 might have been a potential competitive alternative to ALM when factoring in delivery costs, given the close proximity of BLM's premises to [Merchant Customer D]. While the CMA does not have evidence to support these possible explanations, they illustrate the point that there are plausible

[176] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 7.3 (URN 3966).
[177] URN 4092.
[178] Transcript of CMA Interview with [Director, BLM] dated 25 September 2019, page 25 (URN 4033).
[179] ALM invoice to [Merchant Customer D] dated 27 July 2016 (ordered 25 July 2016) (URN 2035); ALM invoice to [Merchant Customer D] dated 28 July (ordered 25 July 2016) (URN 2036); ALM invoice to [Merchant Customer D] dated 28 July 2016 (ordered 26 July 2016) (URN 2037); ALM invoice to [Merchant Customer D] dated 29 July 2016 (ordered 26 July 2016) (URN 2040); ALM invoice to [Merchant Customer D] dated 22 August 2016 (ordered 26 July 2016) (URN 2004).

circumstances in which BLM would need to raise its price in order to avoid receiving orders from [Merchant Customer D] even if its original price was already higher than ALM's prices.

3.100 In any event, for the reasons set out at paragraph 5.47, the CMA is not required to determine BLM's precise motivation for raising its prices in order to reach a finding that the parties engaged in the Infringement.

3.101 The CMA visited [Director, Merchant Customer D], one of the directors of [Merchant Customer D], who subsequently provided information and documents under the terms of sections 26 and 26A of the Act. [Director, Merchant Customer D] told the CMA that ALM had supplied [Merchant Customer D] since around 2013. When asked about [Merchant Customer D]'s trading relationship with BLM, he did not identify any incident involving BLM prices in July 2016. He did state, however, that [Merchant Customer D] struggled to get a good price from BLM. He found this odd because [Merchant Customer D] is located very near to BLM's premises and would have expected to get a good deal on that basis. He occasionally obtained supplies from Calder when ALM could not supply quickly enough.[180] They had had one order from BLM during 2015 (they did not state when in 2015 – it is possible that this was during the price war described at paragraph 3.38 above), [✂].[181]

3.102 In any event, given that the two text messages were sent within three minutes of each other (in a context where [Director, BLM] and [Director A, ALM/JML] did not often exchange text messages),[182] it is more likely than not that they were related. In view of this, the most plausible explanation is that the price increase to [Merchant Customer D] was [Director, BLM]'s attempt to '*retrieve the situation*' and avoid taking orders from ALM/JML customers.

3.103 The CMA considers that [Director, BLM]'s statement that BLM would '*not take orders from your* [ALM/JML's] *guys*' further manifests the underlying aim of the Infringement, i.e. that BLM would not pursue orders from [Merchant Customer D]. The fact that BLM implemented a price increase to [Merchant Customer D] on 26 July 2016 instead of waiting until 1 August 2016 in line with its usual policy, and that [Director, BLM] told ALM/JML that he had done so, adds weight to the indication that BLM increased its prices earlier than usual in order to avoid taking an order from an ALM/JML customer.

[180] Note of CMA meeting and interview with [Director, Merchant Customer D] (URN 2301) and handwritten note (which was signed by [Director, Merchant Customer D] to confirm it was an accurate record of the interview) (URN 2302).
[181] URN 2261.
[182] URN 1213 and URN 1215.

3.104 Further, the CMA considers that the pattern of events suggests ALM/JML was not merely a passive recipient of information. As set out at Annex B, the CMA has identified some further evidence of calls between [Director A, ALM/JML] and staff at ALM immediately before his first call to [Director, BLM] on 26 July 2016 (paragraph 3.77) and then following subsequent calls between the two.[183] The CMA considers that these call patterns indicate that in the morning of 26 July 2016, [Director A, ALM/JML] was informed by staff at ALM about the price change that BLM had communicated to [Merchant Customer D] on the previous day; [Director A, ALM/JML] immediately contacted [Director, BLM] to query this price with him.

3.105 [Director, BLM] subsequently sent [Director A, ALM/JML] a text message offering his apologies for the price notification ('*My apologies, we have a f.. up*') and explaining that he would '*retrieve the situation*', while reassuring [Director A, ALM/JML] that BLM would not accept orders from [Merchant Customer D]. The text message sent by [Director, BLM] to [Director A, ALM/JML] later ('*[Shortened name of Merchant Customer D] up from 1.92 to 2.10 today*') purported to explain how [Director, BLM] had 'retrieved the situation'.

3.106 Hence, while the calls of 25 July 2016 appear to have been initiated by [Director, BLM], the pattern of communications on 26 July 2016 began with two calls from [Director A, ALM/JML] to [Director, BLM], following conversations between [Director A, ALM/JML] and colleagues at ALM/JML. Given that the calls of 26 July 2016 occurred only ten minutes before the text message described at paragraph 3.77(d), and in the absence of evidence of a plausible alternative explanation, the CMA finds that these communications were related.

3.107 Moreover, ALM/JML made use of the information from [Director, BLM] by forwarding it internally (as set out at paragraph 3.77) without additional context, suggesting [Director A, ALM/JML] considered the information would be understood without further explanation. This may relate to the fact that [Director A, ALM/JML] had exchanged calls with ALM staff in between his communications with [Director, BLM], as described at paragraph 3.104. This included attempted calls to [Senior Employee, ALM/JML]'s mobile phone as can be seen in Annex B. The CMA therefore considers that [Director A, ALM/JML] had already discussed the issue with ALM/JML staff, probably including [Senior Employee, ALM/JML], and that this was the reason he did not provide additional explanation when he forwarded [Director, BLM]'s text

[183] URN 3231 and URN 3232.

messages to [Director B, ALM/JML] and [Senior Employee, ALM/JML] respectively.

3.108 Accordingly, the CMA has found that the communications of 25 and 26 July 2016 evidence an Infringement between ALM/JML and BLM, in which they engaged in a non-aggression pact in relation to a particular customer and colluded on price to that customer. The conduct also included an exchange of commercially sensitive pricing information.

The August 2016 Infringement

3.109 On 8 August 2016, [Director A, ALM/JML] exchanged several calls with [Director, BLM]. The following day, he sent a text message to [Director B, ALM/JML] regarding BLM. The CMA has found that this text message evidences BLM and ALM/JML engaging in a non-aggression pact and colluding on price. The conduct also included an exchange of commercially sensitive pricing information. The following paragraphs set out details of the communications and events relevant to understanding their context.

3.110 On 8 August 2016, [Director A, ALM/JML] and [Director, BLM] communicated as follows:[184]

(a) At 09:36, [Director, BLM] rang [Director A, ALM/JML] (missed call);

(b) At 09:49, [Director A, ALM/JML] rang [Director, BLM] (call duration two minutes 31 seconds);

(c) At 10:38, [Director, BLM] rang [Director A, ALM/JML] (missed call);

(d) At 10:41, [Director A, ALM/JML] rang [Director, BLM] (call duration seven minutes 51 seconds).

3.111 On 9 August 2016 at 10:56, [Director, BLM] emailed [Employee, BLM] a PowerPoint slide entitled '*5 Top Reasons for Project "PUSH UP"*'.[185] As set out in more detail below, '*Project PUSH UP'* was an internal BLM proposal to increase its prices by £100 per tonne.

3.112 On 9 August 2016 at 14:35, [Director A, ALM/JML] sent [Director B, ALM/JML] a text message saying '*[Nickname for Director, BLM] is gloating with regards to how many of our accounts are calling them due to our 10 day delivery time*

[184] URN 1212, page 13.
[185] URN 1813, page 2.

said that's bollocks it's due to us holding the price if we lose tonnage you know the score! Next breath he wants to go another 100'.[186]

3.113 The text message of 9 August 2016 appears to refer to a conversation between [Director A, ALM/JML] and [Director, BLM], which may have occurred during their telephone calls of 8 August 2016. The CMA considers that the phrase *'next breath he wants to go another 100'* refers to [Director, BLM] disclosing commercially sensitive information about BLM's proposed price increase of £100 per tonne. The following paragraphs set out the CMA's assessment of the evidence and submissions relating to this incident.

3.114 When interviewed by the CMA in June 2018, [Director A, ALM/JML] told the CMA that the text message he sent to [Director B, ALM/JML] on 9 August 2016 reported details of a conversation he had had with [Senior Employee, ALM/JML]. The context of the conversation was that ALM/JML had fallen behind with orders and was working to ten-day delivery times. He explained the message as follows:

(a) '*[Nickname for Director, BLM] is gloating with regards to how many of our accounts are calling them due to our 10 day delivery time'*: [Senior Employee, ALM/JML] had told [Director A, ALM/JML] that BLM had been calling ALM/JML customers to say it was taking a lot of orders because it could offer quicker and cheaper deliveries than ALM/JML[187] (in this context, [Director A, ALM/JML] explained that he referred to both BLM and [Director, BLM] as *[Nickname for Director, BLM]'*);[188]

(b) '*said that's bollocks it's due to us holding the price'*: this referred to [Director A, ALM/JML]'s reply to [Senior Employee, ALM/JML], that BLM was receiving orders because it has reduced its price and ALM/JML had not;[189]

(c) the comment '*if we lose tonnage you know the score'* refers to [Director A, ALM/JML] telling [Senior Employee, ALM/JML] that ALM/JML would respond by targeting BLM accounts or by delaying a price increase to attract orders from BLM customers;[190]

(d) The '*next breath he wants to go another 100'* refers to [Senior Employee, ALM/JML] reporting that BLM had advised customers that it would shortly

[186] URN 1211, page 20.
[187] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, page 71 to page 72 (URN 1420).
[188] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, page 70 to page 71 (URN 1420).
[189] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, page 72 (URN 1420).
[190] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, page 75 (URN 1420).

increase its prices by £100. Announcing a forthcoming price increase would attract orders from customers who wanted to buy before the price increase was implemented.[191]

3.115 To illustrate his explanation of the text message of 9 August 2016, [Director A, ALM/JML] provided the CMA with a copy of an email of 19 August 2016 from BLM to [Merchant Customer C], an ALM/JML customer.[192] [Director A, ALM/JML] said that the email, which advertised BLM's delivery network and standard lead times of three to four working days, had been sent to ALM/JML customers in the context of ALM/JML's supply difficulties: [193]

> '*After we were getting word back from our merchants that they was doing the rounds saying that we was in trouble, all of a sudden that went out to everybody, to all our accounts, well, all of our accounts, to the majority of our accounts.*'[194]

3.116 In his witness statement of August 2019, [Director A, ALM/JML] states that he stands by the explanation described at paragraphs 3.114 and 3.115 above.[195] However, he also states that it was inappropriate for [Director, BLM] to have discussed BLM's pricing with him.[196] It is unclear why [Director A, ALM/JML] has made this point in his witness statement given that he stands by his position that the text message of 9 August 2016 related to a conversation between himself and [Senior Employee, ALM/JML].

3.117 [Director A, ALM/JML]'s witness statement also states that the information about BLM's pricing was not particularly useful from ALM/JML's perspective given that ALM/JML had fallen behind with orders.[197] The CMA understands this to mean that ALM/JML would not have been in a position to take advantage of a competitor's price increase by making additional sales because it was unable to meet the additional demand at that time.

3.118 When interviewed by the CMA in June 2018, [Director B, ALM/JML] told the CMA that the context of the text message of 9 August 2016 was a mill breakdown that had resulted in a delay in ALM/JML delivery times from two to ten working days.[198] He could not remember how he had interpreted the message from [Director A, ALM/JML] (for example whether he had thought

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[191] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, page 75 (URN 1420).
[192] URN 1340.
[193] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, page 73 to page 75 (URN 1420).
[194] Transcript of CMA interview with [Director A, ALM/JML] dated 13 June 2018, page 74 (URN 1420).
[195] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 8.2 (URN 3966).
[196] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 8.4 (URN 3966).
[197] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 8.4 (URN 3966).
[198] Transcript of CMA interview with [Director B, ALM/JML] dated 13 June 2018, pages 24 to 25 (URN 1414).

that [Director A, ALM/JML]'s information was from a conversation with [Senior Employee, ALM/JML] or from another source).[199] He was not involved in the daily running of the business so could only guess at the exact meaning of the text message,[200] but explained the content of the message as follows:

(a) '*[Nickname for Director, BLM] is gloating with regards to how many of our accounts are calling them due to our 10 day delivery time'*: as a result of the mill breakdown and delay to ALM/JML delivery times, *'they* [BLM] j*ust walked in and tried to take our market off us'*.[201]

(b) '*said that's bollocks it's due to us holding the price'*: [Director B, ALM/JML]'s view was that ALM/JML should hold its price, rather than reducing it when LME prices fell, because it offered better service than its competitors, but BLM and Calder had both dropped their prices.[202]

(c) '*if we lose tonnage you know the score'*: if BLM took tonnage from ALM/JML, ALM/JML would have to go out to the market and take tonnage back to maintain its business.[203]

(d) He could not recall the meaning of *'next breath he wants to go another 100'* but thought this might be BLM offering to sell ALM/JML another 100 tonnes or stating that it intended to increase prices by £100 per tonne.

3.119 For the reasons explained in the following paragraphs, the CMA does not accept as credible either of the accounts given by [Director A, ALM/JML] or [Director B, ALM/JML].

3.120 [Director A, ALM/JML]'s explanation that BLM had been calling ALM/JML customers ('*BLM was then doing the rounds, ringing our customers up, saying they could do deliveries quicker and more cheaper'*)[204] does not appear consistent with the text message, which stated that ALM/JML customers were contacting BLM.

3.121 Additionally, while [Director A, ALM/JML] stated in relation to this text message that '*[Nickname for Director, BLM]'* referred to both BLM and [Director, BLM], when asked about references to '*[Nickname for Director, BLM]'* earlier in the interview he had referred only to [Director, BLM]:

[199] Transcript of CMA interview with [Director B, ALM/JML] dated 13 June 2018, page 25 (URN 1414).
[200] Transcript of CMA interview with [Director B, ALM/JML] dated 13 June 2018, page 28 (URN 1414).
[201] Transcript of CMA interview with [Director B, ALM/JML] dated 13 June 2018, page 25 (URN 1414).
[202] Transcript of CMA interview with [Director B, ALM/JML] dated 13 June 2018, pages 23 to 24 (URN 1414).
[203] Transcript of CMA interview with [Director B, ALM/JML] dated 13 June 2018, page 26 (URN 1414).
[204] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, page 71 (URN 1420).

'[Nickname for Director, BLM], he carved the market up. He undercuts everyone in the market. Seriously, the guy's deluded. That is what happens. It is what it is. So, [Nickname for Director, BLM] carves prices up. He does not know we call him "[Nickname for Director, BLM]", by the way!'.[205]

3.122 The CMA has not identified any evidence to support [Director A, ALM/JML]'s statement that '*[Nickname for Director, BLM]*' would refer to BLM as well as to [Director, BLM] (and therefore that the text message did not relay a conversation with [Director, BLM]). [Director B, ALM/JML] also identified '*[Nickname for Director, BLM]'* as referring to [Director, BLM] during his interview (albeit in relation to a separate text message).[206] It is also unclear why [Director A, ALM/JML] would refer to '*gloating*' by '*[Nickname for Director, BLM]*' when reporting a statement by [Senior Employee, ALM/JML] that BLM had been contacting ALM/JML customers.

3.123 Documents reviewed by the CMA relating to BLM's prices between June and October 2016 did not suggest that BLM had reduced its prices as stated by both [Director A, ALM/JML] and [Director B, ALM/JML] (paragraphs 3.114(b) and 3.118(b) respectively). On the contrary, the price notifications sent out by BLM during this period showed increases of £150 per tonne with effect from 1 July 2016,[207] £180 per tonne with effect from 1 August 2016,[208] and £80 with effect from 3 October 2016[209] (there was no increase or decrease in September 2016).

3.124 At the time of the text message of 9 August 2016, therefore, BLM had recently increased its prices by £180 tonne, following a price increase of £150 per tonne the previous month. In both cases BLM's price increased by more than the LME price (based on LME prices on the 25th each month).[210]

3.125 The CMA notes that [Director, BLM], in his draft witness statement, refers to having instructed BLM sales managers to put BLM customers on notice of the proposed price increase in June or July 2016 as a means of testing customers' reactions.[211] This is potentially consistent with the explanations given by [Director A, ALM/JML] (paragraph 3.114(d)) and [Director B,

[205] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, page 20 (URN 1420).
[206] Transcript of CMA Interview with [Director B, ALM/JML] dated 13 June 2018, page 17 (URN 1414).
[207] URN 1422.
[208] URN 1423.
[209] URN 1424.
[210] URN 1421 giving 2016 LME prices on the 25th of each month. The LME price increased by £119 between 25 May and 25 June 2016, and by £172 between 25 June and 25 July 2016.
[211] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 57 (URN 3166).

ALM/JML] (paragraph 3.118(d)), both of which refer to BLM advising customers that it planned to increase prices.

3.126 Taken in the round, however, the CMA considers that the evidence does not support the explanations given by [Director A, ALM/JML] and [Director B, ALM/JML]. As set out at paragraphs 3.120 to 3.124, there are several key points on which these explanations do not appear to be consistent with the available evidence. The CMA has concluded that these points outweigh the one area of potential consistency with [Director, BLM]'s evidence, and accordingly that the explanations given by [Director A, ALM/JML] and [Director B, ALM/JML] are not correct.

3.127 The CMA considers that the text message of 9 August 2016 reflects a conversation that [Director A, ALM/JML] had with [Director, BLM] on 8 August 2016 (during the telephone conversations outlined at paragraph 3.109) and that it was [Director, BLM] who was '*gloating*'. Accordingly, the remainder of the text message may be understood as describing a conversation between [Director A, ALM/JML] and [Director, BLM], with the phrase '*Next breath he wants to go another 100'* describing [Director, BLM]'s disclosure that BLM was considering a £100 per tonne price increase.

3.128 The CMA has concluded, for the reasons set out below, that the text message demonstrates [Director, BLM] providing [Director A, ALM/JML] with competitively sensitive information about BLM's planned price increase, and that [Director A, ALM/JML] made use of this information by sharing it with [Director B, ALM/JML].

3.129 As noted at paragraph 3.111, in August 2016, BLM was considering an initiative (referred to internally as 'Project Push Up') to increase prices by £100 per tonne, separately from any increases to account for changes to the LME price:

(a) On 9 August 2016, the same date as the text message, [Director, BLM] sent [Employee, BLM] an email with a presentation titled '5 Top Reasons for Project "PUSH UP"' attached. This presentation referred to raw material prices being £100 per tonne higher than 2015; [212]

(b) On 17 August 2016, [Director A, Eco-Bat] forwarded a copy of the same presentation to [Director B, Eco-Bat] stating '*[Director B, Eco-Bat] …. £100/Te* [tonne] *per 'push up' planned from [Director, BLM]*'.[213]

[212] URN 1813, page 2.
[213] URN 1815.

(c) On 4 October 2016, BLM announced to its customers that it would implement a price increase of £100 per tonne, to take effect in January 2017.[214] The increase was in addition to any increase in the commodity price for lead and '*reflects only the additional costs of our raw materials, regulatory compliance and distribution that have been absorbed so far during 2016*'.[215]

3.130 The CMA considers that the price increase BLM was planning in August 2016 explains the phrase '*Next breath he wants to go another 100*' in [Director A, ALM/JML]'s text message of 9 August 2016. In response to [Director A, ALM/JML] saying that ALM/JML was '*holding the price*' and would retaliate if they '*lost tonnage*', [Director, BLM] disclosed BLM's future pricing plans, i.e. that BLM was proposing to increase its prices by £100 per tonne. The price increase would prevent ALM/JML losing tonnage. Disclosure of the price increase, therefore, allowed BLM to avoid the retaliation threatened by ALM/JML. [Director A, ALM/JML] made use of this information by sharing it with [Director B, ALM/JML] in his text message of 9 August 2016.

3.131 As set out at paragraph 3.125, [Director, BLM]'s draft witness statement suggests that certain BLM customers had been put on notice of the intended price increase in June or July 2016. However, the CMA has not seen any evidence to suggest that the planned increase was generally known; indeed, as noted at paragraph 3.129(c), this increase was not formally announced to customers until 4 October 2016. The CMA also infers from the wording of the text message from [Director A, ALM/JML] to [Director B, ALM/JML] ('*next breath he wants to go another 100*') that he had not previously been aware of the proposed price increase. Accordingly, the CMA has concluded that the information disclosed by [Director, BLM] to [Director A, ALM/JML] was commercially sensitive pricing information.

3.132 BLM's announcement to customers in October 2016 that it intended to increase prices by £100 per tonne was fed back to ALM/JML by customers. In an internal ALM/JML email, [Employee B, ALM/JML] appeared to suggest that the price increase announcement, which he had picked up from a customer, was unusually early ('*looks like BLM are planning well ahead or are in trouble?*').[216] A possible explanation for BLM announcing its price increase earlier than it might otherwise have done is that BLM was seeking to demonstrate to ALM/JML that it would be increasing its prices by £100 as previously indicated to [Director A, ALM/JML]. This might reduce the risk that

[214] URN 1447.
[215] URN 1333.
[216] URN 0486.

[Director A, ALM/JML] would pursue the threat of retaliation that he had made on 8 August 2016.

3.133 [Director, BLM]'s draft witness statement is consistent with the CMA's findings; he describes disclosing information about BLM's intended price increase in order to diffuse a situation in which [Director A, ALM/JML] had threatened a price attack on BLM customers.[217]

3.134 Accordingly, the CMA has found that the communications of 8-9 August 2016 evidence an Infringement between ALM/JML and BLM, in which they engaged in a non-aggression pact and colluded on price. The conduct also included an exchange of commercially sensitive pricing information.

The April 2017 Infringement

3.135 On 25 April 2017 at 13:02, [Director, BLM] sent [Director A, ALM/JML] the following text message from his Second Phone: '*Down 190 at the buying groups but no blanket adjustment for the rest*'.[218] The following paragraphs set out details relevant to understanding the context of the text message.

3.136 At the time of the text message, there were two buying groups which were each supplied by both ALM/JML and BLM: [Buying Group A] and [Buying Group B].

3.137 On 25 April 2017, following reductions in the LME price, ALM/JML and BLM notified [Buying Group A] and [Buying Group B] of the following price adjustments (to take effect on 1 May 2017):

(a) At 15:55 and 15:56, ALM/JML notified [Buying Group A] that it would reduce prices by £186 per tonne;[219]

(b) At 15:57 and 15:58, ALM/JML notified [Buying Group B] that it would reduce prices by £186 per tonne;[220]

(c) At 15:58, BLM notified [Buying Group A] that it would reduce prices by £220 per tonne;[221]

[217] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 57 (URN 3166).
[218] URN 1214, page 11.
[219] URN 1839, pages 1-2 and URN 1839, page 3. The invoice prices in these emails are each £186 per tonne lower than those found in URN 1260; with attachment URN 1261.
[220] URN 1839, pages 4-5, URN 1839, pages 6-7 and URN 1839, pages 8-9. The invoice prices in these emails are each £186 per tonne lower than those found in URN 1260; with attachment URN 1261.
[221] URN 1809.

(d) At 16:57, BLM notified [Buying Group B] that it would reduce prices by £230 per tonne.[222]

3.138 On the same date, ALM/JML and BLM notified their independent customers of the following price reductions:

- BLM reduced its prices by [✂] per tonne for the majority of its independent customers, with higher reductions for a small number;[223]
- ALM/JML notified different groups of independent customers of price reductions of [✂] per tonne.

3.139 In a weekly report of 3 May 2017 from [Director, BLM] to [Director A, Eco-Bat], [Director, BLM] confirmed that BLM had reduced its prices by [✂] and stated:

> *'In order to try to stimulate some sales we reduced our prices by slightly more to [Buying Group B] and [Buying Group A] buying groups, and we have already seen a couple of orders from [Buying Group B] members who do not normally buy from us which suggests that our price is better than ALM's here. We will have to see if our ploy was successful at [Buying Group A]'.*[224]

3.140 Elsewhere, the report stated:

> *'we may have stolen a march on Envirowales* [ALM and JML's parent company] *at the two major buying groups where our May prices seem to be marginally lower than theirs'.*[225]

3.141 [Director, BLM] told the CMA in his first interview that the text message of 25 April 2017 was a joke, following an LSA meeting at which [Director A, ALM/JML] had referred to being unable to second-guess BLM prices. [Director, BLM] stated that he had responded along the lines that he would send [Director A, ALM/JML] a '*price-change advice'.* He subsequently sent the text message to amuse [Director A, ALM/JML], who would know that he would never consider sharing pricing information. In support of his claim that the text message was not serious, he noted that the prices in the text message did not reflect the price changes BLM had made that month.[226]

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[222] URN 1264.
[223] URN 1427 when compared to the prices in URN 1426.
[224] URN 1266, page 3. Attached to URN 1265.
[225] URN 1266, page 1. Attached to URN 1265.
[226] Transcript of CMA Interview with [Director, BLM] dated 29 June 2018, page 22 to page 24 (URN 1417).

3.142 [Director, BLM] also asserts in his draft witness statement that the text message was intended as a joke.[227] He states that he met [Director A, ALM/JML] and [Director B, ALM/JML] on 22 March 2017 to discuss LSA matters and that during this meeting [Director A, ALM/JML] stated that he could never predict BLM's prices. [Director, BLM] further states that he then responded 'in a joking manner' that he would notify [Director A, ALM/JML] of BLM's prices in the following month. The text message of 25 April 2017 was therefore intended as a reference to this exchange.

3.143 The CMA does not accept [Director, BLM]'s explanations as credible, not least because the CMA has identified other examples of [Director, BLM] providing [Director A, ALM/JML] with pricing information (see for example paragraphs 3.77 and 3.112). Moreover, in his draft witness statement [Director, BLM] maintains the explanation that the text message was a joke, the rationale being that it would be amusing because he would never consider sharing price information (see paragraph 3.141). However, this is now inconsistent with the fact that he also admits (also in the draft witness statement) to anti-competitive contacts with [Director A, ALM/JML].[228]

3.144 Additionally, the CMA notes that, according to [Director, BLM], the text message of 25 April 2017 related to a discussion he had had with [Director A, ALM/JML] at their meeting of 22 March 2017. However, BLM announced a monthly price change two days after this meeting, on 24 March 2017.[229] [Director, BLM] has not explained why, in his account, he waited until the second monthly price change after his exchange with [Director A, ALM/JML] to send his text message, nor why he expected [Director A, ALM/JML] to understand that this was a reference to a joking exchange more than a month earlier.

3.145 It is notable that [Director A, ALM/JML] provided a different explanation, which again the CMA does not consider credible. [Director A, ALM/JML] told the CMA in his interview that he had no idea why [Director, BLM] had sent the message of 25 April 2017 and that it was meaningless to him. He explained that contracts with the buying groups were agreed at the start of each calendar year and specified that the buying price would be set on the 25th of each month (or the nearest working day) based on the LME price of that date plus the 'terms' agreed in the contract. According to [Director A, ALM/JML], this meant that there was no significance to being informed about BLM prices, as they could only have altered according to the LME price.[230]

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[227] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 66 (URN 3166).
[228] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraphs 24 to 25 and 55 to 57 (URN 3166).
[229] URN 1259 and URN 1808.
[230] Transcript of CMA Interview with [Director A, ALM/JML] dated 13 June 2018, page 79 to page 82 (URN 1420).

3.146 The CMA does not accept [Director A, ALM/JML]'s statement that the Parties had no flexibility to adjust monthly prices to the buying groups other than to reflect changes to the LME price. The evidence available to the CMA suggests that it was possible to reduce the margin the Parties charged over LME:

- The difference in price reductions made by BLM and ALM/JML to the buying groups (see paragraph 3.137) would not have been possible if both parties were required to adjust prices only in line with changes to LME prices that month.

- [Senior Employee, BLM] told the CMA that [Buying Group B] and [Buying Group A] would be happy for BLM to reduce its margin below that set out in the contract in any given month, but not to increase it any higher. [✂]. [Senior Employee, BLM] stated that this flexibility had allowed BLM to reduce its prices by £230 per tonne in May 2017, despite LME prices only having fallen by £190 per tonne.[231]

3.147 [Director A, ALM/JML]'s witness statement of August 2019 also does not corroborate [Director, BLM]'s evidence that the text message was a joke. [Director A, ALM/JML] has maintained his position that he did not know why the message had been sent to him and that the information it contained was not significant for him or ALM.[232]

3.148 There is no evidence of ALM distancing itself from the price information received from [Director, BLM].

3.149 In the light of the above and in the absence of any credible alternative explanation being forthcoming from the relevant parties, the CMA has concluded that the text message of 25 April 2017 constitutes the unilateral disclosure of competitively sensitive price information.

3.150 The CMA notes that the price information contained in [Director, BLM]'s text message does not reflect the prices charged by BLM to [Buying Group B] and [Buying Group A] that month. The CMA has concluded that [Director, BLM]'s text message, while ostensibly containing information about BLM's price change, was in fact intended to mislead [Director A, ALM/JML]. In the context of the LME price falling by £190, [Director, BLM] appeared to be reassuring [Director A, ALM/JML] that BLM was reducing its prices to the buying groups by no more than the decrease in the LME. This would have given ALM the confidence to reduce its prices by a similar amount, when in fact BLM reduced

[231] Witness statement of [Senior Employee, BLM] dated 1 March 2019, paragraphs 31 to 33 (URN 3094).
[232] Witness Statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 10.1 (URN 3966).

its prices much further than this (by £220/230, see paragraphs 3.137(c)-(d)). The CMA has concluded that the provision of deliberately misleading information by BLM was intended to influence ALM's pricing decisions and thereby distort competition in the market.

3.151 This explanation is consistent with [Director, BLM]'s statement in the internal email described at paragraph 3.140 above that he had '*stolen a march*' on ALM, presumably so as to capture a greater proportion of the buying groups' business that month.[233]

3.152 Accordingly, the CMA finds that the text message of 25 April 2017 evidences an Infringement between ALM/JML and BLM, in which ALM/JML and BLM colluded on price in respect of certain buying group customers. This was effected by way of a unilateral disclosure of commercially sensitive pricing information from BLM to ALM/JML.

[233] URN 1266, page 1. Attached to URN 1265.

4. Market definition

4.1 When applying the Chapter I prohibition and/or Article 101 TFEU, the CMA is only obliged to define the relevant market where it is not possible, without such a definition, to determine whether the agreement and/or concerted practice is liable to affect trade in the UK and/or between Member States, and whether it has as its object or effect the prevention, restriction or distortion of competition.[234]

4.2 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 has been an infringement.

4.3 Nevertheless, the CMA has formed a view of the relevant market in order to calculate each of the Parties' relevant turnover in the market affected by the Infringements for the purposes of establishing the level of financial penalty that the CMA has decided to impose on the Parties. The relevant turnover, for penalties purposes, is the turnover derived from sales in the relevant market (the '**Relevant Turnover**').

4.4 The Competition Appeal Tribunal ('**CAT**') and the Court of Appeal have accepted that it is not necessary for the CMA to set out the precise relevant market definition in order to assess the appropriate level of the penalty.[235] Rather, the CMA must be '*satisfied on a reasonable, and properly reasoned basis, of what is the relevant product market affected by the infringement*'.[236] To this end, it is also relevant to consider the '*commercial reality*', insofar as it '*can reasonably be shown that the products so grouped were "affected" by the infringement*'.[237] The CMA considers that this principle also applies when assessing the relevant geographic market.

4.5 The market definition reached in this case should therefore be viewed in context, and in light of its purpose as outlined above, and is not determinative for the purposes of any future cases.

4.6 The CMA is not bound by market definitions adopted in previous cases, although earlier definitions can, on occasion, be informative when considering the appropriate market definition. Equally, although previous cases can

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[234] T-62/98 *Volkswagen AG v Commission*, EU:T:2000:180, paragraph 230; T-29/92 *SPO and Others v Commission*, ECR, EU:T:1995:34, paragraph 74.

[235] *Argos and Littlewoods v OFT* and *JJB Sports v OFT* [2006] ECWA Civ 1318 ('***Argos, Littlewoods and JJB***'), at paragraphs 169 to 173 and 189 and *Argos and Littlewoods v OFT* [2005] CAT 13 ('***Argos and Littlewoods***') at paragraph 178.

[236] *Argos, Littlewoods and JJB*, at paragraph 170.

[237] *Argos, Littlewoods and JJB*, at paragraphs 170 to 173 and 228.

provide useful information, the relevant market must be identified according to the particular facts of the case in hand.

4.7 There are normally two dimensions to the definition of the relevant market: a product dimension and a geographic dimension.

The relevant product market

4.8 The CMA considers that the Infringements took place in the relevant product market for the supply of Rolled Lead. The Infringements affect the supply of Rolled Lead, which is therefore the focal product.

4.9 The CMA has been told that demand for Rolled Lead is declining due to the availability of alternative products,[238] and changes in the design of houses.[239] These alternative products include other types of lead (cast lead) as well as oil-based products, bitumen, glass-reinforced plastic, felt, low cost flashing materials, stainless or galvanized steel, copper, zinc, aluminium, asbestos, slates and roofing tiles.[240]

4.10 While ALM/JML supplies certain products which may, in certain circumstances, be substituted for Rolled Lead, the CMA has conservatively excluded any such products from its assessment of the relevant product market. [241]

4.11 The CMA has considered whether separate markets should be defined for customers using Rolled Lead for different end-uses and more specifically whether sales made in the non-construction sector should be part of the same market as those made in the construction sector. The product supplied to each customer is the same and the CMA found no evidence that serving different types of customers would result in significant additional costs. Therefore, the CMA considers that it would be relatively easy and quick for manufacturers of Rolled Lead to switch supply between types of customers and as such the supply to all customers should be defined as a single market.

4.12 The supply of Rolled Lead in the UK is concentrated amongst a small number of suppliers, mainly the Parties and Calder who are the three principal manufacturers and suppliers of Rolled Lead in the UK.

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[238] Transcript of CMA interview with [Director B, ALM/JML] dated 13 June 2018, page 14 lines 2 to 16 (URN 1414).
[239] Transcript of CMA Interview with [Director B, ALM/JML] dated 13 June 2018, page 14 lines 20 to 26 (URN 1414). [Director B, ALM/JML] refers to modern houses being built without chimneys or 'valleys'.
[240] URN 1830 and URN 1840, paragraph 5.
[241] URN 1830 and URN 1840, paragraph 5.

The relevant geographic market

4.13 The CMA finds that the geographic market comprises the entirety of the UK.

4.14 The evidence suggests that UK suppliers of Rolled Lead serve the whole UK. Although there are some indications of geographic focus of sales effort, and the Parties have explained that some customers are located in a single region, others are UK-wide.[242]

4.15 The CMA has also considered whether the relevant geographic market may be wider than the UK.

4.16 Eco-Bat Technologies Limited has a subsidiary in France, LPF, which primarily produces or obtains lead in France rather than being supplied by its British parent.[243]

4.17 While BLM exports a small proportion of its total volumes of Rolled Lead to customers located outside of the UK, the majority of customers are UK-based. There are also some imports into the UK by [Importer A] [✂][244] and [Importer B], [✂].[245]

4.18 The CMA considers that the Infringements took place in the relevant geographic market that is UK wide.

4.19 Therefore, the CMA considers that the Infringements took place in the supply of Rolled Lead in the UK (the '**Relevant Market**').

[242] URN 1829.

[243] www.leplombfrancais.fr/qui-sommes-nous.

[244] Transcript of CMA interview with [Director A, ALM/JML] dated 13 June 2018, page 105, line 8 (URN 1420).

[245] [✂].

5. Legal Assessment

A. Key provisions of UK and EU competition rules

5.1 The Chapter I prohibition prohibits agreements between undertakings and concerted practices which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless an applicable exclusion is satisfied or the agreements/concerted practices in question are exempt in accordance with the provisions of Part 1 of the Act.

5.2 Article 101 of the TFEU prohibits agreements between undertakings, and concerted practices which may affect trade between EU Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market. However, such agreements and concerted practices are exempt from the prohibition in Article 101(1) TFEU if they meet the criteria in Article 101(3) TFEU.

5.3 Under the European Union (Withdrawal Agreement) Act 2020, section 2(1) of the European Communities Act 1972 (under which EU law has effect in the UK's national law) is applicable until the end of the Transition Period.[246] This means that directly applicable EU law, including Articles 101 and 102 TFEU and Regulation 1/2003,[247] will continue to apply in the UK during the Transition Period.

5.4 For the reasons set out below, the CMA finds that the Parties participated in four arrangements which infringed the Chapter I prohibition and/or Article 101 TFEU, because they had the object of preventing, restricting or distorting competition within the UK and the internal market, and may have affected trade within the UK and/or between EU Member States.

B. Undertakings

5.5 For the purposes of the Chapter I prohibition and Article 101(1) TFEU, the term 'undertaking' covers every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.[248] An entity is engaged in 'economic activity' where it conducts any activity '…*of an industrial*

[246] Section 1A, Withdrawal Act (as introduced by section 1, Withdrawal Agreement Act).
[247] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 4.1.2003, p. 1–25.
[248] C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, paragraph 21.

or commercial nature by offering goods and services on the market…'.[249] The term 'undertaking' designates an economic unit, even if in law that unit consists of several natural or legal persons.[250]

5.6 2iM constituted an undertaking for the purpose of the Chapter I prohibition and Article 101(1) TFEU during the period of the Infringements, since it was active in metal manufacturing, distribution and recycling, among other activities. It was therefore engaged in economic activity.

5.7 Eco-Bat constitutes an undertaking for the purpose of the Chapter I prohibition and Article 101(1) TFEU, since during the period of the Infringements it was active in smelting, refining and manufacturing lead and lead products, among other activities. It is therefore engaged in economic activity.

C. The burden and standard of proof

Legal framework

The Burden of Proof

5.8 The burden of proving an infringement of the Chapter I prohibition and/or Article 101(1) TFEU falls on the CMA.[251] The standard is the balance of probabilities.

5.9 Once the CMA has established to that standard an infringement of the Chapter I prohibition and/or Article 101(1) TFEU, the burden is on the undertaking to establish an exemption under section 9 of the Act and/or Article 101(3) TFEU.

The Standard of Proof

5.10 The standard of proof in competition proceedings is governed by the national law of each Member State and this has been recognised by the UK Courts.[252]

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[249] C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

[250] C-97/08 P *Akzo Nobel NV and Others* v *Commission*, EU:C:2009:536, paragraph 55 ('***Akzo***').

[251] This has been established by Regulation 1/2003, the European Courts and the CAT. In particular, Article 2 of Regulation 1/2003 provides that 'in any national or Community proceedings for the application of Articles 101 and 102 of the Treaty, the burden of proving an infringement of Art 101(1) or 102 shall rest on the party or the authority alleging the infringement'. See also, C-49-92 P *Commission v Anic* [1999] para 86, T-67/00 *JFE Engineering v Commission* [2004] para 173, C-235/92 P *Montecatini v Commission* [1999] para 179), *Napp v OFT* [2002] CAT 1 para 100 ('***Napp v OFT***'), *Genzyme v OFT* [2004] CAT 4 para 148, *JJB v OFT* [2004] CAT 17 para 164, *Argos v OFT* [2004] CAT 24 para 157, *Willis v OFT* [2011] CAT 13 para 45 and *Tesco v OFT* [2012] CAT 31 para 88).

[252] Recital 5 of Regulation 1/2003 and *Napp v OFT* para 104.

5.11 The General Court of the European Union ('**General Court**') and Court of Justice (together the '**European Courts**') have consistently stated that the Commission must adduce evidence capable of demonstrating to the '*requisite legal standard*' the existence of the circumstances constituting an infringement.[253] The European Courts have described the '*requisite legal standard*' as meaning that in order to discharge its burden of proof the Commission must produce '*sufficiently precise and consistent evidence*' so as to firmly establish the existence of an infringement, whilst alternative formulations include the demonstration of *'convincing', 'cogent', 'relevant, reliable and credible', 'solid, specific and corroborative'* evidence.[254] Nevertheless, these assertions merely describe the qualitative requirements regarding evidence rather than qualifying a pre-defined degree of persuasion that must be attained for the burden of proof to be discharged.

5.12 Although the CMA must produce *'sufficiently precise and consistent evidence'* to support the firm conviction that the alleged infringement occurred, '*it is not necessary for every single item of evidence* […] *to satisfy those criteria in relation to every aspect of the infringement, but it is sufficient if the body of evidence, viewed as a whole, meets that requirement'*, i.e. the weight of evidence is based on its overall consistency rather than on the value of each individual item of evidence.[255] Moreover, the European Courts have confirmed that '*the evidence must be assessed not in isolation, but as a whole*'[256] and that *'the evidence must be assessed in its entirety, taking into account all relevant circumstances of fact'*.[257]

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[253] C-49/92 P *Commission v Anic* [1999] para 86, T-67/00 *JFE Engineering v Commission* [2004] para 173 and C-185/95 P *Baustahlgewebe v Commission* [1998] para 58.

[254] T-67/00 *JFE Engineering v Commission* [2004] para 179, T-35/05, T-29/83 and 30/83 CRAM and Rheinzink v Commission para 20, T-36/05 Coats Holdings Ltd v Commission para 71, T-38/02 *Groupe Danone v Commission* [2005] para 217 and T-62/98 *Volkswagen v Commission* [2000] paragraphs 43 and 72.

[255] T-442/08 *CISAC v Commission*, ECLI:EU:T:2013, para 97, C-48/69 *ICI v Commission* [1972] para 68, T-44/02 *Dresdner Bank v Commission* [2006] para 63, and T-110/07 *Siemens v Commission* [2011] para 47, T-67/00 *JFE Engineering v Commission* [2004] para 180, T-67/00 *Sumitomo v Commission* [2004] para 180, T-348/08, Limburgse Vinyl Maatschappij and Others v Commission ('***PVC II***') paragraphs 768-778, JEF Engineering and Others v Commission para 180, *Aragonesas v Commission* [2011] paragraphs 95-96 and T-53/03 and *BPB v Commission* [2008] para 185. Compare the Court of Justice in C-613/13 *Keramag Keramische Werke*: corroborating documentary evidence should not be required to satisfy, in itself, all the elements to constitute sufficient evidence of an infringement – by imposing that requirement, the General Court '*failed to consider whether the evidence, viewed as a whole, could be mutually supporting*' (paragraph 55).

[256] T-56/99 *Marlines v Commission*, paragraph 28. See also C-48/69 *ICI v Commission*, EU:C:1972:70, paragraph 68.

[257] T-141/94 *Thyssen Stahl v Commission*, paragraph 175.

Evidence

Direct and Indirect Evidence

5.13 The European Courts have accepted that all types of evidence can be used to prove an infringement of competition law, while in determining the probative value of evidence, every item of evidence has to be evaluated as to its merits.[258]

5.14 Accordingly, the CMA can rely on both direct and indirect/circumstantial evidence to prove a material infringement of the competition rules. While it is for the CMA to prove an infringement '*by adducing* […] *precise and coherent evidence demonstrating convincingly the existence of the facts constituting those infringements* […]', that evidence *'may consist of direct evidence, taking the form, for example, of a written document* […] *or, failing that, indirect evidence, for example in the form of conduct*'.[259]

5.15 An authority is not required to produce express contemporaneous evidence of collusion. In *Hitachi*, a case involving market-sharing, the General Court stated that:

> *'as anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted'*.[260]

5.16 Specifically, cartels are rarely susceptible to proof by direct evidence given that cartelists often take steps to cover their tracks, so that indirect or circumstantial evidence plays an important role in proving an infringement. Indeed, the European Courts have validated the use of circumstantial evidence to corroborate the existence of a cartel.[261] Similarly, the CAT in *JJB Sports* and *Claymore Dairies* recognised the limitations in practice on gathering evidence on cartels and stated that mere indirect evidence may be sufficient to prove the existence of cartels.[262] For example, it might suffice on

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[258] Opinion of AG Mengozzi in C-511/06 P *Archer Daniels v Commission* [2008] para 114.
[259] T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, ECLI:EU:T:2006:265, paragraphs 82-83 ('***GlaxoSmithKline***').
[260] T-112/07 *Hitachi v Commission*, EU:T:2011:342, paragraph 61.
[261] C-48/69 *ICI v Commission* [1972] paragraphs 64-68 and C 89/85 *Ahlstrom Osakeyhtio v Commission (Woodpulp)* [1993] para 71.
[262] *JJB Sport v OFT* [2004] at para 206 and *Claymore Dairies v OFT* [2003] CAT 18 paragraphs 8-10.

its own to prove an infringement if an overall pattern of guilt emerges when viewed in its totality, i.e. indirect or circumstantial evidence usually requires corroboration and should be considered holistically rather than on an item-by-item basis. Indirect evidence might include evidence of communication among the suspected cartelists, e.g. records of telephone conversations which do not describe the substance of their communications.[263]

5.17 In addition, the CMA is not restricted to only adducing written or documentary evidence. The CAT has stated that '*oral evidence of a credible witness, if believed, may in itself be sufficient to prove an infringement* [of Chapter I]*, depending on the circumstances of the particular case*.'[264] Thus, there is nothing to prevent the CMA from proving a cartel infringement solely on the basis of oral statements.[265] In *JFE Engineering* the Court provided an analytical framework for determining the probative value of statements, which depends on whether (i) the statements were made by a representative of a company or individual; (ii) the declarant was required to act in the interests of the company; (iii) the declarant was a direct witness to the anticompetitive facts; (iv) the statement was made deliberately and after careful consideration; (v) the declarant confirms his statements throughout the investigation process; and (vi) the statement is against the interests of the declarant or his company.[266]

Evaluation of Evidence

5.18 The CMA notes that, in line with EU case law, evidence needs to be evaluated on a case-by-case basis and assessed as a whole. Furthermore, as the CAT has held, understanding the wider context is relevant to interpreting evidence.[267]

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[263] *Aragonesas Industrias y Energia, SAU v Commission* paragraphs 184-186.

[264] *Claymore Dairies Ltd and another v Office of Fair Trading (Robert Wiseman Dairies plc and another intervening)* [2003] CAT 18 [2004] compare 177, paragraph 8. Further, the Tribunal stated '*Of course, if the OFT is relying primarily on a witness rather than on documents, it will no doubt look for support in the surrounding circumstances, for example, the dates and timing of price increases. It will no doubt ask itself whether there is reason to believe that the witness may be untruthful or mistaken but as at present advised, we do not think there is any technical rule that precludes the OFT from accepting an oral statement of a witness at face value if it thinks it right to do so.'* ibid

[265] T-15/02 *BASF v Commission* [2006] paragraphs 495-496.

[266] T-67/00 *JFE Engineering v Commission* [2004] paragraphs 205-211.

[267] *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 31. At para 126, the CAT stated: '*If, as is the case here, the Appellants contest the meaning or significance of a document relied on by the OFT, in the absence of any witness statement from the author of the document, the Tribunal has to consider the language used in the document and seek to determine what the author meant by it. The starting point will be that the author meant what they said and said what they meant. A document is not made in a vacuum, however, and should not be construed as if it had been; we have therefore read documents against the factual background known to the parties at the time*.'

5.19 Relevant EU case precedent deals with the probative value of evidence: (i) contemporaneous documents have greater evidential value than statements made '*in tempore suspecto*' (e.g. statements drawn up by the representatives or former representatives of the undertakings under investigation after receiving a statement of objection to seek to mitigate their liability);[268] (ii) the European Courts place increased emphasis on '*the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed, and whether, on its face, the document appears sound and reliable*';[269] (iii) '*in assessing the evidential value of a reporting document, regard should be had first and foremost to the credibility of the account it contains*';[270] (iv) where a piece of evidence is examined in relation to other pieces of evidence, its soundness and reliability is proportional to the extent to which that evidence is consistent with other known facts.

Presumptions and Inferences

5.20 As noted above, anticompetitive activity is often by nature illicit and covert. Accordingly, the Courts have highlighted that '*participation in agreements that are prohibited* […] *is more often than not clandestine and is not governed by any formal rules*'.[271] The Court of Justice has acknowledged the lengths to which participants will go to conceal their illicit contacts and reduce the risk of being discovered. Since cartels are secret activities, it is normal for the evidence to be sparse and for an element of deduction and inference to be required so as to reconstitute certain details.[272]

5.21 Accordingly, a number of evidentiary rules assist the CMA to meet the standard of proof and to discharge its burden of proof, i.e. the use of presumptions and the ability to prove a case by citing mere indicia from which inferences can be drawn.[273]

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[268] T-540/08 *Esso v Commission* [2014] para 75.

[269] AG Vesterdorf Opinion in T-1/89 *Rhone-Poulenc v Commission* [1991], T-25/95 *Cimenteries v Commission* [2000] paragraphs 1053, 1838 and 3172, T-44/02 *Dresdner Bank v Commission* [2006] para 121 and T-38/02 *Groupe Danone v Commission* [2005] para 286.

[270] C-407/04 *Dalmine v Commission* [2007] para 63.

[271] C-68/12 *Protomonopolny urad Slovenskej republiky v Slovenska sporitel'na ('**Slovak Banking Cartel**')*, EU:C:2013:71, paragraph 26.

[272] C-204/00 *Aalborg Portland v Commission* [2004] paragraphs 55-56 and *Claymore Dairies v OFT* [2003] CAT 18 para 3.

[273] C-235/92 P *Montecatini v Commission* [1999] paragraphs 177-181. Also, in *Napp v OFT* the CAT at para 110 held that the OFT is entitled to discharge its burden of proof by relying on inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts. Also, in Claymore Dairies v OFT [2003] the CAT held at paragraphs 8-10 that '*the OFT may well be entitled to draw inferences or presumptions from a given set of circumstances, as part of its decision-making process*'.

5.22 Inferences from circumstantial evidence, i.e. coincidences and indicia, play an important role. Specifically, the Court of Justice has made clear that:

> *'Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.*
>
> *In **most cases**, the existence of an anti-competitive…agreement must be **inferred from a number of coincidences and indicia** which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules'*.[274] [Emphasis added]

5.23 Approving that statement, the CAT has held: '[b]*ecause anti-competitive agreements are usually arrived at covertly, the* [CMA] *may have to rely on circumstantial evidence to establish the facts'*.[275] In fact, *'wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard'*.[276]

5.24 The CMA cannot be necessarily required to produce documents expressly attesting to the alleged infringement, but the fragmentary and sporadic items of evidence which may be available to the CMA should be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted.[277] The CMA may either supplement direct evidence by indirect evidence so as to reconstitute what it considers to be the relevant circumstances and a plausible explanation thereof, or it may prove a certain fact by presenting a sufficient amount of indirect evidence in the form of coincidences and indicia without any clear rebuttal from the defendants.

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[274] C-204/00 *Aalborg Portland*, EU:C:2004:6, paragraphs 56 to 57 ('***Aalborg Portland***") *BPB v Commission* [2008] para 63, *Aragonesas Industrias y Energia, SAU v Commission* para 97 and *Dresdner Bank and Others v Commission* [2006] paragraphs 64-65. The CAT stated in *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, paragraph 96, that these comments apply equally to the OFT. Compare C-634/13 P *Total Marketing Services v Commission*, EU:C:2015:614, paragraph 26; and C-403/04 *Sumitomo Metal Industries v Commission* ('***Sumitomo***') in which the Court of Justice held that the evidence relied on by the Commission – a series of documentary indicia and market share tables – sufficed to prove the existence of a market exclusion agreement: '*where the Commission has succeeded in gathering documentary evidence in support of the alleged infringement, and where that evidence appears to be sufficient to demonstrate the existence of an agreement of an anti-competitive nature, there is no need to examine the question whether the undertaking concerned had a commercial interest in the agreement*' (paragraph 46).

[275] *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, paragraph 96

[276] *JJB Sports plc v Office of Fair Trading [2004] CAT 17, paragraph 206.*

[277] *Aragonesas Industrias y Energia, SAU v Commission* para 97.

5.25 In *Sumitomo Metal Industries v Commission*, the Court of Justice upheld the General Court's approach:

> *'in practice, the Commission is often obliged to prove the existence of an infringement under conditions which are hardly conducive to that task, in that several years may have elapsed since the time of the events constituting the infringement and a number of the undertakings covered by the investigation have not actively cooperated therein. Whilst it is necessarily incumbent upon the Commission to establish that an illegal market-sharing agreement was concluded* […]*, it would be excessive also to require it to produce evidence of the specific mechanism by which that object was attained.*'[278]

5.26 In such circumstances, an offending undertaking can rebut '*frequently recurring examples of circumstantial evidence'* only if they adduce '*cogent evidence'* that cast the facts established by the competition authority in a different light. Thus, the CMA can discharge its burden of proof if there is a lack of an alternative plausible explanation. This means that the requirement for the CMA to present precise and consistent evidence is not satisfied where a plausible explanation can be given for the alleged infringements.[279] However, in the absence of a plausible alternative explanation by the undertaking, certain facts will be considered as proven.

5.27 The EU Courts have shown that they will assume that undertakings operate rationally, and they therefore give little credibility to accounts of facts that appear on their face to be against normal business conduct. For example, the General Court found '*it is not plausible that* [the undertaking] *participated in an exchange of data that a company normally considers confidential, without having been made aware of the aim sought, namely to end the price war and stabilize the markets concerned*.'[280] This presumption of rationality can be used as a method of weighing the credibility of alternative explanations put forward by the parties, and as such, aligns with the other presumptions highlighted in the section.

5.28 An infringement may therefore be established to the requisite legal standard by a body of evidence which, taken together and in the absence of a plausible legitimate explanation, leads to the inference that the parties entered into an anticompetitive agreement.

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[278] *Sumitomo*, paragraph 203.

[279] *CRAM and Rheinzink* para 16 et seq. and *Coats Holdings v Commission* para 71.

[280] Case T-54/03 *Lafarge v Commission,* paragraph 270 [translated from French].

Assessment

5.29 The CMA has based its conclusions on the body of available evidence, taken together[281] and assessed as a whole.[282] This comprises documentary as well as witness evidence and other indicia. For example, data from forensic extractions of the mobile phones of key individuals (phone call logs) play a significant role in this investigation. They provide indicia which, when taken together and set alongside other pieces of evidence such as emails, text messages and witness evidence, provide coherent and convincing evidence of the Infringements.

5.30 As noted at paragraphs 3.52 to 3.53, there is evidence of [Director, BLM] taking steps to conceal his conduct through the use of a second phone.

5.31 In light of this evidence of concealment, it is unsurprising to find that the evidence underlying the Infringements is sporadic and fragmentary, requiring some deduction and inference on the part of the CMA. Where the CMA has identified evidence, however, such as the text messages exchanged between [Director, BLM] and [Director A, ALM/JML] combined with other documentary evidence, the relevant individuals were unable to adduce cogent evidence of an alternative plausible explanation of the facts (or to challenge the very existence of the facts).[283] This is set out in more detail below in relation to each Infringement.

5.32 As set out at paragraphs 2.29 to 2.32, the CMA acknowledges doubts as to the credibility of certain witnesses. Accordingly, the CMA has assessed relevant witness evidence in light of the factors set out at paragraph 5.17 in order to determine its probative value. Where the CMA has identified doubts as to the credibility of a witness, it has generally relied on the evidence of that witness only where it is consistent with or corroborated by other sources and/or where it meets one or more of the other factors set out at paragraph 5.17, as explained further below.

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[281] *GlaxoSmithKline*, paragraphs 82-83; C-613/13 *Keramag Keramische Werke*, paragraph 55; *Aalborg Portland*, paragraphs 56 to 57. The CAT stated in *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, paragraph 96, that these comments apply equally to the OFT. Compare C-634/13 P *Total Marketing Services v Commission*, EU:C:2015:614, in which the Court of Justice held that the evidence relied on by the Commission – a series of documentary indicia and market share tables – sufficed to prove the existence of a market exclusion agreement: '*where the Commission has succeeded in gathering documentary evidence in support of the alleged infringement, and where that evidence appears to be sufficient to demonstrate the existence of an agreement of an anti-competitive nature, there is no need to examine the question whether the undertaking concerned had a commercial interest in the agreement*' (paragraph 46).

[282] T-56/99 *Marlines v Commission*, paragraph 28. See also *ICI v Commission*, paragraph 68, and T-141/94 *Thyssen Stahl v Commission*, paragraph 175.

[283] T-472/13 *Lundbeck v Commission* EU:T:2016:449, paragraphs 109-112. Compare C-89/11 P *E.ON v Commission*, EU:C:2012:738, paragraph 76.

5.33 In the case of [Director A, CBG], the CMA has taken account of his witness evidence regarding the events surrounding the October 2015 Infringement, but has placed limited reliance on his evidence except where it is corroborated by other documentary and/or witness evidence. The CMA has drawn its conclusions regarding the October 2015 Infringement from the text messages, call data and other documentary evidence relating to BLM's withdrawal of supply from CBG. While [Director A, CBG]'s account of these events is set out at paragraph 3.67 for information, the CMA does not rely solely on this account in order to reach its conclusions.

5.34 Similarly, in the case of [Director, BLM]'s draft witness statement and second interview, the CMA has acknowledged inconsistencies that cast doubt on the reliability of these accounts. Accordingly, the CMA has relied on this evidence only where it is supported by other documentary evidence.

5.35 With regard to the use of telephone call data, as noted at paragraph 5.16, indirect evidence such as call records may be sufficient to establish an infringement if an overall pattern of guilt emerges when viewing the evidence in its totality. The CMA considers that where it has relied on telephone call data alongside other direct and indirect evidence, the weight of evidence in the round is sufficient to establish each Infringement on the balance of probabilities.

5.36 The paragraphs below discuss the burden and standard of proof in relation to each Infringement. The characterisation of the Infringements, for example whether they constitute agreements and/or concerted practices, is set out later in the Decision.

October 2015 Infringement

5.37 The CMA has drawn together the text messages of 13 October 2015, supplemented by inferences drawn from the call data of that date and other documentary and witness evidence. Taken together, this combination of direct and indirect evidence allows the CMA to reconstitute the relevant circumstances of the Infringement.

5.38 Specifically, the CMA has inferred from the timing and surrounding documentary and witness evidence that the text message of 13 October 2015 related to BLM's decision to withdraw supply from CBG. ALM/JML, BLM and the relevant individuals all now acknowledge this to be the case.

5.39 [Director A, ALM/JML] states in his witness statement that while he discussed CBG with [Director, BLM], BLM's decision to withdraw supply was unilateral

and the text message was unsolicited.[284] In contrast, the CMA has inferred that the pair reached an agreement or understanding that neither party should supply CBG. This view is supported by the fact that BLM did not supply or deal with CBG at all after this event. In view of the language of the text message, which implies a previous discussion regarding a 'problem' to be resolved (see paragraph 3.69), and the fact that [Director, BLM] informed [Director A, ALM/JML] of BLM's decision to withdraw supply, the CMA considers that there is sufficient evidence to prove, on the balance of probabilities, that BLM's decision resulted from co-ordination with ALM/JML rather than being unilateral.

5.40 Further, [Director A, ALM/JML]'s own evidence is that he informed BLM that ALM/JML was not prepared to supply CBG. The CMA has placed weight on this evidence, given that it goes against both his own and ALM/JML's interests by suggesting a disclosure of ALM/JML's strategic decision with respect to CBG. Given this and the fact that ALM/JML and BLM both acknowledge that the text message of 13 October 2015 referred to BLM's decision to withdraw supply from CBG, the CMA considers that the evidence supports a conclusion that both ALM/JML and BLM informed each other of their respective strategic decisions with respect to CBG.

5.41 The CMA therefore considers that the available evidence, taken in the round and on the balance of probabilities, is sufficient to establish an infringement.

July 2016 Infringement

5.42 The CMA has drawn together the text messages of 26 July 2016, supplemented by inferences drawn from the call data of 25 and 26 July 2016 and other documentary evidence. Taken together, this combination of direct contemporaneous evidence with inferences from circumstantial evidence allows the CMA to conclude that the burden of proof is met in the relevant circumstances of the Infringement.

5.43 Specifically, the CMA has inferred the meaning of [Director, BLM]'s text message to [Director A, ALM/JML] stating *'[Shortened name of Merchant Customer D] up from 1.92 to 2.10 today'* based on (i) the concurrence of the numbers in the text message with the change in BLM's prices to [Merchant Customer D] an hour after the text message was sent (£1.92 and £2.10 being the price per kilogram and therefore corresponding to £1920 and £2100 per tonne respectively); and (ii) BLM's evidence that such a price change would normally have been implemented on 1 August 2016 rather than 26 July 2016. The CMA infers that the text message therefore indicates BLM changing its

[284] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 6.5 (URN 3966).

price to [Merchant Customer D] in advance of the scheduled price increase and disclosing to ALM/JML that it had done so.

5.44 Further, given that that there was an interval of only three minutes between the two text messages from [Director, BLM] to [Director A, ALM/JML], the CMA has inferred that the first text message (*'My apologies, we have a f.. Up but will retrieve the situation this morning and definitely not take orders from your guys'*) related to the second message regarding [Merchant Customer D].

5.45 The text messages of 26 July 2016 contain express and specific price information relating to a specifically identified customer, and they are addressed directly and privately by one competitor ([Director, BLM]) to another ([Director A, ALM/JML]). Thus they constitute strong evidence, and combined with the other evidence mentioned above, the CMA has concluded that they are sufficient to demonstrate the existence of an anticompetitive agreement or concerted practice (as set out below at paragraphs 5.118 to 5.127). It is thus not necessary to examine the question whether there is a plausible alternative explanation for the conduct complained of (see paragraph 5.26 above).

5.46 In any event, the CMA does not consider that the explanation of events given by [Director A, ALM/JML] amounts to a plausible alternative explanation given the points described at paragraphs 3.92 to 3.97. In contrast, [Director, BLM]'s later evidence (described at paragraphs 3.86 to 3.87), is consistent with, and therefore further corroborates, the CMA's interpretation of events.

5.47 While the CMA cannot explain the purpose of BLM changing its price to [Merchant Customer D], given that [Merchant Customer D] was known to be a loyal customer of ALM and was already receiving a lower price from ALM at that time, the burden on the CMA is to prove, to the requisite legal standard, that the infringement took place. This does not require the CMA to demonstrate the precise motivation for the conduct in question. Further, as set out at paragraph 3.99, the CMA has identified some hypothetical scenarios in which [Merchant Customer D] might have considered purchasing from BLM before the price increase came into effect.

5.48 [Director A, ALM/JML]'s evidence is that his calls with [Director, BLM] related to the prices of goods that BLM was cross-supplying to ALM/JML, which had increased following the UK referendum on exiting the European Union in June 2016.[285]

[285] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 7.3 (URN 3966).

5.49 However, the CMA has since received confirmation from BLM that it has made no sales to either ALM or JML since September 2013 and November 2011 respectively.[286] This directly undermines [Director A, ALM/JML]'s statement, which refers to '*the prices that BLM was charging to ALM for cross-supplied materials*'.[287] The CMA also considers that the proximity in timing of the calls and subsequent text messages (the series of two calls, one missed call and two text messages all occurred within 16 minutes) is strongly indicative that they were related. In the absence of another plausible explanation, the CMA considers that it has sufficiently discharged its burden of proof on this point.

5.50 The CMA therefore considers that the available evidence, taken in the round and on the balance of probabilities, is sufficient to establish an infringement.

August 2016 Infringement

5.51 The CMA has drawn on the text message of 9 August 2016, supplemented by inferences drawn from the call data of the previous day and relevant documentary evidence. Taken together, this allows the CMA to reconstitute the relevant circumstances of the Infringement.

5.52 The CMA has ascertained from other evidence that the term '*[Nickname for Director, BLM]*', as used in the text message of 9 August 2016, was a reference to [Director, BLM] (see paragraphs 3.121 and 3.122). The CMA has also drawn on evidence that (i) ALM/JML was suffering from a mill breakdown and therefore delays in its delivery times (see paragraph 3.118), and (ii) BLM was contemplating a price increase of £100 per tonne at the time of the text message and later announced and implemented this increase. This evidence provides context and a plausible explanation for the relevant words in the text message of 9 August 2016. Specifically, the text message is plausibly explained as relating to a previous conversation between [Director, BLM] and [Director A, ALM/JML] about pricing, and the words '*next breath he wants to go another 100*' are plausibly explained as relating to BLM's proposal to increase prices by £100 per tonne.

5.53 [Director A, ALM/JML], [Director B, ALM/JML] and [Director, BLM] have all provided evidence regarding the meaning of the text message. The CMA has duly examined this evidence in the context of all the other available evidence. For the reasons given at paragraphs 3.119 to 3.126, the CMA does not consider that the explanations given by either [Director A, ALM/JML] or [Director B, ALM/JML] are supported by the available documentary evidence.

[286] URN 4092.

[287] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 7.3 (URN 3966).

They are not therefore capable of overturning the CMA's substantiated finding on these events. In contrast, [Director, BLM]'s draft witness statement is consistent with the available documentary evidence and hence with the CMA's finding that he had disclosed information about BLM's intended price increase to [Director A, ALM/JML] during their telephone conversation of 8 August 2016.

5.54 The CMA has thus assessed all available evidence and any alternative explanations proposed by the witnesses. On this basis, the CMA considers that the available evidence, taken in the round and on the balance of probabilities, is sufficient to establish an infringement.

April 2017 Infringement

5.55 The CMA has drawn on the text message of 25 April 2017, supplemented by inferences drawn from the contemporaneous documents, to reconstitute the relevant circumstances.

5.56 Specifically, the CMA infers that '*down 190'* in the text message of 25 April 2017 is a reference to pricing for Rolled Lead, given that LME prices had fallen by £190 per tonne that month. The text message thus contains express and specific price information, relating to specifically identified customers, and is addressed directly and privately by one competitor ([Director, BLM]) to another ([Director A, ALM/JML]). While the text message therefore prima facie constitutes strong evidence of an infringement, the CMA has found that the price communicated by [Director, BLM] did not reflect BLM's price to the buying groups, as the plain meaning of the words would suggest. In examining whether there is a plausible alternative explanation, the CMA has considered the actual prices set by both BLM and ALM/JML to the buying groups on this date as well as witness evidence from [Director, BLM] and [Director A, ALM/JML].

5.57 BLM's prices to the buying groups were lower than was suggested by [Director, BLM]'s text message, namely BLM cut its prices to the buying groups by £220 and £230 per tonne respectively. ALM/JML subsequently reduced its price to the buying groups by £186 per tonne, somewhat less than the £190 stated in [Director, BLM]'s text message (which also corresponded to the LME drop). The CMA has not found any documentary evidence explaining these respective price changes, except for the internal BLM report mentioned below.

5.58 The CMA does not consider that either [Director, BLM] or [Director A, ALM/JML] has plausibly explained the context of the text message. Thus, on the basis of the mixture of direct and indirect evidence on which the CMA

relies and, as noted in paragraph 5.26 above, in the absence of a plausible alternative explanation by the parties, the CMA considers it appropriate to treat certain facts as proven. Furthermore, in the context of [Director, BLM]'s internal report, stating that BLM had '*stolen a march*' on ALM/JML by undercutting ALM/JML's prices to the buying groups, the CMA considers that this provides evidence that [Director, BLM] intended to mislead [Director A, ALM/JML] and influence ALM/JML's prices to the buying groups. The CMA considers this to be a plausible explanation for [Director, BLM]'s actions.

5.59 The CMA therefore considers that the available evidence, taken in the round and on the balance of probabilities, is sufficient to establish an infringement.

D. Agreement(s) between undertakings - Concerted practice(s)

Legal framework

5.60 The Chapter I prohibition and Article 101 TFEU apply to agreements and concerted practices between 'undertakings' as well as to decisions by 'associations of undertakings'.[288] In order to find an infringement, it is not necessary to distinguish between agreements and concerted practices, or to characterise conduct exclusively as an agreement or a concerted practice.[289]

5.61 As explained by the Court of Justice, '*it is settled case-law that, although Article 101 TFEU distinguishes between "concerted practice" and "agreements between undertakings", the aim is to have the prohibition of that article catch different forms of coordination between undertakings of their conduct on the market* […] *and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct*.'[290]

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[288] The concept of an association of undertakings is not discussed further in this document.

[289] *Argos Limited and Littlewoods Limited, JJV Sports plc* v *Office of Fair Trading* [2006] EWCA Civ 1318, paragraph 21. See also T-7/89 *Hercules Chemicals* v *Commission*, EU:T:1991:75, paragraph 264 ('***Hercules Chemicals***'); T-1/89 *Rhône-Poulenc v Commission*, EU:T:1991:56, paragraph 127 ('***Rhône-Poulenc***'); C-49/92 P *Commission* v *Anic Partecipazioni*, EU:C:1999:356, paragraphs 131 and 132 ('***Anic***'); and Commission Decision of 10 July 1986, *Roofing Felt*, Case IV/31.371 ('***Roofing Felt***'), in which the conduct of the undertakings was found to be an agreement as well as a decision of an association.

[290] C-382/12 P *MasterCard* v *Commission*, EU:C:2014:220, paragraph 63 and the case law cited; T-9/99 *HFB and Others* v *Commission*, EU:T:2002:70, paragraphs 186 to 188; 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; joined cases T-305/94 and T-306/94 *LVM* v *Commission*, EU:T:1999:80, paragraph 696: '*In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty*.'

Agreements

5.62 For the purposes of Chapter I and Article 101 TFEU, 'agreements' include oral agreements and 'gentlemen's agreements'.[291] There is no requirement for the agreement to be formal or legally binding, nor for it to contain any enforcement mechanisms.[292] It may consist of isolated acts, a series of acts or a course of conduct.[293] It may be inferred from the conduct of the parties, including conduct that appears to be unilateral.[294] For instance, guidelines that are unilaterally issued by one party (and not consulted upon) that are adhered to by another can amount to an agreement.[295] Tacit acquiescence may also be sufficient to give rise to an agreement for the purpose of the Chapter I prohibition.[296]

5.63 The key question in establishing an agreement for the purposes of the Chapter I prohibition and Article 101 TFEU 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'*.[297] It has been 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…*'.[298]

5.64 However, it is not necessary to establish a joint intention to pursue an anti-competitive aim.[299] Similarly, the parties do not have to have the same motivations for entering into the agreement or engaging in the infringing conduct.[300]

5.65 The fact that a party may have played only a limited part in setting up an agreement, or may not be fully committed to its implementation, or may have

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[291] C-41/69 *ACF Chemiefarma NV* v *European Commission*, EU:C:1970:71, paragraphs 106 to 114).
[292] *JJB Sports plc* v *Office of Fair Trading* [2004] CAT 17, paragraph 155; *Argos Limited and Littlewoods Limited* v *Office of Fair Trading* [2004] CAT 24, paragraphs 153, 658 and 766.
[293] *Anic*, paragraph 81.
[294] *Hercules Chemicals*, paragraph 256 to 258; *GlaxoSmithKline*; and Case C-74/04 P *Commission* v *Volkswagen AG*, EU:C:2006:460, paragraph 37.
[295] *Anheuser-Busch Incorporated/Scottish Newcastle* OJ [2000] L49/37, paragraph 26.
[296] See for example, Case T-41/96 *Bayer v Commission,* EU:T:2000:242, paragraph 102.
[297] 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).
[298] *Hercules Chemicals,* paragraph 256.
[299] *GlaxoSmithKline*, paragraph 77 (upheld on appeal in joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Unlimited v Commission*, EU:C:2009:610).
[300] See for example, Case T-180/15, *ICAP v Commission*, EULI:EU:T:2017:795, paragraphs 177-12, where ICAP argued, regarding its lack of intention to contribute to the overall objectives of the cartel, that it only had a desire to satisfy the wishes of a trader who was the sole customer of one of its brokers. This was rejected by the General Court.

participated only under pressure from other parties, does not mean that it is not party to the agreement.[301]

5.66 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.[302] 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.[303] Indeed, an undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.[304] Such an undertaking may win a customer's business because it knows the price fixed at a meeting, for example.[305]

Concerted practices

5.67 A concerted practice is a form of collusion falling short of an agreement.[306] The concepts of '*agreements'* and '*concerted practices*' are intended to catch forms of collusion having the same nature which are indistinguishable from each other only in their intensity and the forms in which they manifest themselves.[307]

5.68 A concerted practice is '*a form of coordination between undertakings'* which falls short of '*having reached the stage where an agreement properly so-called has been concluded'*, and where competitors knowingly substitute practical cooperation between them for the risks of competition.'[308] The Court of Justice has added that *'By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the*

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[301] *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.8. See also T-25/95 *Cimenteries CBR and Others v Commission*, EU:T:2000:77, paragraphs 1389 and 2557 (**'*Cimenteries CBR*'**) (this judgment was upheld on liability by the Court of Justice in *Aalborg Portland*, although the fine was reduced); and T-28/99 *Sigma Tecnologie di Rivestimento Srl v Commission*, EU:T:2002:76, paragraph 40 and in *Anic*, paragraphs 79–80.

[302] C-86/82 *Hasselblad v Commission,* EU:C:1984:65*,* paragraph 46 (**'*Hasselblad*'**); and C-277/87 *Sandoz prodotti farmaceutici SpA v Commission,* EU:C:1990:6, paragraph 3 (**'*Sandoz*'**); and C-373/14P *Toshiba Corporation v Commission*, EU:C:2016:26, paragraphs 61–63 (**'*Toshiba*'**).

[303] T-588/08 *Dole v Commission*, EU:T:2013:130, paragraph 484.

[304] Case T-308/94 *Cascades v Commission* EU:T:1998:90, paragraph 230.

[305] Case T-62/02 *Union Pigments v Commission,* EU:T:2005:420, paragraph 41.

[306] *ICI v Commission*, paragraph 64; *T-Mobile v Commission*, paragraph 26; and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, paragraphs 151 to 153 (**'*JJB*'**).

[307] *Hasselblad*, paragraph 46; and *Sandoz v Commission*, paragraph 3. See also *Toshiba*, paragraphs 61-63.

[308] *ICI v Commission*, paragraph 64. See also *T-Mobile Netherlands and Others*, paragraph 26 and *JJB*, at paragraph 151.

participants'.[309] In some cases, the concepts of *'agreements'* and *'concerted practices*' may overlap. Indeed, it may not even be possible to draw such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation, some of its manifestations could accurately be described as one rather than the other.[310]

5.69 The Court of Appeal has noted that '*concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for* [the] *purpose*' of determining whether there is consensus between the undertakings said to be party to a concerted practice.[311]

5.70 Concertation between undertakings may take the form of direct or indirect contact between the undertakings such as meetings, 'soundings out' or disclosure of future price intentions or market strategies, whether written or oral.[312] In particular, the concept of a concerted practice does not '*require the working out of an actual plan'*.[313] In *Hercules v Commission* the General Court upheld the Commission's decision that conduct may fall under Article 101 TFEU as a concerted practice '*even where the parties have not explicitly subscribed to a common plan defining their actions in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour'*.[314]

5.71 The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market, including the prices and commercial terms it offers to customers.[315] This requirement of independence strictly precludes any direct or indirect contact between such operators by which an undertaking may influence the future conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market.[316] This is the case where the object or effect of

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[309] *ICI v Commission*, paragraph 65. See also *JJB*, paragraph 151.

[310] *Anic*, paragraph 81.

[311] See the judgment of Court of Appeal in *Argos*, *Littlewoods* and *JJB*, paragraph 22.

[312] See for example, Case T-202/98, etc, *Tate & Lyle v Commission,* [2001] ECR II-2035, EU:T:2001:185, paragraphs 54 onwards ('***British Sugar***'); *plasterboard*, OJ 2005 :166/8, paragraphs 471-477, upheld on appeal in Case T-53/03 *BPB v Commission* [2008] ECR II-1333, EU:T:2008:254, paragraphs 135-155.

[313] *Suike Unie*, paragraph 174.

[314] *Polypropylene* OJ 1986 L230/1, paragraphs 86-88, upheld on appeal in *Hercules Chemicals*, paragraphs 255-256 (appeal on other grounds dismissed in Case C-51/92P [1999] ECR I-4235, EU:C: 1999:357).

[315] *Suiker Unie*, paragraph 173; and *Apex Asphalt*, paragraph 206(iv).

[316] *Suiker Unie*, paragraph 174. See also *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 33; and *Apex Asphalt*, at paragraph 206(v). The case law provides that a concerted practice also arises in the situation in

such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.[317]

5.72 It follows that '*a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two*.'[318] However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.[319]

5.73 In addition, the Court of Justice in *Hüls v Commission* stated that '*subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market.*'[320]

5.74 Therefore, in order to prove concertation, it is not necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have expressly agreed a particular course of conduct on the market. It is sufficient that the exchange of information should have removed or reduced the degree of uncertainty as to the conduct in the market to be expected on his part.

Information Exchange

5.75 Information may be exchanged between competitors in a variety of circumstances, some of which may be legitimate and may fall outside of the scope of Chapter I and/or Article 101 TFEU.[321] Infringing exchanges often occur to reinforce, facilitate or cause the operation of a covert cartel, particularly by exchanging confidential and commercially sensitive information. Alternatively, information may be disclosed or exchanged as part of a stand-alone infringement. For example, in the case of *UK Agricultural Tractors Registration Exchange*, the information exchange system did not directly share prices and did not '*underpin any other anti-competitive*

which the object or effect of the direct or indirect contact is to disclose to a competitor the course of conduct which the disclosing party has decided to adopt or contemplates adopting on the market.

[317] C-172/80 *Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paragraph 14; *Anic*, paragraph 117; and *T-Mobile Netherlands and Others*, paragraph 33.

[318] *Anic,* paragraph 118.

[319] *Anic*, paragraph 124. See also *Apex Asphalt*, at paragraph 206(xi).

[320] C-199/92 *Hüls* v *Commission*, EU:C:1999:358, paragraph 162.

[321] Such as legitimate joint venture or research and development contexts.

arrangement.' Instead, the General Court considered that the regular and frequent exchange by the main suppliers of detailed and strategic information had the adverse effect of revealing to the market the positions and strategies of individual undertakings to their competitors.[322] In *Solvay v Commission* the Court of Justice held that, in a highly concentrated oligopolistic market, the exchange of commercial information between competitors allows undertakings to know the market positions and strategies of their competitors.[323]

5.76 As stated above, a concerted practice arises where two or more undertakings concert together, those undertakings behave on the market pursuant to those collusive practices and there is a relationship of cause and effect between the two.[324] Regarding the first limb, the concertation is often effected through the exchange of commercially sensitive information, whether one-way or two-way, unilaterally and accepted or reciprocally.

5.77 The information disclosed must be of the type that is capable of reducing uncertainty between competitors, or that discloses the course of conduct the discloser has decided or is contemplating adopting on the market. '*Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty […] in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. Consequently sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete*.'[325] The General Court in *Cimenteries*, when examining the concept of uncertainty, stated '*It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part.*'[326]

5.78 Information that reduces strategic uncertainty between competitors does not necessarily have to be completely accurate. Firstly, as shown in *Suiker Unie*, one of the elements of a concerted practice involves contact between the parties seeking to '*influence the conduct on the market of an actual or potential competitor*' or to reveal the discloser's current or intended course of conduct on the market.[327] An undertaking can achieve influence over a competitor through the use of misinformation. Secondly, as outlined above at

[322] *UK Agricultural Tractor Registration Exchange*, OJ 1992 L68/19.
[323] Case C-455/11P *Solvay v Commission* EU:C:2013:796, paragraph 39.
[324] *Anic*, paragraph 131.
[325] *Commission Guidelines on the applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements* (OJ C11, 14.1.2011) ('**Horizontal Guidelines**'), paragraph 61.
[326] *Cimenteries*, paragraph 1852.
[327] *Suiker Unie*, paragraph 174.

paragraph 5.66, the fact that a party may come to recognise that it can 'cheat' on the agreement or concerted practice in order to gain advantage, does not preclude a finding that there was an infringement. In the case of misinformation, this may be the case if the discloser was generally trusted or relied upon to provide accurate information. Thirdly, whether strategic uncertainty is reduced is not a question of hindsight and it should not be determined solely by later events. In the FCA's *Management Consultants* decision, it was highlighted that the fact that a disclosing party did not adhere to the bid it had intended to make does not mean it was not a disclosure of strategic information as '*it is uncertainty as to the conduct on the market "to be expected" that is important*'.[328]

5.79 In one of the appeals to the *Smart Chips* Decision, the General Court examined the type of information that can be considered confidential for the purposes of decreasing uncertainty in the market.[329] The appellant had argued that the information the parties had exchanged was inaccurate and misleading and, in any event, that it was not particularly sensitive. However, the General Court referred to *Dole* as authority for the proposition that an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings in their conduct on the market must be regarded as pursuing an anti-competitive object.[330] The court then went on to hold that the specific information exchanged by the parties related to future pricing strategy in general, and of a customer in particular, and that this was capable of affecting normal competition in the market.[331] Furthermore, regarding inaccuracy, '*… the fact remains that the very disclosure of that type of information on future prices, whether correct or inaccurate, is capable of influencing the conduct of undertakings on the market. In that regard, it has been held that, even on the assumption that it is proved that certain participants in the cartel succeeded in misleading other participants by sending incorrect information and in using the cartel to their advantage, by not complying with it, the infringement committed is not eliminated by that simple fact*'.[332]

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[328] Case CMP/01-2016/CA98 *Anti-competitive Conduct in Asset Management*, paragraph 11.13(d), referencing and quoting *Cimenteries CBR*.

[329] Case T-762/14 *Koninklijke Philips NV v Commission* EU:T:2016:738 ('***Smart Chips***'). The Commission had found that the parties had discussed, at the very least, the price that a named customer had requested from them for 2004, the intention of Samsung and of the applicants not to offer the price requested by that customer (that is $0.80 per chip) and of their intention not to offer the product for a price less than $1.0.

[330] *Smart Chips,* paragraph 62, quoting *Dole*, paragraphs 119 onwards

[331] *Smart Chips*, paragraph 74.

[332] *Smart Chips*, paragraph 91.

5.80 The timing of disclosure, as well as the type of information disclosed, may also be relevant to the finding of an infringement. In *British Sugar*, the General Court held there had been a concerted practice at meetings where only one undertaking had notified its competitors and/or customers about its future pricing intentions. The Court found that the information supplied was not otherwise readily accessible market data and the meetings allowed the participants to become aware of that information '*more simply, rapidly and directly, than they would be able to via the market.*'[333]

5.81 The Court also confirmed in *British Sugar* the principle that it is not sufficient to exclude the possibility of a concerted practice by showing that only one of a number of competing undertakings revealed its market intentions.[334] Therefore, the flow of information must be either requested, reciprocated or otherwise accepted – for instance if the disclosure is unilateral and unsolicited, the receiving party must actively distance themselves from the receipt or its use to escape liability.[335]

5.82 The frequency of disclosure is not determinative of the infringement as a single disclosure can infringe the Chapter I prohibition. Exchanging information with competitors, even at a single meeting, can infringe competition law, depending on the structure and nature of the market in question.[336]

5.83 Disclosure must be deliberate (rather than inadvertent) and the discloser should have the knowledge and awareness that disclosure might affect the competitive conduct of the recipient, this being an important step in evidencing consensus between the parties.[337] Regardless of whether the information was requested, reciprocated or was unilaterally provided, the recipient must be aware that the information has been disclosed to them in order for the undertaking to '***knowingly*** *substitute practical cooperation… for*

[333] *British Sugar*, paragraph 60.

[334] The General Court followed this reasoning subsequently in *Fresh Del Monte* regarding information relevant to banana pricing which was exchanged between importers, the fact that this was available elsewhere was deemed irrelevant (see Case T-587/08 *Fresh Del Monte v Commission* EU:T:2013:129, paragraph 369).

[335] See, for example, the Competition Appeal Tribunal's discussion of conduct at a meeting where confidential information was exchanged (with the undertaking succeeding in distancing itself from the primary cartel but demonstrating active participation in the exchange of information) *Balmoral Tanks Ltd & Anor v Competition and Markets Authority* [2017] CAT 23, paragraph 86.

[336] Case C-8/08 *T-mobile Netherlands* EU:C:2009:343, paragraphs 58-59.

[337] The concept of an agreement centres around the existence of 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: *Bayer v Commission* [2000] ECR II-3383.

the risks of competition.'[338] However, the recipient is not required to appreciate the anticompetitive nature of the disclosure itself.

5.84 Acceptance of the information may take many forms; such as actively using the information disclosed or passing it along to other parties (internal or external). There is a rebuttable presumption that an undertaking accepts information disclosed to it and that it takes that information into account in its future conduct if it remains active on the market. Evidence that an undertaking did not distance itself, reject the information or report its receipt to regulators or internal compliance officers can also support a finding of acceptance.[339]

5.85 As confirmed by the court in *Anic*, after disclosure, there must be subsequent conduct on the market and a relationship of cause and effect between the two. This does not necessarily mean the conduct must produce the specific effect of restricting, preventing or distorting competition.[340] As with *'agreements', 'concerted practices'* can be prohibited where they have an anticompetitive object.

5.86 The General Court has held '*In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect to one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market … It is sufficient that, by its statement of intention, the competitor should have eliminated, or, at the very least, substantially reduced uncertainty as to the conduct* [on the market to be expected on his part]…'[341]

5.87 There is a rebuttable presumption of a causal connection between concertation and subsequent conduct. When undertakings take part, even passively, in discussions with competitors and remain active on the market thereafter, the presumption is that they will take account of those discussions in determining their conduct.[342] In *T-mobile*, the Court held that this presumption is an integral part of EU law and not merely a procedural point on

[338] *ICI v Commission,* paragraph 64 [emphasis added]. See, for example, the Commission decision in *E-books* (Commission Decision of 25 July 2013, *E-Books*, Case AT.39847) involving a concerted practice between publishers via their common wholesaler where the Commission relied on the knowledge each of the publishers had of their competitors' parallel negotiations with Apple of agreements that were not in their own interests, and their understanding that the existence of similar agreements would eventually increase effectiveness of their common plan, see paragraphs 33 and 80.

[339] *Slovak Banking Cartel*, paragraph 27. See also Case C-290/11 P *Comap v Commission*, not published in the ECR, paragraphs 74 and 75.

[340] Case C-235/92P *Montecatini v Commission* ('**Polypropylene**') [1999] ECR I-4539, EU:C:1999:362, paragraphs 123-135.

[341] *Cimenteries CBR,* paragraph 1852.

[342] *Huls v Commission*, paragraphs 158-166.

the burden of proof.[343] The court in *Anic* noted that the presumption applied particularly where competitors concert together on a regular basis over a long period of time.[344] However, subsequently in *T-Mobile*, the Court of Justice confirmed that the presumption also applies even if the concerted action results from a single occasion.

5.88 It is for undertakings to prove that the information exchanged, and potentially therefore the alleged concerted practice, did not have any influence whatsoever on its own conduct on the market.[345] The evidential burden is high in order to rebut the causal presumption. In *Cimenteries*, the Italian parties' participation in a bilateral concerted practice was not negated by evidence that its prices in fact remained lower than those of the French party, since that did not make it '*inconceivable that the Italian undertaking, despite everything, allowed the information … to influence its export prices*'.[346]

Relevant Types of Agreements and Concerted Practices

Refusal to supply – collective boycott

5.89 A refusal to supply or collective boycott takes place when competitors agree to exclude an undertaking or a group thereof by collectively deciding not to supply or obtain goods or services from that undertaking. This may involve for example an agreement not to do business with suppliers of customers or do business subject to restrictive terms or other similar restrictions. This generally takes the form of a collective refusal to supply or a collective refusal to purchase.

5.90 A collective refusal to supply may be restrictive of competition as a stand-alone agreement or as part of a wider cartel arrangement. This was the case in *Pre-insulated Pipes*, concerning, amongst other things, both a collective refusal to purchase and a collective refusal to supply. The Commission stated in that case that:

> '[t]*he principal aspects of the complex of agreements and arrangements which can be characterised as restrictions of*

[343] *T-mobile Netherlands v Commission*, paragraph 59.

[344] *Anic*, paragraph 121.

[345] *Huls v Commission*, paragraph 167.

[346] *Cimenteries CBR, paragraph 1912;* see also *Solvay Solexis* where the Court of Justice held that data illustrating the competitive nature of the market and a decrease of prices at the time of the cartel did not rebut the presumption because it failed to show that the undertaking had not taken account of the information exchanged with its competitors in determining its conduct on the market, paragraphs 44-45; However the Competition Appeal Tribunal found the presumption had been rebutted where the competitively sensitive information had already become publicly available by the time it was indirectly received by a competitor in *Dairy*, see paragraph 278.

competition […]*'* included: *'agreeing a collective boycott of the contractors and suppliers involved in the* [Powerpipe] *project'* and *'approaching Powerpipe's suppliers in order to persuade them to withhold or delay supplies essential for the proper and timely performance of its contracts*[…]'.[347]

5.91 The collective boycott was found to infringe Article 101(1) TFEU, with the Commission noting that:

> '*a boycott may be attributed to an undertaking without there being any need for it actually to participate, or even be capable of participating, in its implementation. Were that not so, an undertaking which approved a boycott but did not have the opportunity to adopt a measure to implement it would avoid any form of liability for its participation in the agreement.*'[348]

5.92 While the underlying reasons and forms of a collective boycott may vary, it often takes the form of excluding a competitor from the market or preventing a potential competitor from entering the market. For example, in the Slovak Banking Cartel case, three banks agreed to terminate contracts and refrain from concluding new contracts with a non-financial institution that provided services to customers in competition with the banks. The Slovak Courts found the banks monitored the competitor's activity, conferred with each other and decided by common agreement to terminate the contacts in a coordinated manner. This view was later endorsed by the Court of Justice.[349]

5.93 Such behaviours are generally considered restrictions of competition by object, as they usually limit the commercial freedoms of suppliers and/or purchasers to determine their actions independently.[350] These restrictions may have the object of preventing, restricting or distorting competition either on their own[351] or as part of wider cartel activity, such as where a collective refusal to supply forms one of a series of efforts or schemes in pursuit of a single economic aim or purpose; it will have the object of preventing, restricting or distorting competition where the single overall agreement and/or

[347] Commission Decision in *Pre-insulated Pipes Cartel*, paragraph 147.
[348] Ibid. (157).
[349] *Slovak Banking Cartel*, paragraph 4
[350] *Commission Staff Working Document*, paragraph 2.5
[351] *The Institute of Independent Insurance Brokers v The Director General of Fair Trading* [2001] CAT 4, paragraphs 179 to 218.

concerted practice has the object of preventing, restricting or distorting competition.[352]

5.94 In *Belgian wallpaper*,[353] relating to an agreement to fix retail prices and an associated collective refusal to supply where a dealer sold below the resale price set by the parties, in fixing the amount of the fine the Commission stated that:

'[t]*he collective boycott is traditionally considered one of the most serious infringements of the rules of competition, since it is aimed at eliminating a troublesome competitor*.' [354]

5.95 The Commission in another case[355] noted that it was '*not necessary* […] *to characterise conduct as exclusively one or other forms of illegal behaviour* [e.g. price-fixing or collective boycott]*: an infringement may present simultaneously the characteristics of each form of prohibited conduct*.'[356] The Commission ruled that the breach was by object as '*the cartel was effective in*

[352] OFT Decision in CA98/01/2009 *Investigation into an alleged collective boycott and alleged price fixing by certain recruitment agencies*, paragraph 3.103. The OFT considered that, where a collective refusal to supply forms one of a series of efforts or schemes in pursuit of a single economic aim or purpose, it will be a restriction by object if the single overall agreement and/or concerted practice has the object of restricting competition. On appeal in *Eden Brown Limited v Office of Fair Trading* [2011] CAT 8, paragraphs 75-76 ('***Eden Brown v OFT***'), the CAT found that "*the OFT was right to emphasise that agreements with the object of price-fixing and a collective boycott of a new entrant into the market are of their nature among the most serious kinds of infringement*" as the "*deliberate intention of the infringing arrangement was to stifle that significant competitive development*."

[353] Commission Decision of 23 July 1974, *Papiers peints de Belgique*, Case IV/426 ('**Commission Decision in *Papier peints***'). The Belgian Groupement des fabricants de papiers peints adopted a decision to cease supplying a competitor, Pex, and its customer International Décor "*as he* [Pex] *refused to comply with the general conditions of sale (which included a price-fixing policy) and to settle an account outstanding with Papiers peints Brepols S.A* [one of the members]. *The Groupement claimed that the boycott was justified because Pex was refusing to comply with the General Conditions of Sale and Pex has outstanding debts with a member of the Groupement.*'
The Commission found that the Groupement's justifications were not valid because "*the General Conditions of Sale and the collectively fixed prices are in violation of Article 85 (1). Pex is entitled to refuse to comply with them, because to do otherwise would result in his infringing Article 85 (1)*" and "*The further claim that Pex had debts* […] *does not justify the other members of the group in refusing to supply him. Moreover, Pex's debts with Papiers peints Brepols S.A. date from a period when the latter was* [already] *calling for a boycott of Pex*."
The Trade Association in that case was an addressee of the decision, but no fine was imposed on the association.

[354] Commission Decision in *Papiers peints*, paragraph IV.3. The case was upheld on appeal, judgment in *Groupement des fabricants de papiers peints de Belgique and others v Commission*, Case 73-74, EU:C:1975:160.

[355] Commission Decision of 3 December 2003, *Electrical and mechanical carbon and graphite products*, Case C.38.359, paragraphs 154-155 ('**Commission Decision in *Graphite products***').

[356] Ibid. (221).

ensuring that cutters could not offer real competition, by either not supplying them at all or by supplying them only at very high prices.'[357]

5.96 In 2009, six recruitment agencies were fined over £7.9 million (after appeal) for price-fixing and for collectively boycotting another company (Parc UK) in the supply of candidates to the construction industry. In 2003, Parc had entered the market with a new and innovative business model to act as an intermediary between construction companies and the different recruitment agencies, which put pressure on the margins of the recruitment agencies. Instead of competing with Parc – and each other – on price and quality, the agencies formed a cartel in which they agreed to boycott Parc and also fix the fee rates they would charge to intermediaries, such as Parc, and certain other construction companies.[358] It was held that it was not necessary to consider to what extent the refusal to supply contributed to the overall anti-competitive objective. On appeal, the CAT found that '*the OFT was right to emphasise that agreements with the object of price-fixing and a collective boycott of a new entrant into the market are of their nature among the most serious kinds of infringement'* as the *'deliberate intention of the infringing arrangement was to stifle that significant competitive development*.'[359]

5.97 Moreover, there have been several cases where coordinated behaviour to keep competitors out from the protected market, or to place them at a competitive disadvantage, were condemned.[360]

Market Sharing

5.98 The Chapter I prohibition and Article 101 TFEU both apply to agreements or concerted practices which 'share markets or sources of supply'. Section 2(2)(c) of the Act and Article 101 TFEU expressly prohibit '*agreements… which… share markets*'. Market-sharing agreements (e.g. where undertakings agree to apportion particular markets, by means of allocating territories[361]

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[357] Ibid. (247). On appeal, the General Court upheld the decision, finding on one specific point of appeal regarding the implementation of the collective boycott and the role each cartel participant had played in it, that even '*if [LCL] had not itself participated in the actual boycotting of cutters, it clearly subscribed to the general policy of the cartel to stop supplying cutters or to supply to them only at very high prices and, like the other members of the cartel, it benefited from the reduced competition from cutters. These facts suffice to establish the responsibility of [LCL].*' - C-554/08 *Le Carbon Lorraine v Commission*, EU:C:2009:702, paragraph 169.

[358] www.gov.uk/cma-cases/construction-recruitment-forum-collective-boycott-and-price-fixing.

[359] *Eden Brown v OFT*, paragraph 75-76.

[360] Commission Decision of 2 April 2003, *French Beef*, Case C/38.279/F3, paragraph 38 and Commission Decision in *Luxembourg Brewers*. See also Commission Decision in *Graphite Products*, paragraphs 154 et. seq. Commission Decision of 26 November 1986, *MELDOC*, Case IV/31.204 and Commission Decision of 2 August 1989, *Welded Steel Mesh*, Case IV/31.553.

[361] *Toshiba*, paragraphs 23–36; C-449/11 *Solvay Solexis v Commission*, EU:C:2013:802, paragraph 82 ('***Solvay Solexis***'); and C-408/12 *YKK Corporation and Others v Commission*, EU:C:2014:2153, paragraph 26.

and/or customers,[362] between themselves) have consistently been found to have, in themselves, an object restrictive of competition.[363]

5.99 Market sharing agreements cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned.[364] These forms of collusion are particularly injurious to the proper functioning of normal competition because, by their very nature, they constrain suppliers from determining independently the commercial policy which they intend to adopt on the market. Furthermore, they deprive customers of the full choice of competitive offerings that might otherwise be available to them. When one undertaking agrees with another undertaking that it will enjoy exclusive access to a territory or customer group, that undertaking acts in the knowledge that it will face little, if any, competition from the other undertaking.

5.100 Businesses may agree to share markets in several different ways. For example, the European Commission and European Courts have found that market sharing through the allocation of customers on the basis of pre-existing commercial relationships restricts competition by object.[365]

5.101 Market sharing agreements may be written, such as in the case of *Luxembourg Brewers,* where there was a written agreement between five brewers which sought to defend the Luxembourg market against imports from other EU Member States.[366] However, a market sharing arrangement may also be oral, such as in *Gas Insulted Switchgear*, where the Court of Justice endorsed the Commission's finding of a 'common understanding' that Japanese undertakings would not compete for switchgear apparatus in Europe and vice versa.[367]

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[362] Commission Decision of 27 November 2002, *Methylglucamine,* Case E-2/37.978, paragraphs 98 and 227; C-440/11P *Commission v Stichting Administratiekantoor Portielje*, EU:C:2013:514, paragraphs 95 and 111.
[363] *Toshiba*, paragraph 28.
[364] *Toshiba*, paragraph 28; and joined cases C-239/11, C-489/11 and C-498/11 *Siemens AG and Others v Commission*, EU:C:2013:866, paragraph 218 ('***Siemens***').
[365] Commission Decision of 17 October 1983, *Cast iron and steel rolls*, Case IV/30.064 ('***Cast iron and steel rolls***'); *Roofing Felt*; and Commission Decision of 5 December 2001, *Luxembourg Brewers*, Case 37.800/F3 ('**Commission Decision in *Luxembourg Brewers***') (appeals dismissed in judgment in *Brasserie Battin v Commission*, joined cases T-49/02, T-50/02, T-51/02, EU:T:2005:298). Note that it is not necessary for the arrangement to cover all of the market, or to exclude all competition – see for example Commission Decision of 1 October 2008, *Candle Waxes*, Case 39181, paragraph 322. See also, for example, Commission Decision of 20 July 2010, *Animal Feed Phosphates*, Case 38866, paragraph 123: the parties were free to compete for some customers in Spain but were nevertheless found to have adhered to a common strategy which limited their individual commercial conduct.
[366] Case L 253/21, upheld on appeal in cases T-49/02 etc *Brasserie Nationale v Commission* EU:T:2005:298.
[367] See Case T-110/07 etc *Siemens v Commission*, EU:T:2011:68; Case T-133/07 etc *Mitsubishi v Commission,* EU:T:2011:345.

5.102 Agreements may be between as few undertakings as two[368] or between the entire industry.[369] Market sharing agreements or concerted practices can vary in their formality and complexity, with the less formal and more *ad hoc* tending to be characterised as concerted practices. They can also vary in the practices they employ, such as geographic market sharing arrangements which can often amount to export bans. The undertakings can expressly agree to allocate identified customers or regions between them, or else operate on the basis of the status quo, often referred to as non-aggression agreements or status quo agreements. This was the case in the *Butadeine Rubber* cartel where the parties agreed not to try to win the major customers of their competitors, instead opting to preserve the status quo in the market.[370] The OFT found a similar system at work in relation to *Stock check pads* where the parties '*…agreed not to target each other's existing customers (to "stop beating the hell out of one another")*'.[371] Non-aggression agreements are often accompanied by explicit or implicit threats of retaliation against the cheating undertaking, which the OFT found in *The Supply of prescription medicines to care homes in England* Decision.[372]

Price-fixing arrangements including the exchange of commercially sensitive information

5.103 The Chapter I prohibition and Article 101 TFEU apply to agreements or concerted practices which 'directly or indirectly fix purchase or selling prices or any other trading conditions'.[373]

5.104 In this regard, the case law is clear that both the Chapter I prohibition and Article 101 TFEU will apply to any form of agreement and/or concerted practice that might restrict or dampen price competition, either directly or indirectly. This includes, for example, an agreement not to quote a price

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[368] Such as in Case T-58/-1 *Solvay v Commission* (annulled on appeal for procedural reasons in C-110/10 P *Solvay v Commission*).

[369] See, for example, *Cimenteries CBR*.

[370] Such as in Case COMP/F/38.638 *Butadiene Rubber and Emulsion Styrene* ("Butadeine Rubber"), recital 98. '*Occasionally market sharing agreements were also made on the fringes of meetings, and bilaterally between meetings. These normally took the form of agreements not to try to win the major customers of the competitors, thereby preserving the status quo of the market and if the competitors made such an aggressive move, they could expect an attack on their main clients in retaliation. ("non-aggression agreements")*';

[371] *Stock check pads*, Case CA98/03/2006, paragraph 102.

[372] *The Supply of prescription medicines to care homes in England* (Case CE/9627/12), paragraphs 5.43-5.45, 6.163-6.140, '[each undertaking agreed it]… *would not actively target care homes already supplied with prescription medicines supplied by* [the other].' There was an implied threat of retaliation that one party would stop buying from the counterpart's parent company if the subsidiary continued to compete for their clients, as the parent company wished to "protect the relationship" with the competitor who was "upset" with the loss of business.

[373] Article 101(1)(c); and section 2(2)(c) of the Act.

without consulting potential competitors,[374] or not to undercut a competitor.[375] An agreement may restrict price competition even if it does not entirely eliminate it.[376] Price-fixing agreements are, by their very nature, restrictive of competition.[377]

5.105 As set out in paragraphs 5.75 to 5.88 above, the exchange of commercially sensitive information can be a stand-alone infringement or as a component of a wider cartel arrangement. In the case of price fixing, this is often achieved through the sharing of sensitive price information, for example in order to align prices between competitors or to check compliance with an agreement to fix prices.

Assessment

5.106 For the reasons set out below, the CMA has found that each of the Infringements described in Section 3 above forms an agreement and/or concerted practice for the purpose of the Chapter I prohibition and Article 101 TFEU.

October 2015 Infringement

5.107 The CMA has found that the incidents described at paragraphs 3.56 to 3.73 above evidence an agreement and/or concerted practice that neither BLM nor ALM/JML should supply CBG; this was underpinned by an exchange of commercially sensitive information regarding their respective strategies towards CBG.

5.108 The CMA considers that the text message from [Director, BLM] to [Director A, ALM/JML] ('*Sorted. Supply withdrawn*') evidences a prior arrangement between ALM/JML and BLM to the effect that BLM would refuse to trade with CBG in future. The word '*sorted'* implies that [Director, BLM] and [Director A, ALM/JML] had previously discussed BLM's decision to withdraw supply from CBG, while the fact that [Director, BLM] informed [Director A, ALM/JML] of the outcome suggests that ALM/JML had an interest in whether BLM supplied CBG. Accordingly, as set out at paragraph 3.73, the CMA has concluded that

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[374] *Cast iron and steel rolls*.

[375] Commission Decision of 15 May 1974, *Agreements between manufacturers of glass containers*, Case IV/400, paragraphs 34 and 35. This case concerned a set of rules on 'fair trading' which a number of companies in various EEC (at that time) Member States agreed with each other to implement. Two of the rules concerned undercutting: rule A.1.(c) prohibiting systematic undercutting of a competitor and rule A.7, which permitted only the matching and not the undercutting of a competitor's prices, when such a competitor introduced new price measures. These rules along with a number of other rules, were found to have as their object the prevention of price competition between the parties.

[376] OFT401, paragraphs 3.5 and 3.6.

[377] *Guy Clair*, paragraph 22.

BLM's decision to withdraw supply from CBG was not unilateral but was rather the result of co-ordination with ALM/JML.

5.109 The evidence described at paragraphs 3.70 to 3.71 indicates a motivation for ALM/JML to enter into an arrangement with BLM regarding CBG. [✂], BLM's supply relationship with CBG was likely to divert sales from merchant customers of ALM/JML to being supplied through BLM merchants. Regarding BLM's motivation, the CMA notes [Director, BLM]'s account that he informed [Director A, ALM/JML] of his decision to close the account out of a fear of retribution from ALM/JML if BLM were seen to be supporting CBG (paragraph 3.66).This suggestion of BLM acting to prevent retaliatory behaviour on the part of [Director A, ALM/JML] and/or ALM/JML is consistent with the evidence in the August 2016 Infringement, from which the CMA has found that [Director, BLM] informed [Director A, ALM/JML] of BLM's plans to increase prices in order to diffuse ALM/JML's threat of retaliation. Finally, both parties had a motivation to avoid upsetting their existing merchant customers by supporting an intermediary who would supply directly to contractors.

5.110 Furthermore, as set out in paragraph 3.71 above, there is evidence of a motivation for co-ordinating the decision not to supply CBG rather than taking such a decision unilaterally. That is because BLM had an interest in knowing that ALM/JML did not intend to supply CBG itself in order to reduce the risk that CBG would remain active in the market and provide business for BLM's competitors.

5.111 The CMA considers that the evidence described above demonstrates a shared intention between ALM/JML and BLM that neither party should supply CBG, which demonstrates a concurrence of wills between them that is a necessary element of proving that they entered into an agreement. This agreement was anti-competitive in nature; by colluding to ensure that CBG could not obtain supplies from either of them, ALM/JML and BLM prevented CBG from entering the market and from disrupting the parties' relationships with their respective customers. This is consistent with the case described at paragraph 5.96, in which a collective boycott by existing market participants of a new and innovative business model was found to stifle significant competitive development and thus to be anti-competitive in nature.

5.112 In any event, the CMA finds a concerted practice not to supply CBG which was achieved by [Director A, ALM/JML] providing [Director, BLM] with commercially sensitive information about ALM/JML's market strategy with regard to CBG, and [Director, BLM] in turn providing [Director A, ALM/JML] with commercially sensitive information about BLM's market strategy with regard to CBG in his message '*sorted. Supply withdrawn'*. [Director A, ALM/JML] acknowledges in his witness statement that he told [Director, BLM]

that ALM/JML was not prepared to supply CBG.[378] In turn, [Director, BLM] indicates in his draft witness statement that his message '*sorted. Supply withdrawn*' referred to CBG.[379] This demonstrates him sharing BLM's market strategy with a competitor.

5.113 The CMA considers that the disclosure of ALM/JML's strategy towards CBG was capable of reducing strategic uncertainty in the market, given that it referred to a specific customer and that [Director, BLM] had recently been made aware that BLM supplied that customer. Furthermore, as set out at paragraph 3.71, the CMA notes [Senior Employee, BLM]'s statement that he originally entered into the supply arrangement with CBG based on his belief that ALM and Calder had done the same, and BLM would be '*handing business to competitors'* if it did not also supply CBG (paragraph 3.68). This suggests that the knowledge that ALM/JML did not intend to supply CBG would be helpful to [Director, BLM] in making the decision to withdraw supply from CBG by reducing the risk that CBG would remain active in the market and provide business for BLM's competitors. The CMA considers, therefore, that the alleged disclosure was important strategic information that would enable BLM to determine its future conduct.

5.114 The CMA has not identified any evidence to suggest that BLM actively distanced itself from receiving the information from ALM/JML, nor that it rejected the information or reported its receipt to regulators or internal compliance officers. On the contrary, [Director, BLM] responded by sending [Director A, ALM/JML] a text message to inform him that BLM had withdrawn supply from CBG. In view of this, the CMA finds that BLM accepted the information from ALM/JML and took it into account in its decision to withdraw supplies from CBG.

5.115 Similarly, the CMA has not identified any evidence to suggest that ALM/JML actively distanced itself from receiving the text message from [Director, BLM] regarding CBG, nor that it rejected the information or reported its receipt to regulators or internal compliance officers. Accordingly, the CMA finds that ALM/JML also accepted information from BLM and took that information into account in its future conduct. These alleged disclosures removed or reduced uncertainty as to both parties' intended conduct on the market.

5.116 The CMA considers that these points demonstrate a concerted practice in which:

[378] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 6.4 (URN 3966).
[379] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 54 (URN 3166).

(a) there was contact between ALM/JML and BLM, via the telephone calls and text message of 13 October 2015, in which ALM/JML and BLM disclosed strategic information about their respective competitive strategies towards CBG;

(b) there was conduct on the market, as both parties remained active in the market, BLM subsequently withdrew supply from CBG and ALM/JML continued to refrain from supplying CBG; and

(c) there was cause and effect between the two, given the presumption that each party took account of the disclosed information when determining its own market strategy and indeed the evidence that [Director, BLM] accepted the information from ALM/JML and took action following it, including responding to ALM/JML to confirm its action (see paragraph 5.87).

5.117 In view of the above, the CMA finds that ALM/JML and BLM entered into an agreement and/or concerted practice not to supply CBG (by withdrawing or otherwise refusing to supply CBG). This was underpinned by an exchange of commercially sensitive information regarding their strategies towards CBG.

July 2016 Infringement

5.118 As set out at paragraphs 3.74 to 3.108, the CMA has found that on 26 July 2016, BLM shared commercially sensitive pricing information with ALM/JML, which the CMA has found evidences an agreement and/or concerted practice to share the market through the allocation of a particular customer between them by way of a non-aggression pact and/or to fix prices in relation to that customer.

5.119 The CMA has concluded that, following BLM sending a price notification to one of ALM's customers ([Merchant Customer D]), [Director A, ALM/JML] and [Director, BLM] exchanged several phone calls, which are set out in paragraphs 3.77 to 3.78. [Director, BLM] then informed [Director A, ALM/JML] via text message that there had been a mistake and that BLM would not take orders from [Merchant Customer D], and subsequently shared BLM's new pricing to [Merchant Customer D] with [Director A, ALM/JML] with an assurance that BLM's prices had been raised.

5.120 The CMA considers that the conduct described above (and at paragraphs 3.74 to 3.108) evidences an agreement, involving a concurrence of wills between ALM/JML and BLM, by which the two shared an intention that BLM would not target [Merchant Customer D] and when it accidentally did, the two coordinated regarding the new price that BLM would notify to [Merchant

Customer D] in order to ensure that it did not receive or accept orders from [Merchant Customer D]. In particular, the CMA infers a non-aggression agreement from the references '*f.. Up'* and '*not take orders from your guys'*, evidencing understanding of a problem to be fixed and that BLM would not target a customer of ALM, in [Director, BLM]'s text messages to [Director A, ALM/JML]. This is consistent with the case law described at paragraph 5.102 and footnote 370, in which competitors agree not to try to win each other's major customers, thereby preserving the status quo of the market.

5.121 Further, the CMA notes [Director, BLM]'s suggestion that ALM/JML offered a competitive price to BLM customer [Merchant Customer A] in retaliation for BLM's pricing to [Merchant Customer D] (see paragraph 3.87). As explained at paragraph 5.102, it is not uncommon for a non-aggression agreement to be accompanied by an explicit or implicit threat of retaliation (against an undertaking 'cheating' on a non-aggression pact).

5.122 As part of the Infringement, [Director, BLM] communicated pricing and other commercially sensitive information in relation to [Merchant Customer D] to [Director A, ALM/JML], namely BLM's amended price to [Merchant Customer D] and the unusual timing of this price change. In line with paragraph 5.105, the CMA finds that this disclosure of price information served the purpose of allowing ALM/JML and BLM to coordinate pricing.

5.123 In any event, the CMA considers that the evidence demonstrates a concerted practice whereby ALM/JML and BLM coordinated BLM's conduct in relation to [Merchant Customer D] by eliminating or at least substantially reducing uncertainty as to BLM's conduct, (see paragraph 5.74), thereby knowingly substituting practical cooperation for the risks of competition (see paragraph 5.68). In particular:

(a) There was direct contact between ALM/JML and BLM (the phone calls and text messages described above) in which BLM disclosed (i) that it would not target [Merchant Customer D] and (ii) its future pricing intentions as regards [Merchant Customer D] as well as the unusual timing of its price change;

(b) There was conduct on the market, as [Director, BLM] amended BLM's price to [Merchant Customer D] and that resulted in conditions of competition that did not correspond to the normal conditions of competition. Furthermore, there is a presumption that ALM took into account BLM's conduct regarding [Merchant Customer D] for the purposes of determining its own conduct as it remained active on the market itself;

(c) There was cause and effect between the two, as evidenced by the wording of the text messages and the timing of the price change in BLM's system as well as evidence that ALM accepted the disclosures BLM made about its conduct in that [Director A, ALM/JML] forwarded [Director, BLM]'s text message containing the new price for [Merchant Customer D] internally to [Senior Employee, ALM/JML].

5.124 The nature of this agreement and/or concerted practice was anti-competitive as it deprived [Merchant Customer D] of its commercial freedom and the full choice of competitive offerings which would otherwise have been available to it (see paragraph 5.99 above). Additionally, BLM shared with ALM/JML the exact details of its new price to [Merchant Customer D] and the fact that it was going to be changed immediately (as shown at paragraphs 3.80 to 3.83). This removed strategic uncertainty as regards the timing and details of the modification to be adopted by BLM as far as its conduct on the market was concerned. As set out in paragraph 5.79 above, where specific information exchanged by the parties relates to future pricing strategy in general, and of a customer in particular, it is capable of affecting normal competition in the market.

5.125 The CMA notes [Director A, ALM/JML]'s statement that the text messages sent to him by [Director, BLM] were unsolicited. As set out at paragraph 3.106, the CMA considers that it was [Director A, ALM/JML] who contacted [Director, BLM] to query BLM's price to [Merchant Customer D] after having been informed by staff at ALM.

5.126 Even if the text messages had been unsolicited, the CMA has not identified any evidence that ALM/JML took active steps to distance itself from receiving the information from BLM, to reject the information, or to report its receipt to regulators or internal compliance officers (see paragraphs 5.81 to 5.84). On the contrary, [Director A, ALM/JML] made use of the information by passing it along internally to [Senior Employee, ALM/JML] and [Director B, ALM/JML] (see paragraph 3.78). In view of this, the CMA has concluded that ALM/JML accepted the information, whether or not it was solicited, and was therefore a party to the infringement.

5.127 Accordingly, the CMA has found that the events of 25-26 July 2016 amounted to an agreement and/or concerted practice between ALM/JML and BLM to share the market by way of a non-aggression pact and/or to fix prices for a particular customer, evidenced by the exchange of commercially sensitive pricing information.

August 2016 Infringement

5.128 The CMA has concluded that the conduct described more fully at paragraphs 3.109 to 3.134 evidences an agreement and/or concerted practice to share the market by way of a non-aggression pact and/or to fix prices. The conduct also includes an exchange of information regarding competitively sensitive market and pricing strategy.

5.129 The CMA considers that the text message of 9 August 2016 evidences the content of the telephone calls between [Director A, ALM/JML] and [Director, BLM] on 8 August 2016: [Director A, ALM/JML] threatened to retaliate if ALM/JML lost sales and/or market share as a result of ALM/JML customers approaching BLM. The CMA considers that the portion of the text message '*Next breath he wants to go another 100'* referred to 'Project PUSH UP', an internal BLM proposal to increase prices by £100 per tonne, and accordingly that this constitutes [Director, BLM] disclosing information about BLM's future pricing and market strategy to ALM/JML.

5.130 The CMA understands that at the relevant time, ALM/JML customers may have been switching to BLM, which may have been due to ALM/JML's mill breakdown which led to delays in ALM/JML's deliveries. In the face of [Director A, ALM/JML]'s threat of retaliation ('*if we lose tonnage you know the score*'), the CMA considers that BLM's disclosure of a planned price increase was intended to provide an assurance to ALM/JML that it would not actively encourage customer switching. This in turn would avoid retaliation by ALM/JML, providing certainty for both parties regarding the future state of affairs regarding customers.

5.131 Following the alleged disclosure, BLM publicly announced the planned price increase to customers eight weeks later, in October 2016 (paragraph 3.129(c)), before implementing it in January 2017. As set out at paragraph 3.132, an internal ALM/JML email suggests that the announcement in October 2016 was unusually early. The CMA considers it likely that BLM brought the public announcement forward in order to signal confirmation to ALM/JML that it intended to implement the price increase as discussed, with the aim of reducing the risk of retaliation threatened by [Director A, ALM/JML].

5.132 In line with paragraph 5.62, the CMA considers that an agreement between ALM/JML and BLM can be inferred from the conduct of the parties involved. In particular, the finding that [Director, BLM] disclosed details of BLM's planned price increase in response to [Director A, ALM/JML]'s threat of retaliation indicates a concurrence of wills, namely a joint intention between BLM and ALM/JML to conduct themselves on the market in a certain way. Specifically, BLM would not seek to capitalise on the ALM/JML mill breakdown by actively

encouraging ALM/JML customers to switch to BLM, and would raise its prices to discourage further switching.

5.133 The CMA considers that the points above demonstrate an agreement in which ALM/JML and BLM shared an intention to collude on market share and/or price in order to preserve the status quo in the market and prevent ALM/JML losing customers to BLM. This agreement was anti-competitive in nature; by agreeing not to compete aggressively and/or colluding on price in order to prevent further customer switching, ALM/JML and BLM deprived customers of the commercial freedom to benefit from the prevailing market conditions. This is in line with the case law on market sharing and non-aggression agreements set out at paragraph 5.102 and footnote 370, covering agreements between competitors not to try to win each other's major customers, thereby preserving the status quo of the market. Furthermore, [Director A, ALM/JML]'s threat of retaliation is consistent with the case law also referred to at paragraph 5.102 that indicates that explicit or implicit threats of retaliation often accompany non-aggression agreements.

5.134 In any event, the CMA considers that the conduct evidences a concerted practice in which:

(a) there was contact between ALM/JML and BLM, as reported by [Director A, ALM/JML] in his text message of 9 August 2016, in which ALM/JML made a threat of retaliation and BLM disclosed commercially sensitive information about its future pricing intentions in response;

(b) there was conduct on the market, as BLM remained active in the market and later raised its prices by £100 as planned and communicated to ALM/JML. Furthermore, there is a presumption that ALM took into account BLM's price change and non-aggression vis-à-vis its customers in determining its own conduct as it remained active on the market itself. This resulted in conditions of competition that did not correspond to the normal conditions of competition;

(c) there was cause and effect between the two, as there is evidence that ALM/JML accepted the information that BLM disclosed as [Director A, ALM/JML] disclosed it internally.

5.135 The CMA considers that this concerted practice was underpinned by BLM's disclosure of commercially sensitive information which was capable of reducing strategic uncertainty in the market. First, [Director, BLM] revealed to a competitor (ALM/JML) that ALM/JML's traditional customers were approaching BLM and placing orders due to ALM/JML's delivery time issues.

Second, [Director, BLM] revealed BLM's existing plans to increase prices by £100 per tonne, in order to avoid retaliation from ALM/JML.

5.136 Whether information is strategic is determined through the analysis of the information itself and the context in which it was exchanged to determine if it is capable of reducing uncertainty (and if it in fact did reduce uncertainty) in the market between competitors as to future conduct, as discussed at paragraph 5.77.

5.137 In terms of the content of the disclosure, the more specific and granular the information provided to a competitor, the more capable it is of removing uncertainty and therefore the more likely it is to be strategic. In the August 2016 Infringement, the information disclosed included specific pricing information as it related to BLM's planned price increase project (see paragraph 3.129). This price increase was part of an initiative to enhance sales margin which had been planned by BLM and Eco-Bat. This strategy was not otherwise publicly known at the time of the alleged disclosure. Disclosure of the information to a competitor was therefore likely to increase transparency in the marketplace, allowing ALM/JML to plan its own market conduct in advance of the price increase being announced.

5.138 The timing of the disclosure with reference to a decision point or an action is also important, as the more proximate in time, the more unlikely it is that the discloser will depart from its stated intention. For instance, if a disclosure occurs in close proximity to a bid, it is unlikely that the discloser will depart from the intentions it previously stated to its competitor(s). [Director, BLM] disclosed the proposed £100 price increase to [Director A, ALM/JML] at the same time as he disclosed the fact that ALM/JML's customers were approaching BLM to switch. Although the pricing disclosure occurred two months before it was announced publicly in October 2016, this was proximate to the time when ALM/JML was handling the consequences of its mill breakdown (see paragraph 3.118). In light of this, ALM/JML might have been under pressure to find ways to mitigate the costs to customers of its delivery delays – for example by reducing prices in order to remain competitive. Early awareness of BLM's plans to increase prices would therefore be particularly damaging to competition, by reducing the incentive for ALM/JML to compete on the merits. Furthermore, as set out in paragraph 5.79 above, disclosing future pricing strategy is recognised as being capable of affecting normal competition in the market.

5.139 Accordingly, the CMA considers that the information disclosure underpinning the concerted practice was strategic in nature. By disclosing and accepting the information in question, therefore, ALM/JML and BLM knowingly substituted practical cooperation for the risks of competition.

5.140 The CMA has not identified any evidence to suggest that ALM/JML actively distanced itself from receiving the information from BLM, rejected the information, or reported its receipt to regulators or internal compliance officers. On the contrary, the CMA has found that [Director A, ALM/JML] made use of the information by passing it along internally to [Director B, ALM/JML]. In view of this, the CMA has concluded that ALM/JML accepted the information, whether or not it was solicited.

5.141 The CMA notes [Director A, ALM/JML]'s statement that information about BLM's intended pricing was not particularly useful to ALM/JML at that time given that ALM/JML had fallen behind with orders.[380] As set out at paragraph 5.138, however, the CMA considers that the information was likely to be useful to ALM/JML in these circumstances. Furthermore, the suggestion that the information was not useful is contradicted by the fact that [Director A, ALM/JML] circulated the information internally. The CMA does not consider, therefore, that [Director A, ALM/JML]'s statement is sufficient to meet the high evidential burden (as described at paragraphs 5.87 and 5.88) required to rebut the presumption that ALM/JML took account of the information when determining its conduct on the market. Accordingly, the CMA has found that ALM/JML accepted the information and took account of it when determining its subsequent market strategy.

5.142 In view of the above, the CMA has found that the events of 8-9 August 2016 amounted to an agreement and/or concerted practice to share the market by way of a non-aggression pact and/or to fix prices. In addition, the conduct involved an exchange of information regarding competitively sensitive market and pricing strategy.

April 2017 Infringement

5.143 The CMA has found that the April 2017 Infringement described at paragraphs 3.135 to 3.152 above amounts to a concerted practice to fix prices through the alignment of BLM's and ALM/JML's prices in respect of certain buying group customers. This was effected by way of a unilateral disclosure of commercially sensitive pricing information from BLM to ALM/JML as contained in [Director, BLM]'s text message '*Down 190 at the buying groups but no blanket adjustment for the rest*'.

5.144 On 25 April 2017, [Director, BLM] contacted [Director A, ALM/JML] by text message and shared commercially sensitive price information with him,

[380] Witness statement of [Director A, ALM/JML] dated 28 August 2019, paragraph 8.4 (URN 3966).

namely the prices that BLM was ostensibly planning to charge the buying groups in the coming month.

5.145 While the information itself was misleading as 'down 190' did not reflect the prices charged by BLM to the buying groups, the CMA considers that [Director, BLM]'s purpose in sending the text message to [Director A, ALM/JML] was to influence ALM/JML's pricing. By ostensibly disclosing BLM's prices, the CMA considers that [Director, BLM] purported to influence ALM/JML to price at the same or a very similar level. This operated to distort competition for a section of customers, namely the buying groups [Buying Group A] and [Buying Group B].

5.146 BLM and ALM/JML both remained active on the market following BLM's disclosure of information. Indeed, shortly after receiving the text message, ALM/JML set its prices to the buying groups [Buying Group A] and [Buying Group B] for the following month. ALM/JML reduced its prices by a little less than the figure stated in the text message, as more fully described at paragraphs 3.137 to 3.138. BLM subsequently claimed to have 'stolen a march' on ALM/JML as a result of seemingly having set a lower price and thereby receiving more orders from the buying groups (see paragraph 3.140).

5.147 The CMA considers that this text message evidences a concerted practice between ALM/JML and BLM because:

(a) there was contact between BLM and ALM/JML, in which BLM disclosed strategic pricing information; the reasons why the information disclosed was strategic are discussed below at paragraphs 5.148 to 5.151.

(b) there was conduct on the market, as both parties remained active in the market and ALM/JML set its prices to the buying groups shortly after receipt of BLM's text message (as set out at paragraph 5.146 above) and that resulted in conditions of competition that did not correspond to the normal conditions of competition.

(c) there was cause and effect between the two, given the presumption that ALM/JML took account of the disclosed information when determining its own market strategy (see paragraphs 5.84 and 5.87).

5.148 As set out at paragraphs 5.135 to 5.138, whether information is strategic is determined through the analysis of the information itself and the context in which it was exchanged.

5.149 In the April 2017 Infringement, the content of the information disclosed by BLM to ALM/JML was sufficiently specific to remove uncertainty as to the conduct BLM would adopt, as it refers to a specific price reduction ('*Down*

190') to a specific group of customers ('*the buying groups*') which ALM/JML could easily identify. Additionally, the fact that BLM's disclosed intention was different from its final one does not imply the disclosed information was not strategic; whether strategic uncertainty is reduced is not determined with hindsight in light of subsequent events (as set out in paragraph 5.78 above). The case law makes it clear that it is uncertainty as to the conduct on the market '**to be expected**' [emphasis added] that is important.[381] The CMA considers that after the disclosure ALM/JML would expect BLM to act according to its intentions as disclosed in the text message.

5.150 The disclosure was proximate in time with the relevant decision point or action; the text message was sent to [Director A, ALM/JML] on the day the Parties updated their prices (25th of the month), prior to the point at which ALM/JML updated its prices. As described at paragraphs 3.145 and 3.146, the CMA considers that ALM/JML had the flexibility to adjust monthly prices at the buying groups. Further, the disclosure was made privately, via text messages by [Director, BLM] to [Director A, ALM/JML], in a context where [Director, BLM] had already provided [Director A, ALM/JML] with strategic information on BLM's proposed pricing intentions (i.e. see the July 2016 Infringement at paragraphs 3.74 to 3.108 and the August 2016 infringement at paragraphs 3.109 to 3.134 above). Given the history of information exchange between the two individuals, it is likely that [Director A, ALM/JML] would take this particular disclosure at face value and believe it to be genuine.

5.151 Accordingly, the CMA considers that the pricing information was strategic, notwithstanding that the CMA considers that it was misleading. As set out at paragraph 5.71 above, the requirement of independence strictly precludes any direct or indirect contact by which an undertaking may influence the future conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market.

5.152 Incorrect information can be used to further an anti-competitive purpose if it is intended to mislead and thereby influence a competitor (see paragraphs 5.78 and 5.79 above). In the present case, the CMA considers that [Director, BLM] intentionally communicated the wrong price to [Director A, ALM/JML] in order to 'steal a march' on ALM/JML (see paragraph 3.140). [Director, BLM]'s text message was capable of removing uncertainty for [Director A, ALM/JML] for the reasons set out in paragraphs 5.148 to 5.151 above, even though it was inaccurate. BLM's disclosure to ALM/JML of its pricing intention, even if intentionally misleading, thus increased transparency between competitors and shows that they substituted practical cooperation for the risks of

[381] *Cimentieres CBR*, paragraph 1852.

competition. ALM/JML had achieved a perceived degree of transparency by learning of BLM's ostensible prices, which is in turn presumed to have influenced its own pricing decisions in respect of the customers in question.

5.153 Specifically, the CMA considers that it may have been [Director, BLM]'s intention to give ALM/JML comfort that BLM was only reducing its prices by the amount of the LME drop (£190) and therefore that it was safe for ALM/JML to reduce to a similar level while still maintaining margin and profitability, given the Parties' contractual commitments to adjust prices to buying groups in accordance with LME movements. The CMA further considers that [Director, BLM] is likely to have recognised the influence that he exerted on [Director A, ALM/JML], which would make it likely ALM/JML would take into consideration the disclosed information in setting its prices to the buying groups. This would allow BLM to set its own prices by reference to ALM/JML's likely prices.

5.154 The CMA has not found any evidence that ALM/JML actively distanced itself from receiving the information from BLM, rejected the information, or reported its receipt to regulators or internal compliance officers. Accordingly, the CMA has found that ALM/JML accepted the information.

5.155 Given that ALM/JML remained active on the market and set its own prices to the buying groups a few hours after [Director A, ALM/JML] had received the text message, there is a rebuttable presumption that ALM/JML took the disclosed information into account. As explained at paragraph 5.88, it would be for ALM/JML to prove that the disclosed information did not have any influence on its own conduct on the market and there is a high evidential burden in order to rebut the causal presumption.

5.156 [Director A, ALM/JML] states in his witness statement that he did not know why the information had been sent to him and that it was not significant to him. However, he has not provided any evidence to suggest that the information did not influence ALM/JML's conduct on the market. As explained at paragraphs 3.145 and 3.146, the CMA does not accept [Director A, ALM/JML]'s previous statement that the information was not significant because ALM/JML had no flexibility to adjust monthly prices other than according to the LME price. Accordingly, the CMA finds that ALM/JML took account of the disclosed information in determining its own market strategy.

5.157 In view of the above, the CMA has found that the events of 25 April 2017 constitute a concerted practice to fix prices by aligning BLM's and ALM/JML's prices in respect of certain buying group customers. This was effected by way of a unilateral disclosure of commercially sensitive pricing information from BLM to ALM/JML.

E. Object of preventing, restricting or distorting competition

5.158 The CMA finds that each of the Infringements had the object of preventing, restricting or distorting competition in the market for Rolled Lead in the UK.

Legal framework

5.159 The Chapter I prohibition and Article 101(1) TFEU prohibit agreements between undertakings and concerted practices which have as their object the prevention, restriction or distortion of competition.

5.160 The term 'object' in both prohibitions refers to the sense of 'aim', 'purpose', or 'objective', of the coordination between undertakings in question.[382] This is assessed objectively. In this context, it is not necessary to establish that the parties jointly intended, subjectively, to pursue an anticompetitive aim – only that they had a common understanding whose terms, assessed objectively, pursue or result in such an aim.[383]

5.161 Where an agreement or concerted practice has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that it has had, or would have, any anti-competitive effects in order to establish an infringement.[384]

5.162 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.[385] 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.[386]

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[382] For example, C-56/64 *Consten & Grundig* v *Commission*, EU:C:1966:41, paragraph 343 ("…*Since the agreement thus aims at isolating the French market… it is therefore such as to distort competition*…"); C-96/82 *IAZ and Others* v *Commission*, EU:C:1983:310, paragraph 25; and C-209/07 *Competition Authority* v *Beef Industry Development Society*, EU:C:2008:643 ('***BIDS***'), paragraphs 32 to 33.

[383] *GlaxoSmithKline*, paragraph 77 (upheld on appeal in Joined cases C-501/06P etc. *GlaxoSmithKline Services Unlimited v Commission*, EU:C:2009:610).

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

[385] C-67/13 P *Groupement des Cartes Bancaires* v *Commission*, EU:C:2014:2204 ('***Cartes Bancaires'***), paragraph 50; affirmed in *Toshiba*, paragraph 26.

[386] *Cartes Bancaires,* paragraphs 49 and 57; *Toshiba,* paragraph 26.

5.163 In order to determine whether an agreement/concerted practice reveals a sufficient degree of harm such as to constitute a restriction of competition 'by object', regard must be had to:

- the content of its provisions,
- its objectives, and
- the economic and legal context of which it forms a part.[387]

5.164 However, the analysis of the context may be '*limited to what is strictly necessary in order to establish the existence of a restriction of competition by object*'.[388] The Commission has published a Staff Working Document that seeks to provide guidance on restrictions of competition by object to assist undertakings when determining whether their agreements may benefit from the *De Minimis* Notice.[389] The Staff Working Document identifies types of agreements between competitors that have been held by the EU Courts to have the object of restricting competition.

5.165 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.[390]

5.166 Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of the Chapter I prohibition, even if the agreement or concerted practice had other objectives.[391] The fact that an agreement pursues other legitimate objectives does not preclude it from being regarded as having a restrictive object.[392]

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[387] *Cartes Bancaires,* paragraph 53 and *Toshiba*, paragraph 27. According to the Court of Justice in *Cartes Bancaires*, paragraphs 53 and 78, in determining that context, it is also necessary to take into consideration all relevant aspects of the context, having regard in particular to the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.

[388] *Toshiba*, paragraph 29. The Court of Justice made the same comment about limiting the analysis of context to what is strictly necessary in relation to price-fixing in C-469/15P *FSL v Commission*, EU:C:2017:308, paragraph 107.

[389] 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, 25.06.2014, SWD (2014) 198 final ('**Commission *Staff Working Document***').

[390] *Cartes Bancaires*, paragraph 54; affirmed in C-286/13 P *Dole v Commission*, EU:C:2015:184, paragraph 118 ('***Dole Food***').

[391] See, for example, Joined Cases C-96/102,104,105,108 and 110/82, *NV IAZ International Belgian and others v Commission,* EU:C:1983:310, paragraphs 22 to 25.

[392] *BIDS*, paragraph 21. See also *Cartes Bancaires*, paragraph 70.

5.167 There is no need to take account of the actual effects of an agreement or concerted practice once it appears that it has as its object the prevention, restriction or distortion of competition.[393]

5.168 As set out above at paragraphs 5.89 onwards, agreements or concerted practices whereby undertakings collectively refuse to supply or purchase, are generally found to be restrictive of competition by object.[394] They are generally aimed at excluding a competitor or eliminating a disruptive new entrant to the market. For example, the Court of Justice in the *Slovak Bank Cartel* case held it was clear the agreement to boycott a competitor had as its object the restriction of competition as the parties could not rely on their stated justification for their conduct, that the excluded competitor was engaging in the market illegally.[395]

5.169 As set out above at paragraphs 5.98 onwards, agreements that share markets are expressly prohibited by Article 101 TFEU and Chapter I of the Act and are generally considered to be restrictive of competition by object. They are particularly injurious to the proper functioning of normal competition because, by their very nature, they constrain suppliers from determining independently the commercial policy which they intend to adopt on the market.

5.170 As set out above at paragraphs 5.103 onwards, agreements which directly or indirectly fix prices are expressly prohibited by Article 101 TFEU and Chapter I of the Act. Agreements or concerted practices which fix prices are considered to be restrictions of competition by their very nature.

5.171 An agreement or concerted practice to share or exchange commercially sensitive information may be a breach of competition by object. The European Courts, the Commission and the CMA have held on numerous occasions that agreements or concerted practices that involve the sharing between competitors of pricing or other information of commercial or strategic significance, or both, can restrict competition by object.[396]

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[393] Case C-58/64 *Consten and Grundig v Commission*, EU:C:1966:41, paragraph 342.

[394] Commission *Staff Working Document,* paragraph 2.5.

[395] *Slovak Bank Cartel*, paragraph 19.

[396] See, for example, *British Sugar,* where the General Court held that an exchange of information regarding future pricing allowed the parties to *'create a climate of mutual certainty as to their future pricing policies*' and amounted to a restriction of Article 101 TFEU by object, paragraphs 58 and 60. See also *Rhone-Poulenc SA v Commission,* T-1/89, EU:T:1991:56, paragraphs 122-124.

Assessment

5.172 The CMA finds that each of the Infringements pursued an anticompetitive object and thus reveal in themselves a sufficient degree of harm to competition that there is no need to examine their effects.

5.173 The CMA has reached this finding having regard to the content of the provisions of each Infringement, their objectives and the economic and legal context of which they form a part.

The content of the provisions of the Infringements

5.174 The Infringements were implemented through a variety of actions that involved conduct that is clearly recognised in case law as having an object of preventing, restricting or distorting competition. In reaching this conclusion, the CMA refers to the evidence set out in Section 3 above and notes in particular the following:

5.175 The CMA has found that the October 2015 Infringement involved an agreement and/or concerted practice not to supply CBG (by withdrawing or otherwise refusing to supply). As explained at paragraph 5.168, a collective refusal to supply will generally be considered a restriction of competition by object because it limits the commercial freedom of suppliers and/or purchasers to determine their actions independently, including where, as in this case, it is aimed at excluding a competitor or eliminating a disruptive new entrant to the market.

5.176 In addition, the CMA finds that the Infringement was underpinned by an exchange of commercially sensitive and strategic information between ALM/JML and BLM in October 2015. As set out at paragraph 5.113, the CMA has found that the information disclosed was capable of reducing strategic uncertainty between the Parties by revealing how one of their competitors intended to respond to a new entrant to the market. Accordingly, the CMA has concluded that the conduct had the object of preventing, restricting or distorting competition.

5.177 The CMA has found that the July 2016 Infringement featured an agreement and/or concerted practice between ALM/JML and BLM to share the market through the allocation of a particular customer by way of a non-aggression pact and/or to fix prices in relation to that customer. It also included an exchange of commercially sensitive pricing information. It is settled case law that market sharing arrangements (such as a non-aggression pact) are, by their very nature, restrictive of competition. Similarly, price-fixing agreements have consistently been found to restrict competition in and of themselves.

Finally, disclosure of commercially sensitive price information has been held on numerous occasions to restrict competition by object. In this instance, there was a private disclosure to a competitor of pricing for a specific customer ([Merchant Customer D]), which reduced or eliminated uncertainty between competitors in relation to that customer.

5.178 The CMA has found that the August 2016 Infringement featured an agreement or concerted practice to share the market by way of a non-aggression pact and/or to fix prices. Additionally, the conduct included an exchange of information regarding competitively sensitive market and pricing strategy. As noted above, the case law is clear that price-fixing, market sharing and disclosure of commercially sensitive pricing information are, by their very nature, restrictive of competition. In this instance, there was disclosure of a specific internal strategy regarding future pricing intention, disclosed privately to a competitor. As discussed at paragraphs 5.137 to 5.138, this information was likely to be useful to ALM/JML in determining its own future conduct on the market.

5.179 The CMA has found that the April 2017 Infringement amounted to a concerted practice to fix prices through the alignment of BLM's and ALM/JML's prices. This was effected by way of a unilateral disclosure of commercially sensitive pricing information, on a targeted and private basis, from BLM to ALM/JML. As noted above, price fixing itself is consistently considered a restriction of competition by object. Further, as explained at paragraph 5.79, an exchange of commercially sensitive pricing information can restrict competition by object even if that information is inaccurate, provided that it is capable of influencing the conduct of the relevant undertaking on the market. In this case, the CMA has found that the very purpose of the alleged disclosure was to influence ALM/JML's conduct on the market.

The objectives of the Infringements

5.180 The CMA considers that the objectives of each Infringement support a finding that the object in each case was to prevent, restrict or distort competition. Specifically, the CMA finds that:

(a) the objective of the October 2015 Infringement was to exclude a disruptive customer or potential new entrant from the market;

(b) the objective of the July 2016 and August 2016 Infringements was to maintain market positions to a particular customer and/or to restrict price competition; and

(c) the objective of the April 2017 Infringement was to restrict price competition to a particular set of customers.

5.181 Although the parties' subjective intention is not a necessary factor in determining whether an agreement has an anti-competitive object, it may be taken into account (see paragraph 5.165). In this context, it is worth noting [Director, BLM]'s account, in which he explained his contacts with [Director A, ALM/JML] as a means of trying to reduce the risk of price-based attacks on BLM's core customer base by ALM/JML.[397] This is consistent with, for example, his disclosure of BLM's future pricing intentions in response to ALM/JML's threat of retaliation (the August 2016 Infringement). The CMA considers that this suggests a subjective intention to increase market transparency and restrict price competition between ALM/JML and BLM.

The legal and economic context

5.182 Sub-section B in Section 3 above on the industry sets out the economic context in which the Infringements took place. As set out there, the Parties are two of the three principal suppliers of Rolled Lead in the UK. The market is highly concentrated, with the three principal suppliers accounting for 90% of supply. It is difficult for Rolled Lead suppliers based outside of the UK to compete effectively on the UK market due to longer delivery times and higher transport costs. Accordingly, the Infringements involved very significant competitors in the market, such that affected customers had limited alternative sources of Rolled Lead.

5.183 Further, by acting to exclude a new entrant to the Relevant Market (the October 2015 Infringement), the Parties ensured that the market remained highly concentrated and limited the potential for an increase in imports. Such conduct is, by its very nature, injurious to the proper functioning of normal competition as customers were deprived of the full choice of supplier which they would have had on a fully competitive market.

Conclusion on the object of preventing, restricting or distorting competition

5.184 For the reasons set out above, the CMA finds that each of the Infringements had as their object the prevention, restriction or distortion of competition within the UK.

[397] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 43 (URN 3166).

F. Appreciable restriction of competition

Legal framework

5.185 Agreements and concerted practices which are restrictive of competition by 'object' will fall within the Chapter I prohibition and/or Article 101 TFEU only if they have as their object an *appreciable* prevention, restriction or distortion of competition. Thus, 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.[398]

5.186 An agreement that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.[399]

Assessment

5.187 The CMA has found that the Infringements had the object of preventing, restricting or distorting competition. Given that the effect on trade test is satisfied (see section G below), the CMA therefore also finds that each Infringement constitutes, by its very nature, an appreciable restriction of competition in the Rolled Lead market in the UK for the purposes of the Chapter I and/or Article 101 TFEU prohibition.

5.188 In any event, and in the alternative, the CMA finds that the Infringements had an appreciable effect on competition for the Rolled Lead market within the UK for the purposes of the Chapter I prohibition and, with the exception of the July 2016 Infringement, within the EU for the purposes of Article 101 TFEU. This conclusion is based on the following findings:

- The geographic scope of the Infringements ranged from regional to the whole of the UK (see paragraphs 4.18 and 4.19 above):
- The market for Rolled Lead in the UK is concentrated, with the Parties being two of the three principal manufacturers and suppliers. The three

[398] C-226/11 *Expedia Inc.* v *Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 16 ('***Expedia***') citing, among other cases, C-5/69 *Völk* v *Vervaecke*, EU:C:1969:35, paragraph 7. See also *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.15.

[399] *Expedia*, paragraph 37; and *De Minimis Notice*, paragraphs 2 and 13. These cases apply mutatis mutandis in respect of the Chapter I prohibition - see Section 60(2) of the Act which provides that, when determining a question in relation to the application of Part 1 of the Act (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the European Court in respect of any corresponding question arising in EU law. See also *Carewatch and Care Services Limited* v *Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch) paragraphs 148ff.

principal manufacturers and suppliers together account for 90% of the market.

- A significant number of customers were likely to have been directly affected by the Infringements, including large buying groups and smaller merchant customers purchasing on demand and therefore subject to monthly price changes.
- The Parties had the following turnover in each of their most recently published annual accounts:[400]
  - ALM and JML: £62,930,816[401] and £7,798,931[402] respectively
  - BLM: £154,821,000[403]
- Due to transport costs and longer delivery times, it is difficult for Rolled Lead imports to compete effectively on the UK market.

G. Effect on trade

Effect on trade within the UK

5.189 The Chapter I prohibition applies to agreements and concerted practices which may affect trade within the UK.[404] The effect on trade does not necessarily need to be 'appreciable'.[405]

Assessment

5.190 The CMA considers that each Infringement was capable of affecting trade within the UK. Each Infringement was implemented within the UK, affecting sales made by UK-based suppliers to UK-based customers.

[400] The CMA understands that a substantial proportion of each Party's turnover is derived from sales of Rolled Lead in the UK.
[401] Annual accounts of Associated Lead Mills Limited for the year ended 31 December 2019.
[402] Annual accounts of Jamestown Metals Limited for the year ended 31 December 2019.
[403] Annual accounts of HJ Enthoven Limited for the year ended 31 December 2019.
[404] The UK includes any part of the UK in which an agreement operates or is intended to operate: the Act, section 2(7). As is the case in respect of Article 101 TFEU, it is not necessary to demonstrate 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: *British Sugar*, paragraph 78.
[405] *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11, paragraphs 459–461. The concept of 'appreciable effect on inter-state trade' is an EU law jurisdictional requirement which demarcates the boundary line between the application of EU competition law and national competition law. According to the CAT, this requirement should not be read into the Act, section 2.

5.191 During the period of the Infringements, the Parties were two of the three principal manufacturers and suppliers of Rolled Lead in the UK. As noted at paragraph 4.14, both Parties serve the whole of the UK, with some customers located in a single region while others are UK-wide.

5.192 Accordingly, the CMA finds that the Infringement may have affected trade within the UK within the meaning of the Chapter I prohibition and that, in so far as required, the effect on trade within the UK was appreciable.

Effect on trade between EU Member States

5.193 Article 101(1) TFEU applies where an agreement and/or concerted practice has the potential to affect trade between EU Member States. Such an effect on trade must be appreciable.

5.194 An effect on trade means that the agreement, decision or concerted practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU Member States.[406] In this context, the concept of 'effect on trade' has a wide scope and is not limited to exchanges of goods and services across borders.[407]

5.195 Trade between Member States may be affected notwithstanding that the relevant market may be national or sub-national in scope.[408] Moreover, horizontal cartels covering a whole Member State are normally capable of affecting trade between Member States. [409] The European Courts have held in a number of cases that '*an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about*'.[410]

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[406] First stated in C-56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, EU:C:1966:38, paragraph 249. See further, for example, Case C-209/78 *Heintz van Landewyck v Commission*, EU:C:1980:248, paragraph 12; C-42/84 *Remia BV and others v Commission of the European Communities*, EU:C:1985:327, paragraph 22. See also Commission Notice (EC) Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C101/07) (the '***Notice on the Effect on Trade***'), paragraph 24.

[407] Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG*, EU:C:1981:178, paragraph 18; and see the *Notice on the Effect on Trade*, paragraph 19.

[408] *Notice on the Effect on Trade*, paragraph 22.

[409] *Notice on the Effect on Trade*, paragraphs 78 to 80.

[410] C-309/99 *Wouters and Others*, EU:C:2002:98, paragraph 95. See also the *Notice on the Effect on Trade*, paragraph 78. For the purposes of assessing whether an agreement and/or concerted practice may affect trade between EU Member States to an appreciable extent the CMA follows the approach set out in the European Commission's published guidance.

Assessment

5.196 The CMA finds that each of the October 2015, August 2016 and April 2017 Infringements had the potential to have an appreciable effect on trade between Member States within the meaning of Article 101 TFEU.

5.197 As noted at paragraph 5.191, both Parties serve the whole of the UK, with some customers located in a single region while others are UK wide. Further, BLM exports a small proportion of Rolled Lead to customers located outside the UK and there are also some imports into the UK (paragraph 4.17).

5.198 The CMA considers that each of the October 2015, August 2016 and April 2017 Infringements had the potential to affect customers across the UK. They were therefore by their very nature capable of having an appreciable effect on trade within the meaning of Article 101.

5.199 The CMA does not propose to find that the July 2016 Infringement had the potential to have an appreciable effect on trade between Member States within the meaning of Article 101 TFEU, on the basis that it involved a customer that had a regional rather than a national business.

H. Exclusion or exemption

Exclusion

5.200 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.[411]

5.201 The CMA finds that none of the relevant exclusions applies to the Infringements.

Exemptions

Block exemption

5.202 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.

5.203 Similarly, pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it does not affect trade between EU Member States but

[411] 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.

otherwise falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation.

5.204 The Parties have not argued that the Infringements are exempt by virtue of a block exemption regulation for the purpose of Article 101(1) TFEU and/or pursuant to section 10 of the Act.

Individual exemption

5.205 Agreements which satisfy the criteria set out in section 9 of the Act and Article 101(3) TFEU are exempt from the Chapter I prohibition and Article 101(1) TFEU. There are four cumulative criteria to be satisfied for this to be the case:

- the agreement contributes to improving production or distribution, or promoting technical or economic progress,
- 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.

5.206 In considering whether an agreement satisfies the above criteria, the CMA will have regard to the European Commission's Article 101(3) Guidelines[412] and relevant case law.

5.207 Any undertaking claiming the benefit of an 'efficiencies' exemption bears the burden of proving that the conditions in section 9(1) of the Act are satisfied.[413]

5.208 The Parties do not argue that the Infringements satisfy the conditions for individual exemption. Although it is for the Parties to demonstrate that these conditions have been satisfied, the CMA does not consider that they would be satisfied in this case given, in particular, the nature of the Infringements.

[412] *Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08) ('***Article 101(3) Guidelines***'), p. 97-118. See also OFT401, paragraph 5.5.
[413] The Act, section 9(2); *GlaxoSmithKline*, paragraphs 82–83.

I. Duration

5.209 The duration of the Infringements is a relevant factor for determining any financial penalties that the CMA decides to impose following a finding of infringement (see further Section 6 below).

5.210 As described more fully in Section 3C, each of the October 2015, July 2016, August 2016 and April 2017 Infringements had a duration of less than one year.

J. Attribution of liability

Legal framework

5.211 Competition law refers to the activities of undertakings. If an undertaking infringes the competition rules, it falls, under the principle of personal responsibility, to that undertaking to answer for that infringement.[414]

5.212 An undertaking may consist of several persons, legal or natural. Given the requirement to impute an infringement to a legal entity or entities on which fines may be imposed and to which an infringement decision is to be addressed, it is necessary to identify the relevant legal persons that form part of the undertaking in question.[415]

Parental liability

5.213 The conduct of a subsidiary may be imputed to its parent company where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities.[416] This is because, in such a situation, the parent company and its subsidiary form a single economic unit, and therefore a single undertaking for the purposes of the relevant prohibitions.[417]

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[414] *Akzo*, paragraphs 54–56.

[415] *Akzo*, paragraph 57.

[416] C-155/14 P *Evonik Degussa GmbH v Commission,* EU:C:2016:446, paragraph 27 ('***Evonik Degussa***'), citing joined cases C-93/13 P and C-123/13 P *Commission and Others v Versalis and Others,* EU:C:2015:150, paragraph 40; judgment in *Alliance One & Others v Commission*, C 628/10 P and C 14/11 P, EU:C:2012:479, paragraph 44 citing *Akzo*, paragraphs 58–59.

[417] *Evonik Degussa*, paragraph 27.

5.214 Where a parent company owns 100% of a subsidiary which has infringed the competition rules, there is a rebuttable presumption that:

(a) the parent company is able to exercise 'decisive influence' over the conduct of its subsidiary; and

(b) the parent company does in fact exercise such decisive influence over the conduct of its subsidiary,

such that the two entities can be regarded as a single economic unit and thus jointly and severally liable.[418]

5.215 It is for the party in question to rebut the presumption by adducing sufficient evidence to show that its subsidiary acts independently on the market.[419] The presumption also applies to situations where the parent company indirectly holds 100% of a subsidiary, for example, via one or more intermediary companies.[420]

Economic succession

5.216 As explained at paragraph 5.211, the general principle is that liability for an infringement of UK competition rules rests with the legal person or entity that committed the infringement (the 'personal responsibility' principle).[421] However, in certain circumstances, an exception is made to the personal responsibility principle where responsibility for the operation of the undertaking has changed following the commission of the infringement (the 'economic successor' principle).

5.217 In such a case, *'when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical.'*[422] It has long been held that the continuation of economic activities is indicative of an economic successor.[423]

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[418] *Evonik Degussa*, paragraph 28 and the case law cited; joined cases C-628/10 P and C-14/11 P *Alliance One & Others v Commission*, EU:C:2012:479, paragraphs 46–48 ('***Alliance One***'); *Akzo*, paragraphs 60–61; C-107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 50.

[419] *Alliance One*, paragraph 47, citing *Akzo*, paragraph 61.

[420] C-90/09 P *General Química SA and Others* v *Commission*, EU:C:2011:21, paragraphs 86–87.

[421] Judgment of 17 December 1991 in Case T-6/89, *Enichem Anic SpA v. European Commission,* EU:T:1991:74, paragraph 236.

[422] Judgement in Case C-280/06 *Autorita Garante Della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA,* EU:C:2007:775, paragraph 42.

[423] Judgement in Case C-29/83 *CRAM v Commission*, EU:C:1984:130, paragraph 9.

5.218 Under the economic successor principle, liability for the new entity is established:

(a) where the entity that committed the infringement no longer exists in law[424] or is no longer economically active,[425] and

(b) where there are 'structural links' (economic and organisational) between the original entity that committed the infringement and the new entity to which the original entity's economic activities were transferred.[426]

5.219 In order to establish whether a person may be regarded as an economic successor, it is necessary to identify the '*combination of physical and human elements* [that is the assets and personnel] *which contributed to the commission of the infringement and then to identify the person who has become responsible for their operation*'.[427]

5.220 It is not necessary that the economic successor has taken over all of the assets and personnel of the relevant undertaking that committed the infringement. It is sufficient that the successor has taken over '*the main part of those physical and human elements that were employed in* [the relevant business] *and therefore contributed to the commission of the infringement in question'*.[428]

5.221 The CMA has first identified the legal entities directly involved in the Infringements. It has then determined whether liability for the Infringements should be shared with another legal entity, in which case each legal entity's liability will be joint and several.

Assessment

Application to ALM and JML

5.222 The CMA intends to hold ALM, JML and International Metal Industries Limited jointly and severally liable for the Infringements committed by ALM and JML.

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[424] Judgment in Case T-6/89, *Enichem Anic SpA v. European Commission,* EU:T:1991:74.
[425] Judgment of 11 March 1999 in Case T-134/94 *NMH Stahlwerke GmBH v. Commission,* EU:T:1999:44; judgment in Case C-280/06 *Autorita Garante Della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA,* EU:C:2007:775, paragraph 40.
[426] Judgment in Case C-280/06 *Autorita Garante Della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA,* EU:C:2007:775, paragraph 48; Judgment in Case C-204/00 P Aalborg Portland A/S v. Commission, EU:C:2004:6.
[427] Judgment in Case T-6/89, *Enichem Anic SpA v. European Commission,* EU:T:1991:74, paragraph 237.
[428] Judgment of 11 March 1999 in Case T-134/94 *NMH Stahlwerke GmBH v. Commission,* EU:T:1999:44, paragraph 130.

5.223 ALM and JML were directly involved in each of the Infringements. Accordingly, the CMA attributes liability to ALM and JML for the Infringements and for any resulting financial penalty which the CMA may decide to impose.

5.224 As set out at paragraphs 3.1 to 3.17 above, at the time of the Infringements International Industrial Metals Limited indirectly (through intermediary companies) held 100 per cent ownership in both ALM and JML. It can therefore be presumed that International Industrial Metals Limited exercised decisive influence over ALM and JML. Accordingly, ALM, JML and International Industrial Metals Limited can be regarded as having formed a single economic unit at the time of the Infringements. However, ownership of ALM and JML has since transferred to International Metal Industries Limited.[429]

5.225 The CMA finds that there is functional and economic continuity between International Industrial Metals Limited and International Metal Industries Limited and therefore that the latter is the economic successor of the former for the purposes of the Chapter I prohibition and Article 101 TFEU. This is for the following reasons:

(a) Ownership of the business and assets of ALM and JML have been transferred in their entirety from International Industrial Metals Limited to International Metal Industries Limited.[430] International Industrial Metals Limited ceased carrying on any economic activity at the time of the transfer.[431]

(b) [Individual], a director[432] and the [✂] shareholder[433] of International Industrial Metals Limited is the [✂] director[434] and shareholder[435] of International Metal Industries Limited and was so at the time of the transfer of ALM and JML.[436]

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[429] URN 4362.

[430] ALM Annual Report and Financial Statement for the year ended 31 December 2018, page 4 (available from Companies House); JML Annual Report and Financial Statements for the year ended 31 December 2018, page 4 (available from Companies House); URN 4362.

[431] URN 4362.

[432] International Industrial Metals Limited Annual Report and Financial Statements for the year ended 31 December 2017, page 2 (available from Companies House).

[433] International Industrial Metals Limited Change of individual person with significant control (PSC) details dated [✂] (available from Companies House).

[434] International Metal Industries Limited Appointment of Director dated [✂] (available from Companies House); URN 4362.

[435] International Metal Industries Limited Notice of Individual Person with Significant Control dated [✂] (available from Companies House); URN 4362.

[436] URN 4362.

(c) The principal activity of International Metal Industries Limited is similar in nature to that of International Industrial Materials Limited, with both being holding companies for ALM, JML and other subsidiaries formerly owned by International Industrial Metals Limited.[437]

5.226 The CMA therefore finds that International Metal Industries Limited, as economic successor to International Industrial Metals Limited, is jointly and severally liable with ALM and JML for their participation in the Infringements.

Application to BLM

5.227 The CMA intends to hold BLM and Eco-Bat Technologies Limited jointly and severally liable for the Infringements committed by BLM.

5.228 BLM was directly involved in each of the Infringements. Accordingly, the CMA attributes liability to BLM for the Infringements and for any resulting financial penalty which the CMA may decide to impose.

5.229 As set out at paragraphs 3.22 to 3.32 above, at the time of the Infringements Eco-Bat technologies indirectly (through intermediary companies) held 100 per cent ownership in BLM. It can therefore be presumed that Eco-Bat Technologies Limited exercised decisive influence over BLM. Accordingly, BLM and Eco-Bat Technologies can be regarded as a single economic unit and thus jointly and severally liable for the Infringements.

K. Conclusion on the application of the Chapter I prohibition and Article 101 TFEU

5.230 On the basis of the evidence set out in this Decision, the CMA finds that the conduct that is the subject of each of the October 2015, August 2016 and April 2017 Infringements breached the Chapter I and/or Article 101 TFEU prohibition, each Infringement being an agreement and/or concerted practice with the object the appreciable prevention, restriction or distortion of competition in relation to the supply of Rolled Lead in the UK and within the internal market.

On the basis of the evidence set out in this Decision, the CMA finds that the conduct that is the subject of the July 2016 Infringement breached the Chapter I prohibition, being an agreement and/or concerted practice with its object the appreciable prevention, restriction or distortion of competition in relation to the supply of Rolled Lead in the UK.

[437] URN 4362.

6. The CMA's action

A. The CMA's decision

6.1 In light of the above, the CMA has made a decision that the Parties participated in a number of agreements and/or concerted practices, as follows:

(a) the October 2015 Infringement as described at paragraphs 3.56 to 3.73 constitutes an agreement and/or concerted practice between ALM/JML and BLM not to supply CBG (by withdrawing or otherwise refusing to supply CBG); this was underpinned by an exchange of commercially sensitive information regarding the Parties' strategy towards CBG.

(b) the July 2016 Infringement as described at paragraphs 3.74 to 3.108 constitutes an agreement and/or concerted practice between ALM/JML and BLM to share the market through the allocation of a particular customer between them by way of a non-aggression pact and/or to fix prices for that customer. The conduct also includes an exchange of commercially sensitive information.

(c) the August 2016 Infringement as described at paragraphs 3.109 to 3.134 constitutes an agreement and/or concerted practice between ALM/JML and BLM to share the market by way of a non-aggression pact and/or to fix prices. The conduct also includes an exchange of information regarding competitively sensitive market and pricing strategy.

(d) the April 2017 Infringement as described at paragraphs 3.135 to 3.152 constitutes a concerted practice between ALM/JML and BLM to fix prices through the alignment of BLM's and ALM/JML's prices in respect of certain buying group customers. This was effected by way of a unilateral disclosure of commercially sensitive pricing information from BLM to ALM/JML.

6.2 The CMA has found that the October 2015 Infringement, August 2016 Infringement and April 2017 Infringement infringed the Chapter I prohibition and Article 101(1) TFEU because they had the object of preventing, restricting or distorting competition for the supply of Rolled Lead in the UK and may have affected trade within the UK and between Member States.

6.3 The CMA has found that the July 2016 Infringement infringed the Chapter I prohibition because it had the object of preventing, restricting or distorting

competition for the supply of Rolled Lead in the UK, and may have affected trade within the UK.

B. Directions

6.4 Section 32(1) of the Act provides that, if the CMA has made a decision that an agreement infringes the Chapter I prohibition or Article 101 TFEU, it may give such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. The CMA has decided not to impose any directions on the Parties in the circumstances of this case as the Infringements are no longer continuing.

C. Financial penalties

General

6.5 Section 36(1) of the Act provides that on making a decision that an agreement (or concerted practice) has infringed the Chapter I prohibition, the CMA may require an undertaking party to the agreement concerned to pay the CMA a penalty in respect of the infringement.

6.6 The CMA considers that it is appropriate to impose a financial penalty on each of the Parties for the Infringements.

6.7 As part of the settlement process (see paragraph 2.23), the CMA issued a draft penalty calculation to each of the Parties. The Parties were afforded the opportunity to make limited representations, which were taken into account in determining the final penalty calculation. The CMA issued a revised draft penalty calculation and provided a further opportunity for the Parties to make limited representations after provisionally deciding that there were no grounds for action in relation to the events of November 2016 (see further paragraph 2.28).

The CMA's margin of appreciation in determining the appropriate penalty

6.8 The CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act in a particular case, provided that (i) the penalty is within the range permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 and (ii) the CMA has had regard to the Penalty Guidance[438] in accordance with section 38(8) of the Act. The CMA is not bound by its decisions in relation

[438] *CMA's guidance as to the appropriate amount of a penalty* ('**CMA73**' or the '**Penalty Guidance**'), available at www.gov.uk/government/publications/appropriate-ca98-penalty-calculation.

to the calculation of financial penalties in previous cases. Rather, the CMA makes its assessment on a case-by-case basis having regard to all relevant circumstances and the objectives of its policy on financial penalties. In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will also have regard to the seriousness of the infringement and the objective of deterring both the undertaking on which the penalty is imposed and other undertakings from engaging in behaviour that breaches the prohibition in Chapter I of the Act (as well as other prohibitions under the Act).

Intention/Negligence

6.9 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition and/or Article 101 TFEU only if it is satisfied that the infringement has been committed intentionally or negligently.[439] However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.[440]

6.10 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 has 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*.'[441]

6.11 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*'.[442]

6.12 The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement or

[439] Section 36(3) of the Act.
[440] *Napp v OFT* [2002], at [453] to [457]. See also *Argos and Littlewoods*, at [221].
[441] *Argos and Littlewoods*, at [221].
[442] C-280/08 P *Deutsche Telekom v Commission*, ECR, EU:C:2010:603, paragraph 124.

conduct in question has as its object the restriction of competition. Ignorance or a mistake of law is no bar to a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.[443]

6.13 The CMA notes that both of the Parties, as part of their Terms of Settlement, have accepted that they have infringed the Chapter I prohibition and/or Article 101(1) TFEU and are liable to pay a penalty. In addition, for the reasons given in Section 5E, the CMA has concluded that each of the Infringements had as its object the prevention, restriction or distortion of competition.

6.14 In any event, the CMA considers that there is a body of evidence indicating that the Parties committed the Infringements intentionally or, at least, that they must have been aware, or could not have been unaware, that their conduct had the object or would have the effect of restricting competition.

6.15 Firstly, there are examples in relation to both Parties' actions to conceal the arrangements with their competitors, which the CMA considers shows their awareness that the conduct was unlawful:

(a) [Director, BLM] operated a second phone to contact individuals at ALM/JML and Calder which he activated shortly after completion of a competition law compliance course. [Director, BLM] gave inconsistent statements about his second phone;[444] in his draft witness statement, [Director, BLM] acknowledged he used a second mobile phone to conceal his communications with competitors and noted that he suspected that '*the renewal of Eco-Bat's competition compliance policies had an influence*' on his decision to operate the second phone.[445]

(b) In his draft witness statement, [Director, BLM] described how he and [Director A, ALM/JML] occasionally met at a café to be '*unobserved*'.[446]

6.16 Secondly, there are several occasions on which the Parties acknowledged, and demonstrated an understanding of, and their obligations under competition law:

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[443] See the Court of Justice's comments in C-681/11 *Bundeswettbewerbsbehörde v Schenker & Co. AG*, EU:C:2013:404, paragraph 38: '*the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct*' and paragraph 41 '*It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine.*'

[444] See paragraph 3.52 above.

[445] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 64 (URN 3166).

[446] Draft witness statement of [Director, BLM] dated 2 July 2019, paragraph 27 (URN 3166).

(a) [Director, BLM] received an email from Eco-Bat Human Resources on 23 November 2016 requesting that he complete a competition compliance training course.[447] Further, during the July Inspections, the CMA found a copy of an Eco-Bat 'Competition Policy Compliance' document in [Director, BLM]'s work area.[448]

(b) The Parties have been members of the LSA, which adopted Competition Compliance Guidelines for the conduct of its own meetings.[449]

6.17 The CMA therefore finds that the Parties committed the Infringements intentionally or, at the very least, negligently.

D. Calculation of the penalty

6.18 When setting the amount of the penalty, the CMA must have regard to the guidance on penalties in force at that time. The Penalty Guidance sets out a six-step approach for calculating the penalty.

Step 1 - starting point

6.19 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to the relevant turnover of the undertaking and the seriousness of the infringement and the need for general deterrence.[450]

Relevant turnover

6.20 The 'Relevant Turnover' is the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.[451] The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.[452]

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[447] URN 2180.
[448] URN 0077, paragraph 9.
[449] URN 0126.
[450] Penalty Guidance, paragraphs 2.3 to 2.15.
[451] Penalty Guidance, paragraph 2.11. The Court of Appeal observed in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* and *JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, paragraph 169 that: '[ ] neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty'. The Court of Appeal considered that it was sufficient for the OFT to 'be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement' (at paragraphs 170 to 173).
[452] Penalty Guidance, paragraph 2.11.

6.21 As set out at paragraph 4.19, the CMA has found that the relevant market affected by the Infringements is the supply of Rolled Lead in the UK.

6.22 The CMA has taken into account the turnover from the supply of Rolled Lead in the UK in the financial year preceding the date when the Infringements ended.

6.23 On the basis of this approach, the CMA considers that the Relevant Turnovers are as follows:

(a) [✂] for the financial year ending 31 December 2014, [✂] for the financial year ending 31 December 2015 and [✂] for the financial year ending 31 December 2016 for Eco-Bat;

(b) [✂] for the financial year ending 31 December 2014, [✂] for the financial year ending 31 December 2015, and [✂] for the financial year ending 31 December 2016 for IMI.

Seriousness of the infringement

6.24 In order to reflect adequately the seriousness of an infringement, the CMA will apply a starting point of up to 30% of the undertaking's relevant turnover. 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.[453] The actual percentage which is applied to the relevant turnover depends, in particular, upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.[454]

6.25 While making its assessment of the seriousness of the infringement, the CMA will consider a number of factors.[455] The CMA will use a starting point towards the upper end of the range for the most serious infringements of competition law which the CMA considers are most likely by their very nature to harm competition, including cartel activity.[456] The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future.[457]

[453] Penalty Guidance, paragraph 2.4.
[454] Penalty Guidance, paragraphs 2.5 to 2.6.
[455] In accordance with paragraph 2.8 of the Penalty Guidance, these factors include the nature of the product, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties. The CMA may also take into account other relevant factors.
[456] Penalty Guidance, paragraph 2.6.
[457] Penalty Guidance, paragraph 2.9.

6.26 The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.[458]

6.27 In determining the starting point in this case, the following factors have been taken into account in assessing the seriousness of the Infringement:

(a) market-sharing agreements, price coordination, unilateral provisions of commercially sensitive pricing information to a competitor and collective boycotts all fall within the scope of cartel activity, for which the CMA will generally use a 21-30% starting point range;

(b) the Parties are two of the three principal manufacturers of Rolled Lead in the UK.

(c) demand for Rolled Lead is declining given the availability of substitute products. However, the substitutes are not suitable in every situation. In particular, Rolled Lead has to be used in certain circumstances (e.g. for listed buildings),[459] and those customers would have no other options.

(d) the October 2015 Infringement may have affected customers in general (by excluding a competitor who might have reduced prices in the market and disrupted the Parties' existing relationships with their respective customers). However, the July 2016, August 2016 and April 2017 Infringements affected only one customer or one category of customers (e.g. buying groups). Additionally, there is evidence of competition with respect to some customers.

(e) the October 2015 Infringement had the objective of coordinating to exclude a potential competitor and/or preventing disruption of the Parties' existing relationships with their respective customers, thereby limiting the choice available to customers. The July 2016, August 2016 and April 2017 Infringements substantially lessened price competition for the affected customers, most probably resulting in higher prices and/or less choice for these customers.

6.28 Furthermore, there has already been a number of previous CMA investigations under the Act concerning anti-competitive conduct in the wider construction sector.[460] The CMA considers that the need for general

[458] Penalty Guidance, paragraph 2.5.

[459] URN 1840, paragraph 5.

[460] For instance *Supply of precast concrete drainage products* CMA Decision of 23 October 2019, *Supply of design, construction and fit-out services* CMA Decision of 16 April 2019*; Supply of galvanised steel tanks for water storage main cartel infringement* CMA Decision CE/9691/12 of 19 December 2016; *Supply of galvanised steel tanks for water storage information exchange infringement* CMA Decision CE/9691/12 of 19 December

deterrence means that the CMA should send a strong signal that anticompetitive behaviour in this sector will not be tolerated.

6.29 Considering the above factors in the round, the CMA has concluded that the appropriate starting points are as follows:

(a) 23% for the October 2015 Infringement;

(b) 24% for the July 2016 Infringement and the August 2016 Infringement;

(c) 22% for the April 2017 Infringement.

Step 2 – adjustment for duration

6.30 The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement.

6.31 As set out at paragraph 5.210, the duration of each of the Infringements was less than one year. Where this is the case, the CMA will treat the duration as being a full year for the purpose of calculating the number of years of that infringement (other than in exceptional circumstances).[461]

6.32 The CMA considers that there are no exceptional circumstances meriting a duration of less than a full year in this case. Accordingly, the CMA has applied a multiplier of one to each of the Infringements.

Step 3 – adjustment for aggravating and mitigating factors

6.33 The basic 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. A non-exhaustive list of aggravating and mitigating factors is set out in the Penalty Guidance.[462]

6.34 In the circumstances of this case, the CMA has adjusted the penalties at step 3 to take into account the following factors:

2016, *Bid rigging in the Construction Industry* OFT Decision CA98/02/2009 of 21 September 2009; *Aluminium Spacer Bars* OFT Decision CA98/04/2006 of 28 June 2006, *English and Scottish roofing contractors* OFT Decision CA98/01/2006 of 22 February 2006; *Felt and single ply roofing contracts in Western-Central Scotland* OFT Decision CA98/04/2005 of 8 July 2005; *and West Midland Roofing Contractors,* OFT decision of 17 March 2004.

[461] Penalty Guidance, paragraph 2.16.

[462] Penalty Guidance, paragraphs 2.17 to 2.19.

Aggravating factor – involvement of directors/senior management

6.35 The involvement of directors or senior management in an infringement can be an aggravating factor.[463]

6.36 In this case, the CMA has taken into consideration the direct involvement of the directors of BLM ([Director, BLM]) and of companies associated with IMI ([Director A, ALM/JML], [Director B, ALM/JML]) in establishing and implementing the Infringements. The CMA considers that company directors have an additional responsibility, beyond that of other employees, not to infringe the law, no matter the size of the undertaking.

6.37 The CMA has therefore applied an increase of 15% to the penalties of Eco-Bat and IMI for this factor.

Mitigating factor – adequate steps having been taken with a view to ensuring compliance with Chapter I and Chapter II prohibitions

6.38 Adequate steps taken by an undertaking with a view to ensuring future compliance with competition law can be a mitigating factor, which may merit a discount in penalty of up to 10%.[464] The mere existence of compliance activities will not be treated as a mitigating factor, but such activities are likely to be treated as a mitigating factor where an undertaking demonstrates that adequate steps, appropriate to the size of the business concerned, have been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the undertaking (from the top down).[465]

Eco-Bat

6.39 Eco-Bat has provided the CMA with details of its compliance programme and the steps taken to ensure a compliance culture within the undertaking. The CMA considers that the compliance activities undertaken by Eco-Bat demonstrate a clear and unambiguous commitment to a culture of competition law compliance and that it has taken appropriate steps relating to risk identification, risk assessment, risk mitigation and review since their introduction.

6.40 The CMA therefore considers that it is appropriate to decrease the penalty of Eco-Bat by 10% to reflect that it has taken appropriate steps with a view to ensuring compliance.

[463] Penalty Guidance, paragraph 2.18.
[464] Penalty Guidance, paragraph 2.19 and fn33.
[465] Penalty Guidance, fn33.

IMI

6.41 IMI has provided the CMA with details of a competition compliance programme which it is currently implementing. The CMA considers that the compliance activities undertaken by IMI demonstrate commitment to a culture of competition law compliance and that it has taken some steps relating to risk mitigation and review. However, the programme does not demonstrate that IMI has clearly identified or assessed areas where it might risk breaking competition law.

6.42 The CMA therefore considers that it is appropriate to decrease the penalty of IMI by 5% to reflect that it has taken some appropriate steps with a view to ensuring compliance.

Mitigating factor – cooperation which enables the enforcement process to be conducted more effectively

6.43 Cooperation which enables the enforcement process to be concluded more effectively and/or speedily can be a mitigating factor. The Penalty Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion).[466]

Eco-Bat

6.44 The CMA considers that it is appropriate to decrease Eco-Bat's penalty by 12% to reflect its significant and consistent cooperation throughout the CMA's investigation, which involved: (i) funding separate legal representation for [Director, BLM] once his role in the cartel became apparent, (ii) entering into a co-operation agreement with [Director, BLM] in which BLM forewent any damages claim against him in exchange for his co-operation with the CMA's investigation, (iii) providing a draft witness statement from [Director, BLM] in support of the CMA's allegations and making him available for two interviews, and (iv) making another employee available for interview when requested. BLM was generally cooperative throughout the investigation.

IMI

6.45 The CMA has considered whether it is appropriate to decrease IMI's penalty to reflect cooperation during the course of the investigation. IMI made three

[466] Penalty Guidance, paragraph 2.19 and footnote 35.

employees available for voluntary witness interviews and offered to cooperate on a number of occasions.

6.46 However, the CMA experienced difficulties with IMI, who often failed to comply with deadlines including, on one occasion, a formal request under under section 26 of the Act. IMI's conduct also unreasonably delayed the CMA's investigation on occasion, for example by waiting until the end of a four-week period in which the CMA had asked it to assess whether certain documents were protected by legal professional privilege to inform the CMA that it did not agree to the request to review the documents.

6.47 While the CMA has not proposed an aggravating uplift be applied for persistent unreasonable behaviour, the CMA has considered that IMI's general conduct during the investigation offset any gains in efficiency arising from the voluntary provision of witnesses for interview. In view of this, the CMA has concluded that the level of cooperation by IMI in the round did not enable the enforcement process to be concluded more effectively and/or speedily and therefore that no reduction is merited.

Step 4 – adjustment for specific deterrence and proportionality

6.48 The penalty may be adjusted at this step to achieve the objective of 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 to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking[467] as well as any other relevant circumstances of the case.[468]

6.49 Increases to the penalty figure at step 4 to ensure that the penalty to be imposed on the undertaking will deter it from breaching competition law in the future will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of the penalty reached at the end of step 3.[469]

[467] In this case the CMA has considered in particular, for each Party, the following indicators: worldwide turnover (three year average and last available year), profit after tax (three year average and last available year), net assets (last available year), adjusted net assets (that is the last available year's assets plus three years dividends), and three year average dividends.
[468] Penalty Guidance, paragraph 2.20.
[469] Penalty Guidance, paragraph 2.21.

6.50 In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or excessive having regard to the infringing undertaking's size and financial position and the nature of the infringement.[470]

6.51 At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the infringing undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.[471]

6.52 The CMA's consideration of step 4 in calculating the financial penalties for Eco-Bat and IMI is set out below.

Eco-Bat

6.53 The CMA considers that Eco-Bat's penalty after step 3 should be decreased by [✂]% to ensure that the level of penalty is proportionate and appropriate, having regard to Eco-Bat's size and financial position, whilst also taking into account the seriousness and nature of the Infringement, as well as Eco-Bat's level of involvement.

6.54 For the purpose of assessing Eco-Bat's size and financial position at step 4, the CMA has had regard to appropriate financial indicators in the round.[472]

6.55 Assessing the resulting penalty in the round, the CMA considers that a penalty of £10,095,630 after step 4 is appropriate in this case to act as a specific deterrent, without being disproportionate or excessive.

IMI

6.56 The CMA considers that IMI's penalty after step 3 should be decreased by [✂]% to ensure that the level of penalty is proportionate and appropriate, having regard to IMI's size and financial position, whilst also taking into

[470] Penalty Guidance, paragraph 2.23

[471] Penalty Guidance, paragraph 2.24.

[472] In particular, the CMA has taken into account that the adjusted penalty at step 4 represents: [✂]% of Eco-Bat's average worldwide turnover for its last three financial years; [✂]% of Eco-Bat's average profit after tax for its last three financial years; and [✂]% of Eco-Bat's adjusted net assets.

account the seriousness and nature of the Infringement, as well as IMI's level of involvement.

6.57 For the purpose of assessing IMI's size and financial position at step 4, the CMA has had regard to appropriate financial indicators in the round.[473]

6.58 Assessing the resulting penalty in the round, the CMA considers that a penalty of £1,776,738 after step 4 is appropriate in this case to act as a specific deterrent, without being disproportionate or excessive.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

6.59 The CMA may not impose a penalty for an infringement that exceeds 10% of the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision or, if figures are not available for that business year, the one immediately preceding it.[474]

6.60 The CMA has assessed the penalties for Eco-Bat and IMI after step 4 against the statutory maximum. This assessment has not necessitated a reduction to any of their penalties at step 5.

Step 6 – application of reduction for leniency and settlement

6.61 The CMA will reduce the undertaking's penalty where the undertaking has a leniency agreement with the CMA in accordance with the CMA's published guidance on leniency, provided always that the undertaking meets the conditions of the leniency agreement.[475]

6.62 Similarly, the CMA will reduce an undertaking's financial penalty at step 6 where the undertaking has entered into a settlement agreement with the CMA in accordance with the CMA's settlement policy.

Leniency

6.63 Neither of the Parties has a leniency agreement with the CMA, hence no reduction is warranted.

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[473] In particular, the CMA has taken into account that the adjusted penalty represents [✂]% of IMI's average worldwide turnover for its last three financial years and [✂]% of IMI's adjusted net assets. The CMA has also taken account of the fact that IMI has averaged a financial loss over the last three years.
[474] Section 36(8) of the Act and the 2000 Order, as amended. See also Penalty Guidance, paragraph 2.25.
[475] Penalty Guidance, paragraph 2.29. See also '*Applications for leniency and no-action in cartel cases*' (OFT 1495), available at www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases.

Settlement

6.64 The CMA will apply a penalty reduction where an undertaking settles with the CMA, which will involve, among other things, the undertaking admitting its participation in the infringement.[476]

6.65 As set out at paragraph 2.23, Eco-Bat and IMI have admitted the facts and allegations of infringement as set out in the SSO (subject to limited representations on manifest factual inaccuracies), which are now reflected in the Decision. In light of these admissions and their agreement to cooperate in expediting the process for concluding the investigation, the CMA has reduced Eco-Bat's penalty by 20% and IMI's penalty by 15%.

6.66 IMI's lower settlement discount reflects the additional time IMI took to inform the CMA of its interest in settling. This reduced the efficiencies that the CMA could achieve through a streamlined administrative procedure, which is the basis upon which the CMA will consider offering settlement.

Financial hardship

6.67 In exceptional circumstances, the CMA may reduce a penalty where the undertaking is unable to pay the penalty proposed due to its financial position. Such financial hardship adjustments will be exceptional.[477]

6.68 The penalties for the Parties do not include any adjustment for financial hardship, which the CMA does not consider would be warranted in this case.

Penalties imposed by the CMA

6.69 The total payable penalties imposed are as follows:

(a) £8,076,504 for Eco-Bat;

(b) £1,510,228 for IMI.

E. Payment of penalty

6.70 The CMA requires IMI and Eco-Bat to pay their respective penalties as set out at paragraph 6.69. Payment should be made by close of the banking business on 5 January 2021 or on such date or dates agreed in writing with the CMA.

6.71 If that date has passed and:

[476] Penalty Guidance, paragraph 2.30.
[477] Penalty Guidance, paragraph 2.33.

(a) 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

(b) such an appeal has been made and determined,

the CMA may commence proceedings to recover from the undertaking in question, as a civil debt due to the CMA, any amount payable which remains outstanding.[478]

[✂]

Ann Pope (Chair), Colleen Keck and Jonathan Scott
(the Case Decision Group)
for and on behalf of the Competition and Markets Authority

4 November 2020

[478] Section 37(1) of the Act.

Annex A – Defined terms

Term	Definition
2iM	Associated Lead Mills Limited, Jamestown Metals Limited (now Royston Sheet Lead Limited) and their former parent company International Industrial Metals Limited
Act	Competition Act 1998
Infringement	See definition at paragraph 1.4
ALM	Associated Lead Mills Limited
ALM/JML	Associated Lead Mills Limited and/or Jamestown Metals Limited (now Royston Sheet Lead Limited)
April 2017 Infringement	See definition at paragraph 1.4
August 2016 Infringement	See definition at paragraph 1.4
BLM	H.J. Enthoven Limited (trading as BLM British Lead)
Calder	Calder Industrial Materials Limited
Calder Group	Calder Industrial Materials Limited and its parent company Calder Group Holdings Limited
CAT	Competition Appeal Tribunal
CBG	Contractor Buying Group – see footnote 13
Chapter I prohibition	Section 2(1) of the Competition Act 1998
CMA	Competition and Markets Authority
CMA Rules	The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014, SI 2014/458
CMA73 or **Penalty Guidance**	*CMA's guidance as to the appropriate amount of a penalty* (CMA73, April 2018)
CMA8	*Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8, January 2019)
Court of Justice	Court of Justice of the European Union
December Inspections	Inspections at the premises of BLM and Calder under the power of warrants issued pursuant to section 28 of the Act on 4 December 2017
Eco-Bat	H.J. Enthoven Limited (trading as BLM British Lead) and its parent company Eco-Bat Technologies Limited
ELSIA	European Lead Sheet Industry Association
European Courts	General Court of the European Union and Court of Justice of the European Union
General Court	General Court of the European Union

Term	Definition
IMI	Associated Lead Mills Limited, Jamestown Metals Limited (now Royston Sheet Lead Limited) and their parent company International Metals Industries Limited
JML	Jamestown Metals Limited (now Royston Sheet Lead Limited)
July Inspections	Inspections at the premises of each of the Parties under the power of warrants issued pursuant to section 28 of the Act on 11 and 12 July 2017
July 2016 Infringement	See definition at paragraph 1.4
LME	London Metal Exchange
LSA	Lead Sheet Training Academy Limited, formerly known as the Lead Sheet Association Limited
LPF	Le Plomb Français
October 2015 Infringement	See definition at paragraph 1.4
Party/Parties	Associated Lead Mills Limited, Jamestown Metals Limited (now Royston Sheet Lead Limited) and their parent company International Metal Industries Limited; and H.J. Enthoven Limited (trading as BLM British Lead) and its parent company Eco-Bat Technologies Limited
Primary Phone	[Director, BLM]'s primary business mobile phone
Relevant Market	The supply of Rolled Lead in the UK
Relevant Turnover	The turnover of an undertaking in the relevant product market and relevant geographic market
Rolled Lead	Rolled milled lead
Second Phone	[Director, BLM]'s additional mobile phone
SO	CMA Statement of Objections dated 27 March 2019
SO Alleged Infringement	See definition at paragraph 2.20
SO Party/Parties	Associated Lead Mills Limited, Jamestown Metals Limited (now Royston Sheet Lead Limited) and their former parent company International Industrial Metals Limited; H.J. Enthoven Limited (trading as BLM British Lead) and its parent company Eco-Bat Technologies Limited; and Calder Industrial Materials Limited and its parent company Calder Group Holdings Limited
SSO	Supplementary Statement of Objections dated 12 June 2020
TFEU	Treaty on the Functioning of the European Union

Term	Definition
UK	United Kingdom

Annex B – Calls and text messages of 26 July 2016