



Decision of the Competition and Markets Authority

Online sales of posters and frames
Case 50223

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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 Names have been replaced by a general descriptor of the individual's role.

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1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1. By this Decision, the Competition and Markets Authority (the '**CMA**') has concluded that the persons listed at paragraph 1.2 below have infringed the prohibition imposed by section 2(1) of the Competition Act 1998 (the '**Act**') (the '**Chapter I prohibition**').

1.2. This Decision is addressed to:

- a. Trod Limited (in administration) ('**Trod**'); and
- b. GB eye Limited ('**GBE**'),

which, in this Decision, are referred to singularly as a '**Party**' and collectively as the '**Parties**'.

1.3. Specifically, the CMA has found that between 24 March 2011 (at the latest) and 1 July 2015 (at the earliest) (the '**Relevant Period**') Trod and GBE infringed the Chapter I prohibition by participating in an agreement and/or concerted practice that where there was no cheaper third party seller on the online retail platform www.amazon.co.uk ('**Amazon UK**'), they would not undercut each other on prices for licensed sport and entertainment posters and frames (including poster frames) sold by both Parties on Amazon UK (the '**Infringement**').

1.4. The CMA has imposed a financial penalty on Trod under section 36 of the Act. GBE was granted full immunity from financial penalties under the CMA's leniency policy on 22 July 2016.¹ Provided that GBE continues to cooperate and comply with the conditions of the CMA's leniency policy, no financial penalty will be imposed on GBE.

¹ *Applications for leniency and no-action in cartel cases* (OFT1495, July 2013), adopted by the CMA Board (the '**CMA leniency guidance**').

2. THE INVESTIGATION

A. GBE's leniency application

- 2.1. The investigation originated with an application for leniency by GBE, which was granted a provisional Type A immunity marker under the CMA's leniency policy on 16 July 2015 in relation to suspected cartel activity in the online supply of licensed sport and entertainment merchandise and related products from March 2011. The CMA confirmed GBE's Type A immunity marker and GBE signed a cooperation letter on 30 October 2015. GBE entered into an immunity agreement with the CMA under the CMA's leniency policy on 22 July 2016 in relation to its involvement in the Infringement.

B. The CMA's investigation

- 2.2. In September 2015, the CMA opened a formal investigation under section 25 of the Act, having determined that there were reasonable grounds for suspecting that the Parties had infringed the Chapter I prohibition in relation to the suspected cartel activity.
- 2.3. On 1 December 2015, the CMA carried out a search of Trod's business premises under section 28 of the Act and a search under section 28A of the Act of the domestic premises of [X] (Trod's [X]). The CMA's searches were conducted simultaneously with the searches carried out by the West Midlands Police on behalf of the Department of Justice in connection with its investigation into wall décor in the USA.²
- 2.4. On the same day, the CMA carried out a voluntary inspection of GBE's business premises and issued document and information requests under section 26 of the Act to software providers which the CMA suspected were suppliers to Trod, namely: [Trod's software provider 1] and [Trod's software provider 2].
- 2.5. During the course of its investigation, the CMA obtained material from GBE as part of its obligation to cooperate as a leniency applicant, including an oral corporate statement and supporting documents on 30 July 2015. The CMA conducted interviews with three individuals from GBE in September 2015: [Employee 1] (employee of GBE throughout the Relevant Period [X])

² The investigation of the Department of Justice, which is a criminal investigation and concerns both individuals and businesses, is separate from the CMA's investigation under the Act.

was interviewed on 16 September 2015,³ [Senior Employee 1] (who has been at GBE throughout the Relevant Period [§<])⁴ was interviewed on 24 September 2015⁵ and [Senior Employee 2] ([§<] throughout the Relevant Period) was interviewed on 30 September 2015.⁶ In October 2015, forensic IT specialists from the CMA's Digital Forensics and Intelligence Service attended GBE's premises and obtained a forensic image of potentially relevant digital material.

- 2.6. On 23 March 2016, Trod entered into administration, and Chris Pole and Allan Graham from KPMG were appointed as joint administrators of Trod ('KPMG' or '**Administrators of Trod**').⁷ The CMA issued document and information requests under section 26 of the Act to KPMG on 4 April 2016 and on 18 May 2016. The CMA also issued a document and information request under section 26 of the Act to a third party on 18 May 2016.
- 2.7. During the investigation, the CMA held State of Play meetings with GBE and the Administrators of Trod on 6 June 2016 and 9 June 2016, respectively.

C. Settlement with Trod

- 2.8. On 9 June 2016 Trod approached the CMA and expressed an interest in exploring settlement.
- 2.9. In accordance with the CMA's settlement policy, on 24 June 2016 the CMA provided Trod with a draft Statement of Objections⁸ together with access to the documents referred to in the draft Statement of Objections, as well as a list of the documents on the CMA's file and a draft penalty calculation.
- 2.10. At the same time, a copy of the draft Statement of Objections was also provided to GBE. On 5 July 2016 GBE made limited representations on the draft Statement of Objections, consistent with the conditions for leniency

³ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [§<] (transcript of the CMA interview with [Employee 1] (GBE), dated 16 September 2015), pages 2 and 15 (CMA Document Reference URN 0530).

⁴ Transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, page 10 (CMA Document Reference URN 0374).

⁵ Transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, page 2 (CMA Document Reference URN 0374).

⁶ Transcript of the CMA interview with [Senior Employee 2] (GBE), dated 30 September 2015, page 2 (CMA Document Reference URN 0375).

⁷ See press release from KPMG: <https://home.kpmg.com/uk/en/home/media/press-releases/2016/03/administrators-appointed-to-trod-limited.html>

⁸ Under paragraph 14.13 of the CMA's guidance, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), a business in settlement discussions will be presented with a Summary Statement of Facts. In the present case, as a draft Statement of Objections was already in preparation, Trod was provided with the draft Statement of Objections.

under the CMA's leniency policy.⁹ Trod made no representations on the draft Statement of Objections.

- 2.11. On 14 July 2016, Trod admitted that it had infringed the Chapter I prohibition (in the terms set out in a revised draft of the Statement of Objections dated 12 July 2016 that took account of GBE's representations), agreed to accept a penalty in the amount of the draft penalty calculation and agreed to co-operate in expediting the process for concluding the investigation. On 21 July 2016, the CMA announced that it had settled the case with Trod.¹⁰
- 2.12. On 27 July 2016, the CMA issued the final Statement of Objections to the Parties. On 3 August 2016 GBE made limited representations on the final Statement of Objections, consistent with the conditions for leniency under the CMA's leniency policy. Trod made no representations on the final Statement of Objections.

⁹ The CMA leniency guidance, paragraphs 5.9 – 5.11. GBE's representations, dated 5 July 2016 (CMA Document Reference URN 0673).

¹⁰ See the CMA's press release, dated 21 July 2016.

3. FACTUAL BACKGROUND

- 3.1. The CMA has found that the Infringement related to an anti-competitive arrangement between Trod and GBE concerning retail sales of licensed sport and entertainment posters (also referred to as 'posters' in this Decision) and frames (including poster frames) sold by both Parties on Amazon UK.¹¹
- 3.2. For reasons of administrative priority, the CMA has focused its analysis on posters and frames which, the CMA considers, are at the core of the Infringement. However, that does not exclude the possibility that the Infringement may have also extended to other licensed sport and entertainment merchandise sold by both Parties on Amazon UK, such as badges, stickers, mugs and transfer tattoos.

A. Industry overview

Posters and frames

- 3.3. Posters comprise printed paper, depicting textual and/or graphical elements, for visual display. They can be broken down by different categories, including sizes, for example, maxi posters, mini posters, giant posters, 3D posters, metallic posters.¹²
- 3.4. Frames provide edging for posters and other products, such as, prints, pictures, photographs, intended to enhance the product and make it easier to display or to protect it. Frames can come in various sizes and designs, including to match the different poster categories.¹³

The supply chain: licensing, production, distribution and retail

- 3.5. Producers of licensed sport and entertainment posters, such as GBE, also produce other licensed sport and entertainment merchandise, including

¹¹ The CMA has investigated whether Trod had similar arrangements in place with parties other than GBE. In light of the review of the relevant evidence and for reasons of administrative priority, the CMA has decided to focus its investigation on the arrangement between GBE and Trod.

¹² Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], page 83 (CMA Document Reference URN 0530).

¹³ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], page 83 (CMA Document Reference URN 0530); GBE's response dated 4 May 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0428).

stickers, badges, transfer tattoos, mugs and keyrings, under similar licensing arrangements.¹⁴

- 3.6. Producers license the content from entertainment companies such as Warner Bros, Disney, the BBC, Sony Pictures, Lucas Film, Marvel, 20th Century Fox, Nickelodeon, Cartoon Network,¹⁵ as well as holders of imaging rights, for example, to The Beatles, Pink Floyd and One Direction.¹⁶ Producers also similarly license rights from sports companies, such as Liverpool FC.¹⁷ Licences tend to cover rights to produce and sell posters relating to a number of specific subjects rather than to an entire portfolio of subjects.¹⁸
- 3.7. There are many rights holders and, therefore, a large number of potential licensors.¹⁹ Licenses typically [redacted] and are non-exclusive, with the licensor typically appointing more than one licensee in a given territory to obtain as many routes to market and distribution channels as possible.²⁰ Licensees can hold a large number of licences.²¹
- 3.8. Producers of posters and other licensed sport and entertainment merchandise can outsource the production of products to third party manufacturers.²²
- 3.9. Posters may reach the end consumer through different routes, including:²³
 - a. Distribution by producers to:
 - i. bricks-and-mortar retailers, for onward sale to end consumers;
 - ii. online retailers for onward sale to end consumers through the online retailer's own website or other online retail platforms, such as Amazon UK;
 - b. Retail directly by producers to end consumers:

¹⁴ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [redacted], page 83 (CMA Document Reference URN 0530); GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052).

¹⁵ GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052) and [Supplier] website at [redacted].

¹⁶ GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052).

¹⁷ GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052).

¹⁸ GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052).

¹⁹ GBE's representations dated 5 July 2016 (CMA Document Reference URN 0673).

²⁰ GBE proffer, dated 30 July 2015, pages 4-5 (CMA Document Reference URN 0052).

²¹ GBE's representations dated 5 July 2016 (CMA Document Reference URN 0673).

²² GBE proffer, dated 30 July 2015, page 5 (CMA Document Reference URN 0052).

²³ GBE proffer, dated 30 July 2015, page 6 (CMA Document Reference URN 0052).

- i. through the producer's own bricks-and-mortar stores; or
 - ii. online through the producer's own website or other online retail platforms, such as Amazon UK.
- 3.10. The main producers (and distributors) of licensed sport and entertainment posters in the UK are GBE and [Supplier] ('**Supplier**'),²⁴ trading as [X] and [Y].²⁵ [Supplier] is principally a wholesaler and retailer of entertainment and art posters, calendars, badges and other licensed merchandise.²⁶ [Supplier] retails products online through its website, [X].²⁷ [Supplier's] total turnover in the financial year ending June 2015 was around £15 million, around £11 million of which was generated in the UK.²⁸ Details of GBE's business, including its turnover, are set out below (paragraphs 3.17 to 3.29).
- 3.11. It has not been possible in the present investigation to obtain figures or a meaningful estimate of market shares for the online retail sales of posters and frames in the UK. GBE has indicated that it is not able to provide accurate estimates of market share figures.²⁹ Trod has also not been able to provide an estimate of market shares.³⁰
- 3.12. GBE has explained that there is a very large number of retailers of frames, far larger number than retailers of posters. Many retailers (including GBE) sell a wide variety of different sized frames, most of which are not for posters (rather they are for photos, prints etc).³¹

Retail on Amazon UK

- 3.13. Amazon Marketplace (or '**Amazon**') is an online retail platform with the domain name 'www.amazon.' which allows third party sellers (that is, sellers other than Amazon) to create their own accounts and sell directly to end consumers.³² Amazon UK is the part of Amazon Marketplace with the domain address www.amazon.co.uk, which is primarily directed at

²⁴ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 52-53 (CMA Document Reference URN 0530); see also transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, page 12 (CMA Document Reference URN 0374).

²⁵ [Supplier] annual report dated 30 June 2015, cover page.

²⁶ [Supplier] annual report dated 30 June 2015, page 2.

²⁷ CMA's research of publicly available information.

²⁸ [Supplier] annual report dated 30 June 2015, page 11.

²⁹ GBE's response dated 4 May 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0428).

³⁰ Trod's (KPMG) response dated 18 April and 29 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document References URN 0348, URN 0349 and URN 0369).

³¹ GBE's response dated 4 May 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0428).

³² GBE proffer, dated 30 July 2015, page 8 (CMA Document Reference URN 0052).

consumers in the UK. Amazon Marketplace is considered to be an important retail outlet for sellers of licensed sport and entertainment merchandise and related products, including posters and frames.³³

- 3.14. In addition to being an online retail platform, Amazon is also itself a retailer of sport and entertainment merchandise and related products on the platform.³⁴ Amazon itself was not involved in the Infringement and has not been investigated by the CMA.
- 3.15. Each third party seller on Amazon UK is assigned a 'Merchant ID', which is its unique identifier on Amazon UK. For example, the Merchant ID for GBE is AKFKPZRS25AVF³⁵ and the Merchant ID for Trod is A112LTL2GXGMT5.³⁶
- 3.16. Each product sold on Amazon UK is assigned a 'Stock Keeping Unit' ('**SKU**'), as a unique identifier associated with its online listing. Once a listing is created for a product, multiple sellers can add themselves as a source of supply, and it is not unusual for there to be four or more sellers selling the same product on one listing.³⁷ In addition to the SKUs, products sold on Amazon Marketplace are also assigned an 'Amazon Standard Identification Number' ('**ASIN**'), which is a 10-character alphanumeric unique identifier assigned for product-identification within Amazon Marketplace. A product with a single SKU may be assigned against multiple ASINs if it has been listed separately by different sellers.³⁸ For example, GBE lists around [redacted] SKUs on Amazon UK and there are around 16,000 ASINs for those products.³⁹

³³ Transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, page 20 (CMA Document Reference URN 0374); witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [redacted], pages 51-52 (CMA Document Reference URN 0530); GBE proffer, dated 30 July 2015, pages 6-7 (CMA Document Reference URN 0052).

³⁴ GBE proffer, dated 30 July 2015, page 8 (CMA Document Reference URN 0052).

³⁵ CMA's research of publicly available information.

³⁶ CMA's research of publicly available information; witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [redacted], page 44 (CMA Document Reference URN 0530) and Document (screenshot) provided by [Employee 1] (GBE) during interview on 16 September 2015: Buy for less online Amazon No A112LTL2GXGMT5 (CMA Document Reference URN 0362).

³⁷ GBE proffer, dated 30 July 2015, page 8 (CMA Document Reference URN 0052).

³⁸ GBE letter dated 14 October 2015, point 2.2, pages 3-4 (CMA Document Reference URN 0087); witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [redacted], pages 24-25 (CMA Document Reference URN 0530).

³⁹ GBE letter dated 14 October 2015, point 2.2, pages 3-4 (CMA Document Reference URN 0087); witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [redacted], pages 25 and 65 (CMA Document Reference URN 0530).

B. The Parties

GBE

- 3.17. GBE is a private limited company registered in England and Wales with company number 02703490. GBE was incorporated on 3 April 1992 under the name of 'Dancemarket Limited'.⁴⁰ Throughout the Relevant Period, GBE has been registered under the name of 'GB eye Limited'.⁴¹ GBE trades as 'GB Posters'. GBE has been an active company throughout the Relevant Period.
- 3.18. GBE's registered address is Goodband Viner Taylor Ellin House, 42 Kingfield Road, Sheffield, South Yorkshire, S11 9AS.⁴²
- 3.19. The current directors of GBE are [X] (Managing Director), [X] (Commercial Director), [X] (International Sales Director).⁴³ [X] and [X] were directors of GBE throughout the Relevant Period. [X] was a director of GBE for the period from 17 June 2008 to 30 November 2011.⁴⁴
- 3.20. GBE is currently owned by [X] (100,000 ordinary A shares, 85% shares), [X] (6,400 ordinary C shares, 5% shares), [X] (6,400 ordinary C shares, 5% shares) and [X] (5,938 ordinary B shares, 5%, 'sleeping partner').⁴⁵ [X] and [X] were the sole shareholders of GBE throughout the Relevant Period.
- 3.21. GBE is an international producer and seller of licensed sport and entertainment merchandise and related products. Posters are GBE's core product, accounting for more than [X] per cent of its sales,⁴⁶ although, according to [Senior Employee 1] (GBE), this has been declining.⁴⁷ GBE also

⁴⁰ Certificate of incorporation, dated 3 April 1992, available at Companies House website at <https://beta.companieshouse.gov.uk/>.

⁴¹ There has not been a registered name change for GB eye Limited throughout the Relevant Period, see filing history on Companies House website at <https://beta.companieshouse.gov.uk/>.

⁴² Companies House, GBE Annual Return dated 3 April 2016, available at Companies House website at <https://beta.companieshouse.gov.uk/>.

⁴³ Companies House, GBE Annual Return dated 3 April 2016, available at Companies House website at <https://beta.companieshouse.gov.uk/>.

⁴⁴ Certificate of appointment of [X] as a director and as a secretary, dated 17 June 2008; Certificate of termination of appointment of [X] as a director, dated 30 November 2011; and Certificate of termination of appointment of [X] as a secretary, dated 30 November 2011; all documents are available at Companies House website at <https://beta.companieshouse.gov.uk/>.

⁴⁵ Companies House, GBE Annual Return dated 3 April 2016, available at Companies House website at <https://beta.companieshouse.gov.uk/>; transcript of the CMA interview with [Senior Employee 2] (GBE), dated 30 September 2015, pages 14-15 (CMA Document Reference URN 0375); and transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, page 11 (CMA Document Reference URN 0374).

⁴⁶ GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052).

⁴⁷ Transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, page 11 (CMA Document Reference URN 0374).

supplies frames and other merchandise, including prints, canvases, mugs, stickers, badges, stationery and key rings.⁴⁸

- 3.22. GBE, in its capacity as a producer of licenced sport and entertainment merchandise, licences content from sports companies, such as [X], and entertainment companies, such as major film studios, record companies and video games publishers (such as [X], [X] and [X]), as well as holders of imaging rights to entertainment figures, such as [X], [X] and [X].⁴⁹
- 3.23. GBE estimates that it has around 200 licence agreements in place, covering the rights to GBE's portfolio of around [X] products. GBE also buys (for resale) some merchandise from third parties which are licensed to produce them, such that it has a total portfolio of around [X] different products.⁵⁰
- 3.24. Once a particular licence has been obtained, GBE's in-house design team prepares layouts and designs for products which are sent to the relevant licensor for approval. Following approval, the relevant products are manufactured by third party manufacturers, such as commercial printers.⁵¹ [Senior Employee 1] (GBE) has explained that GBE itself manufactures some products, such as mugs and frames.⁵²
- 3.25. GBE manufactures and sells frames, including frames that are specific to posters. GBE also sells a wide variety of different sized frames, most of which are not for posters.⁵³
- 3.26. GBE sells the merchandise in the UK:
 - a. as a wholesaler to bricks-and-mortar retailers for onward sale to end consumers;
 - b. as a wholesaler to online retailers for onward sale to end consumers;
 - c. as a retailer online directly to end consumers through GBE's own website (www.gbposters.com); and
 - d. as a retailer online directly to end customers on other online retail platforms, such as Amazon UK.⁵⁴

⁴⁸ GBE proffer, dated 30 July 2015, pages 3-4 (CMA Document Reference URN 0052).

⁴⁹ GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052).

⁵⁰ GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052).

⁵¹ GBE proffer, dated 30 July 2015, page 5 (CMA Document Reference URN 0052).

⁵² Transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, pages 12-13 (CMA Document Reference URN 0374).

⁵³ GBE's response dated 4 May 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0428).

⁵⁴ GBE proffer, dated 30 July 2015, page 6 (CMA Document Reference URN 0052).

3.27. GBE's sales function is split into three divisions:

- a. the UK sales department (headed by [X]) is responsible for wholesale sales to trade customers in the UK and Republic of Ireland, such as bricks-and-mortar retailers, and distributors and online retailers (for example, Amazon and Trod);
- b. the export sales department (headed by [X]) overseas wholesale sales to trade customers based outside the UK; and
- c. the e-commerce department (headed and run on a day-to-day basis by [X]⁵⁵) is responsible for sales made directly to end consumers via GBE's own website (www.gbposters.com) and other online retail platforms (such as Amazon UK).⁵⁶ [X].⁵⁷ The Infringement concerns the activities of the e-commerce department.

3.28. [X].⁵⁸ Originally, online retail offerings were only made through GBE's own website, sales on which were less than £100,000 in 2009.⁵⁹ In around 2010, GBE expanded its online retail presence by beginning to sell on Amazon Marketplace, at which point the e-commerce side of the business was growing.⁶⁰

3.29. GBE's annual turnover for the financial year ending 31 December 2014 was almost £11 million.⁶¹ The majority of the company's turnover relates to activities carried on in the UK and retail sales to UK consumers.⁶² Between [£500,000 and £1,000,000]⁶³ of GBE's turnover in the financial year ending

⁵⁵ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 15-16 (CMA Document Reference URN 0530).

⁵⁶ GBE proffer, dated 30 July 2015, pages 5-6 (CMA Document Reference URN 0052). See also witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 15-16 (CMA Document Reference URN 0530).

⁵⁷ GBE proffer, dated 30 July 2015, pages 6-8 (CMA Document Reference URN 0052); witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], page 2 (CMA Document Reference URN 0530).

⁵⁸ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 15-16 (CMA Document Reference URN 0530).

⁵⁹ GBE proffer, dated 30 July 2015, pages 7-8 (CMA Document Reference URN 0052). See also witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 15-16 (CMA Document Reference URN 0530).

⁶⁰ GBE proffer, dated 30 July 2015, page 8 (CMA Document Reference URN 0052). See also witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 15-16 (CMA Document Reference URN 0530).

⁶¹ GBE proffer, dated 30 July 2015, page 3 (CMA Document Reference URN 0052). GBE's turnover for the period of 1 January 2014 to 30 June 2015 was £15.7 million. Companies House, GBE Abbreviated Accounts for the period of 1 January 2014 to 30 June 2015, available at Companies House website at <https://beta.companieshouse.gov.uk/>.

⁶² GBE proffer, dated 30 July 2015, page 3 (CMA Document Reference URN 0052). See also GBE's representations dated 5 July 2016 (CMA Document Reference URN 0673).

⁶³ This includes shipping costs (see witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], page 91 (CMA Document Reference URN 0530); GBE proffer, dated 30 July 2015, pages 6-7 (CMA Document Reference URN 0052)).

December 2014 was realised through sales on Amazon UK, of which more than [75-100] per cent was derived from sales to UK based consumers.⁶⁴ In the financial year ending December 2014, between [£500,000 and £1,000,000] of GBE's turnover from Amazon UK was derived from sales of posters and frames, and between [£100,000 and £500,000] was derived from sales of other licensed sport and entertainment merchandise.⁶⁵ In the same financial year, more than [50-75] per cent of GBE's online retail sales (by value) of posters and frames were derived from Amazon UK (rather than other online retail platforms).⁶⁶ [For ease of reference, the individuals at GBE involved in the overall narrative are as follows:

| GBE individual (and position during some/all of the Relevant Period) | Abbreviated Reference in this Decision |
|--|--|
| Director or Senior Manager | 'Senior Employee 1' |
| Director or Senior Manager with responsibility for wholesale sales | 'Senior Employee 2' |
| Director or Senior Manager with responsibility for wholesale sales | 'Senior Employee 3' |
| Director or Senior Manager | 'Senior Employee 4' |
| Employee responsible for online retail sales | 'Employee 1' |
| Employee responsible for wholesale sales | 'Employee 2' |
| Employee responsible for online retail sales | 'Employee 3' |
| Employee responsible for wholesale sales | 'Employee 4' |
| Employee responsible for wholesale sales | 'Employee 5' |
| Employee responsible for wholesale sales | 'Employee 7' |
| Employee at GBE | 'Employee 8' |
| Employee at GBE | 'Employee 9' |

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⁶⁴ GBE proffer, dated 30 July 2015, pages 6-7 (CMA Document Reference URN 0052). See also witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 52, 79-81, 91 (CMA Document Reference URN 0530).

⁶⁵ GBE's response dated 29 April 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0419). The figures provided by GBE for 'frames' include 'mounts'.

⁶⁶ GBE's response dated 29 April 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0419).

Trod

- 3.30. Trod is a private limited company registered in England and Wales with company number 05585871. Trod was incorporated on 7 October 2005 under the name of 'Trod Limited'. Trod was an active company throughout the Relevant Period.
- 3.31. Trod's registered address prior to the appointment of KPMG was Units 1 & 2 Tay Road, Frankley Industrial Estate, Birmingham, West Midlands, B45 0LD, company number.⁶⁷ The registered address changed on 13 April 2016 to KPMG LLP, One Snowhill Snow Hill Queensway Birmingham B4 6GH.⁶⁸
- 3.32. [X] is currently the director and sole shareholder of Trod.⁶⁹
- 3.33. Trod has been solely owned by [X] since at least 7 October 2006 (and throughout the Relevant Period).⁷⁰ [X] has been the Managing Director of Trod since its incorporation (and throughout the Relevant Period). [X] was until 5 March 2012, the sole director of Trod. On 2 March 2012 [X] was appointed as director of Trod but resigned as a director on 1 March 2014.⁷¹
- 3.34. The Administrators of Trod took over the trading of the company following their appointment.⁷² Trod ceased trading on 18 May 2016.⁷³ [X] has remained a statutory director of Trod.⁷⁴
- 3.35. The activities of Trod in the paragraphs that follow (here and at 3.C below) are described as at the time before Trod ceased trading.

⁶⁷ Companies House, Trod Annual Return dated 7 October 2015, available at Companies House website at <https://beta.companieshouse.gov.uk/>.

⁶⁸ Certificate of the change of the registered office address, available at Companies House website at <https://beta.companieshouse.gov.uk/>.

⁶⁹ Companies House, Trod Annual Return dated 7 October 2015, available at Companies House website at <https://beta.companieshouse.gov.uk/>.

⁷⁰ [X] was appointed as a director on 7 October 2005; see Certificate of appointment of [X] as a director filed on Companies House. The earliest Annual Return available on Companies House dated 7 October 2006 lists [X] as a sole director and shareholder of Trod. All documents are available at Companies House website at <https://beta.companieshouse.gov.uk/>.

⁷¹ Certificate of appointment of [X] as a director, dated 2 March 2012; and Certificate of termination of appointment of [X] as a director, dated 1 March 2014; both documents are available at Companies House website at <https://beta.companieshouse.gov.uk/>.

⁷² Notice of administrators' appointment, dated 23 March 2016, and cover letter, dated 29 March 2016 (CMA Document Reference URN 0332, and also URN 0331). Please also refer to the cover letter which notes that '*the Company [Trod] is currently continuing to trade...*'. See also Statement of administrators' proposals, dated 16 May 2016, point 3.1 (CMA Document Reference URN 0470 and also URN 0469).

⁷³ Note of call between the CMA and KPMG, dated 13 May 2016 (CMA Document Reference URN 0454), which explains that '*Trod has ceased trading today [13 May 2016] but will continue to exist as a legal entity "in administration" until KPMG finalises residual matters...*'.

⁷⁴ Note of call between the CMA and KPMG, dated 13 May 2016 (CMA Document Reference URN 0454). See also Companies House website at <https://beta.companieshouse.gov.uk/> which shows that [X] remains a statutory director as at 20 June 2016.

- 3.36. Trod was an international wholesaler and retailer of toys and other consumer products, including licensed sport and entertainment posters and frames.⁷⁵ Toys are understood to have been Trod's principal line of business⁷⁶ and its core product by value of sales.⁷⁷
- 3.37. Trod sold products via its own website (www.buy4lessonline.co.uk), as well as on other online retail platforms, such as Amazon UK and other Amazon sites.⁷⁸ Trod traded as 'Buy 4 Less', 'Buy For Less', 'Buy-For-Less-Online', 'Global Trader' and '247 Toys'.⁷⁹
- 3.38. The CMA understands that Trod was not active at the production level, ie it did not design and manufacture the products or license content from third party licensors; rather it purchased products from third parties, including GBE, and then re-sold them, either to distributors or direct to consumers.⁸⁰
- 3.39. Trod's annual turnover for the financial year ending 31 March 2015 was around £15 million, of which approximately £7.8 million was generated in the UK.⁸¹ In the same financial year, Trod generated between £500,000 and £1,000,000 from sales of licensed sport and entertainment posters and frames, and between £50,000 and £55,000 from sales of other licensed sport and entertainment merchandise.⁸² Trod estimates that between 30 and 60 per cent of its total sales are derived from Amazon UK.⁸³ [For ease of reference, the individuals at Trod involved in the overall narrative are as follows:

⁷⁵ Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0348).

⁷⁶ GBE proffer, dated 30 July 2015, page 9 (CMA Document Reference URN 0052); Trod is described as an 'online toy retailer' in the statement of administrators' proposals, dated 16 May 2016, page 3 (CMA Document Reference URN 0470 and also URN 0469).

⁷⁷ Email dated 17 September 2012 at 15:00 from [Senior Employee 2] to [Senior Employee 1], [Senior Employee 3], [Employee 8], [Employee 2], [Employee 7] (all of GBE) (CMA Document Reference URN 0051).

⁷⁸ GBE proffer, dated 30 July 2015, page 10 (CMA Document Reference URN 0052).

⁷⁹ GBE proffer, dated 30 July 2015, page 9 (CMA Document Reference URN 0052). A search for Trod directs to <http://www.buyforlessonline.co.uk/>. 247 Toys is listed as a trading name for Trod Ltd at <http://www.247toys.co.uk/Terms-And-Conditions.htm>.

⁸⁰ GBE proffer, dated 30 July 2015, page 9 (CMA Document Reference URN 0052).

⁸¹ Companies House, Trod Audited Financial Statements for the year ending 31 March 2015, available at Companies House website at <https://beta.companieshouse.gov.uk/>.

⁸² Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0348).

⁸³ Trod's (KPMG) response dated 29 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0369).

| Trod individual (and position during some/all of the Relevant Period) | Abbreviated Reference in this Decision |
|---|--|
| Director or Senior Manager | 'Senior Employee 1' |
| Employee at Trod | 'Employee 1' |
| Employee at Trod | 'Employee 2' |
| Employee at Trod | 'Employee 3' |

]

C. The relationship between the Parties

- 3.40. Trod's relationship with GBE was originally one of customer (Trod) and supplier (GBE). GBE began supplying Trod in around 2009.⁸⁴ Trod was one of GBE's largest online retail customers and the largest '*independent web customer*' of GBE.⁸⁵ GBE's sales to Trod in 2014 amounted to around £[§<].⁸⁶
- 3.41. [Employee 4] and [Employee 5] of GBE were account managers for Trod during the Relevant Period.⁸⁷
- 3.42. While it was trading, in addition to being a customer of GBE at the wholesale level, Trod was also a competitor of GBE (at the retail level) through their respective websites and sales on other online platforms, principally Amazon UK.⁸⁸
- 3.43. Trod was active as a competing seller on many Amazon UK listings on which GBE is active.⁸⁹ Both Parties sold products on Amazon UK which they sourced from other suppliers, such as [Supplier],⁹⁰ and they competed for retail sales of some of these products. However, each Party also listed products that are not sold by the other Party on Amazon UK. For example,

⁸⁴ GBE proffer, dated 30 July 2015, page 10 (CMA Document Reference URN 0052).

⁸⁵ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [§<], page 17 (CMA Document Reference URN 0530). See also GBE's representations dated 5 July 2016 (CMA Document Reference URN 0673).

⁸⁶ GBE proffer, dated 30 July 2015, page 10 (CMA Document Reference URN 0052).

⁸⁷ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [§<], pages 18, 153, 161–162 (CMA Document Reference URN 0530); transcript of the CMA interview with [Senior Employee 2] (GBE), dated 30 September 2015, page 12 (CMA Document Reference URN 0375); transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, page 21 (CMA Document Reference URN 0374).

⁸⁸ GBE proffer, dated 30 July 2015, page 10 (CMA Document Reference URN 0052); witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [§<], pages 16–17 (CMA Document Reference URN 0530).

⁸⁹ GBE proffer, dated 30 July 2015, page 10 (CMA Document Reference URN 0052).

⁹⁰ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [§<], pages 32, 65, 69, 124–125, 156, 204 (CMA Document Reference URN 0530); transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, pages 52, 54 (CMA Document Reference URN 0374).

GBE did not compete with Trod for the sales of toys as GBE does not sell toys.⁹¹

- 3.44. Posters and frames account for most of the products sold by Trod that were sourced by Trod from GBE and [Supplier].⁹² In the financial year ending December 2015, the value of Trod's sales of posters and frames sourced from GBE and [Supplier] was between £250,000 and £500,000, and between [£100,000 and 500,000], respectively.⁹³

D. The arrangement between the Parties

Introduction

- 3.45. The following paragraphs cover the evidence of, and relating to, the arrangement between Trod and GBE not to undercut each other in certain specified circumstances on prices for posters and frames sold by both Parties on Amazon UK during the Relevant Period.
- 3.46. In particular, as set out in more detail below, the evidence shows that [Employee 1] (GBE) and [Senior Employee 1] (Trod) put in place the arrangement to put an end to complaints by [Senior Employee 1] (Trod) about aggressive pricing by GBE, to pacify [Senior Employee 1] (Trod) and to maintain good relations with Trod (as a customer of GBE). The evidence shows that the individuals primarily acting on behalf of GBE and Trod in relation to the arrangement were [Employee 1] (GBE) and [Senior Employee 1] (Trod), respectively. The evidence shows that, after a short period of trying to implement the arrangement manually, GBE implemented the arrangement by the use of automated repricing software which was configured to give effect to it. Trod also used automated repricing software to implement the arrangement, albeit different software from that used by GBE.

Origins of the arrangement

- 3.47. The evidence demonstrates that following the expansion of GBE's retail business to Amazon Marketplace in around March 2010,⁹⁴ GBE started receiving complaints from some of its UK and European wholesale

⁹¹ GBE proffer, dated 30 July 2015, page 10 (CMA Document Reference URN 0052).

⁹² Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016, question 2 (CMA Document Reference URN 0348).

⁹³ Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016, question 2 (CMA Document Reference URN 0348).

⁹⁴ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], page 15 (CMA Document Reference URN 0530).

customers who felt that it was a '*clash of interests*' for GBE to compete against GBE's wholesale customers at the retail level.⁹⁵

3.48. Witness and documentary evidence also demonstrates that Trod was one of the customers who complained about GBE's alleged aggressive pricing (primarily on Amazon Marketplace) that resulted in GBE undercutting Trod.⁹⁶ According to [Employee 1] (GBE), while GBE had received similar complaints from a number of its UK and European wholesale customers, [Senior Employee 1] (Trod) was '*shouting louder than [others]*'. [Employee 1's] (GBE) evidence is that Trod was '*quite an important customer*' and '*the largest...independent web customer*' that GBE would not have wanted to lose.⁹⁷

3.49. [Employee 1's] (GBE) evidence is that the complaints began in early 2011.⁹⁸ However, from contemporaneous email correspondence, the CMA considers that the complaints in fact started as early as June 2010. In an internal email at GBE sent on 17 June 2010 at 11:12, [Employee 4] wrote to [Senior Employee 2] and [Employee 2] (all of GBE), stating:

*'Hi [Senior Employee 2/Employee 2 (GBE)], I'm constantly getting complaints about stuff on Amazon and our website and how we are supplying products to customers and then undercutting them ...'*⁹⁹

In response to [Employee 2's] (GBE) question as to who else had complained, [Employee 4] (GBE) wrote:

'Trod

[redacted] (hasn't actually ordered for a while due to competition)

*[redacted] [redacted] ...'*¹⁰⁰

3.50. According to the evidence of [Employee 1] (GBE) the arrangement that was subsequently put in place was intended to put an end to complaints by Trod

⁹⁵ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [redacted], page 16 (CMA Document Reference URN 0530).

⁹⁶ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [redacted], pages 16-17 (CMA Document Reference URN 0530).

⁹⁷ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [redacted], pages 17-18, 195-196, 219 (CMA Document Reference URN 0530).

⁹⁸ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [redacted], page 16 (CMA Document Reference URN 0530).

⁹⁹ Email dated 17 June 2010 at 11:12 from [Employee 4] to [Senior Employee 2], [Employee 2] (all of GBE) (CMA Document Reference N0155).

¹⁰⁰ Email dated 17 June 2010 at 11:18 from [Employee 4] to [Senior Employee 2], [Employee 2] (all of GBE) (CMA Document Reference N0155).

about aggressive pricing by GBE, to pacify [Senior Employee 1] (Trode) and to maintain good relations with Trode (as a customer of GBE).¹⁰¹

Formation of the arrangement

- 3.51. Evidence shows that the arrangement between GBE and Trode was put in place (at the latest) on 24 March 2011.
- 3.52. [Employee 1's] (GBE) evidence is that his first step to deal with [Senior Employee 1's] (Trode) complaints was to agree with Trode that GBE would stop cutting prices on certain products.¹⁰²
- 3.53. [Employee 1's] (GBE) evidence is corroborated by an email from [Employee 1] (GBE) to [Senior Employee 2] and [Employee 2], both from GBE, dated 14 March 2011 at 09:42 which stated as follows:

'We eased off some of our pricing before the weekend following my chat with Trode. We have seen a significant drop in orders, last Monday we had 416 in comparison to today's 231. I will speak to him again today to try to come up with a short term plan.'¹⁰³ (emphasis added)

- 3.54. [Employee 1] (GBE) explained that 'easing off' pricing resulted in GBE losing orders so GBE sought to put in place a 'solution' that would be 'less detrimental to [GBE's] on-line business'.¹⁰⁴ According to [Employee 1] (GBE), he and [Senior Employee 1] (Trode) therefore agreed that GBE and Trode would not undercut each other's prices for products sold on Amazon

¹⁰¹ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 36-37, 200, 219 (CMA Document Reference URN 0530). See also transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, pages 28, 32-33, 58, 73-74 (CMA Document Reference URN 0374); transcript of the CMA interview with [Senior Employee 2] (GBE), dated 30 September 2015, pages 32-33, 37-39, 43 (CMA Document Reference URN 0375).

¹⁰² [Employee 1] (GBE) explained as follows: '...what came out of that conversation [between [Employee 1] of GBE and [Senior Employee 1] of Trode] was that as a, as a temporary measure, you know, for the sake of goodwill, you know, in terms of maintaining that relationship between GB Eye and- and Trode Limited, I agreed to ease off on our pricing as I think as I described it, which was basically what I meant by that was to stop them undercutting ~~cutting in~~ on certain products. And in the mean... and in the meantime I would then speak with my colleagues, so [Senior Employee 2], you know, [Senior Employee 2] and [Senior Employee 1], and [Employee 2] and what have you, to then, discuss how we would proceed following that.' See witness statement of [Employee 1], dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], page 19 (CMA Document Reference URN 0530).

¹⁰³ Email dated 14 March 2011 at 10:42 from [Employee 1] to [Senior Employee 2], [Employee 2] (all of GBE) (CMA Document Reference URN 0053).

¹⁰⁴ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], page 21 (CMA Document Reference URN 0530).

UK.¹⁰⁵ According to [Employee 1] (GBE) the plan was to trial this for a short period of time to see whether it worked.¹⁰⁶

- 3.55. [Employee 1's] (GBE) evidence about the formation of the arrangement is corroborated by an email chain between [Employee 1] (GBE) and [Senior Employee 1] (Trod) dated 24 March 2011 in which they discussed their efforts to coordinate prices. In that email chain, [Senior Employee 1] (Trod) wrote to [Employee 1] (GBE) in an email dated 24 March 2011 at 15:33 as follows:

*'I have just checked again and still none of your prices on the best selling posters have been increased, infact [sic] you have even dropped some more prices. I guess I was right to wait and not trust you 😊'*¹⁰⁷

- 3.56. In an email dated 24 March 2011 at 15:47 [Employee 1] (GBE) replied to [Senior Employee 1] (Trod), stating:

*'We put all our prices up on the list I sent to you to either £3.94 or 25p below the next cheapest seller, we did this last night as discussed. This morning however you had put your prices up but still below ours. We have since dropped about 5 ASINs to your price to see if you have switched off your software yet, but it is still undercutting us further; this is the only way to check! **You are also still currently undercutting us on more or less every product, we need to see your prices go up to ours before we can re-price any more, we can't experiment with the whole range.***

*I am not sure what you want us to do. We have committed to trialling this for a month and I have given you my word, **but you need to reciprocate and switch off the re-pricing against our products for us to move forward.***

*Please call me back ASAP if you need to discuss further, I intended changing all of our prices today but I can't do anything until I see or hear a positive response from your end.'*¹⁰⁸ (emphasis added)

[Senior Employee 1] (Trod) then emailed [Employee 1] (GBE) later in the day on 24 March 2011 apparently providing him the comfort he was

¹⁰⁵ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 21-22 (CMA Document Reference URN 0530).

¹⁰⁶ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X] pages 25-26 (CMA Document Reference URN 0530).

¹⁰⁷ Email dated 24 March 2011 at 15:33 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference N0004 and N0163).

¹⁰⁸ Email dated 24 March 2011 at 15:47 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0004 and N0163).

seeking that Trod's pricing would change and apologising for the delay.¹⁰⁹
[Senior Employee 1] (Trod) subsequently emailed [Employee 1] (GBE) on 25 March 2011 at 09:11 confirming Trod had changed its pricing:

'I have just checked and most of our prices have changed, if you see any that haven't just email me the asins and I will have a look at them.

*Can you work hard please to try and reprice as much of yours as possible today, because we have lost quite a lot of blue boxes due to this.'*¹¹⁰

- 3.57. [Employee 1's] (GBE) evidence about the formation of the arrangement is also corroborated by an email dated 25 March 2011 at 12:24, in which [Employee 1] (GBE) informed his colleagues at GBE ([Senior Employee 1], [Senior Employee 2] and [Employee 2]) of the arrangement as follows:

'Just to give you an update.

Trod (Buy 4 Less) have agreed not to undercut us on Amazon and I have agreed to reciprocate. We will therefore be aiming to be the same price wherever possible, put prices up and share the sales. I experimented with 30 SKUs yesterday and the results were positive ...

[Senior Employee 1] from Trod seems to be approaching this positively but with caution. I have reassured him that we will commit to trialling this system for a month after which we will review the situation.

*Logistically it is going to be difficult to follow the pricing effectively on a daily basis so I am looking into re-pricing [so]ftware ...'*¹¹¹ (emphasis added)

- 3.58. On the same day, [Employee 1] (GBE) asked [Employee 9] of GBE to do the following:

'Raise prices as high as possible.

Raise maxi posters to £3.94 or 25p below cheapest seller (except buy 4 less)

Lowest maxi posters price £2.59 (£4.59 inc shipping)

¹⁰⁹ Email dated 24 March 2011 at 17:20 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference N0004 and N0163).

¹¹⁰ Email dated 25 March 2011 at 09:11 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference N0004 and N0163).

¹¹¹ Email dated 25 March 2011 at 12:24 from [Employee 1] to [Senior Employee 1], [Senior Employee 2], [Employee 2] (all of GBE) (CMA Document Reference URN 0015).

Where buy for less are lower than us, we match their price'¹¹²
(emphasis added)

- 3.59. The formation of the arrangement between Trod and GBE from (at the latest) 24 March 2011 is also corroborated by the subsequent correspondence between the Parties in relation to implementation of the arrangement cited at paragraphs 3.62 to 3.93, and 3.94 to 3.102 below.
- 3.60. A further email chain regarding implementation of the arrangement provides evidence of the existence of the arrangement at that time. On 10 April 2011 at 15:22, [Senior Employee 1] (Trod) emailed GBE to express his annoyance with [Employee 1] (GBE) for seemingly not having acted in accordance with what had been agreed. [Senior Employee 1] (Trod) emailed [Employee 1], [Senior Employee 2], [Senior Employee 1], [Senior Employee 3], [Senior Employee 4] (all of GBE) with a list of product codes, stating as follows:

'[Employee 1 (GBE)],

[the] following are still wrong, even though you had a sample of the Asins On [sic] the email below, so I do not hold much [ho]pe that this is going to work. As you can see the 2 lists are exactly the same, so you have YET AGAIN done nothing [yo]u said you would do. I am sick and tired of being continually LIED to by you.

*... you and your staff have managed to spend most of your time trying to annoy me **rather than [sic] sticking to at [sic] you agreed.** I have no choice but to take GB off our ignore list, which will make your teams [sic] jobs pointless [at] GB as we will go back to square 1 and sell all of your posters at a loss.'*¹¹³ (emphasis added)

- 3.61. In the same email chain, [Senior Employee 1] (Trod) also wrote directly to the Board of Directors of GBE, seeking to establish a meeting with the directors in order to *'find out where our 2 companies relationship stands going forward'* as a result of the arrangement *'not working'* at the time. The relevant part of the email is set out below:

¹¹² Email dated 25 March 2011 at 10:27 from [Employee 1] (GBE) to [Employee 9] (GBE) (CMA Document Reference URN 0055).

¹¹³ Email dated 11 April 2011 at 15:22 from [Senior Employee 1] (Trod) to [Employee 1], [Senior Employee 2], [Senior Employee 1], [Senior Employee 3], [Senior Employee 4] (all of GBE) (CMA Document Reference URN 0016). The *'ignore list'* referred to in this email is a function of the software that Trod used to implement the arrangement with GBE and is addressed further at paragraphs 3.81 to 3.93 below. The CMA considers that the reference to *'sticking to at you agreed'* is a reference to *'sticking to [wh]at you agreed'*.

'... [Employee 1 (GBE)] has proved to be a complete liar and is just making this situation much worse.

...

*1. If you insist on pushing your retail side by trying to put your own customers out of business then get rid of the idiot, and that is a fair term for [Employee 1 (GBE)] as from talking to him he has about as much knowledge of internet selling as a junior member of my staff with about 1 months experience, that just continually lies to your customer(s), and get someone who can do the job of improving your retail sales by working with your customers and not just p**sing them off continually.*

*2. Can we please arrange a meeting of the directors and myself so I can explain why this is not working and in the long term will only reduce GB Eyes [sic] profits and not improve them. Also so we can try and make this work in everyones [sic] best interests. Or at least I can find out where our 2 companies relationship stands going forward.'*¹¹⁴ (emphasis added)

[Employee 1] (GBE) forwarded the email chain to [Employee 2] of GBE on 11 April 2011 at 09:48, stating:

*'What am I meant to do with someone like this?'*¹¹⁵

Software used to implement the arrangement

- 3.62. As [Employee 1] (GBE) had anticipated in an internal email dated 25 March 2011 at 12:24 in which he stated, *'Logistically it is going to be difficult to follow the pricing effectively on a daily basis so I am looking into re-pricing [so]ftware...'*¹¹⁶, the evidence demonstrates that, after a short period of trying to implement the arrangement manually, GBE implemented the arrangement by the use of automated repricing software which was configured to give effect to it.
- 3.63. As set out below, the evidence demonstrates that Trod also used automated repricing software to implement the arrangement, albeit different software from that used by GBE.

¹¹⁴ Email dated 11 April 2011 at 15:22 from [Senior Employee 1] (Trod) to [Employee 1], [Senior Employee 2], [Senior Employee 1], [Senior Employee 3], [Senior Employee 4] (all of GBE) (CMA Document Reference URN 0016).

¹¹⁵ Email dated 11 April 2011 at 09:48 from [Employee 1] to [Employee 2] (all of GBE) (CMA Document Reference URN 0016).

¹¹⁶ Email dated 25 March 2011 at 12:24 from [Employee 1] to [Senior Employee 1], [Senior Employee 2], [Employee 2] (all of GBE) (CMA Document Reference URN 0015).

GBE – Introduction of [GBE’s software provider’s] Software

- 3.64. The evidence demonstrates that GBE used software provided by [GBE’s software provider] to implement the arrangement.
- 3.65. [Employee 1’s] (GBE) account is that he initially implemented the arrangement manually for around a month, by initially trialling it with 30 SKUs.¹¹⁷ This is corroborated by references to a ‘*trial*’ in the email chain dated 24 March 2011 cited at paragraph 3.56 above.
- 3.66. However, the evidence of [Employee 1] (GBE) and GBE is that, in light of the very large number of SKUs GBE sells on Amazon UK, monitoring and amending pricing manually across all GBE’s listings proved a laborious and time-consuming exercise.¹¹⁸ This is also confirmed by an internal GBE email dated 25 March 2011 at 12:24, when [Employee 1] (GBE) emailed his colleagues at GBE ([Senior Employee 1], [Senior Employee 2] and [Employee 2]) noting that ‘*logistically it is going to be difficult to follow the pricing effectively on a daily basis so I am looking into re-pricing [so]ftware.*’¹¹⁹ [Employee 1] (GBE) therefore looked into the availability of automated repricing software, after having heard from [Senior Employee 1] (Trod) about Trod’s use of such software.¹²⁰
- 3.67. [Employee 1’s] (GBE) evidence is that [Senior Employee 1] (Trod) first introduced him to repricing software during one of their initial calls in relation to the arrangement. [Employee 1] (GBE) understood that [Senior Employee 1] (Trod) was at the time using the repricing software to monitor competitors’ pricing on Amazon Marketplace.¹²¹
- 3.68. Having found out about the existence of repricing software from [Senior Employee 1 (Trod)], [Employee 1] (GBE) explained to the CMA that he

¹¹⁷ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 25-26 (CMA Document Reference URN 0530). See also GBE proffer, dated 30 July 2015, pages 13-14 (CMA Document Reference URN 0052).

¹¹⁸ GBE proffer, dated 30 July 2015, page 14 (CMA Document Reference URN 0052); witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], page 28 (CMA Document Reference URN 0530).

¹¹⁹ Email dated 25 March 2011 at 12:24 from [Employee 1] to [Senior Employee 1], [Senior Employee 2], [Employee 2] (all of GBE) (CMA Document Reference URN 0015). [Senior Employee 1] (GBE) also confirmed that GBE purchased software to implement the arrangement with Trod (see transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, page 41 (CMA Document Reference URN 0374).

¹²⁰ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 22-23 (CMA Document Reference URN 0530).

¹²¹ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], page 22 (CMA Document Reference URN 0530).

researched and found the software [provided by GBE's software provider] which he purchased following consultation with his superiors at GBE.¹²²

- 3.69. The CMA considers that [Employee 1] (GBE) trialled the [GBE's software provider's] software around mid-April 2011, as demonstrated by an email from [Employee 1] (GBE) to [Senior Employee 1] (Trod), dated 13 April 2011 at 17:05, in which [Employee 1] (GBE) stated as follows:

*'[J]ust to let you know, I have been trialling some software offline today and it works perfectly; it successfully dropped 25p below other sellers and matched yours where you are the lowest (both by raising and lowering our prices as [r]equired). [We] will be trialling it live as of tomorrow morning. [P]lease let me or [Employee 3 (GBE)]¹²³ know if you see any problems.'*¹²⁴

- 3.70. The next day (14 April 2011) [Employee 1] (GBE) sent an email to [Senior Employee]¹²⁵ [(Content Management Software Provider)] at 10:21 confirming his decision to choose the software provided by [GBE's software provider]:

*'Just to let you know, i've decided to go with some different software called [GBE's software provider]. It's much better and uses our own SKU. They also have an inventory management function for Amazon US / UK / DE / FR, Ebay etc, but we are only using the repricer.'*¹²⁶

- 3.71. Evidence shows that by 14 April 2011 GBE was using the [GBE's software provider's] software to implement the arrangement with Trod. In particular, the CMA notes that in an email of the same date (at 15:31), [Employee 1] (GBE) informed [Senior Employee 1] (Trod) that:

¹²² Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 23, 27-28 (CMA Document Reference URN 0530).

¹²³ [Employee 3] (GBE) was an assistant to [Employee 1] (GBE). Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 15, 37 (CMA Document Reference URN 0530).

¹²⁴ Email dated 13 April 2011 at 17:05 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0019 and N0166). [Employee 1] (GBE) explained that the software contained an off-line trial mode which simulated the price changes and that price changes would occur on Amazon when the software was switched to on-line mode. Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], page 38 (CMA Document Reference URN 0530).

¹²⁵ [Senior Employee] was the Managing Director of [Content Management Software Provider]. See [Senior Employee's] email signature at the bottom of the email dated 14 April 2011 at 10:21 from [Employee 1] (GBE) to [Senior Employee] ([Content Management Software Provider]) (CMA Document Reference URN 0059). GBE confirmed that '[Senior Employee] is the managing director of [Content Management Software Provider] who provides the content management software, [3<] for the gbposters.com website.' GBE proffer, dated 4 November 2015, page 6 (CMA Document Reference URN 0070).

¹²⁶ Email dated 14 April 2011 at 10:21 from [Employee 1] (GBE) to [Senior Employee] ([Content Management Software Provider]) (CMA Document Reference URN 0059).

*'Our repricing software is now live on Amazon and seems to be working fine, please let us know if you see any anomalies.'*¹²⁷

- 3.72. On the same day at 16:34 [Employee 1] emailed [Senior Employee 2] [Employee 2] and [Senior Employee 1] (all of GBE), explaining that the repricing software had been activated on Amazon UK and that GBE was the same price as Trod on 99 per cent of its listings. The email stated as follows:

*'[We] have now activated the Amazon repricing software and it is working perfectly. Trod should be happy with the outcome as we are now the same price as them on 99% of listings. It will respond to fluctuations in price every [redacted].'*¹²⁸

On 15 April 2011 at 09:06, [Senior Employee 1] (GBE) emailed [Employee 1] (GBE):

*'Hi [Employee 1 (GBE)], Have you communicated this (verbally) to Trod and also does he know you are on holiday? [Senior Employee 1 (GBE)].'*¹²⁹

[Employee 2] responded to [Senior Employee 1] (all of GBE) at 09:07:

*'Yes, [Employee 1 (GBE)] has communicated both to Trod.'*¹³⁰

- 3.73. That GBE was using the [GBE's software provider's] software to match (not undercut) the prices of a competitor is also demonstrated by an email chain of correspondence between [Employee 1] (GBE) and an individual from [GBE's software provider] named [Employee]¹³¹ between 27 April 2011 and 28 April 2011. The email chain demonstrates that there was dialogue between GBE and [GBE's software provider] in which [Employee 1] (GBE) raised an issue about the software not working correctly as regarded its pricing relative to a competitor, with emails being sent back and forth to resolve the issue. In an email dated 27 April 2011 at 7:47, [Employee 1] (GBE) stated as follows:

¹²⁷ Email dated 14 April 2011 at 15:31 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0020 and N0167).

¹²⁸ Email dated 14 April 2011 at 16:34 from [Employee 1] to [Employee 2], [Senior Employee 2], [Senior Employee 1] (all of GBE) (CMA Document Reference URN 0023 and N0170).

¹²⁹ Email dated 15 April 2011 at 09:06 from [Senior Employee 1] to [Employee 1] (all of GBE) (CMA Document Reference N0153).

¹³⁰ Email dated 15 April 2011 at 09:07 from [Employee 2] to [Senior Employee 1] (all of GBE) (CMA Document Reference N0153).

¹³¹ The contact person at [GBE's software provider] with whom [Employee 1] (GBE) corresponded is [Employee] who is the [redacted]. His e-mail address is [redacted]. See email dated 8 October 2015 from Macfarlanes LLP to the CMA, question 3.1 (CMA Document Reference URN 0301).

'I'm wondering if you can help me with an issue...

*[GBE's software provider's software] doesn't seem to be repricing certain products correctly; I have set the rule to match the seller featured here but it has raised us to our ceiling.'*¹³² (emphasis added)

[Employee] ([GBE's software provider]), having asked for further information from [Employee 1] (GBE), at 16:42 explained:

*'It's because the way you have configured rule#55'*¹³³

[Employee 1] (GBE) replied at 11:47, stating:

*'But surely it should just match the price?'*¹³⁴

[Employee] ([GBE's software provider]) agreed in response at 16:49, stating:

*'yes .. that is how you configured the rule ..'*¹³⁵

[Employee 1] (GBE) replied pointing out that *'it has not matched price'* and [Employee] ([GBE's software provider]) and [Employee 1] (GBE) continued to correspond seeking to identify and resolve the issue.¹³⁶

- 3.74. The email chain between [Employee 1] (GBE) and [Employee] ([GBE's software provider]) cited above does not include the name of the competitor. However, GBE has informed the CMA that this email chain concerned Trod.¹³⁷
- 3.75. [Employee 1] (GBE) has explained that rule 55 in the [GBE's software provider's] software ('rule 55 - price match if competing with sellers if they are the lowest price seller') was activated by GBE to implement the arrangement with Trod by GBE adding Trod's Merchant ID number in the relevant location under 'rule 55'.¹³⁸

¹³² Email dated 27 April 2011 at 7:47 from [Employee 1] (GBE) to [Employee] at [GBE's software provider], page 12 (CMA Document Reference URN 0060).

¹³³ (CMA Document Reference URN 0060), page 10.

¹³⁴ (CMA Document Reference URN 0060), page 9.

¹³⁵ (CMA Document Reference URN 0060), page 9.

¹³⁶ (CMA Document Reference URN 0060), page 9 and pages 1-8.

¹³⁷ GBE confirmed that the 'seller' referred to in the document at URN 0060 (ie Annex 8 to the GBE supplementary proffer) is Trod: *'an email exchange which took place between 27th and 28th April 2011 beginning at 07.47 when [Employee 1 (GBE)] communicated with [GBE's software provider] about a problem with the software raising prices to GB eye's ceiling rather than matching a specified seller, i.e. Trod, Annex 8.'* GBE supplementary proffer, dated 4 November 2015, pages 6-7 (CMA Document Reference URN 0070).

¹³⁸ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 43-44 (CMA Document Reference URN 0530) and document provided by [Employee 1] (GBE) during the interview on 16 September 2015: [GBE's software provider] screenshots showing default

- 3.76. [Employee 1's] (GBE) evidence is that he obtained assistance from [GBE's software provider] in configuring the software to implement GBE's pricing strategy, and in particular the arrangement with Trod.¹³⁹ This is corroborated by contemporaneous correspondence between [Employee 1] (GBE) and [GBE's software provider] cited at paragraph 3.73 above.¹⁴⁰

GBE - Functioning of [GBE's software provider's] Software

- 3.77. Based on the evidence provided by GBE and [Employee 1] (GBE), the CMA considers that the [GBE's software provider's] software was configured by GBE to undercut competing products on Amazon UK (initially by a fixed amount of 25 pence and subsequently by a different parameter set by GBE). This was subject (i) to GBE's minimum price and (ii) where the arrangement with Trod applied, in which case Trod's price would be 'matched' where there was no cheaper third party seller on Amazon UK.¹⁴¹
- 3.78. According to GBE, the software was configured to ensure that if Trod had priced a product at £3.99 and there was no other seller on Amazon UK with a lower price, GBE would also set its price at £3.99 (provided this did not go below GBE's unilaterally set minimum price). The arrangement did not, however, prevent GBE from undercutting Trod if another vendor was cheaper than the price offered by Trod (or *vice versa*), so if Trod priced at £3.99 but another vendor priced at, say, £3.75, GBE would and could undercut the other vendor's price of £3.75 by a parameter set by GBE, (so long as this remained above GBE's minimum price). This would bring GBE's price below Trod's without violating the arrangement between Trod and GBE.¹⁴²

settings and price match; rule 55; seller A112LTL2GXGMT5 (Buy-for-less Amazon.com) (CMA Document Reference URN 0361).

¹³⁹ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], page 43 (CMA Document Reference URN 0530).

¹⁴⁰ Email dated 30 August 2012 at 17:38 from [Employee (GBE's software provider)] to [Employee 1] (GBE) (CMA Document Reference URN 0047) and (CMA Document Reference URN 0060). In light of this, the CMA considered whether to investigate further [GBE's software provider's] involvement in the Infringement (including whether [GBE's software provider] may have facilitated the agreement between Trod and GBE). However, the CMA has concluded that this is not an administrative priority.

¹⁴¹ Email dated 13 April 2011 at 17:05 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0019 and N0166); witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 30-32, 38, 40-41, 43 (CMA Document Reference URN 0530).

¹⁴² GBE proffer, dated 30 July 2015, page 24 (CMA Document Reference URN 0052).

Trod's Repricing Software

3.79. Evidence shows that Trod was also using repricing software to implement the arrangement with GBE.¹⁴³ This is demonstrated by (i) [Employee 1's] (GBE) evidence, (ii) contemporaneous email correspondence between [Employee 1] (GBE) and [Senior Employee 1] (Trod), and (iii) evidence from Trod's software providers ([Trod's software provider 1] and [Trod's software provider 2]) as well as contemporaneous email correspondence between Trod and [Trod's software provider 1].

3.80. The CMA has obtained evidence that Trod was not using the [GBE's software provider's] repricing software that GBE was using. For example, on 31 August 2012 [Employee 1] (GBE) forwarded an email from [Employee] at [GBE's software provider] to [Senior Employee 1] (Trod), stating: *'doubt you would want to change service provider but take a look at 2nd link below to read about them'*¹⁴⁴.

- *[Employee 1's] (GBE) evidence*

3.81. [Employee 1] (GBE) did not know which software Trod used but explained that, as he understood it, Trod's software required [Senior Employee 1] (Trod) to put GBE on an *'ignore list'* (this is also referred to as the *'ignore function'* of the software), so that the usual rules Trod had programmed for undercutting competitors did not apply to GBE.¹⁴⁵

- *Contemporaneous email correspondence between [Employee 1] (GBE) and [Senior Employee 1] (Trod)*

3.82. [Employee 1's] (GBE) evidence is corroborated by an email exchange, dated 24 and 25 March 2011 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) quoted at paragraphs 3.55 to 3.56 above at the inception of the arrangement which contains an early reference to Trod's *'ignore list'*¹⁴⁶ which demonstrates that the *'ignore list'* was used by Trod to manipulate its prices. The following is an extract of part of an ongoing email exchange that day.

¹⁴³ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 22-23 (CMA Document Reference URN 0530).

¹⁴⁴ Email dated 31 August 2012 at 09:39 from [GBE's software provider] to [Employee 1] (GBE) (CMA Document Reference URN 0047).

¹⁴⁵ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 22-23 (CMA Document Reference URN 0530).

¹⁴⁶ Email dated 24 March 2011 at 17:20 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference N0004, URN 0054 and N0163).

[Senior Employee 1] (Trod) wrote to [Employee 1] (GBE) at 17:20 on 24 March 2011, stating:

*'I have just checked to see if our prices have changed yet, and they haven't, I checked our **siftware [sic]** and it looks like it didn't save you in our ignore list. So I have added you again and double checked and you are definitely there now. Sorry for the delay in our prices changing.'*¹⁴⁷ (emphasis added)

[Employee 1] (GBE) responded to [Senior Employee 1] (Trod) on 24 March 2011 at 16:22:

*'Thanks [Senior Employee 1 (Trod)] I've just updated some of the best sellers so I'll check again in the morning.'*¹⁴⁸

3.83. A number of emails in September 2012 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) also show that Trod was using a repricing software with an 'ignore' function to implement the arrangement. In particular, there are a number of emails in which [Employee 1] (GBE) and [Senior Employee 1] (Trod) communicated with each other to resolve problems when the Parties' respective software programmes were not working properly to implement the arrangement:

- a. An email from [Employee 1] (GBE) to [Senior Employee 1] (Trod) dated 5 September 2012 at 17:05 refers to the workings of the 'repricer' and the 'ignore function':

*'[Fu]rther to my previous email. Just trying to get my head around your pricing at the moment in order [to] make our repricer work, have you **switched your ignore function off?** If so can you please switch [it b]ack on so that I can get this working? If not, can you remind me what your rule is (% lower than [low]est seller)?'*¹⁴⁹ (emphasis added)

[Senior Employee 1] (Trod) responded to [Employee 1] (GBE) on 5 September 2012 at 21:27, stating:

¹⁴⁷ (CMA Document Reference URN N0004, URN 0054 and N0163).

¹⁴⁸ (CMA Document Reference URN N0004, URN 0054 and N0163).

¹⁴⁹ Email dated 5 September 2012 at 17:05 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0022).

*'...[y]ou call me tomorrow I will tell you how ours works, would rather say than type :)'*¹⁵⁰

- b. In an email chain between [Senior Employee 1] (Trod) and [Employee 1] (GBE) dated 6 September 2012 to 10 September 2012,¹⁵¹ [Employee 1] (GBE) asked [Senior Employee 1] (Trod) if he has turned off the *'ignore function'*. [Employee 1] (GBE) also asked in an email to [Senior Employee 1] (Trod) dated 6 September 2012 at 14:29:

*'... can we try **switching you [sic] ignore function back on** to see [sic] ours is working properly?'*¹⁵² (emphasis added)

[Employee 1] (GBE) followed this up with an email on 7 September 2012 at 14:34, stating:

*'Any update [Senior Employee 1 (Trod)]? I need to get this sorted today, can't afford to miss out on the weekend.'*¹⁵³

In response to [Senior Employee 1's] (Trod) reply about availability to speak to [Employee 1] (GBE), [Employee 1] (GBE) stated in an email dated 10 September 2012 at 09:29:

*'I had already gone home for the weekend. Did you **turn on your ignore function?**'*¹⁵⁴ (emphasis added)

- c. In an email dated 25 September 2012 at 17:36, from [Senior Employee 1] (Trod) to [Employee 1] (GBE), with a subject *'another one you are undercutting'*, [Senior Employee 1] (Trod) listed an ASIN *'B0016KZ3XC'*.¹⁵⁵ In a response dated 26 September 2012 at 09:29, [Employee 1] (GBE) referred to GBE's *'re-pricer'* and the *'ignore rule'*:

*'You need to take a screen shot of these because as with the one yesterday we are currently the same price as you. I suspect that **our re-pricer** is reacting quicker to competitor movements and then yours are following after. I will forward you the email I*

¹⁵⁰ (CMA Document Reference URN 0022).

¹⁵¹ Email chain dated 6 September 2012 to 10 September 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference URN 0032).

¹⁵² Email dated 6 September 2012 at 14:29 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0032). The CMA considers that the reference to *'switching you ignore function'* is a reference to *'switching you[r] ignore function'* and the reference to *'to see ours is working properly'* is a reference to *'to see [if] ours is working properly'*.

¹⁵³ (CMA Document Reference URN 0032).

¹⁵⁴ (CMA Document Reference URN 0032).

¹⁵⁵ Email dated 25 September 2012 at 17:36 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference URN 0035).

*sent the other day, but I would appreciate it if you look into it urgently as you are undercutting us on all stickers and numerous maxis, we just need the **ignore rule** setting up for us across all of our products.*¹⁵⁶ (emphasis added)

- d. In an email dated 29 September 2012 at 01:28, [Senior Employee 1] (Trod) wrote to [Employee 1] (GBE) stating as follows:

*'nearly all posters you are undercutting, so presume your software is broken, so had to **remove you from ignore list**. Let me know when repaired.'*¹⁵⁷ (emphasis added)

- *Evidence from Trod's software providers and contemporaneous emails between Trod and [Trod's software provider 1]*
 - o *[Trod's software provider 1]*

- 3.84. The evidence shows that the 'ignore' function and 'ignore' list referred to in the correspondence above occurred within software provided to Trod by [Trod's software provider 1] ('[Trod's software provider 1]', also called [X]).
- 3.85. [Trod's software provider 1] provides a repricing software for use on Amazon which enables sellers to compete with other online sellers by automatically adjusting the prices of their products in response to the live prices of competitors' products (the [Trod's software provider 1's Amazon repricer]). The [Trod's software provider 1's Amazon repricer] is only available on Amazon Marketplace (and not other online retail platforms, such as eBay) because it is the only online platform that permits the necessary exchange of information required for the software repricing algorithm to function.¹⁵⁸
- 3.86. Prices are adjusted based on the settings determined by the seller, known as the 'compete rules'.¹⁵⁹ Users set the compete rules by creating 'repricing profiles'.¹⁶⁰ Once the settings are in place, the software works to adjust the user's prices automatically (every 15 minutes) in response to the

¹⁵⁶ Email dated 26 September 2012 at 09:29 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0035).

¹⁵⁷ Email dated 29 September 2012 at 01:28 from [Senior Employee 1] (Trod) to [Employee 1] (GBE), page 8 (CMA Document Reference URN 0041).

¹⁵⁸ [Trod's software provider 1's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0528).

¹⁵⁹ [Trod's software provider 1's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0528); [Trod's software provider 1] User Manual, sections 1.10 and 1.15 (CMA Document Reference URN 0203).

¹⁶⁰ [Trod's software provider 1] User Manual, sections 1.10 and 1.15 (CMA Document Reference URN 0203).

competitors' prices, according to the compete rules configured by the user.¹⁶¹

- 3.87. Sellers can exclude the application of the 'compete rules' to selected competitors on Amazon Marketplace by adding them¹⁶² to an '*ignore*' list or a 'seller exclusion' list.¹⁶³ For example, the 'compete rule' can be set automatically to undercut prices for competing products by x%. Adding a competitor to the '*ignore*' list would have the effect of overriding the 'compete rule' and would mean that the seller would not undercut the selected competitor's price on Amazon.
- 3.88. Trod has been a customer of [Trod's software provider 1] since November 2010.¹⁶⁴ As a 'priority' customer of [Trod's software provider 1], Trod was assigned an account manager ([Employee] at [Trod's software provider 1]) to provide technical support to Trod.¹⁶⁵
- 3.89. [Trod's software provider 1] has confirmed that Trod has been using the [Trod's software provider 1's Amazon repricer] since it became a customer in 2010.¹⁶⁶

¹⁶¹ [Trod's software provider 1's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0528).

¹⁶² ie by entering their Amazon 'Merchant ID' number. [Trod's software provider 1's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0528).

¹⁶³ See [Trod's software provider 1] User Manual, section 1.10 (CMA Document Reference URN 0203): '*In this section it is possible to exclude competing against specific sellers*'.

¹⁶⁴ [Trod's software provider 1's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0528).

¹⁶⁵ [Trod's software provider 1's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0528).

¹⁶⁶ [Trod's software provider 1's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0528). This is also confirmed by contemporaneous email correspondence between individuals at Trod (ie [Senior Employee 1], [Employee 1] or [Employee 2]) and [Trod's software provider 1] (ie [Employee]) [Trod's software provider 1] during the Relevant Period. Email correspondence between Trod and [Trod's software provider 1] relates to [Trod's software provider 1] providing assistance in relation to repricing errors, changes to the '*ignore*' list, issues with repricing not working, complaints about services provided by [Trod's software provider 1], amongst other matters. While this correspondence does not specifically refer or relate to GBE, it demonstrates that Trod was using the [Trod's software provider 1's Amazon repricer] to manage its sales on Amazon Marketplace throughout the Relevant Period. See, for example, the email chain dated 28 February 2011 to 1 March 2011 between [Senior Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0279); the email chain dated 6 to 7 March 2011 between [Senior Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0284); the email chain dated 6 to 7 March 2011 between [Senior Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0287); the email chain dated 23 April 2011 between [Senior Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0296); the email chain dated 31 December 2011 to 3 January 2012 between [Senior Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0319); the email chain dated 31 December 2011 to 3 January 2012 between [Senior Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0326); the email chain dated 30 January 2012 between [Senior Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0327); the email chain dated 2 February 2012 between [Senior Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0331); the email chain dated 7 February 2012 between [Senior Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0335); the email chain dated 21 May 2012 between [Senior

- 3.90. Contemporaneous email evidence between Trod and [Trod's software provider 1] also confirms that GBE had been added to Trod's *'ignore'* list. The earliest contemporaneous email that the CMA has seen in which there is express reference to Trod using the [Trod's software provider 1] repricing software to *'ignore'* GBE's pricing dates from February 2012. Following [Employee 1's] (GBE) email to [Senior Employee 1] (Trod) sending links to eight product ASINs that are contained in an email dated 10 February 2012 at 13:37, [Senior Employee 1] (Trod) forwarded the email to [Employee] ([Trod's software provider 1]) on 10 February 2012 at 14:04, stating:

*'Here is [sic] some examples of ASINS where pricing is not working, where you are not ignoring GB posters in these examples.'*¹⁶⁷
(emphasis added)

[Employee] ([Trod's software provider 1]) responded at 14:41:

*'Somehow that exclude sellers got ignored. We are adding them now and should be fine in next repricing.'*¹⁶⁸

[Employee] ([Trod's software provider 1]) sent a further email to [Senior Employee 1] (Trod) at 14:47:

*'Changes are being done. In the next repricing file they will be excluded. I will let you know as soon as file is sent.'*¹⁶⁹

And then again at 18:12:

*'Uk file has been sent. Checked the first asin in file and it went with max price. Please check prices after 15-20 mins.'*¹⁷⁰

- 3.91. Further correspondence from April 2015 demonstrates Trod's use of the software provided by [Trod's software provider 1] to implement the arrangement. In particular, on 16 April 2015 [Employee 1] (GBE) corresponded with [Senior Employee 1's] (Trod) personal assistant and set

Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0345); the email chain dated 24 to 25 May 2012 between [Senior Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0346); the email chain dated 15 to 22 November 2013 between [Employee 1] (Trod) and [Employee] ([Trod's software provider 1]), cc: others (CMA Document Reference N0356); and the email chain dated 31 July 2015 between [Employee 2] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document Reference N0362).

¹⁶⁷ Email dated 10 February 2012 at 14:04 from [Senior Employee 1] (Trod) to [Employee] ([Trod's software provider 1]) (CMA Document Reference N0191).

¹⁶⁸ (CMA Document Reference URN N0191). The CMA considers from the context of this email that the reference to *'exclude sellers'* is a reference to *'excluded seller'*.

¹⁶⁹ (CMA Document Reference URN N0191).

¹⁷⁰ Email dated 10 February 2012 at 18:12 from [Employee] ([Trod's software provider 1]) to [Senior Employee 1] (Trod) (CMA Document Reference N0193).

up a telephone call between GBE and Trod at 16:00 on the same day.¹⁷¹ At 16:46 on the same day [Employee 1] (Trod) emailed [Employee] ([Trod's software provider 1]) with the subject '*Please put on ignore list*' and GBE's Merchant ID in the body of the email.¹⁷² At 16:59 that day, [Employee 1] (GBE) responded '*Thanks [Senior Employee 1 (Trod)]*' to [Senior Employee 1's] (Trod) email stating '*Reset our end*'.¹⁷³ The CMA infers from the content and timing of these emails that an issue had arisen with the operation of the arrangement that had been resolved by Trod instructing [Trod's software provider 1] to add GBE again to Trod's '*ignore*' list.

- *[Trod's software provider 2]*

- 3.92. The CMA has also considered the evidence as to whether Trod was using the repricing software provided by [Trod's software provider 2] to implement the arrangement with GBE. The evidence on this is inconclusive. On the one hand, evidence shows that [Trod's software provider 2] also provides software which can only be used on Amazon Marketplace which has a repricing function which can be configured to set prices automatically, by comparison with other sellers' prices, and also to 'exclude' specified sellers. In addition, [Trod's software provider 2] has confirmed that Trod first put in place settings to enable it to use the [Trod's software provider 2's] Amazon repricer in 2012.¹⁷⁴ On the other hand, [Trod's software provider 2] has confirmed that Trod has not used the repricing software provided by [Trod's software provider 2] to price products on Amazon UK since 3 March 2015 and that it does not generally hold information about Trod's historic use of the Amazon repricer.¹⁷⁵
- 3.93. In light of this, it cannot be ruled out that at some point during the Relevant Period Trod used the repricing software provided by [Trod's software provider 2] to implement the arrangement.¹⁷⁶

¹⁷¹ Email chain dated 13 to 16 April 2015 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document References N0132 and N0233) and email chain dated 13 to 16 April 2015 between [Employee 1] (GBE) and [Employee 3] (Trod) (CMA Document Reference N0131).

¹⁷² Email chain dated 16 April 2015 between [Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document References N0232).

¹⁷³ Email chain dated 13 to 16 April 2015 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document References N0233).

¹⁷⁴ [Trod's software provider 2's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0526).

¹⁷⁵ [Trod's software provider 2's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0526).

¹⁷⁶ [Trod's software provider 2's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0526).

Contact between Trod and GBE about implementation of the arrangement

- 3.94. Evidence shows that the Parties maintained contact in relation to the implementation of the arrangement during the Relevant Period. In particular, the contemporaneous email evidence demonstrates that the Parties ([Employee 1] of GBE and [Senior Employee 1] of Trod) communicated (i) to provide reassurance to each other regarding their ongoing compliance with the arrangement (see paragraph 3.97 below) and (ii) to complain about apparent non-compliance with the arrangement, in particular, when the software did not seem to be working properly (see paragraphs 3.98 to 3.101 below). The Parties also corresponded in relation to the arrangement over the telephone (see paragraph 3.102 below).
- 3.95. The frequency of the email contact varied during the Relevant Period. The CMA has obtained emails evidencing contact between the Parties about the arrangement during the early stages of the arrangement in March 2011 to September 2011,¹⁷⁷ further email contact during the period February 2012 to October 2012¹⁷⁸ and February 2013 to September 2013,¹⁷⁹ and further

¹⁷⁷ Email chain dated 24 to 25 March 2011 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference N0004 and N0163); email dated 12 April 2011 at 15:51 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0017, URN 0018 and N0165); email dated 14 April 2011 at 15:35 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0022, URN 0021 and N0168); email chain dated 5 June and 6 June 2011 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference N0023); email chain dated 22 June 2011 to 23 June 2011 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference URN 0056); email dated 23 June 2011 at 11:50 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0028 and URN 0025); email chain dated 25 July 2011 to 28 July 2011 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference URN 0026 and N0176); email chain dated 29 July 2011 to 26 September 2011 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference N0034 and N0178).

¹⁷⁸ Email chain dated 10 February 2012 to 13 February 2012 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference URN 0028); email dated 12 June 2012 at 16:06 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0048 and N0196); email dated 7 August 2012 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0041); email dated 9 August 2012 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0096); email chain dated 10 August 2012 to 14 August 2012 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0099); email chain dated 29 August 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference N0047); email chain dated 29 to 30 August 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference URN 0030); email chain dated 29 August 2012 to 5 September 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference URN 0031); email chain dated 6 September 2012 to 10 September 2012 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference URN 0032); email chain dated 6 September 2012 to 7 September 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference N0055); email chain dated 16 September 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference URN 0044); email chain dated 24 September 2012 to 26 September 2012 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference URN 0037); email chain dated 26 September 2012 to 27 September 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference URN 0038); email dated 29 September 2012 at 01:28 from [Senior Employee 1] (Trod) to [Employee 1] (GBE), page 8 (CMA Document Reference URN 0041); email chain dated 29 September 2012 to 1 October 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference N0077); email chain dated 29 September 2012 to 8 October 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference N0082).

¹⁷⁹ Email chain dated 26 February 2013 to 25 March 2013 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference N0091); email chain dated 28 August 2013 to 29 August 2013 between

(albeit less frequent) email contact about the arrangement in March 2015, April 2015 and July 2015.¹⁸⁰

- 3.96. [Employee 1] (GBE) has explained that once GBE's software had been set up to give effect to the arrangement with Trod in April 2011, the software carried on giving effect to the arrangement throughout (at least) the Relevant Period.¹⁸¹ After the software was in place, [Senior Employee 1] (Trod) and [Employee 1] (GBE) corresponded when things were not working as had been agreed.¹⁸² [Employee 1] (GBE) explained that a possible reason for the lack of email correspondence between [Senior Employee 1] (Trod) and [Employee 1] (GBE) about the arrangement during certain periods is that everything was working as planned, and that it would not be surprising if there had been no email correspondence during the busy seasonal period from September to January.¹⁸³
- 3.97. The contemporaneous email correspondence shows [Employee 1] (GBE) and [Senior Employee 1] (Trod) seeking to reassure each other about their compliance with the arrangement. For example:
- a. On 12 April 2011 at 15:51 [Employee 1] (GBE) wrote to [Senior Employee 1] (Trod), stating:

*'Hi [Senior Employee 1 (Trod)], Further to our chat I'd like to introduce you to [Employee 3 (GBE)],¹⁸⁴ [Employee 3 (GBE)] meet [Senior Employee 1 (Trod)] from Buy 4 Less. **If you spot any issues relating to our Amazon pricing please forward them directly to [Employee 3 (GBE)] and he will action sort ASAP. If you could copy me on any correspondence it would be much***

[Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference N0109); email chain dated 5 September 2013 to 6 September 2013 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference N0120).

¹⁸⁰ Email chain dated 19 March 2015 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference N0127 and N0229); email chain dated 13 April 2015 to 16 April 2015 between [Employee 1] (GBE) and [Senior Employee 1], [Employee 3] (both of Trod) (CMA Document Reference N0131 and N0230); email dated 1 July 2015 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference URN 0045 and N0254).

¹⁸¹ Subject to the changes described at paragraph 3.77 above and GBE updating its maximum and minimum prices. Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 40-41 (CMA Document Reference URN 0530).

¹⁸² Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 40-41 (CMA Document Reference URN 0530).

¹⁸³ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 104-106 (CMA Document Reference URN 0530).

¹⁸⁴ [Employee 3] (GBE) was an assistant to [Employee 1] (GBE). Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 15, 37 (CMA Document Reference URN 0530).

*appreciated. I'll keep you posted on developments at our end.*¹⁸⁵
(emphasis added)

On 14 April 2011 at 15:35 [Employee 1] (GBE) emailed [Senior Employee 1] (Trod), as follows:

*'Hi [Senior Employee 1 (Trod)], I am going on holiday tomorrow and will be back on 26th April. **If you have any issues relating to ASINs and pricing please contact [Employee 3 (GBE)], if you have any wider issues relating then please contact [Employee 2 (GBE)]***¹⁸⁶ (emphasis added)

- b. In an email from [Employee 1] (GBE) to [Senior Employee 1] (Trod) dated 12 June 2012 at 16:06, [Employee 1] (GBE) explained to [Senior Employee 1] (Trod) that there would be some fluctuations in prices until the software stabilises:

*'Just to let you know, we are changing over to free shipping on Amazon so you may see some fluctuations in pricing for a few hours until the software stabilises.'*¹⁸⁷

- 3.98. The CMA has obtained ample evidence of correspondence between the Parties raising complaints with one another when the software which was used to implement the arrangement did not seem to be working properly and seeking to resolve the issues. For example:

- a. In an email chain between [Senior Employee 1] (Trod) and [Employee 1] (GBE) dated 29 to 30 August 2012¹⁸⁸ the Parties sought to resolve technical issues with the software which had resulted in GBE undercutting Trod:

[Senior Employee 1] (Trod) emailed [Employee 1] (GBE) on 29 August 2012 at 13:42, stating:

*'you are undercutting us'*¹⁸⁹

¹⁸⁵ Email dated 12 April 2011 at 15:51 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0017, URN 0018 and N0165).

¹⁸⁶ Email dated 14 April 2011 at 15:35 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0022, URN 0021 and N0168).

¹⁸⁷ Email dated 12 June 2012 at 16:06 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0048 and N0196).

¹⁸⁸ Email chain dated 29 August 2012 to 30 August 2012 between [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference URN 0030).

¹⁸⁹ (CMA Document Reference URN 0030).

[Employee 1] (GBE) responded to [Senior Employee 1] (Trod) on the same day at 13:50, stating:

*'Can you give a couple of examples?'*¹⁹⁰

A response from [Senior Employee 1] (Trod) to [Employee 1] (GBE) on the same day at 14:27, provided four product codes, stating:

'these are just a few of them, there are a hell of a lot.

*By the way how much are you paying for your maxi poster tubes at the moment?'*¹⁹¹

A further email from [Employee 1] (GBE) to [Senior Employee 1] (Trod) dated 30 August 2012 at 09:27 stated:

*'Just to give you an update, apparently Amazon has updated it's [sic] API so that seller IDs cannot be retrieved. We use seller ID in our ...Ematch price rule which kicks in if you are the lowest seller, this has therefore stopped working which is why the system has started undercutting. The technical guys team are currently trying to find a work around.'*¹⁹²

- b. Similarly, on 29 September 2012 at 17:03 [Senior Employee 1] (Trod) emailed [Employee 1] (GBE), stating:

*'by the looks of it you werent [sic] ignoring us in the first place, so I dont [sic] think you have just changed it to compete. Prices are collapsing now. I can [sic] see how the new justin posters were EVER the same price, every time I have checked them since they were listed you have been undercutting us, so find it very hard to believe that every time you look at the [sic] we are matching price :('*¹⁹³

[Employee 1] (GBE) responded on 1 October 2012 at 09:39, as follows:

¹⁹⁰ (CMA Document Reference URN 0030).

¹⁹¹ (CMA Document Reference URN 0030).

¹⁹² (CMA Document Reference URN 0030). See also, eg email chain dated 22 June 2011 to 23 June 2011 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference URN 0056); email chain dated 29 July 2011 to 26 September 2011 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference N0034); email dated 19 March 2015 at 11:22 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0229 and N0127).

¹⁹³ Email chain dated 29 September 2012 to 1 October 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference N0077). The preceding emails in the chain, also dated 29 September 2012 (at 01:28 and 08:28), are quoted at paragraph 3.99 below. The CMA considers from the context of this email that the reference to 'can' is a reference to 'can't'.

*'[Senior Employee 1 (Trod)], I think you know this not to be true. We have both had software problems in the last month or so and I have done my damndest to get things sorted. How would it be in my interest to try and upset the balance when I know you're [sic] reaction is to turn off your software, undercut us and lose us sales? I just sent you a screenshot as proof, why won't you do the same as requested? Without this I don't know when and by how much you are claiming we are undercutting, I need this information to pass on to our software company in order to try and resolve the situation. I will call you at around 11am to discuss.'*¹⁹⁴

- c. Following a number of emails between [Senior Employee 1] (Trod) and [Employee 1] (GBE), [Employee 1] (GBE) responded on 5 October 2012 at 16:01, stating:

'Sorry this is completely doing my head in! Lots of back and forth with the software people.

*In the meantime I have not [sic] set the software to match the lowest regardless of who the seller is (0% undercut), this means that we will lose out quite a bit on others but should be a failsafe that we don't undercut you, you should therefore be fine for the weekend. This will have to do until we solve the problem once and for all.'*¹⁹⁵

¹⁹⁴ (CMA Document Reference N0077).

¹⁹⁵ (CMA Document Reference URN 0041). The CMA considers that the 'not' in this email is intended to read 'now'. For further correspondence between the Parties corresponding with each other when the software which was used to implement the arrangement did not seem to be working properly and seeking to resolve the issues, see also, for example, the email chain dated 25 July 2011 to 28 July 2011 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference URN 0026 and N0176); the email chain dated 29 July 2011 to 26 September 2011 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference N0034 and N0178); the email chain dated 10 February 2012 to 13 February 2012 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference URN 0028); the email dated 9 August 2012 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0096); the email chain dated 10 August 2012 to 14 August 2012 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0099); the email chain dated 29 August 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference N0047); the email dated 5 September 2012 at 16:14 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0031); the email chain dated 6 September 2012 to 7 September 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference N0055); the email chain dated 24 September 2012 to 26 September 2012 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference URN 0037); the email chain dated 26 September 2012 to 27 September 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference URN 0038); the email chain dated 29 September 2012 to 8 October 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference N0082); the email chain dated 16 September 2012 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference URN 0044); the email chain dated 19 March 2015 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference N0127 and N0229); and the email dated 1 July 2015 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference URN 0045 and N0254).

- 3.99. [Employee 1's] (GBE) evidence is that [Senior Employee 1] (Trod) sometimes took GBE off Trod's *'ignore'* list when GBE's software was not working properly.¹⁹⁶ This is corroborated by email exchanges between [Employee 1] (GBE) and [Senior Employee 1] (Trod). For example, in an email dated 29 September 2012 at 01:28 (cited at paragraph 3.83 above), [Senior Employee 1] (Trod) wrote to [Employee 1] (GBE), stating:

*'nearly all posters you are undercutting, so presume your software is broken, so **had to remove you from ignore list**. Let me know when repaired.'*¹⁹⁷ (emphasis added)

[Employee 1] (GBE) responded at 08:28 on the same day, as follows:

*'[Senior Employee 1 (Trod)], [I] need screenshots!!! Please send, without these I am not seeing anything. **You just switching ignore each time is not doing either of us any good ...**'*¹⁹⁸ (emphasis added)

- 3.100. Evidence shows that the Parties communicated to implement the arrangement not to undercut each other's prices where the use of the software did not achieve that result. For example, in an email to [Employee 1] (GBE) dated 22 June 2011 at 14:24 [Senior Employee 1] (Trod) stated:

*'Your mini posters are well below market value, our max price is £5.09 including shipping on them'*¹⁹⁹

[Employee 1] (GBE) responded to [Senior Employee 1] (Trod) on 23 June 2011 at 11:50, stating:

*'Are you aware that our RRP for mini posters is £1.99? The most we sell them for currently is on our website which works out at £4.24. I am happy to put up the ceiling anyway.'*²⁰⁰

- 3.101. [Employee 1's] (GBE) evidence in relation to the above email chain is that [Senior Employee 1] (Trod) was asking GBE to raise its maximum price

¹⁹⁶ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], page 41 (CMA Document Reference URN 0530).

¹⁹⁷ Email dated 29 September 2012 at 01:28 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference URN 0041).

¹⁹⁸ Email dated 29 September 2012 at 08:28 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0041).

¹⁹⁹ Email dated 22 June 2011 at 14:24 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference N0028 and URN 0025)

²⁰⁰ (CMA Document Reference N0028 and URN 0025). See also email chain dated 5 June to 6 June 2011 between [Senior Employee 1] (Trod) and [Employee 1] (GBE) (CMA Document Reference N0023).

because Trod's maximum price was higher.²⁰¹ [Employee 1] (GBE) explained that where only Trod and GBE were selling a product on a given 'listing' (on Amazon UK²⁰²) and GBE's maximum price was lower than Trod's maximum price, the operation of Trod's *'ignore'* rule would mean that Trod's price could be higher than GBE's. [Senior Employee 1] (Trod) therefore needed to know GBE's maximum price for some products as that *'would give him the upper threshold'*²⁰³ or the 'ceiling' price. GBE did not have an equivalent problem, as its software was set to 'match' (ie not *'ignore'*) Trod's price. So, where Trod's maximum price was lower than GBE's, GBE's software was configured to match Trod's price.²⁰⁴

- 3.102. [Employee 1] evidence is that GBE ([Employee 1]) and Trod ([Senior Employee 1]) also communicated over the telephone, possibly in relation to the implementation of the arrangement.²⁰⁵ Contemporaneous email correspondence between [Employee 1] (GBE) and [Senior Employee 1] (Trod) shows that [Employee 1] (GBE) and [Senior Employee 1] (Trod) communicated over the telephone,²⁰⁶ including in relation to the arrangement,²⁰⁷ however, the CMA has not obtained evidence of the content of the specific telephone conversations between [Senior Employee 1] (Trod) and [Employee 1] (GBE).

²⁰¹ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 98-99 (CMA Document Reference URN 0530).

²⁰² The CMA infers from the operation of the software (as described at paragraphs 3.85, 3.92, 5.21) and the reference by [Employee 1] (GBE) to *'there were only two of us on a given listing'* (emphasis added) that [Employee 1] (GBE) is referring to the Parties' sales of a particular product on Amazon UK (rather than the Parties' sales of the product more generally). Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 45-46 (CMA Document Reference URN 0530).

²⁰³ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 45-46 (CMA Document Reference URN 0530).

²⁰⁴ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 45-46 (CMA Document Reference URN 0530).

²⁰⁵ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 105-109 (CMA Document Reference URN 0530).

²⁰⁶ Email chain dated 26 February 2013 to 25 March 2013 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference N0091); email chain dated 28 August 2013 to 29 August 2013 between [Employee 1] (GBE) and [Senior Employee 1] (Trod) (CMA Document Reference N0109).

²⁰⁷ The CMA infers this from a number of email chains between [Senior Employee 1] (Trod) and [Employee 1] (GBE) in which they refer both to the arrangement and/or the implementation of the arrangement, and attempted, arranged or completed telephone conversations or left voicemail messages. For example, the email dated 7 August 2012 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) in which [Employee 1] (GBE) wrote to [Senior Employee 1] (Trod) *'Further to our chat earlier here are some examples [list of ASINS]...'* (CMA Document Reference N0041). See also the email dated 24 March 2011 at 15:47 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0004 and N0163); the email dated 5 September 2012 at 16:14 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0031); the email dated 7 September 2012 at 19:07 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference URN 0032); the email dated 1 October 2012 at 09:39 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0077); the email dated 6 September 2013 at 09:44 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0120); email chain dated 13 April 2015 to 16 April 2015 between [Employee 1] (GBE) and [Senior Employee 1], [Employee 3] (both of Trod) (CMA Document Reference N0131 and N0230) (see paragraph 3.91 above).

4. THE RELEVANT MARKET

A. Introduction

- 4.1. 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 and/or concerted practice under investigation has as its object or effect the appreciable prevention, restriction or distortion of competition.²⁰⁸
- 4.2. In the present case, the CMA considers that it is not necessary to reach a definitive view on market definition in order to determine whether there is an agreement and/or concerted practice which had as its object the appreciable prevention, restriction or distortion of competition.
- 4.3. Nonetheless, the CMA has formed a view of the relevant market in order to calculate the Parties' 'relevant turnover' in the market affected by the Infringement, for the purposes of establishing the level of any financial penalties that the CMA may decide to impose.²⁰⁹
- 4.4. For these purposes, it is not necessary to carry out a formal analysis; the relevant market may properly be assessed on a broad view of the particular trade affected by the infringement in question.²¹⁰

B. Framework for assessing the relevant market

The relevant product market

- 4.5. As set out in more detail below (see paragraphs 5.17 to 5.28), the CMA considers that the Infringement related to licensed sport and entertainment posters (also referred to as 'posters' in this Decision) and frames (including poster frames) sold by both Parties on Amazon UK. The focal products for the market definition exercise are therefore (i) licensed sport and entertainment posters (or 'posters'), and (ii) frames, sold by both Parties on Amazon UK. Starting with these focal products, the CMA has considered

²⁰⁸ Judgment in *Volkswagen AG v Commission*, T-62/98, EU:T:2000:180, paragraph 230 and judgment in *SPO and Others v Commission*, T-29/92, EU:T:1995:34, paragraph 74. This principle has also more recently been applied by the CAT in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, in which the CAT stated at [176] that '*[i]n Chapter I cases ... determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement*'.

²⁰⁹ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraphs 2.1 and 2.3 to 2.11.

²¹⁰ *Argos and Littlewoods v OFT and JJB Sports v OFT* [2006] ECWA Civ 1318, paragraphs 169 to 173 and 189 and the CAT judgment on penalty, *Argos and Littlewoods v OFT* [2005] CAT 13, at [178].

whether there are reasons to define the relevant markets more broadly for the purpose of calculating any financial penalty.²¹¹

4.6. For the reasons set out below, the CMA has found two separate relevant product markets for the purpose of calculating any financial penalty, which are the sales on Amazon UK of:

- a. licensed sport and entertainment posters; and
- b. frames (including poster frames).

Separate product markets for posters and frames

4.7. The CMA considers that frames are unlikely to be a demand or a supply side substitute for posters because they are functionally different products and are not manufactured using the same processes. Therefore, on a cautious basis, the CMA has defined separate product markets for posters and frames. Further, the fact that posters and frames are categorised separately by online retailers (see below) provides some indication that sellers do not consider that consumers view the two products as substitutes, which supports the CMA's view that posters and frames are not part of the same product market:

- a. In a response to a question on competing products, GBE categorised posters and frames separately, using categories, including, 'wall art', which includes posters, and 'framing', which includes poster frames.²¹²
- b. A number of online sources single out posters as a separate product category. For example, Amazon UK lists 'posters' as a separate product category in the 'home & kitchen' section of 'artwork'.²¹³ GBE²¹⁴ lists 'posters' as a separate category from 'frames' on its website. Although Trod includes posters and frames under the same category of 'posters' on its website, posters and frames are split into two sub-categories.²¹⁵

²¹¹ The CMA has not considered defining the relevant markets more narrowly as that would not affect the relevant turnover for the purposes of calculating any financial penalty.

²¹² GBE's response dated 15 April 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0346).

²¹³ CMA's research of publicly available information on Amazon UK.

²¹⁴ CMA's research of publicly available information on <http://www.gbposters.com/>.

²¹⁵ CMA's research of publicly available information on <http://www.buyforlessonline.co.uk/>.

Posters and frames sold by both Parties

- 4.8. The CMA has considered whether the focal products of (i) posters, and (ii) frames sold by both Parties on Amazon UK are part of (i) a wider product market for posters, and/or (ii) a wider product market for frames, respectively (ie are not limited to the product markets of (i) posters, and (ii) frames sold by both Parties on Amazon UK).
- 4.9. The CMA considers that posters sold by both Parties on Amazon UK are functionally similar products to other posters sold by the Parties and other retailers on Amazon UK such that they form part of the same product market of posters sold on Amazon UK. In particular, the CMA notes that both GBE and Trod have submitted that all posters (and indeed other products) are substitutes from a demand side perspective.²¹⁶ The CMA has found no evidence to contradict this and therefore, for present purposes, has defined a market that includes all posters. In addition, much of the limited evidence that the CMA has been able to obtain in this investigation tends to support this finding:
- a. On the demand side, GBE's evidence indicates that there are two types of consumer: those for whom a poster will be substitutable with many other posters (or indeed other products); and those who have a specialist interest in, for example, a particular band, and will consider a mug or t-shirt featuring that band to be a better substitute for a poster of that band than a poster of another band. GBE submits that it does not know which type of consumer it is dealing with at any one time.²¹⁷ Therefore, the CMA considers there is limited scope for GBE to price discriminate against consumers who are looking to buy a poster with a particular design/content. If enough consumers were of the type that will substitute one poster for another, all posters would be in the same product market. The evidence on this is inconclusive.
 - b. On the supply side, however, the manufacture and retail of one type of poster is likely to be very similar to the manufacture and retail of another, such that if prices were to rise, it would be possible for a retailer to switch from supplying one type of poster to another at short notice and without incurring substantial sunk costs. To the extent that posters may be differentiated by the content, licenses for production of

²¹⁶ GBE's response dated 15 April 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0346); Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0348).

²¹⁷ GBE's response dated 15 April 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0346).

posters typically feature territorial restrictions and are non-exclusive, with the licensor appointing more than one licensee in a given territory to obtain as many routes to market and distribution channels as possible.²¹⁸ Thus, posters that are very similar to those that are sold by both Parties in common are likely to be available from a number of sources.

- c. The description of the production process provided by GBE and set out at paragraphs 3.6 and 3.7, in particular the fact that there is a large number of potential licensors and that licensees can hold a large number of licenses (for example, GBE has around 200 licences (see paragraph 3.23 above)) from which the CMA has inferred that there is likely to be a fairly high degree of supply-side substitutability among different types of posters.

4.10. Likewise, the CMA considers that frames sold by both Parties on Amazon UK are similar products to other frames sold by the Parties and other retailers on Amazon UK such that they form part of the same product market for all frames sold on Amazon. In particular, there is unlikely to be any demand side substitution across different sizes of frames and there may be limited demand side substitution across different types of frame. However, on the supply side, there is likely to be a high degree of supply side substitutability as there does not appear to be anything to prevent a supplier of one size or type of frame from supplying another at short notice and without incurring substantial sunk costs.

4.11. Therefore, for the purposes of calculating any fine in this case, the CMA has defined the relevant product markets which are the sales on Amazon UK of (i) posters, and (ii) frames.

Types of posters

4.12. For present purposes (and given that the Parties sell only licensed sport and entertainment posters), and taking a cautious approach, the CMA has not needed to consider whether posters are part of a wider product market which includes non-licensed sport and entertainment posters. The CMA has therefore defined the product market of 'posters' narrowly to include only licensed sport and entertainment posters, and not other types of posters.

²¹⁸ GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052).

Other discretionary consumer products

- 4.13. The CMA has considered whether other low value discretionary consumer products (including other licensed sport and entertainment merchandise) form part of the product market for posters or the product market for frames. In that context, GBE has submitted that the products it retails compete across a range of broad categories including: Wall Art, Gifting, Entertainment Merchandise and Framing.²¹⁹ GBE noted that for some customers one poster will be substitutable with many other posters or other products; for others who have a specialist interest in, for example, a particular band, they will consider a mug or t-shirt featuring that band to be a better substitute for a poster of that band than a poster of another band.²²⁰ Trod similarly explained that consumers may purchase from among a vast range of inexpensive discretionary products and that posters can be substituted with different art works, wall hangings or different posters.²²¹
- 4.14. There are, however, several reasons to consider that the relevant product markets should not be defined as extending beyond (i) posters, and (ii) frames. In particular, the CMA notes that:
- a. As explained above, a number of online sources single out posters as a separate product category.
 - b. The description of the production process provided by GBE and set out at paragraphs 3.6 and 3.7 above implies that there is a fairly high degree of supply-side substitutability among different types of posters that does not generally extend to other types of toys or gifts.
- 4.15. Furthermore, the CMA notes that posters and frames accounted for the overwhelming majority of the products affected by the Infringement.²²²

²¹⁹ GBE's response dated 15 April 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0346).

²²⁰ GBE's response dated 15 April 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0346).

²²¹ Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0349).

²²² In particular, the CMA notes that posters are GBE's core product line, accounting for approximately more than [3<] per cent of GBE's overall turnover (although, as explained at paragraph 3.21, this has been declining). (See GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052); transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, page 11 (CMA Document Reference URN 0374)).

Posters and frames account for most of the products sold by Trod sourced from GBE. Thus, in the year ending March 2015, Trod sold between [£100,000 and £500,000] of posters and frames sourced from GBE and between [£0 and £100,000] of other licensed sport and entertainment merchandise sourced from GBE. (See the information provided by Trod to the CMA at Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0348).)

Therefore, taking a conservative approach, the CMA considers that there is no need to include the turnover of Trod from the sales of other low value discretionary consumer products in the relevant turnover for the purposes of calculating any financial penalty.

Bricks and mortar retailers

- 4.16. The CMA recognises that online retailers of posters and frames may face competition from bricks-and-mortar outlets. However, as Trod is active only in online sales there is no need for the CMA to consider this issue further.

Online retail platforms

- 4.17. For the reasons set out below, for the purposes of calculating any fine in this case, the CMA considers that the relevant product markets are the sales on Amazon UK (and not on online retail platforms more broadly) of (i) posters and (ii) frames.
- 4.18. The CMA has considered whether sales of posters and frames on other online retail platforms are part of the same product markets for sales of (i) posters and (ii) frames on Amazon UK.
- 4.19. In this context the CMA notes that both Parties consider that retailers selling the relevant products on Amazon UK compete with retailers selling through online retail platforms other than Amazon UK. According to GBE, *'most retailers selling equivalent products within GBE's main categories [including posters] also compete against sellers selling on other online platforms. These include eBay, Rakuten, Game, Fruugo, Tesco Marketplace, Etsy and Notonthehighstreet, as well as the retailers' own websites.'*²²³ Trod notes that *'most consumers will arrive at [A]mazon using a search engine which will provide them with a number of purchasing options.'*²²⁴ The CMA also notes that in the financial years ending December 2011 to December 2015,

Similarly, both GBE and Trod source posters from a third party, [Supplier], which is the other significant UK-based producer of licensed sport and entertainment posters. (See witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 52-53 (CMA Document Reference URN 0530); transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, pages 12-13, 52, 54 (CMA Document Reference URN 0374). Posters and frames also account for most of the products sold by Trod sourced from [Supplier]. Thus, in the financial year ending March 2015, Trod sold between £250,000 and £500,000 worth of posters and frames sourced from [Supplier], and between £20,000 and £25,000 of other licensed sport and entertainment merchandise sourced from [Supplier]. (See Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0348) and Trod's (KPMG) response dated 29 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0369)).

²²³ GBE's response dated 15 April 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0346).

²²⁴ Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0349).

between more than [50-75] per cent²²⁵ and more than [50-75] per cent²²⁶ of GBE's online retail sales (by value) of posters and frames were made from Amazon UK (rather than other online retail platforms).²²⁷ Therefore, a significant proportion of GBE's online retail sales during this period came from online retail platforms (including GBE's own website) other than Amazon UK.

- 4.20. However, for the purposes of calculating any fine in this case, taking a conservative approach and given the limited platform scope of the Infringement (which concerns only sales on Amazon UK), the CMA considers that the relevant markets are the sales on Amazon UK of (i) posters and (ii) frames.

The relevant geographic market

- 4.21. Given that the relevant product markets concern sales on Amazon UK and do not extend to any other online retail platforms, it is not necessary to consider further whether online retailers on Amazon UK face competition from non-UK online retailers for sales to consumers in the UK.
- 4.22. In light of this, and taking into account the limited platform scope of the Infringement (which concerns only sales on Amazon UK), the CMA has defined the geographic market narrowly to include only sales to consumers in the UK.

C. Conclusions on the relevant market

- 4.23. For the reasons set out above, the CMA has found that the relevant markets in this case are sales on Amazon UK to consumers in the UK of:
- a. licensed sport and entertainment posters; and
 - b. frames (including poster frames).

²²⁵ In the financial year ending December 2011.

²²⁶ In the financial year ending December 2014.

²²⁷ GBE's response dated 29 April 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0419).

5. LEGAL ASSESSMENT

A. Introduction

- 5.1. This section sets out the CMA's legal assessment of the arrangement between the Parties (as summarised at paragraphs 3.45 to 3.102 above).
- 5.2. The CMA's findings are made by reference to the Chapter I prohibition: section 2 of the Act prohibits, among other matters, agreements or concerted practices between undertakings which may affect trade within the UK and have as their object the prevention, restriction or distortion of competition within the United Kingdom, unless an applicable exclusion is satisfied or the agreements or concerted practices in question are exempt in accordance with the provisions of Part 1 of the Act. References to the UK are to the whole or part of the UK.²²⁸
- 5.3. For the reasons set out below, the CMA has found that, during the Relevant Period, GBE and Trod infringed the Chapter I prohibition by participating in an agreement and/or concerted practice that where there was no cheaper third party seller on Amazon UK, they would not undercut each other on prices for licensed sport and entertainment posters and frames (including poster frames) sold by both Parties on Amazon UK.

B. Undertakings

Key legal principles

- 5.4. For the purposes of the Chapter I prohibition, the term 'undertaking' covers every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.²²⁹
- 5.5. 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 ...*'.²³⁰
- 5.6. The term 'undertaking' also designates an economic unit, even if in law that unit consists of several natural or legal persons.²³¹

²²⁸ Section 2(1) and (7) of the Act.

²²⁹ Case C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH, EU:C:1991:161, paragraph 21.

²³⁰ Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

²³¹ Case C-97/08 P *Akzo Nobel NV v Commission* EU:C:2009:536, paragraph 55.

The CMA's findings

- 5.7. For the reasons set out below, the CMA has found that each of Trod and GBE is an entity engaged in economic activity:
- a. Throughout the Relevant Period, GBE was and continues to be engaged in the production and sale of licensed sport and entertainment merchandise and related products, including posters and frames.
 - b. Throughout the Relevant Period, Trod was engaged in the sale of toys and other consumer products, including posters and frames.
- 5.8. In light of the above, the CMA has concluded that each of GBE and Trod constitutes an undertaking for the purposes of the Chapter I prohibition.

C. Agreements and/or concerted practices between undertakings

Key legal principles

Agreements

- 5.9. The Chapter I prohibition is intended to catch a wide range of agreements, including oral agreements and 'gentlemen's agreements'.²³² An agreement may be express or implied by the parties, and there is no requirement for it to be formal or legally binding, to be made in writing, or for it to contain any enforcement mechanisms.²³³ An agreement may also consist of either an isolated act, or a series of acts, or a course of conduct.²³⁴
- 5.10. 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*'.²³⁵
- 5.11. The GC 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 (...)*'.²³⁶

²³² Case C-41/69 *ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular, paragraphs 106–114.

²³³ See, for example, the following Commission decisions: *Soda-ash - Solvay*, CFK OJ [1991] L 152/16, at paragraph 11; *Greek Ferries* OJ [1999] L109/24, at paragraph 141; and *Raw Tobacco Spain*, 20 October 2004, at paragraph 265. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 at [658].

²³⁴ Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 81.

²³⁵ Cases T-44/02 etc, *Dresdner Bank v Commission*, EU:T:2006:271, paragraph 55, citing 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).

²³⁶ Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

- 5.12. However, it is not necessary to establish a joint intention to pursue an anti-competitive aim.²³⁷ 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.²³⁸

Concerted practices

- 5.13. The concepts of ‘agreements’ and ‘concerted practices’ are intended to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves’.²³⁹
- 5.14. The Court of Appeal has noted that ‘*concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for [the] purpose*’ of determining whether there is consensus between the undertakings said to be party to a concerted practice.²⁴⁰
- 5.15. For present purposes, the following key points arise from the case law on the concept of a concerted practice:
- a. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market, including the choice of the persons and undertakings to which it makes offers or sells.²⁴¹
 - b. A concerted practice is ‘*a form of 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*’.²⁴² The Court of

²³⁷ 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).

²³⁸ *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.8. See also eg 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 CJ 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.

²³⁹ Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 23; see also Case C-49/92P *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 131 and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, [206(ii)].

²⁴⁰ *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, paragraph 22.

²⁴¹ Cases 40/73 etc *Suiker Unie v Commission*, EU:C:1975:174, paragraph 173. The Court of Justice added that the concept of a concerted practice does not require the working out of an actual plan. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(iv)].

²⁴² 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 and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [151] to [153].

Justice has added that '[b]y its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants'.²⁴³

- c. The coordination (which is prohibited by the requirement of independence) comprises any direct or indirect contact between undertakings which has the object or effect of influencing the conduct on the market of an actual or potential competitor²⁴⁴ thereby creating conditions of competition which do not correspond to the normal conditions of the market in question.²⁴⁵
- d. It follows that '*a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two*'.²⁴⁶ However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.²⁴⁷

5.16. The Court of Justice has held that '*whilst the concepts of an agreement and of a concerted practice have partially different elements, they are not mutually incompatible*' – it is not therefore necessary, in order to find an infringement, to characterise conduct as exclusively an agreement or as a concerted practice.²⁴⁸

²⁴³ Cases 48/69 etc *ICI Ltd v Commission*, EU:C:1972:70, paragraph 65. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [151].

²⁴⁴ Cases 40/73 etc *Suiker Unie v Commission*, EU:C:1975:174, at paragraph 174. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, at paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(v)]. The case law provides that a concerted practice also arises in the situation in which the object or effect of the direct or indirect contact is to disclose to a competitor the course of conduct which the disclosing party has decided to adopt or contemplates adopting on the market.

²⁴⁵ Case 172/80, *Gerhard Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paragraph 14; Case C-49/92P *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 117; and Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, at paragraph 33.

²⁴⁶ Case C-49/92P *Commission v Anic Partecipazioni* EU:C:1999:356, paragraph 118. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(ix)].

²⁴⁷ Case C-49/92P *Commission v Anic Partecipazioni* EU:C:1999:356, paragraph 124. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(xi)].

²⁴⁸ Case C-49/92P *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraphs 131 and 132; Case T-1/89 *Rhône-Poulenc v Commission*, EU:T:1991:56, paragraph 127.

The CMA's findings

Anti-competitive agreement and/or concerted practice between Trod and GBE

5.17. In view of the evidence of the arrangement between GBE and Trod set out at paragraphs 3.45 to 3.102 above, the CMA has concluded that, during the Relevant Period, there was:

- a. a concurrence of wills (and thereby an agreement) between the Parties, and/or
- b. a coordination of conduct between them in which they knowingly substituted practical cooperation between them for the risks of competition (that is, a concerted practice)

not to undercut each other in certain specified circumstances on prices for posters and frames sold by both Parties on Amazon UK. The CMA has concluded that, after a short period of trying to implement the arrangement manually, GBE implemented the arrangement by the use of repricing software which was configured to give effect to it. Trod also used automated repricing software to implement the arrangement, albeit different software from that used by GBE.

5.18. In reaching this conclusion, the CMA has in particular relied on the following:

- a. The evidence about the formation of the arrangement between the Parties set out at paragraphs 3.51 to 3.61 above, including, [Employee 1's] (GBE) evidence and the email correspondence from March 2011, in particular, the email chain dated 24 March 2011 between GBE ([Employee 1]) and Trod ([Senior Employee 1]) in which they communicated their aim and efforts not to undercut each other on prices (cited at paragraphs 3.53, 3.55 to 3.56 above), as well as internal GBE emails in which [Employee 1] (GBE) informed his colleagues at GBE of the arrangement reached between GBE ([Employee 1]) and Trod ([Senior Employee 1]) (cited at paragraphs 3.57 to 3.58 above).
- b. Subsequent correspondence between the Parties about the on-going implementation of the arrangement, in particular evidence that [Employee 1] (GBE) and [Senior Employee 1] (Trod) communicated:
 - i. to provide reassurance to each other regarding the Parties' ongoing compliance with the arrangement (see paragraph 3.97 above); and

- ii. to complain about apparent non-compliance with the arrangement, in particular, [Senior Employee 1's] (Trod) strongly worded complaint to [Employee 1] (GBE) on 10 April 2011 (see paragraphs 3.60 to 3.61 above) and when the software did not seem to be working properly (see paragraphs 3.98 to 3.101 above).
- c. Evidence of GBE's use of the repricing software provided by [GBE's software provider] to implement the arrangement between the Parties (cited at paragraphs 3.64 to 3.78 above), in particular:
 - i. an email from [Employee 1] (GBE) to colleagues at GBE dated 14 April 2011 in which [Employee 1] (GBE) explained the repricing software had been activated on Amazon UK and that GBE was the same price as Trod on 99 per cent of its listings (cited at paragraph 3.72 above); and
 - ii. [Employee 1's] (GBE) evidence that he obtained assistance from [GBE's software provider] in configuring the software to implement GBE's pricing strategy, and the arrangement with Trod, which is corroborated by contemporaneous correspondence between [Employee 1] (GBE) and [GBE's software provider] dated April 2011 (see paragraphs 3.73 to 3.76 above).
- d. Evidence of Trod's use of the repricing software to implement the arrangement between the Parties (cited at paragraphs 3.79 to 3.93 above), in particular:
 - i. [Employee 1's] (GBE) evidence that, as he understood it, Trod's software required [Senior Employee 1] (Trod) to put GBE on an '*ignore list*', so that the usual rules Trod had programmed for undercutting competitors did not apply to GBE (see paragraph 3.81 above);
 - ii. contemporaneous email correspondence between [Employee 1] (GBE) and [Senior Employee 1] (Trod) which shows that Trod was using a repricing software with an '*ignore*' function to implement the arrangement (see paragraphs 3.82 and 3.83 above; and
 - iii. evidence from Trod's software providers ([Trod's software provider 1] and [Trod's software provider 2]), as well as contemporaneous email correspondence between Trod and

[Trod's software provider 1], which shows that the 'ignore' function and 'ignore list' referred to in the correspondence between [Employee 1] (GBE) and [Senior Employee 1] (Trod) occurred within software provided to Trod by [Trod's software provider 1]. Having considered evidence from both [Trod's software provider 1] (see paragraphs 3.84 to 3.89 above) and [Trod's software provider 2] (see paragraphs 3.92 to 3.93 above), in addition to the contemporaneous email correspondence between Trod and [Trod's software provider 1] at paragraphs 3.90 to 3.91 above), the CMA has concluded that the implementation of the arrangement by Trod took place (solely or) primarily through Trod's use of the [Trod's software provider 1's Amazon Repriker].

Scope of the agreement and/or concerted practice

- Nature of the agreement and/or concerted practice

- 5.19. In view of the evidence of the arrangement between GBE and Trod set out at paragraphs 3.45 to 3.102 above, the CMA has concluded that the arrangement between the Parties not to undercut each other's prices only applied where there was no cheaper third party seller on Amazon UK. This is based on the evidence provided by [Employee 1] (GBE),²⁴⁹ which is corroborated by an email he sent to [Employee 9] (GBE) on 25 March 2011 at 10:27, stating 'Raise maxi posters ... below cheapest seller (except buy 4 less)',²⁵⁰ and an email [Employee 1] (GBE) sent on 30 August 2012 at 09:27 in which [Employee 1] (GBE) explained why the 'Ematch price' rule 'which kicks in if [Trod] are the lowest seller' had stopped working.²⁵¹ This limitation

²⁴⁹ [Employee 1 (GBE)] explained as follows: 'I mean we'd always have a minimum price that we'd be prepared to go to, which was just something that we discussed internally, that was never shared. So, you know, he would have his own minimum price of whatever they might be but, if for instance a third party undercut us below our minimum price obviously we wouldn't get it down any further than that, but [Senior Employee 1 (Trod)] and Trod may continue to compete with that customer, and indeed undercut them. So in that situation, you know, we'd-we'd still have very different prices. You know, so **the extent of this agreement was only where one or the other was the lowest seller within the range of our pricing parameters.**' (emphasis added) Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], page 31 (CMA Document Reference URN 0530), see also pages 30-31: 'So, so in the event that the Trod would be the lowest price seller on a- on a listing, I wouldn't undercut him. And in the event that I was the lowest priced seller on a given listing, he wouldn't undercut me. So- so... so the outcome of that would be that we'd be the same price. So you know... '.

²⁵⁰ Email dated 25 March 2011 at 10:27 from [Employee 1] to [Employee 9] (all of GBE) (CMA Document Reference URN 0055).

²⁵¹ Email dated 30 August 2012 at 09:27 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference URN 0030).

on the arrangement meant that, in some instances, the Parties did in fact compete on price on products they both sold on Amazon UK.²⁵²

- 5.20. Independently of the arrangement, both GBE and Trod unilaterally set minimum prices for their respective products. [Employee 1's] (GBE) evidence is that GBE and Trod both had independently set minimum prices.²⁵³ [Employee 1's]²⁵⁴ (GBE) and GBE's²⁵⁵ evidence is that GBE would never go below its minimum price set for each product (even if Trod was pricing below that price). The CMA infers from [Employee 1's] (GBE) evidence about Trod's minimum prices that Trod also set minimum prices for its posters and frames and did not price below these.²⁵⁶

- *Online retail platforms in respect of which the agreement and/or concerted practice applied*

- 5.21. Based on the evidence of [Employee 1] (GBE), GBE and [Trod's software provider 1], the CMA has concluded that the arrangement between the Parties applied to posters and frames (see paragraphs 5.22 to 5.25 below) sold by both Parties on Amazon UK (and not other online retail platforms or the Parties' own websites). In particular:

- a. [Employee 1's] (GBE) evidence is that Trod's complaints about GBE's pricing were primarily about prices on Amazon Marketplace²⁵⁷ and that the arrangement applied to the products both Parties sold on Amazon UK.²⁵⁸ This evidence is corroborated by the email to colleagues at GBE

²⁵² Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 31-32, 46-47, 61, 68-69 (CMA Document Reference URN 0530).

²⁵³ GBE's pre-determined minimum price was explained by [Employee 1]. Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 31-34, 44-47, 61-63 (CMA Document Reference URN 0530).

²⁵⁴ GBE's pre-determined minimum price was explained by [Employee 1]. Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 31-34, 44-47, 62-63 (CMA Document Reference URN 0530).

²⁵⁵ GBE proffer, dated 30 July 2015, pages 11 and 24 (CMA Document Reference URN 0052).

²⁵⁶ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 31, 44-47, 77 (CMA Document Reference URN 0530), for example, 'So, you know, so in those circumstances, **where you've got a third party that goes below our minimum price, Buy4Less will carry on competing with them and that could also happen the other way round as well**' (emphasis added) and 'I mean **GB Posters would always have a minimum price that we'd be prepared to go to, which was just something that we discussed internally, that was never shared. So, you know, [Senior Employee 1] [(Trod)] would have his own minimum price of whatever they might be but, if for instance a third party undercut us below our minimum price obviously we wouldn't get it down any further than that, but [Senior Employee 1] (Trod)] and Trod may continue to compete with that customer, and indeed undercut them. So in that situation, you know, we'd- we'd still have very different prices. You know, so the extent of this agreement was only where one or the other was the lowest seller within the range of our pricing parameters.**' (emphasis added)

²⁵⁷ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 17-18 (CMA Document Reference URN 0530).

²⁵⁸ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 21-25, 50-52, 204-205 (CMA Document Reference URN 0530).

cited at paragraph 3.57 above, where [Employee 1] (GBE) summarises the arrangement reached with Trod, '*Trod (Buy 4 Less) have agreed not to undercut us [GBE] on Amazon and I [[Employee 1 (GBE)]] have agreed to reciprocate*'.²⁵⁹

- b. According to GBE,²⁶⁰ the [GBE's software provider] software that was used by GBE to implement the arrangement cannot be used on eBay. Although it can be used on other online platforms, the information made available on another online retail platform is not as detailed as that available on Amazon Marketplace and it is therefore not possible to apply the same rules on that platform. This is corroborated by the evidence of [Employee 1] (GBE),²⁶¹ who told the CMA that, while the [GBE's software provider] software GBE used to implement the arrangement with Trod on Amazon UK was also used by GBE to set its prices on another online retail platform, it could not be set so that GBE's prices automatically matched Trod's prices on that online retail platform because that platform does not make the necessary information available for the price-matching setting to work.²⁶²
 - c. Evidence from [Trod's software provider 1] (the provider of software solely or primarily used by Trod to implement the arrangement) is that its repricing software was only compatible with Amazon Marketplace.²⁶³
- *Products in respect of which the agreement and/or concerted practice applied*

5.22. The CMA has concluded that the arrangement applied to all posters and frames sold by both Parties on Amazon UK, including products purchased by Trod from GBE and products supplied to both GBE and Trod by third parties. Given the operation of 'listings' or ASINs on Amazon UK, the arrangement was only implemented in respect of products sold by both Parties on Amazon UK where both Parties were listed on the same 'listing' or ASIN on Amazon UK for a particular product. As set out below, this is based on the

²⁵⁹ Email dated 25 March 2011 at 12:24 from [Employee 1] to [Senior Employee 1], [Senior Employee 2], [Employee 2] (all of GBE) (CMA Document Reference URN 0015).

²⁶⁰ GBE proffer, dated 30 July 2015, page 25 (CMA Document Reference URN 0052).

²⁶¹ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 49-50 (CMA Document Reference URN 0530).

²⁶² Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X], pages 50-52 (CMA Document Reference URN 0530).

²⁶³ See paragraph 3.85 above and [Trod's software provider 1's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0528). See also paragraph 3.92 above in relation to the repricing software provided by [Trod's software provider 2], which can also only be used on Amazon Marketplace.

evidence of [Employee 1] (GBE), as well as the evidence provided by [Trod's software provider 1] about the operation of its repricing software.

5.23. [Employee 1's] (GBE) evidence is that the arrangement between GBE and Trod not to undercut each other's prices applied to licensed sport and entertainment merchandise and related products that both Parties sold on Amazon UK.²⁶⁴ This included products which GBE supplied to Trod, as well as products which either Party sourced from third parties, including, posters, frames and stickers.²⁶⁵ [Employee 1's] (GBE) evidence is that the same product may be available for sale on Amazon UK under a number of different listings or ASINs (as defined at paragraph 3.16 above)²⁶⁶ and the arrangement was only implemented where both Parties were listed on the same 'listing' or ASIN on Amazon UK for a particular product.²⁶⁷

5.24. Further, the [Trod's software provider 1's Amazon repricer] user manual demonstrates that the operation of [Trod's software provider 1's Amazon repricer] was dependent on the ASIN of a particular product:

*'Once a relevant Amazon account is added into the application (see section 1.10) it is then possible to apply a series of "Compete" rules to the account that will allow the automatic adjustment of pricing between a set MIN and MAX price against other competitor merchants selling a specific ASIN.'*²⁶⁸ (emphasis added)

5.25. The CMA has concluded that the arrangement applied to posters and frames as: (i) posters and frames account for most of the products sold by Trod that are sourced from GBE, and most of the products sold by Trod that are sourced from [Supplier],²⁶⁹ and (ii) posters are GBE's core product.²⁷⁰ The arrangement did not extend to toys (which is Trod's main product line) as GBE does not sell toys.²⁷¹

²⁶⁴ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 23-24, 32, 51-52, 204-205 (CMA Document Reference URN 0530); GBE proffer, dated 30 July 2015, pages 7 and 13 (CMA Document Reference URN 0052).

²⁶⁵ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 23-24, 32, 51-52, 204-205, 82-85 (CMA Document Reference URN 0530).

²⁶⁶ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], page 25 (CMA Document Reference URN 0530).

²⁶⁷ Witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], page 85 (CMA Document Reference URN 0530).

²⁶⁸ [Trod's software provider 1] User Manual, section 1.10 (CMA Document Reference URN 0203); see also section 1.15.

²⁶⁹ See paragraphs 3.44 and 3.39 and footnote 222 above.

²⁷⁰ See paragraph 3.21 and 3.29, and footnote 222 above.

²⁷¹ GBE proffer, dated 30 July 2015, page 9 (CMA Document Reference URN 0052); witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 72, 105, 155-156 (CMA Document Reference URN 0530); transcript of the CMA interview with [Senior Employee 2] (GBE), dated 30 September 2015, page 52 (CMA Document Reference URN 0375).

Duration of the agreement and/or concerted practice

5.26. The CMA has concluded that the arrangement was put in place on 24 March 2011 (at the latest) and lasted until 1 July 2015 (at the earliest). The CMA's conclusion is based on the following evidence:

- a. The evidence about the formation of the arrangement set out at paragraphs 3.51 to 3.61 above, including, the email correspondence from March 2011, in particular, the email chain dated 24 March 2011 between GBE ([Employee 1]) and Trod ([Senior Employee 1]) in which they communicated their aim and efforts not to undercut each other on prices (cited at paragraphs 3.55 and 3.56 above).
- b. The latest email correspondence between [Employee 1] (GBE) and [Senior Employee 1] (Trod) the CMA has obtained that it considers relates to the arrangement is dated 1 July 2015. In an email of that date at 08:51, [Senior Employee 1] (Trod) sends a link to the ASIN of an Amazon UK to a black wooden poster frame with the subject '*check link please*'.²⁷² While this email does not specifically refer to the arrangement between the Parties, the CMA considers this to relate to its implementation because it is similar to earlier correspondence between [Employee 1] (GBE) and [Senior Employee 1] (Trod) that the CMA considers clearly relates to the implementation of the arrangement.²⁷³ In addition, [Employee 1's] (GBE) evidence and GBE's evidence in its corporate statement is that this email was the latest communication between the Parties in relation to the arrangement.^{274 275}
- c. GBE's evidence in its corporate statement is that the arrangement had been in place since at least March 2011 and was ongoing in July 2015.²⁷⁶

²⁷² Email dated 1 July 2015 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference URN 0045 and N0254).

²⁷³ See email dated 10 February 2012 at 14:04 from [Senior Employee 1] (Trod) to [Employee] ([Trod's software provider 1]) (CMA Document Reference N0191), in which [Employee 1] (GBE) emails a link to various ASINs on Amazon UK to [Senior Employee 1] (Trod), which are subsequently forwarded by [Senior Employee 1] (Trod) to [Trod's software provider 1] as examples of when the [Trod's software provider 1's Amazon repricer] is not ignoring GBE posters.

²⁷⁴ GBE proffer, dated 30 July 2015, page 19 (CMA Document Reference URN 0052); witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [X<], page 191.

²⁷⁵ Whilst it might be the case that the arrangement continued beyond 1 July 2015, the CMA has decided, on administrative priority grounds, not to investigate that matter further.

²⁷⁶ GBE proffer, dated 30 July 2015, page 11 (CMA Document Reference URN 0052).

- d. Evidence that Trod was using the [Trod's software provider 1's Amazon repricer] to 'ignore' GBE as at 10 February 2012,²⁷⁷ and that GBE was added again to Trod's 'ignore' list on 16 April 2015,²⁷⁸ which demonstrates that GBE was on Trod's 'ignore' list at that time.

Conclusion on agreement and/or concerted practice

- 5.27. In view of the foregoing, the CMA has concluded that the arrangement between the Parties constituted an agreement and/or concerted practice for the purposes of the Chapter I prohibition. In particular, the CMA has found that, during the Relevant Period, there was an agreement and/or concerted practice that where there was no cheaper third party seller on Amazon UK, the Parties would not undercut each other on prices for licensed sport and entertainment posters and frames (including poster frames) sold by both Parties on Amazon UK.
- 5.28. That agreement and/or concerted practice is referred to in the remainder of this Decision as the '**Infringing Agreement**'.

D. Object of preventing, restricting or distorting competition

- 5.29. For the reasons set out below, the CMA has found that the Infringing Agreement had as its object the prevention, restriction or distortion of competition.

Key legal principles

- 5.30. In this section and the remainder of this Decision, for ease of presentation, references to 'agreement' include 'concerted practice'.²⁷⁹
- 5.31. The Chapter I prohibition prohibits agreements between undertakings which have as their object the prevention, restriction or distortion of competition.
- 5.32. The term 'object' in the Chapter I prohibition refers to the sense of 'aim', 'purpose', or 'objective', of the coordination between undertakings in question.²⁸⁰

²⁷⁷ See email dated 10 February 2012 at 14:04 from [Senior Employee 1] (Trod) to [Employee] ([Trod's software provider 1]) (CMA Document Reference N0191), cited at paragraph 3.90 above.

²⁷⁸ Email chain dated 16 April 2015 between [Employee 1] (Trod) and [Employee] ([Trod's software provider 1]) (CMA Document References N0232).

²⁷⁹ See also to similar effect section 2(5) of the Act which provides that a provision of Part 1 of the Act which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice (but with necessary modifications).

²⁸⁰ See, for example, respectively: Case 56/64 *Consten & Grundig v Commission*, EU:C:1966:41, p. 343 ('...Since the agreement thus aims at isolating the French market... it is therefore such as to distort

- 5.33. Where an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement had, or would have, any anti-competitive effects in order to establish an infringement.²⁸¹
- 5.34. The Court of Justice of the European Union 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.²⁸² 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.²⁸³
- 5.35. 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:
- a. the content of its provisions;
 - b. its objectives; and
 - c. the economic and legal context of which it forms a part.²⁸⁴
- 5.36. 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.²⁸⁵
- 5.37. 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.²⁸⁶
- 5.38. 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.²⁸⁷

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.

²⁸¹ See, for example, C-8/08 *T-Mobile Netherlands BV v NMa*, EU:C:2009:343 (‘T-Mobile Netherlands’), paragraphs 28-30 and the case law cited therein, and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, at [269].

²⁸² C-67/13 P *Groupeement 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.

²⁸³ *Cartes Bancaires*, paragraphs 49 and 57. See also *Toshiba*, paragraph 26.

²⁸⁴ See *Cartes Bancaires*, paragraph 53 and *Toshiba*, paragraph 27.

²⁸⁵ *Cartes Bancaires*, paragraphs 53 and 78.

²⁸⁶ *Cartes Bancaires*, paragraph 54; affirmed in C-286/13 P *Dole v Commission*, EU:C:2015:184, paragraph 118.

²⁸⁷ *BIDS*, paragraph 21.

- 5.39. Price-fixing agreements are, by their very nature, restrictive of competition.²⁸⁸
- 5.40. Case law and decisional practice demonstrate that there are several ways in which prices can be fixed: for example, price competition has been found to have been restricted by agreements on minimum prices,²⁸⁹ maximum prices²⁹⁰ or on levels of discount.²⁹¹
- 5.41. An agreement not to undercut a competitor's price has been found to constitute a restriction of competition by object.²⁹²

The CMA's findings

- 5.42. This section sets out the CMA's assessment by reference to the content and objectives of the Infringing Agreement, and the economic and legal context of which it forms part.
- 5.43. The CMA considers that the Infringing Agreement described at paragraphs 5.17 to 5.25 above, had as its object the prevention, restriction or distortion of competition within the UK, by preventing the Parties from undercutting each other in certain specified circumstances on prices for licensed sport and entertainment posters and frames (including poster frames) sold by both Parties on Amazon UK.
- 5.44. Such an agreement, by removing or limiting the benefits to consumers of price competition between direct competitors on an important sales channel (Amazon UK), by its very nature restricted pricing competition between two competing online retailers.

Content and objectives of the Infringing Agreement

- 5.45. The content of the Infringing Agreement was that the Parties (in certain specified circumstances) would not to undercut each other's prices for posters and frames sold by both Parties on Amazon UK (see paragraphs

²⁸⁸ See, for example, Case 123/83, *BNIC v Clair* EU:C:1985:33, at paragraph 22.

²⁸⁹ See for example joined cases T-217/03 and T-245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others v Commission (French Beef)* EU:T:2006:391, at paragraph 85.

²⁹⁰ See, for example, *Raw Tobacco Spain*, decision of 20 October 2004, at paragraphs 299 to 302.

²⁹¹ See, for example, Case 246/86 *S C Belasco v Commission* EU:C:1989:301, at paragraph 12.

²⁹² *Agreements between manufacturers of glass containers*, OJ [1974] L160/1, at paragraphs 34 and 35. This case concerned a set of rules on 'fair trading' which a number of companies in various EEC (at that time) Member States agreed with each other to implement. Two of the rules concerned undercutting: rule A.1.(c) prohibiting systematic undercutting of a competitor and rule A.7, which permitted only the matching and not the undercutting of a competitor's prices, when such a competitor introduced new price measures. These rules along with a number of other rules, were found to have as their object the prevention of price competition between the parties.

5.17 to 5.25 above). In view of its content, the CMA therefore considers that a clear objective aim of the Infringing Agreement was to restrict pricing competition between two competing online retailers (GBE and Trod).

- 5.46. The evidence (set out in more detail at paragraphs 3.62 to 3.93 and 3.98 to 3.101 above) demonstrates that repricing software was used to enable the Parties not to undercut (in certain specified circumstances) each other's prices for posters and frames sold by both Parties on Amazon UK to give effect to the Infringing Agreement. This evidence supports the CMA's view that the objective aim of the Infringing Agreement was to restrict pricing competition between GBE and Trod. For example, on 29 September 2012 at 17:03 [Senior Employee 1] (Trod) emailed [Employee 1] (GBE), stating:

*'by the looks of it you werent [sic] ignoring us in the first place, so I dont [sic] think you have just changed it to compete. Prices are collapsing now. I can [sic] see how the new justin posters were EVER the same price, every time I have checked them since they were listed you have been undercutting us, so find it very hard to believe that every time you look at the [sic] we are matching price :('*²⁹³

[Employee 1] (GBE) responded on 1 October 2012 at 09:39, as follows:

*'[Senior Employee 1 (Trod)], I think you know this not to be true. We have both had software problems in the last month or so and I have done my damndest to get things sorted. **How would it be in my interest to try and upset the balance when I know you're [sic] reaction is to turn off your software, undercut us and lose us sales?** I just sent you a screenshot as proof, why won't you do the same as requested? Without this I don't know when and by how much you are claiming we are undercutting, I need this information to pass on to our software company in order to try and resolve the situation. I will call you at around 11am to discuss.'*²⁹⁴ (emphasis added)

- 5.47. Further, the CMA notes that repricing software used by the Parties to implement the Infringing Agreement is normally used by online sellers to compete with other online sellers by automatically adjusting the prices of their products in response to the live prices of competitors' products.²⁹⁵

²⁹³ Email chain dated 29 September 2012 at 17:03 from [Senior Employee 1] (Trod) to [Employee 1] (GBE) (CMA Document Reference N0077).

²⁹⁴ (CMA Document Reference URN N0077).

²⁹⁵ [Trod's software provider 1's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0528); [Trod's software provider 2's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0526); GBE

However, in the present case the repricing software was configured by the Parties to restrict price competition between them in order to give effect to the Infringing Agreement (see paragraphs 3.62 to 3.93 above).

- 5.48. As noted at paragraph 5.38 above, 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.²⁹⁶
- 5.49. The CMA notes the evidence (from GBE) that the Infringing Agreement was put in place (on GBE's side) to put an end to complaints by Trod about aggressive pricing by GBE, to pacify [Senior Employee 1] (Trod) and to maintain good relations with its customer Trod (see paragraphs 3.47 to 3.61 above). Maintaining good relationships with customers is a legitimate objective, however where such an objective is achieved by means of an anti-competitive arrangement, that arrangement can be regarded as having an anti-competitive object. In the present case, therefore, the CMA considers that GBE's aim of maintaining good relations with Trod does not preclude the CMA from finding (as it does in this Decision) that the Infringing Agreement had an anti-competitive object, since one of the aims of the Infringing Agreement was to restrict price competition between Trod and GBE in relation to sales on Amazon UK.
- 5.50. In view of the foregoing, the CMA has found that the Infringing Agreement was objectively aimed at preventing the Parties (in certain specified circumstances) from undercutting each other's prices for posters and frames sold by both Parties on Amazon UK and thus restricting price competition between Trod and GBE in relation to sales on Amazon UK. The CMA has therefore concluded that the Infringing Agreement was therefore inherently aimed at restricting price competition between the Parties for sales on Amazon UK.

Subjective intention

- 5.51. For the reasons set out below, the CMA considers that the CMA's finding that the objective aim of the Infringing Agreement was to restrict price competition between the Parties for sales on Amazon UK is further supported by the evidence of the Parties' subjective intentions.
- 5.52. In particular, the CMA notes the email dated 25 March 2011 from [Employee 1] (GBE) to his colleagues at GBE in which he summarised what he (GBE)

proffer, dated 30 July 2015, pages 14, 17 (CMA Document Reference URN 0052); see paragraphs 3.64 to 3.93 above.

²⁹⁶ *BIDS*, paragraph 21.

had agreed with [Senior Employee 1] (Trod) in respect of not undercutting on price and sets out the intended consequences in terms of raising prices and sharing sales:

*'Trod (Buy 4 Less) have agreed not to undercut us on Amazon and I have agreed to reciprocate. **We will therefore be aiming to be the same price wherever possible, put prices up and share the sales.***²⁹⁷ (emphasis added)

- 5.53. On the same day, [Employee 1] (GBE) emailed his colleague [Employee 9] (GBE) with the following:

*'**Raise prices as high as possible.**
Raise maxi posters to £3.94 or 25p below cheapest seller (except buy 4 less)
Lowest maxi posters price £2.59 (£4.59 inc shipping)
Where buy for less are lower than us, we match their price'*²⁹⁸
(emphasis added)

- 5.54. Further, in an email dated 11 April 2011 from [Senior Employee 1] (Trod) to GBE, [Senior Employee 1] (Trod) expressed the desire to make the Infringing Agreement work in the Parties' best interests:

*'Can we please arrange a meeting of the directors and myself so I can explain why this is not working and in the long term will only reduce GB Eyes [sic] profits and not improve them. **Also so we can try and make this work in everyones [sic] best interests.** Or at least I can find out where our 2 companies relationship stands going forward.'*²⁹⁹ (emphasis added)

- 5.55. Correspondence between the Parties in relation to the implementation of the Infringing Agreement also demonstrates that the Infringing Agreement was aimed at restricting price competition between the Parties for sales on Amazon UK.

²⁹⁷ Email dated 25 March 2011 at 12:24 from [Employee 1] to [Senior Employee 1], [Senior Employee 2]; [Employee 2] (all of GBE) (CMA Document Reference URN 0015). See paragraph 3.57 above

²⁹⁸ Email dated 25 March 2011 at 10:27 from [Employee 1] to [Employee 9] (both of GBE) (CMA Document Reference URN 0055). See paragraph 3.60 above.

²⁹⁹ Email dated 11 April 2011 at 15:22 from [Senior Employee 1] (Trod) to [Employee 1], [Senior Employee 2], [Senior Employee 1], [Senior Employee 3], [Senior Employee 4] (all of GBE) (CMA Document Reference URN 0016). See paragraph 3.61 above.

- 5.56. For example, in an email dated 24 March 2011 from [Employee 1] (GBE) to [Senior Employee 1] (Trod), [Employee 1] (GBE) wrote:

*'You are also still currently undercutting us on more or less every product, **we need to see your prices go up to ours** before we can re-price any more, we can't experiment with the whole range.'*³⁰⁰
(emphasis added)

- 5.57. The CMA has found that the evidence cited at paragraphs 3.45 to 3.102 above and in the preceding paragraphs clearly demonstrates the existence and expression of the Parties' subjective intention not to undercut each other's prices. The CMA therefore considers that the evidence of subjective intention supports the CMA's finding that the objective aim of the Infringing Agreement was to restrict price competition between the Parties for sales on Amazon UK.

The economic and legal context of which the Infringing Agreement forms part

- 5.58. Chapter 3 above provides an overview of the CMA's findings regarding the contextual factual background relevant to the investigation. The CMA has concluded that key points from the factual background that are particularly relevant to the legal and economic context for the purposes of the 'object' assessment show that:
- a. The Infringing Agreement was between two direct competitors, Trod and GBE.
 - b. The Infringing Agreement applied to posters and frames sourced from GBE, which is one of the largest producers and distributors of posters in the UK (with a total turnover in the financial year ending December 2014 of around £11 million). Moreover, the Infringing Agreement was between GBE and one of its largest online retail customers which was also its largest independent web customer (that is Trod, having a total turnover in the financial year ending March 2015 of around £15 million). Posters are GBE's core product,³⁰¹ and posters and frames account for most of the products sold by Trod that are sourced from GBE.³⁰²

³⁰⁰ Email dated 24 March 2011 at 15:47 from [Employee 1] (GBE) to [Senior Employee 1] (Trod) (CMA Document Reference N0004 and N0163). See paragraph 3.56 above.

³⁰¹ GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052). See paragraph 3.21 and 3.29, and footnote 222 above.

³⁰² Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0348). See paragraph 3.44 and footnote 222 above.

- c. The Infringing Agreement also applied to posters and frames which the Parties sourced from [Supplier] (which is also one of the largest producers and distributors of posters in the UK, with a total turnover of around £15 million in the financial year ending June 2015).³⁰³
 - d. The Infringing Agreement applied to posters and frames sold by both Parties on Amazon UK. Amazon Marketplace is an important retail outlet for sellers of licensed sport and entertainment merchandise and related products.³⁰⁴ Indeed, more than [50-75] per cent of GBE's online retail sales in the financial year ending in December 2014 were derived from Amazon UK.³⁰⁵ In the same financial year, more than [50-75] per cent of GBE's online retail sales (by value) of posters and frames were derived from Amazon UK (rather than other online retail platforms).³⁰⁶ Trod estimates that between 30 and 60 per cent of its sales were derived from Amazon UK.³⁰⁷
 - e. The Infringing Agreement was implemented by the Parties by the use of repricing software. Repricing software is normally used by online sellers to compete with other online sellers by automatically adjusting the prices of their products in response to the live prices of competitors' products.³⁰⁸ However, in the present case the repricing software was configured by the Parties to restrict price competition between them in order to give effect to the Infringing Agreement (see paragraphs 3.62 to 3.93 above).
- 5.59. In that context, the CMA has concluded that the Infringing Agreement, being an agreement not to undercut a competing seller on price (in certain specified circumstances) on a major online retail platform, Amazon UK, was inherently restrictive of price competition.

³⁰³ [Supplier] annual report dated 30 June 2015, page 11. See paragraphs 3.17, 3.44 and 3.39 and footnote 222 above.

³⁰⁴ Transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, page 20 (CMA Document Reference URN 0374); witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3], pages 51-52 (CMA Document Reference URN 0530); GBE proffer, dated 30 July 2015, page 7 (CMA Document Reference URN 0052).

³⁰⁵ GBE proffer, dated 30 July 2015, pages 6-7 (CMA Document Reference URN 0052).

³⁰⁶ GBE's response dated 29 April 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0419).

³⁰⁷ Trod's (KPMG) response dated 29 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0369).

³⁰⁸ [Trod's software provider 1's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0528); [Trod's software provider 2's] response to the CMA's request for information and documents dated 1 December 2015 (CMA Document Reference URN 0526); GBE proffer, dated 30 July 2015, pages 14, 17 (CMA Document Reference URN 0052); see paragraphs 3.64 to 3.93 above.

Conclusion on the object of preventing, restricting or distorting competition

- 5.60. In view of the foregoing, the CMA has found that the Infringing Agreement had as its object the prevention, restriction or distortion of competition within the UK, by preventing the Parties (in certain specified circumstances) from undercutting each other's prices for posters and frames sold by both Parties on Amazon UK.
- 5.61. Such an agreement, by removing or limiting the benefits to consumers of price competition between the Parties on an important sales channel, by its very nature restricted pricing competition between two online retailers. It reveals, in and of itself, a sufficient degree of harm to competition such that there is no need to examine its effects. Accordingly, it was restrictive of competition by object.³⁰⁹

E. Appreciable restriction of competition

- 5.62. For the reasons set out below, the CMA has found that the Infringing Agreement appreciably prevented, restricted or distorted competition for the sales of posters and frames on Amazon UK to consumers in the UK.

Key legal principles

- 5.63. An agreement that is restrictive of competition by 'object' will fall within the Chapter I prohibition only if it has as its object an appreciable prevention, restriction or distortion of competition.³¹⁰
- 5.64. The Court of Justice has clarified that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.³¹¹ In accordance with section 60(2) of

³⁰⁹ In making this finding, the CMA has also had regard to the European Commission's decision in *Agreements between manufacturers of glass containers*, OJ [1974] L160/1, in which agreements between manufacturers of glass containers to implement a set of rules that prohibited the undercutting of a competitor's prices in certain circumstances were found to be restrictive of competition by object. The Commission found that the clauses in question which contained the rules on undercutting had 'as their real and principal object the restriction of competition between the parties to the detriment of users of glass containers' (at paragraph 34). It added that '[s]uch provisions thus tend to prevent competitive behaviour, such as the practice of the most efficient and viable undertaking offering lower prices than those of its competitors ...' and concluded that the clauses in question had 'as their object the prevention of price competition between the parties' (at paragraph 35).

³¹⁰ 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 *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.15.

³¹¹ 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.

the Act,³¹² this principle also applies *mutatis mutandis* in respect of 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.

The CMA's findings

- 5.65. As set out above, the CMA has concluded that the Infringing Agreement had the object of preventing, restricting or distorting competition (see paragraphs 5.29 to 5.62 above). Given that the test on effect on trade within the UK is satisfied (see paragraphs 5.67 to 5.71 below), the CMA has therefore found that the Infringing Agreement constitutes, by its very nature, an appreciable restriction of competition for the sales of posters and frames on Amazon UK to consumers in the UK.
- 5.66. In any event, and in the alternative, the CMA has concluded that the Infringing Agreement had an appreciable impact on competition for the sales of posters and frames on Amazon UK to consumers in the UK given the following findings:
- a. The Infringing Agreement applied to posters and frames sourced from GBE, which is one of the largest producers and distributors of posters in the UK (with a total turnover in the financial year ending December 2014 of around £11 million). Moreover, the Infringing Agreement was between GBE and one of its largest online retail customers which was also its largest independent web customer (that is Trod, having a total turnover in the financial year ending March 2015 of around £15 million). Posters are GBE's core product,³¹³ and posters and frames account for most of the products sold by Trod that are sourced from GBE.³¹⁴
 - b. The Infringing Agreement also applied to posters and frames which the Parties sourced from [Supplier] (which is also one of the largest

³¹² Section 60(2) of the Act provides that, when determining a question in relation to the application of Part 1 of the Act (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the European Court in respect of any corresponding question arising in EU law. See also *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraphs 148ff.

³¹³ GBE proffer, dated 30 July 2015, page 4 (CMA Document Reference URN 0052). See paragraph 3.21 and 3.29, and footnote 222 above.

³¹⁴ Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0348). See paragraph 3.44 and footnote 222 above.

producers and distributors of posters in the UK, with a total turnover of around £15 million in the financial year ending June 2015).³¹⁵

- c. The Infringing Agreement applied to posters and frames sold by both Parties on Amazon UK. Amazon Marketplace is an important retail outlet for sellers of licensed sport and entertainment merchandise and related products.³¹⁶ Indeed, more than [50-75] per cent of GBE's online retail sales in the financial year ending in December 2014 were derived from Amazon UK.³¹⁷ In the same financial year, more than [50-75] per cent of GBE's online retail sales (by value) of posters and frames were made from Amazon UK (rather than other online retail platforms).³¹⁸ Trod estimates that between 30 and 60 per cent of its sales were derived from Amazon UK.³¹⁹

F. Effect on trade within the UK

- 5.67. For the reasons set out below, the CMA has found that the Infringing Agreement satisfies the requisite test for an effect on trade within the UK.

Key legal principles

- 5.68. The Chapter I prohibition applies to agreements which may affect trade within the UK.³²⁰
- 5.69. As regards the question whether the effect on trade within the UK should be appreciable, the Competition Appeal Tribunal (CAT) has held in one case that there is no need to import into the Act the rule of 'appreciability' under EU law, the essential purpose of which is to demarcate the fields of EU law

³¹⁵ [Supplier] annual report dated 30 June 2015, page 11. See paragraphs 3.17, 3.44 and 3.39 and footnote 222 above.

³¹⁶ Transcript of the CMA interview with [Senior Employee 1] (GBE), dated 24 September 2015, page 20 (CMA Document Reference URN 0374); witness statement of [Employee 1] (GBE), dated 10 June 2016 (CMA Document Reference URN 0569), Exhibit [3<], pages 51-52 (CMA Document Reference URN 0530); GBE proffer, dated 30 July 2015, page 7 (CMA Document Reference URN 0052).

³¹⁷ GBE proffer, dated 30 July 2015, pages 6-7 (CMA Document Reference URN 0052).

³¹⁸ GBE's response dated 29 April 2016 to the CMA's request for information dated 5 April 2016 (CMA Document Reference URN 0419).

³¹⁹ Trod's (KPMG) response dated 29 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0369).

³²⁰ The UK includes any part of the UK in which an agreement operates or is intended to operate: section 2(7) of the Act. 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.

and UK domestic law respectively.³²¹ In a subsequent case, the CAT held that it was not necessary to reach a conclusion on that question.³²²

The CMA's findings

- 5.70. Based on the evidence set out in Chapter 3 above, the CMA has found that the Infringing Agreement may have affected trade within the UK for the following reasons:
- a. The Infringing Agreement applied to the Parties' sales on Amazon UK (an important sales channel), which is the website on Amazon Marketplace that is primarily directed at consumers in the UK.
 - b. The products which are the subject of the Infringing Agreement are supplied throughout the UK.
 - c. GBE's evidence is that the Infringing Agreement was '*heavily, if not exclusively, UK centric. [...] the geographic scope of the conduct in question was almost [...] entirely, if not entirely, limited to the United Kingdom.*'³²³
- 5.71. The CMA has found that, if the appreciability requirement extends to the effect on trade within the UK, the Infringing Agreement may have appreciably affected trade within the UK for the reasons at paragraph 5.70 above and given that GBE is one of the largest UK poster producers, as well as a significant UK poster retailer, and Trod was one of its largest online customers and also its largest independent web customer.

G. Exclusions and exemptions

Exclusion

- 5.72. 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.³²⁴
- 5.73. The CMA has found that none of the relevant exclusions applies to the Infringing Agreement.

³²¹ *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11 at [459] to [461].

³²² *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14 at [48] to [51] and [62]. The CAT stated that 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.

³²³ GBE proffer, dated 30 July 2015, page 7 (CMA Document Reference URN 0052).

³²⁴ 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.

Exemption

Block Exemption

- 5.74. Pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it does not affect trade between EU Member States but otherwise falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation.
- 5.75. It is for the parties wishing to rely on this provision to prove that the restrictive agreement in question benefits from a block exemption.³²⁵
- 5.76. For the reasons set out below, the CMA has found that the Infringing Agreement does not benefit from a block exemption regulation.
- 5.77. In particular, the CMA has considered whether the Infringing Agreement benefits from the Vertical Agreements Block Exemption Regulation (VABER)³²⁶ but has concluded that it does not:
- a. Although GBE was a supplier of products to Trod during the Relevant Period, the Infringing Agreement was in respect of their activities as competing sellers on Amazon UK. It was not therefore a 'vertical agreement' covered by the VABER.³²⁷
 - b. Moreover, even if the VABER did apply, the Infringing Agreement prevented Trod (and GBE), in certain specified circumstances, from undercutting each other's prices for posters and frames sold by both Parties on Amazon UK. Such a restriction is excluded from the benefit of the VABER by virtue of Article 4(a) of the VABER which provides that the exemption provided by the VABER shall not apply to agreements '*... which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of the buyer's ability to determine its sale price ...*'.

³²⁵ Commission Notice *Guidelines on the Application of Article 81(3) of the Treaty* [2004] OJ C101/97 (Article 101(3) Guidelines), paragraph 35.

³²⁶ 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.

³²⁷ The exemption in VABER applies to 'vertical agreements'. Article 1(1)(a) of the VABER defines a 'vertical agreement' as 'an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'. In the present case, for the purposes of the Infringing Agreement, the Parties were operating at the same level, namely the sale of the products in question on Amazon UK.

- 5.78. The CMA has found that no other block exemption is applicable to the Infringing Agreement.
- 5.79. In view of the foregoing, the CMA has found that the Infringing Agreement is not exempt from the application of the Chapter I prohibition pursuant to section 10 of the Act.

Individual exemption

- 5.80. Agreements which satisfy the criteria set out in section 9 of the Act are exempt from the Chapter I prohibition.
- 5.81. There are four cumulative criteria to be satisfied:
- a. the agreement contributes to improving production or distribution, or promoting technical or economic progress,
 - b. while allowing consumers a fair share of the resulting benefit,
 - c. it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives,
 - d. it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- 5.82. 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.³²⁸
- 5.83. 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).³²⁹ However, each case ultimately falls to be assessed on its merits.
- 5.84. It is for the party claiming the benefit of exemption to prove that the conditions for exemption are satisfied.³³⁰ No such evidence has been provided by either of the Parties.

³²⁸ *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 5.5.

³²⁹ Article 101(3) Guidelines, paragraph 46.

³³⁰ Section 9(2) of the Act.

6. THE CMA'S ACTION

A. The CMA's decision

- 6.1. In light of the above, the CMA has made a decision that GBE and Trod infringed the Chapter I prohibition by participating in an agreement and/or concerted practice that where there was no cheaper third party seller on Amazon UK, they would not undercut each other on prices for licensed sport and entertainment posters and frames (including poster frames) sold by both Parties on Amazon UK, being an agreement and/or concerted practice that had as its object the prevention, restriction or distortion of competition within the UK and which may have affected trade within the UK.
- 6.2. The CMA has decided that the duration of the Infringement was from 24 March 2011 (at the latest) to 1 July 2015 (at the earliest).

B. Attribution of liability

- 6.3. The legal entities that were directly involved in the Infringement during the Relevant Period were Trod Limited and GB eye Limited. Accordingly and in light of Trod's administration, the CMA has found Trod Limited (in administration) and GB eye Limited liable for the Infringement.

C. Directions

- 6.4. Section 32(1) of the Act provides that if the CMA has made a decision that an agreement infringes the Chapter I prohibition, it may give such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. The CMA has decided not to impose any directions on the Parties in the circumstances of this case as the Infringement is no longer continuing.

D. Financial penalties

General points

- 6.5. Section 36(1) of the Act provides that on making a decision that an agreement has infringed the Chapter I prohibition, the CMA may require an undertaking which is party to the agreement concerned to pay the CMA a penalty in respect of the infringement. In accordance with section 38(8) of the Act, the CMA must have regard to the guidance on penalties in force at

the time when setting the amount of the penalty (the '**Penalties Guidance**').³³¹

- 6.6. The CMA has decided to impose a financial penalty on Trod for the Infringement. Trod has agreed as part of settlement to accept a penalty in the amount of £163,371.
- 6.7. GBE was granted full immunity from financial penalties under the CMA's leniency policy on 22 July 2016. Provided GBE continues to co-operate and comply with the conditions of the CMA's leniency policy, as set out in the immunity agreement between GBE and the CMA dated 22 July 2016, no financial penalty will be imposed on it. Consequently, the CMA has not calculated the level of any financial penalty that would be applied to GBE if immunity had not been granted.

The CMA's margin of appreciation in determining the appropriate penalty

- 6.8. Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act³³² and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '**2000 Order**'),³³³ and (ii) the CMA has had regard to the Penalties Guidance in accordance with section 38(8) of the Act, the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.³³⁴ The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.³³⁵ Rather, the CMA makes its assessment on a case-by-case basis³³⁶ having regard to all relevant circumstances and the objectives of its policy on financial penalties. In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will also have regard to the seriousness of the infringement and the desirability of deterring both the undertaking on which the penalty is imposed and other undertakings from engaging in behaviour

³³¹ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board.

³³² Section 36(8) is addressed at paragraphs 6.39 and following below.

³³³ SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

³³⁴ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

³³⁵ See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 (*Eden Brown*), at [78].

³³⁶ See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [116] where the CAT noted that '*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*'. See also *Eden Brown*, at [97] where the CAT observed that '*[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case*'.

that breaches the prohibition in Chapter I of the Act (as well as other prohibitions under the Act and the TFEU as the case may be).³³⁷

Small agreements

- 6.9. The CMA considers that section 39 of the Act (which provides for limited immunity from penalties in relation to the Chapter I prohibition) does not apply in the present case on the basis that the Infringement amounted to a 'price fixing agreement' within the meaning of section 39(9) of the Act.³³⁸

Intention/negligence

- 6.10. The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently.³³⁹ However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.³⁴⁰

- 6.11. 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'.³⁴¹

- 6.12. This is consistent with the approach taken by the Court of Justice which has confirmed:

'the question whether the infringements were committed intentionally or negligently...is satisfied where the undertaking concerned cannot be

³³⁷ Section 36(7A) of the Act and Penalties Guidance, paragraph 1.4.

³³⁸ A 'price fixing agreement' within the meaning of section 39(9) of the Act is 'an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates'. By virtue of section 39(1)(b) of the Act, such an agreement is excluded from the benefit of the limited immunity from penalties provided by section 39 of the Act.

³³⁹ Section 36(3) of the Act.

³⁴⁰ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs [453] to [457]; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [221].

³⁴¹ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [221].

*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’.*³⁴²

- 6.13. The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement or conduct in question has as its object the restriction of competition.³⁴³ As explained at paragraphs 5.29 to 5.61 above, the CMA considers that the Infringing Agreement had as its object the prevention, restriction or distortion of competition. Accordingly, the CMA considers that the Infringing Agreement was committed intentionally.
- 6.14. Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.³⁴⁴
- 6.15. Further, in the light of the evidence set out at paragraphs 3.45 to 3.102 above, the CMA considers that Trod must have been aware, or could not have been unaware that the Infringing Agreement was restrictive of competition. At the very least, the CMA considers that Trod ought to have known that its conduct would result in a restriction or distortion of competition.
- 6.16. For example, there is evidence that the Parties’ intention was to increase prices and not to compete on price, such as an email from [Employee 1] to his colleagues at GBE dated 25 March 2011 (cited more fully at paragraphs 3.57 and 5.52 above), *‘We will therefore be aiming to be the same price wherever possible, put prices up and share sales,’*³⁴⁵ as well as evidence that Trod ([Senior Employee 1]) wanted the Infringing Agreement to work in the Parties’ best interests (see paragraph 5.54 above).
- 6.17. The CMA has therefore found that Trod committed the Infringement intentionally or, at the very least, negligently.

Calculation of penalty

- 6.18. As noted at paragraph 6.5 above, when setting the amount of the penalty, the CMA must have regard to the guidance on penalties in force at that time.

³⁴² Case 280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, paragraph 124.

³⁴³ See *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.9.

³⁴⁴ See Case C-681/11 *Bundeswettbewerbsbehörde v Schenker & Co. AG*, EU:C:2013:404, paragraph 38. See also *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.10.

³⁴⁵ Email dated 25 March 2011 at 12:24 from [Employee 1] to [Senior Employee 1], [Senior Employee 2], [Employee 2] (all of GBE) (CMA Document Reference URN 0015).

The Penalties Guidance sets out a six-step approach for calculating the penalty.

Step 1 – starting point

6.19. The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to the relevant turnover of the undertaking and the seriousness of the infringement.³⁴⁶

- *Relevant turnover*

6.20. The 'relevant turnover' is the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.³⁴⁷ The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.³⁴⁸

6.21. In the present case, the 'last business year' of Trod is the financial year ending 31 March 2015. Trod has not been able to provide turnover figures for Trod in the relevant markets affected by the Infringement, namely, the sales on Amazon UK to consumers in the UK of (i) licensed sport and entertainment posters, and (ii) frames (including poster frames).³⁴⁹ Consequently, the CMA has estimated Trod's relevant turnover by multiplying Trod's turnover of posters and frames acquired from both [Supplier] and GBE in the financial year ending 31 March 2015 (namely, [between £500,000 and £1,000,000]),³⁵⁰ by the proportion of Trod's total turnover that was derived from sales on Amazon UK (namely, [between 30 and 60] per cent),³⁵¹ which resulted in the relevant turnover of [between £200,000 and £400,000].

³⁴⁶ Penalties Guidance, paragraphs 2.3 to 2.11.

³⁴⁷ Penalties Guidance, paragraph 2.7. 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 v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraph 169 that: '[...] neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty.' The Court of Appeal considered that it was sufficient for the OFT to 'be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement' (at paragraphs 170 to 173).

³⁴⁸ Penalties Guidance, paragraph 2.7.

³⁴⁹ Trod's (KPMG) response dated 18 April 2016 and 29 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document References URN 0348, URN 0347 and URN 0369); see also email dated 11 July 2016 from Gateley Plc (KPMG) to CMA (CMA Document References URN 0724).

³⁵⁰ Trod's (KPMG) response dated 18 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0348).

³⁵¹ Trod's (KPMG) response dated 29 April 2016 to the CMA's request for information dated 4 April 2016 (CMA Document Reference URN 0369).

- *Seriousness of the infringement*

- 6.22. In order to reflect adequately the seriousness of an infringement, the CMA will apply a starting point of up to 30 per cent of the undertaking's relevant turnover.³⁵² The actual percentage which is applied to the relevant turnover depends, in particular, upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.³⁵³ When making its assessment of the seriousness of the infringement, the CMA will consider a number of factors.³⁵⁴ The CMA will use a starting point towards the upper end of the range for the most serious infringements of competition law, including hardcore cartel activity.³⁵⁵ The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future. The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.³⁵⁶
- 6.23. In assessing the seriousness of the Infringement, the CMA considers that, on the one hand, the following factors point to a starting point towards the upper end of the range:
- a. the Infringement involved a restriction of price competition between competitors, which is a type of hardcore cartel activity;
 - b. the Infringement was between one of the largest producers and distributors of posters in the UK (GBE) and one of its largest online retail customers which was also its largest independent web customer (Trod); and
 - c. the fact that automated repricing software was used to implement the Infringement, thereby making 'cheating' on the cartel arrangement more difficult.
- 6.24. On the other hand, the CMA has also taken account of the following factors:
- a. the Infringement did not prevent the Parties from competing with other sellers on Amazon UK;

³⁵² Penalties Guidance, paragraph 2.5.

³⁵³ Penalties Guidance, paragraph 2.4.

³⁵⁴ In accordance with paragraph 2.6 of the Penalties Guidance, these factors include the nature of the product, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties. The CMA may also take into account other relevant factors.

³⁵⁵ Penalties Guidance, paragraph 2.5.

³⁵⁶ Penalties Guidance, paragraph 2.6.

- b. under the Infringement, each Party remained free to compete on price with the other Party where there was a cheaper third party seller on Amazon UK; and
- c. the Infringement only applied to (i) posters and (ii) frames sold *by both Parties* on Amazon UK – it did not apply to those posters or frames which were sold only by one of the Parties on Amazon UK.

6.25. Taking the above factors in the round, the CMA considers that the starting point for the Infringement should be at the high (but not the highest) end of the range, and in the circumstances it considers that it is appropriate to apply as a starting point 26 per cent of Trod's relevant turnover. Applying 26 per cent to Trod's relevant turnover of [between £200,000 and £400,000] results in a penalty of [between £50,000 and £100,000] at step 1.

Step 2 – adjustment for duration

- 6.26. The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement. Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional circumstances decide to round up the part year to a full year.³⁵⁷
- 6.27. The CMA has applied a multiplier of 4.25 to the starting point to take account of the duration of the Infringement, namely from 24 March 2011 (at the latest) to 1 July 2015 (at the earliest), which amounts approximately to 4 years and 3 months. Applying this multiplier, results in a penalty of [between £200,000 and £400,000] at step 2.

Step 3 – adjustment for aggravating and mitigating factors

- 6.28. 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. A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.³⁵⁸ In the circumstances of this case, the CMA considered at step 3 the factors set out below.

³⁵⁷ Penalties Guidance, paragraph 2.12.

³⁵⁸ Penalties Guidance, paragraphs 2.13 – 2.15.

- *Aggravating factor: involvement of directors or senior management*

6.29. The involvement of directors or senior management in an infringement can be an aggravating factor.³⁵⁹ The CMA therefore intends to apply an increase to the financial penalty at step 3 for the involvement of [Senior Employee 1] (Trod) in the Infringement, in particular, [Senior Employee 1's] (Trod) role in instigating and implementing the Infringement within Trod (as described in more detail at paragraphs 3.49 to 3.102 above). The CMA considers that an uplift of 15 per cent is appropriate and proportionate in the circumstances of this case.

- *Mitigating factor: cooperation*

6.30. The CMA may decrease the penalty at step 3 for cooperation which enables the enforcement process to be concluded more effectively and/or speedily. The Penalties Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion).³⁶⁰

6.31. The CMA considers that it is appropriate to decrease the penalty at step 3 to reflect (i) Trod's cooperation during the searches conducted on 1 December 2015, in particular, by facilitating the CMA's coordination of its searches with those conducted simultaneously by the West Midlands Police on behalf of the Department of Justice in relation to its investigation into wall décor, as well as (ii) the cooperation of the Administrators of Trod in responding to the CMA's requests for documents and information, and engaging constructively with the CMA regarding the administration process, which enabled the enforcement process to be concluded more efficiently.

6.32. The CMA considers that a 5 per cent reduction for cooperation is appropriate and proportionate in the circumstances of this case.

6.33. Applying the percentage increase and the percentage decrease for aggravating and mitigating factors, respectively, results in a penalty of [between £300,000 and £500,000] at step 3.

Step 4 – adjustment for specific deterrence and proportionality

6.34. The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the infringing

³⁵⁹ Penalties Guidance, paragraph 2.14.

³⁶⁰ Penalties Guidance, paragraph 2.15 and footnote 28.

undertaking will deter it from engaging in anti-competitive practices in the future), or to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.³⁶¹ At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.

- 6.35. Increases to the penalty figure at step 4 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of the penalty reached at the end of step 3.³⁶² In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or excessive having regard to the infringing undertaking's size and financial position and the nature of the infringement.³⁶³
- 6.36. Conversely, where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the infringing undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.³⁶⁴
- 6.37. The CMA considers that Trod's penalty after step 3 should be decreased by [40 to 60] per cent at step 4, to a figure of £204,214, to ensure that the level of penalty is not disproportionate or excessive. The CMA's view is that such a reduction is appropriate having regard to Trod's size and financial position,³⁶⁵ notwithstanding the serious nature of the Infringement and Trod's

³⁶¹ Penalties Guidance, paragraph 2.16. The CMA has considered a range of financial indicators in this regard, based on accounting information publicly available and/or provided by Trod at the time of calculating the penalty. Those financial indicators included relevant turnover, total worldwide turnover for the last financial year, total worldwide turnover over a three year average, net assets for the last financial year, profit after tax for the last financial year, and profit after tax over a three year average, dividends over a three year average, Trod's management accounts for the eleven month period from April 2015 to February 2016. The three year averages were calculated using the period of 3 years and 5 months due to changes in the company's accounting period between the financial year ending 31 October 2011 and the financial year ending 31 March 2013.

³⁶² Penalties Guidance, paragraph 2.17.

³⁶³ Penalties Guidance, paragraph 2.19.

³⁶⁴ Penalties Guidance, paragraph 2.20.

³⁶⁵ See footnote 361 above. The Penalties Guidance provides that, in considering whether any adjustments should be made at step 4 for specific deterrence or proportionality, the CMA will have regard to relevant indicators of the size and financial position of the relevant undertaking as at the time the penalty is being

role in it (see paragraph 6.23 above). The CMA notes, in particular, the unadjusted penalty before the [40 to 60] per cent adjustment at step 4 would be significantly in excess of Trod's profit after tax in the financial year ending 31 March 2015.

- 6.38. Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty of £204,214 at step 4 is appropriate without being disproportionate or excessive.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

- 6.39. The CMA may not impose a penalty for an infringement that exceeds 10 per cent 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 or, if figures are not available for that business year, the one immediately preceding it.³⁶⁶
- 6.40. The CMA has assessed Trod's penalty at step 4 against the maximum penalty threshold set out in the preceding paragraph. This assessment has not necessitated any reduction to the penalty at step 5 of the penalty calculation.³⁶⁷
- 6.41. In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another EU Member State in respect of the same agreement or conduct.³⁶⁸ As there is no such applicable penalty or fine, no adjustment is necessary in this case in that regard.

Step 6 – application of reduction for settlement

- 6.42. The CMA will reduce an undertaking's financial penalty at step 6 where the undertaking has agreed to settle the case with the CMA; which will involve,

imposed. The Penalties Guidance further provides that the CMA may also consider indicators of size and financial position from the time of the infringement (Penalties Guidance, paragraph 2.16). In the circumstances of this case, since Trod is in administration, the CMA has taken the relevant time to be the end of the Infringement and it has taken the financial year for which the most recent audited accounts of Trod were available at that time that is the financial year ending 31 March 2015.

³⁶⁶ Section 36(8) of the Act and the 2000 Order, as amended. See also Penalties Guidance, paragraph 2.21.

³⁶⁷ As audited figures are not available as at the date of this Decision for the financial year ending 31 March 2016 (which in the present case would be the business year preceding the date of the CMA's decision), the applicable turnover for Trod is its worldwide turnover in the financial year ending 31 March 2015, namely £15,059,852. The penalty at step 4, namely £204,214, does not exceed 10 per cent of Trod's applicable turnover.

³⁶⁸ Penalties Guidance, paragraph 2.24.

amongst other things, the undertaking admitting its participation in an infringement.³⁶⁹

- 6.43. As set out at paragraphs 2.8 to 2.11 above, Trod has admitted the facts and allegations of infringement as set out in the draft Statement of Objections dated 12 July 2016, which are now reflected in this Decision. In light of those admissions, and Trod's agreement to cooperate in expediting the process for concluding the investigation, the CMA has reduced Trod's financial penalty by 20 per cent at step 6 such that the maximum amount that is payable by Trod is £163,371 (provided that Trod complies with the continuing requirements of settlement, as set out in the settlement agreement between Trod and the CMA).

Financial hardship

- 6.44. In exceptional circumstances, the CMA may reduce a penalty where the undertaking is unable to pay the penalty proposed due to its financial position. Such financial hardship adjustments will be exceptional and there can be no expectation that a penalty will be adjusted on this basis.³⁷⁰
- 6.45. The CMA considers that in the circumstances of this case, given that Trod is no longer trading but is in administration and the eventual payment of the penalty will be governed by the applicable statutory provisions under the Insolvency Act 1986, there are no exceptional circumstances such as to warrant making any financial hardship adjustment to the penalty after step 6.

Payment of penalty

- 6.46. The CMA therefore requires Trod to pay a penalty of £163,371.
- 6.47. The penalty will become due to the CMA on 13 October 2016³⁷¹ and must be paid to the CMA by close of banking business on that date.³⁷²

³⁶⁹ Penalties Guidance, paragraph 2.26.

³⁷⁰ Penalties Guidance, paragraph 2.27.

³⁷¹ The next working day two calendar months from the expected date of receipt of the Decision.

³⁷² Details on how to pay are set out in the letter accompanying this Decision.

7. THE GLOSSARY

| Term | Definition |
|--|--|
| [Trod's software provider 1's Amazon repricer] | A repricing software provided by [Trod's software provider 1] for use on Amazon which enables sellers to compete with other online sellers by automatically adjusting the prices of their products in response to the live prices of competitors' products |
| the 2000 Order | Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 |
| [Trod's software provider 1] | [Trod's software provider 1] |
| the Act | Competition Act 1998 |
| Amazon Marketplace or Amazon | An online retail platform with the domain name 'www.amazon.' which allows third party sellers (that is, sellers other than Amazon) to create their own accounts and sell directly to end consumers |
| Amazon UK | The online retail platform www.amazon.co.uk |
| Article 101 | Article 101 TFEU |
| Article 101(3) Guidelines | Commission Notice Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97 |
| ASIN | An 'Amazon Standard Identification Number', which is a 10-character alphanumeric unique identifier assigned for product-identification within Amazon Marketplace |
| CAT | Competition Appeal Tribunal |
| [Trod's software provider 2] | [Trod's software provider 2] |
| Chapter I prohibition | The prohibition imposed by section 2(1) of the Act |
| CMA | Competition and Markets Authority |
| CMA leniency guidance | <i>Applications for leniency and no-action in cartel cases</i> (OFT1495, July 2013), adopted by the CMA Board |
| Commission | European Commission |
| Court of Justice or CJ | Court of Justice of the European Union (formerly the European Court of Justice) |
| EU | European Union |
| GBE | GB eye Limited |
| GC | General Court of the European Union (formerly the Court of First Instance) |

| Term | Definition |
|--------------------------------|---|
| Infringement | The CMA's finding that, during the Relevant Period, Trod and GBE infringed the Chapter I prohibition by participating in an agreement and/or concerted practice that where there was no cheaper third party seller on Amazon UK, they would not undercut each other on prices for licensed sport and entertainment posters and frames (including poster frames) sold by both Parties on Amazon UK |
| Infringing Agreement | The CMA's finding that the arrangement in the present case between the Parties constituted an agreement and/or concerted practice that where there was no cheaper third party seller on Amazon UK, they would not undercut each other on prices for licensed sport and entertainment posters and frames (including poster frames) sold by both Parties Amazon UK |
| KPMG or Administrators of Trod | Chris Pole and Allan Graham from KPMG who were appointed as joint administrators of Trod on 23 March 2016 |
| OFT | Office of Fair Trading |
| Parties | Trod and GBE |
| Party | Trod or GBE |
| Penalties Guidance | Guidance as to the appropriate amount of a penalty (OFT423, September 2012), adopted by the CMA Board |
| [Supplier] | [Supplier] |
| Relevant Period | The period between 24 March 2011 (at the latest) and 1 July 2015 (at the earliest) |
| SKU | A 'Stock Keeping Unit', which is as a unique identifier associated with a product's listing on Amazon UK |
| TFEU | Treaty on the Functioning of the European Union |
| Trod | Trod Limited (in administration) |
| VABER | 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 |

SIGNED: []

Stephen Blake, Senior Director - Cartels and Criminal, for and on behalf of the Competition and Markets Authority

12 August 2016