

Decision of the Competition and Markets Authority

Competition Act 1998

Domestic Lighting: anti-competitive practices
concerning resale price maintenance

Case 50952

Section 31 Competition Act 1998

23 March 2022



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

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 Names have been replaced by a general descriptor of the individual's role

CONTENTS

1. Introduction and Executive Summary	1
2. The background and the Investigation	8
Background	8
The Investigation	8
3. Facts	16
Addressees of the Decision.....	16
Dar Lighting Limited	16
Supply of branded Domestic Lighting Products	16
White label and other supply agreements	17
Dar’s sales and distribution network	19
Castlegate 624	19
Lighting sector overview.....	19
Lighting Products	19
The UK Lighting Sector	20
Distributors of Domestic Lighting Products	22
Importance of the internet as a retail channel	22
Price competition in the UK lighting sector.....	23
Market Definition	25
CMA’s conclusion on the relevant market.....	25
Purpose of and framework for assessing the relevant market	25
The relevant product market	26
The relevant geographic market	29
Conclusion on market definition	29
Context and background to and support for the Dar Pricing Policy	30
Dar’s interaction with the CMA prior to the Investigation.....	30
Dar’s move to selective distribution systems.....	31
The use of selective distribution agreements	33
Dar’s selective distribution agreements created an environment to support the Dar Pricing Policy.....	34
Relevant provisions of Dar’s SDAs and Brand Guidelines	34
Certain provisions of the SDAs and/or the Brand Guidelines may have supported an environment that seemed inimical to discounting in the minds of Resellers	35

Dar's implementation and enforcement of the SDAs and/or the Brand Guidelines created a perception amongst Resellers that the SDAs allowed Dar to prevent discounting.....	38
The role played by the display of the RRP and its link to Resellers' selling price	47
Dar Pricing Policy	52
Conclusion	52
Nature of evidence.....	52
People involved: roles and reporting lines	53
Table 3.1: Relevant Dar employees.....	53
Commercial aims, content and communication, scope and duration	56
Commercial aims of the Dar Pricing Policy.....	56
Content and Communication	59
Scope of the Dar Pricing Policy.....	72
Scope: applied to online pricing.....	73
Scope: applied to all Relevant Products	73
Scope: applied to all Dar Resellers.....	74
Duration	74
Monitoring and enforcement of the Dar Pricing Policy	74
Overview	74
Dar issued new price lists and Dar staff contacted Resellers after issuing new price lists with a view to ensuring compliance.....	75
Lighting 'shows' and Dar product launches	76
At Dar's and Resellers' showrooms.....	76
Dar's showroom.....	77
Resellers' showrooms	78
Discussions around pricing matters.....	78
Discussions around margins for Volume 2	80
Discussions about Volume 2 being 'competitive'	80
Discussions on the benefit of 'supplement products'	81
Discussions around the benefits of the price increase and Volume 2 brochure/new catalogue	82
By email, telephone and/or encrypted messaging	83
Dar proactively monitored Resellers' websites from time to time.....	86
The CMA's findings in relation to Dar's monitoring of Resellers' websites	91
Resellers' reporting.....	92
Monitoring by Resellers	92

2017	93
2018	96
2019	97
2020	97
Consequences for Resellers of non-compliance with the Dar Pricing Policy	98
Dar considered and gave instructions as to the threat of sanctions	99
Sanctions threatened/perceived	99
Sanctions imposed	104
Conclusions on the consequences for Resellers of non-compliance with the Dar Pricing Policy	106
Dar’s awareness about the potential illegality of implementing and enforcing the Dar Pricing Policy.....	106
Dar’s staff had a very high degree of relevant and specific knowledge that the implementation and enforcement of the Dar Pricing Policy was potentially illegal	107
Dar’s staff openly demonstrated to Resellers that they understood that the implementation and enforcement of a policy such as the Dar Pricing Policy would be potentially illegal	111
Dar was alerted to the possibility that the implementation and enforcement of the Dar Pricing Policy was potentially illegal by Resellers	115
Dar was aware of the CMA’s continued interest in the lighting industry about matters of RPM.....	115
Dar had been made aware that a possible complaint to or investigation by the CMA was under consideration	115
Dar’s culture of concealment	117
Conclusion.....	121
Illustrative examples of Dar’s monitoring and enforcement.....	121
Volume 1 examples of monitoring and enforcement of the Dar Pricing Policy	123
Volume 2 examples of monitoring and enforcement of the Dar Pricing Policy	130
David Hunt examples of monitoring and enforcement of the Dar Pricing Policy	137
4. Legal Assessment	142
Introduction.....	142
Undertakings	144
Key legal principles	144

Conclusion on undertakings.....	144
Agreement and/or Concerted Practice	145
Key legal principles	145
Agreement	146
Concerted Practice	148
Agreement and/or concerted practice between Dar and each of [Reseller 1] and [Reseller 2].....	149
Dar’s communication of the Dar Pricing Policy.....	149
The Dar Pricing Policy applied to the vast majority of Dar’s Resellers ...	150
Agreement and/or concerted practice between Dar and [Reseller 1]	151
Agreement and/or concerted practice between Dar and [Reseller 2]	178
Object of Preventing, Restricting or Distorting Competition.....	204
Key legal principles	204
General.....	204
Resale Price Maintenance.....	205
Price advertising, advertising and other similar restrictions	207
Legal Assessment of the [Reseller 1] Agreement and [Reseller 2] Agreement	211
Content of the Agreements.....	211
Objectives of the Agreements	213
Legal and economic context of the Agreements.....	214
Conclusion on the object of the Agreements	214
Appreciable Restriction of Competition	214
Key legal principles	214
Legal assessment.....	215
Effect on Trade within the UK.....	215
Key legal principles	215
Legal assessment.....	216
Exclusion or Exemption	216
Exclusion.....	216
Block exemption / Retained exemption.....	217
Individual exemption	217
Attribution of Liability	218
Key legal principles	218
Liability for the Infringements	221
Conclusion on joint and several liability	221

Burden and Standard of Proof.....	222
Burden of proof	222
Standard of proof	222
Presumptions and inferences	223
Assessment	225
5. The CMA's Action.....	226
The CMA's Decision.....	226
Directions	226
Financial penalties.....	227
General	227
The CMA's margin of appreciation in determining the appropriate penalty.....	227
Small agreements	228
Intention/negligence.....	228
Calculation of Penalties	231
Step 1 – the starting point.....	231
Step 2 – adjustment for duration.....	237
Step 3 – adjustment for aggravating and mitigating factors.....	237
Step 4 – adjustment for specific deterrence and proportionality	239
Step 5 – adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy	240
Step 6 – application of reduction for settlement.....	240
Penalty	240
Payment of penalty	241

1. Introduction and Executive Summary

1.1 This Decision is addressed to Dar Lighting Limited ('Dar') and its immediate and ultimate parent company, Castlegate 624 Limited ('**Castlegate 624**') (together, '**Dar Group**').

1.2 By this Decision,¹ the Competition and Markets Authority (the '**CMA**') has concluded that:

1.2.1 Dar infringed the prohibition in section 2(1) of the Competition Act 1998 (the '**Act**') ('**the Chapter I prohibition**') by entering into an agreement and/or participating in a concerted practice with each of [Reseller 1] ('**[Reseller 1]**') and [Reseller 2] ('**[Reseller 2]**'), two of Dar's UK resellers of Domestic Lighting Products:

- whereby each of [Reseller 1] and [Reseller 2] would not advertise or sell online Domestic Lighting Products below a price specified by Dar from time to time (the '**Minimum Price**'); and
- which amounted to resale price maintenance ('**RPM**') in respect of online sales of the Relevant Products by [Reseller 1] (the '**[Reseller 1] Agreement**') and [Reseller 2] (the '**[Reseller 2] Agreement**'); and

1.2.2 Each of the [Reseller 1] Agreement and the [Reseller 2] Agreement:

- had as its object the prevention, restriction or distortion of competition within the UK;
- may have affected trade within the UK; and
- lasted from 3 December 2017 to 25 September 2019 in the case of the [Reseller 1] Agreement and from 1 August 2017 to 27 March 2019 in the case of [Reseller 2] Agreement

(together referred to below as the '**Infringements**').

1.3 The CMA has decided to attribute liability for Dar's Infringements also to its immediate and ultimate parent company, Castlegate 624, making Dar and Castlegate 624 jointly and severally liable for the Infringements.

1.4 The CMA has applied Rule 10(2) of the CMA Rules in this case and has addressed this Decision only to the undertakings identified in paragraph 1.1 above (ie the Dar Group) and not to [Reseller 1] or [Reseller 2].

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

1.5 The CMA has imposed a financial penalty on the Dar Group under section 36(1) of the Act in respect of the Infringements.

Glossary

Table 1.1 Glossary

Term	Definition
Dar	Dar Lighting Limited (Company Number 05270864)
Dar Group	Dar and its immediate and ultimate parent company, Castlegate 624
Castlegate 624	Castlegate 624 Limited (Company Number 07328014), Dar's immediate and ultimate parent company
[Reseller 1]	[Reseller 1] Company Number [X]
[Reseller 2]	[Reseller 2] Company Number [X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
[Reseller]	[X]
Act	Competition Act 1998
Advisory Letter	A letter issued by the CMA (or previously, by the OFT) to a business following a complaint or other intelligence that the said business may be infringing competition law ²
Agreements	The [Reseller 1] Agreement and the [Reseller 2] Agreement collectively, as specified in paragraph 1.2.1 above

² See further information on Advisory Letters at [How to respond to a warning or advisory letter from the CMA - GOV.UK \(www.gov.uk\)](http://www.gov.uk).

Term	Definition
AMA Lighting Market Report UK 2020 - 2024	Report prepared by the market research company, AMA Research Limited (15 th Edition)
Brand Guidelines	Supplementary guidelines issued from time to time by Dar relating to the DHL SDA (DHL Brand Guidelines) and där lighting SDA (där lighting Brand Guidelines), covering the use of images, logos and straplines on Resellers' websites featuring the Relevant Products
Brands of Relevant Products	Include each of David Hunt Lighting, The Light Shade Studio and där lighting (including, for example, Wisebuys, the lighting book and The Lighting Studio)
CAT	Competition Appeal Tribunal
Chapter I prohibition	The prohibition imposed by section 2(1) of the Competition Act 1998
CMA	The Competition and Markets Authority
CMA Rules	The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/58)
Commission	The European Commission
Court of Justice	The Court of Justice of the European Union (formerly the European Court of Justice)
Dar Internal Report	An internal Dar report compiled by sales representatives and circulated internally within Dar, including to [Dar Senior Employee], during the Relevant Period. These reports summarise weekly calls and/or visits to Resellers and are sometimes referred to by Dar as 'Calls Reports' 'Pixsell Activity Reports', ³ 'Weekly reports', 'Activity reports', etc.
där lighting	A brand of Relevant Products supplied by Dar during the Relevant Period which Dar categorises as a mid - to upper - level brand. The där lighting brand also includes several sub-brands: Wisebuys, The Lighting Book, The Lighting Studio, Lumis Lighting and Solus Lighting
Dar Pricing Policy	The arrangements between Dar and its Resellers according to which Resellers would not advertise or sell the Relevant Products online at prices below the Minimum Price
David Hunt Products / DHL Products	Relevant Products supplied by Dar during the Relevant Period under the David Hunt brand, which Dar categorises as a high-end target brand, relating to 'history' and 'luxury'. According to Dar, such products are typically hand-crafted and manufactured in small batches or as manufacture-to-order pieces, aiming to provide a high-end, bespoke personal service
Domestic Lighting Products	Lighting products which comprise lamps (ie sources of light); luminaires (referred to as 'light fittings', ie light fittings which house sources of light), which include, among other things, light or lamp shades, table lamps, ceiling light fittings, wall light

³ 'Pixsell' is the software used by Dar's regional sales team to record their activities, provide quotes and take orders from customers.

Term	Definition
	fittings and security light fittings; controls; and related components, the end users of which are domestic customers
Draft Penalty Calculation	A draft calculation of the maximum total penalty to be imposed on Dar Group in the event that a settlement was agreed in this case, sent to Dar Group by the CMA on 15 December 2021
European Courts	The General Court and the Court of Justice
First Dar Section 26 Notice	Section 26 Notice issued by the CMA to Dar on 25 November 2020
First [Reseller 2] Section 26 Notice	Section 26 Notice issued by the CMA to [Reseller 2] on 5 May 2021
First Warning Letter	A Warning Letter issued by the OFT to Dar on 18 May 2012
First [Reseller 1] Section 26 Notice	Section 26 Notice issued by the CMA to [Reseller 1] on 25 November 2020
General Court	The General Court of the European Union (formerly the Court of First Instance)
IBIS World Industry Report UK	Report prepared by market research company, IBIS World, October 2020 edition
Infringements	The [Reseller 1] Infringement and [Reseller 2] Infringement of the Chapter I prohibition collectively, as specified in paragraph 1.2 above
LIA	Lighting Industry Association
Lighting Products	Products comprising of lamps (ie sources of light), luminaires (referred to as 'light fittings', ie items housing sources of light), which include, among other things, light or lamp shades, table lamps and ceiling, wall and security light fittings), controls, and related components
List Price	The price listed on Dar price lists from time to time under RRP excluding VAT for a Relevant Product
MAP	Minimum advertised price
Minimum Price	The minimum price(s) specified by Dar from time to time in connection with the Dar Pricing Policy
NLC Decision	CMA decision in Case 50343 <i>Online resale price maintenance in the light fittings sector</i> . See Light fittings sector: anti-competitive practices - GOV.UK (www.gov.uk)
NLC Investigation	CMA investigation in Case 50343 <i>Online resale price maintenance in the light fittings sector</i> . See Light fittings sector: anti-competitive practices - GOV.UK (www.gov.uk)
OEM	Original equipment manufacturer
OFT	The Office of Fair Trading, one of the CMA's predecessor organisations
Penalties Guidance	<i>CMA's guidance as to the appropriate amount of a penalty</i> (CMA73, 18 April 2018)
Prioritisation Principles	As set out at CMA Prioritisation Principles - GOV.UK (www.gov.uk)
Relevant Period	The period from 1 January 2017 to 25 November 2020
Relevant Products	All Domestic Lighting Products supplied by Dar to its UK Resellers during the Relevant Period

Term	Definition
Reseller(s)	Resellers who buy, stock and sell Domestic Lighting Products, including the Relevant Products for resale, in the UK. Resellers often have a bricks-and-mortar store with showroom capacity, and many have an online e-commerce website. These resellers usually stock and sell a broad selection of lighting products
Roland	The CAT judgment of 21 April 2021 in Case 1365/1/12/20 <i>Roland (U.K.) Limited and Roland Corporation v Competition and Markets Authority</i>
RPM	Resale price maintenance
RRP	Recommended retail price
Section 26 Notice	A notice issued under section 26 of the Act, which formally requires the production of specified information or documents, which the CMA considers relate to any matter relevant to its investigation
SDA	Selective Distribution Agreement
Second Dar Section 26 Notice	Section 26 Notice issued by the CMA to Dar on 8 July 2021
Second [Reseller 2] Section 26 Notice	Section 26 Notice issued by the CMA to [Reseller 2] on 19 October 2021
Second Warning Letter	A warning letter issued by the CMA to Dar on 20 June 2017
Second [Reseller 1] Section 26 Notice	Section 26 Notice issued by the CMA to [Reseller 1] on 25 June 2021
Special Contract Products	A particular type of white label arrangement that Dar has with certain Resellers, as described in paragraph 3.5
SRP	Suggested retail price
Statement of Objections	A provisional decision issued by the CMA to Dar Lighting Limited and Castlegate 624 Limited on 15 December 2021 alleging that Dar had infringed the Chapter I prohibition of the Act
The Light Shade Studio / LSS	A brand of Relevant Products supplied by Dar during the Relevant Period which Dar categorises as high-end and complementary to DHL, in that it includes hand-made luxury shades, which it also provides for DHL light fittings
The Lighting Book / the Catalogue	Dar's main trade catalogue, generally republished each September. Within the Catalogue are Volume 1 and Volume 2. Since September 2019, the publication has been split in two due to size limitations. Volume 2 contains those products launched after 2 September 2018
Third Dar Section 26 Notice	Section 26 Notice issued by the CMA to Dar on 20 October 2021
Third [Reseller 1] Section 26 Notice	Section 26 Notice issued by the CMA to [Reseller 1] on 14 October 2021
VABER	Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices (OJ L 102,

Term	Definition
	23.4.2010), known as the Vertical Agreements Block Exemption Regulation
Vertical Guidelines	Commission Guidelines on Vertical Restraints [2010] OJ C130/01
Volume 1 Products	där lighting branded Relevant Products launched before 2 September 2018, subsequently included in Volume 1 of The Lighting Book (or the Catalogue). For the purposes of this Decision, Wisebuys products launched before 2 September 2018 are included in Volume 1 Products
Volume 2 Products	där lighting branded Relevant Products launched on or after 2 September 2018, subsequently included in Volume 2 of The Lighting Book (or the Catalogue). For the purposes of this Decision, Wisebuys products launched on or after 2 September 2018 are included in Volume 2 Products. For the purposes of this Decision, Volume 2 Products shall also include any där lighting branded Relevant Products launched on or after 2 September 2018, listed in a supplement issued by Dar and known as 'supplement products'
Warning Letter	A letter issued by the CMA (or previously, by the OFT) to a business following a complaint or other intelligence that the said business may be infringing competition law ⁴
Wisebuys	A brand of Relevant Products, which are a sub-brand of där lighting and which Dar categorises as being entry-level products. Wisebuys' price lists refer to SRPs of Relevant Products rather than RRP

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

⁴ See further information on Warning Letters at [How to respond to a warning or advisory letter from the CMA - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/how-to-respond-to-a-warning-or-advisory-letter-from-the-cma).

2. The background and the Investigation

Background

- 2.1 On 18 May 2012, the Office of Fair Trading ('OFT')⁵ issued a Warning Letter to Dar regarding a potential infringement of competition law as a result of suspected resale price maintenance (the '**First Warning Letter**').⁶
- 2.2 On 24 May 2012, Dar responded to the First Warning Letter, confirming receipt and stating that it takes compliance matters very seriously and that it would seek legal advice.⁷
- 2.3 On 20 June 2017, the CMA issued a further Warning Letter to Dar regarding a potential infringement of competition law as a result of suspected resale price maintenance (the '**Second Warning Letter**').⁸ On the same date, the CMA also issued Warning Letters to five other manufacturers of Lighting Products, and Advisory Letters to seven other manufacturers.
- 2.4 On 26 June 2017, Dar responded to the Second Warning Letter, confirming receipt and stating that it takes compliance matters very seriously and that it would urgently conduct a review of its activities.⁹
- 2.5 On 17 August 2017, Dar and its legal advisers met with the CMA, in respect of the concerns set out in the Second Warning Letter.¹⁰
- 2.6 On 4 September 2017, in a letter to the CMA, Dar outlined the steps it had taken, and the steps it proposed to take, in response to the Second Warning Letter.¹¹
- 2.7 On 30 January 2018, [Dar Senior Employee], as a member of the Lighting Industry Association ('LIA'), attended a meeting between the LIA and CMA representatives.¹²

The Investigation

- 2.8 On 25 November 2020, the CMA opened a formal investigation under section 25 of the Act (the '**Investigation**') into a suspected competition law infringement by Dar.

⁵ One of the CMA's predecessor organisations.

⁶ GMM-000333598 (First Warning Letter).

⁷ GMM-000333600 (Dar's response dated 24 May to the First Warning Letter).

⁸ GMM-000333599 (Second Warning Letter).

⁹ GMM-000333601 (Dar's response dated 26 June 2017 to the Second Warning Letter).

¹⁰ GMM-000333602 (Letter from Dar's legal advisers to the CMA dated 4 September 2017).

¹¹ *Ibid.*

¹² GMM-000333642 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 1(c).

The CMA did so having determined that it had reasonable grounds for suspecting that:

- 2.8.1 Dar had infringed the Chapter I prohibition by being involved in anti-competitive agreements and/or concerted practices (**'arrangements'** where the context permits) with certain of its UK Resellers between September 2008 and 25 November 2020;
 - 2.8.2 these arrangements restricted the price at which Domestic Lighting Products supplied by Dar were advertised online and/or in store by certain of its UK Resellers; and
 - 2.8.3 this, in turn, restricted the price at which Domestic Lighting Products were sold by Resellers – making the arrangements a form of Resale Price Maintenance (**'RPM'**) or Minimum Advertised Pricing (**'MAP'**) amounting to RPM.
- 2.9 At the same time, the CMA made an administrative decision to focus evidence-gathering in the Investigation on the period from 1 January 2017 to 25 November 2020 (**'Relevant Period'**).
- 2.10 On 25 November 2020, the CMA formally launched the Investigation by issuing a notice under Section 26 of the Act (a **'Section 26 Notice'**) to Dar, requiring the provision of specified information and production of specified documents (**'First Dar Section 26 Notice'**). Dar submitted its response to the First Dar Section 26 Notice in tranches, between 11 December 2020¹³ and 19 March 2021.¹⁴
- 2.11 On the same date, the CMA also issued Section 26 Notices to certain senior Dar employees in their personal capacity, namely, to [Dar Senior Employee], [Dar Senior Employee] and [Dar Senior Employee].¹⁵ [Dar Senior Employee],¹⁶ [Dar Senior Employee]¹⁷ and [Dar Senior Employee]¹⁸ each submitted a response to

¹³ See GMM-000333642, GMM-000333640 and GMM-000333643 (Responses dated 11 December 2020 to the First Dar Section 26 Notice). Dar also submitted annexes to its responses.

¹⁴ See GMM-000600424 and GMM-000600426 (Responses dated 19 March 2021 to the First Dar Section 26 Notice). Dar also submitted annexes to its responses.

¹⁵ The CMA also asked these individuals to i) describe their role in responding to the First Dar Section 26 Notice and to ii) confirm that all material accessible by them or on their behalf, which was responsive to the First Dar Section 26 Notice had been included in either Dar's response to the First Dar Section 26 Notice, or as part of these individuals' responses to the Section 26 Notices addressed to them in their personal capacity.

¹⁶ GMM-000333596 (Response dated 4 December 2020 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2020) and GMM-000600432 (Response dated 19 March 2021 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2020).

¹⁷ GMM-000333591 (Response dated 4 December 2020 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2020) and GMM-000600428 (Response dated 19 March 2021 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2020).

¹⁸ GMM-000333595 (Response dated 4 December 2020 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2021) and GMM-000600430 (Response dated 19 March 2021 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2020).

their Section 26 Notices in tranches, between 4 December 2020 and 19 March 2021.

2.12 Also, on 25 November 2020, the CMA issued Section 26 Notices to the following seven Resellers, requiring production of specified information and specified documents:

2.12.1 [Reseller];

2.12.2 [Reseller];

2.12.3 [Reseller];

2.12.4 [Reseller];

2.12.5 [Reseller];

2.12.6 [Reseller]; and

2.12.7 [Reseller 1] ('First [Reseller 1] Section 26 Notice').

2.13 At the same time, the CMA issued Section 26 Notices to certain employees of six of the above seven Resellers in their personal capacity, as follows:

2.13.1 [Employee of Reseller];

2.13.2 [Employee of Reseller];

2.13.3 [Employee of Reseller];

2.13.4 [Employee of Reseller];

2.13.5 [Employee of Reseller]; and

2.13.6 [Employee of Reseller].¹⁹

2.14 On 4 December 2020, the CMA issued follow-up Section 26 Notices to each of these seven Resellers. On the same day, the CMA also issued follow-up Section 26 Notices to the abovementioned employees of these Resellers, in their personal capacity.

¹⁹ The CMA also asked these individuals receiving a Section 26 Notice in their personal capacity to i) describe their role in responding to the Section 26 Notice sent to their company and to ii) confirm that all material accessible by them, or on their behalf, which was responsive to the Section 26 Notice sent to their company had been included in either their company's corporate response, or as part of such these individuals' personal responses to the Section 26 Notices sent to them.

- 2.15 On 22 April 2021, the CMA conducted a voluntary interview with [Employee of Reseller].²⁰
- 2.16 On 28 April 2021, the CMA conducted a voluntary interview with [Employee of Reseller].²¹
- 2.17 Between 29 April and 9 July 2021, the CMA issued Section 26 Notices to the following additional ten Resellers and/or individuals (in their personal capacity):
- 2.17.1 A Section 26 Notice to [Reseller] and a Section 26 Notice to [Employee of Reseller];
 - 2.17.2 A Section 26 Notice to [Reseller] and a Section 26 Notice to [Employee of Reseller];
 - 2.17.3 A Section 26 Notice to [Reseller] and a Section 26 Notice to [Employee of Reseller];
 - 2.17.4 A Section 26 Notice to [Reseller] and a Section 26 Notice to [Employee of Reseller];
 - 2.17.5 A Section 26 Notice to [Reseller] and a Section 26 Notice to [Employee of Reseller];
 - 2.17.6 A Section 26 Notice to [Reseller] and a Section 26 Notice to [Employee of Reseller];
 - 2.17.7 A Section 26 Notice to [Reseller] and a Section 26 Notice to [Employee of Reseller];
 - 2.17.8 A Section 26 Notice to [Reseller] and a Section 26 Notice to [Employee of Reseller];
 - 2.17.9 A Section 26 Notice to [Reseller], and a Section 26 Notice to [Employee of Reseller];
 - 2.17.10 A Section 26 Notice to [Reseller 2] (**'First [Reseller 2] Section 26 Notice'**), and a Section 26 Notice to each of [Employee of Reseller 2] and [Employee of Reseller 2], [X].²²

²⁰ GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021).

²¹ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021). [Employee of Reseller], was also in attendance at this interview. [Employee of Reseller] was not an interviewee and [X] involvement in the interview was limited to locating documents for [Employee of Reseller].

²² [Employee of Reseller 2] was a [X] of [Reseller 2] at the time he received an individual Section 26 Notice. At the time of the contemporaneous evidence obtained by the CMA involving [Employee of Reseller 2], he was a [X] at [Reseller 2].

- 2.18 Despite making efforts to do so, the CMA was unable to organise an interview with or receive information from [Employee of Reseller 1].
- 2.19 On 25 June 2021, the CMA issued a further Section 26 Notice to [Reseller 1] (**'Second [Reseller 1] Section 26 Notice'**).
- 2.20 On 8 July 2021, the CMA issued a further Section 26 Notice to Dar (**'Second Dar Section 26 Notice'**), requiring the provision of specified information and production of specified documents. Dar submitted its response to the Second Dar Section 26 Notice in tranches, between 23 July 2021 and 6 August 2021.²³
- 2.21 On 15 July 2021, the CMA issued a follow-up Section 26 Notice to [Dar Senior Employee], in his personal capacity. [Dar Senior Employee] submitted responses to the follow-up Section 26 Notice on 6 and 13 August 2021.²⁴
- 2.22 On 19 July 2021, the CMA held a State of Play meeting with Dar and its legal advisers, to provide an outline of the status of the Investigation and proposed administrative steps.
- 2.23 On 23 July 2021, Dar submitted that certain of its Resellers who had themselves received a Section 26 Notice from the CMA had approached Dar, asking whether the Investigation was legitimate and *'whether Dar was able to assist with responding'*,²⁵ contrary to the obligations imposed on such Resellers under the Section 26 Notices.²⁶ Dar provided information about seven instances of such interaction:²⁷

Table 2.1 Contact made by certain of Dar's Resellers with Dar outside the ordinary course of business, following the launch of the CMA's Investigation.

Date of contact	Reseller
End of December 2020 or early January 2021	[Employee of Reseller]
February 2021	[Employee of Reseller]
February 2021	[Employee of Reseller]
April 2021	[Employee of Reseller]
5 May 2021	[Employee of Reseller]
End of April 2021 or early May 2021, and again around 10 June 2021	[Employee of Reseller]

²³ GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), GMM-000601424 (Response dated 30 July 2021 to the Second Dar Section 26 Notice) and GMM-000601433 (Response dated 6 August 2021 to the Second Dar Section 26 Notice).

²⁴ GMM-000601414 (Response dated 6 August 2021 to the Section 26 Notice to [Dar Senior Employee] dated 15 July 2021) and GMM-000601418 (Response dated 13 August 2021 to the Section 26 Notice to [Dar Senior Employee] dated 15 July 2021).

²⁵ GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice).

²⁶ Section 26 Notices to Resellers state, *'You should not disclose or discuss this notice, its contents [...] or the existence of this investigation with any other individual or corporate entity outside of [your company] and its legal advisers, without prior discussion with the CMA.'*

²⁷ GMM-000601410 (Annex 2.1 to response dated 23 July 2021 to the Second Dar Section 26 Notice).

Around March 2021 and again around May 2021	[Employee of Reseller]
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- 2.24 On 27 July 2021 the CMA sent Dar a letter outlining the CMA's access to file procedure. Dar agreed to the CMA's proposed procedure on 10 August 2021.
- 2.25 On 2 August 2021, the CMA wrote to Dar to seek further information regarding aspects in which Dar's response to the Second Dar Section 26 Notice appeared incomplete and needed further clarification. In particular, the CMA asked clarificatory questions regarding Christmas gifts, eg, wine cases and other gifts, and letters relating to the CMA's Investigation, delivered by Dar to certain Resellers which Dar was aware had received a Section 26 Notice on 25 November 2020.²⁸ Dar responded to the CMA's clarificatory questions on 6 August 2021.²⁹
- 2.26 On 20 August 2021, having reviewed both the original response dated 23 July 2021 to the Second Dar Section 26 Notice, and Dar's clarification dated 6 August 2021, the CMA wrote again to Dar, expressing its surprise and concern regarding Dar's decision to provide Resellers involved in the Investigation with letters relating to the Investigation, alongside hand-delivered Christmas gifts, as well as Dar's failure to disclose the existence of the letters in the original response dated 23 July 2021 to the Second Dar Section 26 Notice. The CMA considered that Dar should have disclosed this information earlier, as it was clearly responsive to the Second Dar Section 26 Notice.³⁰ The CMA also reminded Dar of its obligation not to discuss the Investigation with Resellers without prior discussion with the CMA, as set out in the First Dar Section 26 Notice.
- 2.27 On 13 September 2021, the CMA conducted a voluntary interview with [Employee of Reseller].³¹
- 2.28 On 14 September 2021, the CMA conducted a voluntary interview with [Employee of Reseller 2].³²
- 2.29 On 16 September 2021, the CMA conducted a voluntary interview with [Dar Senior Employee].³³

²⁸ Dar knew from its own First Dar Section 26 Notice which Resellers would have received a Section 26 Notice at the launch of the Investigation.

²⁹ GMM-000601446 (Response dated 6 August 2021 to the CMA's clarificatory questions dated 2 August 2021).

³⁰ The Second Dar Section 26 Notice asked Dar to provide details of i) any communication between Dar and Resellers regarding the Investigation since its launch, and of ii) Dar personnel having attended premises of any Reseller since the launch of the Investigation.

³¹ GMM-000601948 (Transcript of interview with [Employee of Reseller] on 13 September 2021).

³² GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021).

³³ GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021).

- 2.30 On 7 October 2021, the CMA sent a letter to [Reseller 1], informing it of the CMA's decision to scope it into the Investigation, and its provisional decision to apply Rule 5(3) of the CMA Rules in the Investigation.
- 2.31 On 14 October 2021, the CMA sent a letter to [Reseller 2], informing it of the CMA's decision to scope it into the Investigation, and its provisional decision to apply Rule 5(3) of the CMA Rules in the Investigation.
- 2.32 Also, on 14 October 2021, the CMA issued a third Section 26 Notice to [Reseller 1] (**'Third [Reseller 1] Section 26 Notice'**). On 22 October 2021, [Reseller 1] submitted a response to the Third [Reseller 1] Section 26 Notice.³⁴
- 2.33 On 19 October 2021, the CMA issued a second Section 26 Notice to [Reseller 2] (**'Second [Reseller 2] Section 26 Notice'**). On 25 October 2021, [Reseller 2] submitted a response to the Second [Reseller 2] Section 26 Notice.³⁵
- 2.34 On 20 October 2021, the CMA issued a third Section 26 Notice to Dar (**'Third Dar Section 26 Notice'**). On 2 November 2021, Dar submitted a response to the Third Dar Section 26 Notice.
- 2.35 On 8 November 2021, the CMA held a second State of Play meeting with Dar's legal advisers, to provide an update on the status of the Investigation and proposed administrative steps.
- 2.36 On 18 November 2021, in a call between the CMA and Dar, Dar indicated that it was interested in entering into settlement discussions with the CMA.
- 2.37 On 19 November 2021, Dar confirmed in writing its interest in settling the case.
- 2.38 On 2 December 2021, the CMA wrote to Dar to advise it of the settlement timetable and draft Terms of Settlement. On 9 December 2021, Dar confirmed that it agreed in principle to settlement of the matter.³⁶
- 2.39 On 15 December 2021, the CMA issued a Statement of Objections (**'SO'**)³⁷ addressed to Dar and Castlegate 624, in which it made a provisional decision that Dar had infringed the Chapter I prohibition of the Act. The SO also set out the CMA's intention to hold Castlegate 624 jointly and severally liable for Dar's alleged infringements on the basis that it had been the latter's parent company throughout the period of the Infringements. In the circumstances of this case, the CMA applied Rule 5(3) of the CMA Rules and addressed the SO only to Dar and Castlegate 624

³⁴ GMM-000601954 (Response dated 22 October 2021 to the Third [Reseller 1] Section 26 Notice).

³⁵ GMM-000601960 (Response dated 25 October 2021 to the Second [Reseller 2] Section 26 Notice).

³⁶ This follows Dar having written to the CMA on 19 November 2021 to express an interest in entering into discussions to explore settlement in relation to this Investigation.

³⁷ Subject to Rule 5(2) of the CMA Rules.

and not to the Reseller counterparties to the alleged agreement/s and/or concerted practice/s as set out in the SO.³⁸

- 2.40 On the same date the CMA also provided Dar with a draft penalty calculation ('**Draft Penalty Calculation**') addressed to Dar Group, setting out the CMA's proposed maximum level of penalty in relation to the alleged infringements.
- 2.41 On 16 December 2021, the CMA informed [Reseller 2] and [Reseller 1] that it had issued the SO to Dar and Castlegate 624 and alerted [Reseller 2] and [Reseller 1] to the opportunity for [Reseller 2] and [Reseller 1] to provide representations on the SO. Following a request on the same date from [Reseller 1] to see the SO, the CMA provided [Reseller 1] on 14 January 2022 with a copy of the SO. Having seen the SO, [Reseller 1] did not make any representations save for highlighting certain minor factual inaccuracies concerning references to former [Reseller 1] personnel. [Reseller 2] declined the opportunity to see and/or provide representations on the SO.
- 2.42 On 14 January 2022, following receipt of the SO, Dar submitted representations to the CMA in relation to what it considered to be manifest factual inaccuracies contained in the SO and also made representations on the Draft Penalty Calculation, and reconfirmed its agreement in principle to settle this case.
- 2.43 On 21 February 2022, following settlement discussions, Dar and Castlegate 624 offered to settle the case. Dar and Castlegate 624 voluntarily, clearly and unequivocally admitted the facts and allegations of the Infringements as set out in the SO,³⁹ which are now reflected in the Decision, and agreed to co-operate in expediting the process for concluding the case.
- 2.44 On 23 February 2022, the CMA confirmed that it would settle the case with Dar and Castlegate 624 and that it intended to proceed to issue an infringement decision.

³⁸ Likewise, the CMA has applied Rule 10(2) of the CMA Rules and addressed this Decision to Dar Lighting Limited and Castlegate 624 only.

³⁹ Subject to representations in relation to MFIs communicated to and agreed by the CMA, see paragraphs 14.20 and 14.21 of *Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, [CMA8](#) (December 2021).

3. Facts

Addressees of the Decision

Dar Lighting Limited

- 3.1 Dar is a business based in Banbury (Oxfordshire), which is active in the supply of Domestic Lighting Products in the United Kingdom ('UK').
- 3.2 Dar is a private limited company registered at Companies House under company number 05270864.⁴⁰ It had a turnover of £26.6 million in the financial year ended June 2020 (the most recent year for which Dar has published accounts).⁴¹

Supply of branded Domestic Lighting Products

- 3.3 Dar markets its Domestic Lighting Products in the UK under three brands:⁴²
- 3.3.1 The 'David Hunt Lighting' brand ('**DHL**'): Dar submitted that this is a high-end target brand, relating to luxury hand-crafted lighting made in the Cotswolds. Dar explained that these products are typically manufactured in small batches or as unique manufacture-to-order pieces with a very high degree of personal service.⁴³
- 3.3.2 'The Light Shade Studio' brand ('**LSS**'): Dar submitted that this is a high-end target brand complementary to the DHL brand in that it provides luxury shades for the DHL fittings.⁴⁴
- 3.3.3 The 'där lighting' brand ('**där lighting**'): Dar submitted that this brand is aimed at the mid to upper level aspirational home owning consumer and includes several sub-brands:⁴⁵
- 'Wisebuys': which is a sub-brand of där lighting and which Dar categorises as being entry-level products;
 - 'The Lighting Book': refers to Dar's hard copy catalogue. The Lighting Book constitutes Dar's main trade catalogue, and it is republished each

⁴⁰ See <https://beta.companieshouse.gov.uk/company/05270864>.

⁴¹ Dar Annual Report and Financial Statements for the year ended 30 June 2020, p.19, available at [DAR LIGHTING LIMITED filing history - Find and update company information - GOV.UK \(company-information.service.gov.uk\)](https://beta.companieshouse.gov.uk/company/05270864/annual-reports).

⁴² GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 9.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

September. From September 2019, this catalogue was split into two volumes called respectively 'Volume 1' and 'Volume 2'.⁴⁶

- 'The Lighting Studio' ('**TLS**'): which according to Dar has been used as a brand name for the supply of Lighting Products under original equipment manufacturer ('**OEM**') supply arrangements with [Reseller] and [Reseller] where the purchaser did not wish to use its own brand name;
- 'Lumis Lighting': which according to Dar has been used as a brand name for the supply of Lighting Products under OEM supply arrangements with [Reseller];
- 'Solus Lighting': which according to Dar has been used as a brand name for the supply of relatively limited quantities of 'illuminated tree' lighting products.⁴⁷

White label and other supply agreements

3.4 As well as selling branded Domestic Lighting Products, Dar also supplies white labelled Domestic Lighting Products to Resellers.⁴⁸ According to Dar, 'white label' refers to products commissioned to be sold under a customer's own brand or products that have for some other reason not been displayed in catalogues and may be waiting to be catalogued or exiting the range.⁴⁹

3.5 Dar has submitted that it operates a particular type of white label supply agreement with a selected few Resellers, which it sometimes refers to as 'OEM' agreements'.⁵⁰ These arrangements fall outside of Dar's selective distribution agreements ('**SDA(s)**') (see below under 'Relevant provisions of Dar's SDAs and Brand Guidelines') as they are not sold under the dār lighting, DHL or LSS brands. According to Dar, under its 'OEM' supply agreements products are developed through [redacted] and the retailers have full discretion as to the way in which they are retailed including in relation to their branding.⁵¹ For the purposes of this Decision,

⁴⁶ According to Dar, the basis of the distinction between these two volumes is that Volume 2 contains products that were launched after 2 September 2018, and that the dār lighting Brand Guidelines request that, where Volume 2 products are displayed for sale, they are displayed with the brand name. See GMM-000333647 (Response dated 18 December 2020 to the First Dar Section 26 Notice), response to question 18.

⁴⁷ [redacted]. See GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 9.

⁴⁸ A white label arrangement is where the supplier supplies a complete product and the retailer then applies its own brand to the product. See by way of example definition: www.macmillandictionary.com/dictionary/british/white-label.

⁴⁹ GMM-000600424 (Response dated 19 March 2021 to the First Dar Section 26 Notice), response to question 18.

⁵⁰ Dar told the CMA that it had OEM agreements with approximately [redacted] retailers during the Relevant Periods but currently has ongoing OEM arrangements with [redacted] resellers accounting for approx. [redacted]% of Dar's total sales by Value in the financial year 2020/2021. See GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 7.

⁵¹ GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 7.

Domestic Lighting Products supplied under such ‘OEM’ arrangements are referred to as ‘**Special Contract Products**’.⁵²

- 3.6 As noted above, the dār lighting brand includes a number of sub-brands: Wisebuys, The Lighting Book, The Lighting Studio, Lumis Lighting and Solus Lighting. The latter three sub-brands (The Lighting Studio, Lumis Lighting and Solus Lighting) have been used by Dar as brand names for the supply of lighting products under Special Contract Products supply arrangements with a number of retailers, including [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED].⁵³
- 3.7 Dar submitted that, historically, since 2017, between [REDACTED] and [REDACTED]% of Dar’s total sales by value had been under Special Contract Products supply arrangements, although this has [REDACTED] to approximately [REDACTED]% for the financial year ending in June 2020.⁵⁴
- 3.8 Dar submitted that Lighting Products sold under Special Contract Products supply agreements are materially different to the Lighting Products sold by Dar directly to Resellers and end-consumers in terms of design specifications, price, IP rights and commercialisation,⁵⁵ for which reasons the CMA has chosen to exclude this category of products from the focus of this Decision (see further ‘Market Definition’ below). However, the CMA considers that all other types of white label arrangements are within the focus of this Decision.
- 3.9 In addition to white label arrangements for the supply of products as described in paragraph 3.4 above, and Special Contract Products supply arrangements as described immediately above, the evidence shows that during the Relevant Period, Dar entered into [REDACTED] with certain Resellers (specifically [Reseller 1]: see Section 4 below under ‘[Reseller 1’s] [REDACTED] for Dar products’) whereby [REDACTED]. Domestic Lighting Products sold under such arrangements have been considered for the purpose of this Decision.
- 3.10 Dar has submitted that it also sells Lighting Products to [REDACTED] businesses who act as purchasing agents for end consumers, such as for example, a building contractor, interior designer or decorator who is contracted by their client on a project and may

⁵² The CMA notes that for special contracts [REDACTED]. These factors differ from standard contracts. GMM-000601424 (Response dated 30 July 2021 to the Second Dar Section 26 Notice), response to question 35. Further detail was given in the response to question 35.

⁵³ In the financial year ending June 2020, the largest accounts were with [REDACTED]. See GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 7.

⁵⁴ GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 7.

⁵⁵ GMM-000601424 (Response dated 30 July 2021 to the Second Dar Section 26 Notice), response to question 35. Dar’s OEM arrangements sit outside its selective distribution systems. GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 7.

be asked to procure a particular lighting product for that project. These purchasing agents are classified as 'non-Authorised stockists' under the terms of the SDAs.⁵⁶

Dar's sales and distribution network

3.11 As will be further explained in paragraphs 3.56 to 3.65 below, the majority of Dar's distribution of Domestic Lighting Products is now through its selective distribution network. Since the implementation of the SDAs in 2017-18,⁵⁷ Dar has predominantly sold DHL, LSS and dār lighting branded-Relevant Products ('**Brands of Relevant Products**') to Resellers who have entered into SDAs.⁵⁸

Castlegate 624

3.12 Castlegate 624 is a private company, limited by shares, registered at Companies House under company number 07328014.⁵⁹ It is the immediate and ultimate parent company of Dar.⁶⁰

Lighting sector overview

3.13 This section provides an overview of those aspects of the UK lighting sector that are relevant to this investigation.

Lighting Products

3.14 There are three broad product segments in the UK lighting sector:⁶¹

3.14.1 lamps (ie sources of light);⁶²

3.14.2 luminaires (ie light fittings which house sources of light);⁶³ and

⁵⁶ GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to questions 7 and 13.

⁵⁷ Dar introduced SDAs for the DHL and LSS brands in September 2017, and for the dār lighting brand in September 2018. See GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 10.

⁵⁸ GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 10.

⁵⁹ See <https://beta.companieshouse.gov.uk/company/07328014>.

⁶⁰ GMM-000601939 (Castlegate 624 Consolidated Draft Accounts up to 30 June 2021), p.33.

⁶¹ AMA Research Report, 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.13. Dar submitted that it does not supply lighting controls – See GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 notice), response to question 8.

⁶² This also includes LED Light sources which now represent nearly 60% of the total UK lamps market. This is a highly energy efficient source of light that is becoming increasingly popular 'with LEDs now representing by far the largest proportion of most manufacturers' ranges'. See AMA Research Report *Lighting Market Report – UK 2020-2024 Analysis*, pp.14-18.

⁶³ Luminaires are also referred to as 'light fittings' which house the sources of light and include, among other things, light shades, table lamps, ceiling light fittings, wall light fittings and security light fittings.

3.14.3 controls.⁶⁴

- 3.15 For ease of understanding, lamps, luminaires and controls, together with related components, will be referred to collectively as Lighting Products (**‘Lighting Products’**) throughout this Decision.⁶⁵
- 3.16 The sector can be further delineated according to end use, ie domestic or non-domestic.⁶⁶ The focus of this Decision is the supply of Lighting Products for domestic use (**‘Domestic Lighting Products’**) since this is Dar’s principal activity⁶⁷ (see further Section 3, ‘Market Definition’ below).
- 3.17 Competition in the UK Domestic Lighting Products sector takes place at both the upstream level (rival suppliers competing for sales of their product to retailers⁶⁸ and ultimately end users) and the downstream level (rival retailers competing for sales to end users). At the downstream level, competition takes place both between different brands (inter-brand competition) and between different retailers of the same brand (intra-brand competition).⁶⁹

The UK Lighting Sector

- 3.18 The market research company, AMA Research Limited (**‘AMA Research’**), estimates the size of the wider UK Lighting Product market to have been worth £2.17 billion in 2019 based on manufacturers’ selling prices,⁷⁰ of which £ [650-700] million comprises Domestic Lighting Products.⁷¹ According to AMA Research’s estimates, in 2019:
- 3.18.1 Domestic luminaires dominated the UK lighting market, accounting for £ [450-500] million;⁷²
- 3.18.2 Domestic lamps represented £ [150-200] million.⁷³and

⁶⁴ Dar confirmed that it does not supply lighting controls. See GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 notice), response to question 8.

⁶⁵ The CMA considers any components related to the three broad product segments to also be included in the definition of Lighting Products.

⁶⁶ AMA Market Research Report, 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.35.

⁶⁷ GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 notice), response to question 6.

⁶⁸ In this Decision, ‘retailer’ means any organisation that sells lighting products to domestic or non-domestic end-users, including retailers, merchants, electrical wholesalers and contractors/installers. See AMA Research Report, 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.85.

⁶⁹ See paragraphs 3.20 of the *NLC Decision*.

⁷⁰ AMA Market Research Report, 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.14 and p.58. In 2020 Lighting represented an estimated [10- 15]% of the UK electrical wholesaler market, with an estimated value of £[400-450] million – See also Mintel Electrical Wholesalers – UK – March 2021, p.21.

⁷¹ Representing [30-35]% share of 2.17bn of the UK Lighting end user market in 2019 – See AMA Market Research Report, 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.35 and p.58.

⁷² Representing [20-25]% share of 2.17bn of the UK Lighting end user market in 2019 – See AMA Market Research Report, 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.35 and p.58.

⁷³ AMA Market Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.35 and p.58.

3.18.3 Domestic controls⁷⁴ represented £ [20-25] million.⁷⁵

- 3.19 Lighting using light emitting diodes ('LED') now represents the majority of all UK lamp sales.⁷⁶ The LED market has more than doubled in size and its share of the total lighting market had risen from 38% in 2015 to [70-75]% in 2019. According to AMA Research, it is likely that lighting sales will almost exclusively comprise LEDs sometime in the 2020s, and by 2024 it is forecast that LED lighting sales will have grown by around 20% from their 2019 level, representing around 95% of the total UK lighting sector.⁷⁷
- 3.20 According to AMA Research, the relatively recent move to LED light sources has increasingly blurred the distinction between traditional light sources ie lamps (consisting of incandescent lamps and fluorescent tubes) and luminaires (ie light fittings). The growth in the demand for, a relatively new product,⁷⁸ integrated luminaires, LED light sources which can be integrated into the luminaire (including hardwiring it into the fixture as a permanent component)⁷⁹ is, according to AMA Research, making product splits less relevant and more difficult to define. Therefore, AMA Research concluded it is difficult to estimate what proportion of luminaires for which the light source is replaceable in a lamp/module form and those which are partially or fully integrated; and, accordingly, some of the 'luminaire' market value will include a 'lamp' element.⁸⁰
- 3.21 The supply chain for the UK Domestic Lighting Products sector is fragmented and comprises a large number of small firms.⁸¹ This has increasingly blurred the boundaries between the product segments of the Domestic Lighting Product sector (lamps, luminaires and controls) due to a mix of firms who target all segments of the domestic lighting sector whilst others focus on niche segments.⁸²
- 3.22 On its website, Dar describes itself as 'one of the best known designers and distributors of lighting for the home in the UK.'⁸³ In 2020, Dar generated turnover of

⁷⁴ According to AMA Research, lighting controls which enable homeowners to dim or control the hue of lighting to suit particular moods, needs, or the activities being undertaken have become a key driver of growth in the domestic lighting market. AMA Market Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.37.

⁷⁵ AMA Market Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.35 and p.63.

⁷⁶ AMA Market Research Report, 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.10.

⁷⁷ *Ibid*, p.19.

⁷⁸ See article: https://image-src.bcg.com/Images/BCG-How-to-Win-in-a-Transforming-Lighting-Industry-Nov-2015_tcm79-88535.pdf at p.9.

⁷⁹ See, for example, <https://www.freedoniagroup.com/Content/Blog/2018/06/28/The-Pros--Cons-of-LED-Integrated-Lighting-Fixtures>, paragraph 6.

⁸⁰ AMA Market Research Report, 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.13 and p.14.

⁸¹ According to AMA, 'The supply chain remains fragmented with a small number of very large organisations tending to target all sectors of the lighting market and a large number of very small organisations, often supplying niche sectors' and '[s]upply of luminaires is much more fragmented than that of lamps, with a large number of smaller suppliers active in the market', (AMA Research Report, 2020, *Lighting Market Report – UK 2020-2024 Analysis*), p.68 and p.74.

⁸² AMA Market Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.11.

⁸³ <https://www.darlighting.co.uk/about> (as accessed on 21 September 2021).

approximately £24.4 million in the supply of Domestic Lighting Products in the UK.⁸⁴

- 3.23 The other large suppliers of Domestic Lighting Products in the UK noted by AMA Research are: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED].⁸⁵

Distributors of Domestic Lighting Products

- 3.24 Domestic Lighting Products are supplied to end users via home improvement or DIY multiples ([10 – 15]%), trade channels such as electrical wholesalers ([10 – 15]%), department stores/high street multiples/lighting specialists ([45 – 50]%) (all of which fall under the broader category of retailers and which also includes, to a lesser extent, grocery multiples), internet ([15 – 20]%) and mail order channels ([0 – 5]%).⁸⁶ The internet and mail order channels have experienced a rise in demand, particularly during the UK lockdown in relation to the Covid-19 pandemic. The lockdown has contributed to increased growth in the use of the internet by distributors in the sale of Domestic Lighting Products.⁸⁷

Importance of the internet as a retail channel

- 3.25 Online retailing has significantly grown in importance in the UK in recent years, as noted immediately above and more so than ever during the Covid-19 pandemic, with overall online sales near doubling to £[100 – 150] billion in 2020 (an increase of [45 – 50]%), accounting for a record [20 – 30]% of all retail sales.⁸⁸
- 3.26 According to AMA Research, the increase in internet shopping has impacted the lighting sector and most distributors and retailers have now set up transactional websites, offering both retail and trade accounts.⁸⁹ In addition, some manufacturers and distributors have set up transactional websites to enable direct sales to consumers.⁹⁰

⁸⁴ This was a drop from £34.1m in year ending June 2019 and £34.9m in year ending June 2018. Dar Annual Report and Financial Statements for the year ended 30 June 2020, 30 June 2019 and 30 June 2018, available at <https://find-and-update.company-information.service.gov.uk/company/05270864/filing-history>. See also GMM-000601940 (Annex 1.1 to response dated 23 July 2021 to the Second Dar Section 26 Notice). £12.7m of the annual turnover in 2020 was attributable to non-Special Contract Product supply arrangements for Domestic Lighting Products, see GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), response to question 4.

⁸⁵ AMA Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, pp.73-78. [REDACTED] claims to be the largest lamps and accessories supplier in the UK according to the AMA Research Report.

⁸⁶ AMA Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.87. Home improvement multiples and department/high street stores are significant channels for domestic luminaire sales with these outlets having a wide range of refurbishment and decorating products under one roof.

⁸⁷ IBIS World Industry Report UK0.024 titled 'Online Home Furnishing Retailing in the UK' by Thomas Burgess, October 2020, p.15.

⁸⁸ Mintel UK Retail Briefing May 2021, p.4.

⁸⁹ AMA Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.86.

⁹⁰ AMA Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.86.

- 3.27 Most DIY multiples, department stores and grocery multiples which offer homewares products for ‘softer’ home improvement products including decorative lighting ranges⁹¹ do so both in-store and online according to AMA Research.
- 3.28 Dar confirmed that of its top 20 Resellers, almost all (with the exception of [X] non-retail showroom and design practices), sell online or in a combination of online and in-store.⁹²
- 3.29 Consumers have also generally increased their use of the internet to research hi-tech lighting products such as LED products, integrated luminaires and controlled lighting. Consumers more frequent presence online for such research purposes is helping to drive online sales.⁹³
- 3.30 Further, the increase in the ownership of smartphones and tablets encourages consumers to impulse buy and makes it increasingly convenient for consumers to shop online and use ‘click and collect’ services (mobile or m-commerce).⁹⁴

Price competition in the UK lighting sector

- 3.31 Price is an important factor influencing a customer’s choice of reseller for Domestic Lighting Products.⁹⁵ This is particularly the case for sales made online, as internet searches allow consumers to compare easily the prices of different online resellers for a particular product and identify those that offer the lowest prices.⁹⁶
- 3.32 The internet is also an important driver of price competition between sales made through online channels and those made through offline channels (ie in-store or over the telephone). This is due to:
- 3.32.1 The increased transparency of prices on the internet: Many consumers will use the internet as a search and comparison tool, regardless of where they ultimately purchase the Lighting Product.⁹⁷ The internet creates a ‘reference price’ for both online and offline sales, allowing consumers to

⁹¹ AMA Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.86.

⁹² GMM-000333646 (Annex 14.1 to response dated 18 December 2020 to the First Dar Section 26 Notice), Dar’s top 20 Resellers. Only one retailer, [Reseller], trades solely via brick and mortar store.

⁹³ AMA Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.87.

⁹⁴ IBIS World Industry Report UK0.024 titled “Online Home Furnishing Retailing in the UK” by Thomas Burgess, October 2020, p.15.

⁹⁵ AMA Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.87 which points to price to be a key factor in consumer choice particularly when it comes to commodity products.

⁹⁶ AMA Research 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.87.

⁹⁷ AMA Research states: ‘increased use of online or internet retailers/wholesalers has been accompanied by greater willingness of consumers and tradesmen to research their purchases using the internet, prior to making a decision.’ AMA Research 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.86.

demand a better deal from offline channels by, for example, requesting a store to ‘price-match’ an offer made online.⁹⁸

- 3.32.2 The ability of resellers using the online sales channel to sell at lower prices: The overheads associated with online sales tend to be lower than those associated with sales through stores (eg the cost of establishing and maintaining physical premises and staff costs). Therefore, resellers selling online may be able to offer lower prices than resellers focused on ‘offline’ sales channels.
- 3.32.3 The ability to sell or advertise products at discounted prices on the internet can intensify price competition between resellers due to the increased transparency and reduced search costs from internet shopping. Greater price competition increases resellers’ incentives to act efficiently and pass on cost savings to consumers in the form of lower retail prices.⁹⁹
- 3.32.4 The increased transparency of prices on the internet means manufacturers and retailers are also able to easily monitor prices.¹⁰⁰ Indeed, the European Commission (the ‘**Commission**’)’s Final Report on the E-commerce Sector Inquiry, also noted:

‘increased price transparency allows companies to monitor more easily their prices. A majority of retailers track the online prices of competitors. Two thirds of them use automatic software programmes that adjust their own prices based on the observed prices of competitors. With pricing software, detecting deviations from ‘recommended’ retail prices takes a matter of seconds and manufacturers are increasingly able to monitor and influence retailers’ price setting. The availability of real-time pricing information may also trigger automatised price coordination. The wide-

⁹⁸ For example, according to [Employee of Reseller 2], a Reseller of DHL products with a showroom, he would often be asked to price match another resellers lower price even though he was promised by Dar that this would no longer happen. See GMM-000600605 (Note of call with [Employee of Reseller 2] on 18 June 2021). Also see paragraphs 147 and 148 of *Commission Staff Working Document in relation to the Final report on the E-commerce Sector Inquiry* ‘(147) The results of the sector inquiry show that the increased price transparency online is the feature that most affects the behaviour of customers and retailers. It lowers search costs for customers who are able to instantaneously obtain and compare product and price information online and switch swiftly from one channel to another (online/offline). Manufacturers and retailers are also able to easily monitor prices. (148) The ability to directly compare prices of products across a number of online retailers, leads to increased price competition, affecting both online and offline sales [...]’. See https://eur-lex.europa.eu/resource.html?uri=cellar:9d1137d3-3570-11e7-a08e-01aa75ed71a1.0001.02/DOC_1&format=PDF.

⁹⁹ In *Roland*, the CAT stated at paragraph 85, that RPM is a particular concern when it takes place online. The CMA noted in the Decision that the ability to sell or advertise at discounted prices on the internet can intensify price competition, not only between online resellers but also between online and bricks-and-mortar resellers due to the increased transparency and reduced search costs from internet shopping. Available at: https://www.catribunal.org.uk/sites/default/files/2021-04/1365_roland_Judgment_190421-1.pdf.

¹⁰⁰ See paragraph 147 of *Commission Staff Working Document in relation to the Final report on the E-commerce Sector Inquiry*. https://eur-lex.europa.eu/resource.html?uri=cellar:9d1137d3-3570-11e7-a08e-01aa75ed71a1.0001.02/DOC_1&format=PDF.

scale use of such software may in some situations, depending on the market conditions, raise competition concerns.’¹⁰¹

3.33 Therefore, preventing or restricting resellers’ ability to determine their own online resale prices, and in particular preventing or restricting discounting below a fixed level online, would be likely to:

3.33.1 Reduce price competition from online sales of Domestic Lighting Products;

3.33.2 Reduce downward pressure on the retail price of Domestic Lighting Products; and

3.33.3 Thereby potentially result in higher prices to consumers.¹⁰²

Market Definition

CMA’s conclusion on the relevant market

3.34 For the purposes of this case, the CMA finds that the relevant market is no wider than the supply of Domestic Lighting Products (excluding products sold under certain special white label arrangements with Resellers, explained below and referred to for the purpose of this Decision as ‘Special Contract Products’, but including other types of white label arrangements) in the UK. The analysis below considers a product dimension and a geographic dimension.

Purpose of and framework for assessing the relevant market

3.35 When applying the Chapter I prohibition, the CMA is not obliged to define the relevant market unless it is impossible, without such a definition, to determine whether the agreement in question has as its object or effect the appreciable prevention, restriction or distortion of competition.¹⁰³

3.36 In the present case, the CMA considers that it is not necessary to reach a definitive view on market definition in order to determine whether there is an agreement between undertakings which has as its object the appreciable prevention, restriction, or distortion of competition.¹⁰⁴ The Competition Appeal Tribunal (‘CAT’)

¹⁰¹ Final Report on the E-commerce Sector Inquiry:

https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf, paragraph 13.

¹⁰² In *Roland*, the CAT concluded ‘In assessing the relative seriousness of RPM, it is necessary to consider the harm to competition which RPM causes. The immediate effect of RPM is to restrict resellers’ freedom to set their own prices and to compete fully and effectively. RPM restricts intra-brand competition and tends to increase the prices paid by consumers for a particular brand. The fact that RPM leads to higher prices for consumers is supported by the empirical evidence in the DotEcon report.’ Available at: https://www.catribunal.org.uk/sites/default/files/2021-04/1365_roland_Judgment_190421-1.pdf, paragraph 81.

¹⁰³ Case T-62/98 *Volkswagen AG v Commission* EU:T:2000:180, paragraph 230, and Case T-29/92 *SPO and Others v Commission* EU:T:1995:34, paragraph 74.

¹⁰⁴ See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, in which the CAT held, at paragraph 176, that in Chapter I cases ‘determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement’.

and the Court of Appeal have held that it is not necessary for the CMA to set out the precise relevant market definition in order to assess the appropriate level of penalty.¹⁰⁵

3.37 However, for the purposes of establishing the level of any financial penalties that may be imposed on an undertaking for a breach of the Chapter I prohibition, the CMA will consider an undertaking's 'relevant turnover', which is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year.¹⁰⁶ The CMA has therefore formed a view of the relevant market in order to calculate Dar's 'relevant turnover' in the market affected by the Infringements should this be required for the purposes of establishing the level of any financial penalty that the CMA may decide to impose on Dar.

The relevant product market

3.38 For the purposes of this case, the CMA concludes that the relevant product market is no wider than the supply of Domestic Lighting Products (excluding Special Contract Products but including those sold under other types of white label arrangements).

3.39 The CMA's starting point for assessing the relevant product market is the focal products which are subject to the Infringements, in this case Domestic Lighting Products (excluding Special Contract Products but including those sold under other types of white label arrangements). As set out in paragraph 3.14, Domestic Lighting Products encompass lamps, luminaires, and controls.¹⁰⁷ The CMA has considered these products collectively as the CMA finds that the Dar Pricing Policy applied to the full range of the Domestic Lighting Products supplied by Dar (excluding Special Contract Products but including those sold under other types of white label arrangements).¹⁰⁸

¹⁰⁵ The Court of Appeal in its judgment in the *Toys and Kits* appeals stated 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' and 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.' See *Argos Limited and Littlewoods Limited v Office of Fair Trading* and *JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraphs 169 and 170 to 173 respectively.

¹⁰⁶ CMA's guidance as to the appropriate amount of a penalty (CMA73), April 2018, paragraph 2.11.

¹⁰⁷ The relatively recent move to LED light sources has increasingly blurred the distinction between traditional light sources i.e. Lamps and luminaires/light fittings. The growth in the demand for, a relatively new product, integrated luminaires: LED light sources which can be integrated into the luminaire (including hardwiring it into the fixture as a permanent component) is, according to AMA research making product splits less relevant and more difficult (see paragraph 3.20).

¹⁰⁸ Dar explained that it does not supply controls: 'Dar supplies three of the categories of Lighting Products set out in the definition used in the First Business s.26 Notice, namely: lamps (i.e. sources of light); luminaires (referred to as 'light fittings', i.e. light fittings which house sources of light), which include, among other things, light or lamp shades, table lamps, ceiling light fittings, wall light fittings and security light fittings; and related components and spare parts. Dar does not supply lighting controls.' GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 8.

- 3.40 The CMA has not considered whether each product category constitutes separate product markets as the CMA considers that it is not necessary to conclude whether that is the case. Concluding on whether each constitutes separate product markets or are each within a single product market would not make any difference to the level of any financial penalties that the CMA may decide to impose on the Parties. This is because the total ‘relevant turnover’ to be used as the starting point for the calculation of its financial penalty – that is, the total turnover in relation to each category – would be the same under either scenario.
- 3.41 As well as selling branded Domestic Lighting Products (see ‘Supply of branded Domestic Lighting Products’ above), Dar supplies Domestic Lighting Products to Resellers under white label arrangements to be sold under the Reseller’s own brand, as noted above under ‘White label and other supply agreements’. According to Dar, ‘white label’ refers to products commissioned to be sold under a customer’s own brand or products that have for some other reason not been displayed in catalogues and may be waiting to be catalogued or exiting the range.¹⁰⁹
- 3.42 Dar has submitted that it operates a particular type of white label supply agreements with a selected few Resellers, which it sometimes refers to as ‘OEM agreements’ and which are referred to in this Decision as ‘Special Contract Products’. As noted at paragraph 3.5, according to Dar, under ‘OEM’ supply agreements products are developed through [redacted] and the retailers have full discretion as to the way in which they are retailed including in relation to their branding.^{110 111}
- 3.43 In its response to the First Dar Section 26 Notice, Dar explained further that it supplies Special Contract Products under arrangements pursuant to which:

‘Dar supplies Relevant Products which are then retailed under the retailers’ own brands with no connection to Dar. In respect of Relevant Products supplied under [such] arrangements, the retailers have full discretion as to the manner in which they are retailed, including branding or other arrangements. [...] Designs and products are developed through [redacted]. Ultimately, the retailer selects the product line [redacted]. [Such] arrangements sit outside its selective distribution systems, mainly because the products are not Dar branded.’¹¹²

¹⁰⁹ GMM-000600424 (Response dated 19 March 2021 to the First Dar Section 26 Notice), response to question 18.

¹¹⁰ GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 7.

¹¹¹ The CMA notes that for special contracts [redacted]. GMM-000601424 (Response dated 30 July 2021 to the Second Dar Section 26 Notice), response to question 35. Further detail was given in the response to question 35.

¹¹² GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 7. For this case, the CMA has included products sold under other types of white label arrangements within Domestic Lighting Products.

3.44 In its response to the Second Dar Section 26 Notice (in which these arrangements were referred to as ‘OEM arrangements’), Dar explained:

‘There are a number of material differences between Dar's own Lighting Products and those sold under OEM arrangements; [...] Dar's own products are [X] different, are sold at different price points to OEM products, [X], and have different technical specifications. Moreover, the commercial terms on which they are sold (and, indeed, the way in which they are sold) is wholly different to the manner in which retailers sell the products Dar produces for them under its arrangements with OEMs.’¹¹³

3.45 The CMA has also not carried out a detailed analysis of whether Special Contract Products fall within the relevant product market as it does not consider it necessary to do so. Further investigation would be liable only to result in a wider market definition, and a market definition excluding Special Contract Products constitutes a conservative approach for the purposes of calculating any financial penalties. However, a product market excluding Special Contract Products is consistent with Dar's submission that there are a number of material differences between Dar's own Lighting Products and Special Contract Products in terms of design, pricing, IP rights and commercialisation.

3.46 The CMA has also not carried out a detailed analysis of whether there is substitutability between domestic and non-domestic Lighting Products as it does not consider it necessary to do so. Further investigation would be liable only to result in a wider market definition, and a product market limited to Domestic Lighting Products constitutes a conservative approach for the purposes of calculating any financial penalties. However, a product market limited to Domestic Lighting Products is consistent with previous cases¹¹⁴ and Dar's submissions that different manufacturers are active in domestic and non-domestic lighting sectors.¹¹⁵

¹¹³ GMM-000601424 (Response dated 30 July 2021 to the Second Dar Section 26 Notice), response to question 35. Further detail was given in the response to question 35.

¹¹⁴ In previous merger decisions, the Commission has consistently distinguished between ‘consumer/residential light fixtures’ and ‘professional/industrial light fixtures’. Case M.6357 *Koninklijke Philips/Indal Group*, decision of 23 November 2011, paragraph 11, Case M.6194 *Osram/Siteco Lighting*, decision of 22 June 2011, paragraphs 12 to 13. The CMA considered that domestic light products constitute a separate product market from non-domestic light products in its NLC Decision, 3 May 2017, at paragraphs 3.98 to 3.99 ([Case 50343 Online resale price maintenance in the light fittings sector](#)). These previous cases were limited to a subcategory of lighting products.

¹¹⁵ ‘Dar's view is that consumer/residential/domestic Lighting Products and professional/industrial Lighting Products tend to be supplied by different manufacturers/importers. Dar is only aware of two firms which supply both categories of lighting.’ GMM-000601424 (Response dated 30 July 2021 to the Second Dar Section 26 Notice), response to question 32.

The relevant geographic market

- 3.47 For the purposes of this case, the CMA finds that the relevant geographic market is the UK.
- 3.48 The CMA considers that the market for Domestic Lighting Products is not likely to be narrower than the UK. A previous CMA decision¹¹⁶ within the domestic lighting sector (**'NLC Decision'**) noted that manufacturers of domestic lighting tend to supply their products to resellers across the UK, rather than on a regional basis; and UK resellers purchase domestic lighting as a minimum from across the UK from UK-based suppliers or distributors, rather than on a regional basis. Dar also confirmed that it has no variation as to its pricing, the application of its SDAs and the utilisation of its sales channels on the basis of regional variation within the UK.¹¹⁷
- 3.49 In this case, the CMA has received no evidence which is sufficiently comprehensive or compelling to define a market wider than the UK. For the purposes of this case, therefore, the CMA considers that the market for Domestic Lighting Products is no wider than the UK.
- 3.50 Further investigation would be liable only to result in a wider market definition, and a geographic market limited to the UK constitutes a conservative approach for the purposes of calculating any financial penalties. A market no wider than the UK in scope is consistent with previous CMA decisions, which found that the available evidence was not sufficient to define a market wider than the UK.¹¹⁸ The Commission has also defined the market for 'professional/industrial light fixtures' as national in scope in previous cases, albeit it left open the possibility that the geographic market could be wider.¹¹⁹ The Commission noted that market players' shares are very different in different Member States and that a national distribution network is crucial for the success of a given producer.¹²⁰

Conclusion on market definition

- 3.51 In view of the above, the CMA finds that the relevant market in this case is the supply of Domestic Lighting Products (excluding Special Contract Products but including those sold under other types of white label arrangements) in the UK.

¹¹⁶ NLC Decision, 3 May 2017 ([Case 50343 Online resale price maintenance in the light fittings sector](#)).

¹¹⁷ GMM-000601424 (Response dated 30 July 2021 to the Second Dar Section 26 Notice), response to question 38.

¹¹⁸ NLC Decision 3 May 2017 ([Case 50343 Online resale price maintenance in the light fittings sector](#)), paragraph 3.D.III.

¹¹⁹ Case M.6357 *Koninklijke Philips/Indal Group*, decision of 23 November 2011, paragraph 57; IV/M.258 CCIE/GTE, decision of 25 September 1992, paragraph 20.

¹²⁰ Case M.6357 *Koninklijke Philips/Indal Group*, decision of 23 November 2011, paragraph 60.

Context and background to and support for the Dar Pricing Policy

3.52 This Section sets out the relevant factual background to the Dar Pricing Policy, including:

3.52.1 Dar's interaction with the CMA prior to the Investigation.

3.52.2 Dar's move to selective distribution systems.

3.52.3 The use of selective distribution agreements.

3.52.4 The CMA's view that Dar's selective distribution agreements created an environment to support the Dar Pricing Policy.

Dar's interaction with the CMA prior to the Investigation

3.53 Dar submitted that, in November 2016, it sought legal advice as to how to implement an arrangement to manage its concerns about its open network distribution model¹²¹ in a manner compliant with competition law.¹²² Dar explained that the legal advice was also taken in light of the CMA's investigation in Case 50343 concerning *Online resale price maintenance in the light fittings sector*¹²³ ('**NLC Investigation**') which had raised Dar's awareness of the issues associated with operating an open network and the potential role of selective distribution networks.

3.54 Dar informed the CMA that crucial to its decision to adopt a selective distribution system was the advice received by the LIA from [Senior CMA Official] of the CMA in September 2017 as to the most competition law appropriate steps that could be taken to minimise the problem of 'free riding' by certain retailers who had not undertaken equivalent investment in quality displays and training.¹²⁴

3.55 In a letter dated 4 September 2017, Dar's legal advisers confirmed to the CMA the steps taken by Dar to ensure compliance with competition law since receiving the Second Warning Letter and meeting with the CMA on 17 August 2017.¹²⁵

¹²¹ The CMA understands this to mean a network which does not require that resellers meet certain selective criteria before being able to sell the suppliers products.

¹²² GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 12.

¹²³ See *NLC Decision dated 3 May 2017* ([Case 50343 Online resale price maintenance in the light fittings sector](#)).

¹²⁴ GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 12. See also GMM-000333630 (Annex 12.3 to response dated 11 December 2020 to the First Dar Section 26 Notice). The CMA notes that [Senior CMA Official] advised LIA that in order to prevent free-riding in a manner compliant with competition law, a supplier cannot 'impose a minimum advertised price on resellers, particularly in the context of online sales where the transaction is completed on a click to buy basis. This may amount to RPM, as a retailer has no opportunity to reduce the purchase price, which is essentially the same as the price displayed on the website'.

¹²⁵ See paragraph 2.6 above.

Dar's move to selective distribution systems

3.56 As detailed above at paragraph 3.3, Dar sells three Brands of Relevant Products to Resellers in the UK. Dar submitted that, having previously operated an open network distribution model for all its brands, in 2016 it became concerned about maintaining the quality of its brands and customer service levels, as well as preventing some Resellers from free-riding on the customer support and marketing investments made by other Resellers.¹²⁶ In its response to the First Dar Section 26 Notice, Dar expressed its concerns about the open network distribution model as follows:

[redacted]¹²⁷

3.57 As a result, following legal advice, Dar moved the distribution of its branded Lighting Products to a selective distribution system by introducing SDAs with Resellers as follows:

3.57.1 In respect of DHL, in September 2017 (**'DHL SDA'**);¹²⁸

3.57.2 In respect to the LSS, in September 2017 (**'LSS SDA'**);¹²⁹ and

3.57.3 In respect of the 'där lighting' brand, in September 2018 (**'där lighting SDA'**).^{130 131}

3.58 In a letter to one of its Resellers dated 9 November 2018, [Dar Senior Employee] explained the rationale for Dar's move to a selective distribution system as follows:¹³²

[...] we want our Brands to be associated in the consumer mind with style, quality and service rather than becoming synonymous with either internet discount, or "rip off" brands with misleading price tags. We have seen the change in the markets over the last 3 years and how the perception of various brands has changed in many ways influenced by the presentation of brands on the web and associated marketing strategies. Amazon and e-

¹²⁶ GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 12.

¹²⁷ *Ibid.*

¹²⁸ GMM-000333631 (Annex 13.1 to response dated 11 December 2020 to the First Dar Section 26 Notice), DHL SDA.

¹²⁹ GMM-000333632 (Annex 13.2 to response dated 11 December 2020 to the First Dar Section 26 Notice), LSS SDA.

¹³⁰ GMM-000333633 (Annex 13.3 to response dated 11 December 2020 to the First Dar Section 26 Notice), där lighting SDA.

¹³¹ Dar submitted that the discussions at a meeting between the CMA and the LIA (also attended by [Dar Senior Employee]) in relation to the lighting industry's compliance with competition law in January 2018, 'provided some comfort to Dar that it would be a sensible step both commercially, and to ensure compliance with its competition law obligations, to also move the där lighting brand to a selective distribution system.' See GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 12.

¹³² GMM-0003336363 (Email from [Dar Senior Employee] to [Dar Employee] dated 9 November 2018) and GMM-0003336364 (Final draft of a letter from [Dar Senior Employee] to [Employee of Reseller] and [Employee of Reseller] dated 9 November 2018).

bay demonstrated some of the worst with the issues of “free riding” and the advertising of misleading prices. Looking to protect and build our brands we have followed the guidance of the CMA and determined that moving to Selective Distributorship Agreements (SDA) for our brands is the first step in this process.’

3.59 [Dar Senior Employee] also stated that the implementation of the selective distribution system resulted in the closure of most of Dar’s accounts for the following reasons:

‘The SDA is an agreement freely entered into under which both parties undertake to operate to certain standards and in certain ways. It is the case that some of our customers with whom we have had long and close relationships find the requirements of the SDA do not match their strategies and have ceased trading with us. [redacted]. We have been working on the David Hunt SDA for over 12 months. The number of accounts distributing David Hunt Lighting has fallen by almost [redacted]%. [redacted]. [...] The där lighting SDA was launched in September 2018 so is still new and we are dealing with urgent queries. Even at this early stage you will have noticed that we have reduced the number of där distributors as not all of our customer base met the criteria of the SDA. [redacted].’¹³³

3.60 Indeed, Dar noted that the closure of the majority of accounts distributing DHL and LSS products resulted in the reduction of the total number of Resellers¹³⁴ from [1000 - 1500] to [0 - 500].¹³⁵ Dar submitted that this reduction in the number of accounts for all its Brands of Relevant Products enabled it ‘to work more closely with the selected Resellers to support them.’¹³⁶

3.61 By September 2018, Dar had moved the majority of its distribution of the Relevant Products to a selective distribution system,¹³⁷ selling its branded products almost exclusively to Resellers who had entered into the SDAs.¹³⁸

¹³³ *Ibid.*

¹³⁴ GMM-000333628 (Annex 12.1 to response dated 11 December 2020 to the First Dar Section 26 Notice).

¹³⁵ GMM-000601399 (Annex 11.5B to response dated 23 July 2021 to the Second Dar Section 26 Notice), David Hunt Lighting - Training 2020. See also GMM-000601400 (Annex 11.6 to response dated 23 July 2021 to the Second Dar Section 26 Notice), The Light Shade Studio - Training 2020.

¹³⁶ GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 12.

¹³⁷ *Ibid.* Dar also operates Special Contract Product supply arrangements (referred to by Dar as ‘OEM arrangements’) which sit outside its selective distribution systems. Dar submitted that, historically (since 2017) between [redacted] and [redacted]% of Dar’s total sales by value had been under OEM arrangements, although this has [redacted] to approximately [redacted]% for the financial year 2020-2021. See GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 7.

¹³⁸ [redacted] Resellers who stock Dar’s branded products at present do so pursuant to the terms of the SDAs which were implemented by way of agreements in substantively the same form with all Authorised Stockists under one or more of the relevant of the SDAs. [redacted]. See GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), responses to questions 7 and 10.

3.62 The CMA makes no comment in respect of the selection criteria employed by Dar in moving to a selective distribution system nor whether the actual contractual terms of the SDAs comply with the Act. These points have not been a focus of the CMA's investigation and so have not been considered by the CMA. For the avoidance of doubt, this Decision in no way finds that the actual contractual terms of the SDAs infringe the Act.

The use of selective distribution agreements

3.63 The CMA accepts that selective distribution arrangements are a legitimate method of distribution when implemented and enforced in a competition law compliant manner. A selective distribution system can be beneficial for suppliers who wish to create and maintain a prestigious brand image or to provide customers with a qualitative service. As the Commission noted in its Final Report on the E-commerce Sector Inquiry: 'a selective distribution system may also help suppliers build reputation for high quality and convey a desired brand image. Sometimes it may be important for a supplier to signal its quality through limiting its distribution to certain distributors that have a reputation for selling high quality products only and this can be achieved, for example, through exclusive or selective distribution'.¹³⁹

3.64 The Commission also stated the following in relation to selective distribution:¹⁴⁰

'The ability of manufacturers to choose, via selective distribution, the qualitative and quantitative distribution criteria that best fit their products and positioning, has been central for distribution, in particular for high-end business models, for several decades. The results of the sector inquiry do not suggest that the Commission's general approach to qualitative and quantitative selective distribution, as set out in the Vertical Guidelines, needs to be changed.

At the same time, selective distribution is a tool which may, in some cases, serve to facilitate the implementation and monitoring of other types of vertical restraints, some of which may raise competition concerns. Many restrictions to online sales are mainly found in the context of selective distribution systems. For example, **within a selective distribution system, it may be easier for a manufacturer to control pricing, effectively engage in resale price maintenance or prohibit (certain forms of) online sales or advertisement.**' (Emphasis added)

¹³⁹ Final Report on the E-commerce Sector Inquiry: https://eur-lex.europa.eu/resource.html?uri=cellar:9d1137d3-3570-11e7-a08e-01aa75ed71a1.0001.02/DOC_1&format=PDF.

¹⁴⁰ *Ibid.* The Commission also noted that 'this observation does not question the legitimacy of selective distribution as a distribution model as such, but simply takes into account that within a closed network of distributors, vertical restraints can be applied more effectively than outside such a system'.

3.65 Suppliers who adopt a selective distribution model must therefore take particular care to ensure that the implementation and/or enforcement of any selective distribution arrangement does not lead to any infringement of the Act.

Dar's selective distribution agreements created an environment to support the Dar Pricing Policy

3.66 For the reasons set out below, it appears that Dar's implementation and enforcement of the SDAs and their respective Brand Guidelines (as described below in paragraph 3.70), may have supported an environment that seemed inimical to discounting in the minds of Resellers and so engendered a perception amongst its Resellers that the SDAs and Brand Guidelines allowed Dar to prevent discounting.

3.67 Further, while the CMA considers it legitimate for a supplier to require its resellers to display the correct recommended retail price ('**RRP**') when advertising its products, it appears that Dar used the provisions of the Brand Guidelines relating to the correct display of the relevant RRPs, together with the price lists, as means to signal the correct RRPs to Resellers but also as means to signal the Minimum Price and, from time to time, to instruct them to revert to the Minimum Price.

Relevant provisions of Dar's SDAs and Brand Guidelines

3.68 Each of the SDAs for Dar's Brands of Relevant Products grants a Reseller ('Authorised Stockist' under the SDAs) a licence to market, distribute and sell the Relevant Products (branded as DHL, LSS or där lighting, as applicable) under Dar's trademarks subject to the terms of the SDA. The duration of all the SDAs is for an initial term of two years and indefinitely after that until terminated by either party giving the appropriate notice. The SDAs require an Authorised Stockist, among other things:

3.68.1 To purchase all its requirements for the Relevant Products either from Dar or from another Authorised Stockist within the Dar's selective distribution network (Clause 2.2 of the SDAs)

3.68.2 Not to supply the Relevant Products to distributors, retailers, or other resellers who are not members of the Dar's selective distribution network (Clause 2.3 of the SDAs)

3.68.3 Not to sell the Relevant Products from any other physical retail location or place on any other websites other than the premises or websites notified to Dar without the prior written consent of Dar (Clause 2.9 of the SDAs).

3.69 In addition to the obligations set out in the main body of the SDAs, Authorised Stockists are required to meet certain obligations specified in a schedule attached to each SDA titled 'Authorised Stockist Criteria' (each a '**Schedule**') which set out

the standards applicable to Resellers' websites and physical retail premises. These obligations are set out:

3.69.1 In respect of the DHL SDA, in Part 1 of Schedule 3 (where the Stockist has been appointed a Standard Retailer) and in Parts 1 and 2 of Schedule 3 (where the Stockist has been appointed a Brand Partner);¹⁴¹

3.69.2 In respect of the LSS SDA, in Schedule 2; and

3.69.3 In respect of the där lighting SDA, in Schedule 3.

3.70 The website requirements are further explained in the brand guidelines scheduled to the DHL SDA¹⁴² and där lighting SDA¹⁴³ and amended from time to time by Dar by way of supplementary Brand Guidelines. Such supplementary guidelines were issued by Dar in relation to both the DHL SDA ('**DHL Brand Guidelines**')¹⁴⁴ and där lighting SDA ('**där lighting Brand Guidelines**')¹⁴⁵ (together, '**Brand Guidelines**'). Dar confirmed that it expects the principles within the DHL Brand Guidelines to also be followed by signatories to the LSS SDA.¹⁴⁶ These guidelines cover the use of images, logos and straplines on Resellers' websites or printed material featuring Dar's products, to ensure advertising is in line with Dar's overall creative vision and brand objectives.

3.71 Neither the SDAs (including the Brand Guidelines), nor any other written contractual agreement between Dar and the Resellers in the CMA's possession expressly mention the restrictions that formed the basis of the Dar Pricing Policy. In fact, the SDAs state that 'the Stockist shall at its own entire discretion determine the prices at which and (except as specifically provided in this agreement) the terms and conditions on which it sells the Products' (Article 2.6 of each of the SDAs).

Certain provisions of the SDAs and/or the Brand Guidelines may have supported an environment that seemed inimical to discounting in the minds of Resellers

3.72 However, the CMA considers that certain provisions of the SDAs and/or the Brand Guidelines may have supported an environment that seemed inimical to discounting in the minds of Resellers. These are set out below.

¹⁴¹ The DHL SDA contains additional requirements and support for 'Brand Partners' appointed at the discretion of Dar. See GMM-000333631 (Annex 13.1 to response dated 11 December 2020 to the First Dar Section 26 Notice), DHL SDA, Schedule 3, Parts 2 and 3. According to Dar, Brand Partners are [X].

¹⁴² Schedule 2 of DHL SDA.

¹⁴³ Schedule 2 of där lighting SDA.

¹⁴⁴ GMM-000333635 (Annex 13.5 to response dated 11 December 2020 to the First Dar Section 26 Notice), David Hunt Brand Guidelines.

¹⁴⁵ GMM-000333634 (Annex 13.4 to response dated 11 December 2020 to the First Dar Section 26 Notice), där lighting Brand Guidelines.

¹⁴⁶ GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), response to question 9.

- 3.73 The 'Authorised Stockists Requirements' in the SDAs and the Brand Guidelines, contain various requirements concerning the use and presentation of the brand (consisting of the trademarks and the logos) and product images in line with Dar's brand values. They set out the standards applicable to Resellers' websites, including strict instructions related to the use of brand names and logos, product photography, typography and brand colours. Failure to comply with any of these requirements may constitute a material breach of the SDA, allowing Dar to terminate the SDA.
- 3.73.1 One of the requirements is for Authorised Stockists' websites to 'not include any links, images, banners, pop-up windows or text which may, **in the opinion of the Supplier**, negatively affect the Brand or image of the Supplier'¹⁴⁷ (Emphasis added). The Brand Guidelines further explain this requirement, by prohibiting the use of words, flashes or overlays over the logotype and/or image or their negative space.¹⁴⁸ The Brand Guidelines provide illustrative examples of correct and incorrect product photography online, featuring, for example, a 10% discount flash impeding a 'David Hunt lighting' logo¹⁴⁹ or a product image¹⁵⁰ as incorrect and a 'Special Offer' flash impeding the 'där' logo as improper logo use.¹⁵¹
- 3.73.2 In relation to product photography, the Authorised Stockist Criteria require that 'Products must be displayed on the Stockist's website **using only the official images provided by the Supplier**' (Emphasis added).¹⁵² The Brand Guidelines provide examples of correct product photography online, also indicating that images have to be obtained from Dar.¹⁵³
- 3.73.3 In addition, the websites of the Brand Partners under the DHL SDA and the signatories of the där lighting SDA must 'contain a Product picture gallery containing a sufficient number of Inspirational Images;¹⁵⁴ and **must not use Inspirational Images for the purposes of, or on any webpage**

¹⁴⁷ DHL SDA, Schedule 3, Part 1, Clause 5.3.6; LSS SDA, Schedule 2, Clause 5.3.6; där lighting SDA, Schedule 3, Clause 5.3.6.

¹⁴⁸ For example, the där lighting Brand Guidelines prescribe that '*under no circumstances should words, flashes or overlays be used over the image or its negative space (for example for new products or discounting).*' (Emphasis added)

¹⁴⁹ DHL Brand Guidelines, p.7.

¹⁵⁰ DHL Brand Guidelines, p.19.

¹⁵¹ där lighting Brand Guidelines, p.16.

¹⁵² DHL SDA, Schedule 3, Part 1, Clause 5.4; LSS SDA, Schedule 2, Clause 5.4; där lighting SDA, Schedule 3, Clause 5.4.

¹⁵³ DHL Brand Guidelines, p.19; där lighting Brand Guidelines, p.18.

¹⁵⁴ 'Inspirational Images' are defined in the DHL SDA and där lighting SDA as '*art directed images of the Products created in line with the Brand style and designated by the Supplier as Inspirational Images.*'

containing, a sales promotion, seasonal sales campaign, or any other discount or clearance offer.'¹⁵⁵ (Emphasis added)

3.73.4 In terms of compliance with the product imagery, the SDAs provide that 'when requested by the Supplier to update or amend the product image or text description relating to any Product, the Stockist shall comply with such request as soon as practicable.'¹⁵⁶ In addition, the där lighting SDA introduced a sanction for non-compliance with this website requirement in the following terms: '**Failure to comply** with any such request in a reasonable time period (as judged by the Supplier acting reasonably) **may cause the supplier to suspend supply.**'¹⁵⁷ (Emphasis added)

3.73.5 The 'Authorised Stockists Requirements' in the SDAs provide that 'Dar reserves the right to attend the Stockist's premises and/or monitor the Stockist's website in order to assess the Stockist's compliance with the SDA, including with the Authorised Stockists Requirements'.¹⁵⁸

3.73.6 Failure by an Authorised Stockist to meet any of the 'Authorised Stockist Requirements' is deemed to be a material breach of the SDA allowing Dar to terminate it.¹⁵⁹ The assessment as to whether an Authorised Stockist is in compliance with any of its obligations in the Schedule is entirely within the discretion of Dar and Dar is not required to share with the Authorised Stockist any details of any such assessment or its methodology in carrying out such assessments or in reaching its conclusions.¹⁶⁰

3.74 The right to use product images is also referred to in the Terms of Trade appended to The Lighting Book (Price List Catalogues Vol 1 & 2).¹⁶¹ These provide that 'the Seller may, in its absolute discretion and at any time update, amend, replace or withdraw any permission granted for the use of the Images.' The CMA considers that this clause provides Dar with a wide discretion to withhold images from Resellers, which certain Resellers perceived as a credible threat of sanctions for non-compliance with the Dar Pricing Policy (see paragraphs 3.314 to 3.338 below).

3.75 The above provisions may not have given rise to competition law concerns in themselves where implemented and enforced in a competition law compliant

¹⁵⁵ DHL SDA, Schedule 3, Part 2, Clauses 4.1.5 and 4.1.6; där lighting SDA, Schedule 2, Clauses 5.3.10 and 5.3.11.

¹⁵⁶ DHL SDA, Schedule 3, Part 1, Clause 5.6; LSS SDA, Schedule 2, Clause 5.6; där lighting SDA, Schedule 3, Clause 5.7.

¹⁵⁷ där lighting SDA, Schedule 3, Clause 5.7.

¹⁵⁸ DHL SDA, Schedule 3, Part 1, Clause 1.2; LSS SDA, Schedule 2, Clause 1.2; där lighting SDA, Schedule 2, Clause 1.2.

¹⁵⁹ Clause 3.2 of the SDAs.

¹⁶⁰ Clause 3.3 of the SDAs.

¹⁶¹ GMM-000600498 (The Lighting Book - Price List Catalogues Vol 1 & 2 – Valid from 21st September 2019 (Including revisions issued 11th September 2019), Terms of Trade, Schedule 1: Quality, rights of use of images and trading conditions, Clause 15.

manner. However, Dar's implementation and enforcement of the SDAs and/or the Brand Guidelines created a perception amongst Resellers that the SDAs allowed Dar to prevent discounting.

Dar's implementation and enforcement of the SDAs and/or the Brand Guidelines created a perception amongst Resellers that the SDAs allowed Dar to prevent discounting

- 3.76 The contemporaneous evidence set out below shows that the above-mentioned provisions of the SDAs and/or the Brand Guidelines have been relied on by Dar staff during the Relevant Period to communicate the expectations Dar had in terms of product and price presentation on Resellers' websites for all the Brands of Relevant Products. Although the CMA does not consider that these provisions explicitly prevent discounting, it considers that Dar staff's instructions to the Resellers on how to implement these website requirements have created a perception amongst Resellers that discounting was not compatible with the terms of the SDAs.
- 3.77 Dar submitted that, following the introduction of the DHL SDA and LSS SDA in September 2017, it realised that a number of Resellers were not complying with the branding requirements, that there remained a number of poor-quality websites, and that many were effectively ignoring the Brand Guidelines.¹⁶²
- 3.78 As a result, [Dar Employee] was appointed as '[Redacted]' at Dar in order to assist Resellers comply with their SDA requirements. Checklists prepared by [Dar Employee] were periodically circulated to Dar's sales team¹⁶³ for them to record Resellers' compliance with the 'Authorised Stockists Requirements' set out in the DHL SDA,¹⁶⁴ in particular the requirement for Resellers' websites 'not [to] include any links, images, banners, pop-up windows or text which may, in the opinion of the Supplier, negatively affect the Brand or image of the Supplier.'¹⁶⁵ Although these checklists applied only in respect of the David Hunt Products, Dar submitted that it cannot exclude that there might be occasions where they also applied to

¹⁶² GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), response to question 11.

¹⁶³ GMM-000600544 (Internal Dar email from [Dar Employee] to various Dar personnel titled dated 5 June 2019).

¹⁶⁴ GMM-000601394 (Annex 11.2 to response dated 23 July 2021 to the Second Dar Section 26 Notice), Showroom and Display SDA Requirements; GMM-000601395 (Annex 11.3 to response dated 23 July 2021 to the Second Dar Section 26 Notice), Website SDA Requirements.

¹⁶⁵ Dar submitted that the requirement in the checklist are taken directly from clause 5.3.6 of Part 1 of Schedule 3 of DHL SDA (referred at paragraph 3.73.1 above). See GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), response to question 17.

LSS products.¹⁶⁶ In May 2018, 'Website Guidelines'¹⁶⁷ were also produced¹⁶⁸ to use in training sessions with Resellers and provide more concrete examples to refer Resellers when advising on their obligations under the DHL SDA.¹⁶⁹

Dar's internal communications appeared inimical to discounting

- 3.79 The evidence relating to Dar's internal communication following the introduction of the SDAs shows a perception within Dar that discounts and sales campaigns were not compatible 'with the spirit' of the SDAs and the Brand Guidelines for all Brands of Relevant Products. The evidence also shows that Dar was monitoring Resellers' websites and reporting internally those Resellers advertising discounts on its products as contrary to the SDAs and Brand Guidelines.
- 3.80 In an internal Dar email dated 18 January 2018 from [Dar Employee] to [Dar Senior Employee] and [Dar Employee], titled 'Meeting Summary [Dar Senior Employee]/[Dar Employee]/[Dar Employee]', which summarises an internal Dar meeting attended by these three individuals, [Dar Employee] refers to what appears to be a prohibition on sales and offers on DHL products: 'We need to focus on the websites. **No 'sales' 'offers' on DHL at all.**'¹⁷⁰ (Emphasis added)
- 3.81 Dar's solicitors explained the context for this apparent prohibition on 'sales' and 'offers' on DHL products as follows:

'Dar's experience with search algorithms has been that a number of Resellers permanently used the phrase "David Hunt Sale" or similar permutations in order to climb search rankings without necessarily offering the brand at sale prices (particularly when "sale" is understood in the context of the Consumer Protection From Unfair Trading Regulations 2008 ("CPUT08")). Dar has attempted to avoid David Hunt's brand (and imaging provided by Dar), being used as either "clickbait" in direct promotions or in order to "game" search rankings in situations where it effectively amounted to using Dar's IP to further misleading conduct. Dar did not seek to restrict in any way the price at which Resellers were offering Relevant products (and indeed Dar understands that David Hunt Products, amongst Dar's other lines, were offered at a range of discounts by a range of Resellers

¹⁶⁶ GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), response to question 17.

¹⁶⁷ GMM-000601393 (Annex 11.1 to response dated 23 July 2021 to the Second Dar Section 26 Notice), David Hunt Lighting Website Guidelines May 2018.

¹⁶⁸ In March 2018, [Dar Employee] informed the DHL Sales team that a website suggestions document was being prepared, along the lines of the display guidelines used for Resellers' premises, for them to go through their DHL customers and show them what they needed to do in order to meet the DHL SDA requirements. See GMM-000600515 (Internal Dar email from [Dar Employee] to various Dar personnel dated 2 March 2018).

¹⁶⁹ GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), response to question 11.

¹⁷⁰ GMM-000336310 (Internal Dar email from [Dar Employee] to [Dar Senior Employee] and [Dar Employee] dated 18 January 2018).

throughout the Relevant Period) or discounts offered; the comment relates to using the David Hunt brand to promote general sales or offers.’¹⁷¹

3.82 The CMA does not find plausible Dar’s solicitors’ explanation on the meaning behind the instruction ‘No ‘sales’ ‘offers’ on DHL at all’. Although the CMA notes Dar’s legitimate concerns about misleading advertising under CPUT08, it considers that a plain reading of the instruction does not align with the explanation provided by Dar’s solicitors. The CMA considers that the instruction creates the perception of a complete ban on sales and offers rather than the more nuanced point submitted by Dar’s solicitors about fake sales and offers.

3.83 In February 2018, [Dar Employee] confirmed to [Dar Senior Employee] her understanding that the website requirements prohibited pop ups on DHL products, by stating that ‘pop up offer which comes at the end of the purchase when you have already committed to buying the products and added to the basket [...] are not permitted as per the SDA’. She confirmed that she had contacted certain Resellers ([Reseller] and [Reseller]) who agreed to remove the pop ups on their respective websites.¹⁷²

3.84 In an internal email dated 7 September 2018, [Dar Senior Employee] confirmed [Dar Senior Employee's] understanding that under the SDAs product images could not be used to advertise discounts:

‘As I understand how we have written and presented the SDA if a customer has signed an SDA they have access to all current images – product and lifestyle. [...] The question has moved on to if we approve of the use of the image. **This is quite clear under the SDA – images cannot be used to advertise promotions and discounts and sales.** [...] It is clear we do not want them to appear on discount sites or in leaflets advertising sales etc. We reserve the right to review customer’s artwork but I would hope that most of our customers would be wanting to use images in contexts we would be happy with.’¹⁷³ (Emphasis added)

3.85 On 25 October 2018, an internal Dar email from [Dar Employee] to [Dar Employee] reported that [Employee of Reseller] had amended the website as per instructions from Dar: ‘[Employee of Reseller] has taken off the green – “you save 17%” as not in the spirit of the SDA / Brand etc. and most of their other suppliers don’t have a discount showing.’¹⁷⁴ This evidence is another example of the type of

¹⁷¹ GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), response to question 11.

¹⁷² GMM-000600509 (Internal Dar email from [Dar Employee] to [Dar Senior Employee] dated 8 February 2018) and its attachment GMM-000600510 (Screenshot of a [Reseller] promotional banner).

¹⁷³ GMM-000597333 (Internal Dar Email from [Dar Senior Employee] to [Dar Employee], [Dar Senior Employee], [Dar Employee] and [Dar Employee] dated 7 September 2018).

¹⁷⁴ GMM-000336348 (Internal Dar email from [Dar Employee] to [Dar Employee] dated 25 October 2018).

communication which the CMA considers accentuated the perception that discounts were not compatible with the SDAs and the Brand Guidelines.

- 3.86 Another example of Dar's monitoring and internally reporting non-compliance is an email dated 16 April 2019 and titled '[Reseller] Compliance', attaching a PowerPoint presentation with the same title, in which [Dar Employee] reported to [Dar Senior Employee] the non-compliance of [Reseller's] two websites¹⁷⁵ with the DHL SDA's website requirements, referring to 'flashes that devalue the brand' and 'sale devaluing the brand'.¹⁷⁶
- 3.87 On 10 June 2019, an internal Dar email from [Dar Employee] to [Dar Employee] forwarded a mass sale email from [Reseller] advertising a 10% discount for 'Wall Lights | Enjoy 10% off Selected Wall Lights In Store + Online this Weekend', requesting from [Dar Employee] the following: 'When you speak to [Reseller] about their website, please could you also mention the below [discount] with reference to the Brand Guidelines and SDA.'¹⁷⁷
- 3.88 In an internal Dar email dated 7 February 2020, [Dar Employee] forwarded a mass mailing from [Reseller] headed '[Reseller] Final Week Winter Sale' advertising 'an extra 5% off on top of the any current online sale'. [Dar Employee] stressed that promoting a sale using the DHL logo contravenes the SDA and Brand Guidelines: 'very alarmed to see they are **using our logo to promote a sale!** This really is **against the rules and spirit of the SDA and brand guidelines.** Could you possibly give [Employee of Reseller] a call and make sure that whoever does their marketing also knows that this is really not on. I don't suppose there is any way they can take this down?' (Emphasis added). A subsequent email from Dar to [Reseller] instructed them to remove the David Hunt logo from their website's sale page noting that 'this brand is not sale product'.¹⁷⁸
- 3.89 On 12 November 2020, an internal Dar WhatsApp conversation between [Dar Senior Employee] and [Dar Senior Employee] reported [Reseller's] non-compliance with its obligations under the SDA not to use discount banners. [Dar Senior Employee] stressed that dar lighting is not a discount brand by stating, '**No one should be advertising 40% off dar lighting in their header. We are not a discount brand.** Neck and neck on my black list. [...] Thus [sic] is to do with bringing the brand into disrepute I am [sic] saying do not sell at that price just do not use my brand name on your banner in this way. They should nit [sic] be doing

¹⁷⁵ [Reseller] operates two websites: [X] and [X].

¹⁷⁶ GMM-000336406 (Internal Dar email from [Dar Employee] to [Dar Senior Employee] dated 16 April 2019) and its attachment GMM-000336407 (PowerPoint presentation titled '[Reseller] Compliance', pp.4 and 7.

¹⁷⁷ GMM-000336410 (Internal Dar email from [Dar Employee] to [Dar Employee] dated 10 June 2019).

¹⁷⁸ GMM-000597771 (Email from [Dar Employee] to [Reseller] dated 7 February 2020).

it.’¹⁷⁹ (Emphasis added) Although this evidence purportedly shows that [Dar Senior Employee] did not wish to interfere with the prices at which the products were sold (see section on ‘Exculpatory’ documents below), nonetheless it shows that [Dar Senior Employee] did not want Resellers advertising price discounts in respect of the dār lighting brand.

- 3.90 The CMA considers that [Dar Senior Employee] was heavily involved in these communications. In light of [Dar Senior Employee’s] seniority within Dar and [Dar Senior Employee’s] high degree and specific knowledge of competition law (see paragraphs 3.344 to 3.370 below), the strong views [Dar Senior Employee] expressed, including as detailed above, likely reinforced the perception amongst the Dar sales team that discounts and sales campaigns were not compatible ‘with the spirit’ of the SDAs and the Brand Guidelines for all Brands of Relevant Products.

Dar’s external communications appeared to Resellers to be inimical to discounting

- 3.91 In this regard, the CMA considers that Dar’s internal perception that discounts were not compatible with the SDAs and Brand Guidelines likely fed into its external communications with Resellers. Having checked Resellers’ websites to assess their compliance with the SDAs and Brand Guidelines, Dar staff contacted Resellers to instruct them to amend their websites to remove discounts in relation to all three Brands of Relevant Products.¹⁸⁰
- 3.92 The CMA notes that Dar staff’s instructions to Resellers related to the Brand Guidelines’ requirements that ‘under no circumstances should words, flashes or overlays be used over the image or it’s negative space’ and concerns over images or logos being impeded or colours of flashes not complying with the Brand Guidelines (see paragraph 3.73.1).
- 3.93 The CMA further notes that these instructions were not explicitly or directly about the price at which the products were being sold but about product presentation. However, the CMA considers that the forceful way the concerns around the perception of the worth of Brands of Relevant Products were communicated to Resellers created a perception that discounts were not permitted under the SDAs and Brand Guidelines.
- 3.94 To this end, in its response to the Second Section 26 Notice, Dar conceded that some Resellers misinterpreted the SDAs ‘as a tool that could be used to prevent

¹⁷⁹ GMM-000174929 (Internal Dar WhatsApp conversation between [Dar Senior Employee] and [Dar Senior Employee] dated 12 November 2020). For the CMA’s view of the potential reason for ‘exculpatory’ remarks by Dar staff see section on ‘Exculpatory’ documents below.

¹⁸⁰ See paragraphs 3.96 to 3.103 below.

other Resellers from discounting.’¹⁸¹ This concession supports the CMA’s view that Dar may have supported an environment that seemed inimical to discounting in the minds of Resellers and so engendered a perception amongst its Resellers that the SDAs allowed Dar to prevent discounting. Further, the CMA has seen very limited evidence of Dar trying to disabuse Resellers of this perception, that which it has seen, could in some instances have appeared specious, obfuscating Dar’s true conduct in case of any investigation under the Act and may even form part of Dar’s culture of concealment (see paragraphs 3.383 to 3.406 below).

3.95 The evidence cited at paragraphs 3.96 to 3.103 below shows that Dar engendered the perception amongst its Resellers that the SDAs allowed Dar to prevent discounting by allowing Dar to control prices.

3.96 On 23 May 2019, [Dar Employee] sent a WhatsApp message to [Employee of Reseller] explaining the reason for [Reseller] not being given access to the selective distribution network for DHL products as follows: **‘To be able to control the prices** customers who have David Hunt must have a designated area with an approved David Hunt display. Signed an SDA. I don’t think you have sold many?’¹⁸² (Emphasis added). The CMA infers from this evidence that Dar perceived the DHL SDA as giving it the ability to control the prices at which Resellers were selling the DHL products and this message was relayed to Resellers.

3.97 On 11 September 2018, [Dar Employee] messaged [Employee of Reseller] to request him to remove a banner which stated ‘Buy Dar Lighting Online at Trade Prices’.¹⁸³ In interview with the CMA, [Employee of Reseller] explained that [Dar Employee] asked him to remove the banner as it is against the Brand Guidelines.¹⁸⁴ As [Reseller] is not a signatory of the DHL SDA or LSS SDA, the evidence shows that the instructions related to the dār lighting products.

¹⁸¹ GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), response to question 9. See also GMM-000336298 (Internal Dar memo from [Dar Senior Employee] to Sales Team and Directors issued in 2012 and reissued in 2016 and 2017), which stated, *‘I know the market place is full of rumors and speculation and that often our customers appear to gain a wholly inaccurate view of activities from poor, incomplete or even mischievous information that is feed into the market place. I also know customers can assume “policies” when all they are describing is a habitual process or long standing routine. These can lead to mis understandings and talking at cross purposes – so if you have any queries or are in doubt about any query or questions that is put to you please consult the office before responding – it is so important we avoid any mis understanding and everyone is clear we are not interested in and do not support RPM.’*

¹⁸² GMM-000531160 to GMM-000531179 (WhatsApp messages between [Dar Employee] and [Employee of Reseller] between 29 January 2019 to 23 May 2019). See, in particular, GMM-000531176 (WhatsApp message from [Dar Employee] to [Employee of Reseller] dated 23 May 2019 at 10:17pm).

¹⁸³ GMM-000600173 (WhatsApp message from [Dar Employee] to [Employee of Reseller] dated 11 September 2018).

¹⁸⁴ GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021), p.63 and 64.

3.98 Following a complaint from [Reseller] that certain Resellers were not complying with the price presentation requirements set out in the Brand Guidelines, [Dar Senior Employee] responded to [Reseller] as follows:¹⁸⁵

'I cannot comment on the individual cases you point to, to illustrate your case but I would answer these with a general comment. At any one time it will always be possible with searching to find exceptions. I am concerned with the main, majority view. I will judge success or failure by the general experience and overall standard of our Brand presentation and consumer perception in the market place and the general market experience, not by exceptional examples but these exceptions, **where discovered, will be logged and tackled in turn.**' (Emphasis added)

3.99 [Employee of Reseller] emailed [Dar Employee] on 7 January 2019, following a complaint from one of its customers who had bought a lighting product from [Reseller] and subsequently found the same product for less than half the price on [Reseller 1's] website. In her email she stated, 'It's really disappointing to see such a low price - specifically when we have just had to sign a **lengthy contract not to undersell the brand!** Can you let me know how we can explain this to the customer and what can be done to rectify the situation?' (Emphasis added). [Dar Employee] made it known that suspension of the account was a sanction available for non-compliance with the SDA: 'As a company we cannot have any influence on the prices our customers sell at, **if any of them infringe the terms & conditions of our SDA their account will be suspended, as we do not want to see our brand devalued.**'¹⁸⁶ (Emphasis added)

3.100 On 18 January 2019, further to an internal direction from [Dar Employee],¹⁸⁷ [Dar Employee] instructed [Employee of Reseller] to remove sale banners from his website in relation to DHL products: 'The Garbo range seems to have fallen into your dar category and has sale banners on the images which is not allowed within the terms of the SDA. Please let me know when you have rectified it so that I can advise accordingly.' [Employee of Reseller] responded, 'There were 3 products which I think must have always been left in Dar, all sorted now though.'¹⁸⁸

¹⁸⁵ GMM-000336369 and GMM-000336371 (Final draft of a letter dated 9 November 2018 from [Dar Senior Employee] to [Employee of Reseller] and [Employee of Reseller]).

¹⁸⁶ GMM-000336385 (Email from [Dar Employee] to [Employee of Reseller] dated 7 January 2019).

¹⁸⁷ GMM-000597388 (Internal Dar email from [Dar Employee] to [Dar Employee] dated 18 January 2019).

¹⁸⁸ GMM-00000404 (Email chain between [Dar Employee] and [Employee of Reseller] dated 18 January 2019). The CMA also notes an earlier email from [Dar Employee] to [Employee of Reseller] in forceful terms, 'I've just been looking at retailer websites and notice that you've not made any of the updates to the David Hunt area of your website that we discussed. This is a hot topic internally and I don't want you to be one of the ones on the naughty step! Let me know if you're having problems with it, so I am armed if I get asked the question.[...]' [Employee of Reseller] responded on the same day, 'I have done almost everything we discussed, I am just waiting on one part which should be imminent. Maybe you could call me Monday to go through this.' GMM-00000342 (Email chain between [Dar Employee] and [Employee of Reseller] dated 2 March 2018).

- 3.101 An internal Dar checklist dated 10 May 2019 relating to [Reseller's] DHL SDA Website Requirements recorded that [Reseller's] website contained 'Pricing in red giving the impression [sic] of being in a sale'.¹⁸⁹ The CMA considers from the plain meaning of this entry that Dar judged sales not to be compatible with the SDAs.
- 3.102 A subsequent email dated 22 July 2020 from [Employee of Reseller] to his web developer underlines his perception that the DHL Brand Guidelines prevented Resellers from advertising sale prices on the DHL product pages. To his web developer's question 'I remember some time ago you mentioned that some of your brands have certain guidelines on how they want their products displayed on your site', [Employee of Reseller] responded that some of the brands have their own guidelines, including David Hunt for which '**No Sale prices can appear on product page**, cannot show was now price, cannot have a sale flash over image and **no red text**.'¹⁹⁰ (Emphasis added)
- 3.103 In an email dated 30 October 2019 headed '*DHL images*', [Dar Employee] instructed [Employee of Reseller] to remove the red discount on a DHL product: 'Are you also able to remove the red text you have against HOR4264?'.¹⁹¹
- 3.104 This perception that the SDAs firmed up an existing restriction on the level of discount Resellers could offer is clear in [Employee of Reseller's] response to a Section 26 Notice where it wrote, 'Prior to the David Hunt Lighting and [Light] Shade Studio agreements being produced in August 2017, verbal instructions were given that, as part of this distributor agreement, we were expected to sell at the prices stated by Där Group, or we would put at risk our supply and distributor status.'¹⁹²
- 3.105 Resellers' perception that the SDAs prevented them from determining the level of discount on the Relevant Products has been further confirmed by [Employee of Reseller 2]. In interview, in response to a question as to how signing the SDAs had changed the way he advertised or sold Dar products online or in store, [Employee of Reseller 2] responded, '**once the newer agreements came in, it seemed to be that you couldn't discount as heavily. And that's basically what was suggested was in the agreement**.'¹⁹³ (Emphasis added)
- 3.106 The CMA considers that the fear of having their account suspended or closed for non-compliance with the SDAs' and Brand Guidelines' website requirements, increased the pressure on Resellers not to discount.

¹⁸⁹ GMM-000600567 (Checklist dated 10 May 2019 for [Reseller] ([<]), DHL SDA Website Requirements).

¹⁹⁰ GMM-00000274 (Email from [Employee of Reseller] to [Employee of Reseller] dated 22 July 2020).

¹⁹¹ GMM-000333693 (Email from [Dar Employee] to [Employee of Reseller] dated 30 October 2019).

¹⁹² GMM-000333694 (Response dated 7 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 22.

¹⁹³ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.32.

- 3.107 For example, in December 2018, having updated both his websites in line with the Website Guidelines for DHL products, [Employee of Reseller] expressed his concerns about being delisted as a DHL Authorised Stockist.¹⁹⁴
- 3.107.1 In an email headed 'Website SDA Requirements [Employee of Reseller] wrote, 'I wonder if you could please confirm by email, that with these changes we are now fully complying with the Website Guidelines for DHL on both [X] and [X]? Sorry to be pedantic about it, but given recent communications I just want to be absolutely certain that I have actioned everything possible on both sites and that we can go forward safe in the knowledge that we can look to expand the DHL range we list without risk.'¹⁹⁵
- 3.107.2 A few weeks later, not having heard back from Dar, [Employee of Reseller] reiterated his concerns as follows, 'Having completed all of this, we would be extremely grateful if you could confirm that both sites are compliant with the DHL SDA and that this is currently no risk of change to our current situation as DHL stockists and suppliers?'¹⁹⁶
- 3.108 That some Resellers interpreted the SDAs and Brand Guidelines as prohibiting discounts and promotions has been acknowledged by Dar in response to the Second Dar Section 26 Notice. Dar submitted that it was never its view that any level of discount, or the advertising of such a discount in a manner that was consistent with the Brand Guidelines, was captured or proscribed by the DHL SDA. However, Dar was unable to provide the CMA with examples of discounts in a brand compliant manner from the Relevant Period, although it believes that such advertised discounts would have existed at the time.¹⁹⁷
- 3.109 In light of the above, the evidence shows that, through the implementation and enforcement of the SDAs and their respective Brand Guidelines, Dar may have supported an environment that seemed inimical to discounting in the minds of Resellers and so engendered a perception amongst its Resellers that the SDAs and Brand Guidelines allowed Dar to prevent discounting. The enforcement of the SDAs and Brand Guidelines therefore supported the application of the Dar Pricing Policy (see paragraphs 3.111 to 3.127).
- 3.110 Although the contemporaneous evidence on Dar's enforcement of the website requirements relates mainly to DHL products, the use of SDAs for Dar's other Brands of Relevant Products in virtually the same terms as the DHL SDA

¹⁹⁴ The two websites referred to by [Employee of Reseller] are [X] and [X].

¹⁹⁵ GMM-000600522 (Email from [Employee of Reseller] to [Dar Employee], copying [Dar Employee], both of Dar dated 11 December 2018).

¹⁹⁶ GMM-000600533 (Email from [Employee of Reseller] to [Dar Employee], copying [Dar Employee], both of Dar dated 4 January 2019).

¹⁹⁷ GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), response to question 17.

reinforced the perception that discounting was not allowed across all Brands of Relevant Products subject to SDAs. The perception created around DHL of Resellers' not being able to discount therefore carried through to other Brands of Relevant Products for Resellers selling those other Brands of Relevant Products in addition to DHL and so further supported the Dar Pricing Policy. The CMA considers that this perception that the SDAs and Brand Guidelines allowed Dar to prevent discounting would have been commonplace across all the members of Dar's SDA network, by virtue of them having signed the SDAs.¹⁹⁸

The role played by the display of the RRP and its link to Resellers' selling price

- 3.111 The CMA considers it legitimate for a supplier to require its resellers to display the correct RRP when advertising its products. However, for the reasons set out below, the CMA considers that Dar also used the provisions of the Brand Guidelines relating to the correct display of the relevant RRP, together with the price lists circulated to Resellers, as means to signal the correct Minimum Price and instruct Resellers to revert to the Minimum Price.
- 3.112 Although the Brand Guidelines do not explicitly stipulate that the RRP should feature on the product photography online, the images of correct product photography online in both the DHL Brand Guidelines and the dār lighting Brand Guidelines suggest that the RRP should be displayed in conjunction with a product.¹⁹⁹ This requirement is further confirmed by the training materials for the DHL²⁰⁰ and LSS²⁰¹ brands which state that 'the price shown on the website is the RRP including VAT'.
- 3.113 Dar submitted that 'neither the DHL Brand Guidelines and/or the dār lighting Brand Guidelines require RRP to feature on the product photography online. According to Dar, the only circumstances where Dar required that RRP appeared in connection with the online display of its products is where a reseller is offering a discount on the RRP. In those circumstances, the product page needs to make clear that the "before" price is the RRP rather than the retailer's previous price.'²⁰² Dar explained that the requirement to display the RRP was partly a presentation issue and partly intended to ensure that Resellers act in compliance with the Consumer Protection From Unfair Trading Regulations 2008 (CPUT08),²⁰³ reference to which is now

¹⁹⁸ GMM-000333626 (Annex 10.1 to response dated 11 December 2020 to the First Dar Section 26 Notice), Members of Dar's SDA networks.

¹⁹⁹ GMM-000333635 (Annex 13.5 to response dated 11 December 2020 to the First Dar Section 26 Notice), David Hunt Brand Guidelines, p.19. GMM-000333634 (Annex 13.4 to response dated 11 December 2020 to the First Dar Section 26 Notice), dār lighting Brand Guidelines, p.23.

²⁰⁰ GMM-000601399 (Annex 11.5B to response dated 23 July 2021 to the Second Dar Section 26 Notice), David Hunt Lighting - Training 2020.

²⁰¹ GMM-000601400 (Annex 11.6 to response dated 23 July 2021 to the Second Dar Section 26 Notice), The Light Shade Studio - Training 2020.

²⁰² GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), response to question 19.

²⁰³ S.I. 2008/1277.

contained within the dār lighting Brand Guidelines. Dar submitted that these guidelines only require (in line with CPUT08) an Authorised Stockist to make clear a Reseller is referring to RRP where they compare their own price to the higher RRP but the higher price is presented as the Authorised Stockist's previous price rather than the RRP.²⁰⁴

3.114 In relation to the price list circulated or made available on its portal by Dar to Resellers, Dar submitted that these price lists contained an RRP 'both as a recommendation to Resellers and because Dar's wholesale pricing model allows its customers to easily calculate the wholesale price they will be charged in the context of their specific discounts and pricing terms when provided with the RRP.'²⁰⁵ The CMA recognises that in the normal course of legitimate business it would be reasonable for Dar to communicate the correct RRP's and wholesale prices through the provision of price lists.

3.115 Notwithstanding, Dar's above explanations as to the reasons for and circumstances in which Dar required the RRP to be displayed online, the CMA notes that in interview with the CMA, [Employee of Reseller] explained that Dar was 'always a stickler on the RRP's being correct, you know, and up-to-date'²⁰⁶ and he confirmed how changing the RRP would change the price he sold at:²⁰⁷

[CMA Official]: I mean, if -- if they're concerned about the RRP, would it impact on your list price in a situation like this, that you would have been, as I understand it, you would sell at the list price, but if you've mispriced the RRP, would that impact on your list price?

[Employee of Reseller]: Of course, [CMA Official], yes, it would.

[CMA Official]: Okay. And that list price would be the price you would sell at?

[Employee of Reseller]: We would sell to the customer at, yes.

[CMA Official]: So, there is a link, a definite link between a mistaken RRP and the price you sell at?

[Employee of Reseller]: Yes.'

²⁰⁴ Dar submitted that it was concerned that Resellers might be breaching the requirements of CPUT08 in the manner they advertised products as being 'on sale' or 'discounted' when in fact that was the Reseller's permanent price. Dar indicated that such conduct would be misleading, and therefore likely to damage Dar's reputation. GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), responses to questions 11, 19 and 21.

²⁰⁵ GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), response to question 8.

²⁰⁶ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.29, lines 16-17.

²⁰⁷ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.64, lines 11-25.

- 3.116 On occasion, the evidence shows that Dar contacted Resellers to tell them to increase the RRP on a Relevant Product, again, as a byword or code for their sales price.²⁰⁸ In light of the evidence above, the CMA considers that when Dar instructed Resellers to increase the RRP on a given product, it was on occasion, at least in the expectation that the selling price would also rise.
- 3.117 The evidence set out at paragraphs 3.118 to 3.121 below further shows that Resellers understood the Dar Pricing Policy provided for a direct link between the RRP and their sales prices such that, on occasion, Resellers would use 'RRP' as a byword or code for sales price when complaining about another Reseller.
- 3.118 In an email dated 5 November 2017 and headed '[Reseller 1] DAR listings', [Employee of Reseller] complained to [Dar Employee] about [Reseller 1] selling Dar's products below RRP, as contravening Dar's instructions: 'I have sent the link to [Reseller 1] and just wondered if Dar are supplying them directly as they are selling way below the rrp which seems to go against what [Dar Senior Employee] wants online.'²⁰⁹
- 3.119 In an email dated 19 June 2018 and titled 'RRP', [Reseller] complained to Dar about two of Dar's Resellers having wrong RRPs and suggested that Dar contact these Resellers to update their prices:
- 'Please see links attached. We are [sic] have a customer who is interested in several Admirals, however we are having a slight issue with the companies below as they have got the wrong RRP prices and the customer thinks we are putting the wrong prices down. I know they discount what they want, however it doesn't reflect well on anyone if there initial rrp prices are incorrect. I have informed our customer they are incorrect rrps listed and asked them to check your website, however it maybe worthwhile you asking these customers to **update there [sic] prices.**'²¹⁰ (Emphasis added)
- 3.120 In an internal [Reseller] email chain of 28 February 2019, [Employee of Reseller] referred to having been contacted by [Dar Employee] due to a product (coded as CRY1250) having been incorrectly priced and needing to be updated in line with the most recent price list. [Employee of Reseller] instructed [Employee of Reseller] as follows: 'from now on EVERY Dar stock needs to get checked in case sept or jan launch...I think print us all of a list of these products (even if we don't have them) and laminate them so we can all refer to them...give [Employee of Reseller] a copy to. Blooming painful !!'. In her response to [Employee of Reseller], [Employee of Reseller] indicated that having asked [Dar Employee] about the

²⁰⁸ See section titled 'Dar avoided generating potentially incriminating written records related to the Dar Pricing Policy, preferring to use coded communication'.

²⁰⁹ GMM-000221770 (Email from [Employee of Reseller] to [Dar Employee] dated 5 November 2017).

²¹⁰ GMM-000336322 (Email from [Reseller] to [Dar Employee] dated 19 June 2018).

January show items, the latter confirmed that 'we will go out at PRP.'²¹¹ The CMA infers from contemporaneous documents that the reference to 'PRP' prices essentially refers to RRP prices,²¹² thereby indicating that [Reseller] would price Dar's 'January show items' at RRP.

- 3.121 In an email from [Employee of Reseller] to sales.contract@darlighting.co.uk dated 20 May 2019, he asked, 'Please can i have **the retail prices** on the following products thank you. JET4223 x 1; CIA1302 x 1.' On the same date [Dar Employee] responded: 'JET4223 £99 rrp ex vat; CIA1302 £12.50 rrp ex vat.'²¹³ (Emphasis added). The CMA notes here how Dar expressed the retail prices as being RRP exclusive of VAT in both instances.
- 3.122 In an email dated 30 October 2019 headed 'DHL images', [Dar Employee] instructed [Employee of Reseller] to amend the RRP: 'I just wanted to point out in case you weren't aware, that the RRP is incorrect. The price on the pricelist is with the white laminate which is £708 rrp. You are listing the Sloane with a laminate metallic lining which the RRP is actually £740, are you able to update this please?'.²¹⁴
- 3.123 A Dar Internal Calls Report for the week of 2-8 December 2019 listed a call to [Reseller] as follows: 'Met with [Employee of Reseller]. Went through queries on website. Advised he needed to implement the price increase on DHL, said he had only received the dar increase, didnt know about DHL. [...]'.²¹⁵ The CMA considers this entry shows that [Employee of Reseller] was instructed by Dar to increase the prices of DHL Products to the Minimum Price and had likely already increased his prices to the Minimum Price on dar lighting products in accordance with the Dar Pricing Policy.
- 3.124 The CMA considers that, in the normal course of legitimate business, the sharing of competition law knowledge is beneficial. However, in this case, the CMA considers that Resellers' above understanding that Dar would use an apparently legitimate instruction concerning using the correct RRP to instruct them to revert to

²¹¹ GMM-000249663 (Internal [Reseller] email from [Employee of Reseller] to [Employee of Reseller] dated 28 February 2019).

²¹² A spreadsheet provided to [Reseller] by Dar referring to RRP's (GMM-000250400 and GMM-000250401) was subsequently used to generate an internal [Reseller] spreadsheet in which the same RRP's were referred to as PRP's (GMM-000250398 and GMM-000250399). Also see GMM-000599070 (Email from [Dar Employee] to [Employee of Reseller] dated 19 January 2019).

²¹³ GMM-000591547 (Email from [Dar Employee] to [Employee of Reseller] dated 20 May 2019). The CMA notes another email where Dar informed a Reseller of the retail price: in response to an email enquiry dated 15 October 2019 from [Employee of Reseller], asking, 'Would you mind checking a price for me on the below item Lois rustic brown lantern LO14129', [Dar Employee] wrote on 16 October 2019: 'The loi4129 is £60 **retail**' (Emphasis added); GMM-000597604 (Email chain between [Employee of Reseller] and [Dar Employee] dated 15 and 16 October 2019).

²¹⁴ GMM-000333693 (Email from [Dar Employee] to [Employee of Reseller] dated 30 October 2019).

²¹⁵ GMM-000600896 (Dar Internal Calls Report for week of 2 to 8 December 2019).

with the most recent price lists (see 'Illustrative examples of Dar's monitoring and enforcement'). The CMA also considers that the evidence set out above shows that when Dar instructed Resellers to increase the RRP on a given Relevant Product, it did so in the expectation that the Resellers would also alter their selling price.

3.127 In light of the above, the CMA considers that, during the Relevant Period, Dar disseminated RRPs and introduced SDAs that Resellers interpreted as prohibiting discounts and promotions. The enforcement of the SDAs and Brand Guidelines therefore facilitated the application of the Dar Pricing Policy.

Dar Pricing Policy

Conclusion

3.128 The CMA concludes that during the Relevant Period, Dar operated and enforced a wide-ranging pricing policy (the '**Dar Pricing Policy**'), the purpose of which was to ensure that Resellers would not advertise or sell the Relevant Products online below a certain minimum price specified by Dar from time to time (the '**Minimum Price**').²²⁴

3.129 The evidence shows that Dar intended that the Dar Pricing Policy should apply across all or at least the vast majority of its Reseller network, including to [Reseller 1] and [Reseller 2] (see 'Illustrative examples of Dar's monitoring and enforcement' and 'Agreement and/or concerted practice between Dar and each of [Reseller 1] and [Reseller 2]' below).

Nature of evidence

3.130 In reaching its view on the Dar Pricing Policy the CMA has considered the evidence available to it, including contemporaneous documentary evidence, witness interview evidence from a Dar employee as well as from the employees of four Resellers and responses to Section 26 Notices received from Dar and certain employees of Dar and certain Resellers and certain employees of those Resellers.²²⁵

3.131 The CMA's review of the evidence obtained during its investigation shows that evidence of the Dar Pricing Policy is fragmentary. The CMA considers that this is not surprising in light of Dar's awareness about the potential illegality of implementing and enforcing the Dar Pricing Policy as set out at paragraphs 3.343

²²⁴ For the avoidance of doubt, the conclusion is not that there was a formal written policy, but that Dar acted with a view to achieving the aims of the Dar Pricing Policy as described in this Section.

²²⁵ See paragraphs 2.10 to 2.34 above.

to 3.382 below and Dar’s culture of concealment as set out in paragraphs 3.383 to 3.406 below.²²⁶

3.132 Although, for completeness, the CMA notes that Dar may not always have been uniform or highly systematic in and certainly did not automate its approach to the operation and enforcement of the Dar Pricing Policy, including in relation to the Infringements.

3.133 Therefore, the CMA has taken into account the fact that there may be variations in Resellers' experiences, interactions and perceptions of threats, reflecting their different circumstances, including differing interactions with different Dar employees.

3.134 Notwithstanding the above, the witness evidence and the contemporaneous documentary evidence supports the CMA’s findings in this case as set out below. Further, the CMA has uncovered sufficient evidence indicating the existence of the Dar Pricing Policy as set out in more detail below at the paragraphs under ‘Scope of the Dar Pricing Policy’.

People involved: roles and reporting lines

3.135 Tables 3.1 to 3.3 below set out the names and roles of key Dar, [Reseller 1] and [Reseller 2] employees referred to in this Decision to make it easier to understand the context to the evidence set out in the following Sections.

Table 3.1: Relevant Dar employees²²⁷

Employee	Role during the Relevant Period
[Dar Senior Employee]	[REDACTED]
[Dar Senior Employee]	[REDACTED]
[Dar Senior Employee]	[REDACTED]
[Dar Employee]	[REDACTED]
[Dar Employee]	[REDACTED]

²²⁶ See additional contemporaneous evidence at paragraphs 3.142 to 3.147, 3.150, 3.154 to 3.155, 3.211, 3.217 to 3.252, 3.303 and 3.308, as well as paragraphs 4.50, 4.63 to 4.65 and 4.237 below.

²²⁷ Dar employees who are mentioned in the evidence below are listed. The role of Dar’s employees changed during the Relevant Period. See GMM-000333640 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 4, and GMM-000333662 (Annex 3.3 to response dated 22 January to the First Dar Section 26 Notice).

Employee	Role during the Relevant Period
[Dar Employee]	[X]
[Dar Employee]	[X]
[Dar Employee]	[X]
[Dar Employee]	[X]
[Dar Employee]	[X]
[Dar Employee]	[X]
[Dar Employee]	[X]
[Dar Employee]	[X]
[Dar Employee]	[X]
[Dar Employee]	[X]
[Dar Employee]	[X] ²²⁸
[Dar Employee]	[X] ²²⁹
[Dar Employee]	[X] ²³⁰
[Dar Employee]	[X] ²³¹
[Dar Employee]	[X] ²³²
[Dar Employee]	[X]

Source: Dar

²²⁸ [Dar Employee] was in this role from [X] until [X]; afterwards she moved to a [X] role within Dar.

²²⁹ [Dar Employee] left her role in [X].

²³⁰ [Dar Employee] was in this role from [X] until [X].

²³¹ [Dar Employee] was in this role from [X] until [X].

²³² [Dar Employee] was in this role from [X] until [X].

Table 3.2 [Reseller 2] employees²³³

Employee	Area of Responsibility
[Employee of Reseller 2]	[<]
[Employee of Reseller 2]	[<]
[Employee of Reseller 2]	[<]
[Employee of Reseller 2]	[<]
[Employee of Reseller 2]	[<] ²³⁴

Source: [Reseller 2], Companies House

Table 3.3 [Reseller 1] employees²³⁵

Employee	Area of Responsibility
[<]	[<] [Reseller 1] [<] ²³⁶
[<]	[<] ²³⁷
[<]	[<]

Source: [Reseller 1].

Structure of the rest of Section 3

3.136 The remainder of this Section sets out the relevant factual background to the Dar Pricing Policy as indicated by the evidence, including:

3.136.1 Its commercial aims, content and communication, scope and duration;

3.136.2 Its monitoring and enforcement;

3.136.3 The consequences for Resellers of non-compliance;

3.136.4 Dar's awareness about the potential illegality of implementing and enforcing the Dar Pricing Policy;

3.136.5 Dar's culture of concealment; and

²³³ See Companies House, available at [Reseller 2] - Find and update company information - GOV.UK (company-information.service.gov.uk).

²³⁴ [Employee of Reseller 2] was in this role from [<] to [<].

²³⁵ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 1.

²³⁶ [Employee of Reseller 1] was in this role from [<] until [<].

²³⁷ [Employee of Reseller 1] was in this role from [<] to [<].

3.136.6 Illustrative examples of Dar's monitoring and enforcement of the Dar Pricing Policy (underlining the broad application of, and adherence to, the Dar Pricing Policy in relation to Relevant Products across Dar's network of Resellers throughout the Relevant Period).

Commercial aims, content and communication, scope and duration

Commercial aims of the Dar Pricing Policy

3.137 The evidence shows that Dar's commercial aims for introducing the Dar Pricing Policy were at least threefold:

3.137.1 It was designed to protect the perceived quality of the brand by ensuring that the Relevant Products were not seen to be or sold as discount brands on the internet;

3.137.2 It was designed to protect Resellers' margins; and

3.137.3 In turn, it made it desirable for Resellers to stock the Relevant Products.

Protection of the perceived quality of the brand

3.138 In response to the Second Dar Section 26 Notice, Dar confirmed that 'protecting the overall quality perception of Dar's brands was the core aim of introducing the SDAs'.²³⁸ The CMA considers that in this regard the SDAs and the Dar Pricing Policy were supporting the same aims.²³⁹

3.139 Further evidence that Dar did not want to be seen as a discount brand is set out in a WhatsApp exchange between [Dar Senior Employee] and [Dar Senior Employee] dated 12 November 2020 referred to in paragraph 3.89 above. [Dar Senior Employee] forwarded a screenshot²⁴⁰ of [Reseller] displaying a 40% discount banner on Google Shopping. [Dar Senior Employee] added the caption 'is there anything we can do about this. I am sure the SDA covers this as it gives the impression we are a discount brand and it is mid-leading [sic] [...]'. [Dar Senior Employee] responded, 'No one should be advertising 40% of [sic] dar lighting in their header. We are not a discount brand. Neck and neck on my black list.' [Dar Senior Employee] later confirmed that 'thus [sic] is to do with bringing the brand

²³⁸ GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), response to question 9.

²³⁹ In this connection, the CMA notes again as explained above at paragraphs 3.72 to 3.74 that Dar may have supported an environment that seemed inimical to discounting in the minds of Resellers and so engendered a perception amongst its Resellers that the SDAs allowed Dar to prevent discounting.

²⁴⁰ GMM-000174948 (WhatsApp exchange between [Dar Senior Employee] and [Dar Senior Employee] dated 12 November 2020).

into disrepute I am saying do not sell at that price²⁴¹ just do not use my brand name on your banner in this way. They should nit [sic] be doing it.’²⁴²

3.140 On 9 November 2018, in a ‘final draft’ letter to [Employee of Reseller] and [Employee of Reseller], [Dar Senior Employee] wrote, ‘Looking to protect and build our brands we have followed the guidance of the CMA and determined that moving to Selective Distributorship Agreements (SDA) for our brands is the first step in this process. [...] Our Brand is not presented in discount bricks and mortar stores so we do not want it to be presented as a discount brand on line.’²⁴³

3.141 The CMA considers that there is also evidence that certain Resellers understood from Dar that its brand should not be devalued, for example:

3.141.1 In an email from [Employee of Reseller] to [Dar Employee] dated 19 October 2017 (forwarded to [Dar Senior Employee] on the same day), [Employee of Reseller] stated ‘Dar had been looking at customers websites and to stop the devaluing of the David Hunt brand that certain online retailers would now not be able to sell David Hunt. We were told we fell into that category.’²⁴⁴

3.141.2 An email from [Employee of Reseller] to [Dar Employee] dated 12 November 2018,²⁴⁵ forwarded two screenshots of one Relevant Product²⁴⁶ discounted on [Reseller 1’s] website. [Employee of Reseller] referred to the screenshots and stated that she ‘thought that this contravenes all [Dar Senior Employee] was talking about’ and ‘on what planet is that not devaluing the Dar brand. Should I send to [Dar Senior Employee]?’.

Protection of Resellers’ margins

3.142 The evidence shows that one of the reasons why Dar introduced the Dar Pricing Policy was in an attempt to protect the profitability of its Resellers.

3.143 In an internal Dar email from [Dar Senior Employee] to [Dar Employee] dated 6 August 2018 titled ‘Wisebuys prices’, [Dar Senior Employee] stated, ‘[~~£~~] – the RSP Recommended Suggested Price (as opposed to recommend retail price) [~~£~~]. [sic] is supposed to give customers the chance to make more than [~~£~~]% [...]’²⁴⁷

²⁴¹ The CMA considers that this sentence is missing the word ‘not’ and so should read ‘I am not saying do not sell at that price just do not use my brand name on your banner in this way’.

²⁴² GMM-000174929 (Internal Dar WhatsApp conversation between [Dar Senior Employee] and [Dar Senior Employee] dated 12 November 2020).

²⁴³ GMM-000336363 (Email from [Dar Senior Employee] to [Dar Employee] dated 9 November 2018) attaching GMM-000336364 (Letter from [Dar Senior Employee] to [Employee of Reseller] and [Employee of Reseller] dated 9 November 2019).

²⁴⁴ GMM-000336305 (Email from [Employee of Reseller] to [Dar Employee] dated 19 October 2017).

²⁴⁵ GMM-000597373 (Email from [Employee of Reseller] to [Dar Employee] dated 12 November 2018).

²⁴⁶ A Tower 6 Light cluster pendant which is shown in both screenshots.

²⁴⁷ GMM-000336325 (Internal Dar email from [Dar Senior Employee] to [Dar Employee] dated 6 August 2018).

The CMA notes that Wisebuys price lists included an 'RSP' figure rather than a RRP figure. Nonetheless, the CMA considers that this email shows that Dar was looking to protect its Resellers' margins during the Relevant Period.

- 3.144 In an email from [Employee of Reseller] to [Dar Employee] dated 7 September 2018, [Employee of Reseller] reflects his understanding that the protection of Resellers' margins is an element in the Dar Pricing Policy when he states: '[w]e have no plans to go out and try and win a price war. That will only lead to failure. We recognize the importance of keeping prices at sensible levels. All we are asking is for dar to help us secure better margins to keep our business stronger for the future.'²⁴⁸
- 3.145 In an email from [Dar Employee] to [Employee of Reseller] dated 17 November 2020,²⁴⁹ [Dar Employee] set out some action points for [Reseller] noting how to maximise its margin when she stated 'upload as much of Volume 2 as possible in order to maximise the full margin potential' and for Wisebuys products to 'upload, great margin potential and not much exposure online.'
- 3.146 Upon receipt of the email from [Dar Employee], in an email of the same date [Employee of Reseller] explained to [Reseller's] staff copying in that 'all this is stuff is not allowed to be discounted on line so we can maximise our margin.'²⁵⁰
- 3.147 In his response to a Section 26 Notice issued to him in his personal capacity,²⁵¹ [Employee of Reseller] confirmed that it was his interpretation that 'Volume 2 Products could not be discounted based on [Dar Employee] email dated 17th November 2021 stating, 'volume 2 is to maximize the full margin potential, again perhaps ive [sic] misunderstood the volume 2 aspect'.²⁵²

Desirable for Resellers to stock the Relevant Products

- 3.148 In an email to [Dar Employee] on 20 August 2018, [Employee of Reseller] wrote, 'Thanks for the SDA received last week, have a couple of questions [...] Customer on Saturday, was looking for me to match [Reseller 1's] 45% discount, I do hope your SDA will have an impact, difficult currently to see the point of stocking/displaying Dar products for a [3<] % G.P.'²⁵³ The CMA understands that 'G.P.' refers to 'gross profit'.

²⁴⁸ GMM-000597334 (Email from [Employee of Reseller] to [Dar Employee] dated 7 September 2018).

²⁴⁹ GMM-000598359 (Email from [Dar Employee] to [Employee of Reseller] dated 17 November 2020).

²⁵⁰ GMM-000598359 (Email from [Employee of Reseller] to [Dar Employee] dated 17 November 2020).

²⁵¹ GMM-000600203 (Section 26 Notice to [Employee of Reseller] dated 29 April 2021).

²⁵² GMM-000600382 (Response dated 19 May 2021 to the Section 26 Notice to [Employee of Reseller] dated 29 April 2021).

²⁵³ GMM-000601127 (Email from [Employee of Reseller] to [Dar Employee] dated 20 August 2018).

3.149 In a Dar Internal Report forwarded to [Dar Employee] on 15 December 2017, [Dar Employee] reflected on [Reseller's] concerns on matters relevant to its margins such as Reseller discounts, rebates and combatting online competition. To this end she wrote:

'[X] I will spend some time with [Employee of Reseller] going through the showroom and **looking at ways they can combat online competition** and adapt to the market.'²⁵⁴ (Emphasis added)

3.150 In an internal Dar email dated 16 April 2020 to [Dar Senior Employee], [Dar Senior Employee] acknowledged the importance of Resellers' margins in making Dar an attractive brand to stock:

'[X] the changes allows more margin to be taken by re sellers [sic] of all types [X]. This is why I think we need to change the RRP's one way or another to [X] **re sellers [sic] will buy from who they make most margin out of.**'²⁵⁵ (Emphasis added)

Content and Communication

3.151 The following paragraphs outline the evidence the CMA has uncovered regarding the content of the Dar Pricing Policy and the way in which it was communicated to Resellers.

3.152 The CMA has noted, as explained above at paragraphs 3.72 to 3.74, that Dar may have supported an environment that seemed inimical to discounting in the minds of Resellers and so engendered a perception amongst its Resellers that the SDAs allowed Dar to restrict Resellers' freedom to discount. The CMA considers that the Dar Pricing Policy has to be viewed in this context.

Content

3.153 For the reasons set out in paragraphs under 'Dar's culture of concealment' below,²⁵⁶ it is clear that generally Dar did not commit the contents of the Dar Pricing Policy to writing and instead largely relayed its principal contents to Resellers orally, at face-to-face meetings around the periphery of lighting 'shows' and Dar product launches, at meetings and visits to Dar's and Resellers' showrooms, via telephone and only sometimes through encrypted messaging channels via WhatsApp.

²⁵⁴ GMM-000600973 (Internal Dar email from [Dar Employee] to [Dar Employee] dated 15 December 2017) attaching GMM-000600974 (Dar Internal Report dated 11 to 15 December 2017).

²⁵⁵ GMM-000336532 (Internal Dar email from [Dar Senior Employee] to [Dar Senior Employee] dated 16 April 2020).

²⁵⁶ See also 'Dar's preference to communicate orally with Resellers and within Dar').

3.154 To this end, a Dar Internal Report dated 25 September 2018 concerning [Reseller] stated, 'Meeting at där showroom to show [Employee of Reseller] new products due to being unable to attend launch. [...]. [Dar Senior Employee] & [Dar Senior Employee] joined later and discussed all points regarding SDA.'²⁵⁷ The CMA has not seen any further written record of what was said about the SDA at this meeting.

3.155 In interview, [Employee of Reseller] said:

'You're just shown round by somebody, and it can be anybody, one of the sales staff out the office of the new ranges. So, there wasn't specific, um, discussions at the meetings to say, "You must do this", and, "You must do that". That would be -- that was on verbal communication, um, usually from, um, a guy called [Dar Senior Employee], who would, um, discuss verbally, the parameters of what could and couldn't be done. I don't think there's anything actually in writing, of what you can, um, of how -- what percentage you can go at as a discount. There's nothing that we know of has ever been put in writing, it was just verbally done. [...] Usually, usually by [Dar Senior Employee]. That's the only one really, I know of.'²⁵⁸

3.156 In response to the Section 26 Notices dated 29 April 2021, [Employee of Reseller] wrote:

'In Jan 2019, at the Furniture show (NEC)²⁵⁹, I had a conversation with [Dar Senior Employee] (DAR), who informed me of their plans for Volume 2 Products in the DAR Catalogue, which was to maintain a price to the recommended RRP. This was not recorded in anyway'²⁶⁰ [...]

'At the time of the face to face meeting Jan 2019 at the Furniture Show (Exact Date & Time is Unknown) it was advised that DAR have a watertight agreement allowing companies to maintain RRP prices for what was to be known as Volume 2 Products. Any new products were added to the Volume 2 catalogue. [...] We were instructed verbally to sell all Volume 2 Products at full RRP.'²⁶¹

3.157 The CMA notes here the direct link in the Reseller's understanding between the 'watertight agreement' and 'allowing companies to maintain RRP prices'.

3.158 The CMA also notes [Dar Senior Employee] talking in terms of 'catching up' with Resellers who were 'being blamed for everything' when [Dar Senior Employee]

²⁵⁷ GMM-000600851 (Dar Internal Report dated 1 to 30 September 2018).

²⁵⁸ GMM-000601948 (Transcript of interview with [Employee of Reseller] on 13 September 2021), p.90.

²⁵⁹ The CMA notes the show ran from 20-23 January 2019. See <https://januaryfurnitureshow.com/>.

²⁶⁰ GMM-000600464 (Response dated 4 May 2021 to the Section 26 Notices to [Reseller] and [Employee of Reseller] dated 29 April 2021).

²⁶¹ *Ibid.*, responses to questions 5(b) and 7.

messaging [Dar Employee] on 15 October 2020 to say ‘Just setting off to [X] will call around 9 if that is ok. Just about web [Dar Senior Employee] spoke to [Employee of Reseller] so need to catch up with [Reseller] [Reseller] and [Reseller] who now appear to be being blamed for everything!’²⁶² The CMA has not seen any further written record of what was said to [Employee of Reseller], ‘[Reseller] [Reseller] and [Reseller].’

3.159 However, [Reseller] stated in its response to its Section 26 Notice:

‘Dar aggressively tried to maintain its prices. Despite refusing to do so, Dar continued to insist that their products prices were held. [Reseller] has attempted to drop prices repeatedly, and on each occasion DAR have objected in this way by calling and insisting they are put back. A discounted price may be updated on [Reseller’s] website on a weekend and a representative from Dar would telephone [Employee of Reseller] within a few days to ask that the discount is removed.

Dar representatives have also previously called ahead of big sale days, and said to [Employee of Reseller] something along the lines of, “Dar would prefer if you did not include our products in the upcoming Black Friday sales.”²⁶³

3.160 In response to the Section 26 Notice to [Reseller], [Employee of Reseller] wrote, ‘Prior to the David Hunt Lighting and [Light] Shade Studio agreements being produced in August 2017, verbal instructions were given that, as part of this distributor agreement, we were expected to sell at the prices stated by Där Group, or we would put at risk our supply and distributor status.’²⁶⁴ Again, the CMA notes the Reseller’s understanding of the direct link between ‘this distributor agreement’ and ‘we were expected to sell at the prices stated by Där Group.’

3.161 In light of the above evidence, it appears that certain Resellers may have been left with the impression from these face-to-face meetings and other contact with Dar that the SDAs allowed Dar to instruct them to set their prices at and/or to revert to the Minimum Price.

²⁶² GMM-000188596 (WhatsApp message from [Dar Senior Employee] to [Dar Employee] dated 15 October 2020).

²⁶³ GMM-000333709 (Response dated 18 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 22.

²⁶⁴ GMM-000333694 (Response dated 7 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 22.

Communication

The role of price lists in the Dar Pricing Policy

- 3.162 Even though the Dar Pricing Policy was not written down, it was partly communicated through price lists sent by Dar to its Resellers from time to time. Such price lists were also available on the Dar web portal which helped to facilitate the implementation of the Dar Pricing Policy. In summary, Dar's price lists:²⁶⁵
- 3.162.1 Specified the RRP. During the Relevant Period this was initially shown only as exclusive of VAT and from September 2019 the price lists showed RRP as both exclusive and inclusive of VAT²⁶⁶ for dār lighting (The Lighting Book), DHL and LSS branded Relevant Products;²⁶⁷
 - 3.162.2 Set out the net trade price together with a Suggested Retail Price ('SRP'),²⁶⁸ each shown exclusive and inclusive of VAT for Wisebuys products;
 - 3.162.3 Were produced in both PDF and Excel format and contained the same information for dār lighting (The Lighting Book), DHL and LSS branded Relevant Products; and
 - 3.162.4 Allowed Resellers to calculate trade price by deducting a percentage from RRP for dār lighting (The Lighting Book), DHL and LSS branded Relevant Products.²⁶⁹
- 3.163 The CMA considers that the mere provision of price lists by Dar to its Resellers as a means of communicating its recommendation as to resale prices (i.e. its RRP) in the normal course of legitimate business would not usually raise competition concerns. However, the evidence in this case shows that Dar communicated the Minimum Price for the Relevant Products to its Resellers partly through the circulation²⁷⁰ of price lists and making them available via the Dar portal for easy downloading by Resellers. Further, Dar was careful not to communicate pricing instructions explicitly in writing except to a limited extent through encrypted

²⁶⁵ GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), response to question 8.

²⁶⁶ From September 2019. See GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), response to question 8.

²⁶⁷ This applied to price lists provided by Dar both in PDF and Excel format. See GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), response to question 8.

²⁶⁸ [redacted] GMM-000601264 (Response dated 23 July 2021 to the Second Dar Section 26 Notice), footnote 26. See also GMM-000600424 (Response dated 19 March 2021 to the First Dar Section 26 Notice), response to question 18.

²⁶⁹ GMM-000601948 (Transcript of interview with [Employee of Reseller] on 13 September 2021), p.50, line 3.

²⁷⁰ The price lists were distributed via email, post and by hand as well as being available on the Dar lighting web portal for easy downloading by Resellers. See GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), response to question 8.

messaging channels (see 'Dar's culture of concealment' below). Price lists were therefore an integral part of the Dar Pricing Policy.

3.164 As explained above at paragraphs 3.111 to 3.127, it appears that Dar used the provisions of the SDAs relating to the correct display of the relevant RRP together with the price lists as means to signal the correct RRP to Resellers but also as means to instruct them to price at or revert to the Minimum Price.

3.165 Throughout the Relevant Period, price lists were circulated²⁷¹ and made available to view by Resellers on the Dar portal by Dar²⁷² both regularly (in relation to January and September²⁷³ product launches) and on other occasions when products were added to Dar's catalogue and when Dar increased its prices. Dar told the CMA that:

'The Lighting Book²⁷⁴ 'is Dar's main trade catalogue and is generally republished each September',²⁷⁵

'Generally, price lists are only prepared and circulated by Dar following the addition of new products to its catalogue (ie in conjunction with a catalogue update) or following a general change to Dar's prices.²⁷⁶ Price lists are typically communicated to customers three to four weeks prior to the issue of the relevant catalogue. Traditionally, this is done by post, and has in recent years also occurred via email;²⁷⁷ and

'A copy of the current price list is also available to download from the dār lighting web portal at any time. Customers can also request hard copies and digital versions from their sales representative or the sales office, and do so at irregular intervals.'²⁷⁸

3.166 Dar also told the CMA that it has biannual product launches in January and September when new products are generally launched.²⁷⁹ The CMA notes that this coincides with the publication of the Lighting Book and notes that the launch of new

²⁷¹ Dar told the CMA that its price lists are distributed by email, post, hand as well as being available on the Dar Lighting portal for easy downloading by Resellers. GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), response to question 8.

²⁷² Dar told the CMA that it has also published certain one-off price lists see GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), response to question 8.

²⁷³ The CMA notes an email from [Employee of Reseller] to [Dar Employee] dated 26 September 2018 shows that certain price lists including for DHL were published at that time GMM-000597345 (Email from [Employee of Reseller] to [Dar Employee] dated 26 September 2018).

²⁷⁴ See for example, GMM-000336276, GMM-000601562, GMM-000598869, GMM-000597059 and GMM-000598217.

²⁷⁵ GMM-000600424 (Response dated 19 March 2021 to the First Dar Section 26 Notice), response to question 18.

²⁷⁶ The CMA also notes an email from [Dar Employee] to a Reseller, stating that Dar changed its 'price list every six months in January and June with the new product launch'. See GMM-000597317.

²⁷⁷ GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), response to question 8.

²⁷⁸ *Ibid.*

²⁷⁹ GMM-000600424 (Response dated 19 March 2021 to the First Dar Section 26 Notice), response to question 18.

products was a chance for Dar to have oral discussions with Resellers to instruct them that they needed to follow subsequent price lists. These oral discussions are foreshadowed in paragraphs 3.153 to 3.161 above and discussed further below in relation how the Dar Pricing Policy was communicated (see 'Dar's preference to communicate orally with Resellers and within Dar').

Dar staff contacted Resellers with a view to communicating the Dar Pricing Policy and ensuring compliance

- 3.167 There is evidence which shows that Dar's staff would contact Resellers from time to time as necessary to maintain the Dar Pricing Policy. This included contacting Resellers both in or around the launch and after launching new products as well as when issuing a new price list.
- 3.168 In addition to communicating the Dar Pricing Policy through the circulation of price lists and/or making price lists available on the Dar Portal, Dar would communicate the Dar Pricing Policy to Resellers at lighting 'shows', Dar product launches and when Resellers visited Dar's showroom or Dar visited Resellers' showrooms.
- 3.169 Dar would then enforce compliance with the Dar Pricing Policy in face to face meetings or by telephone or via encrypted messaging channels (WhatsApp messages) (see paragraphs 3.217 to 3.226 and 3.253 to 3.263 below).

The nature of communication of the Dar Pricing Policy varied between the Brands of Relevant Products

- 3.170 The CMA observes (at paragraphs 3.176 to 3.184 below) that the Minimum Price for Volume 1 Products changed on two occasions during the Relevant Period and Dar would manage and communicate the changes to the Minimum Price for Volume 1 Products to Resellers on a more ad hoc, and 'need to know' basis. Generally, this was because those Resellers were discounting more than others and Dar needed to instruct them to revert to the Minimum Price. Alternatively, Dar would communicate changes in the Minimum Price in response to complaints by other Resellers that certain Resellers were pricing below the Minimum Price prevailing at the relevant time. These Resellers making complaints were likely to have been routinely pricing at above the Minimum Price, adhering to the Dar Pricing Policy and so would not necessarily have been made aware of any change to the maximum discount allowed in respect of the Minimum Price at the time Dar instituted it.
- 3.171 For Volume 2 Products, the evidence shows that Dar communicated the Dar Pricing Policy to Resellers, all of whom were part of Dar's selective distribution system at that point, at the time when Volume 2 Products were launched. For David Hunt and the Light Shade Studio, the evidence shows that Dar communicated the Dar Pricing Policy to putative signatories to the SDAs before it

introduced the SDAs and as required afterwards (see paragraphs 3.73.3, 3.414 and 4.3).

Dar's Pricing Policy in respect of different Brands or Relevant Products

- 3.172 Below, the CMA sets out its understanding of the prevailing Minimum Price from time to time for each of the Brands of Relevant Products.
- 3.173 The CMA considers that the evidence set out below at paragraphs under 'Illustrative examples of Dar's monitoring and enforcement' shows that the Dar Pricing Policy and the calculation of the Minimum Price may have differed between the Brands of Relevant Products, particularly in respect of the maximum levels of discount from RRP that Resellers were allowed to advertise/sell at by Dar during the Relevant Period.
- 3.174 Further, the CMA considers that the Dar Pricing Policy and, in particular, the maintenance of the relevant Minimum Price in respect of Volume 1 required management by Dar from time to time to ensure Resellers maintained their prices at the Minimum Price. The evidence shows that some Resellers such as [Reseller] (see paragraphs 3.121 and 3.144), [Reseller] (see paragraphs 3.118, 3.180, 3.262, 3.302 and 3.306) and at times [Reseller] (see paragraphs 3.179, 3.369 and 3.393) were content to maintain the Minimum Price because it was directly aligned with their commercial interests to do so, others such as [Reseller]²⁸⁰ (see paragraphs 3.256, 3.268.1 and 3.276 to 3.280), [Reseller] (see paragraphs 3.183.1, 3.306 and 3.434) and [Reseller] (see paragraphs 3.177 and 3.183.1 to 3.183.2) would test the boundaries from time to time and would then be instructed by Dar to revert to the Minimum Price. However, it would appear that [Reseller 1] required the most intense management from Dar as it was seen in the marketplace as the price leader (see paragraphs 3.118, 3.141.2, 3.179, 3.423 and 3.426). Dar's management of the Dar Pricing Policy is probably most (but not exclusively) in evidence regarding the prevailing Minimum Price of the Volume 1 Products. This may be because Volume 1 only became subject to an SDA in September 2018²⁸¹ and Dar's approach to the retail pricing of Volume 1 may have varied prior to the Relevant Period thus making the Dar Pricing Policy in respect of Volume 1 require more management by Dar in the Relevant Period than in respect of the other Brands of Relevant Products.

²⁸⁰ In interview [Employee of Reseller] stated, 'So, we know about the DHL, um, The Light Shade Studio, um, we sold at list price, the list price in the price list we were given, and we showed the customer the RRP. Um, certain Dar products we discounted more, but what we tried to do on the newer products was start them at list price, and then looked at the general market. Some we dropped in price, er, some we kept at list price, um, and it, yeah, and it -- we basically -- that was our, our strategy.' See GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.79, line 21 to p.80, line 1.

²⁸¹ GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice).

3.175 The CMA also notes that while Dar saw the Minimum Price as the relevant RRP minus the maximum discount allowed for the Brands of Relevant Product in question, it would have been happy for Resellers to apply lesser discounts from the relevant RRP and on occasion positively encouraged Resellers to do this (see the evidence from [Reseller] (at paragraph 3.323)²⁸² and [Reseller]²⁸³ (at paragraphs 3.177 and 3.200)).

3.175.1 **Volume 1:** the evidence shows that Dar managed the level of the Minimum Price by instructing its Resellers not to sell Volume 1 online below a minimum price it notified to them from time to time during the Relevant Period. The evidence shows that Dar's management of the Dar Pricing Policy in respect of Volume 1 Products resulted in, at various points in time, the Minimum Price for Volume 1 Products moving between 25% off RRP (including VAT), 30% off RRP (including VAT) and 35% off RRP (including VAT).

3.175.2 **Volume 2:**²⁸⁴ the evidence shows that Dar instructed its Resellers not to sell online below the RRP (exclusive of VAT).

3.175.3 **David Hunt and The Light Shade Studio:** the evidence shows that Dar instructed its Resellers not to sell online below the RRP (exclusive of VAT).

Volume 1

3.176 In January 2017 [Dar Senior Employee] contacted²⁸⁵ [Employee of Reseller], director of [Reseller], 'asking if the discount codes that I had available on my websites were discounting off Dar or David Hunt'. At the time [Reseller] was selling most of its Dar/David Hunt Products at around 25% off RRP, and 'We also had a discount code which we had on the website, and I think when they were combined it was pretty much at near cost.' [Employee of Reseller] said that he thought [Dar Senior Employee] had been concerned about this. He confirmed that following [Dar

²⁸² See also message from [Dar Employee] asking for [Reseller] to remove a 5% discount on DHL. GMM-000336227 (WhatsApp message from [Dar Employee] to [Employee of Reseller] dated 15 September 2017).

²⁸³ GMM-000601948 (Transcript of interview with [Employee of Reseller] on 13 September 2021), p.117, lines 1-9 and p.141, line 8 to p.142, line 11.

²⁸⁴ These are products from Dar's lighting catalogue from September 2019 onwards, which included all Dar products launched since September 2018 (save for DHL and LSS-branded products).

²⁸⁵ [Reseller] stated that its contact with [Dar Senior Employee] was limited: 'Rare face to face visit by [Dar Senior Employee] to introduce there (sic) marketing member of staff [Dar Employee] (possibly 2019) and occasion text/whatsapp msgs (few times per year - rare).' See GMM-000333717 (Response dated 11 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 23. The CMA notes that this response does not reflect the chat exchanges between [Employee of Reseller] and [Dar Senior Employee] as set out in paragraphs 3.176, 3.194, 3.183.2 and 3.217.

Senior Employee's] enquiry, products previously advertised at 30% off RRP were changed to 25% off RRP.²⁸⁶

- 3.177 In interview, [Employee of Reseller] talked about the discounts that Dar would or would not be happy with in relation to 'Där's core range'. [Employee of Reseller] confirmed that references in [contemporaneous documents] to 'minus 30%' and 'minus 35 [%]' related to 'the core range' or Volume 1. [Employee of Reseller] considered that Dar was not happy with Resellers discounting Volume 1 even at 30% off RRP and would still contact [Reseller] in order to seek to push prices closer to the RRP.²⁸⁷
- 3.178 However, by the week commencing 3 December 2017, there is evidence that shows that Dar had relaxed the Dar Pricing Policy to allow for the Minimum Price to reflect a maximum discount of 30% off RRP (see section under '[Reseller 1's] agreement with the Dar Pricing Policy').
- 3.179 Notwithstanding that it appears Dar had agreed with [Reseller 1] that it could further increase the maximum discount it offered online to 35% off RRP by the end of December 2017, Dar's management of the Dar Pricing Policy as regards its other Resellers meant that Dar's instruction not to sell online below 30% off RRP (including VAT) still appeared to prevail in 2019.²⁸⁸
- 3.180 The CMA considers that an internal [Reseller] email dated 1 October 2019 with the subject 'Dar's pricing' from [Employee of Reseller] to [Employee of Reseller] indicated that Dar's approach to discounting in connection with Volume 1 was still continuing. [Employee of Reseller] stated, 'As discussed we are now doing PRPs based on Volume 1 catalogue is RRP +VAT -30% is now our PRP²⁸⁹ [...] These are based on the new price list of Sept 19.'

²⁸⁶ GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021), p.39, lines 12-13, p.40 lines 1-6, 24-25, and p.41, line 1.

²⁸⁷ GMM-000601948 (Transcript of interview with [Employee of Reseller] on 13 September 2021), p.79, line 26 and p.80, lines 1 to 26.

²⁸⁸ To this end, the CMA notes an internal [Reseller] email exchange where [Employee of Reseller] wrote to [Employee of Reseller], 'Trawling through the Dar stuff still, it's, interesting that with products on Google that have multiple outlets, we, [Reseller], [Reseller] etc, have put the prices to the right level, and [Reseller] have actually cut them. Usually they are around 28% cheaper than us. When there's just three or four retailers on Google, they tend to stick to the price though.' [Employee of Reseller] replied later that day, 'remember though that there is not a right level it just seems that they all copied our initial discount I was looking and on the older Dar Stuff the main guys above have all reduced discount to 30% so we may look to do the same next week but will see what [Reseller] do.' GMM-00000360 (Internal [Reseller] email chain between [Employee of Reseller] and [Employee of Reseller] dated 26 September 2019). The CMA notes [Employee of Reseller's] potentially exculpatory statement 'remember though that there is not a right level' and refers to paragraph 3.376. A few days later, in a further email following a contemporaneous price monitoring exercise conducted by him, [Employee of Reseller] noted, 'I just reduced our Dar prices to 30% off which seems to be the level the main players have gone to, Can you just run a few random checks to see that we are competitive, As you call them the [...] will still be there but not overly worried about them for now.' GMM-00000277 (Internal [Reseller] email chain between [Employee of Reseller] and [Employee of Reseller] dated 30 September 2019).

²⁸⁹ The CMA notes an email from [Dar Employee] to [Employee of Reseller] referring to RRP prices and infers these prices are also referred to as PRPs by [Reseller]. See GMM-000599070 (Email from [Dar Employee] to [Employee of Reseller] dated 19 January 2019).

3.181 The CMA considers that by 2020 Dar's approach to discounting in connection with Volume 1 had relaxed further for all Resellers. It was now instructing Resellers that their Minimum Price should not be below 35% off RRP (including VAT).²⁹⁰

3.182 [Employee of Reseller] explained in interview that by 2020, his discount on Dar products had increased to:

'35% off the RRP I sell at. At that time [February 2020], I'd gone from say - I don't know exactly whether it was 30% or around that amount. I know back in -- in the older messages I was at 25% back in 2017, between 25 and 30% and obviously, as time has gone on and more people are competitive, the pricing is sort of getting lower and lower and lower and close to the sort of cost price in certain circumstances, [X].'²⁹¹

3.183 With this in mind, the CMA notes that, based on his understanding of the Dar Pricing Policy at the time, [Employee of Reseller] felt able to complain to [Dar Senior Employee] about other Resellers selling Dar products at a discount of more than 35% off RRP on at least two occasions in 2020:

3.183.1 On 3 February 2020, [Employee of Reseller] sent further messages to [Dar Senior Employee] 'Done mate 35, [Reseller] on 38.5'. [Dar Senior Employee] responded with a thumbs up sign. On 6 February 2020, [Employee of Reseller] sent a WhatsApp message asking, 'Are the others on google shopping going below 35 also ... [Reseller], [Reseller], [Reseller] 👍'.²⁹² The CMA infers that [Employee of Reseller's] reference to "35" is to Volume 1 Products in light of other available evidence.

3.183.2 On 18 August 2020, when [Employee of Reseller] wrote, 'can you check [Reseller] and a few other creeping up 37% and some ppl have vol2 discounted'.²⁹³ The reference to prices 'creeping up 37%' appears to relate to Volume 1 Products, since Volume 2 was mentioned separately.

3.184 In an email from [Employee of Reseller] to [Reseller's Contractor] of [Reseller] dated 3 February 2020 which, given the time and date it was sent, may have been provoked by Dar contacting [Reseller] at the same time as [Reseller] for not adhering to the Dar Pricing Policy and instructing [Reseller] to revert to the Minimum Price, [Employee of Reseller] asked [Contractor] to change 'dar lighting

²⁹⁰ To this end, the CMA notes an internal [Reseller] email from [Employee of Reseller] to [Employee of Reseller] in response to a contemporaneous price monitoring exercise carried out by [Employee of Reseller]: 'This is comprehensive [...] I think I will just do max 35% off across Dar at moment as it seems to be where most people are, we need to keep an eye on [Reseller]/[Reseller]/[Reseller and [Reseller]'. GMM-00000276 (Internal [Reseller] email from [Employee of Reseller] to [Employee of Reseller] dated 4 February 2020).

²⁹¹ GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021).

²⁹² GMM-000168265 and GMM-000168267 (WhatsApp messages from [Employee of Reseller] to [Dar Senior Employee] dated 3 and 6 February 2020).

²⁹³ GMM-000168359 (WhatsApp message from [Employee of Reseller] to [Dar Senior Employee] dated 18 August 2020).

prices [...] to RRP inc VAT -35% [...] urgently'.²⁹⁴ This further shows that as of 3 February 2020, the correct Minimum Price for Volume 1 Products was 35% off RRP (including VAT).

Volume 2

3.185 In response to a Section 26 Notice, [Employee of Reseller] stated:

'In Jan 2019, at the Furniture show (NEC), I had a conversation with [Dar Senior Employee], who informed me of their plans for Volume 2 Products in the DAR Catalogue, which was to maintain a price to the recommended RRP.[...]²⁹⁵

3.186 In an internal [Reseller] email dated 28 February 2019, [Employee of Reseller] confirmed to [Employee of Reseller] amongst other things, 'I also asked [Dar Employee] about the January show items and she confirmed we will go out at the PRP.'²⁹⁶

3.187 An internal [Reseller] WhatsApp message between [Employee of Reseller], [Employee of Reseller] and [Employee of Reseller] dated 18 May 2019 reflects this position: '[...] And dar new prices rrp ex vat👍'²⁹⁷

3.188 In an internal [Reseller] email dated 13 August 2019 from [Employee of Reseller] to [Employee of Reseller] following a contemporaneous price monitoring exercise, [Employee of Reseller] noted, 'Looking at them thus far, the normal selling lines have some big variations on, but the new lines I've checked thus far have all been fairly consistent. There's only 4 or 5 different retailers on google shopping with them including us, but they do seem to be toeing the line price wise. Us, [Reseller], [Reseller], [Reseller] and [Reseller 2].' [Employee of Reseller] replied, '...but it appears everyone has just followed us and put at list price, I am amazed no-one has gone lower but all that does is create a race to the bottom.'²⁹⁸ [Employee of Reseller] subsequently added, 'And as I mentioned later, [Reseller] has undercut some.'²⁹⁹ The CMA considers that the reference to 'toeing the line price wise' shows that [Reseller] was aware that Dar Pricing Policy requires Resellers to price at the Minimum Price for Volume 2 Products and that it has observed that at least

²⁹⁴ GMM-000601561 (Email from [Employee of Reseller] to [Contractor] dated 3 February 2020).

²⁹⁵ GMM-000600464 (Response dated 4 May 2021 to the Section 26 Notices to [Reseller] and [Employee of Reseller] dated 29 April 2021).

²⁹⁶ GMM-000249663 (Internal [Reseller] email between [Employee of Reseller] and [Employee of Reseller] dated 28 February 2019).

²⁹⁷ GMM-000061064 (Internal [Reseller] WhatsApp message between [Employee of Reseller], [Employee of Reseller] and [Employee of Reseller] dated 18 May 2019).

²⁹⁸ See also paragraph 4.214 below.

²⁹⁹ GMM-00000287 (Internal [Reseller] email from [Employee of Reseller] to [Employee of Reseller] dated 13 August 2019) See also GMM-00000288 (Internal [Reseller] email chain between [Employee of Reseller] and [Employee of Reseller] dated 13 August 2019).

certain Resellers (Reseller], [Reseller], [Reseller] and [Reseller 2] were adhering to the Dar Pricing Policy at that time. Further, the CMA notes [Employee of Reseller's] comment 'but it appears everyone has just followed us and put at list price' with circumspection for the reasons set out in paragraph 3.376.

- 3.189 In a further internal [Reseller] email dated 25 September 2019 from [Employee of Reseller] to [Employee of Reseller] following a contemporaneous monitoring exercise, [Employee of Reseller] wrote, 'I've added a bunch of new Dar lines to the spreadsheet now. Just checking, not sure how quickly google shop updates pricing, as on our [Reseller] site we have put the prices up, and although I've only just started to check, it looks like some suppliers have put theirs up too, ([Reseller], [Reseller], [Reseller] and [Reseller] obviously) while others have kept them low (Reseller], [Reseller]), and a couple more [...] (Reseller], [Reseller]) have come in to fill the partial vacuum with lower prices as well.'³⁰⁰
- 3.190 In an email from [Employee of Reseller] to the CMA dated 18 May 2021 clarifying his response to the Section 26 Notice dated 5 May 2021,³⁰¹ [Employee of Reseller] confirmed that Dar only allowed a maximum discount off the RRP to List Price (ie RRP excluding VAT) on Volume 2.³⁰²
- 3.191 An internal Dar WhatsApp conversation between [Dar Senior Employee] and [Dar Employee] on 6 May 2020 appeared to confirm that the Dar Pricing Policy provided that online Resellers should sell Volume 2 at RRP including VAT. [Dar Employee] asked, 'Can I just check online retailers can sell v2 at rrp ex vat?' 'Or should they be Inc vat'. [Dar Senior Employee] responded, 'Correct. But have to be careful we don't [sic] openly say that'.³⁰³
- 3.192 The CMA considers that an internal [Reseller] email dated 1 October 2019 with the subject 'Dar's pricing' from [Employee of Reseller] to [Employee of Reseller] reflects [Reseller] understanding of the Dar Pricing Policy in respect of Volume 2. 'As discussed [...]...Volume 2 RRP is now our PRP. These are based on the new price list of Sept 19.'³⁰⁴

³⁰⁰ GMM-00000280 (Internal [Reseller] email between [Employee of Reseller] and [Employee of Reseller] dated 25 September 2019).

³⁰¹ GMM-000600492 (Email from [Employee of Reseller] to the CMA dated 18 May 2021).

³⁰² *Ibid.*

³⁰³ GMM-000334124 (Internal Dar WhatsApp conversation between [Dar Senior Employee] and [Dar Employee] dated 6 May 2020). In interview, [Dar Senior Employee] provided the CMA with an explanation of this exchange which is set out at paragraph 3.385 to 3.388.

³⁰⁴ GMM-000271683 (Internal [Reseller] email from [Employee of Reseller] to [Employee of Reseller] dated 1 October 2019).

3.193 On 16 October 2019, [Employee of Reseller] wrote to [Dar Employee] reflecting her understanding of Dar's instructions regarding Volume 2:³⁰⁵

'Volume 2 are the prices that are meant to be to RRP less VAT showing no top price I believe? I hadn't known at the point I loaded the new items out of the price book that there was this September Launch sheet and a lot of them are volume 2 so I am going back through the prices and changing them and I am just checking that I am doing the right thing.' (Emphasis added.)

3.194 On 18 August 2020 [Employee of Reseller] alerted [Dar Senior Employee] to the fact that other Resellers were advertising discounts on Volume 2 Products via a WhatsApp message. [Employee of Reseller] stated, 'Ok mate no prbs , can you check [Reseller] and a few other creeping up 37% and **some ppl have vol2 discounted**' (Emphasis added.). The CMA notes that [Employee of Reseller] felt justified in bringing the fact that other Resellers are discounting Volume 2 to Dar's attention which shows he was aware that, in accordance with the Dar Pricing Policy, Resellers were not meant to discount Volume 2 below the RRP (excluding VAT).

3.195 On 13 November 2020, [Employee of Reseller] emailed [Dar Employee] at Dar to ask, 'I will be adjusting the prices next week. Is it volume 1 or 2 that we need to sell at the RRP'.³⁰⁶

3.196 Two months after [Employee of Reseller's] complaint about [Reseller]), there is evidence of [Reseller] instructing its website contractor to increase its prices on Volume 2 Products to above the Minimum Price in October 2020 to RRP inclusive of VAT.³⁰⁷

³⁰⁵ GMM-000336472 (Email chain between [Employee of Resellers] and [Dar Employee] and [Dar Employee], both of Dar, between 16 and 17 October 2019).

³⁰⁶ The CMA asked [Employee of Reseller] to provide more details about her email and in response to a Section 26 Notice issued to her in her personal capacity, [Employee of Reseller] stated that she '[...] had previously spoken to [Dar Employee] concerning [Reseller] selling various products above the RRP via a third party platform namely [Third party platform]. On this occasion she was unhappy for the products to be sold above RRP but finally agreed to do so [...]'. The CMA noted that [Third party platform] was not mentioned in the email chain referred to above and [Employee of Reseller] further clarified that she had a conversation with [Dar Employee] regarding the fact that 'we had listed some of the DarLighting products on [...] the [Third party platform]'. Notwithstanding [Employee of Reseller's] explanation above and taking into account that certain Resellers including [Reseller] had contacted Dar following the launch of the investigation, the CMA considers that this may cast doubt on [Employee of Reseller's] response to the Section 26 Notice. On this basis, the CMA is minded to take the plain meaning of [Employee of Reseller's] email above as evidence of her knowledge of the Dar Pricing Policy as set out above. See GMM-000600362 (Response dated 12 May 2021 to the Section 26 Notice to [Employee of Reseller] dated 5 May 2021). See table 2.1 at paragraph 2.23 above.

³⁰⁷ GMM-000601560 (Email from [Employee of Reseller] to [Reseller's Contractor] dated 14 October 2020). The CMA notes this to be consistent with a [Reseller] submission: 'Our client recalls an occasion during 2020 but cannot recall the date, when a Dar represent [sic] called to ask them not to offer any discount below 35%.' See GMM-000333709 (Response dated 18 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 24.

DHL and LSS

- 3.197 The CMA considers that the evidence shows that Resellers were instructed not to discount David Hunt Products below the Minimum Price.
- 3.198 In response to the Section 26 Notice, [Reseller] wrote, 'Prior to the David Hunt Lighting and [Light] Shade Studio agreements being produced in August 2017, verbal instructions were given that, as part of this distributor agreement, we were expected to sell at the prices stated by Där Group, or we would put at risk our supply and distributor status.'³⁰⁸
- 3.199 In interview, [Employee of Reseller] explained that for DHL and LSS products it would advertise these at 'list price' (ie RRP)³⁰⁹ plus VAT. [Reseller] would then 'give the customer a discount of the VAT element', thus selling DHL products at RRP excluding VAT. [Employee of Reseller] further explained that Dar had told it '[...] several times that this is correct, this is what you should do.'³¹⁰ He added, '[...] you know, as per when they've told us to change prices, they wanted us to sell at those list prices, **or higher**.'³¹¹ (Emphasis added)
- 3.200 In interview when asked about Dar's views on pricing, [Employee of Reseller] responded that Dar 'were very keen to keep it, um, and always trying to position it at RRP.' [Employee of Reseller] was then asked whether this applied just to the David Hunt brand or all brands including Dar, Volumes 1 and 2 and Wisebuys. [Employee of Reseller] explained, 'That's for David Hunt mainly, but they'd always try and get an RRP guide, to push you towards RRP'.³¹²
- 3.201 Further, as set out in paragraph 4.162, [Employee of Reseller 2] confirmed that Dar instructed [Reseller 2] that the Minimum Price for David Hunt Products was 'list price', ie RRP excluding VAT.

Scope of the Dar Pricing Policy

- 3.202 The following paragraphs outline the evidence uncovered by the CMA regarding the scope of the Dar Pricing Policy. As set out below,³¹³ the evidence shows that the Dar Pricing Policy applied to:

³⁰⁸ GMM-000333694 (Response dated 7 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 22.

³⁰⁹ [Employee of Reseller] stated, '[...] your RRP would be inc VAT, so you would have a list price, price list price, say £10 on a, on a product, and you would sell it at £10 but you would advertise it at £12. So, the RRP would be the £12 and the list price would be the £10.' See GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.21, lines 3-6.

³¹⁰ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.20, lines 6-7 and 10-11.

³¹¹ *Ibid.*, p.26, lines 2-3.

³¹² GMM-000601948 (Transcript of interview with [Employee of Reseller] on 13 September 2021), p.17 line 26, p.18 lines 1 to 6.

³¹³ See paragraphs 3.203 to 3.211.

- Online pricing of the Relevant Products;
- All Relevant Products (except Special Contract Products);³¹⁴ and
- All Dar Resellers.

Scope: applied to online pricing

3.203 The evidence outlined shows that Dar focused enforcement of the Dar Pricing Policy on its Resellers' online pricing (see 'Monitoring and enforcement of the Dar Pricing Policy' below). While there is some limited evidence that Dar also enforced the Dar Pricing Policy in store,³¹⁵ the CMA concludes that the scope of the Dar Pricing Policy applied to online pricing only.

Scope: applied to all Relevant Products

3.204 As noted at paragraph 3.165 above, the price lists formed an integral part of the Dar Pricing Policy and were distributed to Resellers via email, post and by hand as well as being made available on the Dar web portal throughout the Relevant Period. Price lists included RRP's (in the case of Wisebuys SRP's) for all the Relevant Products³¹⁶ and therefore each Reseller received details from which they could calculate the Minimum Price for all Relevant Products from time to time throughout the Relevant Period.

3.205 The evidence shows that Dar intended that Resellers should follow the Minimum Prices as calculated from price lists for all the Relevant Products and in accordance with this:

3.205.1 Dar staff would on occasion contact Resellers after a new price list was issued, which, as explained further at paragraphs under the heading 'Dar issued new price lists and Dar staff contacted Resellers after issuing new price lists with a view to ensuring compliance' below, the CMA considers this was with a view to ensuring Resellers applied the relevant new Minimum Price as set out in the price list.

3.205.2 On occasion, Dar monitored and enforced against Resellers who priced Relevant Products below the Minimum Price (see 'Monitoring and enforcement of the Dar Pricing Policy' below).

³¹⁴ See section titled 'White label and other supply agreements'.

³¹⁵ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.34, lines 8-10.

³¹⁶ For Wisebuys an SRP was listed instead of an RRP. See paragraph 3.162.2 above.

3.206 This is further supported by evidence the CMA has obtained from Resellers indicating that they understood they had to comply with the Dar Pricing Policy in respect of all the Relevant Products.³¹⁷

Scope: applied to all Dar Resellers

3.207 The evidence shows that Dar intended that the Dar Pricing Policy should apply across all or at least the vast majority of its Reseller network (see ‘Illustrative examples of Dar’s monitoring and enforcement’ and ‘Agreement and/or concerted practice between Dar and each of [Reseller 1] and [Reseller 2]’ below).

Duration

3.208 The period covered by the CMA’s investigation (referred to in this Decision as the Relevant Period) commenced on 1 January 2017. That date was chosen by the CMA as a result of a prioritisation decision, rather than because the CMA received specific evidence to indicate that the Dar Pricing Policy began on 1 January 2017. The CMA’s investigation was launched on 25 November 2020 (the end of the Relevant Period).

3.209 On the basis of the evidence seen by the CMA, described in this section, the CMA finds that the Dar Pricing Policy began on 1 January 2017 and continued until 25 November 2020.

Monitoring and enforcement of the Dar Pricing Policy

Overview

3.210 The evidence shows that Dar sought to monitor the Dar Pricing Policy during the Relevant Period by:

3.210.1 issuing price lists and contacting Resellers with a view to ensuring compliance with the relevant new Minimum Price; and

3.210.2 monitoring resale prices proactively from time to time and more often reactively, through Resellers reporting where other Resellers were not adhering to the Dar Pricing Policy.

3.211 While the evidence shows that Dar intended that the Dar Pricing Policy should apply across all or at least the vast majority of its Reseller network, it is in the nature of any arrangement such as the Dar Pricing Policy that there will be those who agree strongly with it and never fail to adhere to it and those who push the

³¹⁷ For example, in interview, [Employee of Reseller] told the CMA that while Dar was keen for David Hunt in particular to be sold at RRP, Dar would like Resellers ‘to push your prices up towards RRP on the other brands within Dar’. See GMM-000601948 (Transcript of interview with [Employee of Reseller] on 13 September 2021), p.48, lines 21-22. See also paragraph 4.145 below.

boundaries of what is permitted under the arrangement. For instance, [X], '[Reseller]: Meeting with [Employee of Reseller], went through latest figures for rebate and [Employee of Reseller] advised he would not be going for rebate as he would have to disrupt the market. [...].'³¹⁸

- 3.212 The CMA considers certain Resellers pushed the boundaries from time to time³¹⁹ because it served their purpose to do so. In order to maintain an arrangement such as the Dar Pricing Policy its enforcement needs to be prioritised against those that push the boundaries and will influence others to join them. In this regard, the evidence shows that Dar's focus, in enforcing the Dar Pricing Policy, was on the biggest discounters, in the expectation that the remainder of its Resellers would follow them. Therefore, the CMA has uncovered evidence concerning some Resellers more than others but that does not believe the fact that Dar intended that the Dar Pricing Policy should apply across all or at least the vast majority of its Reseller network.
- 3.213 This Section sets out some examples of Dar's monitoring and enforcement activities. Further illustrative examples of Dar's monitoring and enforcement throughout the Relevant Period are set out in Section under 'Illustrative examples of Dar's monitoring and enforcement' (Paragraph 3.408 - 3.485) below.
- 3.214 The evidence also suggests that Dar considered and gave instructions as to the threat of sanctions, threatened and/or imposed sanctions on Resellers for not adhering to the Dar Pricing Policy, as explained in paragraphs 3.315 to 3.342 below.

Dar issued new price lists and Dar staff contacted Resellers after issuing new price lists with a view to ensuring compliance

- 3.215 The CMA has set out at paragraphs 3.162 to 3.166 above, the relevance of price lists to the Dar Pricing Policy together with details of how they were communicated and made available and the frequency with which they were revised.
- 3.216 Dar would meet, visit, message or call Resellers when new price lists were issued. The CMA considers that this evidence shows that one of the purposes of these contacts was to check that Resellers understood what the new Minimum Price was

³¹⁸ GMM-000600825 (Dar Internal report dated 13 to 19 May 2019), attachment to GMM-000600824 (Internal Dar email from [Dar Employee] to [Dar Senior Employee] dated 21 May 2019). Also see GMM-000597334 (Email from [Employee of Reseller] to [Dar Employee] dated 7 September 2018).

³¹⁹ For instance, in interview [Employee of Reseller] said, 'So, we always, between us, we always wanted to be, one of the best companies with the best service, so not necessarily the cheapest or not necessarily -- we never wanted to chase orders for on price only [...] I would never necessarily say we had to be cheaper than Joe Bloggs, but we'd be close to them, or we would match them if they were a -- if they were a business that we knew [...]'. See GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.12, lines 20-22 and p.14, lines 23-26.

and would comply with it, particularly when assessed against the background of sanctions as explained at paragraphs 3.314 to 3.342 below.

Lighting ‘shows’ and Dar product launches

3.217 The evidence shows that Dar staff would meet with Resellers about the Dar Pricing Policy at lighting ‘shows’ and Dar product launches. To this end, the CMA refers to the evidence of [Employee of Reseller] set out at paragraph 3.396 relating to an unrecorded meeting with [Dar Senior Employee] at the Furniture show at the NEC in January 2019 when [Dar Senior Employee] instructed [Reseller] ‘to maintain a price to the recommended RRP’ for Volume 2 Products.³²⁰ [Employee of Reseller 2] also recalled a meeting with [Dar Senior Employee] at the Furniture show at the NEC in similar terms (see paragraph 4.183),³²¹ and so did [Employee of Reseller], who told the CMA that he would speak to Dar representatives, mainly [Dar Employee], but also [Dar Senior Employee] and occasionally, [Dar Senior Employee], at annual trade shows ‘like the NEC’.³²²

3.218 The CMA considers that communication between Dar and Resellers at trade or lighting shows would be verbal by nature, therefore, there would be limited, if any, contemporaneous evidence of such communication. Nevertheless, the CMA refers to Dar’s list of in-person contact with Resellers, in particular, instances of communication at trade or furniture shows.³²³ In light of this and the abovementioned accounts in interviews, the CMA considers that there were indeed conversations about pricing that took place at trade or lighting shows.

At Dar’s and Resellers’ showrooms

3.219 The evidence shows that certain Resellers met with Dar at its showrooms and Dar staff would visit Resellers’ showrooms from time to time in connection with the SDAs and Dar Pricing Policy. Some reports of such visits refer to discussions including about ‘pricing matters’, ‘good margin(s)’ and the ‘competitive’ nature of new products.

3.220 The CMA acknowledges that, in the normal course of legitimate business communications, it would be reasonable for Dar to refer to such ‘pricing matters’, ‘good margin(s)’ and the ‘competitive’ nature of new products. However, in light of Dar’s culture of concealment highlighted at paragraphs 3.383 to 3.406, including

³²⁰ GMM-000600464 (Response dated 4 May 2021 to the Section 26 Notices to [Reseller] and [Employee of Reseller] dated 29 April 2021).

³²¹ [Dar Senior Employee] also confirmed that he had spoken to [Employee of Reseller 2] at the NEC show. See GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.128, lines 15-17.

³²² GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021), p.55, lines 7-11.

³²³ During the Relevant Periods, Dar met with Resellers once or twice a year, in most cases, in the context of trade shows or new product launches. The CMA notes that Dar met with [Reseller] more frequently in the UK, between twice and four times a year. Dar also met with [Reseller] once a year at a ‘[><]’ See GMM-000333645 (Annex 16.1 to response dated 18 December 2020 to the First Dar Section 26 Notice).

Dar's use of coded language (at paragraphs 3.399 to 3.406) and taking into account the evidence that the CMA has uncovered in the round, this evidence shows that these visits provided an opportunity for Dar staff to discuss the Dar Pricing Policy with such Resellers.

Dar's showroom

3.221 In interview, [Employee of Reseller] told the CMA that Dar has a show each September to launch its new products and at these shows or following the shows he was told by Dar, '*you can't discount those products on that launch*'.³²⁴ [Employee of Reseller] further explained how such conversations would arise, he stated, 'You're just shown round by somebody, and it can be anybody, one of the sales staff out the office of the new ranges. So, there wasn't specific, um, discussions at the meetings to say, "You must do this", and, "You must do that". That would be -- that was on verbal communication, um, usually from, um, a guy called [Dar Senior Employee], who would, um, discuss verbally, the parameters of what could and couldn't be done.'³²⁵

3.222 [Employee of Reseller] also stated in interview, that these shows would take place at Dar's showroom in Banbury,³²⁶ and if [Dar Senior Employee] was there:

[...] he would probably have a quiet conversation saying, [...] "Don't discount it heavily, try not to discount it heavily". [...] it would be words like that in a casual chat. But [Dar Senior Employee] was not -- um, he was at the last, er, what was it, the last one which would be 2020, so, um, at the 2019, I can't -- I honestly can't remember who I was shown around. I think it was with the reps at that point, [Dar Employee]. Um, who never -- who didn't say anything about what you could or couldn't do. She possibly said stuff about logos, but she certainly wouldn't have said anything about, um, anything to do with pricing.'³²⁷

3.223 [Employee of Reseller] could not remember a specific conversation with [Dar Senior Employee] at the 2020 launch meeting but stated that he knew 'that would have been more of a specific chat by phone after the show'.³²⁸

³²⁴ GMM-000601948 (Transcript of interview with [Employee of Reseller] dated 13 September 2021), p.88, lines 24-26.

³²⁵ *Ibid.*, p.90, lines 9-15.

³²⁶ *Ibid.*, p.91, line 12. In addition, and in light of [Employee of Reseller's] explanation of the clandestine discussions instigated by Dar in connection with the Dar Pricing Policy at its showroom, and Dar's culture of concealment more generally, the CMA also refers to the Dar Internal Reports indicating Dar meeting with [Employee of Reseller] on 21 September 2018, on 25 September 2018 with [Employee of Reseller] and on 4 October 2018 with [Reseller]. See GMM-000600851 (Dar Internal Report dated 1 to 30 September 2018) and GMM-000600689 (Dar Internal Report dated 1 to 5 October 2018).

³²⁷ GMM-000601948 (Transcript of interview with [Employee of Reseller] dated 13 September 2021), p.90, lines 12-32.

³²⁸ *Ibid.*, p.93, lines 7-8.

Resellers' showrooms

- 3.224 The CMA has also obtained a series of Dar Internal Reports from 2018 and 2019 which were circulated to, amongst others, [Dar Senior Employee], and record Dar's visits to Resellers' showrooms.
- 3.225 While the CMA notes that these Dar Internal Reports are not explicit in their reference to the Dar Pricing Policy, they clearly cover discussions with Resellers about pricing, price lists, margins etc which, in light of the totality of the evidence uncovered and Dar's culture of concealment (see paragraphs 3.383 to 3.406), may have strayed into instructions as to the Minimum Price which could be calculated from the price lists.³²⁹
- 3.226 Notwithstanding what [Employee of Reseller] has said about the role of [Dar Employee] towards [Reseller] at paragraph 3.222 above, the evidence shows that she and certain other Dar sales people had an opportunity to play an active role in the implementation of the Dar Pricing Policy in relation to other Resellers, when visiting their showrooms. To this end, the CMA notes the evidence concerning [Dar Employee's] visits to [Reseller 2's] showroom (see paragraphs 4.171 to 4.176 below).

Discussions around pricing matters

- 3.227 Certain Dar Internal Reports recorded Dar visits to Resellers' showrooms where pricing matters were discussed.
- 3.228 A Dar Internal Report dated 5 March 2018 concerning [Reseller] stated, 'Dropped off brochures and went through pricing and pro forma terms'.³³⁰
- 3.229 A Dar Internal Report dated 15 May 2018 stated, '[Employee of Reseller] Discussed figures for rebate and advised I would send figures every Friday until the end of June. [Employee of Reseller] concerned he may become aggressive whilst chasing his rebate and advised it was fine. [...]. Complained about [Reseller]. Advised dates for DHL launch.'³³¹ The CMA notes that this Dar Internal Report shows that pricing matters were discussed with [Employee of Reseller].

³²⁹ See for example, GMM-000600605 (Note of call with [Employee of Reseller 2] on 18 June 2021). [Employee of Reseller 2] told the CMA that instructions to change prices were relayed verbally and mainly 'during showroom visits from the Dar reps'. See also GMM-000601449 (Response dated 15 July 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 9 July 2021), response to question 6. [Employee of Reseller] told the CMA that prior to the Coronavirus (COVID-19) pandemic, '[Dar Employee] and/or [Dar Employee] would pop in every now and again to look at our displays [...] I think it was [Dar Employee] who mentioned to me about some David Hunt products that needed updating on our website, so they asked me to change them to the most up to date prices, after a new pricelist was released.'

³³⁰ GMM-000600905 (Dar Internal Report dated 5 to 9 May 2018).

³³¹ GMM-000600771 (Dar Internal Report dated 14 to 18 May 2018).

- 3.230 A Dar Internal Report dated 6 June 2018 in relation to [Reseller] stated 'Went through price list and discount'.³³²
- 3.231 A Dar Internal Report dated 19 October 2018 shows that [Dar Employee] met or spoke with certain other Resellers. On 15 October 2018, [Reseller]: 'Met [Employee of Reseller], gave brochures and price list. Explained how the price list works and terms etc, [Employee of Reseller] said she would send an order in a couple of weeks when she has had confirmation of the fittings from her client.'³³³
- 3.232 A Dar Internal Report dated 7 November 2019 shows that on 1 November 2019, [Dar Employee] met with a Reseller, [X]: 'Met with [Employee of Reseller]. Discussed price increase implementation. [...]'.³³⁴
- 3.233 A Dar Internal Report dated 12 Nov 2018 concerning [Reseller] recorded 'Went through new catalogue and price list and left a copy'³³⁵
- 3.234 A Dar Internal Report dated 26 February 2019 shows that on 15 February 2019, [Dar Employee] spoke to [Reseller], about not discounting below the Minimum Price on Volume 2 Products: 'SPOKE TO [EMPLOYEE OF RESELLER] TO LOOK AT HER PRICES ON HER WEBSITE NO NEED TO DISCOUNT ALL THE NEW PRODUCTS FROM SEPT & JAN LAUNCH WILL LOOK AT THIS AND GET BACK TO ME'.³³⁶
- 3.235 A Dar Internal Report dated 21 May 2019 records: '[Reseller]: Meeting with [Employee of Reseller], went through latest figures for rebate and **[Employee of Reseller] advised he would not be going for rebate as he would have to disrupt the market.** Discussed DHL showroom & web criteria for SDA.'^{337 338} (Emphasis added)
- 3.236 The CMA notes an entry dated 2 December 2019 in a Dar Internal Report in respect of [Reseller] which records: 'HAPPY TO PUT NEW DAR PRODUCTS ON DISPLAY PRICES BECAUSE ARE NOT DISCOUNTED ON THE WEB SHE WILL SEND ORDER TO ME.'³³⁹

³³² GMM-000600903 (Dar internal Report dated 4 to 8 June 2018).

³³³ GMM-000600693 (Dar Internal Report dated 15 to 19 October 2018).

³³⁴ GMM-000597654 (Dar Internal Report dated 28 October to 1 November 2019).

³³⁵ GMM-000600897 (Dar Internal Report dated 12 to 16 November 2018).

³³⁶ GMM-000600808 (Dar Internal Report dated 11 to 17 February 2019).

³³⁷ GMM-000600825 (Dar Internal Report dated 13 to 19 March 2019), attachment to GMM-000600824 (Internal Dar email from [Dar Employee] to [Dar Senior Employee] dated 21 May 2019).

³³⁸ GMM-000600771 (Dar Internal Report dated 14 to 18 May 2019).

³³⁹ GMM-000600808 (Dar Internal Report dated 11 to 17 February 2019).

3.237 In light of the totality of the evidence uncovered and Dar's culture of concealment (see paragraphs 3.383 to 3.406), the CMA considers that Dar is likely to have used these or similar visits at times to implement and enforce the Dar Pricing Policy.

Discussions around margins for Volume 2

3.238 Certain Dar Internal Reports recorded Dar visits to Resellers' showrooms where the margins for Volume 2 Products were discussed.

3.239 The CMA notes a Dar Internal Report dated 14 December 2018 records that [Dar Employee] met with some of Dar's other Resellers and emphasised the margins generated by Dar's new products (Volume 2):

3.239.1 On 10 December 2018, [Reseller]: 'Met with [Employee of Reseller], went through figures, advised new products are good margin. [...].'

3.239.2 On 11 December 2018, [Reseller]: '[...]. Gave invite to [Reseller] and advised all new products have good margins. [...].'³⁴⁰

3.240 The CMA is unclear how [Dar Employee] could make this claim about new products generating 'good margins' without the Dar Pricing Policy being in force and therefore a knowledge of the price at which Resellers sell these Relevant Products. On this basis, the CMA considers this is likely evidence of the communication and/or implementation of the Dar Pricing Policy.

Discussions about Volume 2 being 'competitive'

3.241 Certain Dar Internal Reports recorded Dar visits to Reseller showrooms where Volume 2 Products being 'competitive' was discussed.

3.242 A Dar Internal Report dated 1 February 2019 shows that on 31 January 2019, [Dar Employee] spoke or met with some further Resellers and told them that 'new' products were 'competitive':

[Reseller]: '[...]. Updated on new products, advised all products in new brochure are competitive. Discussed images are available on request and went through benefits of SDA. [...].'

[Reseller]: 'Met with [Employee of Reseller] following show visit. Collected new account form and went through and signed SDA. Explained all products in new brochure are competitive [...].'³⁴¹

³⁴⁰ GMM-000600707 (Dar Internal Report dated 10 to 14 December 2018).

³⁴¹ GMM-000600714 (Internal Dar email from [Dar Employee] to [Dar Employee] dated 1 February 2019).

- 3.243 A further Dar Internal Report notes that on 19 February 2019, [Dar Employee] spoke with a Reseller, [Reseller]: ‘Spoke to [Employee of Reseller] & [Employee of Reseller]. Gave new brochure and price list and went through. Advised all products are competitive and gave update on changes with Sda and images. Discussed DHL and criteria for area.’³⁴²
- 3.244 The CMA considers that these claims about new products (Volume 2) being ‘competitive’ were likely made on the basis that the Dar Pricing Policy was in force. In light of the totality of the evidence uncovered and the culture of concealment operated by Dar (see paragraphs 3.383 to 3.406), the CMA considers the term ‘competitive’ is referring to the Relevant Products not being subject to discounting online by virtue of the enforcement of the Dar Pricing Policy. This, in turn, would have offered potentially good margins for the Resellers. On this basis, the CMA considers this is likely evidence of the communication and/or implementation of the Dar Pricing Policy.

Discussions on the benefit of ‘supplement products’

- 3.245 In addition, the CMA notes that certain Dar Internal Reports record that Resellers would not need to discount ‘supplement products’. The CMA understands that these were Volume 2 Products³⁴³ where (per the Dar Pricing Policy) Dar had instructed Resellers to price at RRP exclusive of VAT.
- 3.246 A Dar Internal Report dated 24 July 2019 notes that on 16 July 2019, [Dar Employee] met with [Reseller]: ‘Met with [Employee of Reseller]. Discussed the different product banding, A and B. Currently they are selling A at RRP in [t]he showroom which they describe as 20% off which excludes the VAT. **Explained that they need to bring in more of the Supplement products because they wont [sic] need to discount as heavily. [...].**³⁴⁴ (Emphasis added)
- 3.247 A Dar Internal Report dated 5 August 2019 records that [Dar Employee] met with some Resellers:
- 3.247.1 On 22 July 2019, [Reseller]: ‘[...]. Business is very quiet at the minute, **[Employee of Reseller] is asking [Employee of Reseller] to increase**

³⁴² GMM-000597399 (Internal Dar email dated 26 February 2019).

³⁴³ As they were launched after the Catalogue had been split between Volumes 1 and 2. [Reseller], for example, referred to supplement products as ‘Volume 2 [...] New range’. See GMM-000333717 (Response dated 11 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 15. The CMA also notes Dar’s submission that supplement products were ‘not categorised as either Volume 1 or Volume 2’, as upon their launch, Dar did not reprint its Catalogue to include them, but rather added them as ‘supplements’ or additions to the Catalogue. See GMM-000601424 (Response dated 30 July 2021 to the Second Dar Section 26 Notice), response to question 5. However, the CMA’s definition of Volume 2 encompasses all dār lighting branded Relevant Products launched on or after 2 September 2018, hence the CMA considers these ‘supplement products’ to be Volume 2 Products for the purposes of this Decision.

³⁴⁴ GMM-000597476 (Dar Internal Report dated 15 to 21 July 2019).

GP. Explained the importance of [sic] the supplement products. He is mlre [sic] encouraged to push. [...]. (Emphasis added)

3.247.2 On 29 July 2019, [Reseller]: ‘Met with [Employee of Reseller] [sic]. [...]. **Discussed supplement, fully understood and will be buying into new products** in september [sic] once had a clearance. [...].’³⁴⁵ (Emphasis added)

3.248 The CMA considers that the references to ‘supplement’ in the three visits above is a reference to Volume 2 Products being subject to the Dar Pricing Policy. In light of the totality of the evidence uncovered and the culture of concealment operated by Dar (see paragraphs 3.383 to 3.406), the CMA considers this is likely evidence of the communication and/or implementation of the Dar Pricing Policy. In particular, as Dar had instructed Resellers to price at RRP exclusive of VAT for Volume 2 Products, the CMA considers that Dar sales people were using the lack of discounting to underline the potential margins available to Resellers.

Discussions around the benefits of the price increase and Volume 2 brochure/new catalogue

3.249 Further, the CMA notes a Dar Internal Report recording references by Dar to price increases and the Volume 2 brochure and catalogue helping Resellers.

3.250 A Dar Internal Report dated 27 August 2019 notes that on 23 August 2019, [Dar Employee] met or spoke with some further Dar Resellers:

3.250.1 [Reseller]: ‘Met with [Employee of Reseller] and went through terms letter. Not happy with target as now beginning to suffer with internet as had not before. Explained price increase and Vol 2 brochure will help towards turnover.’³⁴⁶

3.250.2 [Reseller]: ‘Met with [Employee of Reseller], went through new terms letter. Shocked about target but advised price increase and new catalogue will help. [...].’³⁴⁷

3.251 The CMA considers that the references to the benefits of the ‘price increase and Vol 2 brochure’ and ‘price increase and new catalogue’ are references to Volume 2 Products which were the subject of the Dar Pricing Policy. On this basis, the CMA considers this is likely evidence of the communication and/or implementation of the Dar Pricing Policy.

³⁴⁵ GMM-000600800 (Dar Internal Report dated 29 July to 4 August 2019).

³⁴⁶ GMM-000336432 (Dar Internal Report dated 19 to 25 August 2019).

³⁴⁷ *Ibid.*

3.252 The CMA notes that these Dar Internal Reports cover matters related to the Dar Pricing Policy such as discussions around pricing matters, margins for Volume 2, Volume 2 being 'competitive', the benefit of supplement products and the benefits of the price increase and Volume 2 brochure/ new catalogue. In light of the CMA's understanding from the totality of the evidence it has uncovered and Dar's culture of concealment (see paragraphs 3.383 to 3.406), the CMA considers that discussions at certain Reseller's showrooms from time to time likely strayed into discussions concerning the implementation of the Dar Pricing Policy and instructions as to the Minimum Price which could be calculated from the price lists.³⁴⁸

By email, telephone and/or encrypted messaging

3.253 The evidence shows that Dar staff would contact Resellers by telephone or message (and on a sole occasion by email) to communicate and implement the Dar Pricing Policy or when prices fell below a certain level to enforce compliance with the Dar Pricing Policy.

3.254 Solicitors for [Reseller] submitted in response to the Section 26 Notice to [Reseller] that '[Employee of Reseller] is unable to recall specific dates or times, but can confirm that whenever he was asked to fix prices, it was via telephone call from Dar representatives'. [Reseller's] solicitors noted, 'it was always the local representatives from Dar for the local area who would approach our client and tell it to fix Dar product prices. They would contact our client by calling [Employee of Reseller's] mobile telephone. Such requests to fix prices were always given verbally. [...] **Dar aggressively tried to maintain its prices.** Despite refusing to do so, **Dar continued to insist that their products prices were held.** Our client has attempted to drop prices repeatedly, and on each occasion, DAR have objected in this way by calling and insisting they are put back'.³⁴⁹ (Emphasis added)

3.255 The CMA has also obtained evidence which corroborates submission that requests by Dar about selling the Relevant Products at a certain level were made verbally, rather than in writing. In interview, [Employee of Reseller] told the CMA, 'there's nothing in the SDAs [...] that told us we had to sell at XYZ [...]. It was [...] a verbal.' [Employee of Reseller] also stated in interview: 'We had nothing in writing with regard to pricing other than what we've provided you.'³⁵⁰

3.256 In a WhatsApp exchange on 15 September 2017 with [Employee of Reseller], [Dar Employee] wrote, 'Hi [Employee of Reseller], I have been asked to ask you if you

³⁴⁸ See footnote 329 above.

³⁴⁹ GMM-000333709 (Response dated 18 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 22.

³⁵⁰ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.35, lines 16-17.

could remove the 5% discount of David Hunt on google?³⁵¹ In response and apparently responding to an earlier request to revert to the Minimum Price, [Employee of Reseller] stated, 'Hi [Dar Employee], sure will sort on Monday. Just put my prices up again too. Cheers.'³⁵²

- 3.257 In a message purportedly responding to previous contact from Dar dated 19 October 2018, [Employee of Reseller] wrote, 'Hi [Dar Senior Employee], I've changed all the prices of the new products to RRP. It may take an hour or so for google to index the changes but I am seeing some already have changed. Have a great weekend and I will catch up with you next week about spending more cash with DAR. [Employee of Reseller] 😊👍'.^{353 354}
- 3.258 The CMA has also obtained evidence that shows that if a Reseller did not comply with the new Minimum Price, Dar would contact the relevant Reseller to instruct them to adjust their price to the new Minimum Price.
- 3.259 In interview, [Employee of Reseller] explained, 'the calls were sporadic from [Dar Senior Employee] and it would be to say, "Could you possibly change your prices", or, "Could you change your prices going up, in an upwards direction".'³⁵⁵ Also in interview [Employee of Reseller] clarified, 'Yeah, I, I don't want it to be that I'm diluting things, no, because I'd say "insistent" and "aggressive" is probably, um, you know it's a persistent, it's a persistent, um, asking for prices to be changing. [...]'.³⁵⁶
- 3.260 In response to the CMA's question in a Section 26 Notice to [Reseller] dated 25 November 2020 as to whether Dar has ever requested or instructed [Reseller] not to sell any Relevant Products below a particular price, solicitors acting for [Reseller] submitted that:

'Our client recalls an occasion during 2020, but cannot recall the date, when a Dar representative called to ask them not to offer any discount below 35%. There have also been occasions when Dar would instruct our client not to offer any form of reduction / drop the price below RRP on a

³⁵¹ GMM-000336227 (WhatsApp message from [Dar Employee] to [Employee of Reseller] dated 15 September 2017).

³⁵² GMM-000336229 (WhatsApp message from [Employee of Reseller] to [Dar Employee] dated 15 September 2017).

³⁵³ GMM-000089550 (WhatsApp message from [Employee of Reseller] to [Dar Senior Employee] dated 19 October 2018). Also see GMM-00000363. An internal [Reseller] email from [Employee of Reseller] to [Employee of Reseller] dated 1 November 2019, refers to [Reseller's] impression of Dar staff having spoken to certain Resellers about pricing. [Employee of Reseller] stated, 'I've had a go through the dar list - there's a lot less red, and even within the red, there's a smaller variation in the prices i.e. in many cases there's fewer people with cheaper prices, and the cheaper prices have increased as well, so it looks like someone has had a word.'



³⁵⁴ The meaning of the emojis used by [Employee of Reseller] is as follows: according to [👉 Grinning Face Emoji \(emojipedia.org\)](https://emojipedia.org/😄/), the 'grinning face' emoji 'often conveys general pleasure and good cheer or humour'; according to [👉 Thumbs Up Sign Emoji \(emojipedia.org\)](https://emojipedia.org/👍/), a thumbs-up emoji indicates approval.

³⁵⁵ In interview, [Employee of Reseller] confirmed that these calls referred to products in Volume 1. See GMM-000601948 (Transcript of interview with [Employee of Reseller] dated 13 September 2021), p.112, line 23.

³⁵⁶ GMM-000601948 (Transcript of interview with [Employee of Reseller] dated 13 September 2021), p.84, lines 15-18.

specific range of Dar products, such as their new range released each year. [...] The majority of the requests made by Dar were effectively “You have reduced the price on this item or range, please put the price back / remove the discount”. More recently, on occasions, the request was “You must keep these products at one price level or you must keep this product at RRP and not go below the RRP”.³⁵⁷


3.261 For example, an email of 4 January 2017 from [Employee of Reseller] to [Dar Senior Employee] states, ‘Thanks for the email I have just logged on we had 250 products with the 30% off the Rrp and remainder at 25% off so I have now changed it to 25% off all [...]’.³⁵⁸ This appears to refer to an earlier email from [Dar Senior Employee] to [Employee of Reseller] earlier in the day.³⁵⁹

3.262 On 29 January 2019, [Dar Employee] sent a WhatsApp message to [Employee of Reseller] asking, ‘have you had a chance to look at our new Sept products on your site? [...]. Thanks, [Dar Employee] ’.³⁶⁰ [Employee of Reseller] replied ‘Sorry haven’t had a chance to look at them yet (away at suppliers just now) but will have a look this wk and will let you know when we will be going live.’ On 31 January 2019, [Employee of Reseller] sent a message to [Dar Employee] explaining ‘just to say that we will be changing the prices in [sic] Monday 11 th feb.’ and [Dar Employee] responded, ‘That’s great thank you ’.^{361 362}

³⁵⁷ GMM-000333709 (Response dated 18 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020).

³⁵⁸ GMM-000597071 (Email from [Employee of Reseller] to [Dar Senior Employee] dated 4 January 2017).

³⁵⁹ GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021), p.39, lines 12-13, p.40 lines 1-6 and 24-25, and p.41, line 1. In interview, [Employee of Reseller] confirmed that his email to [Dar Senior Employee] dated 4 January 2017 would have been in response to an email from [Dar Senior Employee] ‘asking if the discount codes that I had available on my websites were discounting off Dar or David Hunt’. [Employee of Reseller] further explained that at the time [Reseller] was selling most of its dar lighting branded Relevant Products/David Hunt Products at around 25% off RRP, and ‘We also had a discount code which we had on the website, and I think when they were combined it was pretty much at near cost.’ [Employee of Reseller] said that he thought [Dar Senior Employee] had been concerned about this. He confirmed that following [Dar Senior Employee]’s enquiry, products previously advertised at 30% off RRP were changed to 25% off RRP. [Employee of Reseller] also said that he thought the reference to ‘250 products’ was likely to have been to David Hunt Products: transcript p.50.

³⁶⁰ According to,  [Green Heart Emoji — \(emojis.wiki\)](https://emojis.wiki/green-heart/) a heart emoji indicates love and affection. ‘The Green heart emoji is used to show one’s love for a healthy lifestyle and organic everything: food, cosmetics etc’. However, it can also resemble an emoji of envy. See <https://emojis.wiki/green-heart/>.

³⁶¹ According to  [Smiling Face with Smiling Eyes Emoji \(emojipedia.org\)](https://emojipedia.org/smiling-face-with-smiling-eyes-emoji/), this emoji often expresses genuine happiness and warm, positive feelings.

³⁶² Also see GMM-000249663 (Internal [Reseller] email between [Employee of Reseller] and [Employee of Reseller] dated 28 February 2019). [Employee of Reseller] wrote, ‘FYI I have been informed that this was on the September price list and should now be £650 [...]’. Later that day, [Employee of Reseller] followed up, ‘Don’t worry why this was missed...please Change to £650 on Monday and from now on EVERY Dar stock needs to get checked in case sept or jan launch...I think print us all a list of these products [...] so we can all refer to them [...] Blooming painful !!’ [Employee of Reseller] replied the same day, ‘I called [Dar Employee] and she wasn’t sure why this wasn’t on the original spreadsheet. I confirmed this will be changed on Monday. I also asked about the January show items and she confirmed we will go out at the PRP [sic].’ GMM-000250398 (Internal [Reseller] email between [Employee of Reseller] and [Employee of Reseller] dated 8 March 2019). On 8 March 2019, in an internal [Reseller] email to [Employee of Reseller], [Employee of Reseller] wrote, ‘Please see attached Dar September launch lines. [...] I have been given the cost and

3.263 On 20 November 2019, [Employee of Reseller] sent a WhatsApp message to [Dar Employee] stating, ‘something I forgot to mention when I spoke to you yesterday it’s following on from our conversation a while ago about website price’s, people are still selling with massive discounts 40%+ found one that is selling Luther for 47% off’. [Dar Employee] replied that at ‘the end of the day it is the customer’s discretion what they wish to discount’. In response, [Employee of Reseller] retorted ‘I just want to say it wasn’t the customers discretion (me) when you were ringing me a couple of times a week asking me when I was going to change them to fall in line with the others.’³⁶³

3.264 The CMA considers that these examples show Resellers increased their prices to the Minimum Price further to monitoring and enforcement by Dar staff. Further illustrative examples are included in section under ‘Illustrative examples of Dar’s monitoring and enforcement’.

Dar proactively monitored Resellers’ websites from time to time

3.265 In response to the First Dar Section 26 Notice,³⁶⁴ Dar told the CMA that ‘it does not systematically or routinely monitor Resellers’ retail selling prices of Relevant Products’. However, ‘[o]ccasionally employees will, **on an ad hoc basis, and as part of Dar’s general business activities, undertake web searches for the Relevant Products and note the prices** such products are sold at.’ (Emphasis added)

3.266 Also, in response to the First Dar Section 26 Notice, Dar stated:

Dar employees will also visit Resellers websites, or undertake general web searches for Relevant Products for reasons unrelated to the monitoring of price. For example, Dar may wish to observe the manner in which Relevant Products are being advertised or displayed (and whether the same is for example in accordance with the terms of its relevant [SDA] and the relevant brand guidelines), ensure that all those who are selling Relevant Products are Authorised Stockists under Dar’s [SDAs] or ensure that Relevant Products are being correctly described (for example, in 2020 it was identified that [Reseller 1] was incorrectly measuring the size of certain Relevant Products, leading to miscalculations of shipping costs).

³⁶⁵

PRP [sic] ex vat from [Dar Employee]. Please see attached email. I am waiting to get the January show costs from [Dar Employee] [...]. GMM-000271943 An internal [Reseller] email dated 1 October 2019 from [Employee of Reseller] to [Employee of Reseller] stated, ‘Here is the list we were discussing. If you could check if they appear on Vol 1 or 2... [Employee of Reseller] gave these prices prior to the new info received today. Although after the call with [Dar Employee] earlier I think this list will stay as it is. Thanks’.

³⁶³ GMM-000336140 (Message from [Employee of Reseller] to [Dar Employee] dated 20 November 2019).

³⁶⁴ GMM-000600424 (Response dated 19 March 2021 to the First Dar Section 26 Notice), response to question 19.

³⁶⁵ *Ibid.*

3.267 In response to the Section 26 Notices issued to each of [Dar Senior Employee],³⁶⁶ [Dar Senior Employee]³⁶⁷ and [Dar Senior Employee]³⁶⁸ in their personal capacity, each personally confirmed that all material accessible by them or on their behalf, which was responsive to the First Dar Section 26 Notice had been included in either Dar's response to the First Dar Section 26 Notice or as part of their own personal response.

3.268 However, following the CMA's request to Dar at the second state of play meeting on 8 November 2021 to consider whether it could be confident that all responsive documents had been identified, Dar subsequently identified 30 documents relating to the monitoring of Resellers' prices. On 19 November 2021, Dar stated that it had carried out 'limited further keyword searches' and to this end provided further documents to the CMA. Dar stated that it had identified additional responsive documents showing 'examples of ad hoc web searches for Relevant Products and noting the prices such products are sold at'. According to Dar, these documents related to:

3.268.1 A 'General Pricing Validation process undertaken between 8 June 2017 and 14 September 2017' showing the percentage of discount applied by each of 36 Resellers (including but not limited to [Reseller 1], [Reseller 2], [Reseller], [Reseller], [Reseller], and [Reseller]) against five Volume 1 Products and five DHL products.³⁶⁹ Dar explained that 'it decided to review the prices at which some of its resellers were listing products to ensure it was aware of the position of its products in the market, and of competitor prices, to validate the pricing of products by Dar in a proposed September 2017 product launch.'

3.268.2 A review of the 'market price' charged by 51 Resellers (including [Reseller 1], [Reseller 2], [Reseller], [Reseller], [Reseller], and [Reseller]) for five products in Dar's 'Indian Collection' launched in September 2018 and five products launched in January 2018.³⁷⁰ Dar explained that it 'was gathering information on the price of these products in order to understand the low uptake of the launch.'

³⁶⁶ GMM-000333596 (Response dated 4 December 2020 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2020) and GMM-000600432 (Response dated 19 March 2021 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2020).

³⁶⁷ GMM-000333591 (Response dated 4 December 2020 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2020) and GMM-000600428 (Response dated 19 March 2021 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2020).

³⁶⁸ GMM-000333595 (Response dated 4 December 2020 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2021) and GMM-000600430 (Response dated 19 March 2021 to the Section 26 Notice to [Dar Senior Employee] dated 25 November 2020).

³⁶⁹ GMM-000601969 (Email from [Dar Employee] to [Dar Senior Employee] dated 14 September 2017) attaching GMM-000601970 (Spreadsheet titled 'Etailors Extract').

³⁷⁰ GMM-000601979 (Spreadsheet titled 'Customer Websites')

3.269 Dar told the CMA that it also considered internally whether relevant Dar individuals could recall any other instances of similar documents. As a result, it identified an email from [Dar Employee] to [Dar Senior Employee] dated 30 November 2018 which [Dar Employee] forwarded to [Dar Senior Employee] again on 16 January 2019.³⁷¹ [Dar Employee] stated, 'These are the ones I have flagged, I have checked more but the pricing is correct'. [Dar Employee attached a spreadsheet showing eight Volume 2 Products, these products were each listed with the relevant RRP (ex VAT) (the Minimum Price) and the relevant online selling price (inc VAT) advertised by each of six Resellers (including, [Reseller 1], [Reseller], [Reseller], [Reseller] and [Reseller]). Dar explained that it:

'believes that each of the examples identified were advertising RRP's that were not the current RRP in the price list at the relevant time. While the advertised price was not the RRP, to the best of Dar's recollection this was not the concern – it was that the relevant retailer was comparing their advertised price to an "RRP" which was not Dar's RRP as published in its price list, therefore misrepresenting the discount that the retailer was offering.'

3.270 Notwithstanding Dar's explanation for this particular monitoring exercise set out above, the CMA understands from [Dar Employee's] statement, 'These are the ones I have flagged, I have checked more but the pricing is correct' that the Resellers in this spreadsheet were each advertising below the Minimum Price for each of the Relevant Products listed in this spreadsheet whereas other Resellers checked by [Dar Employee] were advertising at or above the Minimum Price. The CMA considers that, for the Resellers listed in this spreadsheet, each Reseller was advertising below the Minimum Price for the relevant Volume 2 Products listed.

3.271 Moreover, despite Dar's explanation that its concern was that 'the relevant retailer was comparing their advertised price to an "RRP" which was not Dar's RRP as published in its price list', the CMA notes that the spreadsheet prepared by [Dar Employee] includes columns titled as 'RRP (ex VAT)' and 'selling price inc VAT' but notably does not capture the relevant Resellers advertised RRP for each Relevant Product. The CMA considers this is surprising given that this was the purported purpose of the exercise according to Dar. As a result, this casts doubt on Dar's explanation set out above.

3.272 Dar also identified a further spreadsheet prepared on 16 July 2019.³⁷² This set out the RRP and selling price for eight Volume 2 Products advertised by 27 Resellers

³⁷¹ GMM-000601963 (Email from [Dar Employee] to [Dar Senior Employee] dated 30 November 2018) attaching GMM-000601964 (Spreadsheet titled 'Online Pricing'). On 16 January 2019, [Dar Employee] forwarded this spreadsheet again to [Dar Senior Employee]. See GMM-000601965 (Email from [Dar Employee] to [Dar Senior Employee] dated 16 January 2019) attaching GMM-000601966 (Spreadsheet titled 'Online Pricing').

³⁷² GMM-000601991 (Spreadsheet titled 'Healthcheck prices').

(including [Reseller 1], [Reseller], [Reseller], [Reseller], [Reseller] and [Reseller]). Dar explained³⁷³ that this document was prepared for Dar's Digital Marketing team and lists the 'customer accounts that [this] team was responsible for. Six products had been selected for the purpose of identifying the general market positioning of the customer accounts, with the intention being to bring the team together and familiarise them with the accounts.'

3.273 The CMA considers that, notwithstanding its earlier submissions in response to the First Dar Section 26 Notice,³⁷⁴ that 'it does not systematically or routinely monitor Resellers' retail selling prices of Relevant Products,' this evidence shows that from time to time Dar took a systematic approach to apprising itself of its Resellers' online retail prices.

3.274 The CMA has also considered the additional contemporaneous evidence below of Dar monitoring its Reseller's websites. The below extract from an internal Dar email dated 18 January 2018³⁷⁵ from [Dar Employee] shows that Dar planned to proactively monitor Resellers' websites, at least in respect of David Hunt Products.

'WEBSITES

We need to focus on the websites.

No 'sales' 'offers' on DHL at all.

No red, orange etc.

No Was / Now pricing, only allow RRP and Our Price.

They need to be careful of price *establishing / permanently discounting*.
(Need to do more research on this – the rules have changed) [Law Firm Website]

[Dar Employee] – [Dar Employee] to look at the MIS *product descriptions*.

[Dar Employee] - Sales Reps to get details of all the websites for their DHL accounts.'

3.275 A Dar Internal Report dated 29 January 2018 in respect of a visit to [Reseller] records: 'Meeting with [Employee of Reseller] to follow up from the show. She had been trying to contact her web developer to request he remove the discount icons

³⁷³ GMM-000601925 (Response dated 19 November 2021 to the First Dar Section 26 Notice), updated response.

³⁷⁴ GMM-000600424 (Response dated 19 March 2021 to the First Dar Section 26 Notice), response to question 19.

³⁷⁵ GMM-000336310 (Internal Dar email from [Dar Employee] to [Dar Senior Employee] and [Dar Employee] dated 18 January 2018).

of [sic] the David Hunt images on the website but he had not replied to her calls or emails.’³⁷⁶

- 3.276 Having reviewed [Reseller’s] website, on 8 February 2018, in an internal Dar email, [Dar Employee] wrote to [Dar Employee]:³⁷⁷ ‘This pops up on [Reseller’s] website when you add a product into your basket and checkout’. [Dar Employee] attached a screenshot of [Reseller’s] website, where an offer is shown: ‘£5 off orders over £100’, ‘£10 off orders over £150’, ‘£15 off orders over £200’, ‘reveal code’. Later that day, [Dar Employee] forwarded the email to [Dar Senior Employee], stating, ‘I have just spoken to [Employee of Reseller] about his pop up below and logo. [Dar Employee] has sent him another one. He is going to exclude David Hunt from this pop up offer which comes at the end of the purchase when you have already committed to buying the products and added to the basket.’ [Dar Employee] added in relation to another Reseller, ‘[Reseller] were just counter offering with their pop up. They have agreed to remove today.’
- 3.277 [Dar Senior Employee] responded the same day,³⁷⁸ ‘Thanks – to be clear it is only the flags and presentation we are interested in. thanks’. [Dar Employee] then wrote, ‘Absolutely, I reiterated that point to [Employee of Reseller] and [Employee of Reseller] at [Reseller]. The pop ups are not permitted as per the SDA.’ The CMA notes an apparent confusion here amongst Dar staff as to what was a legitimate problem under the SDA. However, the CMA considers that it goes further than this. In reality, it appears that Dar is trying to exert further control over [Reseller’s] pricing by preventing a means of offering a discount on David Hunt Products.
- 3.278 On 15 May 2019, [Dar Employee] wrote in a text to [Dar Senior Employee]: ‘Spoke to [Dar Employee]. [Reseller] are going to be postponed. Also had a good look through [Reseller] website. **Most prices are ok**, mainly antler and station (both David Hunt Products) that is wrong. And a few disc products to take off. Will chat tomorrow and **get them to change on Friday. Will reinforce message about dhl not being associated with a sale or offer**. Also will chat to [Dar Employee] about checking websites and plan with [Reseller] thanks for your support. [Dar Employee]’³⁷⁹ (Emphasis added).
- 3.279 On 10 September 2019 a Dar Internal Report records, ‘[Reseller] Met with [Employee of Reseller], went through the catalogues and showed the new products. They are looking to bring in a small selection of new bits, they have 4 spaces. Discussed they need to bring in more and push out heavily discounted.

³⁷⁶ GMM-000600741 (Dar Internal Report dated 29 January to 2 February 2018).

³⁷⁷ GMM-000600509 (Internal Dar email from [Dar Employee] to [Dar Senior Employee] dated 8 February 2018).

³⁷⁸ *Ibid.*

³⁷⁹ GMM-000086527 (Internal Dar WhatsApp message from [Dar Employee] to [Dar Senior Employee] dated 15 May 2019).

Currently they are discounting, using RRP then 25%, then 15% but they are starting to offer delivery and [sic].³⁸⁰

- 3.280 On 25 November 2020, [Dar Senior Employee] sent an internal Dar email to all sales representatives stating, '[...] Can I also request that during lockdown where customer visits are limited, that you audit your customers websites to ensure they are confirming to the SDA. I have no doubt that most websites are not and therefore it is important a plan is made with your customer with action points and deadlines.[...].’ The same day [Dar Employee] responded, ‘Will try and work my way through [Employee of Reseller’s] website 😊.’³⁸¹

The CMA’s findings in relation to Dar’s monitoring of Resellers’ websites

- 3.281 Notwithstanding Dar’s assertion that the documents set out at paragraphs 3.265 to 3.269 above, ‘are each examples of ad hoc web searches for Relevant Products’, the CMA considers that taking into account the totality of the contemporaneous evidence, this shows that Dar would proactively check its Resellers’ websites from time to time during the Relevant Period, sometimes taking a systematic approach, and so would have been able to see if Resellers were adhering to the Dar Pricing Policy.
- 3.282 In terms of coverage of Dar’s Resellers, the CMA considers that the contemporaneous evidence shows on occasion that between 6 and 51 Resellers were monitored by Dar. In relation to the coverage of Dar’s products, the CMA considers that Dar monitored the advertised price of its Relevant Products for all Brands of Relevant Products.
- 3.283 The CMA is particularly concerned that the documents relating to the instances of monitoring by Dar set out at paragraphs 3.265 to 3.269 above were not identified by Dar earlier in response to the First Section 26 Notice. Rather they were only identified following prompting by the CMA and almost 12 months after the issue of the First Dar Section 26 Notice. Dar’s failure to identify these documents is particularly surprising given that certain of the above documents were copied to [Dar Senior Employee] directly on at least two separate occasions³⁸² and that each of [Dar Senior Employee], [Dar Senior Employee] and [Dar Senior Employee] confirmed that all material accessible by each individual (or on their behalf) which was responsive to the First Dar Section 26 Notice to Dar had been included in Dar’s response or as part of their own personal response. The CMA considers that

³⁸⁰ GMM-000597563 (Dar Internal Report dated 9 to 15 September 2019).

³⁸¹ GMM-000095728 (Internal Dar email chain between [Dar Senior Employee], Sales Reps, including [Dar Employee], and [Dar Senior Employee] dated 25 November 2020).

³⁸² For example, see GMM-000601963 (Internal Dar email from [Dar Employee] to [Dar Senior Employee] dated 30 November 2018), attaching GMM-000601964 (Spreadsheet titled ‘Online Pricing’). On 16 January 2019, [Dar Employee] forwarded this spreadsheet again to [Dar Senior Employee], see GMM-000601965 (Email from [Dar Employee] to [Dar Senior Employee] dated 16 January 2019), attaching GMM-000601966 (Spreadsheet titled ‘Online Pricing’).

this omission may lend further support to the CMA's description of Dar's culture of concealment (see paragraphs 3.383 to 3.406).

Resellers' reporting

Monitoring by Resellers

- 3.284 The evidence shows that Resellers also proactively policed each other's online pricing and complained to Dar orally and/or emailed, including emailing weblinks, to Dar³⁸³ in order to alert Dar as to when other Resellers were likely pricing below the Minimum Price.³⁸⁴ There is also some evidence of Dar reacting to such Reseller complaints and instructing the Reseller complained about to adhere to the Dar Pricing Policy.
- 3.285 From the evidence uncovered by the CMA it is clear that certain Resellers were more systematic in their monitoring than others. The CMA notes for instance that [Reseller 1] used automated software to track the prices of other Resellers (including [Reseller] and [Reseller]) during the Relevant Period (see paragraphs 4.127 to 4.129 below), [Reseller] carried out frequent contemporaneous monitoring exercises using Google Shopping covering Resellers including [Reseller 2], [Reseller] [Reseller], [Reseller], [Reseller], among others.³⁸⁵ [Reseller 2] used Google Shopping from time to time,³⁸⁶ [Reseller] monitored [Reseller]³⁸⁷ and multiple other resellers,³⁸⁸ and [Reseller] carried out at least one extensive monitoring exercise with a view to complaining to Dar.³⁸⁹
- 3.286 In addition, [Employee of Reseller] stated in interview that it would 'look at the competition' whenever sales of the Relevant Products were 'quiet'. He added that [Reseller] would 'try and have a price comparison meeting once every two weeks but sporadically [it will] look at, at particular brands that are falling', and that it would have been monitoring [Reseller] and [Reseller], who [Employee of Reseller] refers to as 'quite big players' in the lighting industry, as well as [Reseller] and [Reseller].³⁹⁰

³⁸³ For example, see below section 'Illustrative examples of Dar's monitoring and enforcement'.

³⁸⁴ See for example paragraph 3.194 above.

³⁸⁵ [Reseller] also monitored [Reseller], [Reseller 2], [Reseller], [Reseller], [Reseller] and [Reseller]. See paragraphs 3.188 to 3.189 and 4.213.1 to 4.213.3.

³⁸⁶ GMM-000601449 (Response dated 15 July 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 9 July 2021), response to questions 9, 10(a) and 10(b). See also GMM-000600491 (Response dated 12 May 2021 to the First [Reseller 2] Section 26 Notice), response to questions 8, 9(a) and 9(b).

³⁸⁷ See paragraph 3.194.

³⁸⁸ For example, [Reseller] (see paragraph 3.304), [Reseller 1] (see paragraphs 3.438 and 4.118), [Reseller] (see paragraph 3.292), [Reseller] (see paragraph 3.296 and 3.330), and many others on the market more generally (see paragraphs 3.301, 3.332, 3.432 and 3.438).

³⁸⁹ See paragraphs 3.302 and 3.306.

³⁹⁰ GMM-000601948 (Transcript of interview with [Employee of Reseller] on 13 September 2021), p.135, lines 11-14; p.136, lines 14-16 and 23-26; and p.137, lines 17-23.

3.287 [Employee of Reseller] also stated in interview that ‘if certain brands dropped off the radar a little bit – and of course [Reseller’s] biggest brands were [...] Där’, [Employee of Reseller] would ‘go on Google and [he would] check what people were selling for’ and occasionally adjust his prices by a couple of per cent to make [Reseller] more competitive.³⁹¹

3.288 In light of this and the number of complaints to Dar uncovered by the CMA below, the CMA considers that Resellers were monitoring other Resellers’ prices on a regular and widespread basis during the Relevant Period. In this regard, the CMA also notes [Dar Senior Employee’s] comment in interview that Resellers would follow [Reseller 1’s] prices like ‘a herd.’³⁹²

2017

3.289 On 11 January 2017, [Employee of Reseller] emailed [Dar Senior Employee] with a link to a Volume 1 Product (Avenue floor lamp) advertised on [Reseller’s] website but without any message.

3.290 In interview with the CMA, [Employee of Reseller] explained that:

‘at that time, [Reseller] had the Avenue floor lamp at below cost price and I’d had a price match for it and I had to -- I had to price promise it because obviously I had that on the website and I lost £15, I think, £10, £15, just off the top of my head, but obviously, these things do stand out and yeah, and obviously, it’s a frustration for me because I’ve lost money [...]’³⁹³

3.291 [Employee of Reseller] added that he had spoken to [Dar Employee] around that time to complain about [Reseller] and that she had told him that she had received a number of complaints from Resellers about [Reseller].³⁹⁴

3.292 Also on 11 January 2017, [Employee of Reseller] emailed [Dar Senior Employee] a link to a Google Shopping page relating to the Axton light with the comment:

‘As previously mentioned we are looking to get things back to normal can you confirm when the above sellers will be doing the same.

³⁹¹ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.13, lines 12-18. [Employee of Reseller], however, noted that he did not have ‘time to constantly check what other websites are doing’ (p.50, lines 15-16) and that he ‘never wanted to go down the route of price software’ (p.80, line 7). The CMA considers to be consistent with [Employee of Reseller’s] account of [Reseller’s] general approach to pricing, which did not seek to make [Reseller] the cheapest Reseller on the market (p.26, lines 9-13).

³⁹² GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.114, lines 12-16; p.115, line 21.

³⁹³ GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021), p.52.

³⁹⁴ GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021), pp.53 to 54.

we are currently at 25% and hoping to get back to 20% or rrp exc Vat price by End of Jan if the rest will follow.

[Reseller] being the main culprit (they have just had there account closed by [Supplier] for similar issues heavy price reductions and brand damaging.’³⁹⁵

3.293 On 23 January 2017, [Employee of Reseller] sent a further email to [Dar Senior Employee] and [Dar Employee] with a link to a Volume 1 Product (Morgan 6 light) advertised on ‘[X]’ stating:

‘This is aggressive discounting 37% Off rrp.

im getting price match after price match and customer accusing us that we are over charging etc when we are at the right level of pricing.’³⁹⁶

3.294 In interview with the CMA, [Employee of Reseller] explained that by ‘aggressive discounting’ he meant ‘I think if you’re selling at 37% off the RRP plus -- I can’t remember the exact discount code on the website or the promo that they had on the website, but I know that it was pretty much close to cost price, um, and obviously, if you’re selling it at – you’re making 1% or 0%, it’s aggressive in my eyes.’³⁹⁷

3.295 In relation to the comment ‘we are at the right level of pricing’, [Employee of Reseller] explained that this meant, ‘The right level of pricing for my -- for what I need to sustain my business.’³⁹⁸

3.296 On 25 January 2017, [Employee of Reseller] sent a further email to [Dar Senior Employee] containing a link to ebay and the comment, ‘[Reseller] heavily discounted on ebay store’.³⁹⁹

3.297 The CMA considers that these emails indicate that [Reseller] alerted Dar to Resellers who were not pricing at the Minimum Price. In the CMA’s view, and notwithstanding [Employee of Reseller’s] explanations, his comments that ‘we are at the right level of pricing’, ‘we are looking to get things back to normal can you confirm when the above sellers will be doing the same’, and ‘if the rest will follow’ show that [Reseller] understood that it was pricing at or above the Minimum Price

³⁹⁵ GMM-000601978 (Emails between [Employee of Reseller] and [Dar Senior Employee] dated 11 and 25 January 2017, no subject), [Employee of Reseller] email to [Dar Senior Employee] dated 11 January 2017.

³⁹⁶ GMM-000597073 (Email from [Employee of Reseller] to [Dar Senior Employee] dated 23 January 2017).

³⁹⁷ GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021), p.57.

³⁹⁸ GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021), p.58.

³⁹⁹ GMM-000601978 (Emails between [Employee of Reseller] and [Dar Senior Employee] dated 11 and 25 January 2017, no subject), [Employee of Reseller] email to [Dar Senior Employee] dated 25 January 2017.

and that the application of the Dar Pricing Policy meant it (and other Resellers) should not sell or advertise the Relevant Products below the Minimum Price.

- 3.298 On 13 February 2017, [Employee of Reseller] emailed [Dar Senior Employee] under the subject heading '*online prices DHL*' complaining that they quoted an interior designer a trade price for two David Hunt Products 'only for her customer to find these online heavily discounted' on [Reseller's] website.⁴⁰⁰
- 3.299 In an email dated 18 February 2017 [Employee of Reseller] complained to [Dar Employee] about [Reseller].⁴⁰¹ He stated, 'It's so nice to be in retail!!!! Tried to sell a RAWLEY 12 to a customer today we £555 list. During the conversation customer showed me it from [Reseller] [sic] lighting at £396! Just great !!'⁴⁰²
- 3.300 In an email dated 20 March 2017, [Reseller] provided Dar with a web link to a Luther product (a Volume 1 Product) advertised on [Reseller's] website, stating 'Hi [Dar Employee], Over the weekend we lost sales of the Luther because of this price online. Are they allowed to undercut your product so much? [...]'⁴⁰³
- 3.301 In an email dated 23 January 2017, [Employee of Reseller] of [Reseller] provided [Dar Senior Employee] and [Dar Employee] with a web link to a Morgan product (a Volume 1 Product) advertised on [Reseller's] website. [Employee of Reseller] stated, 'This is aggressive discounting 37% Off rrp . im getting price match after price match and customer accusing us that we are over charging etc when we are at the right level of pricing.'⁴⁰⁴
- 3.302 On 5 November 2017 [Employee of Reseller] emailed [Dar Employee] (copying [Employee of Reseller]) with the subject '[Reseller 1] DAR listings' referring to a Dar product on [Reseller 1's] website, stating:⁴⁰⁵

'I have sent the link to [Reseller 1] and just wondered if Dar are supplying them directly as they are selling way below the rrp which seems to go against what [Dar Senior Employee] wants online.

Look forward to hearing from you.'

⁴⁰⁰ GMM-000336290 [Employee of Reseller] stated, '[<] with DHL. We have the dedicated space in our showroom, for people to view David Hunt products only to go online and buy them a lot cheaper [...]' and GMM-000336294 [Dar Senior Employee] responded to [Employee of Reseller] and noted that '[...] Looking at the current RRP of this product, this particular website is selling approx. 10% cheaper than this price. [...]'.

⁴⁰¹ [Reseller] was a member of the dar lighting SDA from 1 August 2018 to 7 June 2019. See GMM-000333626 (Annex 10.1 to response dated 11 December 2020 to the First Dar Section 26 Notice), Members of Dar's SDA networks.

⁴⁰² GMM-000597077 (Email from [Employee of Reseller] to [Dar Employee] dated 18 February 2017).

⁴⁰³ GMM-000597079 (Email from [Employee of Reseller] to [Dar Employee] dated 20 March 2017).

⁴⁰⁴ GMM-000597073 (Email from [Employee of Reseller] to [Dar Senior Employee] and [Dar Employee] dated 23 January 2017).

⁴⁰⁵ GMM-000336306 (Email chain between [Dar Employee], [Employee of Reseller] and [Employee of Reseller] of [Reseller] between 2 and 5 November 2017).

2018

- 3.303 A Dar Internal Report dated 25 October 2018 concerning a visit to [Reseller] (a Reseller) noted, 'Meeting with [Employee of Reseller]. [...] Complained about certain retailers still being below on DHL.'⁴⁰⁶
- 3.304 In a WhatsApp message dated 18 February 2020 to [Dar Senior Employee], [Employee of Reseller] wrote, ' [Employee of Reseller] got his feed purposely incorrect needs updating to show his website price on all Dar v1, just concerned [Employee of Reseller] will start dropping his also 🙄.'⁴⁰⁷
- 3.305 A Dar Internal Report dated records a meeting at [Reseller] on 6 April 2018 where [Reseller] complained, '[t]hey are struggling to match internet sales. One example was the Cristin pendant [a Volume 1 Product], customer wanted 4, our RRP is Â£195 [sic] but the customer could find this online for Â£145 [sic] so [Reseller] Asked them to buy it online.'⁴⁰⁸
- 3.306 In an internal [Reseller] email dated 26 July 2018, [Employee of Reseller] wrote to [Employee of Reseller], 'At last getting somewhere with dar so can you please put prices next to all products over the weekend from our usual candidates [Reseller] etc etc for this list.'⁴⁰⁹ [Employee of Reseller forwarded this email internally on 30 July 2018 to [Employee of Reseller] stating, 'Subject: Urgent DAR Project for [Employee of Reseller [...] [Employee of Reseller] requested price comp work done for the attached list of Dar products. I managed to get through about half, but there are still ~90 products still to do. If you could please ask [Employee of Reseller] to work his way through these by end of the week, that would be great. I would suggest starting by googling the product code and checking Google Shopping. If any of the competitors listed on attached doc aren't showing in GShopping, then check their sites directly.[...]. Then on 3 August 2018, [Employee of Reseller] sent an internal [Reseller] email to [Employee of Reseller] to notify her that '[Employee of Reseller] has completed the spreadsheet.' In response on the same day [Employee of Reseller] wrote, 'Fab. Can you please print it off and leave on my desk.'⁴¹⁰

⁴⁰⁶ GMM-000600695 (Dar Internal Report dated 22 to 26 October 2018).

⁴⁰⁷ GMM-000168274. According to 🙄 [See-No-Evil Monkey Emoji \(emojipedia.org\)](https://emojipedia.org), the emoji used by [Employee of Reseller] is 'often used as a playful way to convey a laughing, disbelieving, cringing *I can't believe what I'm seeing!* or *I can't bear to look!*'.

⁴⁰⁸ GMM-000600658 (Dar Internal Report dated 2 to 6 April 2018).

⁴⁰⁹ GMM-000230740 (Internal [Reseller] email from [Employee of Reseller] to [Employee of Reseller] dated 26 July 2018).

⁴¹⁰ *Ibid.*

2019

- 3.307 On 18 January 2019 [Employee of Reseller] (a Reseller) sent [Dar Employee] an email with the Subject '[Reseller]' together with an image of [an internet page with the results of a research concerning the product '9 arm dar garbo'].⁴¹¹ On the same day [Dar Employee] forwarded the email internally to [Dar Employee] who in turn forwarded it to [Dar Employee], stating, 'Please could you contact [Employee of Reseller] regarding the below. Not sure if this is a mistake but look at the website, he has a sale banner on the product which is against the SDA rules.'⁴¹² On the same date, [Dar Employee] wrote to [Employee of Reseller]: 'The Garbo range seems to have fallen into your dar category and has sale banners on the images which is not allowed within the terms of the SDA.'⁴¹³ Again on 18 January 2019, [Employee of Reseller] responded, 'There were 3 products which I think must have always been left in Dar, all sorted now though.' [Dar Employee] forwarded this response to [Dar Employee], saying, 'All sorted with [Employee of Reseller].'⁴¹⁴
- 3.308 In a Dar Internal Report dated 17 June 2019, it is recorded for 7 June 2019 '[Reseller] Met with [Employee of Reseller] - update on sales meeting, [...]. [Reseller] are disrupting internet sales. [...].'⁴¹⁵

2020

- 3.309 In an apparent response to being asked to revert to the Minimum Price by Dar, on 3 February 2020, [Employee of Reseller] sent further messages to [Dar Senior Employee] 'Done mate 35, [Reseller] on 38.5'. In response to [Reseller's] implicit complaint about [Reseller], [Dar Senior Employee] replied with a thumbs up sign.⁴¹⁶
- 3.310 In an email from [Employee of Reseller] to [Reseller's Contractor] dated 3 February 2020 which, given the time and date it was sent, may have been provoked by Dar contacting [Reseller] at the same time as [Reseller] for not adhering to the Dar Pricing Policy and instructing [Reseller] to revert to the Minimum Price. [Employee of Reseller] asked [Contractor] to change 'dar lighting prices [...] to RRP inc VAT - 35% [...] urgently'.⁴¹⁷

⁴¹¹ GMM-000597389 (Email chain involving [Employee of Reseller], [Dar Employee], [Dar Employee] and [Dar Employee], all of Dar, and [Employee of Reseller] dated 18 January 2019).

⁴¹² GMM-000597388 (Internal Dar email from [Dar Employee] to [Dar Employee] dated 18 January 2019).

⁴¹³ GMM-000597389 (Email chain involving [Employee of Reseller], [Dar Employee], [Dar Employee] and [Dar Employee], all of Dar, and [Employee of Reseller] dated 18 January 2019).

⁴¹⁴ GMM-000597390 (Internal Dar email from [Dar Employee] to [Dar Employee] dated 18 January 2019).

⁴¹⁵ GMM-000600796 (Dar Internal Report dated 3 to 9 June 2019).

⁴¹⁶ GMM-000168265 and GMM-000168267 (WhatsApp messages from [Employee of Reseller] to [Dar Senior Employee] dated 3 and 6 February 2020).

⁴¹⁷ GMM-000601561 (Email from [Employee of Reseller] to [Contractor] dated 3 February 2020).

3.311 On 26 April 2020, [Employee of Reseller] sent an email to [Dar Senior Employee], copying [Dar Senior Employee], both of Dar, with the subject '*[Reseller] not sticking to rules*'. [Employee of Reseller] attached a screenshot to his email of [Reseller's] website, showing [Reseller] advertising the BIB6450 (a Volume 2 Product)⁴¹⁸ at a reduced price of £311.22 with a free UK delivery.⁴¹⁹

3.312 On 11 October 2020, [Employee of Reseller]. Limited sent an email to [Dar Employee] copying in [Dar Senior Employee] and [Dar Employee] attaching a screenshot from Google Shopping of a SEB0322 (a Volume 2 Product)⁴²⁰ advertised by [Reseller] as well as a Mikara 6 Light cluster (a Volume 2 Product)⁴²¹ advertised by [Reseller], [Reseller] and [Reseller] and stated:

'We have invested a great amount of time, valuable retail space, and money to promote Dar Lighting and as such we are looking for a return on this investment: a quick Google Search (please see below) reveals that items from the new supplement (AW20) are already finding themselves on line [sic] with prices lower than we are offering them at [...].'⁴²²

3.313 The above shows that Resellers would regularly complain to Dar about other Resellers not adhering to the Dar Pricing Policy and that Dar would instruct Resellers in writing at least from time to time to adhere to the Dar Pricing Policy. Further illustrative examples of this are included in section under 'Illustrative examples of Dar's monitoring and enforcement' below together with further evidence indicating that Dar did contact some Resellers identified as not complying with the Dar Pricing Policy by another Reseller to instruct them to revert to the Minimum Price.

Consequences for Resellers of non-compliance with the Dar Pricing Policy

3.314 The evidence set out in this Section shows that:

3.314.1 At least on one occasion Dar considered and gave instructions as to the threat of sanctions for non-compliance with the Dar Pricing Policy,

⁴¹⁸ GMM-000598217 (STERLING MASTER LIGHTING BOOK WISEBUYS PRICE LIST EFFECTIVE 25.9.20.xlsx, tab 'LIGHTING BOOK - volume 2').

⁴¹⁹ GMM-000597830 The screenshot also displays the RRP for the above product and shows that [Reseller's] selling price was at 35% off the RRP.

⁴²⁰ GMM-000598217 (STERLING MASTER LIGHTING BOOK WISEBUYS PRICE LIST EFFECTIVE 25.9.20.xlsx, tab '2020 LAUNCHES').

⁴²¹ GMM-000598217 (STERLING MASTER LIGHTING BOOK WISEBUYS PRICE LIST EFFECTIVE 25.9.20.xlsx, tab 'LIGHTING BOOK - volume 2').

⁴²² GMM-000601202 (Email chain between [Employee of Reseller] and [Dar Employee] between 11 and 13 October 2020). In response, [Dar Employee] wrote, 'Firstly, as I am sure you know there is nothing we can do in relation to the prices our products are sold for online, we will however try to support you where we can' See also paragraphs 3.371 to 3.375.

3.314.2 At least two Resellers perceived that there was a credible threat of sanctions for non-compliance with the Dar Pricing Policy; and

3.314.3 Dar did on occasion impose sanctions on Resellers for non-compliance with the Dar Pricing Policy.

Dar considered and gave instructions as to the threat of sanctions

3.315 In an internal email from [Dar Senior Employee] to [Dar Senior Employee] dated 23 November 2018 with the subject: 'RE: [Reseller] running 20% off DHL [X] for Black Friday', [Dar Senior Employee] wrote, 'Has [Dar Employee] spoken to them they know they cannot advertise David Hunt name – they should be rung up and told to avoid being out on stop take it down.' The CMA understands that [Dar Senior Employee] was checking whether [Dar Employee] had telephoned [Reseller] and threatened it with being put on stop unless it took down the reference to '20% off DHL [X] for Black Friday' from its website.

Sanctions threatened/perceived

3.316 The evidence shows that, irrespective of whether sanctions were actually imposed, Resellers perceived that there was nonetheless a credible threat of sanctions for non-compliance with the Dar Pricing Policy.

Image rights

3.317 As explained at paragraphs 3.73.2 and 3.73.3 above, under the SDAs Dar provides Resellers with official and/or 'inspirational' images for Relevant Products from time to time which Resellers require under the SDAs in order to sell the Relevant Products online.

3.318 As explained at paragraph 3.74 above, the CMA notes that the Terms of Trade appended to The Lighting Book (Price List Catalogues Vol 1 & 2)⁴²³ provide, at Clause 15 of the Schedule 1 titled 'Quality, right of use of images, and trading conditions', that: 'the Seller may, in its absolute discretion and at any time update, amend, replace or withdraw any permission granted for the use of the Images.' The CMA considers that this clause provides Dar with a wide discretion to withhold images from Resellers (which in itself may be legitimate when implemented and enforced in a competition law compliant manner), which certain Resellers perceived as a credible threat of sanctions for non-compliance with the Dar Pricing Policy.

⁴²³ GMM-000600498 (The Lighting Book - Price List Catalogues Vol 1 & 2 - Valid from 21st September 2019 (Including revisions issued 11th September 2019)), Terms of Trade, Schedule 1: Quality, rights of use of images and trading conditions, Clause 15.

- 3.319 For instance, solicitors acting for [Reseller] stated, '[o]ur client signs a licence given by Dar once a year in order to be able to sell Dar products. This does not discuss pricing. Our client is required to sign this to get the product images released to them to display online and to make sure that they represent Dar products correctly online.'⁴²⁴ ⁴²⁵
- 3.320 Similarly, in response to a Section 26 Notice addressed to him in his personal capacity, [Employee of Reseller 2] told the CMA that he understood that adhering to the Minimum Price was a condition of the agreement by which Dar granted [Reseller 2] the right to use the product images for Volume 2 Products: 'We was told if we discounted products from this new catalogue after signing the agreement to use the images we would have our account stopped.'⁴²⁶ As further explained at paragraphs 4.164 to 4.167 below, the CMA considers that [Reseller 2] feared not being able to use the images and thereby not being able to sell the Relevant Products covered by the SDAs, as it had construed its ability to receive or use images from Dar as conditional on 'playing ball.'
- 3.321 The CMA therefore considers that concerns over being able to access image rights and so sell the Relevant Products were instrumental in Resellers' adherence to the Dar Pricing Policy.

[Reseller]

- 3.322 In response to the Section 26 Notice to [Employee of Reseller] wrote, 'Prior to the David Hunt Lighting and [Light] Shade Studio agreements being produced in August 2017, verbal instructions were given that, as part of this distributor agreement, we were expected to sell at the prices stated by Där Group, or we would put at risk our supply and distributor status.'⁴²⁷ In accordance with Dar's culture of concealment (see paragraphs 3.383 to 3.406 below), [Employee of Reseller] told the CMA that sanctions were not made explicit. [Employee of Reseller] explained, 'I think with the DHL products, we'd left them at the price structure that we always had done, and certainly by the evidence that you've already got, you can see that if we didn't, we were told that you had to remove sale banners or sale prices, for example, so there was nothing within the agreement, or I wasn't told within the agreement, "All right, you sign this agreement but you've got

⁴²⁴ GMM-000333706 (Response dated 11 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 18. Although it is understood that this is [Employee of Reseller's] statement, it is noted that since the adoption of the SDAs, Dar does not issue separate licences in relation to product images (which are consequently not required to be entered into annually). The right to use Inspirational Images / product images is contained in the SDAs.

⁴²⁵ See paragraph 4.166 below.

⁴²⁶ GMM-000600479 (Response dated 11 May 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 5 May 2021), response to question 2 (j).

⁴²⁷ GMM-000333694 (Response dated 7 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 22.

to sell at this price.” It was just left at the pricing structure that we had done prior to the agreement.’⁴²⁸

- 3.323 [Employee of Reseller] confirmed in interview that it was his understanding that if he had changed prices for David Hunt that would have put at risk his distributorship of David Hunt Products. [Employee of Reseller] told the CMA that his understanding was based on ‘[...] because they wanted, you know, as per when they’ve told us to change prices, they wanted us to sell at those list prices, or higher. Um, I guess -- yeah, I don’t suppose we would have been selling DHL anyway had we said we want to sell at 20% less, for example, I don’t know, I don’t think we’d have been selling DHL anyway. [...]’.⁴²⁹
- 3.324 [Employee of Reseller] told the CMA in interview that the threat of sanctions led him to comply with Dar’s pricing instructions because he couldn’t risk losing his distributorship of David Hunt or Light Shade Studio Products. He stated, ‘we were mindful of conversations with DAR prior to distributor agreements being given, that we may be at risk of losing the David Hunt and [Light] Shade studio distributor status. We could not commercially afford to do this so we tried to do promotions in other ways, such as via Affiliates using promotional codes on google for customers to enter to gain a discount [...].’
- 3.325 [Employee of Reseller] also stated in interview, ‘Well, just back to what we were saying earlier, in that, you know, we didn’t want any risk of relationship, risk of supply, distributor er status, um. You know, if we lost that account, it was a good percentage of our -- of our turnover, and, you know, I’ve got -- we’ve got mouths to feed (laughing). You know, it comes, it does, it comes down to you’ve got to keep your business going.[...] Er, yeah, yeah, for sure, you know, er, I didn’t want to rock the boat, I did not want to um have compromising issues that compromised our business. Had we -- had we not sold very much of them, you know, I would have told them to get lost, I think. But, no, I felt compelled to, we had to’.⁴³⁰

[Reseller]

- 3.326 The indirect threat of sanctions (in the form of having his Dar account frozen)⁴³¹ was also credible to [Employee of Reseller] if he did not follow Dar’s pricing requests and/or instructions. In response to the Section 26 Notice to [Reseller], [Employee of Reseller] stated that he was told by Dar, ‘you must do this and if you

⁴²⁸ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.24, lines 9-16.

⁴²⁹ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.26.

⁴³⁰ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.49, lines 6-19.

⁴³¹ In interview, [Employee of Reseller] explained that the term ‘frozen’ meant a temporary stop to his Dar account. He stated this ‘would mean put you on stop. [...] If you were put on stop for whatever reason’. See GMM-000601948 interview [Employee of Reseller] p.102 lines [...] If you were put on stop for whatever reason’. See GMM-000601948 (Transcript of interview with [Employee of Reseller] on 13 September 2021), p.102, lines 4-6.

do not' [...] felt an indirect threat was given'. [Employee of Reseller] 'felt that Dar would freeze its [Reseller] account if he 'did not do as they asked'.⁴³²

3.327 In interview [Employee of Reseller] explained that, 'Där, as a company, um, had a policy of, of trying to push its prices up in an upward -- to protect retail mainly, to go -- you know, not -- to, to put it bluntly. And therefore you, you didn't know what they could do. You didn't know -- they, they never actually said what they could do, but in the back of your mind there was always a feeling, you know, you -- you know, you, you're turning over a decent amount at that stage with them, so you're always -- the biggest worry is that they would close the account. So, you, you're always got that in the back of your mind.'⁴³³

3.328 [Employee of Reseller] told the CMA he could not remember Dar saying: "We will close your account if you don't do this" but it's a possibility it, it, it's always in the back of your mind it's a possibility that if at some stage you didn't go that way, it's a possibility. You know, rebates were taken, discounts were taken, account -- quite a few accounts were closed. Um, so yeah, I'd say that Där were quite, um, you know coming back to that word "aggressive", I would say in the market, they've been one of the most aggressive. They've made redundancies, they've taken rebates and as I say discounts so, yeah, in, in their policy they've been quite, um, aggressive in what they've done.'⁴³⁴

3.329 Although [Employee of Reseller] had not heard of any Dar accounts being closed specifically because they were not pricing at or above the Minimum Price, [Employee of Reseller] told the CMA '[...] it's a possibility but I haven't personally heard that.' He further explained that the possibility of having his Dar account frozen is 'a factor that you always think about. With brands they are -- they have the power to do what they wish in this trade, which is, er, as a cottage industry it's -- it's something that you, um, always are aware of.'

[Reseller]

3.330 The CMA considers that there is also evidence of some expectation of enforcement of Dar's Pricing Policy linked to Dar's SDAs. In an email dated 18 January 2019 from [Employee of Reseller] to Dar, [Employee of Reseller] complained about Resellers still selling Dar products at 'silly prices' and asked when this would stop. [Employee of Reseller] stated that 'these big companies are still playing their games, can you please give me some reassurance that this is going to stop soon?' because 'if they don't play ball its making a joke of your

⁴³² GMM-000333709 (Response dated 18 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 25(g).

⁴³³ GMM-000601948 (Transcript of interview with [Employee of Reseller] dated 13 September 2021).

⁴³⁴ *Ibid.*

contract, if they haven't signed the contract then surley [sic] by now you can cease their supply.'⁴³⁵

[Reseller]

3.331 There is some evidence that shows that Dar had given the impression that [Reseller's] account with Dar was closed for failing to adhere to the Dar Pricing Policy⁴³⁶ (see further paragraphs 4.229 to 4.231). The CMA considers that regardless of the reason as to why [Reseller's] Dar account was actually closed,⁴³⁷ at least one Reseller understood the reason was for failing to adhere to the Dar Pricing Policy and so this added to the general perception of the credible threat of sanctions for non-compliance with Dar's Pricing Policy.⁴³⁸

[Reseller]

3.332 In addition, in an internal [Reseller] WhatsApp conversation with [Employee of Reseller] dated 25 October 2020 [Employee of Reseller] sent three screenshots of Google Shopping searches. The first image shows four other Resellers ([Reseller], [Reseller], [Reseller] and [Reseller]) selling the Dar ENS0422 Ensio 4 Light Pendant (a Volume 2 product) at a price lower than [Reseller's] one of £95.⁴³⁹ The second image shows two other Resellers ([Reseller] and [Reseller]) selling the Dar MIK0650 Mikara 6 Light Cluster Pendant (a Volume 2 product) at a price lower than [Reseller's] one of £220.⁴⁴⁰ The third image shows three other Resellers ([Reseller], [Reseller] and [Reseller]) selling the Dar SAN5339 Santino 3 Light Semi Flush (a Volume 2 product) at a price lower than [Reseller's] one of £160.⁴⁴¹

3.333 In each case [Reseller] was selling the Relevant Products online at the Minimum Price (RRP ex VAT) and so in accordance with the Dar Pricing Policy. [Employee of Reseller] then stated, 'no wonder were selling less dar lighting full price. can you send these to [Dar Employee]. hopefully get th [sic] account taken off them.'⁴⁴²

3.334 This apparent expectation of enforcement including under the SDAs against Resellers with Resellers losing their accounts if they discounted lends further

⁴³⁵ Email from [Employee of Reseller] to sales.contract@darlighting.co.uk dated 18 January 2019.

⁴³⁶ For example, in interview, [Employee of Reseller] of [Reseller] told the CMA that [Reseller's] 'account was closed by Dar' and that although he did not 'know the absolute specifics [...]'. [Employee of Reseller] thought the 'owner [...] fell out with Dar' See GMM-000601948 (Transcript of interview with [Employee of Reseller] dated 13 September 2021). p.108 lines 10 to 18.

⁴³⁷ See GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.148, lines 9-19. [Dar Senior Employee] told the CMA that the reason for [Reseller's] account being closed was first, as they had 'appeared several times [×], saying that they're, [×]'. [Dar Senior Employee] added that Dar 'then sent a sales representative, er, to the shop. [×].'

⁴³⁸ See GMM-000600846 (Dar Internal Report dated 8 to 12 January 2018), which states, [×].

⁴³⁹ GMM-000025961 (Screenshot of Google Shopping search: Dar ENS0422 Ensio 4 Light Pendant).

⁴⁴⁰ GMM-000025963 (Screenshot of Google Shopping search: Dar MIK0650 Mikara 6 Light Cluster Pendant).

⁴⁴¹ GMM-000025965 (Screenshot of Google Shopping search: Dar SAN5339 Santino 3 Light Semi Flush).

⁴⁴² GMM-000025966 (WhatsApp message from [Employee of Reseller] to [Employee of Reseller] dated 25 October 2020).

support to the CMA's view that Dar may have supported an environment that seemed inimical to discounting in the minds of Resellers and so engendered a perception amongst its Resellers that the SDAs allowed Dar to restrict Resellers' freedom to discount (see paragraphs 3.72 to 3.74).

Sanctions imposed

[Reseller]

- 3.335 The evidence shows that sanctions were imposed on some Resellers who did not comply with the Dar Pricing Policy. For example, emails from [Reseller] to Dar refer to [Reseller] being no longer allowed to sell David Hunt Products because it had discounted these products on its website. On 22 September 2017, [Employee of Reseller] wrote to Dar (copying in [Dar Employee]) and stated 'we have been told by [Dar Employee] that we are no longer allowed to sell David Hunt Products in our showroom because we were discounting on our website. We had no prior warning of this and we were simply matching 99% of the other online retailers'.⁴⁴³
- 3.336 On 19 October 2017, [Employee of Reseller] wrote again to Dar explaining that he had received 'a visit from [Dar Employee] who backtracked on what she originally told' him which was that Dar had been looking at customers websites and that to stop the devaluing of the David Hunt brand certain online retailers would now not be able to sell David Hunt. Instead, [Employee of Reseller] was told by [Dar Employee] 'that this was not the case and that to sell David Hunt retailers had to satisfy certain criteria'.⁴⁴⁴
- 3.337 In response to a Section 26 Notice on 17 June 2021, [Employee of Reseller] confirmed that [Reseller] had been told verbally by [Dar Employee] that it was no longer allowed to sell David Hunt Products in its showroom because of discounting David Hunt Products on its website 'by 20% on rrp to match all of the other websites selling the same brands'.⁴⁴⁵ As a result, [Reseller] stopped selling David Hunt Products after 19 October 2017.

[Reseller]

- 3.338 An exchange of emails between [Reseller] and [Dar Senior Employee] refers to [Reseller] having been placed 'on stop' because it had discounted DHL products too heavily. Specifically, on 19 February 2018, [Employee of Reseller] emailed [Dar Senior Employee] and stated, '**Apparently we are on stop for discounting David Hunt?** I wasn't aware there was an issue until 5 mins ago'. On the same day, [Dar Senior Employee] responded to [Employee of Reseller] stating, 'I think you have

⁴⁴³ GMM-000336305 (Email from [Employee of Reseller] to Dar dated 22 September 2017).

⁴⁴⁴ GMM-000336305 (Email from [Employee of Reseller] to [Dar Employee] dated 19 October 2017).

⁴⁴⁵ GMM-000600504 (Response dated 17 June 2021 to the Section 26 Notice to [Employee of Reseller] dated 29 April 2021).

misunderstood me. I called you to advise that there are obligations that you are not fulfilling under the terms of your selective distribution agreement. You told me you have nothing to do with that side of the business any more and was not bothered by what I had to say. Therefore I have put you on stop until I have some clarification. As soon as your SDA obligations are met and I have clarification who is now running [Reseller], I will review my decision.’ In response, [Employee of Reseller] emailed [Dar Senior Employee] and stated ‘You told me you would not make contact with [Employee of Reseller] via email or the phone and you were putting the account on stop. I think there is a slight discrepancy on how the phone call went here. Please make contact with [Employee of Reseller] to discuss this.’ (Emphasis added)⁴⁴⁶

- 3.339 In a related email dated 1 March 2018, [Employee of Reseller], a contractor acting for [Reseller],⁴⁴⁷ wrote to [Dar Senior Employee] and [Employee of Reseller] and explained that he had reduced the discount on David Hunt Products when requested but that due to a mistake in the way that a David Hunt product had been listed on [Reseller’s] website it was shown with a greater discount. [Employee of Reseller] referred to a telephone conversation on the same day with [Dar Senior Employee] and stated ‘In our call just now you [Dar Senior Employee] mentioned we’d been put on stop as these changes hadn’t been made’. [Employee of Reseller] then asked [Dar Senior Employee] ‘hopefully your [sic] can restore our service ASAP based on the fact this has been a mistake by myself and certainly no fault of [Employee of Reseller].’⁴⁴⁸
- 3.340 In response to a Section 26 Notice, [Employee of Reseller] stated he had no recollection of the above emails from [Employee of Reseller].⁴⁴⁹ Specifically, the CMA asked [Employee of Reseller] to explain his understanding of [Employee of Reseller’s] reference to ‘we’d been put on stop as these changes hadn’t been made’. In his response, amongst other things, [Employee of Reseller] said that he had ‘no idea’ of where the changes were meant to be made and to what, or what is meant by ‘put on stop’ or who had put who ‘on stop’. Similarly, [Employee of Reseller] had no recollection whether there was a link between being put ‘on stop’ by Dar and that ‘changes hadn’t been made’.
- 3.341 The CMA understands from Dar that certain Resellers including [Employee of Reseller] contacted Dar looking for assistance to respond to the Section 26 Notice

⁴⁴⁶ GMM-000601126 (Email from [Employee of Reseller] to [Dar Senior Employee] dated 19 February 2018), GMM-000601145 (Email from [Dar Senior Employee] to [Employee of Reseller] dated 19 February 2018).

⁴⁴⁷ [Redacted] See GMM-000600496 (Response dated 20 May 2021 to the Section 26 Notice to [Employee of Reseller] dated 30 April 2021), response to question 3(a).

⁴⁴⁸ GMM-000336312 (Email chain between [Dar Senior Employee], [Employee of Reseller] and [Employee of Reseller] dated 1 March 2018).

⁴⁴⁹ GMM-000600496 (Response dated 20 May 2021 to the Section 26 Notice to [Employee of Reseller] dated 30 April 2021). See also GMM-000336312 (Email chain between [Dar Senior Employee], [Employee of Reseller] and [Employee of Reseller] dated 1 March 2018).

issued to [Reseller] referenced at paragraph 2.17.6 above.⁴⁵⁰ As a result, the CMA considers that this may cast some doubt on [Employee of Reseller's] response to the Section 26 Notice. On this basis and taking into account [Dar Senior Employee's] email of 19 February 2018 which appears to contradict the understanding of both [Employee of Reseller] and [Employee of Reseller], the CMA is minded to take the plain meaning of each of [Employee of Reseller's] and [Contractor's] contemporaneous emails as evidence that Dar imposed sanctions on [Reseller] for non-compliance with the Dar Pricing Policy.

Conclusions on the consequences for Resellers of non-compliance with the Dar Pricing Policy

3.342 The evidence above shows that:

3.342.1 Dar considered and gave instructions as to the threat of sanctions;

3.342.2 Irrespective of whether sanctions were imposed, they were perceived by at least two Resellers as being a credible implicit threat; and⁴⁵¹

3.342.3 On at least three occasions,⁴⁵² Dar imposed sanctions on Resellers for non-compliance with the Dar Pricing Policy.

Dar's awareness about the potential illegality of implementing and enforcing the Dar Pricing Policy

3.343 The evidence shows that Dar understood that its communications and interactions with its network of Resellers pertaining to the Dar Pricing Policy were potentially illegal. The CMA sets out examples in this Section of the evidence which shows that:

3.343.1 Dar's staff had a very high degree of relevant and specific knowledge that the implementation and enforcement of the Dar Pricing Policy was potentially illegal;

3.343.2 Dar's staff openly demonstrated to Resellers that they understood that the implementation and enforcement of a policy such as the Dar Pricing Policy potentially would be illegal;

3.343.3 Resellers had alerted Dar to the possibility that the implementation and enforcement of the Dar Pricing Policy was potentially illegal;

⁴⁵⁰ GMM-000601410 (Annex 2.1 to response dated 23 July 2021 to the Second Dar Section 26 Notice).

⁴⁵¹ See sections on 'Sanctions threatened/perceived' and 'Sanctions imposed'.

⁴⁵² See section on 'Sanctions imposed'.

3.343.4 Dar was aware of the CMA's continued interest in the lighting industry about matters of RPM;

3.343.5 Dar had been made aware that a possible complaint to or investigation by the CMA was under consideration; and

3.343.6 Dar's staff, in the light of their knowledge of the potential illegality of their conduct, operated under a culture of concealment whereby they tried to avoid creating potentially incriminating written records and either communicated with Resellers orally or used coded language to conceal communications regarding the Dar Pricing Policy.

Dar's staff had a very high degree of relevant and specific knowledge that the implementation and enforcement of the Dar Pricing Policy was potentially illegal

3.344 The evidence available to the CMA and set out below shows that Dar staff, including senior employees such as [Dar Senior Employee], and [Dar Senior Employee], had a very high degree of relevant and specific knowledge that the implementation and enforcement of the Dar Pricing Policy was potentially illegal.

Two Warning Letters, significant legal advice and competition law compliance training

Two Warning Letters

3.345 On 18 May 2012, Dar received the First Warning Letter (addressed to [Dar Senior Employee])⁴⁵³ regarding a potential infringement of competition law as a result of RPM practices. This stated that the OFT had '*received information which suggests that Dar may be imposing minimum resale prices on online retailers of domestic light fittings and this could amount to an infringement of the Chapter I prohibition.*' On 24 May 2012, Dar responded to the First Warning Letter, confirming receipt and stating that it takes compliance matters very seriously and that it would seek legal advice.⁴⁵⁴

3.346 The CMA sent Dar the Second Warning Letter on 20 June 2017 (addressed to [Dar Senior Employee]).⁴⁵⁵ This letter stated:

'[t]he CMA has reasonable grounds to suspect that Dar may have been involved in anti-competitive agreements or practices with retailers which restricted the price at which light fittings products supplied by Dar were sold online by retailers.' The CMA noted that 'While it is generally lawful to issue recommended retail prices (RRPs) to retailers, these can amount to

⁴⁵³ GMM-000333598 (First Warning Letter). See also paragraph 2.1 above.

⁴⁵⁴ GMM-000333600 (Response dated 24 May to the First Warning Letter). See also paragraph 2.2 above.

⁴⁵⁵ GMM-000333599 (Second Warning Letter). See also paragraph 2.3 above.

illegal RPM when accompanied by threats or pressure on the retailers to sell at or above those prices. Threatening to charge retailers higher cost prices for products or to stop supplies if they do not abide by the RRP's may constrain their freedom to price independently.'

- 3.347 On 26 June 2017, Dar responded to the Second Warning Letter, confirming receipt and stating that it takes compliance matters very seriously and that it would urgently conduct a review of its activities.⁴⁵⁶

Legal advice

- 3.348 Dar submitted that, in November 2016, it sought legal advice as to how to implement an arrangement to manage its concerns about Dar's open network distribution model in a manner compliant with competition law.⁴⁵⁷ Dar explained that the legal advice was also taken in light of the NLC Investigation which had raised Dar's awareness of the issues associated with operating an open network and the potential role of selective distribution networks.
- 3.349 On 4 September 2017, Dar's legal advisers wrote to the CMA, confirming steps Dar had taken upon receiving the Second Warning Letter, and further steps it was planning to take, including face-to-face training on competition law compliance, focussing on RPM issues.⁴⁵⁸

Competition law compliance training for Dar staff

- 3.350 Dar staff undertook competition law compliance training on 3 October 2017⁴⁵⁹ and then again on 20 June 2019.⁴⁶⁰

Internal compliance communications and the employment of [Dar Senior Employee]

- 3.351 On 26 September 2017, [Dar Employee] sent a document to [Dar Employee], stating, 'Internet pricing document attached was sent by [Dar Senior Employee] in 2012 and re-sent in 2016. We have training on this hot topic in the sales meeting next week so may be useful to have a read through and digest.'⁴⁶¹ The document referred to by [Dar Employee] was sent internally by [Dar Senior Employee] to Dar's 'Sales Team, Directors' on 1 August 2012 and re-sent on 17 June 2016.⁴⁶²

⁴⁵⁶ GMM-000333601 (Response dated 26 June 2017 to the Second Warning Letter); see also paragraph 2.4 above.

⁴⁵⁷ GMM-000333643 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 12.

⁴⁵⁸ GMM-000333602 (Letter from Dar's legal advisers to the CMA dated 4 September 2017). See also GMM-000333642 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 2.

⁴⁵⁹ GMM-000333619 (Response dated 25 November 2020 to the First Dar Section 26 Notice), response to question 2.

⁴⁶⁰ GMM-000333607 (Internal Dar email from [Dar Employee] to various Dar personnel dated 20 June 2019).

⁴⁶¹ GMM-000597147 (Email from [Dar Employee] to [Dar Employee] dated 26 September 2017).

⁴⁶² GMM-000597150 (Internal Dar memo from [Dar Senior Employee] to Sales Team and Directors dated 1 August 2012)

The CMA notes that the same document was also reissued by [Dar Senior Employee] for a third time, on 1 August 2017.⁴⁶³ This document stated:

‘As you may be aware our sector has come under the scrutiny of the OFT. We must be aware that even if we believe this does not apply to us in the circumstances of any investigation we may well be involved.

As I have stated on previous occasions it is important all our activities and policies are compliant with current regulations and legislation. Now it is even more important that we ensure that we all act in compliance and in such a manner as there can be no mis-understandings. I have prepared the following note to clarify our position.

The area of most sensitivity currently would appear to be the issue of retail price maintenance (RPM). It must be clear that this is something we do not support, encourage, endorse or carry out.’

3.352 However, despite having been circulated three times within Dar, [Dar Senior Employee] said in interview that he did not recall receiving this memo,⁴⁶⁴ which causes the CMA to doubt how thoroughly Dar followed up in order to ensure that its Reseller-facing staff were fully aware of Dar’s legal obligations.

3.353 [redacted],⁴⁶⁵ [redacted]⁴⁶⁶ [redacted]⁴⁶⁷[redacted].

Highly relevant and informative messaging from external sources including the CMA

3.354 On 18 February 2017, [Employee of Reseller] forwarded [Dar Employee] an article under the subject: ‘Found this in Interiors Monthly magazine’. The headline of the article stated, ‘CMA says Poole Lighting has been carrying out online price maintenance.’⁴⁶⁸ The CMA notes this refers to the NLC Investigation.

3.355 In the years leading up to the NLC Decision, the CMA had publicised the illegality of RPM as follows:

3.355.1 Prior to the NLC Investigation, the CMA had released a film on RPM.⁴⁶⁹

⁴⁶³ GMM-000336298 (Internal Dar memo from [Dar Senior Employee] to Sales Team and Directors dated 1 August 2017).

⁴⁶⁴ GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.176 to 178.

⁴⁶⁵ [redacted].

⁴⁶⁶ [redacted].

⁴⁶⁷ [redacted].

⁴⁶⁸ GMM-000597077 (Email from [Employee of Reseller] to [Dar Employee] dated 18 February 2017).

⁴⁶⁹ See [What is resale price maintenance \(RPM\)? - YouTube](#).

- 3.355.2 On 21 June 2016, the CMA issued an open letter to suppliers and retailers about RPM and compliance with competition law.⁴⁷⁰
- 3.355.3 On 21 June 2016, it issued advice for retailers about RPM agreements (updated on 29 June 2020)⁴⁷¹ and a case study on its investigations in the commercial catering and bathroom fittings sectors.⁴⁷²
- 3.356 On 9 February 2017, the CMA issued a press release about the CMA's NLC Investigation.⁴⁷³
- 3.357 On 3 May 2017, the CMA issued its NLC Decision in relation to RPM. Dar was aware of both the NLC Investigation and the NLC Decision which involved a direct competitor in its industry.
- 3.358 Following the NLC Decision, the CMA conducted significant amplification work focussed on the lighting industry and also the wider economy aimed at deterring similar RPM conduct. This included:
- 3.358.1 On 20 June 2017, issuing a further press release about the CMA's NLC Investigation,⁴⁷⁴ an update to the open letter of 21 June 2016 with case information about the CMA's NLC Investigation and NLC Decision,⁴⁷⁵ and an update to the 21 June 2016 case study.⁴⁷⁶
- 3.358.2 Also on 20 June 2017, issuing six Warning Letters⁴⁷⁷ (including one to Dar) and seven Advisory Letters⁴⁷⁸ to companies within the lighting industry, relating to RPM.
- 3.358.3 On 30 January 2018, meeting with members of the LIA and the Federation of Small Businesses, including Dar, to discuss the issue of RPM and how businesses intend to ensure compliance going forward.⁴⁷⁹
- 3.359 The above evidence shows that Dar's staff had a very high degree of relevant and specific knowledge about how RPM was illegal and therefore understood that the implementation and enforcement of the Dar Pricing Policy was potentially illegal.

⁴⁷⁰ [Restricting online resale prices: CMA letter to suppliers and retailers - GOV.UK.](#)

⁴⁷¹ [Guidance overview: Resale price maintenance: advice for retailers - GOV.UK.](#)

⁴⁷² [Resale price maintenance case studies - Case study - GOV.UK.](#)

⁴⁷³ [CMA challenges lighting company's pricing restrictions - GOV.UK.](#)

⁴⁷⁴ [Lighting company fined £2.7 million for restricting online prices - GOV.UK \(www.gov.uk\).](#)

⁴⁷⁵ See footnote 470.

⁴⁷⁶ See footnote 471.

⁴⁷⁷ [Warning letters issued by the CMA - GOV.UK.](#)

⁴⁷⁸ [Advisory letters issued by the CMA - GOV.UK.](#)

⁴⁷⁹ GMM-000333642 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 1.

Dar's staff openly demonstrated to Resellers that they understood that the implementation and enforcement of a policy such as the Dar Pricing Policy would be potentially illegal

2017

- 3.360 In an email to Resellers dated 22 September 2017, [Dar Senior Employee] referenced the NLC Decision and the compliance steps taken by the CMA in the lighting industry and stated amongst other things: 'We cannot take any action whatsoever to influence the price you apply when reselling our products.'⁴⁸⁰
- 3.361 On 13 February 2017, [Employee of Reseller] emailed [Dar Senior Employee] under the subject heading '*online prices DHL*' complaining about the price of a Relevant Product advertised on [Reseller's] website. [Employee of Reseller] noted that she Just wanted to make Dar 'aware of the impact of the website pricing is having on our business.' I know you have said you cannot tell people what to sell at etc.'⁴⁸¹
- 3.362 [Dar Senior Employee] responded to [Employee of Reseller] stating, 'As you rightfully say, there is nothing we can do in terms of influencing the price our products are being sold for by our retailers. There is [sic] strict laws against this type of activity and we have to operate within the parameters of these laws.'⁴⁸²
- 3.363 On 14 December 2017, [Employee of Reseller] emailed [Dar Employee] complaining about a 40% discount for a Dar product advertised on [Reseller's] website. [Dar Employee] responded, 'Under the competition and market authority rules we cannot interfere in any pricing issues nor would the company wish to.'⁴⁸³
- 3.364 In a Dar Internal Report dated 20 November 2017, [Dar Employee] recorded, 'Met [Employee of Reseller] and [Employee of Reseller] - advised the changes with roles at Dar and that I was now their contact. [Employee of Reseller] said he had taken the decision this week to remove all Dar from his website as he can't compete with other sites and makes him look expensive. Very unhappy about DHL SDA and further emails regarding retail price maintenance [sic] - talked about my experience within the appliances industry and the how serious the issue is for Dar which he accepted.'⁴⁸⁴

2018

⁴⁸⁰ GMM-000333606 (Email from [Dar Senior Employee] to Resellers dated 22 September 2017).

⁴⁸¹ GMM-000336290 (Email from [Employee of Reseller] to [Dar Senior Employee] dated 13 February 2017).

⁴⁸² GMM-000336294 (Email from [Dar Senior Employee] to [Employee of Reseller] dated 13 February 2017).

⁴⁸³ GMM-000336308 (Email chain between [Dar Employee] and [Employee of Reseller] dated 14 December 2017). See also attachment GMM-000336309 (Screenshot of [Reseller's] website).

⁴⁸⁴ GMM-000600921 (Dar Internal Report dated 20 November 2017).

3.365 On 24 September 2018, [Dar Senior Employee] emailed [Employee of Reseller] with the subject line ‘Worth a read...’⁴⁸⁵ [Dar Senior Employee’s] email only included a link to an article published on mondaq.co.uk and titled ‘CTSI⁴⁸⁶ Guide on Pricing Practices – What Does It Mean For Retailers?’⁴⁸⁷ which talks about RRP’s.

3.366 On 9 November 2018, in a ‘final draft’ letter to [Employee of Reseller] and [Employee of Reseller], [Dar Senior Employee] wrote:

‘Looking to protect and build our brands we have followed the guidance of the CMA and determined that moving to Selective Distributorship Agreements (SDA) for our brands is the first step in this process. [...] We have tried to draw everyones’ attention to the issues of product and price presentation including placing in our Brand Guidelines reference to the Consumer Protection From Unfair Trading Regulations 2008 and Guidance for Traders On Pricing Practices 2016 issued by the Chartered Trading Standards Institute. [...] Our Brand is not presented in discount bricks and mortar stores so we do not want it to be presented as a discount brand on line. How a price is calculated is not our concern.’⁴⁸⁸

2019

3.367 On 19 July 2019, [Dar Employee] sent an email to [Employee of Reseller] confirming the agenda for its customer conference (this was internally referred to by Dar as an ‘SDA meeting’)⁴⁸⁹ due to take place on 1 August 2019.⁴⁹⁰ In that email Dar noted that its competition law solicitor was ‘in attendance for information and advice’. It also noted that such competition law solicitor would be giving a ‘Competition Law Presentation’ and taking ‘Q&A.’⁴⁹¹

2020

3.368 In an email dated 13 October 2020, [Dar Employee] responded to [Employee of Reseller]: ‘Firstly, as I am sure you know there is nothing we can do in relation to

⁴⁸⁵ GMM-00000395 (Email from [Dar Senior Employee] to [Employee of Reseller] dated 24 September 2018).

⁴⁸⁶ Chartered Trading Standards Institute.

⁴⁸⁷ [CTSI Guide On Pricing Practices – What Does It Mean For Retailers? - Corporate/Commercial Law - UK \(mondaq.com\)](https://www.mondaq.com/uk/corporate-commercial-law/ctsi-guide-on-pricing-practices-what-does-it-mean-for-retailers).

⁴⁸⁸ GMM-000597370 (Letter from [Dar Senior Employee] to [Employee of Reseller] and [Employee of Reseller] dated 9 November 2019).

⁴⁸⁹ GMM-000590531 (Email from [Dar Employee] to [Employee of Reseller] dated 24 July 2019).

⁴⁹⁰ The customers who attended this conference were: [Employee of Reseller], [Employee of Reseller], [Employee of Reseller] and [Employee of Reseller], [Employee of Reseller], [Employee of Reseller], [Employee of Reseller], [Employee of Reseller], [Employee of Reseller] and [Employee of Reseller], [Employee of Reseller], [Employee of Reseller], and [Employee of Reseller]. See GMM-000333642 (Response dated 11 December 2020 to the First Dar Section 26 Notice), response to question 2.

⁴⁹¹ GMM-000264261 (Email from [Employee of Reseller] to [Dar Employee] dated 20 July 2019).

the prices our products are sold for online, we will however try to support you where we can.’⁴⁹²

- 3.369 In response to the Section 26 Notice to [Reseller] dated 25 November 2020, [Employee of Reseller] noted, ‘I have had a number of conversations with Dar during the relevant period about retail prices, I have constantly been telling them that I cannot make money selling their products if I try to compete with the heavy discounters online. These conversations would either take place when our Rep [X] called or a meeting with [Dar Senior Employee] or [Dar Senior Employee] at trade shows or one of Dar’s showroom events. The response was always very much the same that they are aware of the problem and are looking at ways to overcome this but they always mentioned in line with the CMA as the whole industry is very aware of the Poole lighting case in 2016.’⁴⁹³
- 3.370 In response to the Section 26 Notice dated 25 November 2020, [Reseller] stated, ‘As a retailer from time to time complaints are made to Dar with regards to many retailers selling at absolute bare minimum margins which makes the retail business very tough to make any sort of profit, in dar’s defence even after complaints have been made I have been again made fully aware by my dar rep that pricing is up to the retailers to make there [sic] own business decisions regarding pricing.’⁴⁹⁴

‘Exculpatory’ documents

- 3.371 Further, the CMA has reviewed certain emails and letters written by Dar staff that appeared to be written in deliberately exculpatory terms, indicating Dar’s in depth knowledge of competition law and clear understanding that policies such as the Dar Pricing Policy would be potentially illegal. Similarly, the CMA has noted certain documents written by Resellers in apparently deliberately exculpatory terms which the CMA suspects may not be quite what they seem on their face.
- 3.372 For example, on 27 September 2017, [Dar Senior Employee] sent a mass email to Resellers, titled ‘DAR LIGHTING LTD – IMPORTANT CUSTOMER NOTICE’. In it, [Dar Senior Employee] referred to the CMA’s NLC Decision⁴⁹⁵ and stated, ‘we wish to emphasise, that we cannot take any action whatsoever to influence the price that you apply when reselling our products [...] there is nothing we can do legally to influence the price at which any of our customers resell our products.’⁴⁹⁶

⁴⁹² GMM-000336755 (Email from [Dar Employee] to [Employee of Reseller] dated 13 October 2020).

⁴⁹³ GMM-000333740 (Response dated 3 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020).

⁴⁹⁴ GMM-000333717 (Response dated 11 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 22.

⁴⁹⁵ See *NLC Decision dated 3 May 2017* ([Case 50343 Online resale price maintenance in the light fittings sector](#)).

⁴⁹⁶ GMM-000591374 (Email from [Dar Senior Employee] to resellers dated 21 September 2017).

- 3.373 On 31 October 2020, [Dar Senior Employee] sent an internal Dar email, attaching a document titled '[Reseller] notes for Sales Team 31 10 20.docx'. In [Dar Senior Employee's] email, [Dar Senior Employee] wrote, 'I have prepared these notes for the sales team to give them information they can discuss with their customers.'⁴⁹⁷ In the attached document, [Dar Senior Employee] wrote, 'The RRP inc VAT of the brand will be important and like all discussions on prices the rules of the CMA need to be applied so within the bounds of any sales distribution agreement the price is set by the retailer.'⁴⁹⁸
- 3.374 It is clear that such 'exculpatory' statements were also deployed by salespeople. For instance, on 20 November 2019, [Employee of Reseller] complained about other Resellers discounting below the Minimum Price. In an apparently 'exculpatory' response [Dar Employee] replied that at 'the end of the day it is the customer's discretion what they wish to discount'.⁴⁹⁹ However, [Employee of Reseller] retorted: 'I just want to say it wasn't the customers discretion (me) when you were ringing me a couple of times a week asking me when I was going to change them to fall in line with the others.'⁵⁰⁰
- 3.375 Notwithstanding Dar's very high degree of relevant and specific knowledge that the implementation and enforcement of the Dar Pricing Policy was potentially illegal, there is significant evidence indicating Dar's continued implementation and enforcement of the Dar Pricing Policy (see paragraphs 3.76 to 3.110). In this light, and in light of the culture of concealment operated by Dar (see paragraphs 3.383 to 3.406), the use of these exculpatory statements from time to time at the very least shows an inconsistent approach by Dar in its response to certain complaints from Resellers about other Resellers' pricing when compared to actions taken by Dar in relation to certain Resellers who apparently priced below the Minimum Price. At the very worst, such communications could, in some instances, have appeared specious, obfuscating Dar's true conduct in case of any investigation under the Act.
- 3.376 In addition, the CMA notes that from time to time [Employee of Reseller] in particular would make ostensibly exculpatory comments such as 'there is no criteria as to what we can sell the new lines for'⁵⁰¹ in emails which contradicted or attempted to explain some of [Employee of Reseller's] real time observations such as 'they do seem to be toeing the line price wise.' To this end, the CMA observes that [Employee of Reseller] was aware at least by July 2019 of a possibility of a complaint to or that an investigation by the CMA was under consideration (see paragraph 3.379). Further, the CMA notes that [Employee of Reseller] may have

⁴⁹⁷ GMM-000103263 For the CMA's view as to the potential reason for this 'exculpatory' remark see paragraphs 3.371 to 3.376.

⁴⁹⁸ GMM-000103264 (Document titled '[Reseller] notes for Sales Team 31 10 20.docx').

⁴⁹⁹ GMM-000336139 (Message from [Dar Employee] to [Employee of Reseller] dated 20 November 2019).

⁵⁰⁰ GMM-000336140 (Message from [Employee of Reseller] to [Dar Employee] dated 20 November 2019).

⁵⁰¹ For the CMA's view as to the potential reason for this 'exculpatory' remark see paragraph 3.376.

spoken with [Dar Senior Employee] about this.⁵⁰² As such, and in light of the culture of concealment operated by Dar as set out in paragraphs 3.383 to 3.406, the CMA considers that any comments made by [Employee of Reseller] of this type need to be viewed with circumspection.

Dar was alerted to the possibility that the implementation and enforcement of the Dar Pricing Policy was potentially illegal by Resellers

3.377 On 22 September 2017, [Employee of Reseller] emailed [Dar Senior Employee] complaining that he had been told by Dar that [Reseller] was no longer allowed to sell DHL products in its showroom because it was discounting on its website. [Employee of Reseller] stated, 'Could you please clarify as **the action you have taken seems to be in direct contradiction to your letter and looks to breach CMA rules**'.⁵⁰³ Having not received a response, [Employee of Reseller] then sent a further email to [Dar Senior Employee] on 19 October 2017 stating that he 'would be approaching the CMA regarding this matter unless it [was] speedily resolved'.⁵⁰⁴ (Emphasis added).

Dar was aware of the CMA's continued interest in the lighting industry about matters of RPM

3.378 A Dar Internal Report dated 12 January 2018 records a visit to [Reseller] :

'Had to wait for [Employee of Reseller] to finish his phone conversation so talked to [Employee of Reseller] who is still going on about the [X] and how Dar has become impossible to sell etc. When [Employee of Reseller] came down to see me he told me that he had just come off the phone to the CMA who had called him saying they were doing a survey on the lighting industry to gain feedback on the recent fines imposed. They asked him whether any of the suppliers were putting pressure on him regarding pricing which he confirmed they were not.'⁵⁰⁵

Dar had been made aware that a possible complaint to or investigation by the CMA was under consideration

3.379 It is clear that at least [Employee of Reseller]⁵⁰⁶ and [Employee of Reseller]⁵⁰⁷ had had discussions with an individual working in the lighting industry, and were aware of their concerns around the Dar Pricing Policy in mid- 2019. It is also clear that at

⁵⁰² GMM-000600825 (Dar Internal Report dated 13 to 19 May 2019), attachment to GMM-000600824 (Internal Dar email from [Dar Employee] to [Dar Senior Employee] dated 21 May 2019).

⁵⁰³ GMM-000336305 (Email from [Employee of Reseller] to Dar dated 22 September 2017).

⁵⁰⁴ GMM-000336305 (Email from [Employee of Reseller] to Dar dated 19 October 2017).

⁵⁰⁵ GMM-000600847 (Dar Internal Report dated 12 January 2018).

⁵⁰⁶ GMM-000600850 (Dar Internal Report dated 1 to 7 July 2019).

⁵⁰⁷ GMM-000502158 (Internal [Reseller] WhatsApp message from [Employee of Reseller] to [Employee of Reseller] dated 28 June 2019).

least [Employee of Reseller] had spoken about such concerns with Dar in July 2019 and was advised that [Dar Senior Employee] would call him.⁵⁰⁸

3.380 In this regard, the CMA notes that on 20 June 2019 [Dar Employee] circulated to Dar's staff an email from [Dar Senior Employee] attaching an internal company notice concerning this.⁵⁰⁹ Amongst other things, the notice stated:

"It has come to my attention that [Company active in the lighting industry] is telephoning some customers asking questions and making unfounded allegations about dār lighting. [X] then appears to claim that dār is "price fixing" and encourages our customers to change their prices or risk infringing the law [X]. I have made enquiries internally and I am satisfied that the claims apparently being made by [Company active in the lighting industry] (namely [X] and that dār is engaging in price fixing or otherwise infringing the law) are without foundation.

We are satisfied that dār's dealings with customers do not infringe competition or any other laws and we will ensure that this continues to be the case.[...]

These events show the importance of maintaining our standards and ensuring that at all times we operate to the code of conduct delivered in the training we received in our Competition Compliance Seminar. I have attached the slides from that training for easy reference in case you wish to remind yourself of the points covered. Please read through them again and check your notes to ensure you are operating in accordance with them.'

3.381 The cover email attaching the company notice and signed by '[Dar Senior Employee]' stated, 'At our next Sales Meeting we will run a refresher on the Competition Compliance Training to ensure we are all keeping up and to get up to date with any developments in this area. Please call [Dar Employee] in the meantime if you have any immediate questions.'

3.382 The CMA notes that the evidence it has uncovered in this investigation is fragmentary (see paragraphs 3.131, 4.333 and 4.338). The fragmentary nature of the evidence base may or may not have been exacerbated by Dar's actions having been made aware that a possible complaint to or investigation by the CMA was under consideration before the CMA's investigation in this case was launched.

⁵⁰⁸ GMM-000600850 (Dar Internal Report dated 1 to 7 July 2019).

⁵⁰⁹ GMM-000333607 (Internal Dar email from [Dar Employee] to various Dar personnel dated 20 June 2019).

Dar's culture of concealment

- 3.383 The evidence shows that Dar staff, in the light of their knowledge of the potential illegality of the Dar Pricing Policy,⁵¹⁰ their awareness of the CMA's continued interest in the lighting industry about matters of RPM⁵¹¹ and awareness of a potential investigation by the CMA,⁵¹² operated under a culture of concealment. This took the form of, at least at times, Dar staff avoiding creating potentially incriminating written records related to the Dar Pricing Policy and instead using encrypted messaging channels or communicating with each other or with Resellers orally or using coded communications.
- 3.384 As noted above at paragraph 3.191, on 6 May 2020 in a WhatsApp conversation with [Dar Employee], [Dar Senior Employee] appeared to confirm Dar's Pricing Policy for Volume 2 Products and stated, 'Correct. But have to be careful we dont openly say that'.⁵¹³
- 3.385 In interview, [Dar Senior Employee] was asked to explain what was meant by these messages, he stated that he was 'just focused on the ex VAT and inc VAT thing' and explained:

'the context of that is, is that what I'm saying to her is that PS -- er, so, she's replied back, "Or should it be in..., including VAT?" So, I replied, er, "Correct, it, it should be including VAT on, on the -- on the consumer, er, website". What I was asking her to be careful is, is that don't tell them that they need to be selling at RRP. That's what she needs to be careful about. Don't come straight over that, "No, you have to sell at RRP". "Yes, you can -- you have to advertise it as including VAT".'

- 3.386 [Dar Senior Employee] was then asked to explain who he was referring to by the term 'we'. In response, [Dar Senior Employee] said that he was referring to:

'[...] the business, So, we don't openly -- so, wha..., what I'm saying is, is, "Oh, should it be including VAT?" and I say, "Correct but we have -- er, have to be careful we don't openly say that". It -- it's a figure of speech, "we" as in "We don't want to say to the customer that you need to be selling at RRP"; that's what I'm saying. What the message is, "You need to be selling including VAT".'

- 3.387 [Dar Senior Employee] further explained that what he meant by the statement 'But be careful we don't openly say that' was '[...] just exactly what I said, is that don't

⁵¹⁰ See paragraphs under 'Dar's awareness about the potential illegality of implementing and enforcing the Dar Pricing Policy'.

⁵¹¹ See paragraphs under 'Dar was aware of the CMA's continued interest in the lighting industry about matters of RPM'.

⁵¹² See paragraphs 3.379 to 3.382.

⁵¹³ GMM-000335194 (WhatsApp message from [Dar Senior Employee] to [Dar Employee] dated 6 May 2020).

tell them that they need to sell at RRP. Tell them that they need to include VAT in that.'

3.388 [Dar Senior Employee] was then asked whether there was a culture within Dar of not necessarily, putting certain matters in writing to which [Dar Senior Employee] replied 'No'.

3.389 Notwithstanding [Dar Senior Employee's] explanation, from the plain meaning of the above messages, the CMA considers that Dar wanted to avoid the creation of potentially incriminating written records and an evidence trail relating to the Dar Pricing Policy. Therefore, [Dar Senior Employee] advised [Dar Employee] not to 'openly' refer to the Dar Pricing Policy.

Dar's preference to communicate orally with Resellers and within Dar

3.390 The CMA notes Dar limited its written communications and preferred to communicate orally. The CMA further notes that, as set out below (see paragraphs 3.391 to 3.398), a number of Resellers explained to the CMA that Dar had a tendency to give pricing instructions orally.

3.391 On 28 November 2018, [Dar Senior Employee] sent a message by WhatsApp to [Dar Senior Employee] and wrote, 'Had a long chat x 2 with [Employee of Reseller] and [Reseller 1]. Can't really email you the convos so will discuss tomorrow.'⁵¹⁴

3.392 In interview, [Dar Senior Employee] didn't recall what the message was about nor what was discussed. But [Dar Senior Employee] said he thought that the reference in his statement 'can't really email you the convos' was to the fact that he doesn't tend to write long emails. Notwithstanding [Dar Senior Employee's] explanation, the CMA infers from this statement that [Dar Senior Employee] sought to explain verbally to [Dar Senior Employee] the content of his discussions with each of the two Resellers in order to avoid generating a written evidence trail.

3.393 In an internal [Reseller] email dated 3 February 2020, [Employee of Reseller] wrote to [Employee of Reseller], 'Can you check Dar prices as I heard a rumour prices may be moving with a few of the major sellers, some have already and some later today. Not sure what level but I believe prices are going up rather than down, we can then adjust if needed (unless they go down)'.⁵¹⁵ The CMA considers that the likely source of this information was Dar and notes again that there is no written record of this conversation between [Employee of Reseller] and Dar.

⁵¹⁴ GMM-000089930 (Chat message sent by [Dar Senior Employee] to [Dar Senior Employee] dated 28 November 2018).

⁵¹⁵ GMM-00000276 (Internal [Reseller] email from [Employee of Reseller] to [Employee of Reseller] dated 4 February 2020).

- 3.394 The CMA also notes [Dar Senior Employee] talking in terms of ‘catching up’ with Resellers who were ‘being blamed for everything’ when [Dar Senior Employee] messaged [Dar Employee] on 15 October 2020 to say, ‘Just setting off to [X] will call around 9 if that is ok. Just about web [Dar Senior Employee] spoke to [Employee of Reseller] so need to catch up with [Reseller] [Reseller] and [Reseller] who now appear to be being blamed for everything!’ The CMA considers that on its face this message is unclear, impenetrable and without earlier or further explanation only told part of the story. The CMA has seen no further communication on this matter.
- 3.395 The CMA further notes that solicitors for [Reseller] submitted in response to the Section 26 Notice to [Reseller] that ‘Such requests to fix prices were always given verbally.’⁵¹⁶
- 3.396 In response to the corporate and individual Section 26 Notices dated 29 April 2021, [Employee of Reseller] wrote, ‘In Jan 2019, at the Furniture show (NEC), I had a conversation with [Dar Senior Employee], who informed me of their plans for Volume 2 Products in the DAR Catalogue, which was to maintain a price to the recommended RRP. **This was not recorded in anyway.**’⁵¹⁷ [Employee of Reseller] added, ‘We were **instructed verbally to sell all Volume 2 Products at full RRP.**’⁵¹⁸ (Emphasis added)
- 3.397 In response to a Section 26 Notice [Reseller] wrote, ‘Prior to the David Hunt Lighting and [Light] Shade Studio agreements being produced in August 2017, **verbal instructions were given** that, as part of this distributor agreement, we were expected to sell at the prices stated by Dār Group, or we would put at risk our supply and distributor status.’⁵¹⁹ (Emphasis added)
- 3.398 The CMA considers that Dar’s approach to communicate important points only orally is consistent with Dar’s preference to conceal its conduct and avoid generating an evidence trail of potentially incriminating written records.

Dar avoided generating potentially incriminating written records related to the Dar Pricing Policy, preferring to use coded communication

- 3.399 Where Dar did commit matters to writing in connection with the Dar Pricing Policy, it did so in a way to avoid revealing its true meaning, often using coded communication.

⁵¹⁶ GMM-000333709 (Response dated 18 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 22.

⁵¹⁷ GMM-000600464 (Response dated 4 May 2021 to the Section 26 Notices to [Reseller] and [Employee of Reseller] dated 29 April 2021).

⁵¹⁸ *Ibid.*, response to question 7.

⁵¹⁹ GMM-000333694 (Response dated 7 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 22.

- 3.400 To this end, and as explained above at paragraphs 3.111 to 3.127, it appears that Dar used the provisions of the SDAs relating to the correct display of the relevant RRP together with the price lists as means to signal the correct RRP to Resellers but also as means to instruct them to price at or revert to the Minimum Price. This allowed Dar to approach Resellers with an ostensibly legitimate instruction to increase the RRP, knowing that because of the Dar Pricing Policy, it would necessitate that the Reseller to price at or revert to the Minimum Price.
- 3.401 Both Dar and its Resellers had a shared understanding that there was a link between RRP and Resellers' sales prices (see paragraphs 3.111 to 3.127) such that, on occasion, Resellers would use 'RRP' as a byword or code for sales price in order to avoid a potentially incriminating complaint to Dar about another Reseller not adhering to the Dar Pricing Policy.
- 3.402 The CMA also considers that on occasion Dar used coded communications in its Dar Internal Reports. To this end, in a Dar Internal Report dated 16 January 2017, it was recorded: 'Had a long conversation about the market and current situation. [Employee of Reseller] very keen to go back to 'normal'.'⁵²⁰ The CMA notes the lack of detail and vagueness in this report of a long conversation with an important Reseller. It assumes the reader understands what is the 'current situation' and 'normal' or that the writer will inform the reader orally about what is meant.
- 3.403 The CMA also notes that various Dar Internal Reports written by Dar sales representatives following calls or meetings with Resellers used apparently coded language, such as 'pricing matters', 'good margin(s)' and the 'competitive' nature of new products.⁵²¹ See for example the evidence cited in paragraphs 3.241 to 3.248 above.
- 3.404 Further the CMA notes that sales representatives used coded communications in Dar Internal Reports that the CMA has exposed in other cases. In this regard, the evidence also shows that Dar sales representatives would discuss with Resellers which Dar products would increase Resellers' margins. For example, in a Dar Internal Report,⁵²² [Dar Employee] stated that she had visited [Reseller] and 'went through figures, advised new products are good margin' and also during her visit to [Reseller], [Dar Employee] discussed 'new ranges launched and advised of good margin opportunities'. Similarly, [Dar Employee] visited [Reseller] and advised which 'new products in supplements have good margin potential'.⁵²³

⁵²⁰ GMM-000600790 (Dar Internal Report dated 16 to 20 January 2017).

⁵²¹ As noted in paragraph 3.220 above, the CMA acknowledges that, in the normal course of legitimate business communications, it would be reasonable for Dar to refer to such 'pricing matters', 'good margin(s)' and the 'competitive' nature of new products.

⁵²² GMM-000600707 (Dar Internal Report dated 10 to 14 December 2018).

⁵²³ GMM-000600832 (Dar Internal Report dated 20 to 26 May 2019).

3.405 In this regard, the CMA refers to its finding at paragraph 3.160 in *Synthesizers and hi-tech equipment*:⁵²⁴

‘The CMA also notes, as set out at paragraphs 4.62 to 4.64 below, [Reseller 1] submitted that Korg UK sought to minimise written communications by making them as brief and indirect as possible, e.g. by referring to ‘margin’ in written correspondence to [Reseller 1] in order to highlight [Reseller 1’s] advertised retail pricing.’

3.406 The CMA considers that the above evidence shows that Dar staff operated under a culture of concealment. This took the form of, at least at times, Dar staff avoiding creating potentially incriminating written records related to the Dar Pricing Policy and instead using encrypted messaging channels or communicating with each other or to Resellers orally or using coded communications.

Conclusion

3.407 The CMA considers that the evidence set out above shows that:

3.407.1 Dar’s staff had a very high degree of relevant and specific knowledge that the implementation and enforcement of the Dar Pricing Policy was potentially illegal, including through reports from Resellers,

3.407.2 Dar had been aware of the CMA’s continued interest in the lighting industry about matters of RPM,

3.407.3 Dar had been made aware that a possible investigation by the CMA was under consideration,

3.407.4 Dar instituted a culture of concealment in connection with the Dar Pricing Policy whereby it avoided generating potentially incriminating written communications, and

3.407.5 Dar and its staff had a clear understanding that enforcing the Dar Pricing Policy was potentially anticompetitive and despite this carried out the Infringements in the knowledge that it potentially constituted illegal RPM.

Illustrative examples of Dar’s monitoring and enforcement

3.408 The Dar Pricing Policy operated mainly on a verbal basis and so generated a limited amount of documentary evidence. The primary reasons for this were that

⁵²⁴ *Synthesizers and hi-tech equipment: anti-competitive practices 50565-4* - GOV.UK (www.gov.uk), paragraph 3.160. See also the CMA’s decisions in [Electronic drum sector: anti-competitive practices 50565-5](#) - GOV.UK (www.gov.uk), paragraphs 3.185 to 3.195; [Digital piano and digital keyboard sector: anti-competitive practices 50565-2](#) - GOV.UK (www.gov.uk), paragraphs 3.165 to 3.167; and [Guitars: anti-competitive practices 50565-3](#) - GOV.UK (www.gov.uk), paragraphs 3.184 to 3.191.

Dar staff operated under a culture of concealment in relation to the Dar Pricing Policy (as explained in paragraphs 3.383 to 3.406 above) and Resellers were able to implement the Dar Pricing Policy by using the price lists circulated or made available by Dar from time to time without needing to routinely communicate with Dar about it.

3.409 Notwithstanding Dar's culture of concealment, the CMA has obtained contemporaneous documentary evidence which shows Dar's monitoring and enforcement of the Dar Pricing Policy.

3.410 Below are some illustrative examples of communications involving Dar and certain of its Resellers. These examples indicate the widespread application of and adherence to the Dar Pricing Policy in relation to all Relevant Products across Dar's network of Resellers during the Relevant Period.

3.411 More specifically, these communications indicate that:

3.411.1 the Dar Pricing Policy was intended to apply to all or at least the vast majority of Resellers of the Relevant Products as noted at paragraph 3.207 above;

3.411.2 the Dar Pricing Policy was intended to apply to all Relevant Products as noted at paragraph 3.204 above;

3.411.3 Dar monitored Resellers accounting for the vast majority of its UK sales at least throughout the Relevant Period in order to enforce the Dar Pricing Policy as follows:

3.411.4 Resellers reporting to Dar, either by email, WhatsApp or verbally, where other Resellers were not adhering to the Dar Pricing Policy;

3.411.5 Dar proactively checking its Resellers websites from time to time during the Relevant Period with the result that Dar would have been able to see if Resellers' were adhering to the Dar Pricing Policy;⁵²⁵ and

3.411.6 Dar enforced the Dar Pricing Policy by contacting Resellers directly who were found or suspected not to be adhering to the Dar Pricing Policy with a view to agreeing that they would increase their prices to at least the Minimum Price.

3.412 Based on the contemporaneous evidence from the Relevant Period set out at paragraphs under 'Consequences for Resellers of non-compliance with the Dar Pricing Policy' and 'Illustrative examples of Dar's monitoring and enforcement' and that set out in Section 4, the CMA has reasonable grounds for suspecting that at

⁵²⁵ See paragraphs under 'Dar proactively monitored Resellers' websites from time to time'.

least 20 Resellers selling the Relevant Products were subject to the Dar Pricing Policy.⁵²⁶

- 3.413 In addition, as set out at paragraphs 3.284 to 3.313 the evidence shows that at least a further eight Resellers proactively undertook monitoring and complained to Dar about other Resellers likely pricing below the Minimum Price. Although the CMA has not obtained evidence of Dar reacting to these Resellers' specific complaints, the CMA considers that this is not surprising and is consistent with its findings that Dar operated under a culture of concealment (see paragraphs 3.383 to 3.406). As a result, the CMA has reasonable grounds for suspecting that these additional eight Resellers were also subject to the Dar Pricing Policy.⁵²⁷
- 3.414 Finally, as set out at paragraphs 3.95 to 3.105, the evidence shows that Dar engendered a perception amongst its Resellers that the SDAs allowed Dar to restrict their freedom to discount by allowing Dar to control prices. As a result, the CMA has reasonable grounds for suspecting that each of the Resellers that were signatories to an SDA⁵²⁸ were subject to the Dar Pricing Policy.⁵²⁹
- 3.415 However, the CMA makes no findings in respect of any Resellers of the Relevant Products other than [Reseller 1] and [Reseller 2].

Volume 1 examples of monitoring and enforcement of the Dar Pricing Policy

Dar Internal Report, January 2017 – [Reseller]

- 3.416 In a Dar Internal Report titled 'Show Visitors NEC Jan 2017', it was recorded: '[Reseller] [...] Still holding prices but have done 20% off for Jan.'⁵³⁰ The CMA understands the reference to 'Still holding prices' to be a reference to [Reseller] (a Reseller) pricing Relevant Products at or above the Minimum Price and the

⁵²⁶ For example, the illustrative examples set out below involve Dar and at least 20 of its Resellers. These Resellers taken together accounted for at least [30-40]% of Dar sales of Relevant Products in 2019 (the most recent year for which the CMA has been provided revenue information). This calculation is based on the revenue figures provided by Dar on 9 January 2020, GMM-000333646 (Annex 14.1 to response dated 18 December 2020 to the First Dar Section 26 Notice), Dar's top 20 Resellers, GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), table 3.2 and table 4.1, and 891GMM-000601937 (Table 6.1 Additional Resellers Table).

⁵²⁷ These at least 8 Resellers taken together with the 20 Resellers (at least) covered in paragraph 3.412 above accounted for at least [30-40]% of Dar UK's sales of Relevant Products in 2019 (the most recent year for which the CMA has been provided revenue information). This calculation is based on the revenue figures provided by Dar on 9 January 2020, GMM-000333646 (Annex 14.1 to response dated 18 December 2020 to the First Dar Section 26 Notice), Dar's top 20 Resellers, GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), table 3.2 and table 4.1 and GMM-000601937 (Table 6.1 Additional Resellers Table).

⁵²⁸ GMM-000333626 (Annex 10.1 to response dated 11 December 2020 to the First Dar Section 26 Notice), Members of Dar's SDA networks.

⁵²⁹ These Resellers taken together accounted for at least [70 – 80]% of Dar UK's sales of Relevant Products in 2019 (the most recent year for which the CMA has been provided revenue information). This calculation is based on the revenue figures provided by Dar on 9 January 2020, GMM-000333646 (Annex 14.1 to response dated 18 December 2020 to the First Dar Section 26 Notice), Dar's top 20 Resellers. See also revenue figures for online/bricks and mortar Resellers subject to SDAs, Online Resellers subject to SDAs GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), table 3.2 and table 4.1 and GMM-000601937 (Table 6.1 Additional Resellers Table).

⁵³⁰ GMM-000600792 ('Show visitors NEC 2017').

reference to 'but have done 20% off for Jan' suggests that Dar may have agreed to such a promotion.

February 2017: Rawley 12 (Volume 1) – [Reseller]

- 3.417 On 18 February 2017, [Employee of Reseller] emailed [Dar Employee] and stated, 'Tried to sell a RAWLEY 12 (a Volume 1 Product) to a customer today we £555 list. During the conversation customer showed me it from [Reseller] at £396!'⁵³¹
- 3.418 The CMA considers that [Reseller] was alerting Dar to [Reseller] pricing below the Minimum Price.⁵³² The CMA therefore considers that this email shows that [Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers, including [Reseller]) would not sell or advertise the Relevant Products below the Minimum Price.

May 2017: JES5450 (Volume 1) – [Reseller]

- 3.419 On 31 May 2017, [Employee of Reseller] emailed [Dar Employee] under the subject line 'Price Match request for JES5450' (a Volume 1 Product)⁵³³ stating:
- '[Employee of Reseller] has asked me to contact you regarding a Price Match request we have received from a customer who purchased a JES5450 from us. Customer has see [sic] this fitting on the website of [Reseller] for £197.50. As we haven't implemented last price change yet we are competitive on price at £239. [Employee of Reseller] is concerned as to how this lighting shop can sell this fitting so cheaply and how this is affecting your brand?'⁵³⁴
- 3.420 The CMA considers that [Reseller] alerted Dar to the fact that [Reseller] was not pricing at the Minimum Price online.⁵³⁵ The CMA considers that it shows that [Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers including [Reseller]) would not sell or advertise the Relevant Products below the Minimum Price.

December 2017 (Selina 5 Lighting semi-flush, Volume 1) – [Reseller]

- 3.421 On 14 December 2017, [Employee of Reseller] emailed [Dar Employee] providing a screenshot to a Volume 1 Product⁵³⁶ advertised on [Reseller's website and

⁵³¹ GMM-000597077 (Email from [Employee of Reseller] to [Dar Employee] dated 18 February 2017).

⁵³² The CMA notes that the RRP for a Rawley 12 was £660 inc. VAT and therefore a sales price of £396 represents a discount of 40% off RRP inc VAT. See GMM-000336276 (The Lighting Book Price List 2017), tab 1.

⁵³³ GMM-000597058 (The Lighting Book Price List 2018-19).

⁵³⁴ GMM-000597089 (Email from [Employee of Reseller] to [Dar Employee] dated 31 May 2017).

⁵³⁵ The CMA notes that the RRP for a JES5450 was £330 inc. VAT and therefore an advertised price of £197.50 represented a discount of 40% off RRP inc VAT. See GMM-000336276 (The Lighting Book Price List 2017), tab 1

⁵³⁶ GMM-000597058 (The Lighting Book Price List 2018-19).

stated, 'These guys [Dar Employee], more than 40% discount, what are they thinking....'⁵³⁷

3.422 This email shows that [Reseller] alerted Dar to another Reseller who was not pricing at the Minimum Price.⁵³⁸ The CMA considers it shows that [Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers, including [Reseller]) would not sell or advertise the Relevant Products below the Minimum Price.

August 2018 Academy 5-light foyer pendant, Volume 1 - [Reseller]

3.423 On 20 August 2018 [Employee of Reseller] emailed [Dar Employee] attaching a link to a Volume 1 Product advertised on [Reseller 1's] website stating:⁵³⁹

'Thanks for the SDA received last week, have a couple of questions, perhaps you could give me a ring later in the week.

Customer on Saturday, was looking for me to match [Reseller 1's] 45% discount, I do hope your SDA will have an impact, difficult currently to see the point of stocking/displaying Dar products for a [%<] G.P.'

3.424 [Dar Employee] replied to [Employee of Reseller] stating 'understand your concerns – this appears to be an unexplained 'blip' – out of line with normal pattern. Can you retrieve the sale? If so I will help you!'

3.425 This email shows that [Employee of Reseller] alerted Dar to another Reseller that was not pricing at the Minimum Price.⁵⁴⁰ This shows that [Employee of Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers, including [Reseller 1]) would not sell or advertise the Relevant Products below the Minimum Price. [Dar Employee's] reply seemed intended to reassure [Employee of Reseller] that the Dar Pricing Policy would ordinarily prevent discounting of the type that [Employee of Reseller] had complained about.

⁵³⁷ GMM-000336308 (Email chain between Dar Employee] and [Employee of Reseller] dated 14 December 2017). See also attachment GMM-000336309 (Screenshot of [Reseller's] website). The CMA notes [Dar Employee] responded to [Employee of Reseller], 'Under the competition and market authority rules we cannot interfere in any pricing issues nor would the company wish to.'

⁵³⁸ The CMA notes that the RRP for a Selina 5 Lighting semi-flush was £348 inc. VAT and therefore [Reseller] advertised price of £191.69 represented a discount of 40% off RRP inc VAT. See GMM-000336276 (The Lighting Book Price List 2017), tab 1.

⁵³⁹ GMM-000601127 (Email chain between [Dar Employee] and [Employee of Reseller] dated 21 August 2018).

⁵⁴⁰ The CMA considers that based on its plain meaning this email shows that [Reseller 1] was discounting at 45% off RRP for Volume 1 Products.

November 2018 Dar Tower 6 light pendant (Volume 1) – [Reseller]

3.426 On 12 November 2018, [Employee of Reseller] sent an internal email to [Employee of Reseller] providing two screenshots of a Dar Tower light (a Volume 1 Product)⁵⁴¹ and stated, 'Dar Tower, discounted on [Reseller 1]'.⁵⁴² On the same day, [Employee of Reseller] forwarded this email and the two screenshots to [Dar Employee] and stated:⁵⁴³

'Just noticed this attached... was thinking of [Reseller 1] as they are advertising heavily on TV and everywhere and say this and thought that this contravenes all [Dar Senior Employee] was talking about. As I gather this will be Dar themselves on [Reseller 1] and [X] 32% off – [X] As we were asked and on what planet is that not devaluing the Dar brand. Should I send to [Dar Senior Employee]? As we still haven't had any response to our letter?!'

3.427 [Dar Employee] responded on 12 November 2018 to say, 'I would send it to [Dar Senior Employee].'

3.428 The CMA considers that the above exchange of emails shows that [Employee of Reseller] sent an internal email to [Employee of Reseller] clearly alerting her only to the fact that [Reseller 1] was discounting a Volume 1 product below the Minimum Price. In forwarding this email to Dar, [Employee of Reseller] ostensibly sought to complain about other aspects of the [Reseller 1] advertisement but still clearly alerted Dar to [Reseller 1] not pricing at the Minimum Price for a Dar Tower. The CMA considers it shows that [Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers, including [Reseller 1]) would not sell or advertise the Relevant Products below the Minimum Price. [Dar Employee] confirmation to send the screenshots to [Dar Senior Employee] shows that [Dar Employee] agreed with [Employee of Reseller's] view.

November 2019: Luther range (Volume 1) – [Reseller]

3.429 On 20 November 2019, [Employee of Reseller] sent a WhatsApp message to [Dar Employee] stating 'something I forgot to mention when I spoke to you yesterday it's following on from our conversation a while ago about website price's, people are still selling with massive discounts 40%+ found one that is selling Luther⁵⁴⁴ [a range within Volume 1] for 47% off'.⁵⁴⁵ [Dar Employee] replied that at 'the end of

⁵⁴¹ GMM-000597058 (The Lighting Book Price List 2018-19). GMM-000598217 (STERLING MASTER LIGHTING BOOK WISEBUYS PRICE LIST EFFECTIVE 25.9.20.xlsx, tab 'LIGHTING BOOK - volume 1').

⁵⁴² GMM-000597373 (Email from [Employee of Reseller] to [Employee of Reseller] dated 12 November 2018).

⁵⁴³ GMM-000597373 (Email chain between [Dar Employee] and [Employee of Reseller] dated 12 November 2018).

⁵⁴⁴ Exact product unknown. The Luther range of products is within Volume 1. See GMM-000333708 (The Lighting Book 2019).

⁵⁴⁵ GMM-000600358 (Message from [Employee of Reseller] to [Dar Employee] dated 20 November 2019).

the day it is the customer's discretion what they wish to discount'.⁵⁴⁶ In response, [Employee of Reseller] stated 'I just want to say it wasn't the customers discretion (me) when you were ringing me a couple of times a week asking me when I was going to change them to fall in line with the others.'⁵⁴⁷

- 3.430 In response to the CMA's Section 26 Notice dated 5 May 2021, [Employee of Reseller] explained that the basis for his message above was to enquire 'how some internet companies can sell products with the massive discounts that were being shown online when I certainly couldn't offer those sorts of discounts and return a reasonable profit.' [Employee of Reseller] further explained that by his statement 'wasn't the customers discretion (me)' he was referring to himself as the customer and his freedom to offer discounts. In addition, he understood the phrase 'fall in line' to mean 'fall in line with the maximum discounts allowed'.⁵⁴⁸
- 3.431 The CMA's view is that taking the plain meaning of the above messages and [Employee of Reseller's] subsequent explanation, [Reseller] understood that Dar had previously instructed it to revert to the Minimum Price and that it did not have the freedom to offer discounts greater than the maximum discounts allowed under the Dar Pricing Policy. These messages also indicate that [Reseller] alerted Dar generally to other Resellers who were not pricing at the Minimum Price. The CMA considers therefore that it shows that [Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers) would not sell or advertise Volume 1 Products below the Minimum Price.

January/February 2020: Volume 1 [product not specified] – [Reseller]

- 3.432 On 15 January 2020, [Employee of Reseller] sent WhatsApp messages to [Dar Senior Employee] stating, '[Reseller] was the one I was thinking of Other one was "[Reseller]".⁵⁴⁹ On 3 February 2020, [Employee of Reseller] sent further messages to [Dar Senior Employee] 'Done mate 35, [Reseller] on 38.5'. [Dar Senior Employee] responded with a thumbs up sign.⁵⁵⁰ On 6 February 2020, [Employee of Reseller] sent a WhatsApp message asking, 'Are the others on google shopping going below 35 also ... [Reseller], [Reseller], [Reseller] 👍'.⁵⁵¹
- 3.433 The CMA considers that [Employee of Reseller's] statement '*Done mate 35, [Reseller] on 38.5*' refers to confirmation from [Reseller] that it is now selling at the

⁵⁴⁶ GMM-000336139 (Message from [Dar Employee] to [Employee of Reseller] dated 20 November 2019).

⁵⁴⁷ GMM-000336140 (Message from [Employee of Reseller] to [Dar Employee] dated 20 November 2019).

⁵⁴⁸ GMM-000600358 (Response dated 12 May 2021 to the Section 26 Notice to [Employee of Reseller] dated 5 May 2021).

⁵⁴⁹ GMM-000168263 and GMM-000168264 (WhatsApp messages from [Employee of Reseller] to [Dar Senior Employee] dated 15 January 2020).

⁵⁵⁰ GMM-000168265, GMM-000168266 and (WhatsApp messages from [Employee of Reseller] to [Dar Senior Employee] dated 3 February 2020).

⁵⁵¹ GMM-000168267 (WhatsApp messages from [Employee of Reseller] to [Dar Senior Employee] dated 6 February 2020).

Minimum Price being a discount of 35% off RRP (the prevailing Minimum Price for Volume 1 Products)⁵⁵² presumably following an instruction from Dar to revert to the Minimum Price. It also shows [Reseller] was reporting that [Reseller] was showing a discount of 38.5% off RRP. The CMA considers the above messages indicate that [Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers, including [Reseller]) would not sell or advertise Volume 1 Products below the Minimum Price.

January 2020: Single Midi Pendant (Volume 1) – [Reseller]

- 3.434 On 6 January 2020, [Employee of Reseller] sent an email to [Dar Employee] under the subject line ‘On-line sale price’ and stated, ‘Are other companies supposed to be selling below RRP?, I was just wondering because I’ve found the Single Midi Pendant [a Volume 1 Product⁵⁵³] is been [sic] sold cheap on [Reseller] £23.04⁵⁵⁴ and it differs on other sites also.⁵⁵⁵ We are definitely staying with the prices provided from yourselves.’
- 3.435 Within eight minutes, [Dar Employee] had forwarded this email to [Dar Senior Employee] without adding any further comment.
- 3.436 In response to the CMA’s Section 26 Notice issued in his personal capacity,⁵⁵⁶ [Employee of Reseller] explained that, ‘The purpose of the email was so that the prices we [Reseller] used at the time were fair and correct.’ [Employee of Reseller] further explained that ‘I was told by my Company Director to sell at the Recommended selling price (RRP) provided by them [Dar]. As my boss was away on holiday at the time, I asked the question to find out the correct recommended selling price. We sell the same Dar Lighting products as other companies that came up in the search results; I was simply using it as an example.’⁵⁵⁷
- 3.437 The CMA considers that taking into account the plain meaning of the above email and the totality of the evidence more generally (including how the Dar Pricing Policy used the RRP to calculate the Minimum Price), the evidence shows that [Reseller] alerted Dar to another Reseller who was not pricing at the Minimum Price for the Relevant Product. The CMA considers therefore that the evidence shows that [Reseller] understood that the application of the Dar Pricing Policy

⁵⁵² The CMA considers that these messages relate to Volume 1 Products. See GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021).

⁵⁵³ GMM-000598217 (STERLING MASTER LIGHTING BOOK WISEBUYS PRICE LIST EFFECTIVE 25.9.20.xlsx, tab ‘LIGHTING BOOK - volume 1’).

⁵⁵⁴ The CMA notes that the RRP for a Midi Pendant was £36 inc.VAT and therefore [Reseller’s] advertised price of £23.04 represented a discount of 36% off RRP inc VAT.

⁵⁵⁵ GMM-000336499 (Email from [Employee of Reseller] to [Dar Employee] dated 6 January 2020).

⁵⁵⁶ GMM-000600278 (Section 26 Notice to [Employee of Reseller] dated 5 May 2021).

⁵⁵⁷ GMM-000600477 (Response dated 10 May 2021 to the Section 26 Notice to [Employee of Reseller] dated 5 May 2021).

meant it (and other Resellers, including [Reseller]) would not sell or advertise the Relevant Products below the Minimum Price.

November 2020: Volume 1⁵⁵⁸ Aur1564 – [Reseller]

- 3.438 On 2 November 2020, [Employee of Reseller] sent a WhatsApp message to [Dar Senior Employee] stating ‘I’m getting hammered with price match’s’ ‘Top 3 - [Reseller] - no showroom ?’ [Dar Senior Employee] responded by WhatsApp stating, ‘They are [Reseller], HUGE store, [🤔]. Lol But I will check it out.’ [Employee of Reseller] explained ‘It’s because there [sic] selling everything too cheap’. [Dar Senior Employee] stated, ‘I will educate them’. [Employee of Reseller] stated, ‘Trying to hold my prices but my advertising is spending [sic] and not getting the results I should be because of lower priced idiots 🤔♂️’.⁵⁵⁹ Also [Reseller] in general has 13 price match’s Saturday Sunday on emails’. There Aur1564 @ 217.00,⁵⁶⁰ also [Reseller 1] price match’s’.^{561 562}
- 3.439 The CMA considers that the statement by [Employee of Reseller] ‘Trying to hold my prices but my advertising is spending [sic] and not getting the results I should be because of lower priced idiots 🤔♂️’ indicates that [Reseller] was trying not to reduce its prices below the Minimum Price. The CMA also considers that [Dar Senior Employee’s] phrase ‘I will educate them’ indicates that [Dar Senior Employee] intended to speak with [Reseller] with a view to instructing them to revert to the Minimum Price. [Employee of Reseller] confirmed in interview that this was also his expectation: ‘I think it’s probably education to make sure they’re sustainable, I suppose. [...] I mean obviously I don’t know what he said to them. I’ve never had no feedback to say sort of he’s spoke to anyone, I don’t know.’⁵⁶³ By ‘sustainable’, the CMA understands that [Employee of Reseller] was referring to that Reseller selling Relevant Products at a price that would have been high enough for [Reseller] to make a sufficient profit margin.⁵⁶⁴
- 3.440 The CMA therefore considers that the above messages shows that [Reseller] understood that the application of the Dar Pricing Policy meant it (and other

⁵⁵⁸ GMM-000598217 (STERLING MASTER LIGHTING BOOK WISEBUYS PRICE LIST EFFECTIVE 25.9.20.xlsx, tab ‘2020 LAUNCHES’).

⁵⁵⁹ The emoji used by [Employee of Reseller] is a hand shown pressing against the head of a person, commonly written as *facepalm*. According to [🤔 Face Palm Emoji \(emojipedia.org\)](https://emojipedia.org/), this emoji is used to display frustration or embarrassment at the ineptitude of a person or situation.

⁵⁶⁰ The CMA notes that for the Aur1564 the RRP (inc VAT) was £390 and so [Reseller 1’s] advertised price of £217.00 represented a discount of 44% off RRP (inc VAT).

⁵⁶¹ Volume 2 was launched after 2 September 2018.

⁵⁶² GMM-000168381, GMM-000168383, GMM-000168384, GMM-000168385, GMM-000168386, GMM-000168387, GMM-000168388, GMM-000168389, GMM-000168390, GMM-000168391, and GMM-000168392 (WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller] dated 2 November 2020 to 16 November 2020).

⁵⁶³ GMM-000601952 (Transcript of interview with [Employee of Reseller] on 22 April 2021), p.110.

⁵⁶⁴ *Ibid.*, pp.43 and 92.

Resellers, including [Reseller], [Reseller] and [Reseller 1]) would not sell or advertise Volume 1 Products below the Minimum Price.⁵⁶⁵

Volume 2⁵⁶⁶ examples of monitoring and enforcement of the Dar Pricing Policy

January 2019: (Volume 2) - [Reseller]

- 3.441 On 28 January 2019, [Dar Senior Employee] sent a WhatsApp message to [Dar Employee], stating, '[Reseller] is unchanged'. [Dar Employee replied, 'I will speak to [Employee of Reseller] tomorrow. When I spoke to her at the show she was going to get it done'.⁵⁶⁷
- 3.442 On 29 January 2019, [Dar Employee] sent a WhatsApp message to [Employee of Reseller] asking, 'have you had a chance to look at our new Sept products on your site? [...]. Thanks, [Dar Employee] ❤️'. [Employee of Reseller] replied, 'Sorry haven't had a chance to look at them yet (away at suppliers just now) but will have a look this wk and will let you know when we will be going live.' On 31 January 2019, [Employee of Reseller] sent a message to [Dar Employee] explaining, 'just to say that we will be changing the prices in [sic] Monday 11 th feb' and [Dar Employee] responded, 'That's great thank you 😊'.⁵⁶⁸
- 3.443 Subsequently, on 31 January 2019 [Dar Employee] sent a message to [Dar Senior Employee] stating, 'they will have it done by Monday'.⁵⁶⁹
- 3.444 In interview, [Dar Senior Employee] was asked what he understood [Dar Employee] meant by her statement 'When I spoke to her at the show she was going to get it done' and he explained:
- 'Get the, the [Reseller], um -- get the [Reseller] -- get the David Hunt Lighting, um, er -- on their home page, they were su..., er, er, suggesting that they're selling it and that they were a stockist of it. So, get -- to get the -- to get the reference to David Hunt Lighting removed from the home page of their website.'
- 3.445 The CMA's view considering the above messages' plain meaning including [Dar Employee's] statement 'have you had a chance to look at our new Sept products on your site?' indicate that the above messages relate to Relevant Products

⁵⁶⁵ See also paragraph 4.118.

⁵⁶⁶ GMM-000598217 (STERLING MASTER LIGHTING BOOK WISEBUYS PRICE LIST EFFECTIVE 25.9.20.xlsx, tab 'LIGHTING BOOK - volume 2').

⁵⁶⁷ GMM-000186269 (WhatsApp conversation between [Dar Senior Employee] and [Dar Employee] dated 28 January 2019).

⁵⁶⁸ GMM-000531160, GMM-000531161, GMM-000531163 and GMM-000531164 (WhatsApp messages between [Dar Employee] and [Employee of Reseller] dated 29 to 31 January 2019).

⁵⁶⁹ GMM-000186269 (WhatsApp conversation between [Dar Senior Employee] and [Dar Employee] dated 31 January 2019).

launched in September 2018 rather than the removal of David Hunt Products from the homepage of [Reseller's] website.⁵⁷⁰ The CMA's view is that [Dar Employee] is instructing [Reseller] to move to the Minimum Price and [Employee of Reseller's] statement 'just to say that we will be changing the prices in [sic] Monday 11th feb' shows that [Reseller] was going to change its prices for the September 2018 products in accordance with the Dar Pricing Policy. Therefore, the CMA finds that these messages indicate that [Reseller] understood that the application of the Dar Pricing Policy meant it would not sell or advertise the Relevant Products below the Minimum Price.

February 2019: (CRY1250, Volume 2) – [Reseller]

- 3.446 On 20 February 2019, [Employee of Reseller 2] appears to have complained to [Dar Senior Employee] about [Reseller's] pricing of Volume 2 Products (see [Reseller 1] and [Reseller] in Section 4 below).
- 3.447 On 28 February 2019, [Dar Employee] sent a WhatsApp message to [Employee of Reseller] asking, 'Would you be able to have a look at the CRY1250 [a Volume 2 Product⁵⁷¹]. The price is £650 this was a September line. Thanks 😊'.⁵⁷² The CMA considers that [Dar Employee] was chasing [Reseller], albeit politely, to revert to the Minimum Price. [Employee of Reseller] responded on the same day, 'No probs will let you know' and then confirmed, 'We have no idea how this was missed as not on the list and only on the web. Anyway the price will go up on Monday as we can't change prices midweek'.
- 3.448 On the same day, [Employee of Reseller] sent an internal email to [Employee of Reseller] stating:

'FYI I have been informed that this was on the September price list and should now be £650...please check and let me know.' [Employee of Reseller] added, 'Don't don't [sic] why this was missed...please Change to £650 on Monday and from now on EVERY Dar stock needs to get checked in case sept or jan launch...I think print us all of a list of these products (even if we don't have them) and laminate them so we can all refer to them...give [Employee of Reseller] a copy to. [sic] Blooming painful !!.'⁵⁷³

⁵⁷⁰ The CMA notes that the WhatsApp messages between Dar and [Reseller] regarding the removal of David Hunt Products from [Reseller's] website are dated 23 May 2019 and this pre-dates [Dar Employee's] message to [Reseller] about changing the prices of Volume 2 Products: see paragraph 3.96.

⁵⁷¹ GMM-000598217 (STERLING MASTER LIGHTING BOOK WISEBUYS PRICE LIST EFFECTIVE 25.9.20.xlsx, tab 'LIGHTING BOOK - volume 2').

⁵⁷² GMM-000531168, GMM-000531169 and GMM-000531170 (WhatsApp messages between [Dar Employee] and [Employee of Reseller] dated 28 February 2019).

⁵⁷³ GMM-000249663 (Internal [Reseller] email from [Employee of Reseller] to [Employee of Reseller] dated 28 February 2019).

- 3.449 [Employee of Reseller] subsequently emailed [Employee of Reseller] and stated, 'I called [Dar Employee] and she wasn't sure why this wasn't on the original spreadsheet. I confirmed this will be changed on Monday. I also asked about the January show items and she [[Dar Employee]] confirmed we will go out at the PRP.'⁵⁷⁴
- 3.450 Also on 28 February 2019, [Employee of Reseller] sent an email to [Dar Employee] under the subject heading 'SEPTEMBER LAUNCH PRP CHANGE' and stated, 'For the below line [CRY1250] we will change the price of this 04/03/19. [...] Also for the January show items can you please send me on all PRP's and cost's [sic].'⁵⁷⁵
- 3.451 The CMA considers that [Employee of Reseller's] statement 'Change to £650' refers to the retail price of the CRY1250, based on Dar's price list⁵⁷⁶ which shows the RRP ex VAT as £650 (ie the Minimum Price).
- 3.452 The CMA considers that [Employee of Reseller's] statement 'Anyway the price will go up on Monday as we can't change prices midweek' shows that [Reseller] agreed to increase its price to the Minimum Price following chasing from Dar to do so. The CMA also notes the considerable lengths [Reseller] went to in order to avoid pricing below the Minimum Price in future. Therefore, the CMA considers that the messages indicate that [Reseller] understood that the application of the Dar Pricing Policy meant it should not sell or advertise Volume 2 Products below the Minimum Price.

October 2019: Volume 2 - [Reseller]

- 3.453 On 16 October 2019 [Employee of Reseller] sent an email to [Dar Employee] and asked:⁵⁷⁷

'Volume 2 are the prices that are meant to be to RRP less VAT showing no top price I believe? I hadn't known at the point I loaded the new items out of the price book that there was this September Launch sheet and a lot of them are volume 2 so I am going back through the prices and changing them and I am just checking that I am doing the right thing.'

- 3.454 It appears that the above email was then forwarded to [Dar Employee] who responded to [Employee of Reseller] on 17 October 2019 stating, 'I am not sure if you are referring to Dar or DHL so I have attached all our latest MIS sheets which

⁵⁷⁴ GMM-000249663 (Internal [Reseller] email from [Employee of Reseller] to [Employee of Reseller] dated 28 February 2019).

⁵⁷⁵ GMM-000254969 (Email from [Employee of Reseller] to [Dar Employee] dated 28 February 2019).

⁵⁷⁶ GMM-000250398 (Internal [Reseller] email between [Employee of Reseller] and [Employee of Reseller] dated 8 March 2019); GMM-000250399 (Dar September Launch Lines Sept 2018 updated 11/02/19).

⁵⁷⁷ GMM-000336472 (Email chain between [Employee of Reseller] and [Dar Employee] and [Dar Employee], between 16 and 17 October 2019).

include the new prices effective from 21.9.19'. The CMA notes that the Minimum Price for both David Hunt Products and Volume 2 Product was RRP exclusive of VAT and this may have been the cause of [Dar Employee's] confusion.

- 3.455 The CMA considers that the above email shows that [Reseller] understood that the application of the Dar Pricing Policy meant it would not sell or advertise Volume 2 Products below the Minimum Price that is, RRP exclusive of VAT.

October 2019: Volume 2 - [Reseller]

- 3.456 In a chat message dated 19 October 2019, [Employee of Reseller] confirmed to [Dar Senior Employee] that the new products' prices had been changed to RRP, he stated, 'Hi [Dar Senior Employee], I've changed all the prices of the new products to RRP. It may take an hour or so for google to index the changes but I am seeing some already have changed.'⁵⁷⁸ The CMA asked [Employee of Reseller] to explain this chat message. In response to the [Reseller] Section 26 Notice,⁵⁷⁹ [Employee of Reseller] confirmed that prior to 2017, he received verbal instructions from Dar to ensure that [Reseller's] pricing was in line with other companies. [Employee of Reseller] explained that he did not recall whether this chat message related to maintaining prices although he speculated that 'having received an email earlier on in the day (11.53am) and the mention of RRP, it may indicate that I was under selling some products that were new to the market, and [Dar Senior Employee] suggested I put them up.' Relying on the plain meaning of the document, the CMA considers that [Employee of Reseller]' chat message referring to having changed the prices to RRP indicates that [Reseller] had increased its Volume 2 selling prices to the Minimum Price and so confirmed [Reseller's] compliance with [Dar Senior Employee's] instructions as to [Reseller's] selling price.

December 2019: Volume 2 - [Reseller]

- 3.457 An entry dated 2 December 2019 in a Dar Internal Report in respect of [Reseller] records: 'HAPPY TO PUT NEW DAR PRODUCTS ON DISPLAY PRICES BECAUSE ARE NOT DISCOUNTED ON THE WEB SHE WILL SEND ORDER TO ME.'⁵⁸⁰ This statement shows that [Reseller] may have monitored other Resellers' prices for Volume 2 Products online and recognises that Dar is successfully enforcing the Dar Pricing Policy online. [Reseller] is also signalling that it is content to abide with the Dar Pricing Policy because other Resellers are so doing.

⁵⁷⁸ GMM-000089550 (WhatsApp conversation between [Employee of Reseller] and [Dar Senior Employee] between October and November 2019).

⁵⁷⁹ GMM-000600464 (Response dated 4 May 2021 to the Section 26 Notices to [Reseller] and [Employee of Reseller] dated 29 April 2021), response to question 2.

⁵⁸⁰ GMM-000600808 (Dar Internal Report dated 11 to 17 February 2019).

February 2020: Volume 2, Mikara 6 Light Cluster – [Reseller]

3.458 On 17 February 2020, [Employee of Reseller] sent an email to [Dar Employee] and stated:⁵⁸¹

'Had to price match the following

Mikara 0650 6lt cluster [a Relevant Product] with a list price of £220 plus Vat. It is in Vol 2 catalogue. I thought not allowed to sell online at less than list price.

All other companies that I notice are sticking to the £220 price.

[Reseller] are advertising it at £198.

Hope you can help.'

3.459 This email shows that [Reseller] alerted Dar to another Reseller who was not pricing at the Minimum Price for Volume 2 Products (being the 'list price' excluding VAT, which was in this case £220). The CMA considers therefore that it shows that [Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers, including [Reseller]) would not sell or advertise Volume 2 Products below the Minimum Price.

August/September 2020: Volumes 1 and 2 [products not specified] – [Reseller]

3.460 On 18 August 2020, [Employee of Reseller] sent a WhatsApp message to [Dar Senior Employee] stating, 'can you check [Reseller] and a few other creeping up 37% and some ppl have vol2 discounted'.⁵⁸²

3.461 [Employee of Reseller] sent a further WhatsApp message to [Dar Senior Employee] on 15 September 2020, stating, '[Reseller] are starting the price decline again 😡'.⁵⁸³ [Dar Senior Employee] replied, 'Are you sure? What is your % off?' [Employee of Reseller] stated, '35% and we have a few clearance and discontinueds at 36-37%.' On 16 September 2020, [Employee of Reseller] followed

⁵⁸¹ GMM-000336512 (Email from [Employee of Reseller] to [Dar Employee] dated 17 February 2020). On the same day, [Dar Employee] responded to [Employee of Reseller] explaining that 'unfortunately this is out with our control. We produce a RRP price list only as a guide. It is up to the individual customer what they choose to sell at.' For the CMA's view as to the potential reason for this 'exculpatory' remark see paragraphs 3.371 to 3.376.

⁵⁸² GMM-000168359 (WhatsApp message from [Employee of Reseller] to [Dar Senior Employee] dated 18 August 2018).

⁵⁸³ [Employee of Reseller] inserted an emoji of an angry face. According to [😡 Angry Face Emoji \(emojipedia.org\)](https://emojipedia.org/😡/), this emoji conveys varying degrees of anger, from grumpiness and irritation to disgust and outrage.

this up and stated, 'I'll hold for long as I can but [Reseller] need looking at mate tbh too'.⁵⁸⁴

3.462 This email shows that [Reseller] alerted Dar to other Resellers, including [Reseller]⁵⁸⁵ and [Reseller] who were not pricing at the Minimum Price. [Employee of Reseller's] reference to 'creeping up 37%' appears to refer to those Resellers' discounts off RRP for Volume 1 Products, which [Reseller] was pricing at 35% off RRP. In relation to Volume 2 Products, [Employee of Reseller] appeared to have been complaining that other Resellers were discounting those products below the Minimum Price.

3.463 The CMA therefore considers that the above messages indicate for Volume 1 and Volume 2 Products that [Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers, including [Reseller] and [Reseller])⁵⁸⁶ would not sell or advertise the Relevant Products below the Minimum Price.

November 2020: Volume 2, Wisebuys, Dar AW2020 – [Reseller]⁵⁸⁷

3.464 On 17 November 2020, [Dar Employee] wrote to [Employee of Reseller] and stated:⁵⁸⁸

'... as discussed please see below actions to get [Reseller] up to date and maximising margin potentials.

'Please see below actions:

1. VOLUME 2 PRODUCT (Sep 2018 onwards) – please upload as much of Volume 2 as possible to maximise the full margin potential
2. WISEBUYS – again, please upload, great margin potential and not much exposure online
3. Newproductform-SEP2020 - These are lines selected from the AW2020 launch in September – need to be added to the [sic] your website

⁵⁸⁴ GMM-000168366 (WhatsApp message from [Employee of Reseller] to [Dar Senior Employee] dated 15 September 2020); GMM-000168367 (WhatsApp message from [Dar Senior Employee] to [Employee of Reseller] dated 15 September 2020); GMM-000168368 (WhatsApp message from [Employee of Reseller] to [Dar Senior Employee] dated 16 September 2020); GMM-000168369 (WhatsApp message from [Employee of Reseller] to [Dar Senior Employee] dated 16 September 2020).

⁵⁸⁵ [Reseller].

⁵⁸⁶ [Reseller].

⁵⁸⁷ The CMA understands that [Reseller] is a sister company to [Reseller].

⁵⁸⁸ GMM-000598359 (Email from [Dar Employee] to [Employee of Reseller] dated 17 November 2020).

4. MIS Data for Lamps, Wisebuys, Dar AW2020 and Dar Volume 2: The data for all of this year's products, please upload where necessary the lines you chose, or all.'

3.465 On 17 November 2020, [Employee of Reseller] forwarded [Dar Employee's] email to other [Reseller] employees copying in [Dar Employee]⁵⁸⁹ and stated:

'Please see below from my DAR rep. Please don't ignore as we have spent a lot of time putting this together

We have over 60 products currently on our web site discontinued,

Also when she refers to volume 2, all this is stuff is not allowed to be discounted on line so we can maximise our margin and keep up with current trends

We have tried to cover all the bases to ensure its easy enough for the guys to get online.'

3.466 The CMA considers that [Dar Employee]' statement 'maximum margin potentials' was a code⁵⁹⁰ to refer to pricing at the Minimum Price for Volume 2 Products in order to maximise [Reseller's] profit margins. The CMA considers [Employee of Reseller's] statement, 'when she refers to volume 2, all this is stuff is not allowed to be discounted on line so we can maximise our margin and keep up with current trends' shows that [Reseller] intended to price Volume 2 Products at the Minimum Price following Dar's instruction to do so in order to maximise [Reseller's] profit 'margin'. Similarly, in relation to Wisebuys, given [Dar Employee's] statement 'please upload, great margin potential and not much exposure online' combined with [Employee of Reseller's] instruction not to ignore [Dar Employee's] email, the CMA considers this shows that [Reseller] intended to price at SRP for Wisebuys.

3.467 In the CMA's view, the above emails indicate that [Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers) would not advertise or sell Volume 2 Products and/or the Wisebuys products below the Minimum Price.

⁵⁸⁹ The CMA notes that on 17 November 2020, [Dar Employee] forwarded this exchange of emails to [Dar Employee], see GMM-000598378 (Internal Dar email from [Dar Employee] to [Dar Employee] dated 17 November 2020).

⁵⁹⁰ See paragraphs 3.399 to 3.406.

David Hunt examples of monitoring and enforcement of the Dar Pricing Policy

September 2017: David Hunt range – [Reseller]

- 3.468 On 15 September 2017, [Dar Employee] sent a message to [Employee of Reseller] via WhatsApp stating 'I have been asked to ask you if you could remove the 5% discount of [sic] David Hunt on google? [...]'.⁵⁹¹
- 3.469 On the same day, [Employee of Reseller] responded to [Dar Employee] by WhatsApp and stated 'sure will sort on Monday. Just put my prices up again too.'⁵⁹² [Dar Employee] replied 'Great, thank you'.
- 3.470 In interview, [Employee of Reseller] explained that he believed [Dar Employee's] request to remove the 5% discount on David Hunt Products was as a result of an instruction from someone at Dar. He stated, '...I assumed she'd [Dar Employee] been told from somebody else to ask us [Reseller] to do that. I have no idea. I just got the message and said I would get it sorted.' [Employee of Reseller] was then asked whether he felt obliged to remove the discount code, to which he replied, 'Yes, unfortunately.'
- 3.471 In interview [Employee of Reseller] further explained that 'again, part of what we were instructed was to make sure that our prices were correct, and as I said earlier, in that we had to do that manually, so it took time, so it wasn't just a quick, a quick five-minute job, it took [Employee of Reseller] several hours to change all the prices manually, so if they asked us to change the prices, um, you know, it may have been a couple of weeks for us to do that, so I was basically just replying back to [Dar Employee], because she'd have asked us to do it, I mean, a phone call or previous correspondence, I don't -- I can't remember, to make sure our prices are up-to-date.'⁵⁹³
- 3.472 The CMA considers that [Employee of Reseller's] statement 'sure will sort on Monday', together with the explanation provided by [Employee of Reseller] in interview, shows that [Reseller] removed the 5% discount on David Hunt Products and ensured other prices were at the Minimum Price following a request from Dar and that [Reseller] felt obliged to make this change. The CMA therefore considers that [Reseller] understood that the application of the Dar Pricing Policy meant it would not sell or advertise the Relevant Products below the Minimum Price.

⁵⁹¹ GMM-000336227 (WhatsApp message from [Dar Employee] to [Employee of Reseller] dated 15 September 2017).

⁵⁹² GMM-000336229 (WhatsApp message from [Employee of Reseller] to [Dar Employee] dated 15 September 2017).

⁵⁹³ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.58, line 18 to p.59, line 1.

March 2018: David Hunt – [Reseller]

3.473 On 1 March 2018, [Employee of Reseller]⁵⁹⁴ sent an email to [Dar Senior Employee] and [Employee of Reseller] under the subject line ‘David Hunt Products – Fixed’, [Employee of Reseller] stated:⁵⁹⁵

‘When requested to reduce all the David Hunt products to 15%, I did this on Monday Morning which was the first available chance for me to do this.

Following our second call yesterday, I further reduced these to 9% as discussed. This change was in place by 5pm. See an example now from the site currently:’

3.474 The above email included an email from [Employee of Reseller] to [Dar Senior Employee] which stated:

‘[Employee of Reseller] phoned me and made the requests for me to make these changes following each of your calls with him, making it quite clear the urgency surrounding this.

As you can see from the above, this is a genuine mistake on my part. As you have said yourself, there is no benefit for us to be selling so much cheaper than our competitors, so it has been no benefit to ourselves to delay making this change.

[Employee of Reseller] has done everything you [Dar Senior Employee] have asked in making the requests for me to make the changes, so hopefully your [sic] can restore our service ASAP based on the fact this has been a mistake by myself and certainly no fault of [Employee of Reseller].’

3.475 The CMA considers that the above exchange of emails shows that:

3.475.1 [Employee of Reseller’s] statements that he had reduced ‘all the David Hunt products to 15%’ then changed to ‘9% as discussed’ and that ‘[Employee of Reseller] has done everything you have asked in making the requests for me to make the changes’, indicated that [Reseller] had changed its advertised prices for David Hunt Products to the Minimum Price⁵⁹⁶ following a request to do so from Dar (albeit that there had been a

⁵⁹⁴ At the date of this email [Employee of Reseller] was a [§<] by [Reseller] responsible for amending prices on [Reseller’s] website.

⁵⁹⁵ GMM-000601245 (Email from [Employee of Reseller] to [Dar Senior Employee] and [Employee of Reseller] dated 1 March 2018).

⁵⁹⁶ By way of example, [Employee of Reseller] provided [Dar Senior Employee] with a screenshot of a David Hunt Product (ANT0315) showing the RRP as £286.20 inc. VAT and an advertised price of £260.44 which represented a discount of 9% off RRP inc. VAT which fell within the Minimum Price for David Hunt Products.

mistake in relation to the pricing of certain David Hunt Products where a higher discount had been applied which had been subsequently rectified),⁵⁹⁷ and

3.475.2 [Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers) would not sell or advertise the Relevant Products below the Minimum Price.

November 2018: David Hunt product – [Reseller]

- 3.476 On 23 November 2018, a Dar Internal Report records that [Dar Employee] ‘Met with [Employee of Reseller]. Had an issue over the weekend price matching a DHL [David Hunt] product against a Black Friday deal that [Reseller] were promoting - RRP less VAT less 20%.’
- 3.477 This report shows that [Reseller] alerted Dar to [Reseller] who was not pricing at the Minimum Price for a DHL product. It indicates that [Reseller] understood that the application of the Dar Pricing Policy meant it (and other Resellers, including [Reseller]) would not sell or advertise the Relevant Products below the Minimum Price.

February 2019: David Hunt Products – [Reseller]

- 3.478 On 13 February 2019, [Dar Employee] sent [Employee of Reseller] screenshots of some David Hunt Products under the subject heading ‘DHL Sale items’.⁵⁹⁸ She wrote, ‘Hi [Employee of Reseller], here are a few more, I have just screenshot them.’ [Employee of Reseller] responded, ‘Think I have done them all now, if you see anymore let me know.’ Later that day, [Dar Employee] responded. ‘Great, thank you 😊.’
- 3.479 The screenshots sent by [Dar Employee] showed product pages from [Reseller’s] website that displayed a number of David Hunt Products. Some of the product images had a small red circle next to the image, reading ‘Sale’, and below those images there was a red price with the word ‘Now’ before it.
- 3.480 In its Section 26 response, [Reseller] explained this email as follows, ‘[Dar Employee] sent an e-mail on 13 February 2019 asking us to remove the sale price from some David Hunt Products.’⁵⁹⁹

⁵⁹⁷ Specifically, [Reseller] had incorrectly listed a David Hunt Product (ANT0329) as a Dar Lighting product and had incorrectly applied a discount of 40% off RRP inc. VAT. [Reseller] subsequently corrected this and provided [Dar Senior Employee] with a screenshot showing the RRP as £286.20 inc. VAT and a corrected advertised price of £260.44 which represented a discount of 9% off RRP inc. VAT which fell within the Minimum Price for David Hunt Products.

⁵⁹⁸ GMM-000333692 (Email from [Dar Employee] to [Employee of Reseller] dated 13 February 2019).

⁵⁹⁹ GMM-000333694 (Response dated 7 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 25.

3.481 In interview, [Employee of Reseller] confirmed that the screenshots referred to red sale banners on the product pages on [Reseller's] website. He stated, 'It's the red - - it's the sale banners that, as I said earlier, they didn't like us doing, and it's difficult.' When asked whether the instruction related only to the red 'Sale' circles or also the red 'Now' price, [Employee of Reseller] said that he understood that the instruction applied to both. He confirmed that he had removed the banners at [Dar Employee's] request and described how this made it more difficult for him to sell products that he had in stock but had been unable to sell, as he was not able to apply a discount.⁶⁰⁰

October 2019 David Hunt Products Sloane and Horace – [Reseller]

3.482 On 30 October 2019, [Dar Employee], [X] at Dar, sent an email to [Employee of Reseller] under the subject line '*Re: DHL images*' asking her to list the correct RRP for a Sloane light and to remove the discount on a Horace table lamp, both David Hunt Products.⁶⁰¹ [Dar Employee] wrote:

'Thanks very much for swapping the image over. I just wanted to point out in case you weren't aware, that the RRP is incorrect. The price on the pricelist is with the white laminate which is £708 rrp. You are listing the Sloan with a laminate metallic lining which the RRP is actually £740, are you able to update this please? Are you also able to remove the red text you have against HOR4264?'

3.483 In its Section 26 response, [Reseller] explained this email as follows: '[Dar Employee] sent an e-mail to [Employee of Reseller] on 30 October 2019 telling us to remove a discounted price on some David Hunt products.'⁶⁰²

3.484 When asked in interview which part of the email related to [Reseller] being asked to remove a discounted price, [Employee of Reseller] replied, 'Er, yeah, probably the Horace, because we'd probably got it in stock, which is the HOR4264, where it's got the red text. We probably had it in stock and were trying to shift it.'⁶⁰³

3.485 In relation to the incorrect RRP on the Sloane light, when asked in interview 'if they're [Dar] concerned about the RRP, would it impact on your list price in a situation like this [...] but if you've mispriced the RRP, would that impact on your list price?', [Employee of Reseller] responded, '*Of course..., yes, it would.*'

⁶⁰⁰ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), pp. 47-51.

⁶⁰¹ GMM-000597614 (Email from [Dar Employee] to [Employee of Reseller] dated 30 October 2019).

⁶⁰² GMM-000333694 (Response dated 7 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to question 25.

⁶⁰³ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.26.

Furthermore, when asked ‘So, there is a link, a definite link between a mistaken RRP and the price you sell at?’, he answered, ‘Yes’.⁶⁰⁴

⁶⁰⁴ GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021), p.26.

4. Legal Assessment

- 4.1 This section sets out the key legal principles that apply in this case and the CMA's findings in respect of each of the principles, as follows:
- 4.1.1 **Introduction:** This section sets out the CMA's legal assessment of Dar's agreement and/or concerted practice with each of [Reseller 1] and [Reseller 2], that those Resellers would not advertise or sell online the Relevant Products below a certain Minimum Price specified by Dar from time to time, in accordance with the Dar Pricing Policy. Dar's agreement and/or concerted practice lasted from 3 December 2017 to 25 September 2019 with [Reseller 1] and from 1 August 2017 to 27 March 2019 with [Reseller 2].
 - 4.1.2 **Undertakings:** Dar and each of [Reseller 1] and [Reseller 2] constitute undertakings
 - 4.1.3 **Agreement and/or Concerted Practice:** Dar entered into an agreement and/or concerted practice with each of [Reseller 1] and [Reseller 2]
 - 4.1.4 **Object of Preventing, Restricting or Distorting Competition:** The agreements and/or concerted practices between Dar and each of [Reseller 1] and [Reseller 2] had the object of preventing, restricting or distorting competition in relation to the supply of the Relevant Products
 - 4.1.5 **Appreciable Restriction of Competition:** The agreements and/or concerted practices appreciably prevented, restricted or distorted competition in relation to the supply of Relevant Products
 - 4.1.6 **Effect on Trade within the UK:** The agreements and/or concerted practices had an effect on trade within the UK
 - 4.1.7 **Exclusion or Exemption:** No relevant exclusions or exemptions apply
 - 4.1.8 **Attribution of Liability:** Dar and its immediate and ultimate parent company, Castlegate 624, formed a single economic unit for the purposes of the Chapter I Prohibition throughout the Relevant Period, and
 - 4.1.9 **Burden and Standard of Proof:** The available evidence, taken in the round and on the balance of probabilities, is sufficient to establish the agreements and/or concerted practices.

Introduction

- 4.2 This section sets out the CMA's legal assessment of Dar's agreement and/or concerted practice with each of [Reseller 1] and [Reseller 2], that those Resellers

would not advertise or sell online the Relevant Products below a certain Minimum Price specified by Dar from time to time, in accordance with the Dar Pricing Policy.

- 4.3 As set out above at paragraphs 3.412 to 3.414, the CMA has reasonable grounds for suspecting that each of the Resellers that were signatories to an SDA were subject to the Dar Pricing Policy, and has uncovered specific further evidence relating to at least 28 Resellers that gives the CMA reasonable grounds for suspecting that those specific Resellers were subject to the Dar Pricing Policy.
- 4.4 However, for reasons of administrative efficiency, in accordance with its Prioritisation Principles,⁶⁰⁵ the CMA has decided to focus its findings on [Reseller 1] and [Reseller 2] as two of the numerous Resellers of the Relevant Products in order to show the existence of two or more agreements and/or concerted practices with Dar.
- 4.5 While the CMA has concluded that [Reseller 1] and [Reseller 2] are each a party to an infringing agreement and/or concerted practice with Dar, the CMA has decided not to address this Decision to [Reseller 1] or to [Reseller 2].⁶⁰⁶ The evidence shows that the Dar Pricing Policy was operated as a standard policy applicable to all or at least the vast majority of Dar's Resellers. The CMA therefore considers it reasonable and proportionate to apply Rule 10(2) of the CMA Rules in this case and address this Decision only to Dar. This does not preclude the CMA from taking enforcement action against [Reseller 1], [Reseller 2] or other Resellers in any future cases.
- 4.6 The CMA's findings are made by reference to the following provisions of the UK competition rules:
- 4.6.1 Section 2 of the Act, which prohibits (among other matters) agreements and concerted practices between undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are excluded or exempt in accordance with the provisions of Part 1 of the Act (in this context, references to the UK are to the whole or part of the UK).⁶⁰⁷ The prohibition imposed by section 2 of the Act is referred to as 'the Chapter I Prohibition'.
- 4.6.2 The Vertical Block Exemption Regulation,⁶⁰⁸ which was preserved in UK law as a retained exemption after 31 December 2020 pursuant to the

⁶⁰⁵ Available at [CMA Prioritisation Principles - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441411/cma-prioritisation-principles.pdf).

⁶⁰⁶ Under Rule 10(2) of the CMA Rules, the CMA may address an infringement decision to fewer than all the persons who are or were party to that agreement or are or were engaged in that conduct.

⁶⁰⁷ Section 2(1) and (7) of the Act.

⁶⁰⁸ The Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010).

European Union (Withdrawal) Act 2018 and the Competition (Amendment etc.) (EU Exit) Regulations 2019 (the ‘**Competition SI**’), until its expiry on 31 May 2022.⁶⁰⁹

- 4.7 Under section 60A of the Act, unless it considers it appropriate to act otherwise in light of certain prescribed factors,⁶¹⁰ the CMA is required to act with a view to securing that there is no inconsistency between the principles that it has applied, and the conclusions it has reached, and the principles of EU law and judgments of the EU courts on corresponding issues that were made before 31 December 2020.⁶¹¹ ⁶¹² The CMA must also have regard to relevant decisions or statements of the European Commission made before that date and not withdrawn.

Undertakings

Key legal principles

- 4.8 For the purposes of the Chapter I Prohibition, the focus is on the activities of an ‘undertaking’. The concept of an ‘undertaking’ covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.⁶¹³
- 4.9 An entity is engaged in ‘economic activity’ where it conducts any activity ‘... of an industrial or commercial nature by offering goods and services on the market’.⁶¹⁴
- 4.10 The term ‘undertaking’ also designates an economic unit, even if in law that unit consists of several natural or legal persons.⁶¹⁵

Conclusion on undertakings

- 4.11 The CMA finds that Dar, [Reseller 1] and [Reseller 2] are engaged in economic activities, as set out below:

⁶⁰⁹ Regulation 3(9) of the Competition SI. The Competition SI however makes various amendments to the Vertical Block Exemption Regulation to correct deficiencies resulting from the UK ceasing to be a Member State of the EU (see Competition SI, Schedule 3, Part 2).

⁶¹⁰ Set out in sub-sections 60A(7)(a) to (f). For further information on the prescribed factors and the CMA’s interpretation of sub-sections 60A(7)(a) to (f), see [Guidance on the functions of the CMA after the end of the Transition Period \(CMA125\)](#), 1 December 2020, paragraph 4.22 and footnote 92.

⁶¹¹ Section 60A(8) makes clear this means principles as they have effect in EU law immediately before 31 December 2020, disregarding the effect of principles laid down, and decisions made, by the CJEU on or after 31 December 2020.

⁶¹² The CMA is not required to act with a view to securing that there is no inconsistency between the principles it applies or decisions it reaches and TFEU or CJEU principles or decisions pre-dating 31 December 2020 where it is bound by a principle or decision of a court or tribunal in England and Wales, Scotland or Northern Ireland that requires it to act otherwise: Section 60A(6).

⁶¹³ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, paragraph 21.

⁶¹⁴ Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

⁶¹⁵ Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

- 4.11.1 Throughout the Relevant Period, Dar was (and still is) engaged in the marketing and sale of Domestic Lighting Products.
- 4.11.2 Throughout the duration of the [Reseller 1] Agreement with Dar, [Reseller 1] was an online retailer of home goods and furniture.⁶¹⁶
- 4.11.3 Throughout the duration of [Reseller 2] Agreement with Dar, [Reseller 2] was engaged in the retail sale of Domestic Lighting Products online and in store.⁶¹⁷

4.12 In light of the above, the CMA finds that Dar, [Reseller 1] and [Reseller 2] constituted undertakings for the purposes of the Chapter I Prohibition during the Relevant Period and beyond.

Agreement and/or Concerted Practice

4.13 For the reasons set out below, the CMA finds that Dar entered into an agreement and/or concerted practice with each of [Reseller 1] and [Reseller 2] that each of [Reseller 1] and [Reseller 2] would not advertise or sell online the Relevant Products below a certain Minimum Price specified by Dar from time to time, in accordance with the Dar Pricing Policy.

Key legal principles

4.14 The Chapter I Prohibition applies to both ‘agreements’ and ‘concerted practices’. It is not necessary, for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice.⁶¹⁸ The aim of the Chapter I Prohibition is to catch different forms of coordination between undertakings and thereby to prevent undertakings from being able to evade the competition rules simply on account of the form in which they coordinate their conduct.⁶¹⁹

⁶¹⁶ GMM-00000447 (Response dated 9 December 2020 to the First [Reseller 1] Section 26 Notice), response to question 7.

⁶¹⁷ GMM-000600491 (Response dated 12 May 2021 to the First [Reseller 2] Section 26 Notice), response to questions 1 and 2.

⁶¹⁸ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, EU:C:2009:343, paragraph 23 (citing Case C-49/92 P *Commission v Anic Participazioni, SpA* EU:C:1999:356, paragraph 131). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, [206(ii)].

⁶¹⁹ Case C-382/12 P, *MasterCard Inc. v. European Commission*, EU:C:2014:2201, paragraph 63 and the case law cited therein. The unlawful co-ordination between undertakings may, for example, be characterised as a ‘concerted practice’ during the first phase of an infringement, but may subsequently have solidified into an ‘agreement’, and then been further affirmed, or furthered or implemented by, a ‘decision of an association’. This does not prevent the competition authority from characterising the co-ordination as a single continuous infringement. See Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission*, EU:T:2002:70, paragraphs 186–188; Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de*

Agreement

- 4.15 The Chapter I Prohibition catches a wide range of agreements, including oral agreements and ‘gentlemen’s agreements’.⁶²⁰ An agreement may be express or implied by the parties, and there is no requirement for it to be formal or legally binding, nor for it to contain any enforcement mechanisms.⁶²¹ An agreement may also consist of either an isolated act, or a series of acts, or a course of conduct.⁶²²
- 4.16 The key question in establishing an agreement is whether there has been ‘a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties’ intention.’⁶²³
- 4.17 The General Court of the European Union (**‘General Court’**) has held that ‘(...) it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (...).’⁶²⁴
- 4.18 However, it is not necessary to establish a joint intention to pursue an anti-competitive aim.⁶²⁵ The fact that a party may have played only a limited part in setting up an agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties, does not mean that it is not party to the agreement.⁶²⁶
- 4.19 In the absence of an explicit agreement (for example, written down or based on a contract) between the parties to conduct themselves on the market in a specific way, tacit acquiescence by a party to conduct itself in the manner proposed by the

Servicios Bancarios (Ausbanc), EU:C:2006:734, paragraph 32. See also Case T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission*, EU:T:1999:80, paragraph 696: ‘[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty.’

⁶²⁰ Case C-41/69 *ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular, paragraphs 106–114.

⁶²¹ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, [658]. See also Commission Decision 2003/675/EC *Video Games, Nintendo Distribution and Omega-Nintendo* (COMP/35.587 etc) [2003] OJ L255/33, paragraph 247.

⁶²² Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 81.

⁶²³ 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).

⁶²⁴ Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

⁶²⁵ Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission*, EU:T:2006:265, paragraph 77 (upheld on appeal in Joined cases C-501/06P etc *GlaxoSmithKline Unlimited v Commission*, EU:C:2009:610).

⁶²⁶ *Agreements and concerted practices* (OFT401, December 2004) (adopted by the CMA Board), paragraph 2.8. See also Case T-25/95 *Cimenteries CBR and Others v Commission*, EU:T:2000:77, paragraphs 1389 and 2557 (this judgment was upheld on liability by the Court of Justice in Joined cases C-204/00 P etc *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, although the fine was reduced); and Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraphs 79–80.

other party is sufficient to give rise to an agreement for the purpose of the Chapter I Prohibition.⁶²⁷

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

'(...) in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice.'⁶²⁸

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

'(...) for vertical agreements, tacit acquiescence may be deduced from the level of coercion exerted by a party to impose its unilateral policy on the other party or parties to the agreement in combination with the number of distributors that are actually implementing in practice the unilateral policy of the supplier. For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier's unilateral policy if this system allows the supplier to implement in practice its policy.'⁶²⁹

4.22 However, a system of monitoring and penalties may not be necessary in all cases for there to be a concurrence of wills based on tacit acquiescence.⁶³⁰

4.23 The Chapter I Prohibition applies to agreements irrespective of whether they were ever implemented.⁶³¹ 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.⁶³² In addition, the fact that a party does not respect the

⁶²⁷ Case C-74/04 P *Commission v Volkswagen AG* EU:C:2006:460, paragraph 39; Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, and European Commission, *Guidelines on Vertical Restraints* [2010] OJ C130/01 (Vertical Guidelines), paragraph 25(a).

⁶²⁸ Vertical Guidelines, paragraph 25(a).

⁶²⁹ Vertical Guidelines, paragraph 25(a).

⁶³⁰ Case C-260/09 P *Activision Blizzard Germany GmbH v Commission*, EU:C:2011:62, paragraph 77.

⁶³¹ Commission decision of 29 September 2004 *French Beer* (Case COMP/C.37.750/B2), para 64.

⁶³² Case 86/82 *Hasselblad v Commission* EU:C:1984:65, paragraph 46; and Case C-277/87 *Sandoz v Commission*, EU:C:1990:6, paragraph 3.

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.⁶³³

4.24 Likewise, the fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties does not mean that it is not party to the agreement.⁶³⁴

4.25 In particular, where an agreement has the object of restricting competition (as described below), parties cannot avoid liability for the resulting infringement by arguing that the agreement was never put into effect.⁶³⁵

Concerted Practice

4.26 The prohibition on concerted practices prohibits, amongst other things, coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.⁶³⁶

4.27 Although the nature and extent of a concerted practice is addressed in the case law primarily in the context of so-called horizontal relationships (that is, between actual or potential competitors), it is also applicable to vertical relationships (that is, between undertakings at different levels of the supply chain).⁶³⁷ The Court of Appeal has observed that:

'The Chapter I prohibition catches agreements and concerted practices whether between undertakings at different levels or between those at the

⁶³³ Case T-141/89 *Tréfileurope v Commission*, EU:T:1995:62, paragraph 85; and Case C-246/86 *Belasco v Commission*, EU:C:1989:95, paragraphs 10-16.

⁶³⁴ *OFT401* (December 2004), at paragraph 2.8. See also, for example: Case C-49/92P *Commission v Anic Participazioni SpA* EU:C:1999:356, paragraph 80; Cases T-25/95 *Cimenteries CBR SA v Commission*, EU:T:2000:77, paragraphs 1389 and 2557; and Case T-28/99 *Sigma Technologie di Rivestimento Srl v Commission*, EU:T:2002:76, paragraph 40.

⁶³⁵ See, for example: Case 19/77 *Miller v Commission*, EU:C:1978:19, paragraphs 7 and 10; *French Beer* [2006] 4 CMLR 577; Case C-277/87 *Sandoz v Commission*, EU:C:1990:6; and Commission decision 78/921/EEC *WANO Schwarzpulver* OJ [1978] L232/26.

⁶³⁶ Cases 48/69 etc *ICI Ltd v Commission*, EU:C:1972:70, paragraph 64. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 26; *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, [151]–[153]; and Commission Decision 82/367/EEC *Hasselblad* (IV/25757) [1981] L161/18, (*Hasselblad*), recital 47, in which the Commission stated (in a vertical context) that: '*[f]or a concerted practice to exist it is sufficient for an independent undertaking knowingly and of its own accord to adjust its behaviour in line with the wishes of another undertaking.*'

⁶³⁷ See, for example, Case T-43/92 *Dunlop Slazenger International Ltd v Commission*, EU:T:1994:259 paragraph 101ff (concerted practice between Dunlop Slazenger and certain of its exclusive distributors in respect of various measures to enforce an export ban). See also Commission Decision 2003/675/EC *Video Games, Nintendo Distribution and Omega-Nintendo* (COMP/35.587 etc) [2003] OJ L255/33, paragraphs 323–324 (agreements and/or concerted practices between Nintendo and its independent distributors to restrict parallel trade). Other examples include: Commission Decision 72/403/CEE *Pittsburgh Corning Europe* (IV/26894) [1972] OJ L272/35 (where a concerted practice was found between a supplier and a distributor); and Commission Decision 88/172/EEC *Konica* (IV/31.503) [1988] OJ L78/34, paragraph 36 (where there was a concerted practice between a supplier and a distributor).

same level of commercial operation. An agreement between a supplier and a commercial customer, which may be called a vertical agreement, may breach the same prohibition as much as an agreement between competing suppliers of the same product or same type of product, which can be referred to as a horizontal agreement.’⁶³⁸

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

‘It is (...) plain that an undertaking may be passively party to an infringement of the Chapter I prohibition. That is so, in particular, where it had taken part in a meeting or other contacts and has done nothing to distance itself from the matters discussed. In those circumstances the undertaking is taken to have tacitly approved of the unlawful initiative, unless it has publicly distanced itself or informed the OFT.’⁶³⁹

Agreement and/or concerted practice between Dar and each of [Reseller 1] and [Reseller 2]

Dar’s communication of the Dar Pricing Policy

4.29 As set out in Section 3 above, the CMA finds that as part of the Dar Pricing Policy, during the Relevant Period, Dar:

- 4.29.1 Instructed certain of its Resellers, including [Reseller 1] and [Reseller 2], not to advertise or sell the Relevant Products online below the Minimum Price in accordance with the Dar Pricing Policy;
- 4.29.2 Monitored Resellers and contacted those, including [Reseller 1] and [Reseller 2], that offered the Relevant Products for sale online at a price below the Minimum Price from time to time and required that any price below the Minimum Price was increased to comply with the Dar Pricing Policy; and
- 4.29.3 Considered and gave instructions as to the threat of sanctions, gave the perception that the threat of sanctions was credible and/or imposed sanctions on Resellers for not adhering to the Dar Pricing Policy, including the threat or imposition of sanctions in relation to [Reseller 1] and [Reseller 2] insofar as explained below.

⁶³⁸ *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, [28].

⁶³⁹ *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, at [1043].

4.30 The CMA also finds that Dar communicated the Minimum Price for the Relevant Products to its Resellers partly through the circulation of price lists and making them available via the Dar portal for easy downloading by Resellers.⁶⁴⁰

The Dar Pricing Policy applied to the vast majority of Dar's Resellers

4.31 As set out above at paragraphs 3.412 to 3.414, the CMA has reasonable grounds for suspecting that each of the Resellers that were signatories to an SDA were subject to the Dar Pricing Policy, and has uncovered specific further evidence relating to at least 28 Resellers that gives the CMA reasonable grounds for suspecting that those specific Resellers were subject to the Dar Pricing Policy.

4.32 However, for reasons of administrative efficiency, the CMA has chosen to focus its assessment of whether there was an agreement and/or concerted practice with Dar which infringed competition law on two Resellers only, namely [Reseller 1] and [Reseller 2].

4.33 Nonetheless the CMA considers that the Dar Pricing Policy could only be effective in its aim of protecting Resellers' margins⁶⁴¹ if there was general adherence to it by the vast majority of Resellers making online sales of the Relevant Products.

4.34 While some Resellers occasionally sold the Relevant Products online below the Minimum Price specified by the Dar Pricing Policy, the evidence in the CMA's possession shows that overall, adherence to the Dar Pricing Policy by Resellers was high.⁶⁴²

4.35 Based on this evidence, the CMA considers that many Resellers were willing to comply with the Dar Pricing Policy and that other Resellers, who may have wanted to discount to below the Minimum Price online to remain competitive on price, had little choice but to comply.⁶⁴³ However, the CMA makes no findings in respect of Resellers of the Relevant Products, other than [Reseller 1] and [Reseller 2].

⁶⁴⁰ See Section 3, 'The role of price lists in the Dar Pricing Policy'.

⁶⁴¹ See Section 3, 'Commercial aims of the Dar Pricing Policy'.

⁶⁴² As noted at paragraph 3.414, the CMA has reasonable grounds for suspecting that each of the Resellers that were signatories to an SDA were subject to the Dar Pricing Policy. See for example paragraph 3.211 and paragraphs under 'The vast majority of Resellers were selling Volume 2 Products at the list price' below.

⁶⁴³ See Section 3, 'Consequences for Resellers of non-compliance with the Dar Pricing Policy'.

Agreement and/or concerted practice between Dar and [Reseller 1]

Background: [Reseller 1's] relationship with Dar

- 4.36 [Reseller 1] is [X]⁶⁴⁴, and is Dar's number [X] Reseller by gross revenue in Dar's top 20 resellers list.⁶⁴⁵ [Reseller 1] started advertising and selling the Relevant Products online well before the start of the Relevant Period, potentially as early as 2009.⁶⁴⁶ Throughout the Relevant Period it advertised and sold the Relevant Products online via its website, [Reseller 1's website].⁶⁴⁷ [X].
- 4.37 [Reseller 1] has been part of Dar's selective distribution network in relation to dār lighting branded Relevant Products since 1 August 2018.⁶⁴⁸ [Reseller 1's] status as [a significant Reseller of Dar] was despite not selling the David Hunt Lighting (DHL) or The Light Shade Studio (LSS) brands.
- 4.38 [Reseller 1's] sales of Relevant Products during the Relevant Period grew from around £[X] million per annum in 2017 to more than £[X] million in the period from 1 January to 9 December 2020.⁶⁴⁹ Between 1 January 2018 and 9 December 2020, Relevant Products accounted for [<10%] of [Reseller 1's] sales of all Lighting Products [X].⁶⁵⁰
- 4.39 In response to the First [Reseller 1] Section 26 Notice, [Reseller 1] stated that:
- ‘In 2020, [Reseller 1] requested that Dar offer for sale the full range of its products on [Reseller 1's website], but Dar has declined to do so. However, the full range of Dar's products is available on [Reseller 1's] [X] site, [X]. Dar has not provided clear reasoning why it cannot offer its product line for sale on [Reseller 1] website other than to reference a “distributor agreement” [X].’⁶⁵¹
- 4.40 In [Reseller 1's] response to the First [Reseller 1] Section 26 Notice, [Reseller 1] reported that ‘there has been no request or instruction from Dār not to sell below a

⁶⁴⁴ [X]: GMM-00000444 ([Reseller 1] [X]).

⁶⁴⁵ GMM-000333646 (Annex 14.1 to response dated 18 December 2020 to the First Dar Section 26 Notice), Dar's top 20 Resellers.

⁶⁴⁶ GMM-00000447 (Response dated 9 December 2020 to the First [Reseller 1] Section 26 Notice), response to question 5.

⁶⁴⁷ GMM-00000447 (Response dated 9 December 2020 to the First [Reseller 1] Section 26 Notice), response to question 5.

⁶⁴⁸ GMM-000333626 (Annex 10.1 to response dated 11 December 2020 to the First Dar Section 26 Notice), Members of Dar's SDA networks. Although [Reseller 1] had not formally executed an SDA, Dar regarded [Reseller 1's] [X] as being pursuant to the terms of the SDA.

⁶⁴⁹ GMM-00000447 (Response dated 9 December 2020 to the First [Reseller 1] Section 26 Notice), response to question 12.

⁶⁵⁰ GMM-00000448 (Response dated 16 December 2020 to the First [Reseller 1] Section 26 Notice), response to question 13.

⁶⁵¹ GMM-00000448 (Response dated 16 December 2020 to the First [Reseller 1] Section 26 Notice), response to question 20.

particular price.’⁶⁵² It appears that those individuals at [Reseller 1] responsible for preparing its response to the First [Reseller 1] Section 26 Notice were unaware of the WhatsApp messages exchanged between [Employee of Reseller 1], former [X] at [Reseller 1], and [Dar Senior Employee], cited under ‘Evidence of [Reseller 1]’s compliance with the Dar Pricing Policy’ below. In its response to the Second [Reseller 1] Section 26 Notice, [Reseller 1] wrote, ‘the information set out in [...] [the WhatsApp conversation between [Dar Senior Employee] and [Employee of Reseller 1]] [...] first came to [Reseller 1]’s knowledge when they were brought to [Reseller 1]’s attention in the Second [Reseller 1] Section 26 Notice.’⁶⁵³

4.41 In its response to the Second [Reseller 1] Section 26 Notice [Reseller 1] confirmed [Employee of Reseller 1]’s role at [Reseller 1] as follows:

‘From [X] until his departure on [X], [Employee of Reseller 1] was a [X], responsible for managing suppliers in [Reseller 1]’s [X] Lighting business.
...

As the [X] with primary responsibility for the Lighting segment [X] during his tenure, [Employee of Reseller 1] served as [Reseller 1]’s Supplier Relationship Manager for Dar, which was one of [Employee of Reseller 1]’s largest supplier accounts. [Employee of Reseller 1]’s other responsibilities as a [X] included monitoring the on-site prices set by [Reseller 1]’s ... [automated price monitoring software] for products [X] ... and the prices for equivalent products available from other retailers.’⁶⁵⁴

4.42 [Reseller 1] also explained in its response to the Second [Reseller 1] Section 26 Notice:

‘[Dar Senior Employee] has always been very focused on the retail pricing of Dar products and [Reseller 1] believes that Dar has had a policy of trying to influence the retail prices of Dar products generally. Indeed, the WhatsApp messages [between [Dar Senior Employee] and [Employee of Reseller 1]] seem to evidence attempts by Dar to increase the retail prices of its product (“Can you increase the price to 325 until further notice”) and at least implicit threats to remove products from the [Reseller 1] platform if its demands were not met (“Take the new products down mate until this is

⁶⁵² GMM-000600460 (Response dated 6 April 2021 to the First [Reseller 1] Section 26 Notice), response to question 24.

⁶⁵³ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 2.

⁶⁵⁴ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 1.

sorted please ... I'm disappointed man. I have spoken to you guys about this.').'⁶⁵⁵

- 4.43 Prior to the introduction of the dār lighting SDAs, Dar sales representatives expressed concerns about [Reseller 1's] discounting policy for Dar products on 15 March 2017, apparently reflecting customer concerns about 'control[ling]' web prices, expressing the view that 'If we took [Reseller 1] out of the market this would help , they lead and others follow'.⁶⁵⁶ [Dar Senior Employee] confirmed that [Reseller 1] was seen as a price leader, stating in interview that 'Within the market, [Reseller 1] would] tend to be followed, generally' in the context of discussing correspondence between Dar and [Reseller 1] dating from February 2019 (see paragraph 4.82).
- 4.44 In November 2017 – after the introduction of the David Hunt and LSS SDAs (to which [Reseller 1] was not a party) but before the introduction of the dār lighting SDA – [Employee of Reseller] emailed [Dar Employee] to complain about [Reseller 1's] pricing of Dar products, writing, 'I have sent the link to [Reseller 1] and just wondered if Dar are supplying them directly as they are selling way below the rrp which seems to go against what [Dar Senior Employee] wants online.'⁶⁵⁷
- 4.45 By December 2017 however, [Reseller 1] appears to have been subject to a restriction on its freedom to discount Dar products, as described in paragraph 4.50 et seq below.
- 4.46 Further, in August 2018, when [Employee of Reseller] sent an email to [Dar Employee] complaining about [Reseller 1] offering a 45% discount on the Academy 5-light foyer pendant, [Dar Employee] described this as an 'unexplained "blip" – out of line with normal pattern'.⁶⁵⁸ This shows that, at that time, [Reseller 1] was largely complying with the Dar Pricing Policy.

[Reseller 1's] agreement with the Dar Pricing Policy

- 4.47 The CMA finds that Dar entered into an agreement and/or concerted practice with [Reseller 1] that [Reseller 1] would not advertise or sell dār lighting branded

⁶⁵⁵ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 2.

⁶⁵⁶ GMM-000597078 (Internal Dar email from [Dar Employee] dated 15 March 2017). [Dar Employee] wrote, '*Feed back from the reps meeting for your ref ... Most customers are happy with the 3rd party advertising ban after you point out this will eventually help them with control . The web will set the market for next year, just as it is this . If we took [Reseller 1] out of the market this would help , they lead and others follow . Customers are convinced [Reseller 1] get much better terms because of web prices .*'

⁶⁵⁷ GMM-000221770 (Email from [Employee of Reseller] to [Dar Employee] dated 5 November 2017).

⁶⁵⁸ GMM-000336327 (Emails exchanged between [Employee of Reseller] and [Dar Employee] dated 20 and 21 August 2018 and headed '[Reseller 1] and SDA'). [Employee of Reseller] wrote, 'Thanks for the SDA received last week, have a couple of questions, perhaps you could give me a ring later in the week. Customer on Saturday, was looking for me to match [Reseller 1's] 45% discount, I do hope your SDA will have an impact, difficult currently to see the point of stocking/displaying Dar products for a [3<] % G.P.'

Relevant Products (Volume 1 and Volume 2) online below the Minimum Price during at least part of the Relevant Period.

- 4.48 This was based on the joint understanding that the Dar Pricing Policy applied to the vast majority of Dar's Resellers, and that Dar would take steps to ensure that other Resellers of the Relevant Products also maintained their prices at or above the Minimum Price. To this end, [Reseller 1] would regularly monitor other Resellers' prices of Relevant Products during the Relevant Period and occasionally report those advertising Relevant Products for sale at below the Minimum Price to Dar in the expectation that Dar would contact such Resellers and instruct them to revert to the Minimum Price.
- 4.49 The CMA finds that the agreement and/or concerted practice between Dar and [Reseller 1] lasted from 3 December 2017 to 25 September 2019.

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

2017

- 4.50 A [Reseller 1] presentation,⁶⁵⁹ apparently sent by [Employee of Reseller 1] of [Reseller 1] to Dar for discussion at a meeting held between [Reseller 1] and Dar in [X] on 15 January 2018,⁶⁶⁰ referred to a 'pricing restriction' applicable to Relevant Products from December 2017. The CMA requested an explanation of the presentation from [Reseller 1] in the Second [Reseller 1] Section 26 Notice. [Reseller 1] explained in its response that the only [Reseller 1] personnel with links with the relevant presentation and responsibility or involvement with pricing (wholesale or retail) at the time of the presentation, including as regards Dar Lighting, were [Employee of Reseller 1] and [Employee of Reseller 1], both of whom had left the organisation. It said that it had no direct knowledge of the presentation and that its explanations (referred to below) 'cannot constitute more than informed speculation'.⁶⁶¹

Slide 5 of the presentation

- 4.51 Slide 5 of the presentation (shown below) set out the pricing restriction, showing 'Pricing with max -30%' in the week commencing 3 December 2017 and a subsequent decline in online visits and conversion rates; followed by 'Pricing with max -35%' in the week commencing 17 December 2017 and a subsequent

⁶⁵⁹ GMM-000601272 ([Reseller 1] PowerPoint presentation dated 16 January 2018), 'DAR Lighting x [Reseller 1] to sent'.

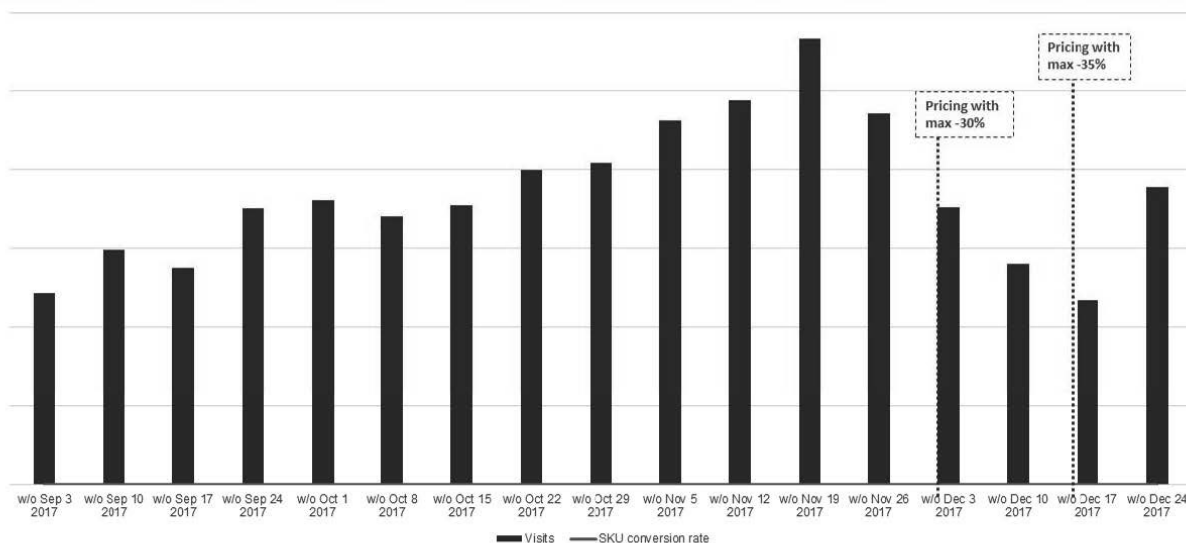
⁶⁶⁰ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to questions 1 and 4: in its response [Reseller 1] described this document as 'A PowerPoint presentation ... which appears to be the presentation referred to as being shared by WeTransfer in the email [GMM-000597184]. [Reseller 1] explained that, 'The properties of the PowerPoint presentation suggest that it was last modified on the morning of 15 January 2018 (the date of the meeting referred to in the email (GMM-000597184)). Dar produced the presentation in response to the Third Dar Section 26 Notice dated 10 October 2021. See GMM-000601942.

⁶⁶¹ GMM-000601954 (Response dated 22 October 2021 to the Third [Reseller 1] Section 26 Notice), response to question 1.

increase in online visits and conversion rates.⁶⁶² [Reseller 1] told the CMA in its response to the Third [Reseller 1] Section 26 Notice that it believed that the phrases 'Pricing with max -30%' and 'Pricing with max -35%' are 'likely to refer to discounts from the recommended price and to retail prices.'⁶⁶³

4.52 The comment at the top of slide 5 reads, 'since pricing restriction conversion rate and visits have dropped – partially countered with the new discounting structure.' When asked via a Section 26 Notice what 'the new discounting structure' referred to, [Reseller 1] replied that it 'has no knowledge as to what "new discounting structure" refers to, other than to note that the slide heading would appear to refer to the period of time marked on the graph on the slide showing a fall in visits and conversion rates from the week of 3 December 2017 until the week of 24 December 2017 which shows an uptick. [Reseller 1] also notes that -35% is ultimately a more competitive price than -30% and may have led to the uptick of sales noted in the graph.'⁶⁶⁴

However, since pricing restriction conversion rate and visits have dropped - partially countered with the new discounting structure [Reseller 1]



⁶⁶² GMM-000601272 ([Reseller 1] PowerPoint presentation dated 16 January 2018), 'DAR Lighting x [Reseller 1] to sent', slide 5.

⁶⁶³ GMM-000601954 (Response dated 22 October 2021 to the Third [Reseller 1] Section 26 Notice), response to question 1.

⁶⁶⁴ *Ibid.*

- 4.53 The CMA infers from the plain meaning of the text on slide 5, evidence relating to the Dar Pricing Policy as it related to Volume 1 Products (as set out in Section 3 above) and [Reseller 1's] explanations, that [Reseller 1] was instructed by Dar to apply a Minimum Price of 30% off RRP (including VAT) to Volume 1 Products in the weeks commencing 3 and 10 December 2017, with the Minimum Price subsequently reduced to 35% off RRP (including VAT) from the week commencing 17 December 2017.
- 4.54 This inference is lent further support by the fact that the discount levels referred to on Slide 5 mirrored to a degree Dar's instructions to other Resellers as regards the Minimum Price for Volume 1 Products from time to time in accordance with the Dar Pricing Policy. Although, the CMA acknowledges that the Minimum Price as applied to [Reseller 1's] Volume 1 Products somewhat pre-empted that applying to other Resellers. The CMA does not consider this as being out of keeping with [Reseller 1] being a price leader and hence its prices of Relevant Products requiring the most intense management from Dar.
- 4.55 [Reseller 1] appears to have complied with the pricing restrictions. On 4 December 2017, [Employee of Reseller 1] sent an email to colleagues at [Reseller 1] with the following request: 'As just discussed, please set supplier UKDARLighting 2856 (maid 4625) on MAP AB +/- 30% of current MAP values. ... Important is that this is done latest by Wednesday morning (as discussed); preferably earlier.'⁶⁶⁵
- 4.56 [Reseller 1] told the CMA in response to a Section 26 notice: 'As regards the phrase "pricing restriction", while [Reseller 1] does not know exactly what it means in the context, [Reseller 1] would refer the CMA to email [GMM-000601270] dated 4 December 2017 which appears to refer to an instruction from [Employee of Reseller 1] to the [Reseller 1] pricing team to "set supplier UKDARLighting 2856 (maid 4625) on MAP AB +/- 30% of current MAP values".'⁶⁶⁶ [Reseller 1] explained in its response that the addressees of [Employee of Reseller 1's] email had no recollection of the context or meaning of that email.
- 4.57 When asked by the CMA in a Section 26 Notice whether the references to the pricing restrictions on slide 5 were to all Relevant Products or only certain Relevant Products, [Reseller 1] replied that 'whilst [Reseller 1] has no direct knowledge, email [GMM-000601270] would appear to be an instruction that would apply to Dar at a supplier level (i.e. to all products).'
- 4.58 The CMA considers that [Employee of Reseller 1's] email of 4 December 2017 shows that [Reseller 1] implemented the pricing restriction of 'max -30%' referred to

⁶⁶⁵ GMM-000601270 (Internal [Reseller 1] email from [Employee of Reseller 1] to [Employee of Reseller 1] and [Employee of Reseller 1] dated 4 December 2017), 'MAP AB +/-30% for UKDARLighting (2856)'.

⁶⁶⁶ GMM-000601954 (Response dated 22 October 2021 to the Third [Reseller 1] Section 26 Notice), response to question 1.

on slide 5 in respect of all Relevant Products supplied by [Reseller 1] at that time (being Volume 1 Products), by overriding the normal operation of [Reseller 1's] [automated price monitoring software] to ensure that Relevant Products were not advertised or sold for less than a price representing a discount of 30% off RRP.

Interaction of [Reseller 1's] 'MAP tool' with its [automated price monitoring software]

4.59 In its response to the First [Reseller 1] Section 26 Notice, [Reseller 1] explained the meaning of 'MAP' in its internal documents and the interaction of the 'MAP tool' with [Reseller 1's] [automated price monitoring software] as follows:

'Across all of [Reseller 1's] catalogue (not just Lighting) [automated price monitoring software] operates to adjust the price of products based on the demand of a given product and the margin of profit [Reseller 1] wishes to achieve over the wholesale cost of that product. Particularly during high demand times (e.g. Black Friday or Easter Weekend), it may be optimal to manually override this [automated price monitoring software] on certain products, to ensure a more even distribution across suppliers. This is achieved through the MAP Tool, which is used across [Reseller 1's] business [X]. This tool, which is referenced in certain of the disclosed documents, is not used [X] to set a Minimum Advertised Price (doing so is explicitly prohibited), but instead references the ability to override the internal [automated price monitoring software] on a temporary basis. No supplier [X] has any input into the use of the MAP tool, it is solely for [Reseller 1's] internal use.'⁶⁶⁷

4.60 In relation to [Reseller 1's] submission that the MAP tool '[X] to set a Minimum Advertised Price (doing so is explicitly prohibited)', the CMA notes that information provided by [Reseller 1] in its response to the Second [Reseller 1] Section 26 Notice shows that the MAP tool was used for precisely that purpose in relation to Relevant Products on at least two occasions during the Relevant Period, in order to comply with the Dar Pricing Policy, both in December 2017 (see paragraphs 4.50 et seq) and in 2019 (see paragraphs 4.93 et seq).

Slide 7 of the presentation

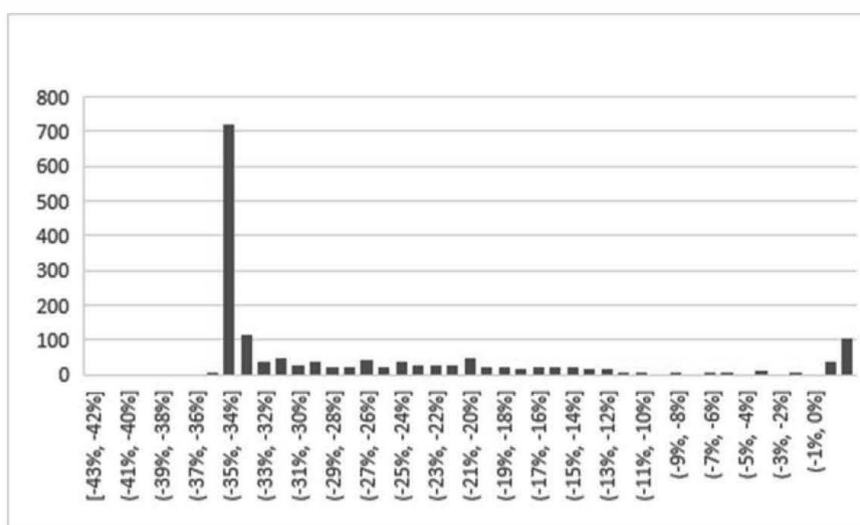
4.61 Slide 7 of the same presentation, shown below, stated, '[Reseller 1] current pricing; ~90% of items is priced between -30% and -35% of RRP'. The CMA notes that the presentation was prepared on 15 January 2018, less than one month after the

⁶⁶⁷ GMM-000600460 (Response dated 6 April 2021 to the First [Reseller 1] Section 26 Notice), response to question 27. The response added, 'Any price set using this MAP Tool is frozen for a maximum of two weeks,' but [Reseller 1] expanded on this in its response to the Second [Reseller 1] Section 26 Notice, writing, 'Two versions of the MAP tool have been developed. One is a temporary measure which sets limits on pricing for a two-week period. There is additionally a tool which allows for a longer-term change in the pricing methodology.' See GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 2.

pricing restriction of 'pricing with max -35%' referred to on slide 5. Slide 7 appears to show that [Reseller 1] was seeking to apply the maximum possible discount to Relevant Products on its website, with over 700 items priced at between 34% and 35% off the RRP; but was nonetheless complying with an instruction from Dar to discount Volume 1 Products no more than 35% off the RRP.⁶⁶⁸

[Reseller 1] current pricing; ~90% of items is priced between -30% and -35% of RRP

[Reseller 1]



7

Slide 3 of the presentation

4.62 Slide 3 of that presentation confirms that [Reseller 1] was complying with the pricing restriction reluctantly but nonetheless felt bound by the restriction, stating:

'December 2017 sharp decline due to uncompetitive situation; -59% for DAR Lighting vs -27% for Lighting shop'. [Reseller 1] wrote in a Section 26 response, '[Reseller 1] believes that the phrase "uncompetitive situation" is likely to have referred to the pricing of Dar products on the [Reseller 1] site being higher than other comparable products within the [Reseller 1] lighting category. This would explain why sales of Dar products were down 59% compared to the stated 27% reduction across the lighting category. ... [Reseller 1] believes that the phrase "Lighting shop" is likely to be the entire

⁶⁶⁸ With the exception of a very small number of items, priced at 37% to 36% off RRP. No Relevant Products appear to have been advertised by [Reseller 1] at more than 37% off RRP at that time.

combined [Reseller 1] lighting category [X], i.e. it referred to the lighting pages on both the [Reseller 1] [X].'

2018

- 4.63 On 16 January 2018, [Employee of Reseller 1], [X] at [Reseller 1], emailed [Dar Senior Employee] and other Dar staff, summarising topics that [Reseller 1] and Dar had discussed during the meeting held in [X] on 15 January 2018. In relation to pricing, [Employee of Reseller 1] wrote, 'Competitiveness; in order to have a levelled playing field with our largest competitors [Reseller] and [Reseller], we need to be able to price at -38% of RRP. Can you discuss if this is possible?'⁶⁶⁹ The email shows that [Reseller 1] required permission from Dar in order to price dar lighting products at a certain level. [Employee of Reseller 1's] question about whether it is possible to sell at -38% off RRP shows evidence of an agreement between [Reseller 1] and Dar that [Reseller 1] should price at a level agreed by Dar which, at that time, appears to have been a Minimum Price of 35% off RRP (including VAT).
- 4.64 In interview, [Dar Senior Employee] explained that the discussion was about [Reseller 1] asking Dar to lower its wholesale price to help fund the discount.⁶⁷⁰
- 4.65 The presentation sent by [Employee of Reseller 1] to Dar for discussion at that meeting (discussed above)⁶⁷¹ contained a section on 'Competitive Pricing'.⁶⁷² As noted above, the presentation stated, '[Reseller 1] current pricing; ~90% of items is priced between -30% and -35% of RRP', indicating that [Reseller 1] was complying with a pricing restriction preventing it from discounting Volume 1 Products by more than 35% off the RRP in January 2018. The presentation compared the prices for various Volume 1 Products sold on [Reseller 1's website] with the online prices of [Reseller] and [Reseller] (two other Resellers) under the heading 'In order to get to be competitive, we need to price at -38% of RRP'.
- 4.66 [Reseller 1] explained in its response to the Second [Reseller 1] Section 26 Notice that 'The presentation makes reference to a desire to price at a discount of 38% to RRP in order to ensure that [Reseller 1] can be competitive against the same products on sale at its competitors (i.e. [Reseller] and [Reseller]).' [Reseller 1] told the CMA in its response that this section of the presentation may have been

⁶⁶⁹ GMM-000597184 (Email from [Employee of Reseller 1] to [Dar Senior Employee] and others at Dar dated 16 January 2018 and headed '[Reseller 1] x DAR Lighting follow up meeting 15.01.2017').

⁶⁷⁰ GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.180, lines 8-19.

⁶⁷¹ GMM-000601272 ([Reseller 1] PowerPoint presentation dated 16 January 2018), 'DAR Lighting x [Reseller 1] to sent'.

⁶⁷² *Ibid*, slides 6-10.

intended to encourage Dar to lower its wholesale prices to allow [Reseller 1] to offer similarly low retail prices.⁶⁷³

- 4.67 Based on the plain meaning of slides 5 and 7 of the presentation and subsequent email dated 16 January 2018, the CMA therefore considers that the presentation was not merely about persuading Dar to lower its wholesale prices but rather that [Reseller 1] was also asking Dar to relax the pricing restriction applicable to dār lighting products sold by [Reseller 1] by increasing the maximum permitted discount off RRP for Volume 1 Products from 35% to 38%.

[Reseller 1] considered itself bound by the Dar Pricing Policy

- 4.68 [Reseller 1] further told the CMA in response to the Second [Reseller 1] Section 26 Notice that, 'Overall, it seems clear that [Reseller 1's] intention was to reduce prices in the face of resistance from Dar.'⁶⁷⁴ The CMA accepts that this might have been [Reseller 1's] intention, but the evidence suggests that [Reseller 1] conducted itself at that time in a way that indicated it was not free to reduce the retail prices of Relevant Products as and when it saw fit, instead considering itself bound by the Dar Pricing Policy.
- 4.69 On 9 February 2018, an email chain which was originally dated 26 July 2016 was forwarded internally by [Employee of Reseller 1] to [Employee of Reseller 1], both of [Reseller 1]. The original email was from [Employee of Reseller 1] to [Dar Senior Employee], in relation to a price list sent to [Reseller 1] by Dar in July 2016. [Employee of Reseller 1] wrote, 'Can you please clarify what our wholesale price and sales price should be? I will make sure to update this by Friday.' [Dar Senior Employee] replied, 'As per my conversation with [Employee of Reseller 1] on Friday, these should have been updated yesterday and I have not had any contact from anyone to suggest otherwise. I have attached the spreadsheet which I sent to [Employee of Reseller 1] last week so I am struggling to understand what the difficulty is.'⁶⁷⁵
- 4.70 Although the evidence is from 2016, for reasons unknown to the CMA, it was deemed relevant enough to [Reseller 1's] business to be forwarded within [Reseller 1] in 2018. It shows that in 2016 [Reseller 1] felt the need to ask Dar what its selling price should be, and that Dar showed dissatisfaction that prices had not yet been updated by [Reseller 1] in accordance with Dar's instruction. [Dar Senior Employee's] statement that prices '*should have been updated yesterday*' potentially implies an agreement between Dar and [Reseller 1] in 2016 in relation

⁶⁷³ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 4.

⁶⁷⁴ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 4.

⁶⁷⁵ GMM-000599999 (Internal [Reseller 1] email from [Employee of Reseller 1] to [Employee of Reseller 1] dated 9 February 2018 and headed 'New Price List').

to prices at which Relevant Products were advertised and sold by [Reseller 1] at that time. [Reseller 1], which had submitted the email to the CMA, wrote in its response to the Second [Reseller 1] Section 26 Notice that '[Reseller 1] has no knowledge as regards the relevance of the email chain . . . , nor why it was forwarded from [Employee of Reseller 1] to [Employee of Reseller 1] on 9 February 2018.'⁶⁷⁶

- 4.71 In October 2018, [Dar Employee] sent a price list for new dār lighting products launched in September 2018 (ie Volume 2 Products) to [Employee of Reseller 1], writing, 'Please find attached RRP pricelist for new Sept 2018 products'. [Employee of Reseller 1] replied, 'The new products launched on site today so I will update the prices for these.' He subsequently wrote, 'The products went live today, but I took them off directly after because they launched with the incorrect price. This should be resolved by mid this week.'⁶⁷⁷
- 4.72 Then, on 22 November 2018, [Dar Senior Employee] sent an email to [Employee of Reseller 1] in very strong terms: 'That makes me feel so much better....not Basically we are not the only ones who look ridiculous.....Let's get it sorted. Can you look at all the new products and the prices you are selling at. Looking at some yesterday, some others look wrong as well. [X]'.⁶⁷⁸ This email shows that, after sending the price list to [Reseller 1], Dar monitored [Reseller 1's] website in order to check that [Reseller 1] had updated its website prices in accordance with the latest price list for Volume 2 Products and sought to enforce compliance with the Dar Pricing Policy if prices were '*incorrect*' (ie not aligned with the Dar Pricing Policy).
- 4.73 On 28 November 2018 [Dar Senior Employee] sent a message to [Dar Senior Employee] that read, '*Had a long chat x 2 with [Employee of Reseller] and [Reseller 1]. Can't really email you the convos so will discuss tomorrow.*'⁶⁷⁹ [Dar Senior Employee] said in interview that he did not recall what the message was about nor what was discussed but added that he thought that the reference to 'can't really email you the convos' was to the fact that he does not tend to write long emails. The CMA considers that the timing of this message shows that the discussions with [Employee of Reseller] and [Reseller 1] might have concerned the application of the Dar Pricing Policy, specifically as regards Volume 2 Products, and that the words 'can't really email you the convos' is potentially reflective of Dar's efforts to avoid putting potentially incriminating communications about the

⁶⁷⁶ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 3.

⁶⁷⁷ GMM-000336360 (Emails between [Dar Employee] and [Employee of Reseller 1] dated between 2 October and 5 November 2018 and headed 'New Pricelist').

⁶⁷⁸ GMM-000597381 (Email from [Dar Senior Employee] to [Employee of Reseller 1] dated 22 November 2018).

⁶⁷⁹ GMM-000089930 (Chat message sent by [Dar Senior Employee] to [Dar Senior Employee] dated 28 November 2018).

Dar Pricing Policy in writing via email (see 'Dar's culture of concealment' above in Section 3).

2019

- 4.74 On 7 January 2019, as part of a longer WhatsApp conversation with [Employee of Reseller 1],⁶⁸⁰ [Dar Senior Employee] wrote:
- 'Can you do me a favour. The BOM3435 [a Volume 1 Product]⁶⁸¹ Can you increase the price to 325 until further notice. Can you do this toady [*sic*]. In fact, looking at the prices of product I think it would be prudent to move prices to 27% from 30% of [*sic*] RRP. The market is starting to charge more. Perhaps call me to discuss.'
- 4.75 [Employee of Reseller 1] replied that he had already left the office but asked, 'Do you want me to take the BOM sku off site?' [Dar Senior Employee] replied, 'Yes please That would be easier for now.' [Employee of Reseller 1] responded, '[Employee of Reseller 1]⁶⁸² will take it off size [*sic*] and let [Dar Employee]⁶⁸³ kn9e [*sic*] [...] The item is site, [Dar Employee] knows [...] Meant to say off site'.⁶⁸⁴
- 4.76 The RRP for BOM3435 (a Bombazine 7-light pendant) at that time was £375 excluding VAT⁶⁸⁵ (£450 including VAT), so it is clear that [Dar Senior Employee] was referring in his message to the advertised retail price for that product on [Reseller 1's website] £325 was around 28% off the RRP including VAT.
- 4.77 This exchange is evidence of Dar giving a clear instruction to [Reseller 1] to increase the retail price for a Volume 1 Product to 28% off the RRP (including VAT) and to then reduce the discount offered off RRP for other products from an initial 30% down to 27%. [Dar Senior Employee's] comment that 'the market is starting to charge more' is consistent with the CMA's findings on the Dar Pricing Policy, including that while Dar saw the Minimum Price as the relevant RRP minus the maximum discount allowed for the Brands of Relevant Product in question, it would have been happy for Resellers to apply lesser discounts from the relevant RRP and on occasion positively encouraged Resellers to do this (see paragraph 3.175).

⁶⁸⁰ GMM-000140659 (WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller 1] dated 3 January 2019 to 10 September 2020).

⁶⁸¹ GMM-000597058 (The Lighting Book Price List 2018-19). GMM-000594650 (MASTER LIGHTING BOOK WISEBUYS PRICE LIST EFFECTIVE 21.9.19 V2.xlsx, tab 'LIGHTING BOOK – volume 1').

⁶⁸² [Reseller 1] told the CMA that it believed the '[><]' referred to in [Employee of Reseller 1] message of 20 February 2019 at 16.19 UTC was [Employee of Reseller 1], who was 'responsible for working with the [><]': Document GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 2.

⁶⁸³ The CMA infers that '[Dar Employee]' is [Dar Employee].

⁶⁸⁴ GMM-000140659 (WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller 1] dated 3 January 2019 to 10 September 2020).

⁶⁸⁵ GMM-000597058 (The Lighting Book Price List 2018-19).

4.78 In interview with the CMA, [Dar Senior Employee] confirmed that ‘I’ve asked him to increase, er, the price of a product that they are selling currently on their website.’ He explained that the reason for this was to ensure that [Reseller 1] did not exceed its stock allocation to the potential detriment of other Resellers. [Dar Senior Employee] said that ‘I would have said ..., “[Employee of Reseller 1], can you please put the price of this product up?”, essentially, to, ... probably slow sales down ... so that, er -- because -- so, they’re not eating into product that isn’t actually meant for them.’

4.79 Notwithstanding [Dar Senior Employee’s] explanation, the CMA considers that [Employee of Reseller 1’s] response shows an agreement between Dar and [Reseller 1] for [Reseller 1] to price at the Minimum Price, and that his offer to take the product off site shows an acceptance of being bound by that agreement with Dar. The exchange shows that Dar would prefer that [Reseller 1] refrain from selling the product, rather than price below the Minimum Price in order to maintain the integrity of the Dar Pricing Policy. Equally, it shows that [Reseller 1] was prepared to forgo sales and revenue in order to adhere to the Dar Pricing Policy.

[Reseller 1] accidentally discounting Volume 2 Products in contravention of the Dar Pricing Policy

4.80 In February 2019 [Dar Senior Employee] appeared to state Dar’s policy on the pricing of Volume 2 Products in a WhatsApp conversation with [Employee of Reseller 1]. In response to a message from [Employee of Reseller 1] reading, ‘I honestly thought we had to price rrp for 6 weeks after launch’ [Dar Senior Employee] replied, ‘No man. Forever. How else are we going to improve the market’. [Employee of Reseller 1] then wrote, ‘If everybody would follow us 😊’,⁶⁸⁶ to which [Dar Senior Employee] replied, ‘Everyone is!!!! That’s the problem. On new products everyone is, you are the only ones that have broken away which is disappointing’. Various messages referring to ‘the new products’, ‘September and January products’ and a ‘list ... from September 2018’, suggest that this was about Volume 2 Products.

4.81 These messages are consistent with the CMA finding that the Dar Pricing Policy required Resellers, including [Reseller 1], to advertise and/or sell Volume 2 Products at a price not below RRP excluding VAT and that most Resellers were complying with that policy.

⁶⁸⁶ According to emojipedia.org/winking-face/, a ‘winking face’ emoji may signal a joke, flirtation, hidden meaning, or general positivity.

4.82 The messages exchanged between [Dar Senior Employee] and [Employee of Reseller 1] on 20 February read in full as follows:⁶⁸⁷

2019-02-20 11:40:07 UTC [Dar Senior Employee]: Can you call me

2019-02-20 11:40:39 UTC [Dar Senior Employee]: On my mobile

2019-02-20 11:43:46 UTC [Employee of Reseller 1]: Incoming Call

2019-02-20 13:17:45 UTC [Employee of Reseller 1]: Our pricing tool is down but I am on it

2019-02-20 13:17:52 UTC [Employee of Reseller 1]: Temporary off site?

2019-02-20 14:55:42 UTC [Dar Senior Employee]: Take the new products down mate until this is sorted please.

2019-02-20 14:58:17 UTC [Dar Senior Employee]: I'm disappointed man. I have spoken to you guys about this.

2019-02-20 16:03:15 UTC [Employee of Reseller 1]: Alright will do

2019-02-20 16:05:27 UTC [Employee of Reseller 1]: I honestly thought we had to price rrp for 6 weeks after launch

2019-02-20 16:19:49 UTC [Employee of Reseller 1]: [Employee of Reseller 1] is removing them now

2019-02-20 16:26:40 UTC [Dar Senior Employee]: No man. Forever. How else are we going to improve the market

2019-02-20 16:27:54 UTC [Employee of Reseller 1]: Alright will be fixed

2019-02-20 16:28:12 UTC [Employee of Reseller 1]: If everybody would follow us 😊

2019-02-20 16:29:26 UTC [Dar Senior Employee]: Everyone is !!!! That's the problem. On new products everyone is, you are the only ones that have broken away which is disappointing

2019-02-20 16:39:58 UTC [Employee of Reseller 1]: They are off site now and won't go back until it's fixed

⁶⁸⁷ GMM-000140659 (WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller 1] dated between 3 January 2019 and 10 September 2020).

2019-02-20 16:40:18 UTC [Dar Senior Employee]: September and January ?

2019-02-20 16:43:12 UTC [Employee of Reseller 1]: Sorry?

2019-02-20 16:44:20 UTC [Dar Senior Employee]: September and January products

2019-02-20 16:44:51 UTC [Employee of Reseller 1]: All the ones that [Dar Employee] marked with new in her sheet

2019-02-20 16:45:10 UTC [Dar Senior Employee]: Ok

2019-02-20 16:45:21 UTC [Dar Senior Employee]: Please get this sorted asap

2019-02-20 16:45:58 UTC [Employee of Reseller 1]: That list is from September 2018

2019-02-20 16:46:01 UTC [Employee of Reseller 1]:

{files\Image\IMG-20190220-WA0001.jpg}⁶⁸⁸

2019-02-20 16:46:15 UTC [Employee of Reseller 1]: They're off already, you cannot buy them

2019-02-20 16:47:01 UTC [Dar Senior Employee]: Ok I want the sales though so the sooner your end is sorted the better

2019-02-20 16:51:06 UTC [Employee of Reseller 1]: Yea I need to speak to pricing tomorrow

2019-02-20 16:51:14 UTC [Employee of Reseller 1]: For normal products we don't go higher than -35% of rrp and these needs to be exact on rrp

2019-02-20 16:51:21 UTC [Employee of Reseller 1]: So 2 different pricing models'

(Emphasis added.)

- 4.83 In stating 'So 2 different pricing models', the CMA considers that [Employee of Reseller 1] was drawing a distinction between Volume 1 Products ('For normal products we don't go higher than -35% of RRP') and Volume 2 Products ('these

⁶⁸⁸ GMM-000140778 (WhatsApp image dated 20 February 2019), attachment to GMM-000140659 (WhatsApp conversation between [Employee of Reseller 1] and [Dar Senior Employee] between 3 January 2019 and 10 September 2020). This image cannot be viewed by the CMA.

needs to be exact on rpp [sic]'). This also accords with the CMA's findings in respect of the Dar Pricing Policy in Section 3.

[Dar Senior Employee] in interview

- 4.84 In interview with the CMA, [Dar Senior Employee] said that he did not ask [Employee of Reseller 1] to take the products off [Reseller 1's] website but that he was merely responding to [Employee of Reseller 1's] question 'Temporary offsite?'.⁶⁸⁹ In relation to his message stating 'I'm disappointed', [Dar Senior Employee] explained that this message was sent in the context of [Reseller 1] having had continual problems with its pricing tool from October 2018 to March 2019.⁶⁹⁰
- 4.85 [Dar Senior Employee] said in interview that he did not know what [Employee of Reseller 1] meant by his statement that, 'I honestly thought we had to price rrp for 6 weeks after launch'⁶⁹¹ and that his response of 'Forever. How else are we going to improve the market' was sarcasm.⁶⁹²
- 4.86 [Dar Senior Employee] said that he thought the reference to '2 different pricing models' was to [Reseller 1's] own pricing tool: 'I think what he's saying is, is that they have two pricing models at [Reseller 1]. They have -- I don't know what he means by "normal products" but they, clearly, have two pricing models at [Reseller 1] So, what, um, it looks like is that they're applying two different pricing models to our products. ... That's their pricing models, yeah, within their pricing tool, I assume.'⁶⁹³
- 4.87 [Reseller 1], on the other hand, told the CMA in its response to the Second [Reseller 1] Section 26 Notice that it 'does not know what is meant by the reference to '2 different pricing models', reiterating that prior to receiving the Second [Reseller 1] Section 26 Notice '[Reseller 1] had no knowledge or awareness of these discussions between Dar and [Employee of Reseller 1]'.⁶⁹⁴
- 4.88 [Dar Senior Employee] further told the CMA in interview that [Employee of Reseller 1] was '*probably referring to products ... I'm guessing, probably from September 2018.*' The CMA notes that while Dar's product catalogue was split into Volumes 1

⁶⁸⁹ GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.108, lines 8-10.

⁶⁹⁰ GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.108, lines 14-19.

⁶⁹¹ GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.108, lines 22-25; p.109, lines 10-13.

⁶⁹² GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.108, lines 25-26; p.109, lines 6-12.

⁶⁹³ GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.118, lines 2-12.

⁶⁹⁴ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 2.

and 2 only in September 2019, Volume 2 included all där lighting products launched since September 2018.

- 4.89 In relation to his message that ‘Everyone is !!!! That's the problem. On new products everyone is, you are the only ones that have broken away which is disappointing’, [Dar Senior Employee] explained in interview that ‘generally, everyone ... looks at [Reseller 1] as, you know, ... where the market is. And everyone, kind of ... it's generally, the ... lighting resellers... -- they're all, kind of, operate in a herd. What I'm saying there is, “Look, you've, kind of, broken away from the herd”.’ ‘Within the market, they’d tend to be followed, generally.’⁶⁹⁵

CMA’s understanding

- 4.90 Notwithstanding [Dar Senior Employee’s] explanation, the CMA infers that the statements ‘on new products everyone is [following [Reseller 1]]’ and ‘you are the only ones that have broken away’ are not simply a reference to the fact that other Resellers followed [Reseller 1’s] pricing, but also to the fact that Dar considered [Reseller 1] to have temporarily departed from the Dar Pricing Policy for Volume 2 Products.
- 4.91 The CMA considers that [Dar Senior Employee’s] writing ‘How else are we going to improve the market’ is reflective of what the CMA finds were the aims of the Dar Pricing Policy at that time, namely to protect the perceived quality of the brands, protect Resellers’ margins and make it desirable for Resellers to stock the Relevant Products. With [Reseller 1] being [a significant reseller of Dar] and having the role of price leader in the market, holding [Reseller 1] to a Minimum Price on Volume 2 Products was also intended to reduce the downward pressure on prices across Dar’s Resellers more generally.
- 4.92 Further, the CMA considers that [Employee of Reseller 1’s] writing ‘Alright will be fixed’, ‘They are off site now and won't go back until it's fixed’ and ‘They're off already, you cannot buy them’ are indicative of [Reseller 1] complying with the Dar Pricing Policy when challenged by Dar.

[Employee of Reseller 1’s] instructions to [Reseller 1] colleagues

- 4.93 The following day (21 February 2019), [Employee of Reseller 1] sent an internal email within [Reseller 1] to a mailbox called ‘PricingQuestions’. In the email he wrote:

‘Can you please set the SKUs attached on MAP 0 on a SKU level?’

⁶⁹⁵ GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.114, lines 12-16; p.115, line 21.

The fixed MAP price can be found in column E.

These SKUs had to be taken off site because of many supplier complaints.

This also means that I cannot update the MAP numbers over the Extranet, are you able to do this?

Once this is set, I will set the SKUs back live.⁶⁹⁶

- 4.94 [Reseller 1] explained that [Employee of Reseller 1's] request for the 'SKUs attached' to be set to 'MAP 0' meant that they should be set to a specified price that no longer 'floats' with [Reseller 1's] [automated price monitoring software].
- 4.95 An Excel sheet attached to the email⁶⁹⁷ lists 208 Relevant Products, all but eight of which were Volume 2 Products. The remaining eight products were Volume 1 Products. [Employee of Reseller 1's] email referred to a 'fixed MAP price' in column E of the spreadsheet, which listed prices that corresponded to the RRP excluding VAT listed for those products in Dar's September 2018 price list for Relevant Products contained in its catalogue, The Lighting Book.⁶⁹⁸
- 4.96 [Employee of Reseller 1] continued to correspond internally within [Reseller 1] with regard to the price change for nearly two weeks, until 5 March 2019.⁶⁹⁹
- 4.97 This internal [Reseller 1] correspondence is indicative of [Reseller 1] taking proactive steps to comply with the Dar Pricing Policy.

[Reseller 1's] proposed solution to enable it to adhere to the Dar Pricing Policy

- 4.98 On 25 February 2019, [Dar Senior Employee] messaged [Employee of Reseller 1] to request an update on progress, asking, 'Hi. Where are you with putting the new products back live?'. [Employee of Reseller 1] replied, 'Yea I wrote you that our system doesn't allow price deviation and fixed prices. I don't have a solution yet'. [Dar Senior Employee] stated, 'Your system allows MAP pricing I'm sur [sic]' to which [Employee of Reseller 1] replied, 'Only map pricing within a rang [sic]. Since the Poole scandal, we don't have that anymore'. The CMA infers that the reference to the 'Matt scandal' is to the NLC Decision in 2017 finding that another lighting

⁶⁹⁶ GMM-000601274 (Internal [Reseller 1] email from [Employee of Reseller 1] dated 21 February 2019 and headed 'UKDARLighting MAP 0 on SKU level'). [Reseller 1] told us that 'The email is from [Employee of Reseller 1] to an internal email address that is no longer active and was manned by junior pricing staff (often interns) in the [redacted]. [Employee of Reseller 1], in copy, is also a junior individual in the pricing team. [Employee of Reseller 1] had and has no responsibilities in relation to making pricing changes, and it is unclear why she would have been copied.'

⁶⁹⁷ GMM-000601275 (Spreadsheet titled 'Copy of DAR Remove').

⁶⁹⁸ GMM-000597058 (The Lighting Book price list 2018-19).

⁶⁹⁹ GMM-000601277 (Internal [Reseller 1] emails dating from 21 February to 5 March 2019 and headed 'UKDARLighting MAP 0 on SKU level').

manufacturer had infringed competition law by engaging in resale price maintenance in the supply of domestic light fittings online.⁷⁰⁰

- 4.99 On 26 February 2019, [Employee of Reseller 1] wrote to [Dar Senior Employee], 'Have the solution, [Employee of Reseller 1] will set them live today'. However, the solution does not appear to have worked immediately since, on 27 February 2019, [Employee of Reseller 1] wrote in an internal email that 'This is not set properly. Can you make sure the MAP ranking is correct and these SKUs are priced at RRP?'⁷⁰¹
- 4.100 It appears that the products were put back online on 26 or 27 February 2019, but only briefly. On 27 February 2019, [Dar Senior Employee] wrote to [Employee of Reseller 1] again to say that 'products have gone back on line and they are still wrong. This is causing me alot [sic] of issues.' [Employee of Reseller 1] replied, 'Taking them off site. This is the pricing team. I apologise'. [Dar Senior Employee] replied, 'These kind of thing infuriates [Dar Senior Employee] and puts me in a bad place.' [Employee of Reseller 1] confirmed, 'They're off site in 15 min. Until resolved'.
- 4.101 The emails conclude on 5 March 2019, with an internal [Reseller 1] email to [Employee of Reseller 1] confirming that the issue appeared to have been resolved.⁷⁰² [Reseller 1] confirmed to the CMA that the price changes that had been requested by Dar were implemented by [Reseller 1]:

'[Reseller 1] has been able to confirm that changes to its retail pricing formula for the c200 SKUs mentioned in ROB-00000712 were made by 5 March 2019 and from that date [Reseller 1's] [automated price monitoring software] no longer applied to these products. [Reseller 1] believes this change remained in place for only a very short time. By 3 July [2019], [Reseller 1's] pricing records reflect that all the products in question were once more being priced according to the [...] [automated price monitoring software].

The resulting impact on [Reseller 1's] retail prices appears to have been mixed and short-term. For example, while the prices of many of the relevant SKUs fell after returning to [the] [automated price monitoring software], some prices increased.'

- 4.102 The CMA finds that this evidence shows that [Reseller 1] complied with an instruction from Dar to price Volume 2 Products (and a small number of Volume 1

⁷⁰⁰ See CMA's [NLC Decision](#) dated 3 May 2017 ([Case 50343 Online resale price maintenance in the light fittings sector](#)).

⁷⁰¹ GMM-000601277 (Internal [Reseller 1] email from [Employee of Reseller 1] to [Employee of Reseller 1] dated 27 February 2019 and headed 'UKDARLighting MAP 0 on SKU level').

⁷⁰² GMM-000601277 (Internal [Reseller 1] email from [Employee of Reseller 1] to [Employee of Reseller 1] dated 5 March 2019 and headed 'UKDARLighting MAP 0 on SKU level').

Products) at a Minimum Price of RRP excluding VAT, in accordance with the Dar Pricing Policy.

5 products accidentally not complying with the Dar Pricing Policy

- 4.103 A few days later, on 14 March 2019, [Dar Senior Employee] wrote the following message to [Employee of Reseller 1]: ‘Tyo0108 [Tyona pendant light] gai0150 [Gaia 1-light pendant] jam0539 [Jamelia 5-light pendant] zya5450 [Zya 5-light flush] azi0135 [Azia 1-light pendant]. I've noticed these are new products but not at the correct level. I'm sure there will be others 🤯’.⁷⁰³ These five Volume 2 Products were listed in the spreadsheet that [Employee of Reseller 1] sent to ‘PricingQuestions’ on 21 February 2019 with a request to change their advertised prices to RRP excluding VAT.
- 4.104 [Employee of Reseller 1] replied, ‘I’ll have a look now Refreshing everything manually’. [Dar Senior Employee] asked, ‘Ok. What caused this and are you confident all the products have been captured now?’ [Employee of Reseller 1] responded, ‘I am confident all have been captured I compared all new product’s rrp vs current sales price’. [Dar Senior Employee] wrote in return, ‘More confident than last time...’ [Employee of Reseller 1] explained, ‘Everything was refreshed Settings are still correct and the items should follow the pricing rule’.⁷⁰⁴
- 4.105 The CMA notes [Employee of Reseller 1’s] reference to the comparison between ‘rrp vs current sales price’ for ‘all new products’ and his reference to ‘the pricing rule’. These references, taken together with the evidence discussed immediately above, are consistent with the CMA’s findings on the Dar Pricing Policy (see Section 3, ‘Conclusion’ and ‘Commercial aims, content and communication, scope and duration’). The CMA considers that ‘the pricing rule’ refers to an instruction by Dar not to advertise or sell Volume 2 Products below a Minimum Price of RRP excluding VAT, in accordance with the Dar Pricing Policy.

The [Reseller 2] complaint

- 4.106 [Dar Senior Employee] appears to have contacted [Employee of Reseller 1] on 14 March 2019 as a direct consequence of a WhatsApp exchange with [Employee of Reseller 2] the previous day. On 13 March 2019, [Employee of Reseller 2] had written to [Dar Senior Employee]: ‘did you get to speak to [Reseller 1]?’ [Dar Senior Employee] replied, ‘They should be sorted ??’ [Employee of Reseller 2] then responded, ‘4 our [sic] of 5 we looked at aren’t [Dar Senior Employee]’. [Dar Senior

⁷⁰³ GMM-000140659 (WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller 1] dated between 3 January 2019 and 10 September 2020). The emoji added by [Dar Senior Employee] appeared to signal his disbelief or shock. See [🤯 Shocked Face with Exploding Head Emoji \(emojipedia.org\)](https://emojipedia.org/shocked-face-with-exploding-head-emoji/), where this emoji is defined as ‘a visual form of the expression *mind blown*, it may represent such emotions as shock, awe, amazement, and disbelief’.

⁷⁰⁴ GMM-000140659 (WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller 1] dated between 3 January 2019 and 10 September 2020).

Employee] asked, 'Can you send me some codes?' [Employee of Reseller 2] then provided the Dar product codes: 'Tyo0108 gai0150 jam0539 zya5450 azi0135. Probably more though [Dar Senior Employee]'. These were the same product codes that [Dar Senior Employee] sent to [Employee of Reseller 1] the following day.

4.107 A few hours after the WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller 1] referred to above, [Dar Senior Employee] enquired again about certain products that had not been updated and added: 'Should I ask again about your confidence level...' [Employee of Reseller 1] replied, 'Zy5450 in your price list has an rrp of 200 [...] Want me to raise it to 240?' [Dar Senior Employee], monitoring the [Reseller 1] website in real time, responded, 'It's okay it literally just updated'.⁷⁰⁵

4.108 [Dar Senior Employee] wrote to [Employee of Reseller 2] two weeks later, on 27 March 2019, confirming that [Reseller 1] had changed its prices: '*Sorry I have not got back to you. It shoulda [sic] be sorted a couple of weeks ago*'.

[Employee of Reseller 1]

4.109 An individual working in the lighting industry provided the CMA with a contemporaneous summary of a telephone conversation they had had with [Employee of Reseller 1] on 28 June 2019:

'I called [Employee of Reseller 1] at [Reseller 1] to ask why they are not competing on this item and he told me that Dar are seeking to maintain pricing and profit on these items and that they were supporting this. I've discussed the legality and fairness of this and he agrees it doesn't look good on [Reseller 1] for behaving in this way.'⁷⁰⁶

4.110 On 16 August 2019, [Employee of Reseller 1] reported to [Dar Senior Employee] that, '[Employee of Reseller 1] is calling the shots, I'm off the account myself to a big degree.'⁷⁰⁷ In [redacted], [Employee of Reseller 1] left [Reseller 1].⁷⁰⁸

[Reseller 1's] [redacted] for Dar products

⁷⁰⁵ The 'Zy5450' is 'ZYA5450', which is a 'Zya' 5-light flush. It launched in May 2018 as part of the dār brand and is still available (as at the date of Dar's list of Relevant Products).

⁷⁰⁶ GMM-000601775 (Email correspondence between an individual working in the lighting industry and the CMA dated between 20 June 2019 and 28 June 2019 and headed 'CONFIDENTIAL - CONTINUING RPM IN LIGHTING SECTOR'), together with attached screenshots GMM-000601784 (Screenshot (49)) and GMM-000601778 (Screenshot (50)). Despite making efforts to do so, the CMA was unable to organise an interview with or receive information from [Employee of Reseller 1].

⁷⁰⁷ GMM-000140659 (WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller 1] dated between 3 January 2019 and 10 September 2020), see [Employee of Reseller 1] message of 5 August 2019 at 17:21 UTC.

⁷⁰⁸ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 1.

4.111 In mid-2019, [Reseller 1] appears to have begun to take steps to detach itself from the Dar Pricing Policy by [changing its business strategy], which [Reseller 1] described as moving to a '[X]'. [Reseller 1] explained in its response to the Second [Reseller 1] Section 26 Notice, '... since the autumn of 2019 [Reseller 1] has moved to a [X] for Dar products which [X] in an effort to avoid Dar continuing to apply pressure in this way.'⁷⁰⁹

4.112 In its response to the Third [Reseller 1] Section 26 Notice, [Reseller 1] provided further explanation of the rationale for the move:

'a) The move to a '[X]' means that [Reseller 1] would no longer [X] for Dar products, which would effectively be [X]. [Reseller 1] strongly encouraged this change, and it did not involve any change in the commercial terms on which Dar supplied Relevant Products to [Reseller 1]. Rather, it only affected the way that [Reseller 1] markets the Relevant Products.

b) This move was at [Reseller 1's] initiative, in an effort to simplify the relationship with Dar and avoid Dar continuing to put pressure on [Reseller 1's] pricing.

c) Dar was not happy about the change, but ultimately agreed because Dar understood that it was important to [Reseller 1's] overall strategy.

d) A move to [X] made it more difficult for Dar or other suppliers to complain that [Reseller 1] was discounting their products or otherwise pricing too low.'⁷¹⁰

4.113 It appears that most of the Relevant Products sold by [Reseller 1] had been [X] by early August 2019, with [Dar Senior Employee] noting in a message to [Employee of Reseller 1], 'I have seen most products now [X], however there are 17 products which have not been. Is there a particular reason why these 17 have been omitted?'⁷¹¹

4.114 By 24 September 2019, all but eight of the Relevant Products sold by [Reseller 1] had been [X]. In an email to Dar on that date, [Employee of Reseller 1] wrote, '[X]: we've experienced some tech issues for the remaining 8 SKUs that trigger this [X], if we don't get them changed very soon we probably briefly deactivate

⁷⁰⁹ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 2.

⁷¹⁰ GMM-000601954 (Response dated 22 October 2021 to the Third [Reseller 1] Section 26 Notice), response to question 2.

⁷¹¹ GMM-000140659 (WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller 1] dated between 3 January 2019 and 10 September 2020). See [Dar Senior Employee]'s message of 16 August 2019 at 12:01 UTC.

them to not irritate our joint customers.’⁷¹² The following day, [Employee of Reseller 1]⁷¹³ confirmed to Dar that the remaining eight products had been [X], and that no Relevant Products were searchable on [Reseller 1’s website] based on searches for ‘dar lighting’, writing, ‘all (8 missing) SKUs [X] are [X] now. E.g. our [automated price monitoring software] suggests [X] for the term "dar lighting". (At least shows that [X] works for the brand term.)’⁷¹⁴

2020

4.115 On 8 July 2020, [Employee of Reseller 1] emailed [Dar Senior Employee] and [Dar Senior Employee], both of Dar, in response to an email from [Dar Senior Employee] the previous day asking [Reseller 1] to provide a list of its retail prices.⁷¹⁵ [Employee of Reseller 1] wrote:

‘So [Reseller 1] is taking a much firmer approach to the retail price topic than we have on occasions in the past. I am happy to provide transparency but we just need to be clear on expectations as we obviously need to decide on our pricing policy independently. Happy to align quickly on a call with you or [Dar Senior Employee] to clarify the purpose of sharing the data. Once we are clear on the purpose / expectations, happy to share.’

4.116 [Dar Senior Employee] replied, ‘The sole purpose of doing it is to make sure you are competitive in the market. In the past we have only spotted issues with box dimensions and RRP’s when comparing data. I don’t need this on a weekly basis or anything, but it is good housekeeping to review once a quarter.’ [Employee of Reseller 1] then wrote, ‘Okay. Please see attached’, and apparently attached a spreadsheet titled ‘[Reseller 1] [X]’, which is not available to the CMA.

4.117 This email chain shows [Reseller 1] trying to disengage further from the Dar Pricing Policy in July 2020.

4.118 Notwithstanding [Reseller 1’s] [change of business strategy]’ for Relevant Products, at least one Reseller continued to express its concerns to Dar about the possibility of consumers comparing its prices for Relevant Products with [Reseller 1’s] on Google Shopping. [Employee of Reseller] complained to [Dar Senior Employee] in November 2020 that he was receiving price match requests from consumers based on the prices of Relevant Products sold by [Reseller 1], among

⁷¹² GMM-000210294 (Email correspondence between [Dar Senior Employee] and [Employee of Reseller 1] and others at [Reseller 1] dated between 10 September 2019 and 25 September 2019 and headed ‘Dar – weekly turnover’).

⁷¹³ [Employee of Reseller 1] left [Reseller 1] in June 2020. See GMM-000100480 (Email from [Employee of Reseller 1] to [Dar Senior Employee], [Dar Senior Employee] and [Dar Senior Employee] dated 26 June 2020).

⁷¹⁴ GMM-000210294 (Email correspondence between [Dar Senior Employee] and [Employee of Reseller 1] and others at [Reseller 1] dated between 10 September 2019 and 25 September 2019 and headed ‘Dar – weekly turnover’).

⁷¹⁵ GMM-000600044 (Emails between [Employee of Reseller 1] and [Dar Senior Employee] and [Dar Senior Employee] dated from 3 to 9 July 2020 and headed ‘Retail’s’).

other Resellers. [Dar Senior Employee] responded, '[Reseller 1] [X]', to which [Employee of Reseller] replied, 'People just know it's [X].' [Dar Senior Employee] added, 'No but im wondering how are they finding it in the first place on their site.' [Employee of Reseller] explained that 'There still using gtin barcodes as showing on shopping still.'⁷¹⁶

[Reseller 1] accepted sanctions for non-compliance with the Dar Pricing Policy by removing Relevant Products from sale

4.119 Evidence uncovered by the CMA shows that on at least two occasions, [Reseller 1] agreed to withdraw Relevant Products from sale in response to a request from Dar to increase the advertised or selling price, thereby forgoing potential revenue from sales of those products. The Relevant Products were then placed back on sale once the price had been increased.

7 January 2019: 7-bulb Dar chandelier removed from sale for one week

4.120 On 7 January 2019, [Dar Senior Employee] sent a WhatsApp message to [Employee of Reseller 1] asking him to increase the price of a 7-bulb Dar chandelier that had been launched prior to September 2018, as noted above. When [Employee of Reseller 1] asked whether he should take the product 'off site', [Dar Senior Employee] replied 'Yes please'. Later that day, [Employee of Reseller 1] confirmed that the product was off site.

4.121 In its response to the Second [Reseller 1] Section 26 Notice, [Reseller 1] confirmed that 'the product associated with the [Reseller 1] SKU mentioned in [the messages] – a 7 bulb Dar chandelier – was temporarily removed from the [Reseller 1] [X] site on 7 January 2019, the date of the relevant WhatsApp exchange. It was placed back on the site on 14 January 2019.'⁷¹⁷

20 February 2019: 200 Dar products removed from sale for 9-13 days

4.122 The WhatsApp messages exchanged between [Employee of Reseller 1] and [Dar Senior Employee] on 20 February 2019 and subsequent internal [Reseller 1] correspondence (see paragraphs 4.82 to 4.101) indicate that [Reseller 1] removed just over 200 Dar products from sale at Dar's instruction⁷¹⁸ for between 9 and 13 days while the prices were adjusted. [Employee of Reseller 1] first confirmed to [Dar Senior Employee] that the products were 'off site' on 20 February; subsequent

⁷¹⁶ GMM-000168248 (WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller] dated between 22 October 2019 and 16 November 2020).

⁷¹⁷ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 2.

⁷¹⁸ See GMM-000140659 (WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller 1] dated between 3 January 2019 and 10 September 2020), particularly [Dar Senior Employee]'s message to [Employee of Reseller 1] at 14:55 UTC on 20 February 2019: 'Take the new products down mate until this is sorted please.'

internal [Reseller 1] emails suggest that the products were made available on [Reseller 1's] website again between 1 March and 5 March.⁷¹⁹

- 4.123 As [a significant Reseller of Dar], [Reseller 1] appears to have been much more important a customer to Dar than Dar was as a supplier to [Reseller 1], accounting as it did for [<10%] of [Reseller 1's] lighting revenues during the Relevant Period. [Reseller 1] also told the CMA in its response to the First [Reseller 1] Section 26 Notice that '[Reseller 1] does not consider any products from any supplier to have a "must-stock" status'.⁷²⁰
- 4.124 Nonetheless, Dar appears to have been in a position to impose sanctions on [Reseller 1] as a result of [Dar Senior Employee]'s relationship with key individuals at [Reseller 1], specifically [Employee of Reseller 1] and [Employee of Reseller 1]. The WhatsApp conversations between [Dar Senior Employee] and [Employee of Reseller 1] show [Dar Senior Employee] repeatedly putting pressure on [Employee of Reseller 1] to 'sort' the pricing of Dar products, and [Employee of Reseller 1] duly acquiescing on behalf of [Reseller 1].
- 4.125 [Reseller 1] told the CMA that [Employee of Reseller 1] 'was young and inexperienced and not regarded as an effective [X]. This ultimately contributed to his departure. In particular, it was felt that [Employee of Reseller 1] found it difficult to push back firmly against pressure from suppliers and, as a result, to obtain the deeply discounted wholesale prices that [Reseller 1] relies on under its business model. [...] [Dar Senior Employee] has been in role at Dar for a very considerable number of years and was already a very experienced manager at Dar during the Relevant Period.'⁷²¹
- 4.126 The CMA finds that Dar managed to exert sufficient pressure on [Reseller 1] through [Dar Senior Employee's] relationship with [Employee of Reseller 1] and that [Reseller 1] succumbed to that pressure and took down Relevant Products from its website in order to ensure it did not sell such Relevant Products at a price that was not in accordance with the Dar Pricing Policy. In so doing, it would have lost sales and forgone revenue. The CMA considers that this would have been akin to being put on stop by Dar for an equivalent period and shows that [Reseller 1] considered itself bound to adhere to the Dar Pricing Policy.

⁷¹⁹ GMM-000601277 (Internal [Reseller 1] emails dating from 21 February to 5 March 2020 and headed 'UKDARLighting MAP 0 on SKU level').

⁷²⁰ GMM-00000448 (Response dated 16 December 2020 to the First [Reseller 1] Section 26 Notice), response to question 16.

⁷²¹ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 2.

[Reseller 1] monitoring other Resellers and reporting those who did not comply with the Dar Pricing Policy

4.127 [Reseller 1] explained to the CMA that it engages in monitoring of prices of third party Resellers as part of its [automated price monitoring software]-based pricing model, and that this monitoring has both real-time automated and manual elements. [Reseller 1] told the CMA in its response to the Second [Reseller 1] Section 26 Notice that:

‘as part of its pricing strategy, [Reseller 1] is obliged to engage in monitoring of the prices of its competitor third party retailers. [...] this includes automated monitoring [...]. There will also be a degree of manual monitoring by staff in the Category Management group of third-party pricing.’⁷²²

4.128 [Reseller 1] told the CMA in its response to the First [Reseller 1] Section 26 Notice that the number of Relevant Products monitored by its automated software has varied over time but at times covered more than half of the Relevant Products supplied by [Reseller 1]. It added that the Resellers that had been monitored by the software during the Relevant Period included [Reseller] and [Reseller].⁷²³

4.129 [Reseller 1] explained that [Employee of Reseller 1] responsibilities as a [X] included ‘monitoring the on-site prices set by the [Reseller 1] ... [automated price monitoring software] for products [X] ... and the prices for equivalent products available from other retailers.’⁷²⁴

4.130 The CMA notes that [Reseller 1] (specifically [Employee of Reseller 1]) carried out a comparison of its own retail prices for selected Relevant Products with those of [Reseller] and [Reseller] for the purpose of its meeting with Dar in January 2018 (discussed earlier in this section).

4.131 On 13 February 2019, [Employee of Reseller 1] sent a WhatsApp message to [Dar Senior Employee], stating, ‘Also [Reseller] are discounting quite a bit’ ‘Just fyi’.⁷²⁵ In interview with the CMA, [Dar Senior Employee] described this as ‘another example of frustration from ... resellers.... another communication off somebody ... venting or frustrated,’ suggesting that [Dar Senior Employee] was contacted by Resellers regularly with complaints about other Resellers’ prices.

⁷²² GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 2.

⁷²³ GMM-00000447 (Response dated 9 December 2020 to the First [Reseller 1] Section 26 Notice), response to question 10.

⁷²⁴ GMM-000601554 (Response dated 23 July 2021 to the Second [Reseller 1] Section 26 Notice), response to question 1.

⁷²⁵ GMM-000140659 (WhatsApp messages between [Dar Senior Employee] and [Employee of Reseller 1] dated between 3 January 2019 and 10 September 2020).

The CMA's findings on the agreement and/or concerted practice between Dar and [Reseller 1]

- 4.132 In view of the above evidence, the CMA finds that, between 3 December 2017 and 25 September 2019:
- 4.132.1 [Reseller 1] understood that, under the Dar Pricing Policy, it was required to amend its prices of Volume 1 and Volume 2 Products it had available for sale on its website to at least the Minimum Prices notified to it by Dar from time to time;
 - 4.132.2 Dar monitored [Reseller 1's] pricing and on occasions where [Reseller 1] was not adhering to the Dar Pricing Policy, Dar instructed [Reseller 1] to follow the Dar Pricing Policy with regard to the pricing of Volume 1 Products and Volume 2 Products. [Reseller 1] generally complied with these instructions;
 - 4.132.3 [Reseller 1] accepted sanctions for non-compliance with the Dar Pricing Policy by agreeing to remove Volume 1 Products and Volume 2 Products from sale when notified by Dar that the products were being advertised and/or sold on [Reseller 1's website] at a price below the Minimum Price, until the prices had been adjusted; and
 - 4.132.4 During the Relevant Period, the evidence shows that [Reseller 1] on occasion reported other Resellers to Dar for advertising and/or selling Relevant Products online at a price below the Minimum Price. This further confirms that there was an understanding between [Reseller 1] and Dar that the Dar Pricing Policy applied to Resellers in general, including [Reseller 1].
- 4.133 The CMA has taken into account the context of the arrangements between Dar and [Reseller 1], including the evidence that Dar staff were aware of the potential illegality of implementing and enforcing the Dar Pricing Policy with Resellers, including [Reseller 1], and were careful not to avoid creating potentially incriminating written records related to the Dar Pricing Policy, instead using encrypted messaging channels or communicating with each other or to Resellers orally or on occasion using coded communications. (See 'Dar's awareness about the potential illegality of implementing and enforcing the Dar Pricing Policy' and in particular the sub-section titled 'Dar's culture of concealment').
- 4.134 In addition, the nature of the Dar Pricing Policy was such that Dar rarely needed to contact [Reseller 1] about it (in writing or otherwise) when [Reseller 1] was complying with it, because it was based on a price list as far as pricing for individual Relevant Products was concerned. This limited the need for written or oral communication about the Dar Pricing Policy (and therefore the amount of written evidence relating to it) (see 'The role of price lists in the Dar Pricing Policy').

- 4.135 In light of the above, the CMA finds a concurrence of wills between Dar and [Reseller 1] that [Reseller 1] would not advertise or sell Volume 1 Products and Volume 2 Products online below the Minimum Price between 3 December 2017 and 25 September 2019.
- 4.136 The CMA finds that this constitutes an agreement for the purposes of the Chapter I Prohibition.
- 4.137 In the alternative, the CMA finds that the arrangements identified above constituted at least a concerted practice between Dar and [Reseller 1], on the basis that [Reseller 1] knew Dar's wishes as regards the Dar Pricing Policy and adjusted its online advertising and pricing behaviour as a result, thereby knowingly substituting practical cooperation for the risks of price competition between it and other Resellers.
- 4.138 The CMA finds that this constitutes a concerted practice for the purposes of the Chapter I prohibition.
- 4.139 In the remainder of this Decision, the agreement and/or concerted practice that the CMA finds between Dar and [Reseller 1] that [Reseller 1] would not advertise or sell Relevant Products online below the Minimum Price will be referred to as the '[Reseller 1] Agreement'.
- 4.140 The CMA finds that the duration of the [Reseller 1] Agreement was one year and nine months (from 3 December 2017 to 25 September 2019).

Agreement and/or concerted practice between Dar and [Reseller 2]

Background: [Reseller 2's] relationship with Dar

- 4.141 [Reseller 2] is a Dar Reseller. Based on the fact that the company files abridged accounts,⁷²⁶ it qualifies as a small company, whose turnover is no more than £10.2 million.⁷²⁷ [Reseller 2] is not among Dar's top 20 Resellers.⁷²⁸ Dar's sales of Relevant Products to [Reseller 2] during the Relevant Period, up to June 2019, averaged around £[<] per annum.⁷²⁹
- 4.142 [Reseller 2] started advertising and selling the Relevant Products online well before the start of the Relevant Period, potentially as early as [<].⁷³⁰ Throughout the

⁷²⁶ According to Companies House filing history for [Reseller 2] (accessed on 15 March 2022).

⁷²⁷ See [Accounts filing options for small companies - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/accounts-filing-options-for-small-companies) (accessed on 18 March 2022).

⁷²⁸ GMM-000333646 (Annex 14.1 to response dated 18 December 2020 to the First Dar Section 26 Notice), Dar's top 20 Resellers.

⁷²⁹ GMM-000601937 (Annex 6.1 to response dated 2 November 2021 to the Third Dar Section 26 Notice).

⁷³⁰ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021). [Employee of Reseller 2] explained (at p.12, line 25) that [Reseller 2] had opened for business in [<], although it was incorporated in [<]. He added that [Reseller 2] had sold the Relevant Products 'for nearly [<] years' (at p.13, line 21).

Relevant Period it sold the Relevant Products, both online via its website, [REDACTED],⁷³¹ and in store.⁷³² In interview with the CMA, [Employee of Reseller 2], [REDACTED] [Reseller 2], estimated that Dar accounted for around half of [Reseller 2's] business for much of the Relevant Period.⁷³³

4.143 [Reseller 2] was Dar's [REDACTED]⁷³⁴ and has been part of Dar's selective distribution systems:

- since 1 August 2017 for David Hunt Lighting (DHL) and The Light Shade Studio (LSS);⁷³⁵ and
- since 1 August 2018 for dār lighting branded products.⁷³⁶

4.144 [Reseller 2] informed the CMA in its response to the First [Reseller 2] Section 26 Notice that Dar instructed the company not to sell 'Dar Lighting Book 2⁷³⁷ & David Hunt' products below a particular price during the Relevant Period. [Reseller 2] stated that these requests were issued 'Whenever we discounted a product online at over list price' and that such instructions were given 'orally'.⁷³⁸

4.145 While [Reseller 2's] Section 26 response referred to two Brands of Relevant Products, 'Dar Lighting Book 2 & David Hunt', in interview with the CMA, [Employee of Reseller 2] said that the Dar Pricing Policy applied to all Brands of Relevant Products.⁷³⁹

⁷³¹ GMM-000600513 (Dar list of David Hunt customer websites dated 2 February 2018).

⁷³² GMM-000600491 (Response dated 12 May 2021 to the First [Reseller 2] Section 26 Notice), response to questions 1 and 2.

⁷³³ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.94, lines 19-25.

⁷³⁴ In a Dar Internal Report concerning [Reseller], [Dar Employee] stated, 'It looks as though he wants to embrace it fully and go for Brand Partner [...]. Obviously we will need to discuss as [Reseller 2] [being] close, I did say that they were [REDACTED] and will be remaining one.' GMM-000600935 (Dar Internal Report dated 14 to 18 August 2017).

⁷³⁵ Selective Distributorship Agreement for David Hunt Lighting Branded Products between Dar Lighting Limited and [Reseller 2], dated 26 August 2017; Selective Distributorship Agreement for The Light Shade Studio Branded Products between Dar Lighting Limited and [Reseller 2] dated 26 August 2017. GMM-000333626 (Annex 10.1 to response dated 11 December 2020 to the First Dar Section 26 Notice), Members of Dar's SDA networks.

⁷³⁶ Selective Distributorship Agreement for Dar Lighting Branded Products between Dar Lighting Limited and [Reseller 2], undated but '2018' printed on the front page. GMM-000333626 (Annex 10.1 to response dated 11 December 2020 to the First Dar Section 26 Notice), Members of Dar's SDA networks.

⁷³⁷ The CMA understands that this is a reference to Volume 2 of The Lighting Book, which listed dār lighting branded products launched from September 2018 onwards.

⁷³⁸ GMM-000600491 (Response dated 12 May 2021 to the Section 26 Notice to [Reseller 2] dated 5 May 2021), response to questions 6 and 7.

⁷³⁹ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.92, lines 19 to 25. In interview, [Employee of Reseller 2] stated, when referring to requests from Dar to put prices up, 'I, I would say all of them. If, if there was a, an increase -- I think we used to have a, an annual price increase once a year, which [...] So, I, I guess if it's products online, they would say, "You haven't put your prices up to the new price list". Something like that.' When asked to confirm whether such requests were made in the context of annual price increases, [Employee of Reseller 2] responded that they were made in various contexts (transcript p.93), as set out in paragraph 4.193 below.

4.146 Neither the SDAs nor any other written contractual agreement between Dar and [Reseller 2] in the CMA's possession expressly mention the restrictions that formed the basis of the Dar Pricing Policy.

Background: [Reseller 2's] concerns about competitive pressure from the internet

4.147 From the evidence that the CMA has uncovered, it appears that [Reseller 2] had a large showroom with a significant space dedicated to David Hunt Products⁷⁴⁰ and grew its internet site to the point whereby, at its height, [Reseller 2] was shipping around [X] orders a week to its customers.⁷⁴¹ The CMA considers that having a significant showroom footprint, may have accentuated the competitive pressure [Reseller 2] experienced from rivals discounting Relevant Products on the internet. To this end, in interview, [Employee of Reseller 2] stated in relation to rivals discounting Relevant Products, 'I just wanted to be operating on a level playing field.' [Employee of Reseller 2] also said, 'So either we're allowed to sell at what price we want to, or they adhere to what we adhered to.'⁷⁴² In light of this, the CMA considers that the evidence below shows that [Reseller 2] was keen to find ways to ways to shield itself from the competitive pressure it faced from rivals discounting Relevant Products online during the Relevant Period. It may have been [Reseller 2's] keenness in this respect that prompted [X] [Employee of Reseller 2] [X].⁷⁴³

4.148 During the Relevant Period, [Reseller 2] looked to shelter itself from such competitive pressure with Dar's assistance by selling uncoded and white label Relevant Products in store and entering into the SDAs with Dar which it believed comprised the Dar Pricing Policy. Ultimately, it led to [Reseller 2] deciding to significantly scale back but not end its internet presence (see below under '[Reseller 2] scaled back but did not end its online presence').

[Reseller 2] tried selling uncoded and white label Relevant Products in store

4.149 During the Relevant Period, in 2017, the evidence shows that [Reseller 2] looked at ways to reduce its exposure in-store to competitive pressure from the internet. To this end, it tried displaying 'uncoded' Dar catalogues and Relevant Products (ie not

⁷⁴⁰ GMM-000600605 (Note of CMA call with [Employee of Reseller 2] on 18 June 2021).

⁷⁴¹ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.88, lines 9-10.

⁷⁴² GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.66, line 11, and p.84, lines 22-23.

⁷⁴³ GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.128, line 17.

displaying the Dar product codes) in store⁷⁴⁴ to help ‘combat against online’⁷⁴⁵ but with unsatisfactory results.⁷⁴⁶

4.150 In 2019, Dar supplied [Reseller 2] with certain Relevant Products under a white label arrangement in store because they were different to what was available on the internet.⁷⁴⁷ [Reseller 2] told the CMA in response to the Second [Reseller 2] Section 26 Notice, ‘we sold white label products in store after being invited to do so.’⁷⁴⁸ Various Dar Internal Reports written by [Dar Employee] recorded discussions with [Reseller 2] in 2019 including her impression that [Reseller 2] was, on the whole, satisfied with the white label arrangement.⁷⁴⁹ The CMA considers that one of the reasons for Dar’s supply of such white label products was to help shield some of [Reseller 2’s] in-store sales of Relevant Products from online competition.

The lead up to the SDAs

4.151 It appears from Dar Internal Reports that [Reseller 2] expressed concerns to Dar about the performance of its business and loss of sales of Relevant Products to other Resellers as a result of the discounts they were offering online in early 2017. For example, in January 2017 [Dar Employee] reported on a meeting between [Employee of Reseller 2] and [Dar Senior Employee] at the NEC Light Show between 23 and 25 January 2017:

‘[Employee of Reseller 2] came for a quick look round and a chat with [Dar Senior Employee]. Had just lost an order for 5 Symbols [Volume 1 Products] to [Reseller] at 40% discount. [Dar Senior Employee] agreed to match. [...]’⁷⁵⁰

⁷⁴⁴ In a Dar Internal Report, [Dar Employee] wrote that she had visited [Reseller 2’s] shop together with [Dar Employee] on 10 November 2017 and ‘[...] looked at the Dar display stands and identified they were losing sales due to having full brand and product code descriptions - advised [Employee of Reseller 2] to change the tickets to the uncoded ones and monitor if this makes a difference. Advised we would send him some uncoded catalogues to give them to his customers rather than keep referring [sic] them to their website.’ See GMM-000600721 (Dar Internal Report dated 6 to 10 November 2017).

⁷⁴⁵ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.18, line 21. [Employee of Reseller 2] explained in interview that the purpose of displaying uncoded catalogues in store was to reduce the number of customers coming into the store and obtaining advice from [Reseller 2] staff, not making a purchase and then looking for a cheaper price online (transcript p.18, lines 25-26, and p.19, line 1).

⁷⁴⁶ Following a further visit to [Reseller 2] on 13 December 2017, [Dar Employee] noted, ‘[...] They had changed all the price tags to uncoded on the Dar displays so I asked if they had noticed a difference in sales which [Employee of Reseller 2] was still negative about saying customers still taking photos and walking out. [...]’ GMM-000600731 (Dar Internal Report dated 11 to 15 December 2017).

⁷⁴⁷ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.19, lines 16-26, and p.20, lines 1-4.

⁷⁴⁸ GMM-000601960 (Response dated 25 October 2021 to the Second [Reseller 2] Section 26 Notice (GMM-000601842)), response to question 7.

⁷⁴⁹ See for example GMM-000600826 (Dar Internal Report dated 6 to 12 May 2019), GMM-000600795 (Dar Internal Report dated 10 to 16 June 2019) and GMM-000600800 (Dar Internal Report dated 29 July to 4 August 2019).

⁷⁵⁰ GMM-000600789 (Internal Dar email from [Dar Employee] to [Dar Employee] dated 27 January 2017) and attachment GMM-000600792 (Internal Dar document), ‘Show visitors NEC 2017’.

- 4.152 In February 2017, [Dar Employee] reported that she had spoken to [Employee of Reseller 2] and [Employee of Reseller 2] again and that they were, 'Still feeling very down and despondant [sic]. Just hoping that something magical happens at the end of the month.'⁷⁵¹
- 4.153 In March 2017, [Dar Employee] reported that she had visited the [Reseller 2] showroom and spoken to [Employee of Reseller 2]: '[...] They are very pleased about the recent latter [sic] and we confirmed that our products are not being sold through the [Reseller] website. [...]'^{752 753}
- 4.154 In the months leading up to the introduction of the David Hunt SDA, Dar Internal Reports refer to a discussion between [Reseller 2] and [Dar Senior Employee],⁷⁵⁴ and suggest that [Reseller 2] was feeling more positive about its business outlook. The CMA has seen no further record of this discussion.
- 4.155 In June 2017, [Dar Employee] reported that she had spoken to [Employee of Reseller 2] at [Reseller 2] and that '[Employee of Reseller 2]'⁷⁵⁵ was happier after conversation with [Dar Senior Employee] and we discussed that there may be some changes to make to the David Hunt area once we know what the plans are.'⁷⁵⁶
- 4.156 In July 2017, [Dar Employee] reported on a meeting with [Employee of Reseller 2] and [Dar Senior Employee] stating, 'summary sent to you by email.'⁷⁵⁷

SDAs

- 4.157 [Reseller 2's] relationship with Dar for much of the Relevant Period was based on SDAs for all of the Relevant Products (in the case of DHL products, since 1 August 2017 and, in the case of dār lighting products, since 1 August 2018, both continuing beyond the end of the Relevant Period). As noted above, neither the SDAs nor any other written contractual agreement between Dar and [Reseller 2] in the CMA's possession expressly mention the restrictions which formed the basis of the Dar Pricing Policy.

⁷⁵¹ GMM-000600940 (Dar Internal Report dated 6 to 10 February 2017).

⁷⁵² GMM-000600956 (Dar Internal Report dated 6 to 10 March 2017).

⁷⁵³ The CMA infers that this relates to a letter that Dar sent to Resellers in February 2017 to reiterate its ban on selling Relevant Products through third party websites: GMM-00000180 (Letter from Dar to Resellers dated 24 February 2017).

⁷⁵⁴ GMM-000600957 (Dar Internal Report dated 15 to 19 May 2017).

⁷⁵⁵ The CMA is not aware of a [X] having worked at [Reseller 2] during the Relevant Period and therefore infers that this might have been written in error and intended to refer to [Employee of Reseller 2].

⁷⁵⁶ GMM-000600949 (Dar Internal Report dated 12 to 16 June 2017).

⁷⁵⁷ GMM-000600957 (Dar Internal Report dated 15 to 19 May 2017).

[Reseller 2's] agreement with the Dar Pricing Policy

- 4.158 The CMA finds that Dar entered into an agreement and/or concerted practice with [Reseller 2] that [Reseller 2] would not advertise or sell David Hunt Products or Volume 2 Products online below the Minimum Price during the Relevant Period.
- 4.159 This was based on the joint understanding that the Dar Pricing Policy as it related to David Hunt Products and Volume 2 Products applied to the vast majority of Dar's Resellers, and that Dar would take steps to ensure that other Resellers of the Relevant Products also maintained their prices at or above the Minimum Price. To this end, [Reseller 2] would monitor other Resellers' prices of Relevant Products during the Relevant Period and report those advertising below the Minimum Price to Dar in the expectation that Dar would either contact such Resellers and instruct them to revert to the Minimum Price or permit [Reseller 2] to discount below the Minimum Price.
- 4.160 Furthermore, while individuals involved in the management of [Reseller 2] told the CMA they never read the SDAs,⁷⁵⁸ they were led to believe by individuals at Dar, and hence understood, that [Reseller 2] was bound by the Dar Pricing Policy in relation to David Hunt and Volume 2 Products as a result of having signed the relevant SDAs.
- 4.161 The CMA finds that the agreement and/or concerted practice between Dar and [Reseller 2] lasted from 1 August 2017, being the date of the DHL SDA between Dar and [Reseller 2], to 27 March 2019.

Evidence of [Reseller 2's] understanding of the Dar Pricing Policy

- 4.162 [Reseller 2] stated, in response to the First [Reseller 2] Section 26 Notice, that it was required to advertise and/or sell David Hunt Products and Volume 2 Products in accordance with the Dar Pricing Policy, i.e. at a price no lower than 'list price',⁷⁵⁹ which [Employee of Reseller 2] clarified in interview meant the RRP excluding VAT.⁷⁶⁰ [Reseller 2] wrote in its response to the First [Reseller 2] Section 26 Notice that Dar instructed it not to sell David Hunt Products and Volume 2 Products below list price orally, 'Whenever we discounted a product online at over list price.'⁷⁶¹

[Reseller 2] understood that it was bound by the Dar Pricing Policy as a result of having signed the SDAs

⁷⁵⁸ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.28, lines 8-10; p.32, lines 12, 15-16; and p.71, line 12.

⁷⁵⁹ GMM-000600491 (Response dated 12 May 2021 to the First [Reseller 2] Section 26 Notice), response to question 5.

⁷⁶⁰ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.56, lines 14-15.

⁷⁶¹ GMM-000600491 (Response dated 12 May 2021 to the Section 26 Notice to [Reseller 2] dated 5 May 2021), response to question 7.

4.163 [Employee of Reseller 2] told the CMA in interview that, while he had never read the SDAs,⁷⁶² he understood the restrictions on discounting David Hunt and Volume 2 Products were linked to the SDAs:

'Because previously we'd sold at what price we thought was a fair price for the product. **And once the newer agreements came in, it seemed to be that you couldn't discount as heavily. And that's basically what was suggested was in the agreement.**'⁷⁶³

[...]

'2017, that it ... it's ... it was -- it was asking you to stop discounting, stop devaluing the products.'⁷⁶⁴

[...]

'[...] it was just an ongoing thing. "Why, why is it being discounted? Why, why, why? Why is it so you discount so heavily?"'⁷⁶⁵

'[...] It, it was in with the agreement, because **that's what we were told. "Volume 2, David Hunt, can't sell for less than this. This is what the agreement says." So ... that's what we signed and that's what we did**'⁷⁶⁶

(Emphasis added.)

4.164 [Employee of Reseller 2] told the CMA, in response to a Section 26 notice issued to him in his personal capacity, that he understood that adhering to the Minimum Price was a condition of the agreement by which Dar granted [Reseller 2] the right to use the product images for Volume 2 Products: 'We was told if we discounted products from this new catalogue after signing the agreement to use the images we would have our account stopped.'⁷⁶⁷

4.165 In interview, [Employee of Reseller 2] elaborated on this further: '[Dar Senior Employee] pointed out that, "Look, you've got to go with these rules of this -- the prices that I'm saying to you", and that's when we, we got the images off him and asked him for the sheets. And then we had other people selling for less, and I'm

⁷⁶² GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.28, lines 8-10; p.32, lines 12, 15-16; and p.71, line 12.

⁷⁶³ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.32, lines 5-8.

⁷⁶⁴ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.33, lines 23-25.

⁷⁶⁵ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.34, lines 10-11.

⁷⁶⁶ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.46, line 26 to p.47, line 3.

⁷⁶⁷ GMM-000600479 (Response dated 11 May 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 5 May 2021), response to question 10.

saying, “Look, I’ve, I’ve done this. Why are you allowing them to sell for bigger discounts and, and I can’t?” And he said, “That’s in the agreement”.⁷⁶⁸

- 4.166 [Employee of Reseller 2] also stated that he felt the SDA was a case of ‘This is this year’s agreement. You’ve got to [...] sign it to keep the supply going.’ He confirmed that if he did not sign the SDA, he ‘wouldn’t be able to have the images [...] to sell online’ and added that the SDAs ‘possibly changed the [...] relationship’ between Dar and [Reseller 2]. [Employee of Reseller 2] further added that images provided by Dar by virtue of [Reseller 2] having signed the SDA, and which [Reseller 2] could use on their website to advertise Relevant Products, had to be specifically requested from Dar, as they were not ‘automatically sent out, so I’m presuming that they wanted you to play ball if you [...] got the images’.⁷⁶⁹
- 4.167 The CMA considers that [Reseller 2] feared not being able to use the images and so sell Relevant Products covered by the SDAs, as it had construed its ability to receive or use images from Dar as conditional on ‘playing ball’. The CMA considers this was one of the reasons why [Reseller 2] continued to comply with the Dar Pricing Policy.

Communications between Dar and [Reseller 2] relating to [Reseller 2’s] adherence to the Dar Pricing Policy

- 4.168 The response from [Reseller 2] to the CMA’s First [Reseller 2] Section 26 Notice referred to communications from Dar with ‘[Dar Senior Employee], [Dar Employee] [the CMA notes from the Dar Internal Reports this is a reference to [Dar Employee], as confirmed by [Employee of Reseller 2] in interview] and [Dar Employee] (David Hunt Rep) [the CMA notes from the Dar Internal Reports this is a reference to [Dar Employee], as confirmed by [Employee of Reseller 2] in interview].’⁷⁷⁰
- 4.169 As noted above, [Reseller 2] told the CMA in its response to the First [Reseller 2] Section 26 Notice that Dar had instructed it not to sell David Hunt Products and Volume 2 Products below list price ‘orally’.⁷⁷¹
- 4.170 [Dar Senior Employee] told the CMA in a response to the Section 26 Notice dated 15 July 2021 addressed to him personally that he corresponded with [Employee of Reseller 2] during the Relevant Period through various means: telephone call, WhatsApp, SMS and email, as well as meeting at a trade show.⁷⁷² A meeting that took place between [Dar Senior Employee] and [Employee of Reseller 2] at the

⁷⁶⁸ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.48, line 23 to p.49, line 2.

⁷⁶⁹ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.28, lines 7-8; p.28, line 26 to p.29, line 5; p.32, line 3; and p.71, lines 14-15.

⁷⁷⁰ GMM-000600491 (Response dated 12 May 2021 to the First [Reseller 2] Section 26 Notice), response to question 5.

⁷⁷¹ GMM-000600491 (Response dated 12 May 2021 to the First [Reseller 2] Section 26 Notice), response to question 7.

⁷⁷² GMM-000601417 (Annex 2 to response dated 6 August 2021 to the Section 26 Notice to [Dar Senior Employee] dated 15 July 2021).

NEC Lighting Show in January 2019 regarding the pricing of Volume 2 Products is discussed later in this section (see 'Discussion at the January 2019 Light Show at the NEC' below).

- 4.171 [Employee of Reseller 2] and [Employee of Reseller 2] (both [X] of [Reseller 2]) also described how discussions about the pricing of Relevant Products, including instructions to [Reseller 2] to increase prices of David Hunt and Volume 2 Products in accordance with the Dar Pricing Policy, took place during showroom visits by Dar sales representatives.
- 4.172 During a call between [Employee of Reseller 2] and the CMA, [Employee of Reseller 2] said that the Dar representatives used to visit [Reseller 2's] showroom quite frequently during the Relevant Period 'because it was [X]' and [Reseller 2] 'was quite a big customer at the time, with part of the showroom dedicated to a David Hunt Lighting display.'⁷⁷³ [Employee of Reseller 2] said that sometimes [Reseller 2] made 'mistakes on the prices shown in the showroom' but that, for the main part, the Dar reps would pull [Reseller 2] up on its retail prices on the internet, ask it to put up retail prices if they were wrong and also change its description of products, if incorrect.'⁷⁷⁴
- 4.173 [Employee of Reseller 2] explained further in interview that such oral instructions were usually given in person during visits to the [Reseller 2] showroom:
- [...] usually it would be just a visit to the showroom off either [Dar Employee] or [Dar Employee]. Just point out that our prices were lower than what they'd asked us to sell them at. On, online this is. Online. And, and all -- oh, and also to be fair, it was pointed out a few times in the showroom as well that we'd under-priced products. For the David Hunt brand more so with [Dar Employee].'⁷⁷⁵
- 4.174 [X] at [Reseller 2] and [X], [Employee of Reseller 2], confirmed [Employee of Reseller 2's] account, stating, 'to my knowledge all conversations about pricing were done orally, in person. As they're based in Banbury [X].'⁷⁷⁶
- 4.175 [Employee of Reseller 2] further explained in response to a Section 26 Notice, 'I cannot remember any specific dates, but I would say it would've been before the coronavirus pandemic hit. [Dar Employee] and/or [Dar Employee] would pop in every now and again to look at our displays or bring items to us that we could use for display. I think it was [Dar Employee] who mentioned to me about some David Hunt products that needed updating on our website, so they asked me to change

⁷⁷³ GMM-000600605 (Note of CMA call with [Employee of Reseller 2] on 18 June 2021).

⁷⁷⁴ GMM-000600605 (Note of CMA call with [Employee of Reseller 2] on 18 June 2021).

⁷⁷⁵ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.36, lines 13-21.

⁷⁷⁶ GMM-000601449 (Response dated 15 July 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 9 July 2021), response to question 13.

them to the most up to date prices, after a new pricelist was released. This could've been towards the end of 2018 or early 2019, but I cannot specifically remember. We scaled back our online presence quite heavily in 2019 I think.⁷⁷⁷

- 4.176 In addition, [Employee of Reseller 2] wrote in response to a Section 26 Notice that '[Dar Employee] did ask me on a couple of occasions to update products that had changed when a new pricelist came out,' and that these requests in respect of David Hunt were made 'Usually after a new pricelist was released, so once or twice a year.'⁷⁷⁸

Dar Internal Reports

- 4.177 The CMA has obtained copies of Dar Internal Reports that record that Dar sales representatives – initially [Dar Employee] and subsequently [Dar Employee] – made regular visits to [Reseller 2's] showroom. Examples of these Dar Internal Reports are cited above, under 'Background: [Reseller 2's] relationship with Dar'. The Dar Internal Reports seen by the CMA indicate that Dar visited or otherwise spoke to [Reseller 2] staff on at least seven occasions in 2017 (usually [Dar Employee] and/or [Dar Employee] speaking to [Employee of Reseller 2] and/or [Employee of Reseller 2], although there are also two records of meetings involving [Dar Senior Employee]);⁷⁷⁹ on at least eleven occasions in 2018 (usually involving [Dar Employee] and/or [Dar Employee] for Dar and, from [Reseller 2], [Employee of Reseller 2], [Employee of Reseller 2], [Employee of Reseller 2] and/or [Employee of Reseller 2]);⁷⁸⁰ and on at least six occasions in 2019 (all involving [Dar Employee] visiting [Reseller 2] and speaking to one or more of [Employee of Reseller 2], [Employee of Reseller 2], [Employee of Reseller 2], [Employee of Reseller 2] or [Employee of Reseller 2] [likely [Employee of Reseller 2]]⁷⁸¹).⁷⁸² The CMA notes how this supports what [Employee of Reseller 2] said to the CMA above when he stated Dar representatives used to visit [Reseller 2's] showroom quite frequently.⁷⁸³

- 4.178 While the Dar Internal Reports seen by the CMA refer to only two visits by [Dar Employee] to [Reseller 2] in 2020, in January and February,⁷⁸⁴ the CMA notes that

⁷⁷⁷ GMM-000601449 (Response dated 15 July 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 9 July 2021), response to question 6.

⁷⁷⁸ GMM-000601449 (Response dated 15 July 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 9 July 2021), response to questions 7 and 8.

⁷⁷⁹ GMM-000600943, GMM-000600789, GMM-000600956, GMM-000600949, GMM-000600957, GMM-000600721, GMM-000600731 (Various Dar Internal Reports).

⁷⁸⁰ GMM-000600735, GMM-000600739, GMM-000600743, GMM-000600743, GMM-000600763, GMM-000601403, GMM-000600550, GMM-000600779, GMM-000600916, GMM-000600680 and GMM-000600703 (Various Dar Internal Reports).

⁷⁸¹ Based on staff details provided by [Reseller 2], the CMA is not aware of any individuals working at [Reseller 2] during the relevant period named [Employee of Reseller 2].

⁷⁸² GMM-000600803, GMM-000600877, GMM-000600826, GMM-000600795, GMM-000600800, GMM-000336432 (Various Dar Internal Reports).

⁷⁸³ GMM-000600605 (Note of CMA call with [Employee of Reseller 2] on 18 June 2021).

⁷⁸⁴ GMM-000600671, GMM-000600886 (Various Dar Internal Reports).

according to Dar, Dar Internal Reports ceased to be compiled after February 2020, when the impact of the Coronavirus (COVID-19) pandemic started to limit activity and contact with Resellers.⁷⁸⁵ Further, the CMA notes that both [Dar Employee] and [Dar Employee] were placed on furlough by Dar in 2020 and subsequently left Dar at the end of June 2020 and on 21 August 2020 respectively.⁷⁸⁶ This was further confirmed by a WhatsApp message from [Dar Senior Employee] to [Employee of Reseller 2] dated 13 August 2020, when he confirmed that he was taking over the [Reseller 2] account.⁷⁸⁷

- 4.179 Only one such Dar Internal Report from the Relevant Period relating to [Reseller 2] included an explicit mention of pricing of Relevant Products. [Dar Employee] reported that she had visited [Reseller 2] on 23 August 2019 and, 'Spoke with [Employee of Reseller 2] [likely [Employee of Reseller 2]] & [Employee of Reseller 2] and went through terms letter/target. [Employee of Reseller 2] [likely [Employee of Reseller 2]] asked for spreadsheet asap re price increase to start working on it.'⁷⁸⁸
- 4.180 It also appears from these Dar Internal Reports that Dar carried out checks on [Reseller 2's] and other David Hunt resellers' websites to verify whether they were compliant with the David Hunt SDA. For example, a report by [Dar Employee] of a check she carried out on [Reseller 2's] website on 10 June 2019 and a subsequent discussion she had with [Employee of Reseller 2] read: 'Update in Sept Advised [Employee of Reseller 2] of website changes required to meet SDA 10.06.19'.⁷⁸⁹ A related spreadsheet apparently completed by [Dar Employee] on 10 June 2019 records various comments on [Reseller 2's] website unrelated to pricing.⁷⁹⁰
- 4.181 As noted above, the witness evidence from [Employee of Reseller 2] and [Employee of Reseller 2's] response to a Section 26 Notice addressed to him personally shows that showroom visits were commonly used to discuss the implementation of the Dar Pricing Policy. The Dar Internal Reports confirm that such showroom visits took place regularly during the Relevant Period. While the reports rarely mention pricing, that does not in the CMA's view undermine such evidence but is consistent with the CMA's findings that Dar operated a culture of concealment such that its staff would generally avoid creating potentially incriminating written records related to the Dar Pricing Policy (see 'Dar's culture of concealment' in Section 3 above).

⁷⁸⁵ GMM-000601424 (Response dated 30 July 2021 to the Second Dar Section 26 Notice), response to question 6.

⁷⁸⁶ GMM-000601424 (Response dated 30 July 2021 to the Second Dar Section 26 Notice), response to question 30.

⁷⁸⁷ GMM-000177102 (WhatsApp conversation between [Dar Senior Employee] and [Employee of Reseller 2] dated 13 August 2020).

⁷⁸⁸ [Employee of Reseller 2] did not recall if he was a witness to this conversation. See GMM-000601449 (Response dated 15 July 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 9 July 2021), response to question 4.

⁷⁸⁹ GMM-000600550 (Dar Internal Report dated 14 June 2019).

⁷⁹⁰ GMM-000600555 (Internal Dar Excel spreadsheet dated 10 June 2019), '[Reseller 2] Website SDA Requirements'.

4.182 The CMA therefore finds that these regular showroom visits were occasions where the implementation of the Dar Pricing Policy was discussed and agreed between Dar and [Reseller 2] from time to time.

Discussion at the January 2019 Light Show at the NEC

4.183 [Employee of Reseller 2] told the CMA that he met [Dar Senior Employee] in late January 2019 in the margins of the Light Show at the NEC. [Employee of Reseller 2] said that during that meeting, he was told that he would receive the product images required to sell Volume 2 Products online on the condition that he agreed to sell those products at a Minimum Price of RRP excluding VAT.⁷⁹¹

4.184 [Dar Senior Employee] presented a different recollection of that meeting. He told the CMA in interview:

[S] Er, and I said to him, ... “Why don't you focus on -- rather than complaining, focus on where you can make money -- where you can, er ... where there's margin opportunity for you.” ... I told him I didn't think that, er, the -- our new products were being discounted as much as the old products.’⁷⁹²

4.185 [Dar Senior Employee] appears to have sent the product images to [Employee of Reseller 2] on or around 29 January 2019.⁷⁹³

4.186 [Employee of Reseller 2] further recalls a specific discussion with [Dar Senior Employee] at the same NEC Light Show during which [Dar Senior Employee] asked [Employee of Reseller 2] to send him links to Resellers’ websites that were not complying with the Minimum Price for Volume 2 Products. [Employee of Reseller 2] told the CMA in interview that the essence of the conversation with [Dar Senior Employee] was ‘everyone's holding these prices and that's what they are, and if you don't – if you see somebody that's not, send me the link’.⁷⁹⁴

4.187 [Dar Senior Employee] maintains that [Employee of Reseller 2] sent the links on his own initiative: ‘Er, he then went away, er, and, basically, er, then communicated with me and told me that I was a liar, er, by saying that the communication -- that, “What you've told me is incorrect”, er, and ... that, “Here's a selection of products that aren't”.’⁷⁹⁵

⁷⁹¹ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), pp. 69-71.

⁷⁹² GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.128, lines 17-25.

⁷⁹³ GMM-000155846 (WhatsApp conversation between [Dar Senior Employee] and [Employee of Reseller 2] dated 28 January to 27 March 2019). [Employee of Reseller 2's] message of 29 January 2019 at 15:42 read, ‘Got the images thanks As. Did you add the spec sheet?’

⁷⁹⁴ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.84, lines 2-3.

⁷⁹⁵ GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.128, line 26 to p.129, line 3.

[Reseller 2's] adherence to the Dar Pricing Policy

4.188 In interview with the CMA, [Employee of Reseller 2] explained that [Reseller 2] generally advertised David Hunt Products and Volume 2 Products at the Dar list price, meaning the RRP excluding VAT listed in Dar's price lists,⁷⁹⁶ in accordance with the Dar Pricing Policy. As a result, [Reseller 2] advertised David Hunt Products and Volume 2 Products with a lower discount than other Relevant Products supplied by [Reseller 2]:

'on the David Hunt, we used to discount without the VAT. So basically 17%. And the Där products, I think it was about 20%'⁷⁹⁷

'we never got to the point of, of saying, "No. I'm going to discount more." We just toed the line'⁷⁹⁸

4.189 When asked whether [Reseller 2] would have discounted David Hunt Products and Volume 2 Products further but for the Dar Pricing Policy, [Employee of Reseller 2] confirmed that was the case, and explained that [Reseller 2] had applied bigger discounts in the past, and in relation to other lighting products:

'Yes. And, and we did in, in other -- in other products.'⁷⁹⁹

'Yes, because we, we had done that in the past.'⁸⁰⁰

4.190 [Employee of Reseller 2] explained, 'when we was questioned on possibly Volume 2 and David Hunt, I think we're talking about really, they were really strict on you keeping to that price. The full RRP and it was -- it was told you can sell without VAT, which is when I suppose it started to get awkward.'⁸⁰¹

4.191 [Employee of Reseller 2] told the CMA in interview that he considered that he had to comply with such requests.⁸⁰² Dar was a major part of [Reseller 2's] business at the time and he could not afford to lose its business.⁸⁰³

4.192 [Employee of Reseller 2] also stated that these requests related to all Brands of Relevant Products stocked by [Reseller 2]. He added that Dar issued 'an annual price increase once a year' and would occasionally look at [Reseller 2's] prices

⁷⁹⁶ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.39, line 13.

⁷⁹⁷ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.41, lines 1-2.

⁷⁹⁸ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.46, lines 19-24.

⁷⁹⁹ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.49, lines 14-15.

⁸⁰⁰ GMM-000601993 (Transcript of interview with Senior [Employee of Reseller 2] on 14 September 2021), p.94, line 8.

⁸⁰¹ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.44, lines 15-22.

⁸⁰² GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.72, lines 15-25 and p.94, lines 15-25.

⁸⁰³ GMM-000600605 (Note of call with [Employee of Reseller 2] on 18 June 2021).

online and make comments along the lines of ‘You haven’t put your prices up to the new price list’.⁸⁰⁴

- 4.193 [Employee of Reseller 2] clarified in interview that the instructions from Dar were not limited to annual price increases but that ‘if we’d made a mistake on pricing online, or, or, or I think I say in there a description or the wrong – a bad image or something like that. It was just “Put it right”.’ [Employee of Reseller 2] said that ‘in their [Dar’s] eyes’ there was little distinction between mistakenly listing the wrong price online and intentionally discounting below the Minimum Price specified by Dar: ‘if I’ve made a mistake or I’ve over discounted it because I wanted to, it’s the wrong price.’⁸⁰⁵

[Reseller 2] complaining about other Resellers discounting contrary to the Dar Pricing Policy

[Reseller 2]

- 4.194 Following the meeting with [Dar Senior Employee] at the NEC Lighting Show, [Employee of Reseller 2] sent various emails to [Dar Senior Employee] containing links to other Resellers’ websites.
- 4.195 It appears that [Employee of Reseller 2] sent the first such weblink to [Dar Senior Employee] soon after receiving the product images, on 30 January 2019:

‘2019-01-30 16:13 [Employee of Reseller 2]: Just sending you a link to your email

2019-01-30 16:46 [Dar Senior Employee]: Just in a meeting but I got it. Leave it with me

2019-01-30 16:47 [Employee of Reseller 2] Ok thanks [Dar Senior Employee]’.⁸⁰⁶

- 4.196 That link was to [Reseller’s] website, under cover of an email titled ‘New Products’.⁸⁰⁷ In interview, [Employee of Reseller 2] confirmed that the Relevant Product concerned was the Där hexagon three-light pack bar, with the product code HEX0322,⁸⁰⁸ a Volume 2 Product.⁸⁰⁹ [Employee of Reseller 2] explained, ‘it would have been a link I’ve sent to [Dar Senior Employee] as an example of

⁸⁰⁴ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.92, lines 16-20 and 24-25.

⁸⁰⁵ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.93, lines 16-17.

⁸⁰⁶ GMM-000155846 (WhatsApp conversation between [Dar Senior Employee] and [Employee of Reseller 2] dated 28 January to 27 March 2019), messages dated 30 January 2019.

⁸⁰⁷ GMM-000601548 (Email from [Reseller 2] to [Dar Senior Employee] dated 30 January 2019).

⁸⁰⁸ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.82, lines 6-7.

⁸⁰⁹ GMM-000598217 (STERLING MASTER LIGHTING BOOK WISEBUYS PRICE LIST EFFECTIVE 25.9.20.xlsx, tab ‘LIGHTING BOOK - volume 2’).

somebody selling this new product in the Där Lighting Book 2 at a discounted price, which we're not allowed to compete with.'⁸¹⁰

- 4.197 The CMA considers that by writing, 'Leave it with me,' [Dar Senior Employee] was indicating that he would take some action in response to [Employee of Reseller 2's] email.

[Reseller] and [Reseller]

- 4.198 On 13 February 2019, [Employee of Reseller 2] sent two further weblinks to [Dar Senior Employee] by email, one to [Reseller 2] (apparently to a shopping page filtered by product type 'crystal') and one to [Reseller's] website (a product page for a Crystal 18-light ceiling pendant with product code CRY1850).⁸¹¹ The CRY1850 was a Volume 2 Product, along with the only two other Crystal light fittings sold by Dar.⁸¹² It is thus clear that [Employee of Reseller 2] was alerting [Dar Senior Employee] to other Resellers' prices for Volume 2 Products.

[Reseller 1] and [Reseller]

[Reseller 1] February 2019

- 4.199 On 20 February 2019 at 14:53 [Employee of Reseller 2] sent [Dar Senior Employee] a weblink to [Reseller 1's] website by email headed 'new lighting'.⁸¹³ At 14:58 he sent a further email headed 'new lights' that included four further weblinks to [Reseller 1's] website, together with the comment, 'and many more...'.⁸¹⁴
- 4.200 In interview [Employee of Reseller 2] confirmed that 'new lights' referred to Volume 2 Products. He explained:

'what I'm saying here is, "Look, this is the new Book 2. We've bought these products. We've put them online. We've put them in our showroom. We've adhered to what you've and this is an example of someone else who hasn't adhered to it, and ..." And as the answer with everything else is, "Why ... are they allowed to do it and we're not?"'⁸¹⁵

- 4.201 At 15:01 on the same day, apparently in response to [Employee of Reseller 2's] emails, [Dar Senior Employee] sent a WhatsApp message to [Employee of

⁸¹⁰ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.82, lines 16-19.

⁸¹¹ GMM-000601549 (Email from [Reseller 2] to [Dar Senior Employee] dated 13 February 2019).

⁸¹² GMM-000598217 (STERLING MASTER LIGHTING BOOK WISEBUYS PRICE LIST EFFECTIVE 25.9.20.xlsx, tab 'LIGHTING BOOK - volume 2'). No 'Crystal' light fittings appear in the tab 'LIGHTING BOOK - volume 1'.

⁸¹³ GMM-000601550 (Email from [Reseller 2] to [Dar Senior Employee] dated 20 February 2019).

⁸¹⁴ GMM-000601551 (Email from [Reseller 2] to [Dar Senior Employee] dated 20 February 2019).

⁸¹⁵ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.83, lines 14-19.

Reseller 2] stating, 'I'm already dealing with it. There is a new account manager there and the info has not been exchanged. I'm on it I promise'.⁸¹⁶

4.202 The CMA considers that, in contacting [Dar Senior Employee] in this way, [Employee of Reseller 2] was expecting [Dar Senior Employee] to contact [Reseller 1] and instruct it to revert to the Minimum Price; and that [Dar Senior Employee]'s response indicated that he would do so. [Employee of Reseller 2's] expectation is borne out by the evidence below⁸¹⁷ and the CMA notes [Dar Senior Employee]'s subsequent confirmation that [Reseller 1] actually reverted to the Minimum Price following his instruction to do so and accordingly continued to adhere to the Dar Pricing Policy.

[Reseller] *February 2019*

4.203 On 20 February 2019 at 15:02 [Employee of Reseller 2] wrote, 'Ok thanks [Dar Senior Employee] just [Reseller] then'. At 15:15 [Dar Senior Employee] replied, 'They should be sorted', to which [Employee of Reseller 2] replied, 'Not yet [Dar Senior Employee]'.⁸¹⁸

4.204 In a Section 26 response, [Employee of Reseller 2] explained, 'This is the same as above, why are others allowed to discount and we wasn't'.⁸¹⁹ 'We felt we were being threatened with our account being closed if we discounted but other resellers still able to sell at discounted prices. This relates to [Reseller] selling discounted Dar products but we wasn't allowed to without risking our account being closed.'⁸²⁰

4.205 [Employee of Reseller 2] told the CMA in interview that he understood [Dar Senior Employee]'s statement 'They should be sorted' as meaning 'I would say that they've put their price back to what everyone was told to sell at'.⁸²¹

4.206 [Dar Senior Employee] explained in interview that [Employee of Reseller 2's] complaint had been about the fact that [Reseller] was selling David Hunt Products after it had lost distribution rights for those products. He said that 'They should be sorted' meant David Hunt Products 'coming off the [Reseller] home page'.⁸²²

4.207 [Dar Senior Employee]'s account is at odds with [Employee of Reseller 2's] explanation. It is also at odds with contemporaneous evidence showing that [Dar

⁸¹⁶ GMM-000155846 (WhatsApp conversation between [Dar Senior Employee] and [Employee of Reseller 2] dated 28 January to 27 March 2019), messages dated 20 February 2019.

⁸¹⁷ See also paragraphs under '20 February 2019: 200 Dar products removed from sale for 9-13 days' above.

⁸¹⁸ GMM-000155846 (WhatsApp conversation between [Dar Senior Employee] and [Employee of Reseller 2] dated 28 January to 27 March 2019), messages dated 20 February 2019.

⁸¹⁹ GMM-000600479 (Response dated 11 May 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 5 May 2021), response to question 2(d).

⁸²⁰ GMM-000600479 (Response dated 11 May 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 5 May 2021), response to question 2(e).

⁸²¹ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.61, lines 10-11.

⁸²² GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), pp.140-141.

Employee] had contacted [Reseller] about its pricing of Volume 2 Products in January 2019, following which [Dar Employee] sent a message to [Dar Senior Employee] on 31 January stating, 'they will have it done by Monday' (see above in Section 3). The CMA infers that this was the reason why [Dar Senior Employee] subsequently informed [Employee of Reseller 2] that 'They should be sorted' and is consistent with [Employee of Reseller 2's] understanding.

4.208 Further evidence shows that [Dar Employee] contacted [Reseller] again on 28 February 2019, eight days after [Employee of Reseller 2's] correspondence with [Dar Senior Employee], apparently asking [Reseller] to revert to the Minimum Price for a Volume 2 Product (see 'February 2019: (CRY1250, Volume 2) - [Reseller] above in Section 3).

[Reseller 1] March 2019

4.209 On 13 March 2019 at 15:56 [Employee of Reseller 2] sent a WhatsApp message to [Dar Senior Employee] asking, 'did you get to speak to [Reseller 1]?' [Dar Senior Employee] replied a few minutes later stating, 'Yes should be sorted ??'. At 15:57 [Employee of Reseller 2] replied, '4 our [sic] of 5 we looked at aren't [Dar Senior Employee]'. At 15:58 [Dar Senior Employee] wrote, 'Can you send me some codes'. At 16:01 [Employee of Reseller 2] replied, 'Tyo0108 gai0150 jam0539 zya5450 azi0135 . Probably more though [Dar Senior Employee]'.⁸²³

4.210 In a Section 26 response dated 11 May 2021, [Employee of Reseller 2] explained, 'I think this is again Dar allowing other companies to discount and we wasn't. I think this would have been a price check I made to show as an example that other companies were given preferential treatment and not threatened into changing prices. These are Dar Lighting Book 2 products that we were told we could not discount but I could see others being able too. Again I felt unfairly treated and used these to proof our point.'⁸²⁴

4.211 On 27 March 2019 at 20:21 [Dar Senior Employee] wrote, "Sorry I have not got back to you. It shouldal [sic] be sorted a couple of weeks ago".⁸²⁵ [Employee of Reseller 2] explained in his Section 26 response, 'I wanted to know why we were still unable to discount and I take it from this response other companies had treated in the same manner I had.' When asked to elaborate on his written response in interview, [Employee of Reseller 2] explained that 'what I, I presume that means is that they should have been told to put their prices to the same price as everybody

⁸²³ GMM-000155846 (WhatsApp conversation between [Dar Senior Employee] and [Employee of Reseller 2] dated 28 January to 27 March 2019), messages dated 13 March 2019.

⁸²⁴ GMM-000600479 (Response dated 11 May 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 5 May 2021), response to question 2.

⁸²⁵ GMM-000155846 (WhatsApp conversation between [Dar Senior Employee] and [Employee of Reseller 2] dated 28 January to 27 March 2019), message dated 27 March 2019.

else has been told to resell at. So I guess [...] that's what he means by "should be sorted".'⁸²⁶

The vast majority of Resellers were selling Volume 2 Products at the list price

4.212 [Employee of Reseller 2] told the CMA in interview that at that time he observed that some 95% of Resellers were selling Volume 2 Products at the list price (ie RRP excluding VAT).⁸²⁷ He explained, 'We ... played ball and then we complained when other people didn't but, as I say, I'm just a [X]. [...] Also everybody was selling it – 95% of other people were selling at those prices – so we, we just thought, "Well, that's the agreement", so we just went with it.'⁸²⁸

4.213 This observation by [Employee of Reseller 2] was consistent with the findings from [Reseller's] contemporaneous price monitoring exercise in August 2019 (see paragraphs 3.188 to 3.189 above):

4.213.1 In an internal [Reseller] email on 13 August 2019, [Employee of Reseller] wrote to [Employee of Reseller], 'Looking at them thus far, the normal selling lines have some big variations on, but the new lines I've checked thus far have all been fairly consistent. There's only 4 or 5 different retailers on google shopping with them including us, but they do seem to be toeing the line price wise. Us, [Reseller], [Reseller], [Reseller] and [Reseller 2]. I'll keep plodding through it tomorrow. [...]'⁸²⁹

4.213.2 In response [Employee of Reseller] stated on 13 August 2019, '[...], there is no criteria as to what we can sell the new lines for⁸³⁰ but it appears everyone has just followed us and put at list price, I am amazed no-one has gone lower but all that does is create a race to the bottom. There are quite a few more who stock the Dar new lines who don't use Google shopping.'⁸³¹

4.213.3 On 13 August 2019 [Employee of Reseller] replied to [Employee of Reseller], 'I'll have a check through some of the usual suspects and add them in. On Google, [Reseller 2] is one that comes up with the new lines on Google shopping, but not so much with the regular lines.'⁸³²

⁸²⁶ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.65, lines 11-17.

⁸²⁷ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.58, line 1.

⁸²⁸ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), pp. 71-72.

⁸²⁹ GMM-00000287 (Internal [Employee of Reseller] email chain between [Employee of Reseller] to [Employee of Reseller] dated 13 August 2019).

⁸³⁰ See paragraph 3.376 and footnote 288.

⁸³¹ GMM-00000288 (Internal [Employee of Reseller] email chain between [Employee of Reseller] to [Employee of Reseller] dated 13 August 2019).

⁸³² GMM-00000288 (Internal [Employee of Reseller] email chain between [Employee of Reseller] to [Employee of Reseller] dated 13 August 2019).

[Reseller 2] scaled back but did not end its online presence

- 4.214 In 2018 [Reseller 2] continued to be frustrated by what it saw as unfair online competition engendered by the continued unfair enforcement of the Dar Pricing Policy by Dar.
- 4.215 In a Dar Internal Report, [Dar Employee] recorded that she had spoken to [Employee of Reseller 2] and [Employee of Reseller 2] on 13 June 2018 ‘at length [...] re market conditions & ways to compete. Discussed rebate and unfairness as they have stopped selling online and get penalized with no rebate as not hit target.’⁸³³
- 4.216 In further Dar Internal Reports, [Dar Employee] recorded that she visited [Reseller 2] again in September and November 2018:
- 4.216.1 On 11 September 2018: ‘[...] Spoke to [Employee of Reseller 2] & [Employee of Reseller 2] about rebate for last year with sales down due to no longer trading on the internet. Discussed SDA and future benefits.’⁸³⁴
- 4.216.2 On 28 November 2018: ‘[...] Advised YTD figs and target - up on last year. Confirmed rebate for 17/18 received. [Employee of Reseller 2] said since taking unknown/higher end brands his turnover had doubled. The new [X] showroom is paying off. Had lost £[X] since withdrawing from the internet including investment in showroom. [...]’⁸³⁵
- 4.217 However, there appears to have been some confusion as to whether [Reseller 2] stopped selling Relevant Products online in 2018. Clearly, Dar’s sales representative had this impression (see above). However, having checked its records, [Reseller 2] has confirmed in its response to the Second [Reseller 2] Section 26 Notice that this was not the case and that, while it scaled back its sale of Relevant Products online during 2018 and then again in 2019, it did not stop selling Relevant Products online entirely at any time during the Relevant Period.⁸³⁶
- 4.218 While [Reseller 2] decided to reduce its online range of Dar products in 2018, the evidence discussed earlier in this section shows that [Employee of Reseller 2] then decided to stock Volume 2 Products online on the strength of [Dar Senior

⁸³³ GMM-000600779 (Dar Internal Report dated 11 to 15 June 2018).

⁸³⁴ GMM-000600680 (Dar Internal Report dated 10 to 13 September 2018).

⁸³⁵ GMM-000600703 (Dar Internal Report dated 26 to 30 November 2018).

⁸³⁶ GMM-000601960 (Response dated 25 October 2021 to the Second [Reseller 2] Section 26 Notice (GMM-000601842)), response to questions 1 and 6. In addition, [Employee of Reseller 2] stated, ‘We always had a lot more products online compared to instore. But then we scaled back our online products a couple of years ago.’ See GMM-000601449 (Response dated 15 July 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 9 July 2021), response to question 11.

Employee's] assurances that Resellers in general would follow the Dar Pricing Policy in respect of Volume 2 Products.

4.219 However, [Employee of Reseller 2] subsequently became disillusioned by what he regarded as the unfair enforcement of the Dar Pricing Policy and reduced [Reseller 2's] range of Relevant Products online by between [X]% and [X]% in 2019.⁸³⁷ [Employee of Reseller 2] told the CMA in interview, 'I should say, after two months of going backwards and forward with various examples of other people being able to discount, or discounting online without having their accounts paused or stopped, I've just had enough. So pulled the Lighting Book 2 as well.'⁸³⁸

4.220 [Employee of Reseller 2] explained further in interview:

'I think we just, just decided to, to, to take our business more offline and just focus more on our showroom. So it probably started in, in 2018 and probably the Där Lighting Book 2, which we was told would be -- you had to sell at this price and everyone else is going to sell at that price, probably we -- I would say we probably put that online because it's a new product, and we put those new products in our showroom. And then I would say by the end of Feb -- March, we're looking at on the discussion of the Där Lighting Book 2, we just thought, "No, it's not working", so we just pulled that as well.'⁸³⁹

4.221 [Employee of Reseller 2] explained that [Reseller 2] reduced its online selection of Relevant Products in 2019 to reflect those on display in the showroom: 'I think I said just we had Där products in display in the showroom and those are the ones that we'd left on the website' [...] 'So, so, for, for example, we might have 1,000 lights on display in the showroom, but we might have 5,000 on the website, so we'd have probably took the 4,000 off if it was something like that.'⁸⁴⁰ While [Employee of Reseller 2] estimated that the range of Relevant Products for sale by [Reseller 2] online reduced by some 80-90%, [Employee of Reseller 2] described the Relevant Products retained on [Reseller 2's] website as 'steady good sellers'. [Employee of Reseller 2] estimated that [Reseller 2] only halved its turnover on Relevant Products as a result.⁸⁴¹

4.222 [Employee of Reseller 2] explained in interview that, following this change, [Reseller 2] advertised Relevant Products at list price:

⁸³⁷ See GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.17, lines 1-2. [Employee of Reseller 2] stated, '[...] 2019, it, it's when we basically took [X]% of Där products offline and off the showroom.' See also p.77, lines 16-18: 'for example, we might have 1,000 lights on display in the showroom, but we might have 5,000 on the website, so we'd have probably took the 4,000 off if it was something like that.'

⁸³⁸ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.85, lines 9-18.

⁸³⁹ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.75, lines 18-26.

⁸⁴⁰ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.77, lines 16-18.

⁸⁴¹ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.78, lines 9-10.

'we just put the prices, what they said, and we just left them there. We didn't alter it. We didn't look at what other people were saying. If someone wanted me to price match, I'd say yes or no.

[...]

When we sell instore, we -- we use the price lists and we also -- well, we just sell what we think it's worth and that's what we do. If someone asks for a discount and they want to buy a lot of things, we, we try and accommodate'⁸⁴²

- 4.223 While [Employee of Reseller 2] referred to the pricing of Relevant Products instore, it appears from his description of [Reseller 2's] business model from March 2019 that those Relevant Products would have been advertised at the same price online: 'I think what we probably did was kept the products online that we had in our showroom, so people could look when they went home -- basically sending them a link off our website to that product.'⁸⁴³
- 4.224 When asked in interview how [Reseller 2's] business relationship had changed since it implemented its new business model, [Employee of Reseller 2] stated, 'Well, it hasn't changed at all, as far as I'm concerned. We obviously don't spend as much, but that's the only change.'⁸⁴⁴
- 4.225 Also in interview, when asked about how he had linked entering the SDAs with a restriction on [Reseller 2's] ability to discount coming into force. [Employee of Reseller 2] stated that, 'sounds around the right kind of time, 2017, that it ... it's ... it was it was asking you to stop discounting, stop devaluing the products.'⁸⁴⁵ When he was asked if this was for all Brands of Relevant Products and not just DHL, [Employee of Reseller 2] explained, 'it just seems to all melt into one timescale for me. It was it was just an ongoing thing. "Why, why is it being discounted? Why, why, why? Why is it so you discount so heavily?" [Employee of Reseller 2] could not remember exact dates but said, 'It just seems to be an ongoing thing for the last four – three or four or five – years, and, and possibly after 2019, [...] it seemed that the online business was just too difficult and policed if you like. You was [sic] being told what to do all the time, [...], so we just stepped back from the internet, if you like.'⁸⁴⁶

⁸⁴² GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.88, lines 5-8 and 22-25.

⁸⁴³ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.74, lines 9-15.

⁸⁴⁴ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.78, lines 15-16.

⁸⁴⁵ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.33, lines 23-25.

⁸⁴⁶ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.34, lines 9-11 and 15-21.

4.226 Notwithstanding [Reseller 2] stepping back from the internet, the CMA notes first that [Reseller 2] confirmed that this only entailed a reduction in the number of Relevant Products sold online.⁸⁴⁷ The CMA notes second that [Reseller 2] continued to be bound by the SDAs which it understood comprised the Dar Pricing Policy (see paragraphs 4.160 and 4.163 to 4.167) at least until the end of the Relevant Period. The CMA notes third that by continuing to price Relevant Products at list price online (see paragraphs 4.222 and 4.239.1), [Reseller 2] potentially continued to comply with the Dar Pricing Policy for David Hunt and Volume 2 Products until the end of the Relevant Period.

Threat of sanctions from Dar for non-compliance with the Dar Pricing Policy and [Reseller 2's] fear of sanctions

4.227 [Reseller 2] explained that it was told about the consequences of not complying with the requests made by Dar. It wrote, '*We were told our account would go on hold unless we corrected our prices.*'⁸⁴⁸

4.228 In his response to a Section 26 notice addressed to him personally, [Employee of Reseller 2] provided information and an explanation regarding his chat conversation with [Dar Senior Employee]. The responses show both an explicit and implicit threat of sanction by Dar against [Reseller 2] if it did not adhere to the Dar Pricing Policy.⁸⁴⁹ [Employee of Reseller 2] wrote:

'At this time [early 2019] we were told not to sell any Lighting Book 2 or David Hunt products below list price. This conversation relates to other resellers discounting and why can't I discount. **We were told if we did not adhere to this policy our account would go on hold or be closed. We were told an example of this is [Reseller] who had had their account closed.**'

'**We felt we were being threatened with our account being closed** if we discounted but other resellers still able to sell at discounted prices. This relates to [Reseller] selling discounted Dar products but we wasn't [sic] allowed to without risking our account being closed.'

'Dar Lighting Book 2. We was told **if we discounted products from this new catalogue after signing the agreement to use the images we would have our account stopped.**'⁸⁵⁰

⁸⁴⁷ GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.77, lines 4-7.

⁸⁴⁸ GMM-000600491 (Response dated 12 May 2021 to the First [Reseller 2] Section 26 Notice), response to question 7.

⁸⁴⁹ GMM-000600479 (Response dated 11 May 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 5 May 2021), response to question 7.

⁸⁵⁰ GMM-000600479 (Response dated 11 May 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 5 May 2021), response to questions 2.

(Emphasis added.)

- 4.229 In interview with the CMA, [Employee of Reseller 2] clarified that [Dar Senior Employee] had not explicitly told him that [Reseller] had had its account closed due to non-compliance with the Dar Pricing Policy. He explained that '[Dar Senior Employee] was probably suggesting that [Reseller] are no longer stocking Dar products. And to be fair, you probably wouldn't voluntarily not stock Dar products if you want to be strong online.' [Employee of Reseller 2] said that he was left with the impression that [Reseller's] Dar account closure was connected to its pricing of Relevant Products.⁸⁵¹
- 4.230 The CMA considers that, whatever the reasons why [Reseller's] account was in fact closed, Dar's reference to a Reseller having its account closed in the context of instructing [Reseller 2] not to discount products amounted to a barely veiled threat of having its own account put on hold or closed in the event of unauthorised discounting by [Reseller 2].
- 4.231 [Employee of Reseller 2] told the CMA that the threat of sanctions led him to comply with pricing instructions from Dar because Dar was a major part of [Reseller 2's] business at the time (accounting for around [X]% of [Reseller 2's] sales for much of the Relevant Period)⁸⁵² and he could not afford to lose its business.
- 4.232 The CMA also notes that [Reseller 2] continued to be bound by the SDAs which it understood comprised the Dar Pricing Policy (see paragraphs 4.160 and 4.163 to 4.167) at least potentially until the end of the Relevant Period. It also understood that its use of the image rights for Relevant Products was contingent on its agreement and adherence to the Dar Pricing Policy.
- 4.233 The CMA considers that the perceived threat of Dar imposing those sanctions was very credible, since both the SDA and the terms of trade of The Lighting Book contained provisions allowing Dar to terminate the SDAs (see section on 'Dar's selective distribution agreements created an environment to support the Dar Pricing Policy') and/or remove image rights⁸⁵³ (see paragraphs 3.317 and 3.318), which would have had the effect of preventing Resellers from selling affected Relevant Products online (or at all).

⁸⁵¹ The CMA has seen evidence to suggest that other reasons were behind the closure of [Reseller's] account. See for example, GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.98, lines 11 to 14.

⁸⁵² GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.94, lines 15-25.

⁸⁵³ See GMM-000597059 (The Lighting Book, 2018-2019), p.86 or GMM-000600498 (The Lighting Book, 2019), p.77. The Lighting Book Terms of Trade - Schedule 1, Clause 15: 'the Seller may, in its absolute discretion and at any time update, amend, replace or withdraw any permission granted for the use of the Images'.

4.234 The CMA therefore concludes that the threat of sanctions was credible, as was [Reseller 2's] fear of such sanctions. This persisted throughout the Relevant Period and meant that [Reseller 2] generally complied with the Dar Pricing Policy.

[Reseller 2] monitoring other Resellers and reporting those who did not comply with the Dar Pricing Policy

4.235 [Reseller 2] told the CMA that it complained about other Resellers' retail prices 'as other retailers were selling online at larger discounted prices but we were told not to discount any more than list price. A Google shopping search was used for examples.'⁸⁵⁴ [Reseller 2] told the CMA that 'We only looked at other resellers prices when we were told to amend ours from a Dar representative.'⁸⁵⁵ It added that the monitoring was carried out online using a Google Shopping search and that the monitoring was focused on David Hunt and Volume 2 Products. [Reseller 2] said that it monitored 'No one specific just whoever showed up on Google shopping.'⁸⁵⁶

4.236 The CMA notes the five examples of [Reseller 2] sending links to other Resellers' websites by email to Dar and making further complaints about [Reseller 1] and [Reseller] on WhatsApp, referred to under 'Evidence of [Reseller 2's] understanding of the Dar Pricing Policy' above. When asked in interview what action [Employee of Reseller 2] expected or hoped [Dar Senior Employee] would take after sending him the links, [Employee of Reseller 2] replied, 'Well, I was hoping we'd be able to, er ... I can't think of the word ... be able to ... compete with them. So either we're allowed to sell at what price we want to, or they adhere to what we adhered to.'

4.237 [Employee of Reseller 2] additionally recalled [Employee of Reseller 2] complaining about other Resellers' prices in face-to-face meetings with [Dar Senior Employee]. In his personal response to the CMA's Section 26 Notice, [Employee of Reseller 2] wrote, 'I remember [Employee of Reseller 2] speaking to [Dar Senior Employee] in our shop about some online retailers selling at prices that were lower than what we could sell at, but I cannot remember specifically who or when.'⁸⁵⁷

4.238 In the CMA's view, this monitoring and reporting of other Resellers who were not pricing at the Minimum Price, too, shows that [Reseller 2] understood there to be an agreement and/or concerted practice with Dar in relation to the Dar Pricing Policy which meant that it (and other Resellers) would not advertise or sell DHL

⁸⁵⁴ GMM-000600491 (Response dated 12 May 2021 to the First [Reseller 2] Section 26 Notice), response to question 5.

⁸⁵⁵ GMM-000600491 (Response dated 12 May 2021 to the First [Reseller 2] Section 26 Notice), response to question 8.

⁸⁵⁶ GMM-000600491 (Response dated 12 May 2021 to the First [Reseller 2] Section 26 Notice), response to question 9.

⁸⁵⁷ GMM-000601449 (Response dated 15 July 2021 to the Section 26 Notice to [Employee of Reseller 2] dated 9 July 2021), response to question 6.

products or Volume 2 Relevant Products below the Minimum Price during the Relevant Period.

The CMA's findings on the agreement and/or concerted practice between Dar and [Reseller 2]

- 4.239 In view of the foregoing, while the CMA notes there is potentially evidence up until the end of the Relevant Period pointing towards [Reseller 2's] adherence to the Dar Pricing Policy, the CMA considers it should take a conservative view in this case and finds only that, between 1 August 2017 and 27 March 2019:
- 4.239.1 [Reseller 2] understood that, under the Dar Pricing Policy, it was required to set its prices for David Hunt and Volume 2 Products online not below the Minimum Prices set out within price lists issued by Dar from time to time. [Reseller 2] considered itself bound by the Dar Pricing Policy as a result of having signed the SDAs, which continued to apply throughout the Relevant Period;
- 4.239.2 Dar monitored [Reseller 2's] pricing and on occasions where [Reseller 2] was not adhering to the Dar Pricing Policy, Dar instructed [Reseller 2] to follow the Dar Pricing Policy with regard to the pricing of David Hunt and Volume 2 Products. [Reseller 2] generally complied with these instructions;
- 4.239.3 [Reseller 2] considered itself under threat of sanction, ie account closure, for non-compliance with the Dar Pricing Policy; and
- 4.239.4 On several occasions during the Relevant Period, [Reseller 2] reported other Resellers to Dar for advertising and/or selling Volume 2 Products online at a price below the Minimum Price and Dar instructed certain such Resellers to revert to the Minimum Price. This further confirms that there was an understanding between [Reseller 2] and Dar that the Dar Pricing Policy applied to Resellers in general, including [Reseller 2].
- 4.240 The CMA has taken into account the context of the arrangements between Dar and [Reseller 2], including the evidence that Dar staff were aware of the potential illegality of implementing and enforcing the Dar Pricing Policy, including in relation to [Reseller 2], and avoided creating potentially incriminating written records related to the Dar Pricing Policy, instead using encrypted messaging channels or communicating with each other or to Resellers orally or using coded communications: see Section 3, 'Dar's awareness about the potential illegality of implementing and enforcing the Dar Pricing Policy' and in particular the sub-section headed 'Dar's culture of concealment'.
- 4.241 In addition, the nature of the Dar Pricing Policy was such that Dar rarely needed to contact [Reseller 2] about it (in writing or otherwise) when [Reseller 2] was

complying with it, because it was based on a price list as far as pricing for David Hunt and Volume 2 Products was concerned: indeed, the evidence shows that the Minimum Price was the RRP (excluding VAT) listed in Dar's price lists (see paragraphs 3.162 to 3.166 and 3.204 to 3.205.2). This limited the need for written or oral communication about the Dar Pricing Policy (and therefore the amount of written evidence relating to it).

- 4.242 Similarly, [Reseller 2] did not keep written records of pricing instructions by Dar, or actions taken by [Reseller 2] as a result. [Employee of Reseller 2] explained that, 'he did not think there would be a documentary evidence trail as [Reseller 2] would have just used the relevant catalogue to update the prices and descriptions manually on their website. He did not think that the website would record any changes. He said that there were only 4 people working for [Reseller 2] and so they did not record things.'⁸⁵⁸
- 4.243 In light of the above, the CMA finds a concurrence of wills between Dar and [Reseller 2] that [Reseller 2] would not advertise or sell David Hunt or Volume 2 Products online below the Minimum Price between 1 August 2017 and 27 March 2019.
- 4.244 The CMA finds that this constitutes an agreement for the purposes of the Chapter I Prohibition.
- 4.245 In the alternative, the CMA finds that the arrangements identified above constituted at least a concerted practice between Dar and [Reseller 2], on the basis that [Reseller 2] knew Dar's wishes as regards the Dar Pricing Policy and adjusted its online advertising and pricing behaviour as a result, thereby knowingly substituting practical cooperation for the risks of price competition between it and other Resellers.
- 4.246 The CMA finds that this constitutes a concerted practice for the purposes of the Chapter I prohibition.
- 4.247 In the remainder of this Decision, the agreement and/or concerted practice that the CMA finds between Dar and [Reseller 2] that [Reseller 2] would not advertise or sell Dar Lighting branded products online below the Minimum Price will be referred to as the '[Reseller 2] Agreement'.
- 4.248 The CMA finds that the duration of the [Reseller 2] Agreement was one year and seven months (from 1 August 2017 to 27 March 2019).

⁸⁵⁸ GMM-000600605 (Note of call with [Employee of Reseller 2] on 24 June 2021).

Object of Preventing, Restricting or Distorting Competition

4.249 For the reasons set out below, the CMA finds that the [Reseller 1] Agreement and the [Reseller 2] Agreement each had as its object the prevention, restriction or distortion of competition.

Key legal principles

General

4.250 The Chapter I Prohibition prohibits agreements between undertakings which have as their object the prevention, restriction or distortion of competition.

4.251 The term ‘object’ in both prohibitions refers to the sense of ‘aim’, ‘purpose’, or ‘objective’, of the coordination between undertakings in question.⁸⁵⁹

4.252 Where an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement has had, or would have, any anti-competitive effects in order to establish an infringement.⁸⁶⁰

4.253 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.⁸⁶¹ 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.⁸⁶²

4.254 In order to determine whether an agreement reveals a sufficient degree of harm such as to constitute a restriction of competition ‘*by object*’, regard must be had to:

4.254.1 The content of its provisions;

4.254.2 Its objectives; and

⁸⁵⁹ See, for example, respectively: Case 56/64 *Consten & Grundig v Commission*, EU:C:1966:41, p. 343 (‘...[s]ince the agreement thus aims at isolating the French market... it is therefore such as to distort competition...’); Case 96/82 *IAZ and Others v Commission*, EU:C:1983:310, paragraph 25; C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643 (BIDS), paragraphs 32–33.

⁸⁶⁰ See, for example, C-8/08 *T-Mobile Netherlands BV v NMa*, EU:C:2009:343, paragraphs 28–30 and the case law cited therein *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, at 269.

⁸⁶¹ C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204 (*Cartes Bancaires*), paragraph 50; affirmed in C-373/14 P *Toshiba v Commission* EU:C:2016:26 (*Toshiba*), paragraph 26.

⁸⁶² *Cartes Bancaires*, paragraphs 49 and 57. See also *Toshiba*, paragraph 26.

4.254.3 The economic and legal context of which it forms a part.⁸⁶³

4.255 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.⁸⁶⁴

4.256 An agreement may be regarded as having an anti-competitive object even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives.⁸⁶⁵

Resale Price Maintenance

4.257 Section 2(2)(a) of the Act expressly prohibits agreements and/or concerted practices which '*directly or indirectly fix purchase or selling prices*'.

4.258 RPM is defined in the Vertical Guidelines as 'agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer'.⁸⁶⁶ RPM has been found consistently in UK (as well as in EU and other national) decisional practice to constitute a restriction of competition by object.⁸⁶⁷ The Court of Justice

⁸⁶³ *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.

⁸⁶⁴ *Cartes Bancaires*, paragraph 54; affirmed in *C-286/13 P Dole v Commission*, EU:C:2015:184, paragraph 118.

⁸⁶⁵ *BIDS*, paragraph 21. See also *Ping Europe Limited v CMA* [2018] CAT 13 (Ping), paragraphs 101-105, where the CAT confirmed that its approach follows that set out by the Court of Justice in, e.g., *Cartes Bancaires*. More specifically, the CAT stated that '*the Tribunal approaches the issue of object infringement on the basis that an agreement revealing a sufficient degree of harm to competition may be deemed to be a restriction of competition "by object" irrespective of the actual, subjective aims of the parties involved, even if those aims are legitimate.*'

⁸⁶⁶ Vertical Guidelines, paragraph 48.

⁸⁶⁷ See cases further below in this section, including cases such as: Commission Decision 73/322/EEC *Deutsche Phillips* (IV/27.010) [1973] OJ L293/40; Commission Decision 77/66/EEC *GERO-fabriek* (IV/24.510) [1977] OJ L16/8; Commission Decision 80/1333/EEC *Hennessy-Henkell* (IV/26.912) [1980] OJ L383/13; Commission Decision 97/123/EC *Novalliance/Systemform* (IV/35.679) [1997] OJ L47/11; Commission Decision 2001/135/EC *Nathan-Bricolux* (COMP.F.1/36.516) [2001] OJ L 54/1, paragraphs 86–90; in *Volkswagen II*, Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4, annulled on appeal Case T-208/01 *Volkswagen AG v Commission* EU:T:2003:326 and Case C-74/04 P *Commission v Volkswagen AG*, EU:C:2006:460; *CD prices*, Commission Press Release IP/01/1212, 17 August 2001; Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975). See also CMA decisions: *Online resale price maintenance in the bathroom fittings sector (Bathroom fittings)*, CE/9857-14, 10 May 2016; *Commercial refrigeration*, CE/9856-14, 24 May 2016; *Online resale price maintenance in the light fittings sector (NLC Decision)*, 50343, 3 May 2017; *Online resale price maintenance in the digital pianos and digital keyboard sector*, 50565-2, 1 August 2019; *Online resale price maintenance in the guitar sector*, 50565-3, 22 January 2020; *Online resale price maintenance in the electronic drum sector*, 29 June 2020. See also *HUSKY*, Czech NCA decision of 28 January 2011, upheld on appeal by Brno Regional Court judgment of 26 April 2012; *Young Digital Planet*, Polish NCA decision of 30 October 2012; *Hyundai Motor Vehicles*, Bulgarian NCA decision of 6 November 2012; *Vila*, Danish NCA settlement decision of 30 October 2013; *Pioneer v Bundeswettbewerbshörde*, Austrian Cartel Court rulings of March–June 2014; *Witt Hvidevarer*, Danish NCA settlement of 10 July 2014; and decision by the Austrian Competition Authority against *Samsung Electronics Austria GmbH* of 4 November 2015 (BWB/K-396). See to this effect also the Commission Staff Working document '*Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice*', revised version of 03/06/2015, paragraph 3.4 (http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex_en.pdf).

has also held that the imposition of fixed or minimum resale prices on distributors is restrictive of competition by object.⁸⁶⁸

- 4.259 The Court of Justice has established that it is not unlawful for a supplier to impose a maximum resale price or to recommend a particular resale price.⁸⁶⁹ However, describing a price as a '*recommended*' retail price does not prevent this from amounting to de facto RPM if the reseller does not remain genuinely free to determine its resale price (for example, if there is pressure or coercion exerted by the supplier to adhere to the recommended price).⁸⁷⁰
- 4.260 The Court of Justice has confirmed that 'it is necessary to ascertain whether such a retail price is not, in reality, fixed by indirect or concealed means, such as the fixing of the margin of the [reseller],⁸⁷¹ threats, intimidation, warnings, penalties or incentives'.⁸⁷² This would include, for example, threats to delay or suspend deliveries or to terminate supply in the event that the retailer does not observe a given price level.⁸⁷³ Other measures include the withdrawal of credit facilities, prevailing on other dealers not to supply⁸⁷⁴ and threatened legal action, pressuring telephone calls and letters.⁸⁷⁵

⁸⁶⁸ See Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284, paragraph 44, where the Court of Justice held that '*provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of [Article 101(1)] which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty*'. See also Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank*, ECLI:EU:C:2020:265, paragraph 62, where the Court of Justice held the following: '*That consideration notwithstanding, it is clear from the very wording of Article 101(1)(a) TFEU that an agreement which "indirectly fix[es] purchase or selling prices" may also be regarded as having as its object the prevention, restriction or distortion of competition within the internal market.*' Vertical Guidelines, paragraphs 223–229. See also Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102/1 (VABER), recital 10.

⁸⁶⁹ See, for example, Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504 paragraph 4.

⁸⁷⁰ Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504; and Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485. See also VABER, Article 4(a); and Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, EU:C:1986:41, paragraph 25.

⁸⁷¹ Vertical Guidelines, paragraph 48. [Text in square brackets added by the CMA].

⁸⁷² Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485, paragraph 71. See also Case C-260/07 *Pedro IV Servicios SL v Total España SA*, EU:C:2009:215, paragraph 80; and Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4 (which includes warnings against deep discounting).

⁸⁷³ Vertical Guidelines, paragraph 48. See also Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65; and Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4.

⁸⁷⁴ Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65.

⁸⁷⁵ See Commission Decision 2001/711/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4. In paragraphs 44–55 of its decision, the Commission noted various measures taken to enforce 'price discipline' among dealers, including threats of legal action against dealers offering discounts, dealers reporting discounts to Volkswagen and telephone calls and letters from Volkswagen demanding that discounts and promotions be ceased. The decision was overturned on appeal to the GC due to the Commission's flawed assessment of whether or not there was an agreement between Volkswagen and its dealers. However, the Commission's analysis of RPM remains relevant and this case confirms that recommended retail prices could involve unlawful RPM.

- 4.261 RPM can be achieved not only directly, for example, via a contractual provision that directly sets a fixed or minimum resale price,⁸⁷⁶ but also indirectly.⁸⁷⁷ As previously stated, whether or not there is indirect RPM in any particular case will depend on whether the ability of resellers to determine their resale prices has genuinely been restricted.⁸⁷⁸
- 4.262 Lastly, RPM can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of an automated price-monitoring system or the obligation on resellers to report other members of the distribution network who deviate from the standard price level.⁸⁷⁹ However, the use of such measures does not, in itself, constitute RPM.⁸⁸⁰

Price advertising, advertising and other similar restrictions

4.263 Restrictions on advertising prices below a certain level have in the past sometimes been found to lead to de facto RPM. The Commission has considered the application of Article 101(1) TFEU to advertising restrictions imposed by manufacturers in supply agreements in a number of investigations. The OFT has also concluded that advertising restrictions can restrict retailers' ability to determine their own sale prices in a previous decision.⁸⁸¹

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

4.264.1 Guidelines issued to retailer requiring them to use (in shops or outside) the supplier's recommended list prices,⁸⁸²

⁸⁷⁶ Case 243/83 *SA Binon & Cie v SA Agence et messageries de la presse*, EU:C:1985:284; Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, EU:C:1987:418; Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, EU:C:1988:183; Commission Decision of 16 July 2003 *PO/Yamaha* (COMP/37.975); Agreements between Lladro Comercial SA and UK retailers fixing the price for porcelain and stoneware figures, CP/0809-01, 31 March 2003.

⁸⁷⁷ See Vertical Guidelines, paragraph 48.

⁸⁷⁸ Order in Case C-506/07 *Lubricantes y Carburantes Galaicos SL v GALP Energía España SAU*, EU:C:2009:504; and VABER, Article 4(a).

⁸⁷⁹ Vertical Guidelines, paragraph 48. See to this effect also Commission Decisions of 24 July 2018 AT.40181 – Philips, paragraph 64: (*'Price monitoring and adjustment software programmes multiply the impact of price interventions. Consequently, by closely monitoring the resale prices of its retailers and intervening with lowest-pricing retailers to get their prices increased, Philips France's Consumer Lifestyle business could avoid online price "erosion" across, potentially, its entire (online) retail network.'*) as well as AT.40182 – Pioneer, paragraph 155; and AT.40469 – Denon & Marantz, paragraph 95.

⁸⁸⁰ Vertical Guidelines, paragraph 48.

⁸⁸¹ Agreements between Lladro Comercial SA and UK retailers fixing the price for porcelain and stoneware figures, CP/0809-01, 31 March 2003. See also [Trade associations, professions and self-regulating bodies](#) (OFT408, December 2004), adopted by the CMA Board, paragraph 3.14.

⁸⁸² Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975). *Infra*.

- 4.264.2 A contractual requirement not to produce advertising material which includes prices different from the supplier's price list without the supplier's approval;⁸⁸³
- 4.264.3 A contractual requirement to withdraw and not to repeat advertisements to which the supplier objected in writing (where there was evidence that this was being used to exclude dealers who were offering low prices from the supplier's distribution network);⁸⁸⁴
- 4.264.4 A contractual requirement (agreed between members of a trade association) requiring them to display the supplier's list price and prohibiting any public announcement of rebates on those prices;⁸⁸⁵ and
- 4.264.5 A prohibition on dealers mentioning discounts or price reductions in any advertising materials, advertisements or promotional campaigns.⁸⁸⁶
- 4.265 The *Hasselblad*⁸⁸⁷ and *Yamaha*⁸⁸⁸ decisions stress the importance of price advertising in terms of communicating with customers and in encouraging price competition.
- 4.266 In *Yamaha*,⁸⁸⁹ the Commission objected to restrictions contained in selective distribution agreements on dealers' advertising prices which were different to Yamaha's list prices. In particular, the Commission was concerned by advertising restrictions which formed part of a wider policy by Yamaha to enforce RPM in a number of territories including the Netherlands and Italy. Yamaha placed restrictions on its dealers in the Netherlands and Italy preventing them from advertising prices below Yamaha's recommended retail prices.
- 4.267 The Dutch dealer contracts (described as '*guidelines*') prohibited dealers from advertising prices which differed from Yamaha's list prices. The Commission stated that:

[Yamaha's guidelines] clearly prevented the dealer from announcing either within or outside the shop a price other than the one established in the price list. Even if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the customer the price it fixed and that such discounts, if the dealer was still

⁸⁸³ *Ibid.*

⁸⁸⁴ Commission Decision 82/367/EEC *Hasselblad* (IV/25.757) [1982] OJ L161/18; upheld on appeal in Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65. *Infra.*

⁸⁸⁵ Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and others v Commission* EU:C:1975:160.

⁸⁸⁶ Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures, CP/0809-01, 31 March 2003.

⁸⁸⁷ Commission Decision 82/367/EEC *Hasselblad* (IV/25.757) [1982] OJ L161/18 (*Hasselblad*).

⁸⁸⁸ Commission Decision 16 July 2003 *PO/Yamaha* (COMP/37.975) (*Yamaha*).

⁸⁸⁹ *Ibid.*

willing to offer them, could not be communicated in a way contrary to the guidelines. (...) [The circular sent to Dutch dealers] constitutes a restriction of the dealer's ability to determine its sales prices. This practice has the object of fixing the maximum level of discounts and, as a consequence, the minimum level of resale prices, thereby restricting or distorting price competition.'⁸⁹⁰

Meanwhile, the distribution agreement with dealers in Italy prohibited dealers from publishing '*in whichever form*' prices which differed from Yamaha's official price lists. The dealers were also prohibited from reproducing advertising material and price lists which were different to Yamaha's official price lists. The Commission found that 'the dealers' freedom to set prices is strictly limited. Dealers cannot attract clients by advertising prices that differ from the "published prices" of [Yamaha], nor by indicating prices in their shops different from those indicated by [Yamaha]'.⁸⁹¹

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

4.269 In *Groupement des Fabricants de Papiers Peints de Belgique*, the Court of Justice equated a prohibition on announcing rebates with 'a system of fixing selling prices'.⁸⁹²

4.270 In both *Yamaha* and *Groupement des Fabricants de Papiers Peints de Belgique*, it was accepted that the possibility of resellers being able to grant discounts did not prevent the restriction from infringing Article 101(1) TFEU. In *Yamaha*, the Commission stated of the restrictions that '*[e]ven if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the customer the price it fixed and that such discounts, if the dealer was still willing to offer them, could not be communicated in a way contrary to the guidelines.*'⁸⁹³

4.271 In *Hasselblad*, the Commission condemned a selective distribution agreement which allowed the manufacturer to prohibit adverts by a dealer containing statements that it '*can match any other retailer's selling prices*'.⁸⁹⁴ In addition to prohibiting particular adverts, *Hasselblad* had also threatened to withdraw credit facilities from dealers who did not treat prices in its retail price list as minimum selling prices and had terminated a UK dealership which had advertised its

⁸⁹⁰ *Ibid*, paragraphs 125–126. [Text in square brackets added by the CMA].

⁸⁹¹ *Ibid*, paragraphs 133–135. [Text in square brackets added by the CMA].

⁸⁹² Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique and others v Commission*, EU:C:1975:160.

⁸⁹³ *Yamaha*, paragraph 125.

⁸⁹⁴ *Hasselblad*, paragraph 38.

products at discounted prices. The Commission found that Hasselblad's contractual right to prohibit adverts restricted competition within the meaning of Article 101(1) for the following reason:⁸⁹⁵

'This extensive right of intervention enables Hasselblad (GB) to prevent actively competing and price-cutting dealers (...) from advertising their activities, the more so as Hasselblad (GB) is not required to give any justification for its censorship measures.'

4.272 The Commission concluded that Hasselblad's distribution policy (including Hasselblad's right to prohibit adverts) 'interferes with the freedom of the authorised dealers to fix their prices, using the dealers' fear of termination of the Dealer Agreement as a means of hindering price competition between authorised dealers'.⁸⁹⁶ The Commission considered that Hasselblad's use of its dealer agreements (including the advertising restrictions) 'as a means to influence retail prices', amounted to a restriction of competition under Article 101(1) TFEU. On appeal,⁸⁹⁷ the Court of Justice found that the Commission had been right to conclude that the advertising restriction constituted an infringement of Article 101(1) TFEU.⁸⁹⁸

4.273 In *Lladró*,⁸⁹⁹ the OFT noted that the advertising of resale prices, including discounts, promotes price transparency between retailers and provides a significant incentive for retailers to compete on price. Provisions restricting a retailer's freedom to inform potential customers of discounts which are being offered removes a key incentive for, and constitute an obstacle to, price competition between retailers. The OFT concluded in *Lladró* that the 'obvious consequence' of price advertising restrictions is to restrict retailers' ability to determine their own sale prices and that 'any such provision has as its object the prevention, restriction or distortion of competition.'⁹⁰⁰

⁸⁹⁵ *Ibid*, paragraph 60.

⁸⁹⁶ *Ibid*, paragraph 66.

⁸⁹⁷ Case 86/82 *Hasselblad (GB) Limited v Commission*, EU:C:1984:65, paragraph 43.

⁸⁹⁸ On the assessment of advertising restrictions, more specifically 'MAP' (minimum advertised pricing), under EU competition law, please also see the European Parliament's 'Notice to Member States' regarding 'Petition No 2383/2014 by Norbert Perstinger (Austrian), on the introduction of the Minimum Advertised Price (MAP) in the European Union', available at

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%20COMPARL%20PE-572.975%2001%20DOC%20PDF%20V0%2F%2FEN>.

⁸⁹⁹ Agreements between *Lladró Comercial SA* and UK retailers fixing the price for porcelain and stoneware figures, CP/0809-01, 31 March 2003.

⁹⁰⁰ *Ibid*, paragraph 70.

4.274 Further, in *Commercial refrigeration*⁹⁰¹ the CMA found that a policy which prevented resellers from advertising the supplier's products below a minimum advertised price (MAP) set out in the supplier's MAP policy constituted de facto RPM as in the legal and economic context in which it operated, it genuinely restricted in practice the ability of the resellers to determine their online sales price for the relevant products at a price below the MAP.⁹⁰²

Legal Assessment of the [Reseller 1] Agreement and the [Reseller 2] Agreement

4.275 For the reasons set out below, the CMA finds that the object of each of the [Reseller 1] Agreement and the [Reseller 2] Agreement (together, the '**Agreements**') was to prevent, restrict or distort competition through RPM and it was therefore, by its very nature, harmful to the proper functioning of normal competition. This finding is based on an assessment set out below of the Agreements' content and objectives as well as the legal and economic context in which they operated.

Content of the Agreements

4.276 In relation to the [Reseller 1] Agreement, as set out above:

4.276.1 The [Reseller 1] Agreement stipulated that [Reseller 1] would not advertise or sell the Volume 1 and Volume 2 Products online below the Minimum Price in accordance with the Dar Pricing Policy.

4.276.2 [Reseller 1's] commitment to adhere to the Dar Pricing Policy was reinforced by measures on the part of Dar and that of other Resellers to monitor the market and identify Resellers which advertised or sold the Relevant Products online below the Minimum Price. It was also reinforced by sanctions imposed by Dar for non-compliance with the Dar Pricing Policy, by requiring [Reseller 1] remove Relevant Products from sale if not priced in accordance with the Dar Pricing Policy and hence depriving [Reseller 1] of sales of such products and related revenue until such time as the prices of Relevant Products had been brought into compliance with the Dar Pricing Policy.⁹⁰³

⁹⁰¹ *Commercial refrigeration*, Case CE/9856/14, 24 May 2016. The CMA found that the minimum advertised price policy constituted RPM because, by restricting the price at which its goods were advertised online, the policy prevented dealers from deciding the resale price for those goods. The CMA found that there is a clear link between the advertised price and the resale price when goods are purchased online.

⁹⁰² *Ibid.* in particular, see paragraphs 6.43.2-3. In making this finding the CMA noted, in particular, that where customers buy the products online (ie '*click-to-buy*' sales), the advertised price is typically the price paid by the customer, that is, the sales price and, also, that the MAP policy was reinforced by measures to identify resellers who priced below the MAP combined with actual or threatened sanctions for advertising prices below the MAP.

⁹⁰³ See paragraphs 4.82 to 4.97 above.

- 4.277 In relation to the [Reseller 2] Agreement, as set out above:
- 4.277.1 The [Reseller 2] Agreement stipulated that [Reseller 2] would not advertise or sell David Hunt Products or Volume 2 Products online below the Minimum Price in accordance with the Dar Pricing Policy.
- 4.277.2 [Reseller 2's] commitment to adhere to the Dar Pricing Policy was reinforced by measures on the part of Dar and that of other Resellers to monitor the market and identify Resellers who advertised or sold the Relevant Products online below the Minimum Price. It was also reinforced by a credible threat of sanctions by Dar for non-compliance with the Dar Pricing Policy. As set out in paragraphs 4.227 to 4.234 above, Dar threatened [Reseller 2] with account closure in the event of non-adherence to the Dar Pricing Policy. Such threats were significant to [Reseller 2's] business, since Dar accounted for around [X]% of [Reseller 2's] business during much of the Relevant Period.
- 4.278 The CMA concludes that even insofar as the Agreements related to the price at which [Reseller 1] and [Reseller 2] could advertise the Relevant Products online (in terms of requiring adherence to a MAP), it restricted in practice the ability of [Reseller 1] and [Reseller 2] to sell the Relevant Products online at a price below the Minimum Price. This is because where a customer bought the Relevant Products from [Reseller 1] or [Reseller 2] online (ie 'click-to-buy' sales), the advertised price was typically the price paid by the customer for the Relevant Products, that is, the sales price.⁹⁰⁴
- 4.279 As set out above, the CMA finds that the restrictions on [Reseller 1] setting its own resale price for the Relevant Products applied to the sale of Relevant Products by [Reseller 1] online from 3 December 2017 to 25 September 2019. The CMA finds that the restrictions on [Reseller 2] setting its own resale price for David Hunt Products and Volume 2 Products applied to the sale of such Relevant Products by [Reseller 2] online from 1 August 2017 to 27 March 2019.
- 4.280 On the basis of the above, the CMA finds that the Agreements amounted to RPM in respect of online sales of the Relevant Products by [Reseller 1] and [Reseller 2].
- 4.281 RPM has consistently been found to have the object of preventing, restricting or distorting competition.⁹⁰⁵

⁹⁰⁴ GMM-00000447 (Response dated 9 December 2020 to the First [Reseller 1] Section 26 Notice), response to question 6. GMM-000601995 ([Reseller 2] response to CMA information request dated 6 December 2021).

⁹⁰⁵ See to this effect, for example, the Commission decisions of 24 July 2018 in cases AT.40465 *Asus*, (e.g. at paragraph 107); AT.40469 *Denon & Marantz*, (e.g. at paragraph 93 *et seq.*); AT.40181 *Philips*, (e.g. at paragraph 61) and AT. 40182 *Pioneer*, (e.g. at paragraph 152).

Objectives of the Agreements

- 4.282 The CMA concludes that the main objective of the Agreements (and the Dar Pricing Policy more generally) was to specify a Minimum Price at which [Reseller 1] and [Reseller 2] (and other Resellers adhering to the Dar Pricing Policy) would sell the Relevant Products. The totality of the evidence in the CMA's possession shows that Dar's commercial aims for introducing the Dar Pricing Policy, which formed the basis of the Agreements, were at least threefold:
- 4.282.1 It was designed to protect the perceived quality of the brand by ensuring that the Relevant Products were not seen to be or sold as discount brands on the internet;
 - 4.282.2 It was designed to protect Resellers' margins; and
 - 4.282.3 In turn, it made it desirable for Resellers to stock the Relevant Products.⁹⁰⁶
- 4.283 The CMA concludes that, in the absence of the Agreements, [Reseller 1] and [Reseller 2] would have been able to determine independently their online retail prices for the Relevant Products. In this way, they would have had the freedom to attract and win customers by signalling to customers the existence of a price advantage over their competitors. This would have greatly increased the scope for price competition between each of [Reseller 1] and [Reseller 2] and their competitors.
- 4.284 The evidence shows that Dar was aware that the implementation of the Dar Pricing Policy (the basis for the Agreements) would lead to potentially illegal restrictions on price. As set out in Section 3 above under 'Dar's awareness about the potential illegality of implementing and enforcing the Dar Pricing Policy', Dar understood that its communications and interactions with its network of Resellers (including [Reseller 1] and [Reseller 2]) pertaining to the Dar Pricing Policy were potentially illegal; and as set out in Section 3 under 'Dar's culture of concealment', the totality of the evidence uncovered by the CMA shows that Dar instituted a culture of concealment in connection with the Dar Pricing Policy whereby it avoided generating potentially incriminating written communications with Resellers (including [Reseller 1] and [Reseller 2]) regarding adherence to the Minimum Price or threats regarding potential sanctions explicitly in writing, except by using encrypted messaging channels.
- 4.285 The CMA finds that this 'subjective' awareness of the necessary consequences of the Dar Pricing Policy further supports its conclusion that the Agreements had the

⁹⁰⁶ See paragraphs 3.137 to 3.150 above.

object of preventing, restricting or distorting competition through RPM in the supply of the Relevant Products in the UK.

Legal and economic context of the Agreements

4.286 Section 3 above provides an overview of the UK lighting sector (see 'Lighting sector overview'). In reaching its finding that the Agreements had the object of preventing, restricting or distorting competition, the CMA has had regard to the actual context in which the Agreements operated, including:

4.286.1 The goods affected by it;

4.286.2 The conditions of the functioning and structure of the market; and

4.286.3 The relevant legal and economic context.

4.287 The CMA considers that the legal and economic context in which Lighting Products, including luminaires, lamps and controls, are supplied means that a restriction on the price at which the Relevant Products can be advertised or sold online restricts competition by its very nature. This is based, among other factors, on the ever-increasing importance of the internet as a retail channel, and the fact that product pricing is one of the main factors on which Resellers compete.

Conclusion on the object of the Agreements

4.288 For the reasons set out above, the CMA finds that the Agreements had as their object the prevention, restriction or distortion of competition (through RPM) in the supply of the Relevant Products within the UK.

Appreciable Restriction of Competition

4.289 For the reasons set out below, the CMA finds that the Agreements appreciably prevented, restricted or distorted competition for the supply of the Relevant Products within the UK for the purposes of the Chapter I Prohibition.

Key legal principles

4.290 An agreement that is restrictive of competition by 'object' will only fall within the Chapter I Prohibition if its effect on competition is appreciable.⁹⁰⁷

4.291 The Court of Justice has clarified that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature

⁹⁰⁷ It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 16 citing, among other cases, Case 5/69 *Völk v Vervaecke*, EU:C:1969:35, paragraph 7. See also [OFT401](#) (December 2004), paragraph 2.15.

and independently of any concrete effect that it may have, an appreciable restriction on competition.⁹⁰⁸ In accordance with section 60A of the Act, this principle applies equally in respect of the Chapter I Prohibition (taking account of the relevant differences between Article 101 TFEU and the Chapter I Prohibition): accordingly, an agreement that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.⁹⁰⁹

Legal assessment

4.292 As set out above, the CMA concludes that the Agreements had the object of preventing, restricting or distorting competition (see paragraph 4.288 above). The Agreements were also capable of affecting trade within the UK (see section on ‘Effect on Trade within the UK’ below). The CMA therefore finds that the Agreements constituted, by their very nature, an appreciable restriction of competition in the retail sale of Relevant Products for the purposes of the Chapter I Prohibition.

Effect on Trade within the UK

4.293 For the reasons set out below, the CMA finds that the Agreements satisfy the test for an effect on trade within the UK.

Key legal principles

4.294 The Chapter I Prohibition applies to agreements and concerted practices which may affect trade within the UK.⁹¹⁰ As set out in its guidance on Agreements and Concerted Practices, the CMA considers that in practice it is very unlikely that an agreement which appreciably restricts competition within the UK does not also affect trade within the UK. So, in applying the Chapter I Prohibition the CMA’s focus will be on the effect that an agreement has on competition.⁹¹¹

4.295 On whether the effect on trade within the UK must be appreciable, the CAT has held that there is no need to import into the Act the rule of ‘appreciability’ under EU law. The CAT’s reasoning for this is that in EU law the requirement of an appreciable effect on trade is a jurisdictional rule the essential purpose of which is

⁹⁰⁸ Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 37; and Commission Notice on agreements of minor importance [2014] OJ C291/01, paragraphs 2 and 13.

⁹⁰⁹ See, for example, *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraph 148 *et seq.*

⁹¹⁰ The UK includes any part of the UK in which an agreement operates or is intended to operate: section 2(7) of the Act. As is the case in respect of Article 101 TFEU, it is not necessary to 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: joined cases T-202/98 *etc Tate & Lyle plc and Others v Commission*, EU:T:2001:185, paragraph 78.

⁹¹¹ *Agreements and concerted practices*, OFT 401, paragraph 2.25. This guidance was originally published by the OFT and has been adopted by the CMA Board.

to demarcate the fields of EU law and UK domestic law respectively. According to the CAT, there is therefore no need to import this concept into domestic competition law.⁹¹²

Legal assessment

4.296 The CMA finds that the Agreements may have affected trade within the UK or a part of the UK. This is because the pricing restriction imposed by the Agreements applied to [Reseller 1's] and [Reseller 2's] online prices, in relation to products which are traded throughout the UK and beyond. The pricing restriction therefore potentially affected consumers wishing to purchase the Relevant Products from [Reseller 1] and [Reseller 2] throughout the whole of the UK and possibly beyond.

4.297 Furthermore, as set out above under 'Appreciable Restriction of Competition', the CMA concludes that the Agreements led to an appreciable restriction of competition. The evidence shows that this restriction had its main effect in the UK as the Agreements related to Relevant Products supplied to UK customers. This means that the criterion set out in the CMA's guidance on Agreements and Concerted Practices is also met.⁹¹³

4.298 On this basis, the CMA concludes that the Agreements satisfy the test for an effect on trade within the UK.

Exclusion or Exemption

Exclusion

4.299 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.⁹¹⁴

4.300 The CMA finds that none of the relevant exclusions applies to the Agreements.

⁹¹² *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11, [459]–[461]. In a subsequent case (*North Midland Construction plc v Office of Fair Trading* [2011] CAT 14, [48]–[51] and [62]), the CAT held that, although there had been some criticism of the CAT's decision in *Aberdeen Journals*, it was not necessary to reach a conclusion on the question whether the appreciability requirement extends to the effect on UK trade test as, at least in that case, there was a close nexus between appreciable effect on competition and appreciable effect on trade within the UK, in that if one was satisfied, the other was likely to be so. For completeness, it should be mentioned that the High Court has doubted whether the CAT was correct on this point in two cases, namely *P&S Amusements Ltd v Valley House Leisure Ltd* [2006] EWHC 1510 (Ch), paragraphs 21, 22 and 34 and *Pirtek (UK) Ltd v Joinplace Ltd* [2010] EWHC 1641 (Ch), paragraphs 61–67.

⁹¹³ See paragraph 4.294 above.

⁹¹⁴ 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.

Block exemption / Retained exemption

- 4.301 Pursuant to section 10 of the Act, an agreement is exempt from the Chapter I Prohibition provided that it falls within a category of agreement which is exempt by virtue of a retained block exemption regulation.
- 4.302 It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.⁹¹⁵ Dar has provided no evidence to show that the exemption criteria are satisfied.
- 4.303 Vertical agreements that restrict competition may be exempt from the Chapter I Prohibition if they fall within the Vertical Agreements Block Exemption Regulation (the 'VABER').⁹¹⁶ The VABER exempts such agreements where the relevant market shares of the supplier and the buyer each do not exceed 30%, unless the agreement contains one of the so-called 'hardcore' restrictions in Article 4 of the VABER.⁹¹⁷
- 4.304 Article 4(a) of the VABER provides that the exemption provided for in Article 2 of the VABER does not apply to those agreements which directly or indirectly have as their object 'the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered, by any of the parties.'
- 4.305 As set out above, in the CMA's view, the Agreements restricted [Reseller 1's] and [Reseller 2's] (that is, the buyer's) ability to sell the Relevant Products online below the Minimum Price. Therefore, the Agreements restricted [Reseller 1's] and [Reseller 2's] (the buyers') ability to determine its sale price (ie it amounted to RPM).⁹¹⁸ The CMA therefore finds that Article 4(a) of the VABER is engaged in the present case such that the block exemption provided for in Article 2 of the VABER does not apply to the Agreements. It follows that the Agreements are not exempt from the application of the Chapter I Prohibition by virtue of section 10 of the Act.

Individual exemption

- 4.306 Agreements which satisfy the criteria set out in section 9 of the Act are exempt from the Chapter I Prohibition.
- 4.307 There are four cumulative criteria to be satisfied:

⁹¹⁵ See by analogy section 9(2) of the Act.

⁹¹⁶ Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1 is included in the definition of 'retained block exemption regulation' for the purposes of section 10 of the Act.

⁹¹⁷ See Articles 2–4 of the VABER.

⁹¹⁸ See paragraphs 3.33, 4.267 and 4.273 above.

- 4.307.1 The agreement contributes to improving production or distribution, or promoting technical or economic progress;
- 4.307.2 While allowing consumers a fair share of the resulting benefit;
- 4.307.3 The agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and
- 4.307.4 The agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

4.308 In considering whether an agreement satisfies the criteria set out in section 9 of the Act, the CMA will have regard to the Commission's Article 101(3) Guidelines.⁹¹⁹

4.309 The CMA notes that agreements which have as their object the prevention, restriction or distortion of competition are unlikely to benefit from individual exemption as such restrictions generally fail (at least) the first two conditions for exemption: they neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).⁹²⁰ However, each case ultimately falls to be assessed on its merits.

4.310 It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.⁹²¹ Dar has provided no evidence in this regard.

Attribution of Liability

Key legal principles

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

4.312 Companies belonging to the same corporate group will often constitute a single undertaking within the meaning of the Chapter I Prohibition, allowing the conduct of a subsidiary to be attributed to the parent. A parent company may be held jointly

⁹¹⁹ Commission Notice, *Guidelines on the Application of Article 81(3) of the Treaty* [2004] OJ C101/97 (Article 101(3) Guidelines). See also [OFT401](#) (December 2004), paragraph 5.5.

⁹²⁰ Article 101(3) Guidelines, paragraph 46 and Vertical Guidelines, paragraph 47.

⁹²¹ Article 101(3) Guidelines. see paragraphs 51–58; Vertical Guidelines, paragraph 47. See also section 9(2) of the Act.

and severally liable for an infringement committed by a subsidiary company where, at the time of the infringement, the parent company was able to and did exercise decisive influence over the conduct of the subsidiary, so that the two form part of a single economic unit for the purposes of the Chapter I Prohibition.⁹²²

- 4.313 According to settled case law, in the specific case where a parent company has a 100% shareholding in a subsidiary that has infringed the competition rules: (i) the parent company is able to exercise decisive influence over the conduct of the subsidiary; and (ii) there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.⁹²³
- 4.314 In those circumstances, it is sufficient for the CMA to prove that the subsidiary is wholly owned, either directly or indirectly, by the parent company in order to presume that the parent exercises decisive influence over the commercial policy of the subsidiary. The CMA will then be able to regard the parent company as jointly and severally liable for the payment of any fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.⁹²⁴
- 4.315 As to the interpretation of ‘decisive influence’, the CAT noted in *Durkan*⁹²⁵ that such influence may be indirect and can be established even where the parent does not interfere in the day-to-day business of the subsidiary or where the influence is not reflected in instructions or guidelines emanating from the parent to the subsidiary. Instead, one must look generally at the relationship between the two entities, and the factors to which regard may be had when considering the issue of decisive influence ‘are not limited to commercial conduct but cover a wide range’.⁹²⁶
- 4.316 In examining whether a parent company has the ability to exercise decisive influence over the market conduct of its subsidiary, account must be taken of all

⁹²² Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 60–61; and Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130. See also Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, EU:C:1983:293, paragraph 50.

⁹²³ Case T-517/09 *Alstom v Commission*, EU:T:2014:999, paragraph 55; Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 60. Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v Commission*, EU:T:2010:453, paragraphs 126–130; and Case T-325/01 *DaimlerChrysler AG v Commission*, EU:T:2005:322, paragraphs 217–221. This principle was recently confirmed again by the General Court in its judgment of 12 July 2018, *The Goldman Sachs Group v Commission*, T-419/14, ECR, EU:T:2018:445, paragraph 44.

⁹²⁴ See Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 61 and *The Goldman Sachs Group v Commission*, T-419/14, ECR, EU:T:2018:445, paragraph 45. See Case C-90/09 P *General Química SA v Commission* EU:C:2011:21, paragraph 89 in respect of circumstances where there is an interposed company.

⁹²⁵ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6.

⁹²⁶ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6 [22].

the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to its parent company and, therefore, of the economic reality.⁹²⁷

4.317 The actual exercise of decisive influence is assessed on the basis of factual evidence including, in particular, through an analysis of the management powers that the parent companies have over the subsidiary.⁹²⁸ The actual exercise of decisive influence can be shown directly by the parent's specific instructions or rights of co-determination of commercial policy and also can be inferred indirectly from the totality of the economic, organisational and legal links between the parent company and the relevant subsidiary.⁹²⁹ Influence over aspects such as corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters are relevant even if each of those factors taken in isolation does not have sufficient probative value.⁹³⁰

4.318 The actual exercise of decisive influence by the parent company over the subsidiary may be deduced from any, or a combination, of the following non-exhaustive factors:

4.318.1 Board composition and board representation by the parents on the board of the subsidiary;⁹³¹

4.318.2 Overlapping senior management;⁹³²

4.318.3 The business relationship between the parent company and the subsidiary;⁹³³

4.318.4 Presence of the parent company in the same business sector;⁹³⁴

4.318.5 Sole representation by the parent company in the administrative proceedings;⁹³⁵

⁹²⁷ See Joined cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce Inc. v Commission and Commission v Fresh Del Monte Produce Inc.*, EU:C:2015:416, paragraph 76. See also Case C-440/11 P *European Commission v Stichting Administratiekantor Portielje and Gosselin Group NV*, EU:C:2013:514, paragraph 66; and Case T-45/10 *GEA Group AG v Commission*, EU:T:2015:507, paragraph 133.

⁹²⁸ T-77/08 *The Dow Chemical Company v Commission* ECLI:EU:T:2012:47 confirmed on appeal C-179/12 *The Dow Chemical Company v Commission* ECLI:EU:C:2013:605.

⁹²⁹ T-314/01 *Avebe v Commission* ECLI:EU:T:2006:266, paragraph 136 and case-law cited; T-77/08 *The Dow Chemical Company v Commission* ECLI:EU:T:2012:47 paragraph 77; *Durkan v Office of Fair Trading* [2011] CAT 6, paragraphs 19–22.

⁹³⁰ T-132/07 *Fuji Electric Co. Ltd v Commission* ECLI:EU:T:2011:344, paragraph 183.

⁹³¹ Case T-399/09 *Holdings Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraph 38.

⁹³² Case T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 184.

⁹³³ T-132/07 *Fuji Electric Co. Ltd v Commission* ECLI:EU:T:2011:344, paragraph 184.

⁹³⁴ Commission Decision 2007/691/EC *Fittings* (COMP/F/38.121) [2007] OJ L283/63.

⁹³⁵ Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission*, EU:C:2000:630.

4.318.6 Parent and subsidiary presenting themselves to the outside world as forming part of the same group, such as references in the annual reports, description of being part of the same group;⁹³⁶ and

4.318.7 The level of control over the important elements of the business strategy of the subsidiary, the level of integration of the subsidiary into the parent company's corporate structure and how far the parent company, through representatives on the board of the subsidiary, was involved in the running of the subsidiary.⁹³⁷

Liability for the Infringements

4.319 The legal entity that was directly involved in the Infringements throughout the Relevant Period was Dar Lighting Limited (Company Number 05270864). Accordingly, the CMA finds Dar Lighting Limited liable for the Infringements.

4.320 Castlegate 624 Limited (Company Number 07328014) owns 100% of the shares in Dar Lighting Limited.⁹³⁸ Accordingly, based on the legal principles set out in paragraph 4.313 above, this means (i) that Castlegate 624 Limited exercises decisive influence over the commercial policy of Dar Lighting Limited and (ii) there is a rebuttable presumption that Castlegate 624 did in fact exercise decisive influence over the conduct of Dar. Castlegate 624 has not rebutted this presumption.

4.321 Dar Lighting Limited has an Irish trading subsidiary, DAR Lighting (Ireland) Limited.⁹³⁹ The CMA has received no evidence to suggest that DAR Lighting (Ireland) Limited had any direct involvement in the Infringements.

Conclusion on joint and several liability

4.322 In the light of the above, the CMA concludes that Dar Lighting Limited (Company Number 05270864) and its immediate and ultimate parent company, Castlegate 624 Limited (Company Number 07328014), formed a single economic unit for the purposes of the Chapter I Prohibition throughout the Relevant Period. Dar Lighting Limited and Castlegate 624 Limited are therefore jointly and severally liable for the payment of any fine imposed in relation to the Infringements.

⁹³⁶ Case T-399/09 *Holding Slovenske elektrarne d.o.o. (HSE) v Commission*, EU:T:2013:647, paragraphs 33-36 and 62-66.

⁹³⁷ *Durkan v Office of Fair Trading* [2011] CAT 6, paragraph 31.

⁹³⁸ GMM-000601939 (Castlegate 624 Limited Consolidated Draft Accounts up to 30 June 2021), p.33.

⁹³⁹ Dar Lighting Limited has two further subsidiary undertakings: David Hunt Lighting Limited and Solus Lighting Limited. While Dar owns 100% of the shares in both subsidiaries, both are dormant: GMM-000601391 (Dar Lighting Limited Annual Report and Financial Statements up to 30 June 2020). See also GMM-000601939 (Castlegate 624 Limited Consolidated Draft Accounts up to 30 June 2021), p.33.

Burden and Standard of Proof

Burden of proof

4.323 The burden of proving an infringement of the Chapter I Prohibition lies with the CMA.⁹⁴⁰

4.324 This burden does not preclude the CMA from relying, where appropriate, on inferences or evidential presumptions. In *Napp*, the CAT stated:

‘That approach does not in our view preclude the Director,⁹⁴¹ in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example (...) that an undertaking’s presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged.’⁹⁴²

4.325 The CMA finds that it has discharged its burden of proof in this case.

Standard of proof

4.326 The CMA is required to show that an infringement has occurred on the balance of probabilities, which is the civil standard of proof.⁹⁴³ The CAT clarified in the *Replica Football Kit* appeals that⁹⁴⁴ ‘[t]he standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.’

4.327 The Supreme Court has further clarified that this standard of proof is not connected to the seriousness of the suspected infringement.⁹⁴⁵ The CAT has also expressly accepted the reasoning in this line of case law.⁹⁴⁶

4.328 The General Court and Court of Justice (together the ‘**European Courts**’) have consistently stated that the Commission must adduce evidence capable of

⁹⁴⁰ *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [95] and [100]. See also *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17 [164] and [928]–[931]; and *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31 [88].

⁹⁴¹ References to the ‘Director’ are to the former Director General of Fair Trading (DGFT). The post of DGFT was abolished under the Enterprise Act 2002 and the functions of the DGFT were transferred to the OFT. From 1 April 2014 the OFT’s competition and certain consumer functions were transferred to the CMA by virtue of the Enterprise and Regulatory Reform Act 2013.

⁹⁴² *Napp Pharmaceutical Holdings Ltd and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [110].

⁹⁴³ *Tesco Stores Limited and Others v Office of Fair Trading* [2012] CAT 31 [88].

⁹⁴⁴ *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17 [204]. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, [164]–[166].

⁹⁴⁵ *Re S-B (Children)* [2009] UKSC 17 [34]. See also *Re B (Children)* [2008] UKHL 35 [72].

⁹⁴⁶ *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 [15]–[16].

demonstrating to the '*requisite legal standard*' the existence of the circumstances constituting an infringement.⁹⁴⁷ 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.⁹⁴⁸ 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.

4.329 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.⁹⁴⁹ Moreover, the European Courts have confirmed that 'the evidence must be assessed not in isolation, but as a whole'⁹⁵⁰ and that 'the evidence must be assessed in its entirety, taking into account all relevant circumstances of fact'.⁹⁵¹

Presumptions and inferences

4.330 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*'.⁹⁵²

4.331 Accordingly, a number of evidentiary rules assist the CMA to meet the standard of proof and to discharge its burden of proof, ie the use of presumptions and the

⁹⁴⁷ 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.

⁹⁴⁸ 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.

⁹⁴⁹ 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).

⁹⁵⁰ T-56/99 *Marlines v Commission*, paragraph 28. See also C-48/69 *ICI v Commission*, EU:C:1972:70, paragraph 68.

⁹⁵¹ T-141/94 *Thyssen Stahl v Commission*, paragraph 175.

⁹⁵² C-68/12 *Protomonopolny urad Slovenskej republiky v Slovenska sporitel'na ('Slovak Banking Cartel')*, EU:C:2013:71, paragraph 26.

ability to prove a case by citing mere indicia from which inferences can be drawn.⁹⁵³

- 4.332 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'.⁹⁵⁴ In fact, 'wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard'.⁹⁵⁵
- 4.333 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.⁹⁵⁶ 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.
- 4.334 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.

Conclusion on standard of proof

- 4.335 The CMA finds that the requisite standard of proof has been met in relation to the Infringements.

⁹⁵³ 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*'.

⁹⁵⁴ *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, paragraph 96.

⁹⁵⁵ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, paragraph 206.

⁹⁵⁶ *Aragonesas Industrias y Energia, SAU v Commission* para 97.

Assessment

- 4.336 The CMA has based its conclusions on the body of available evidence, taken together⁹⁵⁷ and assessed as a whole.⁹⁵⁸ This comprises documentary as well as witness evidence and other indicia.
- 4.337 As noted in Section 3 above under ‘Dar’s culture of concealment’, there is evidence of Dar taking steps to conceal the existence of the Dar Pricing Policy. Further, as set out in the same section under ‘Dar’s awareness about the potential illegality of implementing and enforcing the Dar Pricing Policy’, Dar’s senior management and staff exhibited a high degree of awareness that RPM is illegal, due in part to the two warning letters that Dar had received.
- 4.338 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.
- 4.339 The CMA finds that the available evidence, taken in the round and on the balance of probabilities, is sufficient to establish the Infringements.

⁹⁵⁷ *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).

⁹⁵⁸ 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.

5. The CMA's Action

The CMA's Decision

- 5.1 On the basis of the evidence set out in this Decision, the CMA finds that Dar infringed the Chapter I Prohibition by entering into an agreement and/or participating in a concerted practice with each of [Reseller 1] and [Reseller 2]:
- 5.1.1 that each of [Reseller 1] and [Reseller 2] would not advertise or sell online the Relevant Products below the Minimum Price;
 - 5.1.2 which amounted to RPM in respect of online sales of the Relevant Products by each of [Reseller 1] and [Reseller 2].
- 5.2 The CMA finds that each of these agreements and/or concerted practices:
- 5.2.1 had as its object the prevention, restriction or distortion of competition within the UK;
 - 5.2.2 may have affected trade within the UK; and
 - 5.2.3 lasted from:
 - (a) 3 December 2017 to 25 September 2019 in the case of the [Reseller 1] Infringement; and
 - (b) 1 August 2017 to 27 March 2019 in the case of the [Reseller 2] Infringement.
- 5.3 The CMA has also decided to attribute liability for Dar's Infringements to its ultimate parent company, Castlegate 624, making Dar and Castlegate 624 jointly and severally liable for the Infringements.
- 5.4 The remainder of this Section sets out the enforcement action the CMA shall take and its reasons for taking that action.

Directions

- 5.5 The CMA finds that the Infringements have ceased. Therefore, in the CMA's view, it is not necessary to give directions to any party in this case.⁹⁵⁹

⁹⁵⁹ Section 32(1) of the Act provides that if the CMA has made a decision that an agreement infringes the Chapter I Prohibition, it may give to such person(s) as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

Financial penalties

General

- 5.6 Section 36(1) of the Act provides that on making a decision that an agreement⁹⁶⁰ has infringed the Chapter I Prohibition, the CMA may require an undertaking which is a party to the agreement concerned to pay the CMA a penalty in respect of the infringement.
- 5.7 As set out above, the CMA finds Dar and Castlegate 624 (which are part of the same single economic unit) jointly and severally liable for the Infringements. Therefore, in the CMA's view it is appropriate to impose any financial penalty for the Infringements jointly and severally on Dar and Castlegate 624 (together '**Dar Group**').

The CMA's margin of appreciation in determining the appropriate penalty

- 5.8 Provided that:
- (a) the penalties which the CMA imposes are within the range of penalties permitted by section 36(8) of the Act⁹⁶¹ and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '**2000 Order**');⁹⁶² and
 - (b) the CMA has had regard to its guidance as to the appropriate amount of a penalty (the '**Penalties Guidance**')⁹⁶³ in accordance with section 38(8) of the Act,⁹⁶⁴

the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.⁹⁶⁵

- 5.9 The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.⁹⁶⁶ Rather, the CMA makes its assessment on a case-

⁹⁶⁰ Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.

⁹⁶¹ Section 36(8) of the Act reads: '*No penalty fixed by the [OFT] under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State).*'

⁹⁶² The Competition Act (Determination of Turnover for Penalties) (Amendment) Order 2000 (SI 2000/309), as amended by the Competition Act (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

⁹⁶³ On 16 December 2021, the CMA published updated *Guidance as to the Appropriate Amount of the Penalty* (CMA73) which applies from the date of its publication to new CA98 cases and to ongoing CA98 cases in which a Draft Penalty Statement or, if there are ongoing settlement discussions, a draft penalty calculation has not yet been issued. Since in this case a draft penalty calculation was issued prior to that date as part of settlement discussions, the applicable penalties guidance is the version of CMA73 that was published on 18 April 2018.

⁹⁶⁴ Penalties Guidance, paragraph 1.10.

⁹⁶⁵ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports plc and Allsports Limited v Office of Fair Trading* [2005] CAT 22, at [102].

⁹⁶⁶ See, for example, *Eden Brown and Others v Office of Fair Trading* [2011] CAT 8, at [78].

by-case basis,⁹⁶⁷ having regard to all relevant circumstances and the twin objectives of its policy on financial penalties.

- 5.10 In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will have regard to the seriousness of the infringement and the need to deter both the infringing undertakings and other undertakings from engaging in behaviour that breaks the prohibition in Chapter I of the Act.⁹⁶⁸

Small agreements

- 5.11 Section 39 of the Act provides for limited immunity from penalties in relation to the Chapter I prohibition. Specifically, section 39(3) of the Act provides that a party to a 'small agreement' is immune from financial penalties for infringements of the Chapter I prohibition.⁹⁶⁹ However, the CMA concludes that this does not apply in this case since: (a) Dar Group's turnover alone exceeded the £20m turnover threshold in every business year ending in a calendar year preceding a calendar year during which the Infringements occurred;⁹⁷⁰ and (b) in any event, the Infringements concern RPM, a form of '*price fixing agreement*',⁹⁷¹ which by virtue of section 39(1)(b) of the Act is excluded from the benefit of the limited immunity from penalties provided by section 39 of the Act.

Intention/negligence

- 5.12 The CMA may impose a penalty on an undertaking which has infringed the Chapter I Prohibition if it is satisfied that the infringement has been committed intentionally or negligently.⁹⁷² However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent for the purposes of determining whether it may exercise its discretion to impose a penalty.⁹⁷³

⁹⁶⁷ Penalties Guidance, paragraphs 2.5 and 2.8. See, for example, *Kier Group and Others v Office of Fair Trading* [2011] CAT 3, at [116] where the CAT noted that '*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*'.

⁹⁶⁸ Section 36(7A) of the Act; Penalties Guidance, paragraphs 1.3-1.4.

⁹⁶⁹ Regulation 3 of the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI/2000/262) provides that the category of agreements for which no penalty may be imposed under section 39 of the Competition Act comprises '*all agreements between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million*'. The term 'applicable turnover' means the turnover determined in accordance with the Schedule to the Regulations.

⁹⁷⁰ Castlegate 624 Limited - Annual Report and Financial Statements for the years ended 30 June 2019, 30 June 2018 and 30 June 2017; available at [CASTLEGATE 624 LIMITED filing history - Find and update company information - GOV.UK \(company-information.service.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/644443/castlegate_624_limited_filing_history_-_find_and_update_company_information_-_gov.uk_(company-information.service.gov.uk)).

⁹⁷¹ A 'price fixing agreement' within the meaning of section 39(1) of the Act is '*an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates*'.

⁹⁷² Section 36(3) of the Act.

⁹⁷³ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs 453-457; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221.

5.13 The CAT has defined the terms ‘intentionally’ and ‘negligently’ as follows:

‘(...) an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition’.⁹⁷⁴

5.14 This is consistent with the approach taken by the Court of Justice which has confirmed that ‘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.’⁹⁷⁵

5.15 The intention or negligence relates to the facts, not the law. Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.⁹⁷⁶

5.16 As set out in previous decisions, the CMA takes the view that the circumstances in which the CMA might find that an infringement has been committed intentionally include situations in which the agreement or conduct in question has as its object the restriction of competition.⁹⁷⁷ In establishing whether or not there was intention, the CMA may also have regard to numerous other factors, including documents generated by the undertaking in question and witness evidence.

5.17 The CMA finds that there is strong evidence that Dar must have been aware, or could not have been unaware, that its conduct had the object, or would have the effect of restricting competition. For example:

5.17.1 Dar’s staff had a very high degree of relevant and specific knowledge that the implementation and enforcement of the Dar Pricing Policy was potentially illegal;⁹⁷⁸

⁹⁷⁴ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 221.

⁹⁷⁵ Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 124.

⁹⁷⁶ See Case C-681/11 *Bundeswettbewerbsbehörde v Schenker & Co. AG*, EU:C:2013:404.

⁹⁷⁷ CMA decisions: *Online resale price maintenance in the bathroom fittings sector*, CE/9857-14, 10 May 2016: paragraph 7.16; *Commercial refrigeration*, CE/9856-14, 24 May 2016: paragraph 7.19; *Online resale price maintenance in the light fittings sector (NLC Decision)*, 50343, 3 May 2017: paragraph 5.14; *Online resale price maintenance in the digital pianos and digital keyboard sector*, 50565-2, 1 August 2019: paragraph 5.18; *Online resale price maintenance in the guitar sector*, 50565-3, 22 January 2020: paragraph 5.18 (bullet point 4); *Online resale price maintenance in the electronic drum sector*, 29 June 2020: paragraph 5.6; and *Residential estate agency services*, 17 December 2019: paragraph 7.14.

⁹⁷⁸ See paragraphs 3.344 to 3.359 above.

- 5.17.2 Dar's staff demonstrated to Resellers that they understood that the implementation and enforcement of the Dar Pricing Policy would be potentially illegal;⁹⁷⁹
- 5.17.3 Resellers had alerted Dar to the possibility that the implementation and enforcement of the Dar Pricing Policy was potentially illegal;⁹⁸⁰
- 5.17.4 Dar was aware of the CMA's continued interest in the lighting industry about matters of RPM;⁹⁸¹ and
- 5.17.5 Dar had been made aware that a possible complaint to or investigation by the CMA was under consideration.⁹⁸²
- 5.18 Moreover, even ignoring the evidence set out in the paragraph above, RPM is a well-established competition law infringement⁹⁸³ and Dar, at the very least, ought to have known that restricting its Resellers' freedom to determine their own resale prices would reduce price competition between Resellers.
- 5.19 In addition, the CMA has taken into account evidence of the culture of concealment as implemented by Dar in respect of the Dar Pricing Policy, which formed the basis for the Infringements, as strong evidence of an intentional infringement.⁹⁸⁴
- 5.20 Finally, the CMA has concluded that the Infringements have as their object the prevention, restriction or distortion of competition⁹⁸⁵ and object infringements are by their very nature harmful to the proper functioning of competition. As a result, the CMA finds that Dar could not have been unaware of the anti-competitive nature of its conduct.⁹⁸⁶
- 5.21 The CMA, therefore, finds that Dar committed the Infringements intentionally. This same evidence would also be sufficient to support the CMA's finding that Dar committed the Infringements, at the very least, negligently. The CMA therefore finds that the conditions for imposing a penalty on Dar Group are therefore met.

⁹⁷⁹ See paragraphs 3.360 to 3.376 above.

⁹⁸⁰ See paragraph 3.377 above.

⁹⁸¹ See paragraph 3.378 above.

⁹⁸² See paragraphs 3.379 to 3.382 above.

⁹⁸³ By way of an example illustrating that RPM is a well-established competition law infringement, the CMA notes the reference in the Advocate General's opinion in Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank*, ECLI:EU:CL2019:678, paragraph 53: 'Therefore, such an agreement is neither, as the referring court correctly points out, a typical horizontal price-fixing agreement nor, I would add, anything that could be readily qualified as a vertical resale price maintenance agreement.'

⁹⁸⁴ See paragraphs 3.383 to 3.406 above.

⁹⁸⁵ See paragraphs 4.275 to 4.288 above.

⁹⁸⁶ See paragraph 5.14 above.

Calculation of Penalties

5.22 As noted above at paragraph 5.8, when setting the amount of the penalty the CMA must have regard to the Penalties Guidance. The Penalties Guidance sets out a six-step approach for calculating the penalty. The six steps and their application in this case are set out below. In determining the amount of the penalty in this case the CMA has considered in detail Dar Group's representations on the Draft Penalty Calculation pursuant to settlement discussions. The six steps and their application in this case are set out below.

Step 1 – the starting point

5.23 The starting point for determining the level of financial penalty that will be imposed on an undertaking is calculated having regard to: (i) the seriousness of the infringement and the need for general deterrence; and (ii) the relevant turnover of the undertaking.⁹⁸⁷

5.24 In this case, the CMA has decided to apply a starting point percentage of 19% to a relevant turnover of £[<], leading to a starting point of £[<] based on the considerations set out below.

Seriousness of the Infringements and the need for general deterrence

5.25 The CMA will apply a starting point of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers). The more serious and widespread the infringement, the higher the starting point is likely to be. In applying the starting point, the CMA will also reflect the need to deter the infringing undertaking and other undertakings generally from engaging in that type of infringement in the future.⁹⁸⁸

5.26 In making this case-specific assessment, the CMA will first take into account how likely it is for the type of infringement at issue, by its nature, to harm competition.⁹⁸⁹

5.27 At the second stage, the CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of the specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately consumers.⁹⁹⁰

5.28 Finally, the CMA will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence. In particular, the

⁹⁸⁷ Penalties Guidance, paragraph 2.3 to 2.10.

⁹⁸⁸ Penalties Guidance, paragraph 2.4.

⁹⁸⁹ Penalties Guidance, paragraph 2.5.

⁹⁹⁰ Penalties Guidance, paragraph 2.8.

CMA will consider the need to deter other undertakings, whether in the same market or more broadly, from engaging in the same or similar conduct.⁹⁹¹

Nature of the Infringements

- 5.29 The Infringements involve RPM. In *Roland*, the CAT confirmed: ‘Although RPM is less serious than the most serious cartel infringements, RPM is nevertheless an inherently serious infringement [...] which has a harmful effect on consumers.’⁹⁹² The CAT also reaffirmed, as regards the seriousness of RPM, that the immediate effect of RPM is to restrict resellers’ freedom to set their own prices and to compete fully and effectively, as well as to restrict intra-brand competition which tends to increase the prices paid by consumers for a particular brand.⁹⁹³
- 5.30 The CMA considers, in line with the CAT’s view in *Roland*, that RPM is particularly damaging when it takes place online, as ‘the ability to sell or advertise at discounted prices on the internet can intensify price competition, not only between online resellers but also between online and bricks-and-mortar resellers.’⁹⁹⁴ In *Roland*, the CAT held that the particular circumstances of that case supported ‘an assessment of RPM as being at the top end of the “less serious” (10% to 20%) category of infringement.’⁹⁹⁵

Specific circumstances relevant to the extent and likelihood of harm to competition in this case

- 5.31 The relevant specific circumstances in this case were as follows.
- 5.32 **The nature of the product, including the nature and extent of demand for the product:** The Dar Pricing Policy applied to online pricing.⁹⁹⁶ In 2019, sales through the internet accounted for [15 – 20]% of the sale of Domestic Lighting Products in the UK.⁹⁹⁷ The evidence provided by Dar shows that, of its top 20 Resellers, almost all sold the Relevant Products online or in a combination of online and in-

⁹⁹¹ Penalties Guidance, paragraph 2.9.

⁹⁹² *Roland*, paragraph 96.

⁹⁹³ The CMA observes that in *Roland*, the CAT noted, at paragraph 67: ‘The CMA referred to the DotEcon report which recorded that its decisions condemning RPM in Bathroom Fittings and Light Fittings had led to an estimated fall in prices of around 17%.’ The CAT also noted, at paragraph 81: ‘[...] The fact that RPM leads to higher prices for consumers is supported by the empirical evidence in the DotEcon report referred to above.’

⁹⁹⁴ *Roland*, paragraph 85.

⁹⁹⁵ *Ibid.* Moreover, the CAT held that there is not necessarily a significant difference between the seriousness of RPM and the seriousness of horizontal infringements (*Roland*, paragraph 81). The CAT endorsed the views expressed by the CMA in *Digital Pianos* that RPM was in fact a serious infringement ‘within the categories of infringements [...] which will generally attract a starting point between 21 and 30%’, though not within the category of the most serious infringements of the Chapter I prohibition, such as horizontal price fixing, market sharing and other cartel activities, ordinarily attracting a starting point towards the upper end of that bracket. The CAT also held that 20% was not the upper limit for the starting point of RPM and suggested that where the CMA finds multiple infringements, this would render the infringement even more serious and warrant an even higher starting point. See *Roland*, paragraph 94.

⁹⁹⁶ See paragraph 3.203 above.

⁹⁹⁷ AMA Research Report 2020, *Lighting Market Report – UK 2020-2024 Analysis*, p.87.

store during the Relevant Period.⁹⁹⁸ Further evidence collected by the CMA shows that at least three out of Dar's top five Resellers were selling the Relevant Products almost exclusively or exclusively online during the Relevant Period.⁹⁹⁹ Moreover, as the CMA has found in previous decisions,¹⁰⁰⁰ the ability to sell or advertise the Relevant Products at discounted prices on the internet can intensify price competition between resellers (online and/or offline) due to the increased transparency and reduced search costs from internet shopping. Further, the CMA considers that preventing or restricting the ability for resellers to determine their own online resale prices is likely to reduce price competition and, in turn, undermine a key benefit of e-commerce.¹⁰⁰¹

5.33 The structure of the market, including Dar's market share: Although Dar has submitted that in 2017 it had approximately [0 – 5]% of the share of supply of domestic lighting,¹⁰⁰² the CMA considers that a purely quantitative market share analysis, in a market which is fragmented and comprises a large number of small firms,¹⁰⁰³ potentially understates Dar's significance as a supplier on the basis of Resellers' testimonies.^{1004 1005}

5.34 The market coverage of the Infringements: The Infringements covered all of the Relevant Products sold by [Reseller 1] and [Reseller 2].¹⁰⁰⁶ The Infringements had a clear effect on both of these Resellers, with Dar seeking to prevent or restrict their ability to determine their own retail prices for the Relevant Products. Furthermore, the CMA has reasonable grounds for suspecting that at least 28 Resellers selling the Relevant Products (including [Reseller 1] and [Reseller 2]),

⁹⁹⁸ GMM-000333646 (Annex 14.1 to response dated 18 December 2020 to the First Dar Section 26 Notice), Dar's top 20 Resellers.

⁹⁹⁹ GMM-000333646 (Annex 14.1 to response dated 18 December 2020 to the First Dar Section 26 Notice). See also GMM-000333717 (Response dated 11 December 2020 to the Section 26 Notice to [Reseller] dated 25 November 2020), response to questions 12 and 13.

¹⁰⁰⁰ See, for example, CMA's decision in the [Electronic drum sector: anti-competitive practices 50565-5 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/electronic-drum-sector-anti-competitive-practices-50565-5), paragraphs 3.32, 3.33 and 5.27. Also see paragraphs 147 and 148 of *Commission Staff Working Document in relation to the Final report on the E-commerce Sector Inquiry* referred to at footnote 100 above.

¹⁰⁰¹ *Roland*, paragraph 66.

¹⁰⁰² See GMM-000601935 (Response dated 2 November 2021 to the Third Dar Section 26 Notice), response to question 7.

¹⁰⁰³ See paragraph 3.21 above.

¹⁰⁰⁴ See to that effect *Roland*, paragraph 74. The CAT held that '*The adherence to the pricing policy of Reseller 1, who was one of the top five resellers of Roland branded products, was highly visible to other resellers and would have had the effect of bringing other resellers into line or at least had the potential to do that which is the test in the Guidance. This was not a one-off, isolated instance of RPM, with a single reseller.*'

¹⁰⁰⁵ For example, [Reseller] considered Dar to be a 'hugely' important and a 'main supplier', one of 'the brands that [it] wanted on [its] site'. When asked in an interview whether any of the Dar products or brands were 'a must have for [Reseller]', [Employee of Reseller] replied, 'I'd say all of them, [...], except probably the Wisebuys'; see GMM-000601945 (Transcript of interview with [Employee of Reseller] on 28 April 2021, p.77, lines 13-15 and p.78, lines 7-10). In addition, [Reseller 2] told the CMA that Dar was a major part of its business and that it could not afford to lose its business (see GMM-000600605 - Note of call with [Employee of Reseller 2] on 18 June 2021). [Reseller 2] further told the CMA, 'And to be fair, you probably wouldn't voluntarily not stock Dar products online if you want to be strong online.' See GMM-000601993 (Transcript of interview with [Employee of Reseller 2] on 14 September 2021), p.98, lines 12-14.

¹⁰⁰⁶ See paragraphs 3.205 to 3.208 above. The CMA notes that [Reseller 2] sold all Relevant Products; see GMM-000600491 (Response dated 12 May 2021 to the First [Reseller 2] Section 26 Notice), response to question 3.

and each of the Resellers that were signatories to an SDA,¹⁰⁰⁷ were subject to the Dar Pricing Policy.¹⁰⁰⁸

5.35 The actual or potential effect of the Infringements on competitors and third parties: The CMA considered the following factors in particular:

5.35.1 In terms of intra-brand competition, the CMA considers that the Infringements would likely have had a wider adverse effect on the market by reducing downward pressure on the retail price of the Relevant Products more widely. In particular:

- As [a significant Reseller of Dar],¹⁰⁰⁹ [Reseller 1] was highly visible to other Resellers. So when, following instruction from Dar, [Reseller 1] reverted to the Minimum Price in relation to a Relevant Product, other Resellers likely would have followed. This is because [Reseller 1] was seen as a price leader whose prices other Resellers would follow like ‘a herd’.¹⁰¹⁰
- The evidence shows that Dar applied the Dar Pricing Policy to its Resellers and from time to time during the Relevant Period proactively monitored their compliance, sometimes taking a systematic approach.¹⁰¹¹
- The CMA notes that while Dar did not make use of automated price monitoring software, [Reseller 1] did use such software to monitor other Resellers, including ones with a large online presence, such as [Reseller] and [Reseller], during the Relevant Period.¹⁰¹²
- Further, as noted at paragraphs 3.285 above, the CMA finds that certain Resellers were monitoring other Resellers’ prices on a regular and widespread basis during the Relevant Period and that this was a very simple and straightforward task given the availability of Google Shopping, which obviated the need for sophisticated price monitoring software. For instance, [Reseller] monitored multiple Resellers, including [Reseller], who in turn monitored [Reseller] and [Reseller].¹⁰¹³ [Reseller] also carried out frequent contemporaneous monitoring exercises using Google Shopping covering multiple Resellers, including

¹⁰⁰⁷ GMM-000333626 (Annex 10.1 to response dated 11 December 2020 to the First Dar Section 26 Notice), Members of Dar’s SDA networks.

¹⁰⁰⁸ These Resellers taken together accounted for at least [70 - 80]% of Dar UK’s sales of Relevant Products in 2019 (the most recent year for which the CMA has been provided revenue information). See paragraphs 3.412 to 3.414 above. See also *Roland*, paragraphs 91 to 92.

¹⁰⁰⁹ GMM-000333646 (Annex 14.1 to response dated 18 December 2020 to the First Dar Section 26 Notice), Dar’s top 20 Resellers.

¹⁰¹⁰ GMM-000601930 (Transcript of interview with [Dar Senior Employee] on 16 September 2021), p.114, lines 12-16.

¹⁰¹¹ See paragraphs 3.265 to 3.283 above.

¹⁰¹² GMM-00000447 (Response dated 9 December 2020 to the First [Reseller 1] Section 26 Notice), response to questions 10 and 11.

¹⁰¹³ [Employee of Reseller] referred to both these Resellers as ‘quite big players’ in the lighting industry. GMM-000601948 (Transcript of interview with [Employee of Reseller] on 13 September 2021), p.136, lines 23-26.

[Reseller 2], [Reseller], [Reseller], [Reseller] and [Reseller], amongst others.

- The CMA considers, therefore, that the combination of Dar’s occasional proactive monitoring, [Reseller 1’s] use of automated price monitoring software and the availability of Google Shopping, amplified the impact of the Infringements in two ways: (i) it enabled Dar and certain Resellers to detect prices below the Minimum Price and for Dar to secure reversion to the Minimum price; and (ii) it also enabled Resellers to follow each other’s prices, so that when the Dar Pricing Policy impacted the prices of some, others followed suit.

5.35.2 In terms of inter-brand competition, the evidence shows that Dar was using its Resellers’ pricing of competitor products in order to price its own products.¹⁰¹⁴ The CMA considers it likely that Dar’s competitors also benchmarked the pricing of their own products against Resellers’ advertised prices for Dar’s similar products. The CMA therefore considers that the Dar Pricing Policy had at least a potential effect on Dar’s competitors.

General deterrence

5.36 In setting the starting point at 19%, the CMA has also taken into account the need to deter other undertakings from engaging in similar infringements in the future. This includes undertakings both within the lighting industry and the wider economy,¹⁰¹⁵ which the CMA considers would benefit from more general deterrence in relation to RPM.¹⁰¹⁶

5.37 On 3 May 2017, the CMA issued its NLC Decision in relation to RPM in the lighting industry. Following the NLC Decision, the CMA conducted significant amplification work focussed on the lighting industry aimed at deterring similar RPM conduct,¹⁰¹⁷ including issuing six Warning Letters¹⁰¹⁸ (including one to Dar) and seven Advisory Letters¹⁰¹⁹ to companies within the lighting industry, relating to RPM. Notwithstanding, that amplification work, the CMA is now issuing a further infringement decision relating to RPM in the lighting industry.

¹⁰¹⁴ GMM-000336323 (Internal Dar email from [Dar Senior Employee] to [Dar Employee] dated 26 July 2018).

¹⁰¹⁵ Penalties Guidance, paragraphs 1.4 and 2.9.

¹⁰¹⁶ In *Roland*, the CAT held, at paragraph 85: ‘*In assessing the seriousness of the RPM and need for general deterrence, we consider that the CMA’s evidence that RPM is widespread in the UK economy and, in particular, in the musical instrument sector, is important.*’ See also *FP McCann Limited v CMA* [2020], where the CAT held, at paragraph 159: ‘[...] *On that subject, we have the considered opinion of the CMA that there remains a need for general deterrence and we will assess the appropriateness of the CMA’s penalty on that basis.*’

¹⁰¹⁷ See paragraph 3.358 above.

¹⁰¹⁸ See register of Warning Letters issued by the CMA: [Warning letters issued by the CMA - GOV.UK](#).

¹⁰¹⁹ See register of Advisory Letters issued by the CMA: [Advisory letters issued by the CMA - GOV.UK](#).

- 5.38 It is the CMA's view that the lighting industry is not an isolated example of such conduct and RPM appears to be a problem in the UK economy.¹⁰²⁰ The CMA notes the number of complaints it receives in respect of RPM¹⁰²¹ and the infringement decisions it has issued in recent years relating to RPM in the wider economy, including *Bathroom Fittings*,¹⁰²² *Commercial Refrigeration*¹⁰²³ and five separate infringement decisions in the musical instruments industry.¹⁰²⁴
- 5.39 The CMA therefore considers that notwithstanding its scrutiny of and enforcement against RPM, there is still a need for general deterrence.¹⁰²⁵
- 5.40 The CMA considers that on balance, a 19% starting point is appropriate in this case to adequately reflect the seriousness of this type of infringement and the level of general deterrence required. The CMA also notes that the starting point in this case is not out of line with the starting point adopted by the CMA in other analogous decisions.¹⁰²⁶

Relevant turnover

- 5.41 The 'relevant turnover' is defined in the Penalties Guidance as the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year.¹⁰²⁷ The 'last business year' is the financial year preceding the date when the infringement ended.¹⁰²⁸
- 5.42 In this case, Dar's relevant turnover in the Relevant Market¹⁰²⁹ for the financial year ending in June 2019 was £[~~£~~].

¹⁰²⁰ In *Roland*, the CAT held, at paragraph 85: '*In assessing the seriousness of the RPM and need for general deterrence, we consider that the CMA's evidence that RPM is widespread in the UK economy and, in particular, in the musical instrument sector, is important.*'

¹⁰²¹ See *Roland*, paragraphs 64 to 68.

¹⁰²² *Online resale price maintenance in the bathroom fittings sector*, CE/9857-14, 10 May 2016.

¹⁰²³ *Commercial refrigeration*, CE/9856-14, 24 May 2016.

¹⁰²⁴ See the CMA's decisions in [Synthesizers and hi-tech equipment: anti-competitive practices 50565-4 - GOV.UK \(www.gov.uk\)](http://www.gov.uk); [Electronic drum sector: anti-competitive practices 50565-5 - GOV.UK \(www.gov.uk\)](http://www.gov.uk); [Digital piano and digital keyboard sector: anti-competitive practices 50565-2 - GOV.UK \(www.gov.uk\)](http://www.gov.uk); [Guitars: anti-competitive practices 50565-3 - GOV.UK \(www.gov.uk\)](http://www.gov.uk); and [Digital pianos, digital keyboards and guitars: anti-competitive practices 50565-6 - GOV.UK \(www.gov.uk\)](http://www.gov.uk).

¹⁰²⁵ For the CMA's past amplification work relating to RPM see *Roland*, paragraphs 64 to 68.

¹⁰²⁶ *Roland*, paragraph 96, *Guitars*, paragraph 5.22 and *Commercial refrigeration*, paragraph 7.33.

¹⁰²⁷ Penalties Guidance, paragraph 2.11. The CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* and *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2006] EWCA Civ 1318, [169], that: '[...] *neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty.*' At [170]-[173], the Court of Appeal considered that it was sufficient for the OFT to '*be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement.*'

¹⁰²⁸ Penalties Guidance, paragraph 2.11.

¹⁰²⁹ The Relevant Market for the purposes of this Decision is no wider than the supply of Domestic Lighting Products (excluding Special Contract Products but including those sold under other types of white label arrangements) in the UK. See paragraph 3.34 above.

Step 2 – adjustment for duration

- 5.43 The starting point under step 1 may be increased or, in particular circumstances, decreased to take into account the duration of the infringement.¹⁰³⁰ Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional cases decide to round up the part year to a full year.¹⁰³¹
- 5.44 The composite duration for the Infringements is from 1 August 2017 to 25 September 2019 (2 years and 2 months). Accordingly, the CMA has applied a duration multiplier of 2.25 years, rounding up to the nearest quarter year.
- 5.45 Consequently, the penalty after step 2 is £[~~8~~].

Step 3 – adjustment for aggravating and mitigating factors

- 5.46 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are mitigating factors.¹⁰³² A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.¹⁰³³ In the circumstances of this case, the CMA considers that it is appropriate to adjust the penalty at step 3 to take account of the factors set out below.

Aggravating factor: failure to take sufficient action after two Warning Letters

- 5.47 The CMA has applied an uplift on the penalty as Dar committed the Infringements despite receiving two Warning Letters.¹⁰³⁴ Dar received Warning Letters from the OFT and the CMA in May 2012 and June 2017 respectively, in relation to RPM or similar conduct, informing it that imposing minimum retail prices on distributors could amount to an infringement of the Chapter I prohibition. Dar confirmed receipt of each of these letters, stated that it took compliance matters very seriously and that it would urgently conduct a review of its activities and seek legal advice. In addition, on 4 September 2017, Dar's legal representatives wrote to the CMA, outlining the steps Dar had taken, and the steps it proposed to take, in response to the Second Warning Letter.
- 5.48 The CMA has applied an uplift of 35%, which it considers appropriate in light of Dar committing the Infringements despite receipt of two Warning Letters.

¹⁰³⁰ Penalties Guidance, paragraph 2.16.

¹⁰³¹ Penalties Guidance, paragraph 2.16

¹⁰³² Penalties Guidance, paragraph 2.17.

¹⁰³³ Penalties Guidance, paragraphs 2.18 and 2.19.

¹⁰³⁴ Penalties Guidance, paragraph 2.18.

Aggravating factor: Infringements committed intentionally (rather than negligently)

- 5.49 The fact that an infringement was committed intentionally rather than negligently can be an aggravating factor.¹⁰³⁵
- 5.50 The CAT has determined that an infringement is committed '*intentionally*' for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition.¹⁰³⁶ As set out in paragraphs 5.17 to 5.21 above, there is a large body of evidence indicating that Dar must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition.
- 5.51 The CMA therefore considers that it is appropriate to apply an uplift of 10% to Dar Group's penalty for committing the Infringements intentionally.

Mitigating factor: adequate steps having been taken to ensure compliance with competition law

- 5.52 The CMA considers that it is appropriate to grant Dar Group a 10% penalty reduction as it has taken adequate steps with a view to ensuring future compliance with competition law, including providing ongoing competition law training to Dar's staff.
- 5.53 Dar Group has now provided details of a new and comprehensive competition law compliance programme. This includes appropriate steps relating to competition law risk identification, assessment, mitigation, and review, to which Dar Group has fully and publicly committed.¹⁰³⁷
- 5.54 Dar has published a statement regarding its public commitment to compliance on its website.¹⁰³⁸ It has also committed to submitting a report to the CMA on its compliance activities every year, for the next five years.

¹⁰³⁵ Penalties Guidance, paragraph 2.18 and footnote 31.

¹⁰³⁶ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [221]. See also: *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 [456]: '*...an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition... It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without it being necessary to show that the undertaking also knew that it was infringing the Chapter I or Chapter II prohibition.*'

¹⁰³⁷ Dar submitted representations on 25 February 2022 and 10 March 2022, which outline the development and implementation of a sufficiently comprehensive competition law compliance programme. The CMA received clear commitment from Dar for the swift implementation of this programme, by the deadlines set out in Dar's submissions and agreed with the CMA.

¹⁰³⁸ See the compliance statement on Dar's web page, updated on 14 March 2022: <https://www.darlighting.co.uk/competition-law>.

5.55 The CMA considers that Dar Group has provided sufficient evidence of compliance activities which demonstrate a clear and unambiguous commitment to future competition law compliance throughout the organisation from the top down to warrant a penalty reduction of 10%.

Step 4 – adjustment for specific deterrence and proportionality

5.56 At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round.¹⁰³⁹ The penalty may be adjusted either to:

- increase it to achieve specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future); or
- reduce it to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking at the time the penalty is being imposed¹⁰⁴⁰ as well as any other relevant circumstances of the case, such as the nature of the infringement and the impact of the undertaking's infringing activity on competition.¹⁰⁴¹

5.57 The penalty for the Infringement after step 3 is £[<]. Taking all the relevant circumstances of this case into account, including Dar Group's financial indicators in the round, on balance, the CMA considers that a reduction for proportionality is required in this case.

5.58 In performing its step 4 analysis, and in accordance with the Penalties Guidance, the CMA has had regard to Dar Group's size and financial position, the nature of the Infringements and their impact on competition. As a result, the CMA deems that a penalty of £[<] would be disproportionately high.

5.59 As regards Dar Group's financial position, in particular, the CMA has considered a range of financial indicators in this regard, based on the last three years' worth of published accounting information and information provided by Dar at the time of calculating the penalty. Those financial indicators included: relevant turnover; worldwide turnover; operating profit; profit after tax; net assets; and dividends. In light of Dar Group's financial indicators specifically, the CMA considers that the penalty should be reduced to £1,875,000. The CMA considers that a penalty of such magnitude is appropriate and sufficient for deterrence purposes without being disproportionate or excessive.

¹⁰³⁹ Penalties Guidance, paragraph 2.24.

¹⁰⁴⁰ As set out in paragraph 2.20 of the Penalties Guidance, the CMA will generally consider three-year averages for profits and turnover and may consider indicators of size and financial position from the time of the infringement.

¹⁰⁴¹ Penalties Guidance, paragraph 2.20.

Step 5 – adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy

- 5.60 The CMA may not impose a penalty for an infringement that exceeds 10% of an undertaking's 'applicable turnover', that is the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision.¹⁰⁴²
- 5.61 The CMA has assessed the penalty against this threshold and found there to be no need for any reduction of the penalty at step 5 of the penalty calculation.

Step 6 – application of reduction for settlement

- 5.62 The CMA will reduce an undertaking's penalty at step 6 where the undertaking agrees to settle the case with the CMA.¹⁰⁴³ This involves, among other things, the undertaking admitting its participation in the infringement.¹⁰⁴⁴
- 5.63 In this case, the CMA considers it appropriate to grant Dar Group a 20% discount to reflect the fact that Dar has expressed a genuine interest and willingness to enter into settlement discussions with the CMA before the CMA issued the Statement of Objections, admitted the Infringements and agreed to cooperate in expediting the process for concluding the Investigation. This discount is granted on condition that Dar continues to comply with the continuing requirements of settlement as set out in the settlement agreements between each of Dar and Castlegate 624 and the CMA.

Penalty

- 5.64 The following table sets out a summary of the penalty calculation and the penalty that the CMA requires Dar Group to pay in relation to the Infringements. The individual figures in the summary table are rounded to the nearest pound sterling.

¹⁰⁴² Section 36(8) of the Act and the 2000 Order, as amended. See also Penalties Guidance, paragraph 2.25. The business year on the basis of which worldwide turnover is determined will be the one preceding the date on which the decision of the CMA is taken or, if figures are not available for that business year, the one immediately preceding it.

¹⁰⁴³ Penalties Guidance, paragraphs 2.29 and 2.30.

¹⁰⁴⁴ Penalties Guidance, paragraph 2.30.

Table 5.1: Summary table of final penalty for Dar Group

Step	Description	Adjustment	Figure	
	Relevant turnover		£[X]	
1	Starting point	x 19%	£[X]	
2	Duration multiplier	x 2.25	£[X]	
3	Adjustment for aggravating and mitigating factors	<i>Aggravating: two warning letters</i>	+35%	+ £[X]
		<i>Aggravating: intent</i>	+10%	+ £[X]
		<i>Mitigating: compliance</i>	-10%	- £[X]
		Total after adjustment	+35%	£[X]
4	Adjustment for specific deterrence or proportionality	Reduction for proportionality	-£[X]	
5	Adjustment to take account of the statutory maximum penalty	N/A	N/A	
	Penalty after Step 5		£1,875,000	
6	Pre-SO Settlement discount	-20%	-£375,000	
Total Penalty Payable			£1,500,000	

Payment of penalty

5.65 In light of the above, the CMA requires Dar Group to pay a penalty of £1,500,000.

5.66 This penalty will become due to the CMA in its entirety on 24 May 2022¹⁰⁴⁵ or on such date or dates agreed in writing with the CMA.¹⁰⁴⁶

Dated 23 March 2022

**Ann Pope, Senior Director of Antitrust Enforcement
for and on behalf of the Competition and Markets Authority**

¹⁰⁴⁵ The next working day two calendar months from the date of receipt of the Decision.

¹⁰⁴⁶ Details on how to pay the penalty are set out in the letter accompanying this Decision.