Neutral Citation Number: **[2026] EWHC 1995 (Ch)**

Case No: FS-2024-000004

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 July 2026

Before :

MR JUSTICE RICHARDS

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Between :

COMPETITION AND MARKETS AUTHORITY	**Claimant**
- and –	
EMMA MATRATZEN GMBH AND OTHERS	**Defendants**

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\- -

Rob Williams KC and Daisy Mackersie (instructed by **Competition and Markets Authority**) for the **Claimant**
Anneli Howard KC and Jonathan Lewis (instructed by Van Bael & Bellis) for the **Defendants**

Hearing dates: 3 June – 5 June 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 30 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Richards :

1. In these Part 8 proceedings, the Claimant (the **CMA**) seeks an enforcement order under s217 of the Enterprise Act 2002 (**EA 2002**) against the Defendants (to whom I refer as **Emma** unless there is any need to refer to a particular Defendant).

2. Emma's business primarily involves selling mattresses online to UK consumers. The CMA opened an investigation into Emma's selling practices on 28 November 2022. Since then the parties have worked together to address many of the CMA's concerns. Those included the use of "urgency messaging" on Emma's website that involved, broadly, visitors to Emma's website being shown a countdown timer suggesting that particular mattresses would be available at particular prices only for a limited period that was coming ever closer to expiry.

3. The CMA remains concerned, however, about Emma's use of what the parties describe as "reference pricing". Although that term may not be familiar to readers of this judgment, the concept will be. Reference pricing involves suggesting to customers or potential customers that a product is being offered at a price which is lower than some other price (the **Reference Price**). So, for example, the description of a product on the website might include the statement "Was £1,000, now £500". A further example would be a description of the price of a product as "~~£1,000~~ £500" with the struck-through figure of £1,000 serving as the Reference Price. A Reference Price can also be forward-looking in the sense that Emma might offer a product for sale at £500 but indicate that this is an introductory offer and the price will go up to £1,000 in the future.

4. The parties have also narrowed the scope of their dispute on the use of reference pricing. Emma is prepared to accept that it should adhere to what it describes as "**Duration Requirements**" which preclude it from using a Reference Price unless the product in question is offered for sale at that Reference Price for a particular length of time. However, the parties are apart on the CMA's request that Emma adhere to a "fixed volume requirement" (**FVR**). The FVR is difficult to summarise as it applies to various types of Reference Price, some of which are backward-looking, such as a "was/now" Reference Price, and some of which are forward-looking, such as a Reference Price used as part of an introductory offer. However, the essence of the FVR is a 1:2 ratio that requires that for every two products that Emma offers for sale at the lower price, it must sell or have sold one product at the higher Reference Price.

5. That description of the FVR ignores various important "safety valves" and qualifications that the CMA accepts should be built into the requirement. So, for example, the CMA accepts that special provisions should apply to clearance sales in which Emma seeks to sell all remaining stock at discounted prices. It accepts that Emma should be given a 15% "margin of error" so that it does not breach the FVR simply because it sells more goods at the discounted price than it was expecting. It is, therefore, important to recognise that the CMA accepts that realistic steps should be taken to prevent the FVR becoming a tripwire, particularly given the serious consequences that would flow if Emma breached any order requiring it to comply with the FVR. However, the essence of the CMA's proposal can be understood by reference to the 1:2 ratio that I have described. Therefore, in the remainder of this judgment, unless it is necessary to refer to safety valves specifically, I will refer to the FVR generically, it being understood that the CMA accepts it should include a number of safety valves.

PART A – LEGAL PROVISIONS

6. The present Part 8 proceedings were issued in October 2024. Since then, a new consumer protection regime has been enacted in the Digital Markets, Competition and Consumers Act 2024 (the **DMCCA**). However, the parties agree that this dispute falls to be determined under the "old law" which is to be found in the Consumer Protection from Unfair Trading Regulations 2008 SI/2008/1277 (the **Regulations**) as enforced via Part 8 of EA 2002.

The Regulations

7. By Regulation 3(1) "unfair commercial practices are prohibited". Regulation 2 defines "commercial practice" in terms which, it is common ground, include all relevant aspects of Emma's use of Reference Prices that form the basis of CMA's complaint.

8. A commercial practice is "unfair" only if it falls within either Regulation 3(3) or Regulation 3(4). The CMA relies on Regulation 3(4)(a), and more specifically a "misleading action" which satisfies Regulation 5(2) which provides as follows:

> (2) A commercial practice satisfies the conditions of this paragraph—
>
> (a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and
>
> (b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise…
>
> (4) The matters referred to in paragraph (2)(a) are – …
>
> (g) the price or the manner in which the price is calculated;
>
> (h) the existence of a specific price advantage; …

9. Thus Regulation 5(2) contains two requirements: (i) that the commercial practice contains false information or deceives or is likely to deceive and (ii) that the practice has a causative effect on a "transactional decision". Both of these requirements are to be considered by reference to their effect on the "average consumer". Regulations 2(2) to 2(5) explain how that effect is to be gauged including, in Regulation 2(2):

> (2) In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect

10. The concept of a "transactional decision" is defined in Regulation 2 as follows:

> …any decision taken by a consumer, whether it is to act or to refrain from acting, concerning—
>
> (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or
>
> (b) whether, how and on what terms to exercise a contractual right in relation to a product…

11. As Bacon J explained in *CMA v Care UK Health and Social Holdings Ltd and another* [2021] EWHC 2088 (Ch), the concept of a "transactional decision" is not confined to a decision to purchase a particular product or service but can also include a decision preparatory to the purchase of a product that is nevertheless directly related to the decision to purchase, such as a decision to enter a shop. That is an example drawn from "bricks and mortar" retailing. In the context of an online business such as that of Emma, the parties were agreed that, for example, decisions to click on product descriptions on Emma's website and to add a product to an electronic basket would be "transactional decisions" just as much as a decision to purchase a product would be.

12. The following propositions arising from Regulation 5(2) and the concept of the "average consumer" were common ground:

    i) The court does not need expert evidence as to the effect that reference pricing might have on consumers generally when considering the issues summarised in paragraph 9. Rather, the court can assess those issues for itself by reference to the characteristics of the average consumer set out in Regulations 2(2) to 2(5) (see, for example, the approach taken by the court in *The Office of Fair Trading v Purely Creative Limited* [2011] EWHC 106 (Ch) and paragraph [146] of the judgment of Etherton J (as he then was) in *The Office of Fair Trading v The Officers Club Ltd* [2005] EWHC 1080 (Ch).

    ii) The definition of the "average consumer" set out in Regulation 2(2) reflects the point that the consumer protection requirements of the Regulations are intended to protect consumers who take reasonable care of themselves (as distinct from ignorant, careless or over-hasty consumers) from being misled ([62] of *Purely Creative*).

    iii) When assessing the question of causation set out in paragraph 9, the court applies a "but for" test, asking whether "but for the relevant misleading action or omission of the trader, the average consumer would have made a different transactional decision from that which he did make" ([62] of *Purely Creative*).

Enforcement powers

13. The CMA is a "general enforcer" for the purposes of EA 2002. That gives it power to apply for an enforcement order under s215 of EA 2002 against Emma on the basis that they have engaged in conduct which constitutes a "Schedule 13 infringement". By s212(1) of EA 2002 read together with paragraph 19 of Schedule 13 to EA 2002, any act or omission which contravenes the Regulations and "harms the collective interests of consumers" is a Schedule 13 infringement.

14. Sections 217(1) and (2) specify the two situations in which this court can make an enforcement order:

> (1) This section applies if an application for an enforcement order is made under section 215 and the court finds that the person named in the application has engaged in conduct which constitutes the infringement.
>
> (2) This section also applies if such an application is made in relation to a Schedule 13 infringement and the court finds that the person named in the application is likely to engage in conduct which constitutes the infringement.

15. If either of those two situations in present then s217(3) provides that the court may make an enforcement order. It is common ground that this is a discretionary power: the court is not obliged to make an enforcement order whenever a Schedule 13 infringement has occurred or is likely to occur.

16. Sections 217(5) to (8) set out some provisions relating to enforcement orders:

> (5) an enforcement order must—
>
> (a) indicate the nature of the conduct to which the finding under subsection (1) or (2) relates, and
>
> (b) direct the person to comply with subsection (6).
>
> (6) A person complies with this subsection if he—
>
> (a) does not continue or repeat the conduct;
>
> (b) does not engage in such conduct in the course of his business or another business;
>
> (c) does not consent to or connive in the carrying out of such conduct by a body corporate with which he has a special relationship (within the meaning of section 222(3)).
>
> (7) But subsection (6)(a) does not apply in the case of a finding under subsection (2).
>
> (8) An enforcement order may require a person against whom the order is made to publish in such form and manner and to such extent as the court thinks appropriate for the purpose of eliminating any continuing effects of the infringement—
>
> (a) the order;
>
> (b) a corrective statement.

17. The CMA wants to use an order under s217 EA 2002 as the means of imposing the FVR on Emma. To do that, the CMA wants this court to direct Emma pursuant to s217(6)(a)

and (b) not to, for example, continue, repeat or engage in "conduct" consisting of using Reference Prices that do not comply with the FVR, or to engage in that "conduct" in their businesses.

18. The CMA showed me the judgment of the Court of Appeal in *Office of Fair Trading v Vance Miller* [2009] EWCA Civ 34. It argued, by reference to [46] of the judgment of Arden LJ (as she then was) that, "The court should see that what is prohibited is as clearly described as the circumstances permit, taking into account the need to give fair warning to the defendant of the acts that might constitute a breach." It argues that this dictum positively supports the proposition that the FVR should be set out in an enforcement order.

19. During the trial, Emma accepted that it had committed some Schedule 13 infringements although it does not accept that it has committed all the infringements alleged. However, it does accept that, if this court holds otherwise, an enforcement order <u>could</u> be made although it argues that there are good reasons for the Court not to make any enforcement order, or one that specifically requires it to adhere to a 1:2 FVR.

PART B – RELEVANT FACTS

20. As I note, the CMA has brought its claim under Part 8 of CPR. Mr Williams KC in his opening submissions made a virtue of this noting that it meant that the court is not being presented with any expert evidence and there has been no cross-examination of witnesses.

21. For the most part, I agree with Mr Williams KC. However, it became clear during the hearing that the parties are not agreed on some important factual issues. With hindsight, some limited cross-examination would have helped me to make some findings on disputed factual matters. In the event, neither party suggested that I should do anything other than make the best of the situation by reference to the unchallenged witness evidence before me.

22. That witness evidence consisted of:

    i) For Emma – a witness statement of Mr Dennis Schmoltzi, one of the two founders and managing directors of Emma Sleep GmbH.

    ii) For the CMA – a witness statement of Ms Hayley Fletcher, the then Interim Senior Director of Consumer Protection at the CMA and the senior responsible officer for the CMA's investigation into Emma's online selling practices.

Emma's business and its customers

23. As noted, Emma primarily sells mattresses online to consumers in the UK and elsewhere over its website. It also sells beds and other bed accessories.

24. Emma sells its own brand of mattresses, which it itself manufactures, over its website. It offers a more limited range of products than its more established competitors such as Dreams, Bensons for Beds and John Lewis. Of course, Emma's mattresses come in a range of sizes. They also come at a range of price points. It uses different branding to describe different product lines: some examples used at times material to this dispute

were “Emma Original”, “Emma Premium”, “Emma Next Generation Premium” and “Emma Hybrid”.

25. Emma regards itself as a disruptor of the established market for mattresses in the UK and elsewhere. It considers that it has been able to disrupt the market because its Emma branded mattresses are of high quality and offered at competitive prices. Independent consumer organisations such as Which? and Good Housekeeping in the UK have endorsed Emma’s products. Emma also offers its customers a 200-night trial period with a no-quibble money-back guarantee and considers that this is a driver of sales in the UK. Emma considers that it generates high levels of customer satisfaction: between the start of 2021 and 18 November 2024, 75.42% of its 32,830 customers have given Emma mattresses a score of 8 out of 10 or more.

26. I accept Mr Schmoltzi’s unchallenged evidence that customers in the UK tend to buy a mattress on average every 7-8 years. I also accept his evidence that, when making a relatively high cost and infrequent purchase such as a new mattress, UK consumers are well-informed and price-sensitive, often using online research and price comparison tools before making a purchase.

27. That dynamic, coupled with the fact that consumers will typically not have an urgent need for a new mattress means that UK consumers can afford to wait for what they see as a good deal. I accept Mr Schmoltzi’s evidence that the mattress sector in the UK generally is influenced by high levels of seasonality with demand for mattresses peaking around promotional periods such as Black Friday, Boxing Day and January sales with less activity often during May and June and the pre-Christmas season.

28. In his witness statement, Mr Schmoltzi calculated that, between October 2023 and September 2024, Emma had 2-4% market share of the UK mattress market. He calculated that sum by reference to what he said were Emma’s sales of £40-80m in that period and his estimate of total sales of mattresses in the UK during that period of £2bn. The £2bn figure was produced by (i) assuming a UK population of 68 million, (ii) assuming that on average 1.5 people sleep on each mattress so that the UK needs 45.333m mattresses, (iii) assuming that each mattress is changed every 7.5 years so that (iv) each year 45.333m/7.5 (being around 6m) new mattresses are purchased and (v) estimating that each such mattress cost around £294 at that time which he considered, from his experience, to be a realistic average price.

29. The CMA says that Emma’s true market share is much higher. It points to an internal Emma document that suggested that the UK mattress market in the UK was worth £950m in 2023, of which £665m were sold online. That document suggests that Emma’s revenue in 2023 was £150-200m and so estimated that Emma had 23-30% of the market for online mattresses and 16-21% of the market for all mattresses.

30. As the CMA points out, Mr Schmoltzi prepared his estimate on the basis of sales of £40-80m, whereas the other document assumes sales of £150-200m. The CMA suggests that Mr Schmoltzi has used the wrong sales figures. The difficulty with that, of course, is that £150-200m could be the wrong sales figure.

31. It is simply not possible for me to resolve this factual dispute by reference to unchallenged evidence. Mr Schmoltzi’s estimate in his witness statement is certainly broad brush. However, it is not obviously wrong or implausible. If the CMA had wished

to challenge that evidence, they should have sought to cross-examine Mr Schmoltzi. In the absence of such cross-examination, I will not disbelieve Mr Schmoltzi's evidence and I proceed on the basis that Emma did indeed have a market share between October 2023 and September 2024 of around 2-4%.

Emma's "high price/high discount" strategy

32. During the course of its investigation, the CMA obtained disclosure from Emma on its pricing strategy. One such document consisted of guidelines (the **Pricing Guidelines**) that Emma used from around 2022. The CMA invites me to conclude from the Pricing Guidelines that Emma's strategy at the time was one of "high price/high discount" which involved Emma continuously offering high discounts (in comparison with high Reference Prices) to deceive customers into believing that they were getting a good price.

33. There is some support for that interpretation of Emma's "high-price/high discount" strategy in the Pricing Guidelines themselves. The Pricing Guidelines suggested that employees should "find a legal way to ideally provide meaningful and effective discounts every day". The Pricing Guidelines suggested that, in markets with "no legal risk" (which in context appeared to include the UK), employees should "go for high-price high-discount all the time" but in markets with high legal risk, products that were on discount should be rotated to comply with legal requirements.

34. It is certainly possible to read the following "Rule 12" in the Pricing Guidelines as an encouragement to mislead consumers:

> **Rule 12: Try to create clear reasons for consumer to believe this is a unique sales opportunity.** e.g. Black Weeks, end of season sale, Easter sale, Christmas sale, Independence Day sale, King's day, ... (so everything around national holidays), Emma Birthday sale, Summer Sale, Winter Sale, ...

35. However, that is not inevitably an exhortation to deceive. If consumers truly are being offered a good deal, it is not necessarily deceptive to take positive steps to persuade them of that fact by suggesting that a unique sales opportunity is being offered.

36. Other Emma internal documents suggest that Emma might have been following the kind of strategy that the CMA alleges. The ruling of the Advertising Standards Authority (**ASA**) described in paragraphs 53 to 56 below, showed that Emma had engaged in misleading advertising using Reference Prices on two occasions. On 11 March 2022, a member of Emma's UK team emailed Mr Schmoltzi and others to explain the ASA's ruling. That email explained a proposed "action plan" in response to that ruling:

> We are testing different alternatives to still go with [high price/high discount strategy] but in a more indirect way, which includes bundle sales, private sales, listing new products etc. We will continue finding the most aggressive solutions.

37. In June 2022, at an internal "Big Lever workshop", Emma employees were apparently asking themselves:

> What solutions can we find regarding the ASA regulation of not having our mattress on discount all the time?

38. However, the inference that the CMA draws is not unanswerable. It is also possible to read the internal Emma documentation referred to above as seeking to advertise discounts as much as was possible (the "most aggressive solutions" referred to) within the constraints of law and regulation. That can quite fairly be read as an exhortation to explore the boundaries of law and regulation but not to exceed those boundaries.

39. Mr Schmoltzi's witness evidence was that the "high price/high discount strategy" referred to a strategy of setting undiscounted prices at the higher end of Emma's affordable target range and giving higher discounts during sales periods. He contrasted that with a plausible alternative strategy of "everyday low prices" under which Emma would generally set prices at the mid- or lower point in its affordable target price range, but offer no discount. He denied that Emma's undiscounted prices are inflated or high relative to those of its competitors.

40. Mr Schmoltzi's explanation of the "high price/high discount strategy" is plausible and has been given in a witness statement verified by a statement of truth. Since Mr Schmoltzi has not been cross-examined, he has not been given an opportunity to answer the allegation summarised in paragraph 32. I will not disbelieve Mr Schmoltzi's explanation and, as a consequence, I will not conclude that the CMA have made good that allegation.

41. Mr Schmoltzi went further in his witness statement, arguing that even at their undiscounted Reference Prices, Emma's products were both (i) better in quality and (ii) cheaper than comparable products of their competitors. He said that, "What the CMA claims to be 'high prices' [i.e. Reference Prices] are in fact very competitive prices, even at full price." I accept that Mr Schmoltzi holds those beliefs about Emma's products.

42. However, the evidence before me, and the constraints of the Part 8 procedure, mean that I am in no position to make a finding that Mr Schmoltzi's beliefs are true. I cannot, for example, compare the specification of Emma's products with those of competitors to satisfy myself that Mr Schmoltzi truly is comparing like with like. I accept that Emma's endorsements by consumer organisations such as Which? and the statistics on customer satisfaction referred to in paragraph 25 suggest that a good number of Emma's products are perceived favourably in the market. However, that does not establish the broad factual proposition summarised in paragraph 41.

Other aspects of the UK regulatory environment in which Emma operates

<u>The ASA</u>

43. The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (the **CAP Code**) precludes the use of marketing materials that materially mislead. The ASA has power to intervene in cases involving misleading advertising.

44. On 22 June 2023, an edition of *CAP News* was published entitled "Make sure the price is right: using reference pricing in ads". No-one suggests that this document has the force of law and the CMA does not suggest that it even has the status of evidence showing that Emma's use of Reference Prices was misleading. Rather, the CMA advances this as evidence of what others in the industry were thinking at the time about Reference Prices

in order to support its argument that it is taking a fair and reasonable position on the FVR in this case.

45. The edition of *CAP News* referred to research that the ASA had commissioned that it considered established that "consumers have limited understanding of pricing practices in general, and reference pricing in particular, and have an expectation that reference prices are regulated and can therefore be trusted". The document suggested that there were five key points to consider when using a Reference Price in advertising:

i) *Where the Reference Price was offered*: a Reference Price might be misleading if it is not used in the same sales channel as the discounted price (for example if the Reference Price was available in-store, but the discounted price was available only online). A Reference Price might also be misleading if charged only at a limited number of stores.

ii) *How long the Reference Price was offered for*: it was generally desirable for a Reference Price to have been charged for a longer time than the discounted price.

iii) "*How many did you actually sell*"? The document observed:

> If you can't demonstrate significant sales at the higher reference price, or that this was a realistic selling price, the ad is likely to be problematic. What is "significant" will depend on the product and the frequency with which that type of product is usually purchased.

iv) *How recently the Reference Price was offered*: A Reference Price would be likely to be misleading if it is not the most recent established price. Similarly, the ASA would likely regard increasing the price of a product for a short period of time immediately before advertising a discounted price to be misleading.

v) *Where a Reference Price takes the form of a "recommended retail price", whether the product is generally sold at that price*: That addressed a specific rule on recommended retail prices in the Advertising Codes.

The Chartered Trading Standards Institute (**CTSI**)

46. The CTSI periodically publishes a document entitled *Guidance for traders on pricing practices*. This is intended to be non-binding guidance on obligations under the Regulations. At times material to this dispute, the most recent guidance was that published in 2018 (the **2018 CTSI Guidance**). This document was updated in 2025 and its provisions dealing with Reference Prices were materially similar to those in the 2018 Guidance.

47. The 2018 CTSI Guidance emphasised that using a reference price can create a point which consumers use as a base for estimating the value of a product. It might reduce the effort consumers put into shopping around. Therefore, the guidance stressed that "reference pricing calls for a high level of trust and integrity" particularly since consumers will be unlikely to have made a record of any reference prices used in order to determine for themselves whether the claimed price reduction is genuine.

48. The guidance stated that the central question when asking if use of a Reference Price is acceptable is "… whether the average consumer would think that it is a fair comparison". The guidance went on to give a "non-exhaustive" list of issues that should be considered when determining whether a price reduction is genuine. Those largely overlapped with the matters considered in the *CAP News* extract described above. However, some additional detail was given on some issues.

49. The 2018 CTSI Guidance, like *CAP News*, considered that the level of sales actually made at the Reference Price was a relevant consideration, framing one of the issues to be considered as:

> 5. Were significant sales made at the higher price prior to the price comparison being made or was there any reasonable expectation that consumers would purchase the product at the higher price?

50. Thus the 2018 CTSI Guidance approached this issue in two stages. The presence of "significant sales" at the higher price might, of itself, support the proposition that the higher price was genuine. However, even if significant sales were not made at the higher Reference Price, the Reference Price might still be genuine if the trader could point to a reasonable expectation that consumers would purchase the product at that higher price. That two-stage approach is also brought out in a table on page 16 of the 2018 CTSI Guidance.

<u>CMA Guidance</u>

51. On 1 August 2024 the CMA published a guidance paper entitled *Discount and reference pricing principles: selling mattresses online*. That document stated that, in the online mattress sector, the question of whether a price comparison is genuine will depend on whether the 1:2 FVR set out in paragraph 4 above is satisfied. Emma is critical of this document, characterising it as an attempt by the CMA to impose, through guidance, the very FVR that Emma considers to be wrong and unprincipled. The CMA's position is that the guidance was seeking to achieve a level playing field: having reached a settlement with another online mattress supplier, Simba, which included a 1:2 FVR, the CMA wished to encourage all businesses in the sector to adhere to the same rules to avoid distortions that might arise if some businesses were complying with a FVR and others were not.

52. I do not need to decide whether or not it was appropriate for the CMA to publish this guidance during the currency of its dispute with Emma. However, given the basis on which the CMA is advancing evidence of guidance given to businesses in the sector (see paragraph 44 above, it is clear to me that I should not take the CMA's own publication as evidence of the reasonableness of the CMA's position on the FVR and therefore I say nothing more about this guidance.

The ASA's ruling on previous instances of Emma's use of Reference Prices

53. In a ruling dated 16 March 2022, the ASA found that two examples of Emma's use of a Reference Price on its website were misleading.

54. The first example concerned an advertisement on the website on 27 September 2021 offering a particular mattress for sale for £637.45. Text above that selling price stated "45% savings" and "From ~~£1,159.00~~".

55. That particular product launched in March 2021. The ASA considered data covering 7 months from the date of launch to the expiry of the promotional offer. The ASA noted that throughout the 224-day period for which it had data, the mattress had been priced at the reference price for all customers on just 68 of those days. Over that period, only 17% of units had been sold at the reference price. The ASA noted that the item had been on promotion (to all customers, both new and existing) since the reference price was increased to £1,159.

56. Overall, the ASA concluded:

> Because the product had not been priced at the reference price for significantly longer than it had been on promotion, and only 17% of units had been sold at the reference price, we considered that Emma had not demonstrated that their reference prices were the usual selling prices of the product.

57. Thus the breach that the ASA identified arose as the result of the combination of two factors: (i) the product had not been offered for sale for long enough at the Reference Price and (ii) only 17% of units had been sold at the Reference Price.

58. The second example concerned a different product page on Emma's website. On 12 November 2021 that advertised a different mattress at £1,039.35. Text above that selling price stated "39% savings" and "From ~~£1,728.00~~". Emma intended that as an introductory offer. However, that was not made clear on the product page or the previous pages through which a customer would have had to click through to land on the product page.

59. Therefore, in this case, the breach arose because Emma had not explained to consumers that the mattress was a new product that had never been offered for sale at £1,728. In those circumstances, the ASA found that customers would believe that £1,728 was the "usual selling price of the mattress" at the time of the advert, rather than as a price that would or might be charged in the future.

The data

60. The CMA opened its investigations into Emma on 28 November 2022. In the course of that investigation, it has collected sales data from Emma covering three distinct periods. The **First Analysis Period** ran from 1 November 2021 to 30 November 2022, some 13 months ending more or less on the date the CMA's investigations started. The **Second Analysis Period** ran from 1 December 2022 to 31 August 2023 and thus straddles the date of the ASA ruling on Emma's use of Reference Prices. The **Consultation Period** was a statutory consultation period that ran from 1 September 2023 to 29 February 2024.

61. The figures in the table below are agreed between Emma and the CMA to be broadly correct. They show the average period of time over the three analysis periods for which four leading lines of Emma's mattresses were offered for sale at a Reference Price that was referred to in a promotional offer.

	Average percentage of time offered at Reference Price			
Period	**Emma Original**	**Emma Premium**	**Emma Next Generation Premium**	**Emma Hybrid**
First Analysis Period	1.36%	18.81%	N/A	81.77%
Second Analysis Period	48.91%	58.76%	54.10%	69.34%
Consultation Period	56.04%	67.21%	50.55%	93.41%

62. In a sense, the figures set out in the table above are of historic interest. Soon after the CMA started its investigation, Emma accepted it had to offer products for sale at Reference Prices for a sufficiently long period for it to be fair to advertise that product as being discounted by comparison with that Reference Price. That acceptance is reflected in the marked difference in the average percentage time for which Emma Original and Emma Premium mattresses were offered for sale at Reference Prices in the First Analysis Period as compared with later analysis periods. However, the CMA say that the data remains instructive for the reasons set out in paragraph 64 below.

63. The figures set out in the table below are also agreed to be broadly correct. They show, for the same four product lines, the percentage of the volume of sales in each of the analysis periods that were made at a Reference Price, as distinct from a discounted price, with the shaded cells representing areas in which Emma now accepts it has breached the Regulations:

	Percentage of volume sold at Reference Price			
Period	**Emma Original**	**Emma Premium**	**Emma Next Generation Premium**	**Emma Hybrid**
First Analysis Period	0.08%	1.72%	N/A	24.06%
Second Analysis Period	3.98%	1.46%	0.37%	3.64%
Consultation Period	4.90%	0.02%	0.99%	3.73%

64. I agree with the CMA that a comparison between the figures in the two tables suggests that, even where a particular mattress has been offered for sale at a high Reference Price for a similar period of time as it is offered at a discounted price, Emma has made many more sales at the discounted price. That effect can be seen in the following table:

Mattress type	**% Time at full price**	**% Product sold at full price**
Second Analysis Period		

Emma Original	48.91	3.98
Emma Premium	58.76	1.46
Emma Next Gen Premium	54.10	0.37
Emma Hybrid	69.34	3.64
Consultation Period		
Emma Original	56.04	4.90
Emma Premium	67.21	0.02
Emma Next Gen Premium	50.55	0.99
Emma Hybrid	93.31	3.73

Whether consumers will buy a mattress only if they consider it to be discounted

65. In his witness statement, Mr Schmoltzi emphasised that the purchase of a mattress is a high-value, but infrequent and generally non-urgent purchase. That means that customers can "wait for a good deal" which drives both Emma and its competitors to "offer substantial discounts for part of their offering at all times". Having made those points, in paragraphs 18 and 19 of his witness statement, Mr Schmoltzi said:

> 18. To my understanding of the industry, this culture of high headline discounts has educated consumers over years and decades, with the result that consumers expect that mattresses should be bought at a significant discount and will defer their purchase until a suitable promotion is available. This effect is even more important in my experience with lower priced market segments, where consumers are more price sensitive compared to more premium segments. This can also be seen in the discounts of Dreams and Bensons for Beds, where the rather cheaper private label products have higher discounts compared to more expensive brands.
>
> 19. Customers today expect discounts as part of the purchasing process, especially in an industry where price and promotional strategies play a substantial role in consumer choice.

66. Mr Schmoltzi made his witness statement on 19 November 2024. Some support for Mr Schmoltzi's evidence quoted in paragraph 65 comes from the fact that, in the First Analysis Period, 98.2% of Emma's sales came from the sale of products that were advertised at a discount using a Reference Price.

67. The CMA takes issue with Mr Schmoltzi's analysis. It points to a document generated by Emma (the **March 2025 Paper**) that analyses the effect of new UK pricing and promotional practices that Emma introduced on 14 January 2025 as a consequence of the CMA investigation. That document showed that, across all mattresses, in 2024 Emma sold 7 discounted mattresses for every 1 mattress sold at an undiscounted price. However, between January and March 2025, the ratio switched and in those three months Emma sold 1 discounted mattress for every 2 mattresses sold at an undiscounted price. Put

another way, in 2025, after introducing changes in response to the CMA's investigation, the proportion of full-priced mattresses sold in the first three months of 2025 was 14 times the same proportion calculated for the 12 months in 2024.

68. Those figures represent totals across all mattresses. No figures are available by reference to individual product lines.

69. Emma's paper did, however, suggest that its changed approach had come at a cost both to Emma and consumers. It suggested that (i) Emma's changed approach meant that UK customers now face on average higher prices when purchasing Emma's products and (ii) because Emma's competitors were not also adopting Emma's approach, there was a reduction in traffic on Emma's website which had caused its market share, and its growth, to decline. That led to a significant reduction in Emma's conversion rate (the proportion of customers who, having visited the website, make a purchase). Emma also estimated that its net revenue in the first quarter of 2025 fell by 40% to 60%.

70. The March 2025 Paper also suggested that it would simply not be commercially feasible to maintain the 1:2 ratio for each particular product line it sold.

71. Both sides sought to extract some quite significant conclusions from these materials, none of which had been the subject of cross-examination given the constraints of the Part 8 procedure:

    i) The CMA suggested that even if, as Mr Schmoltzi said in the extract from his witness statement quoted at paragraph 65 above, customers have been "educated" only to buy mattresses that are on promotion that can only be because of the misleading sales practices of Emma and others. The CMA says that this cannot be a reason to decline to make an enforcement order that requires Emma to cease those practices.

    ii) Emma suggests that the March 2025 Paper demonstrates that Emma is paying an unfair commercial price for being the business that the CMA has investigated. It suggests that other businesses who are not subject to investigation are currently benefiting at Emma's expense.

72. Both of those arguments rest on quite complicated factual assertions. The CMA's argument in paragraph 71.i) asserts a causative link between sales practices and customer behaviour. I do not see how that could straightforwardly be established without quite detailed evidence as to the market, participators in it, and their actions. A similar lack of data on the sales practices and figures of Emma's competitors means I cannot make the finding requested in paragraph 71.ii).

73. In the light of Mr Schmoltzi's unchallenged witness evidence and the additional evidence in the form of the March 2025 Paper, I reach the following conclusions:

    i) A mattress is a reasonably high-cost, infrequent and generally non-urgent purchase. Accordingly, at any given moment in time, a good number of Emma's prospective customers will be in a position simply to defer the purchase of a mattress until a later date.

ii) Of course that will not be true of all prospective customers. Although Mr Schmoltzi does not give these examples, common-sense indicates situations in which a purchase of a mattress can become more urgent. A customer may have experienced significant damage to a mattress that makes it unusable. A customer may be moving out of furnished accommodation into unfurnished accommodation so that they have to buy a mattress by the time they move into the new accommodation. However, the statement in sub-paragraph i) above will be true of a good proportion of Emma's potential customers as Mr Schmoltzi says. I consider it realistic to conclude that the "average consumer" of Emma's products will be someone in a position to defer purchase of a mattress should they choose to. That was the tenor of Mr Schmoltzi's unchallenged evidence which I accept.

iii) That average consumer will also be well-informed and price-sensitive and often using price comparison tools before making a purchase (see paragraph 26 above).

iv) The good proportion of prospective customers who are in a position to defer a purchase therefore need something to induce them not to defer. As Mr Schmoltzi says in his witness statement, one such inducement would be a perception that, if they purchase now, they are getting a good price in the form of a discount. Emma's wish to provide inducements not to defer a purchase also explains its use of the "urgency messaging" described in paragraph 2 above. (That is not a finding that urgency messaging was acceptable, just a finding that it was a response to an aspect of customer behaviour that Emma experiences.)

v) The ability of Emma's customers to defer purchases until, for example, they feel they are getting a good deal arises to a good extent because of the very nature of the product that Emma is selling (see sub-paragraph i) above).

vi) Customers' ability to defer purchases, and Emma's response to that behaviour by offering discounts, contributes to the seasonality of Emma's business that Mr Schmoltzi describes. A good proportion of customers like to wait until a promotional period (such as Black Friday or Boxing Day sales) to make a purchase of a mattress online. Moreover, even outside market-wide promotional periods, such as Black Friday or Boxing Day sales, customers tend to purchase mattresses advertised as discounted as, in many cases, the perception of a good deal provides the inducement to purchase a mattress rather than defer that purchase. That phenomenon is not attributable to misleading sales practices of Emma or its competitors in the market that involves selling mattresses online.

vii) It is possible for Emma to make online sales of undiscounted mattresses. Therefore, it is not the case that Emma's prospective customers will only buy mattresses that are advertised as discounted. That much is clear from the March 2025 Paper.

viii) After Emma started adhering to the 1:2 ratio described in the March 2025 Paper, key metrics of its business declined significantly. That is a statement about <u>correlation</u>. No party has put before me the kind of statistical, econometric and market evidence that would be necessary to show that adhering to the 1:2 ratio <u>caused</u> Emma's business metrics to decline so dramatically. However, the CMA have not suggested that there was any other cause of that decline.

ix) I am in no position to make a finding as to whether Emma's competitors have benefited from Emma adhering to the 1:2 ratio. I simply have insufficient information on their business metrics.

Steps that Emma has taken following commencement of the CMA's investigation

74. Since the CMA opened its investigation in November 2022, Emma has co-operated and has responded constructively to the CMA's concerns.

75. I accept Mr Schmoltzi's unchallenged evidence that, in response to the CMA's concerns, Emma has taken the following steps:

i) From 22 August 2023, it has ensured that a Reference Price had to be offered for a minimum of 30 days.

ii) From 25 July 2023, it adapted bundle discount structures and lowered typical discount ranges.

iii) From 6 April 2023, it has stopped the use of urgency-driven messaging unless well-substantiated.

iv) It has enhanced the transparency of its advertising, by including appropriate disclaimers to ensure that consumers are clearly informed from May 2023.

76. The quality and extent of Emma's co-operation with the CMA, and its addressing of the CMA's concerns, can be seen from the fact that, on 22 May 2026, Emma and the CMA entered into a Consent Order dealing with the CMA's issues on Emma's use of urgency messaging. Pursuant to that Consent Order, Emma acknowledged that aspects of its previous conduct on urgency messaging involved Schedule 13 infringements. Emma undertook not to repeat that conduct.

77. Moreover, Emma has gone further than the position set out in paragraph 75.i) in relation to the length of time for which a product must be offered at the Reference Price. It accepts that use of a Reference Price is misleading if the product in question has not been offered for sale at the Reference Price for at least as long as it is being offered for sale at the discounted price.

78. Indeed the quality and extent of Emma's co-operation with the CMA, and its alteration of its business practices in the light of the CMA's concerns, can be seen from the fact that the only aspect of the CMA's concerns that is does not accept relates to the FVR.

PART C – WHETHER EMMA BREACHED THE REGULATIONS

79. The whole flavour of the CMA's case is that Emma has already breached the Regulations so that I have power, by s217(1) of EA 2002 to make an enforcement order. I also understand the CMA to argue that, given those historic infringements, unless an enforcement order is made, Emma will continue to infringe, a situation falling within s217(2) of EA 2002. Both of those arguments are based firmly on the proposition that Emma has, in the past committed Schedule 13 infringements.

80. I recognise that the court has power, by s217(2) of EA 2002, to make an enforcement order even if a trader has not actually committed any previous Schedule 13 infringements.

However, I do not consider this to be a live consideration in this case. The need or otherwise for an enforcement order in this case must be rooted in Emma's conduct to date. If conduct to date is not enough to justify the making of an enforcement order, apprehensions as to future conduct will not alter that position.

Admitted breaches

81. In its pleadings in this case, Emma has admitted that certain specific and limited forms of its use of Reference Prices breached the Regulations:

i) where Emma has offered a new product for sale with a struck-through Reference Price without previously having offered, or subsequently offering, that product for sale at the higher Reference Price;

ii) where Emma has offered a product for sale using a struck-through Reference Price which was not the price that had been charged immediately before the start of the relevant promotion;

iii) where Emma used a Reference Price in circumstances in which the product had previously been offered for sale at that higher Reference Price but was also available at a lower price in a parallel discount promotion as part of a bundle a lower overall price at the same time.

82. Emma admitted during trial, by reference to the table set out in paragraph 63 above, that its sales of mattresses in the shaded cells were insufficient to substantiate an assertion that Emma's customers were willing in sufficient quantities to purchase those mattresses at the undiscounted Reference Price.

83. In a consent order of 22 May 2026, Emma admitted that its conduct on Urgency Messaging breached the Regulations and it gave undertakings as to its future conduct in that regard.

Other alleged infringements - the CMA's central point

84. In his oral submissions, Mr Williams KC suggested that Emma had failed to engage with the CMA's case on infringement. He described that failure as "remarkable". I do not, however, accept that criticism of Emma's approach.

85. It is, of course, possible to rationalise this case as involving two issues: the first being whether Emma had committed Schedule 13 infringements and the second being what, if any, enforcement order should be made in the light of any such infringements as were established. The CMA itself approached the issue in that way. It characterises the Schedule 13 infringements as being a misleading use of Reference Prices that deceives consumers into thinking that they are getting a good deal when, in fact, they are paying the same price as most other consumers. If it can establish Schedule 13 infringements of that kind, the CMA seeks an enforcement order that requires Emma to adhere to a 1:2 FVR subject to safety valves and qualifications.

86. It is true that a good part of Emma's written skeleton argument was devoted to explaining why, in its submission, no enforcement order should be made. However, that did not mean it was failing to engage with the CMA's case on breach. Section 217(5) requires

any enforcement order to specify the nature of the conduct which has constituted the infringement. The enforcement order must then direct the person bound by it not to continue or repeat that conduct. Emma's central argument was that a failure to meet the FVR was not, on its own, conduct that involved a Schedule 13 infringement. Therefore, the court should not make an enforcement order that directed Emma to meet the FVR whether with, or without, safety valves. In my judgment, it was appropriate for Emma to make its case in that way.

87. It is, therefore, relevant, though not determinative, to consider whether an average consumer would feel misled or deceived if it knew that Emma was not adhering to an FVR of around 1:2. After all, the touchstone of whether an action is a "misleading action" is the perspective of the average consumer (see paragraph 9 above). In performing that evaluation, I will not be unduly constrained by the CMA's suggestion that the applicable FVR should be in the ratio of 1:2. As the table in paragraph 63 shows, apart from in relation to the Emma Hybrid mattress in the First Consultation Period (in relation to which Emma came close to meeting a 1:3 FVR which is equivalent to selling 25% of goods at a Reference Price), Emma has been a long way from meeting a 1:2 FVR. I will, therefore, consider the possibility that, even if an average consumer would not feel misled or deceived if Emma failed to meet a 1:2 FVR, that consumer would feel misled by failure to meet an FVR of a similar level. However, this approach must have its limits. The CMA has chosen to come to court with a request for an enforcement order based on a 1:2 FVR. Given that request, Emma's evidence has dealt with an FVR of at, or around, that level. There would, therefore, be difficulties with a conclusion that, an average consumer would feel misled by a failure to meet a materially different FVR since neither party has directed its evidence or submissions at that level of FVR.

88. However, I agree with the CMA that an average consumer's perspective of a 1:2 FVR, or even a 1:3 or 1:4 FVR cannot be determinative if those ratios are viewed purely in isolation. I also need to address the CMA's case that, whatever level of FVR is appropriate for an enforcement order, Emma's actions involving Reference Prices are misleading or deceptive including in areas in which Emma admits no breach. In order to establish those other breaches, the CMA relies on the following central propositions which are not tied to a specific level of FVR:

i) The purpose and effect of a Reference Price is to encourage a customer to believe that they will be getting a good deal if they purchase the product at the advertised lower price.

ii) In order not to be misleading, a Reference Price must be the "usual" price. While they accept that the guidance referred to in paragraphs 43 to 50 above does not have the force of law, they assert that the guidance is supportive of this proposition which is consistent with common-sense.

iii) It follows that use of a Reference Price will be misleading if, in fact, the discounted price is the usual price. That is because using the Reference Price involves a representation to customers that they are getting a "good deal" consisting of either a specified level of discount, or a more general price advantage, as compared with that usual price.

iv) Overall, customers paying the same price as almost everyone else are not getting a good deal. They are paying the normal price and any use of a Reference Price that suggests otherwise is misleading.

89. I do not understand the proposition set out in paragraph 88.i) to be controversial.

90. The proposition in paragraph 88.ii) is controversial:

i) Emma accepts that any Reference Price needs to be a "genuine price" (preferring this formulation to the CMA's concept of a "usual" price). However, Emma does not accept that there is a Platonic ideal of a "usual price" (or a "genuine price") that can be measured simply by considering the level of sales made. Rather, it argues for a more open-textured analysis of what is misleading. It accepts that a comparison between the number of products sold at a Reference Price with the number of products sold at a discounted price is relevant as if insignificant quantities of mattresses are sold at a Reference Price, that may suggest that the price is not genuine. However, Emma does not accept that this kind of comparison can, on its own, determine whether particular use of a Reference Price is misleading or not.

ii) The CMA agrees that factors other than the number of sales made at the Reference Price are relevant. However, it argues that Emma's approach risks overlooking an obvious point that, if substantially all sales are actually made at a discounted price, it is necessarily misleading to argue that consumers purchasing at that price are getting a good deal. They are not because, in effect, the discounted price, rather than the Reference Price, is the usual price.

91. The propositions in paragraphs 88.iii) to 88.iv) are controversial. However, they are controversial because of the difference between the parties that I have explained in paragraph 90.

92. Therefore, the parties are agreed that if a Reference Price is not a "usual price" or a "genuine price" in the requisite sense, it will be misleading to suggest to an average consumer that a discount is being offered by comparison with that Reference Price. Where the parties disagree is as to what an average consumer would perceive a genuine or usual Reference Price to be. The CMA's position is that a price paid by a relatively small proportion of consumers is incapable of being a genuine or usual Reference Price. Emma's position is that this proposition, modest as it may seem, is not borne out as other factors are relevant.

<u>The perspective of the average consumer</u>

93. In my judgment, it is significant that an average consumer visiting Emma's website has a choice to make. On seeing Emma's selection of mattresses, even if they thought the quality and specification of a particular mattress met their needs, they could simply decide to defer buying a mattress altogether. Accordingly, a Reference Price acts as an inducement to an average consumer not to defer purchasing a mattress, but rather to take some action because of a perception that a good deal is on offer. I agree with both parties that an average consumer would not consider a good deal to be on offer if the Reference Price was not a realistic selling price for the mattress in question.

94. An average consumer's decision on whether to defer taking some action on their own purchasing decision is not directly affected by the price that other consumers have paid in connection with their own purchasing decisions. The average consumer is reasonably well informed, reasonably observant and circumspect. Provided that a Reference Price is realistic, the average consumer will realise that some purchasers will have their own reasons for purchasing at a full Reference Price without waiting for a discount. The fact that other consumers act in that way will not of itself affect the average consumer's perception of whether he or she is being offered a good deal or not.

95. I accept that an average consumer's perceptions as to how many sales are being made at the Reference Price will have a clear effect on their perceptions of the deal being offered to them. To give some extreme examples, if an average consumer was told that, to date, all sales of a particular mattress have taken place at a Reference Price, that consumer might well feel that the discounted price represents a very good deal and so be more inclined to act rather than defer the purchase of a new mattress. Conversely, an average consumer told that no sales whatsoever had taken place at the Reference Price would be likely to question whether that Reference Price truly is a realistic price.

96. However, an average consumer visiting Emma's website is not entering a competition to "beat" other consumers by paying a lower price for a mattress than 50%, 33% or even 25% of other purchasers of that mattress. He or she would not, therefore, consider that the question whether a price is realistic can be determined solely by reference to a fixed 1:2 FVR, or even an FVR in that approximate range.

97. An example illustrates this point. Suppose that Emma had offered a particular mattress for sale at £1,000 for three months, genuinely believing that that was a realistic price for a mattress of that specification. However, unknown to Emma, a competitor was, at the same time, offering a comparable mattress for £800. As a result, Emma makes no sales at all of the mattress at the Reference Price of £1,000. When it realises the presence of the competitor product, Emma discounts the mattress to £750 and markets it as "~~£1,000~~ £750" whereupon sales of the mattress soar and Emma sells 100 mattresses on Day 1 of the promotion.

98. On the CMA's approach to the FVR, since Emma made zero sales of the mattress at £1,000, every single customer who chooses to buy the mattress for £750 on Day 1 has been misled into thinking they are getting a good deal. I do not consider that the average consumer would share that view. Certainly the average consumer, on being told that no sales were made at £1,000 would initially be sceptical about whether £1,000 was a realistic price. However, a good number of those average consumers would have been using online research and price comparison tools before making a purchase (see paragraph 73.iii) above) and so would have declined to purchase the mattress at £1,000. On being told the full facts, purchasers on Day 1 could reasonably feel that they were getting a good deal. They would feel that their decision not to purchase at £1,000 was vindicated by Emma's decision to reduce the price significantly. Indeed the sheer number of Day 1 purchasers buying the mattress for £750 might reinforce a consumer in the belief that a good deal was being offered since so many were taking it up.

99. I quite accept that if the mattress was still being advertised as "~~£1,000~~ £750" many weeks later, purchasers at £750 might have a somewhat different view. After a period £1,000 will no longer be a realistic Reference Price. In addition, the more sales that are made at £750, the more likely an average consumer would be to regard £1,000 as an unrealistic

Reference Price. However, I do not accept that purchasers on Day 1 at £750 would regard the Reference Price of £1,000 as <u>necessarily</u> unrealistic even if no sales were actually made at that price.

<u>The relevance or otherwise of Emma's subjective beliefs</u>

100. In his oral submissions on behalf of the CMA, Mr Williams KC said that, in asserting that Emma's commercial practices were misleading, the CMA was not making any assertions about Emma's subjective intention. No doubt the CMA regards that as a softening of its position. In any event, the CMA would have found it difficult to make a case based on subjective intention given that it has chosen to bring its claim under Part 8 and so has had no opportunity to cross-examine on matters of subjective intention. Whatever the CMA's reasons, in my judgment the absence of a consideration of subjective intention shows a flaw in the CMA's approach. Put simply that approach to FVR ignores a consideration that the average consumer would consider to be of real relevance, namely the presence or otherwise of a genuine and (perhaps) reasonable belief on Emma's part as to whether a Reference Price is a realistic price for the product in question.

101. I am reassured in my view that this would be a relevant consideration for the average consumer by the fact that it forms part of the ASA's and the CTSI's guidance. That guidance does not have the force of law. It is not binding on me. However, the views of the ASA and of the CTSI on the perspectives of an average consumer are entitled to a degree of respect, while not being determinative given that I am concerned with the perspectives of an average consumer of Emma's specific products.

102. It is, in my judgment, of relevance that when considering sales volumes (see paragraph 45.iii)) the ASA's guidance specifically envisages that low sales volumes at a reference price on their own are not determinative since, even if sales volumes are low, an advertisement might not be misleading if a Reference Price is a "realistic price". The 2018 CTSI Guidance makes the same point in terms (see paragraph 49 above). I am reassured that the approach of both the ASA and of the CTSI is consistent with my own analysis above of how an average consumer of Emma's specific goods would think.

103. I recognise that the ASA, in its ruling considered in paragraphs 53 to 57 above, attached significance to the fact that only 17% of sales of the relevant product were made at the Reference Price. However, its overall conclusion was that it was the combination of relatively low sales at the Reference Price and the fact that the product had been on offer at that price for an insufficiently long period that led to the finding of breach. I note that Emma and the CMA have, in material aspects, agreed the text of an enforcement order (if one is to be made) relating to Duration Requirements.

104. I was shown the judgment of Etherton J (as he then was) in *Office of Fair Trading v The Officers Club Ltd* and another [2005] EWHC 1080 (Ch). The central question raised in that case was whether a "bricks and mortar" retailer's advertisements relating to its "70% off strategy" were misleading, and hence unlawful, under The Control of Misleading Advertisements Regulations 1988 and EA 2002 as then in force.

105. In *Officers Club*, the Office of Fair Trading (**OFT**) put the trader's subjective beliefs at the heart of their case. Their central assertion was that the trader's advertising contained an implied representation that the 70% discount was a "genuine" discount (see [75] of

the judgment). That representation was false because the Reference Price that supported the claim of the discount was an artificial or inflated price set with the overriding purpose of claiming the subsequent discount (see [70] of the judgment). The OFT sought to substantiate that allegation by asserting that the trader never expected to offer or sell any significant proportion of its goods at the higher Reference Prices. Those Reference Prices were, therefore, never fixed in good faith, but were simply a vehicle to enable the trader to claim it was offering a significant discount.

106. The court held that a reasonable customer would have regarded the trader's advertising as impliedly stating that the Reference Price was a "genuine price as distinct from, and by contrast with, an artificial price" (see [157] of the judgment). The court also held that one aspect of a genuine price was that the seller honestly believes that the price is an appropriate sale price for the goods ([158]). Moreover, the advertising contained an implied representation as to the quantity of goods offered for sale at the Reference Price as being a substantial or significant proportion of the goods. It also contained an implied representation that goods had been sold at the higher Reference Price for a reasonably substantial period of time (see [163]).

107. Having formulated the implied representations in that way, Etherton J made the following evaluative finding at [161]:

> Provided that the higher price was a price at which TOC [i.e. the trader] at the time honestly believed that the goods could then be sold in significant numbers, and provided significant numbers of the goods had in fact been placed by TOC on the market for sale at that price, I see no reason why the ordinary, reasonable consumer paying the discounted price would believe that he or she had been misled and deceived merely because TOC had always intended to reduce the goods to the discounted price in order to achieve a higher and quicker turnover at that price.

108. At [162], Etherton J noted that his conclusion at [161] was expressed by reference only to the genuineness of the trader's belief because the OFT had not argued that there was a requirement that the belief be reasonable as well as genuine. However, he noted that evidence that suggested a belief was not reasonable (for example that the Reference Price was not comparable to prices charged by competitors) might indicate that the trader did not hold a genuine belief that goods could be sold at that price.

109. Thus, in *Officers Club*, the court concluded that a trader's subjective beliefs as to whether a significant number of goods could be sold at a Reference Price were highly relevant to the question whether its advertising materials were misleading. Both parties rightly point out that *Officers Club* (i) concerned a very different "bricks and mortar business" and (ii) was decided a long time ago by reference to that specific business at a time when consumer behaviour could well have been different. I would add that Etherton J's conclusions would necessarily have been reached in the light of the OFT's submissions that the trader's subjective beliefs were relevant..

110. Accordingly, *Officers Club* is not an authority that sets out any principles on the interpretation or application of the Regulations. Nor is it even an example of how the Regulations have been applied in similar situations since (i) it was not concerned with the Regulations at all and (ii) the business it analysed was very different and (iii) Etherton

J was considering the perspective of consumers over 20 years ago and that perspective could well have changed since then.

111. However, putting matters at their very lowest, it can be seen that *Officers Club* is not inconsistent with my conclusion that Emma's subjective beliefs do matter. I do not consider I need to consider "bright line" questions such as whether use of a Reference Price is necessarily not misleading if Emma genuinely believes it could sell significant quantities of the relevant product at that price. I do not need to determine whether any such belief also needs to be objectively reasonable. I conclude simply that:

i) In deciding whether a Reference Price is "genuine" or "realistic", an average consumer would pay some regard to the number of sales of the relevant product that Emma has made at that price.

ii) However, an average consumer would also consider it relevant to consider whether Emma had a genuine belief that it could make significant sales at that Reference Price. After all, Emma can be expected to know the market in which it operates and the price at which particular mattresses can realistically be sold taking into account the products and prices offered by competitors. If Emma subjectively believes that it can make significant sales at a Reference Price, it will often be right (though not in situations like that described in paragraph 97). If it does not hold that belief, the Reference Price is unlikely to be a realistic price.

iii) Therefore, even if Emma's sales at a Reference Price did not satisfy the 1:2 FVR (or a ratio close to it), an average consumer might still conclude that the Reference Price is "genuine" or "realistic" if Emma had a real belief that it could sell significant quantities of the relevant goods at that price.

iv) If Emma's belief referred to in sub-paragraph iii) above is also objectively reasonable, that would provide a further indication in favour of the proposition that the Reference Price is genuine or realistic.

v) The CMA's argument that use of a Reference Price is necessarily misleading if almost all sales are made at the discounted price is accordingly flawed as it leaves out of account considerations that an average consumer would consider to be relevant.

112. On the basis of my conclusions set out in paragraph 111, I can analyse a further hypothetical situation. Suppose that Emma considers that a realistic selling price for a particular mattress is £1,000 in the sense that it could make good quantities of sales at that price to consumers who are less price sensitive or less inclined to wait for a discount. Emma makes some sales at that price. However, Emma decides that its commercial interests will be advanced if it offers the mattress for sale for £750, hoping that this will induce more price-sensitive consumers to make a purchasing decision reasoning that lower profit margin on each individual mattress will be compensated by higher aggregate profits from increased volume. Emma's commercial judgment is vindicated and after a week it has sold many mattresses for £750 and come nowhere near meeting a 1:2, or even 1:3 or 1:4 FVR.

113. I will not conclude that an average consumer who purchases the mattress for £750 in that first week of discounting would necessarily feel deceived or misled. More likely, in my

judgment, is that the average consumer in that first week would feel that his or her decision to delay the purchase has been vindicated. By waiting, that consumer has obtained, for £750, a mattress that Emma, with all of its knowledge of the market, genuinely believed could have been sold for £1,000 and of which sales were made at that price. The fact that numerous other consumers obtained that deal in the first week would not, in my judgment, vitiate an average consumer's belief that he or she had obtained a good deal.

114. Again I accept that the longer the mattress is advertised at "~~£1,000~~ £750" the less secure the conclusion above would become as the less realistic the £1,000 Reference Price will become as a comparator.

115. I have considered carefully whether the situation that I have considered in paragraph 112 is a real-world scenario. If it is a purely theoretical construct then it will shed little light on how an average consumer would perceive Emma's actual sales practices. The CMA suggests that the situation is not a real-world scenario because Emma has put forward no evidence to establish the hypothesis on which it rests, namely that Emma expected it could make good quantities of sales of its mattresses at undiscounted Reference Prices.

116. In the first place, I do not consider that Emma can be criticised for not putting in evidence as to its expectations of selling large volumes of mattresses at a particular Reference Price. This is not a case like the ASA's investigations considered in paragraphs 53 to 59 in which a particular promotional offer is under examination. Rather, the CMA is asserting that because Emma makes insufficient sales at an undiscounted Reference Price it necessarily follows that its use of Reference Prices is unfair and misleading. In making that assertion, the CMA says that it is not asking this court to consider subjective beliefs (see paragraph 100 above).

117. Moreover, I consider that there is some evidence of Emma's subjective beliefs. I have accepted Mr Schmoltzi's unchallenged evidence that he considers Emma's undiscounted Reference Prices to represent good value (see paragraph 41 above). I do, therefore, consider the example in paragraph 112 to represent a real-world scenario, rather than a purely theoretical construct.

Other breaches – conclusion

118. Emma has committed the breaches of the Regulations that are set out in paragraphs 81 to 83 above. I will not, however, conclude that Emma has committed Schedule 13 infringements more generally than that.

119. The ASA has certainly found that specific promotions made misleading claims in advertisements (see paragraphs 53 to 59 above). I accept that this finding, together with Emma's admissions of specific breaches involving the use of Reference Prices described in paragraph 82 above, could be symptomatic of a wider malaise involving Emma's use of Reference Prices.

120. I also accept that the data raises a question mark. That data reveals a small proportion of sales taking place at Reference Prices. Moreover, the small proportion continued even after Emma took action to address the CMA's concerns about the period for which products were on promotion (see, in particular, the table set out in paragraph 64 above).

121. However, on balance, I have concluded that the CMA's assertion of a wider category of Schedule 13 infringements is based on insufficiently secure foundations:

i) I do not accept the CMA's characterisation of Emma's "high price/high discount strategy" as being indicative of misleading sales practices generally (see paragraph 40 above).

ii) The CMA has not established that Emma lacked a genuine belief that Reference Prices that it used were realistic and achievable (see paragraph 115 above). The presence or absence of such a genuine belief would be a highly material consideration when it comes to evaluating whether use of a particular Reference Price is misleading or not particularly given that Emma's beliefs will draw on its experience of competitive pricing pressures in the market for online mattresses.

iii) While raising a question mark, the data does not demonstrate that Emma's use of Reference Prices is misleading in a more general sense than has been admitted in paragraphs 81 and 82 above. As I have sought to explain, given the nature of Emma's business and the products that it is selling, there are real-world scenarios in which there is a low (or even zero) percentage of sales at a Reference Price, but the average consumer would still not feel misled or deceived (see paragraphs 97 to 99 and paragraphs 112 to 113 above). Those real-world scenarios arise in circumstances where Emma has a genuine belief that a particular Reference Price is a realistic selling price for the product in question and are not, therefore, gainsaid by the CMA's approach to this dispute which proceeds on the basis that Emma's subjective beliefs are not relevant.

iv) The real-world scenarios to which I have referred suggest that the CMA's focus on the low level of sales at Reference Prices places insufficient emphasis on other relevant considerations. Those considerations include, but are not limited to, Emma's subjective beliefs as to whether its Reference Prices are realistic. They also include considerations that I have described in paragraph 73 above that are attributable to the very nature of the products that Emma is selling rather than to any misleading sales practices that Emma has adopted.

PART D – WHETHER TO MAKE AN ENFORCEMENT ORDER

Are the preconditions for the making of an enforcement order present?

122. I took it to be common ground that the breaches referred to in paragraphs 81 to 83 above caused, or were likely to have caused, the average consumer to take a transactional decision which he or she would not otherwise have taken. Given the breadth of the concept of "transactional decision" to which I have referred in paragraphs 10 and 11 above, I do not consider that proposition could seriously be disputed. Mr Schmoltzi's own evidence is that it is an average consumer's perspective that a discounted price represents a good deal that acts as an inducement to the average consumer to purchase mattresses or, at the very least, to browse Emma's website and products listed thereon.

123. For similar reasons, if I had accepted that Emma's infringement of the Regulations went beyond those admitted I would have accepted that such infringements caused, or were likely to have caused, the average consumer to take a transactional decision that he or she would not otherwise have taken.

124. In order to show that any infringements of the Regulations have harmed the collective interests of consumers, it must be shown that harm is caused to a section of the public rather than to an individual consumer. Such harm may be inferred from an accumulation of individual instances of infringement (see [188] of *Purely Creative* and the authorities referred to therein).

125. Emma argued that, even though it admits that some uses of Reference Prices were deceptive or misleading, there could be no "collective harm" on the basis, in essence, that the CMA have not shown that any purchasers were induced to make purchasing decisions which they regret. On the contrary, Emma's customer satisfaction statistics and consumer awards show that its customers are generally satisfied with their purchases. I am unpersuaded by that argument. The misleading uses of Reference Prices that Emma admits involved a large number of customers and potential customers visiting Emma's website. It is no answer to say that a good number of customers were ultimately satisfied with their purchase in circumstances where misleading practices have had a causative effect on a transactional decision. Moreover, I accept the CMA's point that, conceptually, customers' reported satisfaction levels could be reduced if they were told that Emma's use of Reference Prices was misleading.

126. Overall, even though I have not accepted the CMA's case on the wider existence of Schedule 13 infringements, given Emma's admissions, I conclude that Emma has committed some Schedule 13 infringements. The pre-conditions for making an enforcement order are present.

Should I make an enforcement order by reference to a 1:2 FVR?

127. The admitted Schedule 13 infringements mean that I have power to make an enforcement order. However, for the reasons set out below, I will not make such an enforcement order.

128. Imposing a 1:2 FVR will not address the Schedule 13 infringements summarised in paragraph 81 above. Emma and the CMA have agreed the text of provisions which, if included in an enforcement order, would address those infringements. In a similar vein, the infringements summarised in paragraph 83 have been addressed to the CMA's satisfaction by Emma giving undertakings. Therefore, the only Schedule 13 infringements in relation to which an enforcement order referencing a 1:2 FVR would have utility are those summarised in paragraph 82 (as I have rejected the CMA's case alleging a wider class of Schedule 13 infringements).

129. A difficulty that I have with an enforcement order by reference to a 1:2 FVR is that those areas in which Emma has admitted breaches involve much different FVR metrics. For example, Emma's admitted breach in relation to Emma Premium mattresses in the Consultation Period involves an FVR of around 1:50,000. Imposing a 1:2 FVR would in my judgment involve a very real risk that the line is being drawn in the wrong place.

130. Moreover, as I have explained when considering the extent of Emma's Schedule 13 infringements, there are real-world scenarios in which, because of the presence of countervailing considerations including those relating to Emma's subjective intentions and beliefs, even a very low FVR would not necessarily result in a Schedule 13 infringement. Of course, in admitting the breaches summarised in paragraph 82 above, Emma can be taken to accept that there were no relevant countervailing considerations in those cases. However, the possibility remains that, if I made an enforcement order by

reference to a 1:2 FVR, Emma would be in breach of that enforcement order in circumstances in which countervailing considerations mean that Emma committed no Schedule 13 infringement. That would risk being a disproportionate outcome since under the DMCCA, breach of an enforcement order would expose Emma to fines calculated by reference to a percentage of its turnover as well as criminal penalties.

131. The CMA points to the safety valves in its proposed enforcement order and suggests that those could be adapted to avoid the risk of Emma being in "undeserved" breach of a 1:2 FVR. However, while I acknowledge the care that the CMA has brought to its work on safety valves, I do not consider this to address the problem. The general proposition that there is a Schedule 13 infringement whenever the preponderance of sales is at a discounted price is insecure because of the relevant considerations that that approach overlooks (see paragraph 121). Given the potentially serious sanctions that would apply to any breach of the DMCCA, I consider that it would be wrong in principle to seek to impose a 1:2 FVR and then provide safety valves that dilute the effect of that requirement. That would be to proceed from the wrong starting point since, if Emma fails to identify a particular safety valve (or the CMA refuses to agree to it), Emma risks draconian consequences even if it has not committed a Schedule 13 infringement.

132. Relatedly, the situations that I have considered in paragraphs 97 to 99 or paragraph 112 link to a consideration of Duration Requirements. It may be that the Duration Requirements in the CMA's draft order either permit, or could be amended so as to permit, the kind of promotions that I consider in those paragraphs. However, that would not address the concern. The examples in paragraphs 97 to 99 and paragraph 112 demonstrate that there are real-world scenarios in which an average consumer would not feel misled by use of a Reference Price in a period even if few consumers actually pay that Reference Price. That is a powerful riposte to the CMA's case for imposing a 1:2 FVR.

133. Therefore, overall, I do not consider that I should make an enforcement order that imposes a 1:2 FVR as I am not satisfied that breaching a 1:2 FVR, even with the safety-valves that the CMA proposes, involves a Schedule 13 infringement. I also have concerns about the proportionality of imposing a 1:2 FVR. While I have not been able to find that Emma's adherence to a 1:2 FVR as set out in the March 2025 Paper caused a decline in Emma's business fortunes (see paragraphs 71 and 72 above), there must be a risk that this was the cause. It would be disproportionate to require Emma to run the risk of a potentially significant decline in its business fortunes given the issues that I have identified with a 1:2 FVR.

134. Emma made other objections to an enforcement order based on a 1:2 FVR. For example, it suggested that the CMA was seeking, by the back door, to impose a new business strategy of "everyday low prices" on Emma. It suggested that Emma was being unfairly targeted as a relatively small participant in the market and that, if the CMA wished to impose a 1:2 FVR, it should do so on an industry-wide basis by asking Parliament to change the law. It submitted that no European jurisdiction has sought to impose an FVR and that the UK should not do so either, whether by way of legislation or the CMA's use of enforcement orders.

135. Those submissions touch on matters of real difficulty and complexity. I do not, however, need to address them. The reasons I have outlined above in my judgment represent a

sufficient reason in this case for declining to impose an enforcement order by reference to a 1:2 FVR.

Should I make a different enforcement order?

136. Some submissions were made as to what I should do if I declined to make an enforcement order referencing a 1:2 FVR. In oral argument, Emma suggested that a 1:19 FVR (which would require Emma to make only 5% of its sales at the Reference Price) would be more palatable. Alternatively, it suggested a requirement that:

> Emma shall not engage in conduct which amounts to misleading price reference promotions, by using or setting a strike through reference price at a level at which it has no reasonable expectation of achieving significant sales.

137. I am conscious that a lot of effort and thought has gone into a 1:2 FVR on both sides. I have rejected the request that I make an enforcement order by reference to that level of FVR. However, I consider that rather than simply selecting something different, I should give the parties an opportunity to agree on the terms of an enforcement order that takes into account the conclusions I have expressed in this judgment. If the parties cannot agree, then I can hear further submissions on the terms of an enforcement order (if one is to be made) at a hearing on consequential matters. That was the approach that both parties suggested early in their respective submissions when they asked that I make a "decision in principle" on the kind of enforcement order I would be minded to make.

DISPOSITION

138. I will not make the enforcement order the CMA asks me to that references a 1:2 FVR (or similar ratio). I will hear further submissions on whether, and if so on what terms, the court should make any enforcement order. To that end the parties should liaise with a view to agreeing a time-estimate for a further hearing in Michaelmas Term 2026 to dispose of these proceedings and to address consequential matters. Having done so, they should approach my clerk with a view to fixing that hearing.