

# Competition Act 1998

## Decision of the Office of Fair Trading

Roma-branded mobility scooters: prohibitions on online sales and online price advertising

CE/9578-12

5 August 2013

**Note:** Confidential information in the original version of this Decision has been redacted from the published version on the public register. Also, the names of individuals mentioned in the original version of this Decision have been removed and replaced by general descriptions of those individuals' roles. These redactions are indicated in square brackets, for example '[name redacted]'.

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# 1 INTRODUCTION

## A EXECUTIVE SUMMARY

- 1.1 By this decision, of which Annexes A to E form an integral part (this 'Decision'), the Office of Fair Trading ('the OFT') has concluded that the undertakings listed at paragraph 1.8 below (each 'a Party', together 'the Parties') have infringed the prohibition imposed by section 2(1) ('the Chapter I prohibition') of the Competition Act 1998 ('the Act') by participating in agreements and/or concerted practices which had as their object the prevention, restriction or distortion of competition in relation to the supply of mobility scooters in the UK.
- 1.2 This Decision is issued under section 31 of the Act to the Parties in accordance with Rules 7 and 8 of the OFT's procedural rules (the OFT's Rules).<sup>1</sup> It states which of the applicable prohibitions of the Act the OFT concludes have been infringed, namely the Chapter I prohibition, the facts on which the OFT relies for this conclusion, the action the OFT is taking and its reasons for taking that action.<sup>2</sup>
- 1.3 A substantial amount of information, including sections on the Legal Framework and the Relevant Market, are in the Annexes to the Decision. This has been done in response to the specific circumstances of this case where the majority of the Parties are not legally represented, in order to assist each of the Parties to identify more easily and understand the case against it. As set out above, the information contained within the Annexes, nonetheless, constitutes an integral part of the Decision.

## B THE OFT'S INVESTIGATION

- 1.4 The OFT opened its formal investigation in April 2012, after receiving intelligence during the course of its 2011 market study into the mobility aids sector. That intelligence provided the OFT with reasonable grounds to, inter alia, suspect that Roma Medical Aids

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<sup>1</sup> The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751). Available on the OFT's website at [www.oft.gov.uk](http://www.oft.gov.uk).

<sup>2</sup> Rule 7(1) of the OFT's Rules.

Limited ('Roma') and certain retailers had entered into anti-competitive agreements and/or participated in concerted practices which prohibited retailers from:

- (i) selling mobility scooters supplied by Roma online, and
  - (ii) advertising prices online in respect of mobility scooters supplied by Roma.
- 1.5 In April 2012, the OFT used its formal powers under sections 26 and 27 of the Act in order to obtain documents and information in relation to the agreements and/or concerted practices. The OFT further conducted voluntary witness interviews with certain retailers during summer 2012 and key Roma employees on 4 September 2012.
- 1.6 In October and November 2012 respectively, the OFT sent to Roma and the retailers listed below in paragraph 1.8, a Summary of Preliminary Key Findings of Fact document and a Legal Principles Paper, which set out the OFT's proposal to reach a preliminary finding that there had been an infringement of competition law. On dates in February 2013 and March 2013, certain parties provided the OFT with an admission of liability (on the basis of the facts and law set out in those papers).
- 1.7 On 21 March 2013, the OFT issued to the Parties a Statement of Objections in which it proposed to make a decision that the Parties have infringed the Chapter I prohibition of the Act by participating in agreements and/or concerted practices which had as their object the prevention, restriction or distortion of competition in relation to the supply of mobility scooters in the UK. The purpose of the Statement of Objections was to give each Party an opportunity to make representations on the OFT's proposed decision. Roma, in line with the admission of liability it provided to the OFT, made limited representations on the Statement of Objections. The OFT did not receive representations from any other Party.

## **C PARTIES**

- 1.8 This Decision is addressed to each party to which the OFT has attributed liability in respect of agreements and/or concerted practices

which the OFT has concluded constitute an infringement of the Chapter I prohibition, namely:

1. *Roma Medical Aids Limited* (manufacturer)
2. *Careco (UK) Limited (formerly Discount Mobility Direct Limited)* (retailer)
3. *Discount Mobility Shop Limited /Mobility Abroad Limited* (retailer)
4. *Discount Mobility Plus Limited/Rutland Mobility Limited* (retailer)
5. *Mobility Independence Limited* (retailer)
6. *MT Mobility Ltd/Hooplah Limited* (retailer)
7. *Protec Mobility Trading Limited* (retailer)
8. *GBL Wheelchair Services Limited* (retailer)

1.9 A description of each of the Parties and the legal entities to which liability is attributed for the infringements is set out at Annexe C of this Decision ('Attribution of Liability').

## **D SUMMARY OF THE INFRINGEMENTS**

1.10 The OFT has concluded that the Parties have infringed the Chapter I prohibition by entering into agreements and/or participating in concerted practices which had as their *object* the prevention, restriction or distortion of competition in relation to the supply of mobility scooters in the UK by, in respect of certain mobility scooters supplied by Roma:

- prohibiting online sales by retailers between July 2011 and April 2012, and
- prohibiting online advertising by retailers of any prices between July 2011 and April 2012 (collectively 'the Prohibitions').<sup>3</sup>

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<sup>3</sup> The OFT's finding is that the infringements which are the subject of this Decision spanned different periods between July 2011 and April 2012 for different Parties.

1.11 Based on the OFT's assessment of the evidence in its possession, the agreements and/or concerted practices comprised the following elements:

**A** Roma sent a circular to its retailer network on 21 June 2011, which specified that five models of mobility scooters (the *Alcora*, *Corella*,<sup>4</sup> *Sorrento*, *Lyon* and *Granada*, hereinafter referred to as the Roma-branded Scooters) would, from 4 July 2011, be available '*in-store only*'.<sup>5</sup> Taken together with the other evidence available to the OFT, this effectively meant that as of 4 July 2011 retailers were not permitted to:

- sell those mobility scooters online, or
- advertise the price of those mobility scooters online.

**B** Between July 2011 and April 2012,<sup>6</sup> at least the retailers listed in paragraph 1.8 above agreed to abide by, or acquiesced in, Roma's requests and/or instructions not to engage in online price advertising or in online sales of the Roma-branded Scooters, although not all retailers complied with Roma's requests and/or instructions at all times.

**C** Between July 2011 and April 2012, Roma continued to communicate to retailers that they were not permitted to sell the Roma-branded Scooters online or to advertise the price of those mobility scooters online.

**D** Roma monitored retailer compliance with the above policy. In particular, wherever Roma identified that a retailer was not complying with its requests and/or instructions, it would request

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<sup>4</sup> The Roma-branded 'Alcora' and 'Corella' mobility scooters were replaced by the Roma-branded 'Vegas' mobility scooter, which was introduced in spring 2012. The OFT's finding is that the Prohibitions also applied to the 'Vegas' mobility scooter.

<sup>5</sup> This policy did not apply to the Shoprider-branded mobility scooters which Roma supplies.

<sup>6</sup> Roma has indicated that since 17 April 2012, it ceased to instruct retailers not to advertise prices online in respect of, or not to sell, online Roma-branded Scooters, albeit the OFT does not have evidence of a specific termination event.

and/or instruct that retailer to remove the pricing from the internet and/or cease selling the product on the internet.

- E** Roma threatened retailers that non-compliance with its policy would result in Roma ceasing to supply them with Roma-branded Scooters.

## **E SUMMARY OF THE OFT'S COMPETITION CONCERNS**

1.12 Well-functioning markets depend both on competition working well and on consumers making good choices. Consumers drive competition where they are empowered to shop around through access to readily available and accurate information about the products they are seeking and the various offers available in the market. The provision of price and product information plays an important role in this respect. In this context, the internet may be particularly important as a means to make such information easily accessible to end-consumers, particularly those having restricted mobility.

1.13 Easy access to products and information via the internet can therefore:

- make it easier for consumers to compare product and price information,
- provide consumers with a greater number of retailers they can purchase from, and
- make it easier for consumers to access a greater number of product offerings than may otherwise be available in their local geographic area.

1.14 As a result, the internet can intensify price competition between retailers and enable consumers to obtain better value for money.

1.15 In a sector such as the mobility scooters sector, where:

(i) end-consumers have restricted mobility and may therefore not be able to visit several bricks and mortar outlets, and

(ii) customers are often first-time buyers,

the ease of access to price and product information and alternative sales methods can be particularly important. Therefore, easier access to a greater choice of retailers via the internet and increased price transparency, alongside relevant product and service information, can positively impact consumers' ability to identify the best deal for them, at very low search costs. This increased price transparency and an increase in the number of - potentially more efficient - retailers that consumers can buy from are likely to strengthen price competition between mobility scooter retailers, including bricks and mortar retailers and hybrid retailers<sup>7</sup> as well as doorstep sellers, and result in lower end-prices.<sup>8</sup>

1.16 The OFT concludes that as a result of the Infringements (see 'Defined Terms' at Section F below) retailers were restricted in accessing a wider consumer base with the help of the internet. Viewed another way, consumers were significantly restricted from:

- identifying and better obtaining discounted prices, by shopping around, and/or
- buying products that are not available from bricks and mortar retailers in their particular local area.

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<sup>7</sup> That is, retailers using multiple sales channels, such as bricks and mortar outlets and the internet.

<sup>8</sup> [Document number redacted]: *'We believe that internet prices have an impact on brick-and-mortar store prices. The prices of some mobility scooters displayed on the internet pressure brick-and-mortar stores to lower their prices for the same model(s) when selling them in store.'*

[Document number redacted]: *'Internet mobility scooter pricing does impact the prices in brick-and-mortar stores. In recent years more and more consumers are aware of the benefit of using the internet to check pricing of mobility scooter models they may be interested in purchasing.'*

[Document number redacted]: *'The emergence of the internet has clearly enabled consumers to readily compare the prices of products offered in bricks-and-mortar stores with those offered by the generally lower cost specialist internet sites. The extent to which that has impacted upon genuine bricks-and-mortar store [sic] offering fair prices and good support to consumers on a fairly complex product is not clear, but it is clear that internet price visibility does help to reduce the frequency of overcharging by the direct sales companies in the sector.'*

- 1.17 The OFT concludes that this resulted in preventing, restricting or distorting price competition between retailers and higher prices potentially being paid by end-consumers and a reduction in the variety of products that are easily available for consumers. The OFT notes that, in that sense, the agreements and/or concerted practices undermined the benefits of the transparency and enhanced search functions brought about by the internet and the possibilities offered by e-commerce.
- 1.18 The OFT is particularly concerned that in the context of a distribution system that is selective, and where intra-brand competition has therefore already been limited, a prohibition on price advertising and a prohibition on online sales undermine benefits brought about by the internet.
- 1.19 Further, the OFT considers that to the extent that similar prohibitions/restrictions are replicated in the market, then any prevention, restriction or distortion of competition would be further reinforced and exacerbated.
- 1.20 The OFT is particularly concerned that in a sector, such as the present, where consumers are potentially more vulnerable, the above-named prohibitions are liable to disproportionately impact on such consumers and to place them at a particular disadvantage.

## F DEFINED TERMS

Term	Definition
the Act	The Competition Act 1998
Infringements	The infringements which are the subject of this Decision.
the CAT	The Competition Appeal Tribunal
the Chapter I prohibition	The prohibition set out in section 2 of the Act.
the Commission	The European Commission
CJ	The Court of Justice
Decision	This Decision, issued by the OFT.
GC	The General Court
the OFT	The Office of Fair Trading
the OFT's Rules	The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751)
Party/the Parties	Each entity/the entities listed at paragraph 1.8.
the Prohibitions	Collectively the online sales prohibition and the online price advertising prohibition that are the subject of this Decision.
RRP	Recommended Retail Price
Retailer/Retailers	Each entity/the entities listed at paragraph 1.8, numbered 2 to 8.
Roma-branded Scooters	The following models of mobility scooter manufactured by Roma: the <i>Alcora</i> , <i>Corella</i> , <i>Sorrento</i> , <i>Lyon</i> , <i>Granada</i> and <i>Vegas</i> .
the Statement	The Statement of Objections issued in this case on 21 March 2013.
TFEU	Treaty on the Functioning of the European Union
the VABER	Commission Regulation 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, OJ 2010 L/102/1, known as the Vertical Agreements Block Exemption Regulation.
Vertical Guidelines	The Commission's <i>Guidelines on Vertical Restraints</i> , Commission Notice OJ 2010 C130/1.

## 2 BACKGROUND

### A SUMMARY DESCRIPTION OF MOBILITY SCOOTERS

- 2.1 Mobility scooters are battery-powered vehicles that are used by persons who have restricted mobility. Two illustrative examples are provided below.



**Figure 2.1: Roma Sorrento**



**Figure 2.2: Roma Granada**

- 2.2 Mobility scooters, amongst other mobility aids, can play a vital role in supporting the ways in which elderly people or physically impaired people live their lives by enabling them to live more independently, safely and healthily. For example, they can assist their users in carrying out daily living activities, accessing their place of employment and a wider range of social and leisure activities. In addition, mobility scooters can reduce the risk of accidents or injuries related to restricted mobility.<sup>9</sup>
- 2.3 Mobility scooters are used by persons who have restricted mobility and who may not have the stamina or arm or shoulder flexibility necessary to operate a manual wheelchair. Mobility scooters are also used by persons with systemic conditions or whole-body disabling conditions but who are still able to stand and walk a few steps, to sit upright without torso support, and to control the steering tiller of a mobility scooter.

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<sup>9</sup> OFT1374, 'Mobility aids, an OFT market study', (September 2011), page 4, paragraph 1.1 available at <http://www.of.gov.uk/OFTwork/markets-work/mobility-aids>.

- 2.4 Mobility scooters are not prescription healthcare products. However, they are classified as medical devices by the Medicines and Healthcare Products Regulatory Agency.<sup>10</sup>
- 2.5 In its representations made in response to the OFT's Statement issued on 21 March 2013 (hereinafter referred to as Roma's representations), Roma emphasised the need for consumers to receive an 'assessment'. The OFT recognises the importance, in the context of mobility scooter retailing, of consumers having access to suitable pre-sales services and advice in order to ensure that they purchase products that are suitable to their needs.<sup>11</sup>

## **B POTENTIAL FOR CONSUMER DETRIMENT**

- 2.6 In early 2010, key interested parties raised concerns with the OFT that the mobility aids sector may not be working well for consumers. Following a public consultation on the proposed scope of a market study into this sector, the OFT launched its study in February 2011, which, amongst other issues, focussed on the following areas of potential concern:
- whether consumers were being treated fairly,
  - whether consumers can access, assess and act on information which enables them to make informed purchasing decisions and to drive vigorous competition amongst firms.<sup>12</sup>
- 2.7 In carrying out this study, the OFT obtained information which suggested that there was potential for consumer detriment in this sector, particularly due to certain factors that can contribute to the

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<sup>10</sup> For further information see [www.mhra.gov.uk](http://www.mhra.gov.uk).

<sup>11</sup> In particular, Roma submitted that this is because mobility scooters '*are used in areas where other members of the public can potentially be affected by their use: on pavements or pedestrianised areas or, in the case of Class 3 scooters, on public roads. The potential danger for the user and others means that there is good reason to insist that consumers have to undergo an assessment and receive advice before they purchase a mobility scooter*'. Roma's representations, paragraphs 5.1 to 5.3, and paragraph 5.29.

<sup>12</sup> For further information see [www.offt.gov.uk/shared\\_offt/market-studies](http://www.offt.gov.uk/shared_offt/market-studies).

vulnerability of consumers when purchasing mobility aids, including mobility scooters.

2.8 The OFT identified that potential and existing users of mobility aids, including users of mobility scooters, may have particular difficulties in obtaining information which can assist them in their purchasing decision, so as to help them obtain products that represent value for money and that meet their needs, due to factors which include the following:

- **first-time purchases:** consumers in this sector are often first-time buyers.<sup>13</sup> They are therefore likely to have a limited frame of reference in order to judge whether the products on offer represent good value, unless they shop around and compare prices being offered (both in terms of the prices of other brands and the same brands sold by alternative retailers).
- **consumers' restricted mobility:** due to the mobility issue, for which the mobility scooter is needed, the extent to which consumers are able physically to shop around may be limited. For example, some consumers with significant mobility problems may be unable to visit bricks and mortar stores. They may also be dependent, or heavily dependent, on alternative sales channels, including doorstep sales, the internet and mail and catalogue orders. Limited ability to shop around may prevent consumers from obtaining a better deal, thereby potentially leading them to pay higher prices for their purchases, and from having less choice.

2.9 For many of those who use mobility scooters the purchase of a mobility scooter will represent a very significant expense. The OFT's research in the present investigation shows that the price of a mobility scooter can range from £349 to £5,995, depending on the 'class',

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<sup>13</sup> Data from the consumer survey of the OFT's market study into the mobility aids sector in 2011 shows that around 55% of consumers who purchased mobility scooters for themselves and 45% of consumers who purchased mobility scooters on somebody's behalf were first-time buyers.

brand and model of scooter.<sup>14</sup> Given the significant expense that mobility scooters can represent, empowering consumers with the right information and tools to obtain good value can help ensure that they are able to afford to purchase a mobility scooter, which they may depend on in order to live more independently, safely and healthily.

- 2.10 The OFT places particular emphasis on protecting vulnerable consumers and will intervene where necessary in order to protect their interests, particularly where certain business practices are liable to disproportionately impact on such consumers or where they may be placed at a particular disadvantage.<sup>15</sup>

## **C INDUSTRY BACKGROUND**

- 2.11 There is little reliable public data available on the size of the UK mobility scooters sector, by value or volume of sales.
- 2.12 Based on the information received from the UK suppliers of mobility scooters,<sup>16</sup> the OFT has estimated that the size of the mobility scooters sector, in terms of the number of mobility scooters sold, was approximately 57,500 in 2011.<sup>17</sup>
- 2.13 Roma was one of the three largest (in terms of unit sales) mobility scooter suppliers in the UK in 2011 based on market shares estimated

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<sup>14</sup> The OFT's high-level online research found that the price of travel scooters ranged between £349-£2,199, medium scooters ranged between £499-£2,649 and large scooters ranged between £835 - £5,995. (Date of research: 20 to 21 November 2012).

<sup>15</sup> As is evidenced in the OFT's annual plans for 2012-2013 and 2013-2014. For further information visit the OFT's website at: <http://www.of.gov.uk>.

<sup>16</sup> Advanced Vehicle Concepts Ltd., Betterlifehealthcare Ltd., Days Healthcare UK Ltd., Drive Medical Ltd, Electric Mobility Euro Ltd., Freerider Luggie Ltd., Handicare Ltd., Invacare Ltd., Kymco Healthcare UK Ltd., Mini Crosser A/S, One Rehab Ltd., Pride Mobility Products Ltd., Pro Rider Mobility Ltd., Roma Medical Aids Ltd., Sunrise Medical Ltd., TGA Electric Leisure Ltd., Van Os Medical UK. Documents: 3688AVCQ, 3702DPH, 3859DR, 3692EME, 3693FLU, 3695HandM, 3697Inv, 3699Kymco, 3700Minic, 3811OR, 3446PR, 3845ProR, 3841RO, 3704SunM, 3705TGA, 3813TI, and 3715VanOs.

<sup>17</sup> The OFT could not obtain consistent data from market players in order to calculate the size of the market in terms of value of sales.

by the OFT, with a market share of approximately [between 10 and 15 per cent (actual figure redacted)].<sup>18</sup> Further, the top three suppliers make up 54 per cent of the market while all other suppliers in this market have a market share of between one and eight per cent.

2.14 Roma currently supplies [between 400 and 500 (actual figure redacted)] retailers out of an estimated 800-1,200 mobility scooter retailers in the UK,<sup>19</sup> which makes Roma's dealer network the second largest in the UK.<sup>20</sup>

### ***How Roma selects retailers***

2.15 Roma's distribution arrangements with retailers display characteristics of a selective distribution system. While Roma's selection of retailers for the system appears to be essentially on qualitative grounds there is some evidence also of a degree of quantitative selection.<sup>21</sup>

### **Qualitative selection**

2.16 The evidence in the OFT's possession suggests that when deciding whether to open a new retail account, Roma considers whether the relevant retailer can provide end-consumers with the necessary pre- and after-sales support, by having regard to:

- the retail applicant's level of knowledge and expertise,
- whether the retailer's retail premises are easily accessible for end consumers in order to obtain an 'assessment', and
- whether the retailer has the necessary infrastructure in order to repair and service mobility scooters.

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<sup>18</sup> The OFT's calculations are based on data received from the suppliers listed at footnote 16 above (see the documents there referred to).

<sup>19</sup> Document 3830RO.

<sup>20</sup> By comparison, the largest dealer network consists of between [600 to 700 (actual figure redacted)] retailers. The third largest dealer network consists of between [400 to 500 (actual figure redacted)] retailers. See documents 3693FLU and 3713PR.

<sup>21</sup> Quantitative selection is selection that aims to fix or limit the number of dealers in a particular geographic area.

2.17 In interview with the OFT dated 4 September 2012, an Area Sales Manager for Roma [name redacted] stated the following:<sup>22</sup>

*'Albeit you know, I would say that they have to have certain criteria to open an account, to make sure that if you're going to open an account and you're going to do a supply of scooters or any powered type products, you have the facility to ... for the after care service. You've got to have at least the knowledge of being able to look after any services due to looking after the product, after sales. That really is about it and decent facilities for people to get to as well, to get assessments you know. We wouldn't open an account if someone lived on the eighth floor of a block of flats, because that would be just unreasonable wouldn't it?'*<sup>23</sup>

2.18 Roma has also produced to the OFT the following evidence of it applying qualitative selection criteria. In an undated email to a retailer applicant, Roma requested the applicant to answer the following questions for the purposes of determining whether an account should be opened for that retailer:

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<sup>22</sup> Document 3450WS, page 7.

<sup>23</sup> See also Document 3451WS, CD 1 of 5 page 8 – Roma's Commercial Director [name redacted]'s interview with the OFT dated 4 September 2012:

*'Yeah they get the paperwork so they can review the detail to find out, to evaluate really if it's feasible to open this particular interest up because one thing that if they got existing customers in position and it's only on the doorstep somewhere it wouldn't be viable to open up a dealership that's gonna obviously cause problems for an existing customer so we then politely say thank you very much, we don't look to open them because you've got coverage in the area and these dealers have been established some time. Roma would also review the structure of a potential customer and what as I said is of the purchasing. We look at the premises to make sure they've got something tangible to work from and also to look at show room, look at stock to be housed on their showroom because when I go to assess people; make sure they've got the infrastructure there, the service department and repair area because as you know these are medical device equipment and they need to go in for servicing and repair to tanks and what we do as well on the order forms then for the application form is ensure that people are given the understanding that they could be opened up with us or not; so we don't have a delay of say 2 or 3 weeks, it's virtually instantaneous if they can come on board with us or not. We do then provide training which is free of charge for products first of all which is conducted by the ASM [Area Sales Manager] and also scooter and service maintenance training, we encourage people to have that which is held in the facility by one of our technical team here at Bridgend.'*

- *'How long have you been in business, do you have any experience in the Mobility industry. [sic]*
- *Do you have business premises, main showroom or work from home? Address and postcode please.*
- *Do you have a qualified technician on board to repair and service Roma's mobility scooters?'*<sup>24</sup>

2.19 In its representations, Roma emphasised that one further requirement it imposes on its retailers is that retailers attend certain training provided by Roma, including training on how mobility scooters work, how an assessment should be conducted and training on service and maintenance.<sup>25</sup>

2.20 Finally, Roma requires that its retailers complete a standard Warranty and Assessment form in which they must confirm the following in relation to each mobility scooter sold, which further evidences the application by Roma of qualitative criteria in order to maintain a selective distribution system:

*'[...] the product has been demonstrated prior to commissioning/delivery and is suitable for use by the person named above'*<sup>26</sup>

The form must also be signed by the customer to confirm that the product has been demonstrated, that the customer is aware of its functions, and that the customer agrees to read the manual prior to using the product.<sup>27</sup>

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<sup>24</sup> See Document 0040RO.

<sup>25</sup> Roma's representations, paragraph 5.12.

<sup>26</sup> See Document 3453WS (Document 3 of 5, page 10) and Document 0037RO.

<sup>27</sup> Roma's representations, paragraph 5.13.

2.21 The form further prompts the retailer to assess whether the end-consumer would be able to safely operate a mobility scooter.<sup>28</sup>

### Quantitative selection

2.22 In interview, the evidence of two Roma employees – an Area Sales Manager [name redacted], and the Commercial Director [name redacted] – was that Roma prefers not to supply more than one retailer in any given catchment area so as to 'support' their appointed retailer by limiting the potential for local price competition within their brand.<sup>29</sup>

2.23 In its representations Roma stated that it '[...] *refutes this has been their reasoning or that this conclusion is entirely correct*'. Roma further stated in its representations that the Area Sales Manager

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<sup>28</sup> The form prompts the retailer to assess the end-consumer in respect of the following: 'progressive illness [yes/no] ', 'eyesight [good/acceptable]', 'main use [indoors/outdoors]', 'hearing ability [good/acceptable]', 'balance [good/acceptable]', 'concentration [good/poor]', 'coordination [good/acceptable]'.

<sup>29</sup> In interview with the OFT dated 4 September 2012, Roma's Area Sales Manager [name redacted], said as follows: '*You also ... you may have a longstanding customer who already would be ... have an account with Roma. You wouldn't like to open someone on his doorstep and lose that business because you wouldn't ... well I'm sure you would, you could imagine the comments made by our existing customer, if I was to open someone three doors down.*' [...] *No, sometimes you know, if I had information of an account application form, we would have the details there, albeit I could go on route finder and put my ... that postcode in and the put postcodes in of existing customers that I have around, to see how close they were.*

OFT: *So you'd be able to work out how close they were?*

Roma Area Sales Manager [name redacted]: *Yeah, and that's just my way of trying to work out whether, am I going to upset someone else for the sake of ... there's some customers who may not want to open an account with Roma, but when they've had a part-exchange in, of a Roma scooter or a shop rider scooter, they want an account there and then because they may need a part, which ... they haven't been one since they dealt with us, until they wanted to. So sometimes I wouldn't sell something for £50, to upset a dealer on his doorstep, who's doing a good turnover with Roma. It's just polite isn't it.'*

See also Document 3451WS, CD 1 of 5 page 8 - Commercial Director of Roma [name redacted]'s interview with the OFT dated 4 September 2012 referred to above in footnote 23.

[name redacted] '[...] *does not have responsibility to open accounts or contribute to the strategy of the company. Such decisions are taken by the directors.*'

2.24 In light of these representations, the OFT has re-examined the available evidence, in particular the interview with Roma's Commercial Director [name redacted]. In interview, Roma's Commercial Director [name redacted] stated that one of the criteria applied by Roma in evaluating whether a new account should be opened is the proximity of the applicant's location to any existing Roma retailer, such that Roma would decline to open a new account if Roma already had 'coverage' in the relevant area.<sup>30</sup> The OFT notes that the evidence of a Roma Area Sales Manager [name redacted] was consistent with that of Roma's Commercial Director [name redacted].

2.25 This witness evidence is corroborated by the evidence of one particular retailer, [retailer name redacted], which was unable to open an account with Roma due to its proximity to an incumbent Roma retailer in the locality.<sup>31</sup>

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<sup>30</sup> In interview with the OFT dated 4 September 2012, there was the following exchange between the OFT and Roma's Commercial Director [name redacted]:

Roma's Commercial Director: *So our Area Sales Managers, or we refer to them ASM's, they would review the account application form because they are situated within the regions; we have people positioned, employed across different parts of the country [...].*

OFT: *Yeah. So if a retailer says "I'll be interested in selling Roma products" then depending on where that retailer is located you say to the ASM responsible for that territory "you have a look at this", is that it yeah?*

Roma's Commercial Director: *Yeah they get the paperwork so they can review the detail to find out, to evaluate really if it's feasible to open this particular interest up because **one thing that if they got existing customers in position and it's only on the doorstep somewhere it wouldn't be viable to open up a dealership that's gonna obviously cause problems for an existing customer so we then politely say thank you very much, we don't look to open them because you've got coverage in the area and these dealers have been established some time.***  
[Emphasis added]

<sup>31</sup> In an interview with the OFT dated 7 August 2012, [retailer name redacted]'s Director [name redacted], stated:

- 2.26 Moreover, the OFT has been informed by certain mobility scooter retailers that the number of bricks and mortar retailers in a typical catchment area of 10-20 miles is limited, and in certain local areas can even be limited to one retailer.<sup>32</sup>
- 2.27 In the OFT's view, the totality of the evidence in the OFT's possession supports the conclusion that Roma prefers not to supply more than one retailer in any given catchment area. The OFT has inferred from that evidence, in particular the interviews with a Roma Area Sales Manager [name redacted] and its Commercial Director [name redacted], that one rationale behind this policy may be to 'support' existing retailers by limiting the potential for intra-brand price competition.

### **Conclusion on retailer selection**

- 2.28 Roma's selection of retailers is made, therefore, on the basis of criteria that are of a qualitative and quantitative nature, both of which may limit the number of retailers that sell Roma's mobility scooters in this sector.
- 2.29 The OFT considers that Roma's distribution arrangements for mobility scooters either constitute, de facto, a system of selective distribution or have features which are similar to those of a selective distribution system. Therefore, intra-brand competition with respect to Roma-branded Scooters has been limited by those arrangements.

### ***Recent changes in the retail sector***

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*'That's why we was unable to get a Shoprider account, a Roma account, because [retailer name redacted] had it down the road and his business was 50,000 plus a year with Roma, so Roma wasn't going to tread on his toes and open me an account'* [Document number redacted] (page 5).

The OFT has inferred from the above statement that [retailer name redacted] was unable to open an account with Roma in respect of both the Shoprider-branded scooters and the Roma-branded Scooters.

<sup>32</sup> Document 3821TI, Document 3822TI and Document 3824TI.

- 2.30 The OFT has been informed by certain industry players that the retail market has undergone recent changes, and that historically the market may not have been working as well as it should be.
- 2.31 The OFT has been informed that prior to end-2010, under the government-assisted Motability scheme, the retail price of mobility scooters purchased through that scheme was set at the recommended retail price (RRP) minus twenty per cent.<sup>33</sup>
- 2.32 The OFT was informed that this led to the RRP of mobility scooters being set at an unrealistically high level, such that retailers' profit margin for each mobility scooter sold through that scheme was significant.
- 2.33 One interested party suggested to the OFT that high retail prices in the mobility scooters sector prompted the entry of retailers which would subsequently fail and exit the market due to a combination of two changes in the sector:
- changes made in 2010 to the way in which prices were set under the Motability scheme. Under the new scheme, prices were set at a level which more accurately reflected the cost of supplying mobility scooters (but which in turn reduced retailers' profit margins); and
  - the growing importance of the internet and of online distribution models.
- 2.34 Some of the evidence produced to the OFT suggests that during the adverse economic climate, end-consumers have also become more price-sensitive which in turn may also have had an impact on reducing retail prices.<sup>34</sup>

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<sup>33</sup> Motability is a charity that helps people to use the higher rate mobility component of their Disability Living Allowance or their War Pensioner's Mobility Supplement to get powered wheelchairs, scooters and cars through a hire purchase or hire contract scheme.

<sup>34</sup> In interview with the OFT dated 29 August 2012, the Company Director of [retailer name redacted] noted the following in relation to the recent trend in the mobility scooters retail sector:

## ***Sales channels and the importance of the internet***

2.35 Mobility scooters are sold through a range of sales channels, namely:

- bricks and mortar retail premises,
- the internet,
- mail, catalogue and telephone order, and
- doorstep sales.<sup>35</sup>

2.36 Several mobility scooter retailers use a combination of these sales channels (hybrid retailers), for example bricks and mortar retail premises and the internet.

2.37 The majority of mobility scooter sales are made through bricks and mortar retail premises: UK mobility scooter suppliers estimated that this sales channel accounts for approximately 70-75 per cent of their

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*'They [traditional bricks and mortar retailers] wouldn't have done anything particularly impressive to generate revenue or sales. They in essence had just sales on their doorstep because you've got an ageing population, you've got more people using the products, they're becoming more socially acceptable, so they've got more footfall coming into the showroom. You've also got people that aren't aware of the products, what the price is, why is the price this? Why is the price that? So there would never be a price on a product so you could go into a shop and there might be a price on some of them, but the prices would be from ... obviously from me I know what a scooter costs, so, you know, they'd be selling something that costs £400.00 for like £2,000.00 or whatever pounds and they would judge people as they came in and stuff and they became used to making these astronomical margins.*

*I think maybe the recession hit, more and more internet companies popped up and started to do more business. They probably saw less footfall coming into the showroom and when they did come into the showroom they started to hunt around a little bit more. Everyone's trying to save money. They would then know.*

*They would obviously find out that people would come in the shop and then they might see them about locally on a scooter, so it didn't take a rocket scientist to work out they've either tried to buy it cheaper or ... they then go to the people that are supplying them with the product – [redacted name of supplier] or [redacted name of supplier] or whoever – who then say, "Oh I'm really sorry," and probably those local sales people ... unless you've got like a big internet company and you're the local sales person in that area, you know, you're lucky in a way..'*

<sup>35</sup> In this Decision the term 'doorstep sales' refers to transactions which take place when a consumer is visited by a trader in their home.

sales.<sup>36</sup> This sales channel therefore represents the primary route to the market for suppliers in order to allow them to reach end-consumers. Roma further noted in its response to a statutory information request that it only supplies retailers with 'shop fronts'.<sup>37</sup> However, the internet has played an increasingly important role in the sector both as a sales channel<sup>38</sup> and a means to provide price and product information (including as a means to attract the business of consumers who may prefer to make a purchase offline but who use the internet to identify a competitively-priced retailer).<sup>39</sup>

## How information and choice of sales channels may impact on consumers

2.38 As set out above, well-functioning markets depend both on competition working well and on consumers making good choices. Consumers drive competition where they are empowered to shop

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<sup>36</sup> The OFT estimated this from data provided in: Document 2813DR, Document 3692EME, Document 3807Inv, Document 3722Kymco, Document 3739Minic, Document 3442PR, Document 3704SunM, Document 3765TGA, Document 3713VanOs, Document 3845HandM and Document 3845ProR.

<sup>37</sup> See document 3438RO.

<sup>38</sup> Of the nine suppliers who commented on whether the number of online sales has been increasing eight of them confirmed that they had. Documents: 3807Inv, 3845ProR, 3765TGA, 3740DPH, 3722Kymco, 3845HandM, 3704SunM, 3713VanOs, 2813DR.

<sup>39</sup> The internet's importance as an advertising tool is supported by the evidence from retailers: [Document number redacted] : *'Realistically, the internet is a modern tool for shopping that increases a dealer's target audience; is an excellent marketing device and it helps consumers to know what is available.'*

[Document number redacted]: *'[retailer name redacted] has retail outlets and uses the internet for showing the products.'*

[Document number redacted]: *'[retailer name redacted] also operates a website with e-commerce capability but as to mobility scooters, the website is primarily for advertising and marketing purposes.'*

The internet's importance as an information channel is also highlighted in Roma's 'Call Reports'. Document 1598RO: *'Even if they end up buying in a shop, many customers will have done their research online first.'*

around through access to readily available and accurate information about the products they are seeking and the various offers available in the market. The provision of price and product information plays an important role in this respect. In this context, the internet may be particularly important as a means to make such information easily accessible to end-consumers, particularly those having restricted mobility.

2.39 In the absence of such information being available on the internet, consumers are required to do any one or more of the following in order to compare prices:

- physically visit multiple bricks and mortar retailers,
- telephone multiple retailers, in order to obtain the relevant information and to compare the various available offers,
- invite a salesperson to their home to obtain the relevant information.

2.40 There is evidence that potential users of mobility scooters may be deterred from physically visiting multiple bricks and mortar retailers due to their restricted mobility, which may make it difficult to shop around in that way.<sup>40</sup>

2.41 The amount of time and effort required to shop around must also be taken into account. Physically visiting multiple stores (especially where they are distant from one another) and telephoning various retailers can be time-consuming and costly. Consumers typically weigh up the expected benefits (that is, the savings they can make by shopping around) against the costs, including the time, involved in achieving such benefits. The more difficult it is for consumers to compare the various offers available, the less likely it is they will engage in that process, which can result in them paying higher prices or potentially purchasing products that are less suitable to their needs.

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<sup>40</sup> In-depth interviews of the 2011 Mobility Aids Research Report commissioned by the OFT highlighted that it was difficult for some people with limited mobility to visit different dealers which may have contributed to them feeling they had little choice of retailers (see page 11 of the Mobility Aids Research Report).

- 2.42 The use of search functions on the internet, price comparison websites and applications such as 'Google shopping' makes shopping around easier as it requires very little effort on the part of consumers to obtain product information and information on prices. In addition, where products can also be purchased on the internet, consumers benefit from being able to complete their purchase transaction easily without being required to travel any distance. The internet also allows consumers to involve friends and family in the purchase more easily.<sup>41</sup>
- 2.43 Easy access to products and information via the internet can therefore:
- make it easier for consumers to compare product and price information;
  - provide consumers with a greater number of retailers they can purchase from, and
  - make it easier for consumers to access a greater number of product offerings than may otherwise be available in their local geographic area.
- 2.44 As a result, the internet can intensify price competition between retailers and enable consumers to obtain better value for money.

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<sup>41</sup> Evidence from retailers supports the importance of assistance from family members when purchasing a mobility scooter and the role of family members in conducting searches prior to purchasing the product.

[Document number redacted]: '*Consumers generally need the assistance of family members to do this, which [sic] family members also often assist in the final decision as to which scooter to purchase.*'

[Document number redacted]: '*For many elderly customers their younger relatives look up the products on the internet.*'

[Document number redacted]: '*Customers will invariably be accompanied by a family member who has conducted prior research and will support OSM's advice to the user to ensure the correct product is selected.*'

[Document number redacted]: '*95% of customers would know what they need when they call, but this is likely due to users calling upon the assistance of family members who will be savvier with online research before purchasing a product.*'

2.45 In summary then, in a sector such as the mobility scooters sector, where:

- (i) end-consumers have restricted mobility and may therefore not be able to visit several bricks and mortar outlets, and
- (ii) customers are often first-time buyers,

the ease of access to price and product information and alternative sales methods can be particularly important. Therefore, an increase in the choice of retailers via the internet<sup>42</sup> and increased price transparency, alongside relevant product and service information, can positively impact consumers' ability to identify the best deal for them, at very low search costs. This increased price transparency and an increase in the number of - potentially more efficient - retailers that consumers can buy from are likely to strengthen price competition<sup>43</sup> between mobility scooter retailers, including bricks and mortar retailers and hybrid retailers as well as doorstep sellers, and result in lower end-prices.<sup>44</sup>

### ***Incentives of Roma to introduce the online sales and online price advertising prohibitions***

2.46 As set out above, bricks and mortar retailers constitute suppliers' primary route to the market, as they represent approximately 70-75 percent of suppliers' sales.<sup>45</sup> Moreover, the OFT has been informed that bricks and mortar retailers typically stock up to four brands of scooters due to the limited space available in their outlets.<sup>46</sup> Roma has

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<sup>42</sup> One would expect the internet to provide more choice in two ways. First, consumers can choose to purchase from retailers that are situated outside of their local geographic area or that only exist online, thereby providing them with a wider choice of retailers to purchase from. Second, the internet can offer alternative means of providing product and price information, and may result in competitive pricing, in particular where internet retailers face lower fixed costs.

<sup>43</sup> Ibid.

<sup>44</sup> See footnote 8 above.

<sup>45</sup> See footnote 36 above.

<sup>46</sup> Documents: 3823TI, 3812TI, 3827TI, 3821TI and 3820TI.

therefore been 'competing' with other mobility scooter suppliers to get the Roma-branded mobility scooters stocked and sold by retailers.<sup>47</sup>

2.47 Ordinarily, therefore, the OFT would expect that in the absence of a prohibition on online sales and online price advertising, a supplier would be required to compete keenly on cost prices in order to incentivise retailers to stock its products.<sup>48</sup>

2.48 The OFT has been informed that local bricks and mortar retailers have been facing growing pressure on their prices as a result of retailers advertising and/or selling mobility scooters online. The documentary evidence produced by the parties shows certain retailers complaining to Roma that they were unable to compete with 'internet prices' and that they were losing sales and/or that margins were decreasing as a result<sup>49</sup>. In its representations, Roma stated that it '*accepts that it received such feedback*' from retailers.<sup>50</sup>

2.49 Moreover, the documentary evidence produced by the Parties demonstrates that bricks and mortar retailers are less willing to stock a mobility scooter supplier's products, if they perceive those products to be subject to vigorous intra-brand price competition, particularly through the internet<sup>51</sup>.

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<sup>47</sup> See paragraph 2.50. Indeed, Roma noted in its representations (at paragraph 5.30) that it does not have any exclusivity arrangements with retailers, such that it is in competition with other suppliers in respect of its whole dealer network.

<sup>48</sup> Evidence from Roma's 'Call Reports' suggests that this may be the case:

Document 1407RO: '*they would happily pay MORE for product that is kept off the internet. Make product for SHOP ONLY and RMA would have a winner.*'

Document 2487RO: '*Thought price a bit high but if can protect from Internet then more chance of dealers buying.*'

<sup>49</sup> See paragraphs 2.79, 2.80 and 2.86.

<sup>50</sup> Roma's representations, paragraph 5.31.

<sup>51</sup> See paragraphs 2.67, 2.79 and 2.90.

- 2.50 The documentary evidence demonstrates that one reason why Roma introduced the Prohibitions was to incentivise bricks and mortar retailers to stock and sell their products, on the basis that retailers would not face intra-brand competition from the internet and could therefore achieve a higher margin than would otherwise be the case.<sup>52</sup>
- 2.51 In its representations Roma disputed that this was the '*prime reason*' for introducing the Prohibitions, albeit Roma did accept that '*this may have been an indirect consequence of the action*'.<sup>53</sup>
- 2.52 While it is not necessary in this case to consider Roma's incentives in order to conclude that there has been a breach of the Chapter I prohibition, the OFT has considered the contemporaneous documentary evidence in order to understand the context in which the prohibitions were introduced. The evidence referred to in Section D below entitled 'Historical Background to the Infringements' demonstrates that from June 2010 onwards Roma sought to identify ways of maintaining certain retail price points for Roma-branded mobility scooters. The evidence further suggests that the introduction of the online sale prohibition and online price advertising prohibition was an important part of an ongoing effort to achieve such price points '*without losing sales*'<sup>54</sup> or indeed to increase sales so as to '*secure themselves a very strong position in the sector*'.<sup>55</sup>
- 2.53 The OFT does not suggest that these were Roma's sole incentives, and indeed it does not rule out that Roma may have had further aims

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<sup>52</sup> Roma's 'Call Reports' indicate that retailers were more willing to stock Roma products due to the prohibitions:

Document 1609RO: '*has tried to stock product that hasn't been sold online. Now we have removed the ROMA brand from the nett [sic], we will become his sole scooter supplier.*'

Document 1477RO: '*Roma has lost lot of business with this customer due to scooters being sold cheap on Internet. There will be 2 x Granada sales coming from the open day and Russell says he will a lot more now ROMA brand not on internet.*'

<sup>53</sup> Roma's representations, paragraphs 5.32 and 5.35.

<sup>54</sup> Document 2501RO.

<sup>55</sup> Document 2833RO.

when introducing the Prohibitions. However, this does not prevent a finding of an infringement of the Chapter I prohibition.

### ***Conclusion***

2.54 Against this background, the OFT is concerned that, particularly in the context of a distribution system that is selective, and where intra-brand competition has therefore already been limited, a prohibition on online price advertising and a prohibition on online sales undermine benefits of consumer search and choice brought about by the internet.

2.55 The OFT is particularly concerned that in a sector such as the mobility scooters sector, where consumers are potentially more vulnerable and may be less able to shop around physically, the above-named prohibitions are liable to disproportionately impact on such consumers and to place them at a particular disadvantage.

## **D HISTORICAL BACKGROUND TO THE INFRINGEMENTS**

2.56 In the Statement issued on 21 March 2013 the OFT had not proposed to make a provisional finding that Roma and certain of its retailers had infringed the Chapter I prohibition for the period prior to July 2011. However, it is nonetheless helpful to summarise the contemporaneous documents and the accounts provided in interview relating to the period prior to July 2011 in order to understand the context of what followed.

2.57 The evidence produced to the OFT demonstrates that Roma was concerned about low internet prices from as early as June 2010. There then followed a period between June 2010 and the end of June 2011 in which Roma sought to identify ways of maintaining certain retail price points in respect of its mobility scooters. Its actions in that connection included:

- requesting and/or instructing retailers not to sell certain mobility scooters supplied by Roma below the recommended retail price (RRP),
- requesting and/or instructing retailers not to sell certain mobility scooters supplied by Roma below the '*average price*' that other retailers in the same or similar geographic area were charging, and

- requesting and/or instructing retailers not to advertise certain mobility scooters supplied by Roma below the RRP.

2.58 In interview<sup>56</sup> with the OFT on 4 September 2012, Roma's Commercial Director [name redacted] confirmed that Roma was concerned about low internet prices in 2010:

*'When I joined Roma [in August 2010] a number of the Area Managers, the sales guys and dealers approached me with concerns of certain companies on the internet [that] were selling scooters at extremely low prices which made it difficult for the majority of dealers to compete. [...]*

He added:

*[...] how [could] these companies offer such low prices? [...] How could they provide the service and support to the customer base, if they're based in say Bridgend and they were selling up to the north east of England [...] to ensure they can get a call out and give peace of mind to the public?'*

2.59 In its representations Roma confirmed that its concern regarding internet pricing was *'reflective of feedback from retailers that certain internet retailers were selling at exceptionally low prices with which they could not compete'*.<sup>57</sup>

2.60 While Roma's Commercial Director [name redacted] confirmed in interview that Roma required its retailers to provide the necessary level of pre- and post-sales service to end-consumers, he noted in interview Roma's concern that retailers' margins should be sufficiently high in order to cover the labour costs of repairing and maintaining mobility scooters that break down within the manufacturer's warranty period.<sup>58</sup> He stated that this is because end-consumers do not expect

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<sup>56</sup> Document 3451WS (CD 1 of 5, page 16).

<sup>57</sup> Roma's representations, paragraphs 5.33.

<sup>58</sup> Document 3451WS (CD 1 of 5, pages 17 and 19).

to pay for repair/maintenance costs within the warranty period and Roma's policy is only to replace the relevant spare part.<sup>59</sup>

2.61 Roma's Commercial Director [name redacted] stated that Roma had therefore communicated the following to retailers, initially in respect of the Roma-branded Sorrento model and later in respect of other Roma-branded Scooters:

*'[The internal guidelines to Area Sales Managers were] along the lines of ensuring that people don't undersell the products, wording as I say the phrases of, you know, 'sell at an average price'[...].'<sup>60</sup>*

2.62 There is evidence of such communications, which is set out from paragraph 2.70 onwards.

2.63 Roma's Commercial Director [name redacted] further stated in interview<sup>61</sup> that Roma had not requested retailers to sell at a specific price point or at a minimum price:<sup>62</sup>

*'So the brief was to try to get everyone to be in a position to say "let's look at this sensibly across the UK, we're not asking you to sell at a specific price".*

*Which is, if you think of it you've got a zone between the price which is trade [wholesale price] and the RRP you know. But sell sensibly so that you can exist and ...that's ...the remit was for dealers to go forward with the principle to say these are Roma branded products, no-one else has them and then to take people on a general awareness that they could then get a product from Roma we're supporting the dealer'.*

2.64 Roma's Commercial Director [name redacted] further clarified in interview<sup>63</sup> that Roma had not specified an 'average price' but that

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<sup>59</sup> Document 3451WS (CD 1 of 5, page 18).

<sup>60</sup> Document 3451WS (CD 1 of 5, page 26).

<sup>61</sup> Document 3451WS (CD 1 of 5, page 20).

<sup>62</sup> Ibid.

retailers had determined the average price by conducting mystery shopping exercises in their local areas. However, the advent of the internet changed that:

*'with the introduction of more internet sales people have been obviously introducing lower prices and people are saying "well that's what we normally sell at, what can you do to support us here?" and of course we can't drop the pricing to the dealers because we have our costs to consider and we're not making, as I said earlier, a huge margin in the first place'.*

2.65 Finally, Roma's Commercial Director [name redacted] noted in interview<sup>64</sup> that Roma did not have 'visibility of what they [retailers] sell at', but did have visibility in respect of advertised prices.

2.66 Two 'Daily Customer Call Sheets' from a Roma Area Sales Manager [name redacted] dated 7 June 2010<sup>65</sup> and 24 June 2010<sup>66</sup> respectively demonstrate that Roma had a policy in place concerning low retail prices on the internet, and that a Roma Area Sales Manager [name redacted] had communicated that policy to certain retailers. A Roma Area Sales Manager's 'Daily Customer Call Sheet' dated 7 June 2010 notes the following:

*'Customer Name/Contact: [retailer name redacted], [name redacted] Accountant/Head Buyer, [location of retailer redacted] Objectives, Results: Pushed new scooter range and agreed to maintain pricing policy. Thought it a good idea and will support RMA [Roma]. [...]'.*

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<sup>63</sup> Document 3451/WSIbid (CD 1 of 5, page 24).

<sup>64</sup> Document 3451/WSIbid (CD 1 of 5, (pages 29-30).

<sup>65</sup> Document 0068RO.

<sup>66</sup> Document 0065RO.

2.67 In addition, a Roma Area Sales Manager's [name redacted] 'Daily Customer Call Sheet' dated 24 June 2010<sup>67</sup> notes the following:

*'Customer Name/Contact: [retailer name redacted], [location of retailer redacted]*

*Objectives , Results: New shop kicking off [...] Will promote and only show RRP. Happy with this approach.*

*Customer Name/Contact: [retailer name redacted] [remainder of sentence is illegible]*

*Objectives, Results: Pushed new scooter models. Very interested in scooters not sold cheap on Internet [sic]. Outlined RMA [Roma] policy and agreed a good thing. [...]'.*

2.68 On 11 August 2010, a Roma Area Sales Manager [name redacted] sent an email to Roma's Commercial Director [name redacted] entitled 'Online prices'<sup>68</sup> which suggests that a Roma Area Sales Manager had requested and/or instructed the retailers Rutland Mobility (Discount Mobility Plus Ltd) and More Than Mobility (now MT Mobility Ltd) to either increase the price they were displaying on the internet to the RRP or to remove that price altogether.

*'You brought it to my attention last week that two of my dealers were advertising our new Sorrento scooter at discounted prices online. I have rang [sic] the dealers in question and the outcomes are as follows.*

*[Name of Rutland Mobility employee redacted]. [Name redacted] has now changed price online to rrp [sic].*

*[Name of More Than Mobility employee redacted]. Left [name redacted] a message on his answer phone. He replied by text on Monday stating he was on holiday till [sic] next week and would address the issue on his return.*

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<sup>67</sup> Ibid.

<sup>68</sup> Document 0504RO.

*I will chase [name redacted] on Monday to ensure the prices are removed or changed.'*

2.69 It can be inferred that Rutland Mobility adhered to a Roma Area Sales Manager [name redacted]'s request/instruction and that, as a minimum, MT Mobility Ltd expressed its willingness to adhere to the Roma Area Sales Manager's request.

2.70 Roma's Commercial Director [name redacted] responded by email the same day<sup>69</sup>, requesting all Area Sales Managers to monitor retailers' prices, and to address any issues of 'underselling'/'offering lower than recommended prices' in the same manner. Roma's Commercial Director [name redacted] further noted that Areas Sales Managers should inform him of any retailers that were unwilling to change their pricing:

*'[...] please police issues such as this in the way [Roma Area Sales Manager's name redacted] has approached it, ie [sic] send an update on who is underselling our products and the outcome of the calls you've had with those Dealers who have been offering lower than recommended prices.*

*It's as [sic] important to inform me of those who give you a hard time or are unwilling to change their pricing. I will deal with those who fall into this category.'*

2.71 As set out in paragraph 2.61 above, in interview with the OFT, Roma's Commercial Director [name redacted] confirmed that Roma's Area Sales Managers had been instructed to request retailers not to 'undersell' products or to 'sell at an average price'[...]. Roma's Commercial Director [name redacted] further confirmed that many retailers had backed Roma's requests, albeit there were 'one or two who were at times playing lip service.'<sup>70</sup>

2.72 Roma's policy towards low retail prices is further set out in an external email from Roma's Commercial Director [name redacted] to

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<sup>69</sup> Document 0504RO.

<sup>70</sup> Document 3451WS (CD 1 of 5, page 27).

the retailer [retailer name redacted] dated 13 August 2010,<sup>71</sup> in which Roma's Commercial Director [name redacted] explained to [retailer name redacted] that Roma's Area Sales Managers had been instructed to contact retailers 'offering very low prices' and to request that they 'increase their pricing':

*'2. Internet pricing/Dealers reducing pricing. **Action-** As of Wednesday each ASM [Area Sales Manager] has been briefed to update me on who and what products are falling into this category, i.e. offering very low prices that have an impact on Dealers across the UK who are selling at a more realistic level. The ASM will ask the Dealer to increase their pricing- if they don't take this onboard [sic] the Dealers will be contacted by me. From here I can do a couple of potential things-*

*a. Withdraw the product from the Dealer- until they resolve the pricing issue*

*b. Possibly close the Dealer down if they are a repeat offender and don't which [sic] to work in partnership with Roma Medical*

*The last suggestion is an extreme one but we need to ensure everyone adheres to best practice and we all maximise the level of profit we can make.'*

2.73 That email was then forwarded by Roma's Commercial Director [name redacted] to all Area Sales Managers later that day<sup>72</sup> with the request that they do the following:

*'inform all of your Dealers reference point 2. However, please use caution about communicating points a & b in point 2 – i.e. closing accounts down. Just brief everyone that we intend to "police" who is taking advantage and we intend to talk to those who are not playing the game and get them back in line'.*

2.74 There is further evidence that Roma did in fact 'police' certain retailers' websites and that such retailers would be instructed to take

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<sup>71</sup> Document 0492RO.

<sup>72</sup> Document 0503RO.

'corrective action'. In an email from Roma's Commercial Director [name redacted] to Roma's Managing Director [name redacted] and Roma's Company Directors [names redacted] dated 13 August 2010,<sup>73</sup> Roma's Commercial Director stated:

*'FYI – [name redacted] and I are discussing the Top 40 Dealers later today. I've issued a definitive list – The ASMs [Area Sales Managers] have began [sic] policing the Dealers who are dropping their pricing on the internet already and will inform me of who and what corrective actions have taken place or update me if I need to get involved.'*

2.75 On 23 August 2010, a Roma Sales and Administrative Support employee [name redacted] sent an email<sup>74</sup> to Roma's Commercial Director [name redacted], Roma's Company Directors [names redacted], and two of Roma's Area Sales Managers [names redacted], notifying them that she had received complaints from the retailer [retailer name redacted] in respect of another retailer's online pricing:

*'I've recieved [sic] some complaints from I [retailer name redacted] reporting [retailer name redacted] [retailer location redacted] is selling Paris [mobility scooter] at £695 via his website.'*

*[retailer name redacted] have been advised to sell the Paris for no less than £999 so obviously [name redacted]'s concerned. Please could you look into it'.*

2.76 On 24 August 2010, Roma's Commercial Director [name redacted] responded to that email as follows:<sup>75</sup>

*' [...] ASMs [Area Sales Managers], as per the brief supplied involving the new procedure set up to tackle lower prices on the net, please deal with this and report back that the issue has been dealt with.'*

2.77 This was followed by an email from a Roma Area Sales Manager [name redacted] to Roma's Commercial Director [name redacted]

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<sup>73</sup> Document 0463RO.

<sup>74</sup> Document 0549RO.

<sup>75</sup> Document 0549RO.

dated 27 August 2010,<sup>76</sup> which summarises a discussion held on 24 August 2010 between a Roma Area Sales Manager [name redacted] and the retailer Mobility Independence as follows:

*'Tuesday 24/8/2010*

*Mobility Independance [sic] [...] Present.* [Name of Mobility Independence employee redacted], [Name of Roma Area Sales Manager redacted].

*\*internet prices/ new procedure [...]*

[Name of Mobility Independence employee redacted] *also welcomed the policing of internet prices on our new scooter range. When I asked him to look at some of the shoprider prices on his own site (ie paris 695) he said he would gladly up his prices, but only when everybody else does. DMD was who he was referring to.'*

2.78 Annexe E lists a limited selection of the internal 'Call Reports'<sup>77</sup> produced by Roma's Area Sales Managers from August 2010 to March 2012, summarising their discussions with retailers on Roma's online policy. A number of emails further demonstrate that certain retailers believed that Roma's policy would stop its products from being 'devalued' and would allow retailers to 'maintain a decent margin'<sup>78</sup> and/or would protect their sales volume.

2.79 For example, the following internal email from a Roma Area Sales Manager [name redacted] to Roma's Commercial Director [name redacted] dated 27 August 2010, summarises her discussion with the

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<sup>76</sup> Document 0485RO.

<sup>77</sup> Call Reports were generated by Roma's Area Sales Managers to briefly record the details of their visits to Roma's retailer network. The evidence available suggests that the completed Call Reports were sent to Roma's Commercial Director [name redacted] and/or other Roma directors on a weekly basis.

<sup>78</sup> See for example document 0526RO.

retailer [retailer name redacted] concerning Roma's 'new procedures' as follows:<sup>79</sup>

*'Visited [name redacted] at [retailer name redacted] on Wednesday 25 of August [2010]. The following things were discussed:*

- *Online pricing. Discussed new procedure to address this problem. [name redacted] would welcome this move and firmly believes that suppliers have devalued products by allowing internet companies to advertise at low prices. He buys some scooters from [supplier's name redacted] as they have been reasonably active at policing internet prices which in turn makes it easier for dealers to maintain a decent margin. [...]*

2.80 Similarly, a Roma Area Sales Manager's [name redacted] email dated 27 August 2010 to Roma's Commercial Director [name redacted]<sup>80</sup> summarises her discussion with the retailer [retailer name redacted] as follows:

*'Visited [retailer name redacted] on Thursday 26th August. Points raised were as follows:*

- *Discussed online pricing procedures. Met with enthusiasm as they feel internet companies are definitely [sic] impacting on dealer sales.'*

2.81 An email from Roma's Commercial Director [name redacted] to a Roma Area Sales Manager [name redacted] dated 17 September 2010<sup>81</sup> suggests that Roma had requested the retailer [retailer name redacted] to increase its prices in line with its local competitors:

*'If the Dealer is dropping the price to below the "standard position" - i.e. other surrounding Dealers selling at a higher average price. Action = C Don to address with [retailer name redacted] by using the internet pricing procedure. It's to be communicated the range of*

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<sup>79</sup> Document 0526RO.

<sup>80</sup> Document 0581RO.

<sup>81</sup> Document 0497RO.

*scooters - i.e. approx 20 scooters units YTD, will be withdrawn from the account if [retailer name redacted]'s [sic] continue to not promote best practice.*

*Before taking action please confirm with [retailer name redacted] the level of growth, i.e. what products and when we can expect?*

*Tell [name redacted] once you've gained future commitment you will speak to [retailer name redacted]'s [sic] about the follow through relating to the planned activity.'*

2.82 Roma's Commercial Director's [name redacted] witness evidence is consistent with this documentary evidence.<sup>82</sup> As set out in paragraph 2.63 above, Roma's Commercial Director [name redacted] stated that Roma had not specified a price which retailers would be required to sell at. However, Roma's Commercial Director [name redacted] confirmed that Roma had requested certain retailers to increase their prices to be in line with 'the norm' or the 'standard position' on prices in that retailer's local geographic area. Roma's Commercial Director [name redacted] further clarified that Roma had not in fact withdrawn any products from [retailer name redacted].

2.83 The following internal email exchange demonstrates that Roma instructed the retailer Protec (trading as Factory Outlet Scooters) to increase its advertised price on the internet to the RRP. In an email dated 27 September 2010 from a Roma Area Sales Manager [name redacted] to a Roma Area Sales Manager [name redacted] copying in Roma's Commercial Director [name redacted]<sup>83</sup>, a Roma Area Sales Manager was requested to communicate the following to the retailer Factory Outlet Scooters:

*'Hi [Roma Area Sales Manager's name redacted].. [sic]*

*Hope your [sic] well, Can you please have a word with F.O.S again as they are advertising Sorrento on Internet site for £1395 again, they*

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<sup>82</sup> Document 3454WS (CD 4 of 5, page 10).

<sup>83</sup> Document 0513RO.

*lost me sales again today, just when most dealers applauding RMA stance on internet pricing policy.'*

2.84 This was followed by an email of the same date from a Roma Area Sales Manager [name redacted] to a Roma Area Sales Manager [name redacted], copying in Roma's Commercial Director [name redacted]:<sup>84</sup>:

*'I will speak to them first thing in the morning mate.  
Thanks for letting me know.'*

2.85 The following day Roma Area Sales Manager [name redacted] sent the following email to a Roma Area Sales Manager [name redacted] copying in Roma's Commercial Director [name redacted]:<sup>85</sup>

*'I have spoke [sic] to FOS this morning, the price on the sorrento will be changed back to rrp by the end of the day.'*

2.86 The following two internal emails demonstrate that Roma continued to communicate its policy on low internet pricing to retailers. In an internal email from Roma's Commercial Director [name redacted] to two Roma Area Sales Managers [names redacted] dated 16 November 2010,<sup>86</sup> Roma's Commercial Director [name redacted] noted the following:

*'[Name of Roma Area Sales Manager redacted] - I spoke to [name redacted] at this account earlier who told me that they lost a sale of a scooter on the internet to [retailer name redacted] due to the low price they were offering? [sic]*

*If correct can you please liaise with [Roma Area Sales Manager's name redacted], I'm assuming this is your account [Roma Area Sales Manager's name redacted], and report back to me on what action has been taken.'*

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<sup>84</sup> Document 0467RO.

<sup>85</sup> Document 0513RO.

<sup>86</sup> Document 0473RO.

2.87 A Roma Area Sales Manager [name redacted] responded to Roma's Commercial Director [name redacted] on the same day, requesting that something be done to '[lessen] the price difference between dealers and internet sellers' as this would 'benefit everyone in the long term by raising margins' particularly since end-users no longer appeared to value the benefits of after-sales care:<sup>87</sup>

*'I spoke to [name redacted] yesterday and although [retailer name redacted] was the one they came up against this week it now appears to be happening on a regular basis. [name redacted]'s not the only customer to complain.*

*When I checked online there are lots of different companies doing our powerchairs at silly prices. [...]*

*I know we can't price fix but surely there must be some way of lessening the price differences between dealers and the internet sellers. It would surely benefit everyone in the long term by raising margins. End users only see the large savings and because of the amounts involved don't value the benefits of local and after care service in the way they used too [sic].*

*Surely there must be some way we can find a middle ground for our customers and reassure them that we are taking this seriously.'*

2.88 An Annual Sales Meeting PowerPoint presentation dated December 2010<sup>88</sup> shows that Roma discussed the 'withdrawal of prices of Roma branded scooters from Dealer websites'.

2.89 In addition, the following email from a Roma Area Sales Manager [name redacted] dated 11 February 2011 to Roma's Commercial

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<sup>87</sup> Document 0473RO. While a Roma Area Sales Manager [name redacted]'s email refers to a different product, namely powered wheelchairs, that email should be read in the context of Roma's Commercial Director's [name redacted]'s earlier email (dated 16 November 2010), which relates to mobility scooters. Moreover, the policy that was subsequently introduced by Roma applied to mobility scooters. This document has therefore been referred to above.

<sup>88</sup> Document 1382RO.

Director [name redacted]<sup>89</sup> sets out that he had in the past advised retailers not to put prices on their websites with the following aim:

*'One very controversial topic is of course THE INTERNET... Love it or hate it, it is here to stay and its not going to go away and as we all know it is growing... fast.*

*Although the vast majority of dealers have their own website many seem to think it's just a platform for selling CHEAP..... Rather they should be using it as a window of opportunity to reach people such as the housebound disabled... who do not always look at price, what they want generally is a good and knowledgeable company offering quality of service and sound advice. I always advice [sic] dealers NOT to put prices on their websites, rather put their FULL contact details and FULL ADDRESS and name of contact, rather than the 0800/0845 phone numbers which seem to populate most sites. Then its [sic] up to the dealer to use his skills to complete the sale'.*

2.90 The following email from a Roma Area Sales Manager [name redacted] to Roma's Commercial Director [name redacted] dated 26 February 2011<sup>90</sup> reveals that Roma considered that it was losing sales due to low internet pricing, and that one possible solution being offered to solve that problem was to make products available for sale 'in store' only:

*'They just lost sale of Sorrento due to DMD selling it at £995 (Second dealer this week with same problem) [sic]. They sold Sorrento well until Internet dealers dropped prices. Something has to be done as RMA losing business from many dealers due to this.*

*Said they only buy GoGo from Pride as prefer Shoprider, very loyal dealer but plagued by internet [sic].*

*Said they would happily pay MORE for product that is kept off the internet. Make product for SHOP ONLY sale and RMA would have a winner. This system works well in other fields of retailing*

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<sup>89</sup> Document 0884RO.

<sup>90</sup> Document 1407RO.

*Main reason is pricing too expensive plus low pricing on Internet [sic] for RMA products'.*

- 2.91 An email dated 25 May 2011 from a Roma Area Sales Manager [name redacted] to Roma's Commercial Director [name redacted], (copying in Roma's Managing Director [name redacted] and Roma Company Directors [names redacted])<sup>91</sup> demonstrates that Roma continued to seek a solution to the 'damaging [internet] issue' 'without losing sales':

*'I was speaking to one of my dealers today regarding the Granada and he made a suggestion regarding internet sales. What if we compiled a letter that dealers have to sign to agree that if they advertise the Granada it should be for the RRP and when they receive enquiries they can then sell at whatever they decide. **I think this could be a way of dealing with this damaging issue without losing sales?**' [Emphasis added]*

- 2.92 An email dated 14 June 2011 from a Roma Area Sales Manager [name redacted] to Roma's Commercial Director [name redacted]<sup>92</sup> demonstrates that Roma was considering making certain of its products available for sale 'in store only':

*'I've given some thought to the conversation we had last night regarding the "In store only" [sic] product range. I think it's great that we are all coming up with ideas and thinking outside the box in the pursuit of increased sales. What is also great is the fact that the whole sales team realise that in these times of a "depressed market", the best way of securing business is through the support, back up and loyalty we can offer to our dealer network. There is an opportunity out there at the minute for one of the leading manufacturers / importers to grab this market by the scruff of the neck and secure themselves a very strong position within the sector. I honestly think we are one good idea (strategy) away from being the countries [sic] number one supplier of generic mobility products. The question is, is this the one? Is this the one that's going to make us stand out from*

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<sup>91</sup> Document 2501RO.

<sup>92</sup> Document 2833RO.

*the crowd? Is this the one that's going to say to our customers, "I can't afford not to be using ROMA MEDICAL AIDS as my preferred supplier?"*

2.93 A Roma Area Sales Manager [name redacted]'s email further describes how the concept of 'in store only' products could be attractive to Roma's retailers, and that one of the benefits to retailers could include 'better potential dealer margin' whilst still incentivising such retailers to stock Roma's products:

*'I've tried to look at this proposition objectively, taking into consideration both sides of the argument and have listed what I perceive to be the "pro's and con's" of the idea. I've looked at how we can sell this concept to our dealers and tried to look for ways in which it could potentially fall down.*

- *A suite of products that are only available "in store"*
- *Greater value for money with a better potential dealer margin*
- *No need to price match cheap online prices*
- *Give their customers a feeling of exclusivity*

*We are all as A.S.M's constantly being told by dealers that current online prices are putting them off stocking certain products from our portfolio on their shop floors. The above listed bullet points would certainly end that argument and take away that objection from buying our products. What we need to establish is, once we have removed that objection, will the people that are complaining then back us and put the products into stock? I've got no doubt what so ever [sic] that some would. But what we also need to find out is, what is it going to give us in terms of volume?'*

2.94 A Roma Area Sales Manager [name redacted] further suggested that before introducing an 'in store only' sales policy, it would be prudent to canvass the opinion of retailers to ensure that such a policy would lead to the increase in sales that Roma desired. A Roma Area Sales Manager [name redacted] further recommended that retailers' adherence to such a policy should be 'policed':

*'What I suggest going forward with this is, all area managers to compile a list of any interested dealers, as well as producing a list of*

*names we also need to produce estimated volumes. We can collate this information in the same way we did at the end of last year when producing our top 10 opportunity accounts. The products we are talking about using in this scheme are currently low volume for us, so any "guaranteed" increase would be a fantastic result.*

*However, what we really need to establish is that "is this a real objection and not just a smoke screen"? The reason I say that is quite simple. The biggest selling mobility scooter online by some way is the go-go from Pride. This product is also sold into 90% of the retail outlets; including the ones that are complaining about online prices, with that in mind surely we are looking at a massive case of double standards. When I've pointed this fact out to dealers in the past they have never come back with a credible answer. My fear is that once we've removed this objection, they will come up with another one, we have then during the process, compromised our position with some of the larger dealers that also sell online. Weather [sic] we like it or not,*

- The internet is the only retail platform that is growing in this current economic climate*
- A large part of R.M.A's revenue is generated by online retailers*
- Products that are sold online mirror what is being stocked in store*
- More and more people go online now to find what they are looking for, at the price they want they want [sic] to pay*
- If internet dealers haven't got access to particular products they will inevitably push end users onto products they have got*

*In summary, to identify whether this is a viable strategy to push forward with we need to conduct the above mentioned research. We need to be asking the right questions to the right dealers. We need to be firm in our approach and we need to be blunt when seeking answers. We need to be saying to our dealers, "If RMA go ahead with this plan, will you replace the go-go on your shop floor with the corella? [sic]" "Will RMA become your preferred supplier?" Once we've had these questions answered we can then evaluate the potential of the proposed idea.*

*Other things will need to be considered. How are we going to police this? Other companies have come up with similar promises and due to the fact they haven't policed it properly, the idea has lost credibility*

*before its [sic] got going.*

*Although I believe this is a good idea and it is something that could generate more sales, I'm just not sure its [sic] enough to incentives [sic] enough dealers to use us as their preferred supplier. I think we need to be a bit more creative and push concepts and ideas that don't exclude any sector of our customer database. That said I am more than happy to canvass opinion within my territory to see where this could go.'*

2.95 On the following day, a Roma Area Sales Manager [name redacted] contacted a number of retailers ([retailer name redacted], [retailer name redacted]) in order to canvass their opinion on the introduction of an 'in store' only sales policy.<sup>93</sup>

### **Conclusion**

2.96 The evidence above demonstrates that between June 2010 and the end of June 2011 Roma sought to identify ways of maintaining certain retail price points in respect of its mobility scooters. Its actions in that connection included:

- requesting and/or instructing retailers not to advertise certain mobility scooters supplied by Roma below the RRP,
- requesting and/or instructing retailers not to sell certain mobility scooters supplied by Roma below the recommended retail price (RRP), and
- requesting and/or instructing retailers not to sell certain mobility scooters supplied by Roma below the '*average price*' that other retailers in the same or similar geographic area were charging.

2.97 The evidence set out above further demonstrates that the introduction of the online sales prohibition and online price advertising prohibition

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<sup>93</sup> Document 2450RO.

was part of a continued effort on the part of Roma to address the issue of low internet prices.

2.98 In particular, the evidence above demonstrates that Roma's concerns that retailers were facing increasing pressure on retail prices and/or retail margins as a result of low 'internet prices', which it wished to address.

2.99 Moreover, the documentary evidence produced by the Parties demonstrates that bricks and mortar retailers are less willing to stock a mobility scooter supplier's products if they perceive those products to be subject to vigorous intra-brand price competition, particularly through the internet.

2.100 The documentary evidence demonstrates that Roma introduced its prohibition on:

- online sales, and
- online price advertising

as a means to incentivise bricks and mortar retailers to stock and sell its products on the basis that retailers would not face intra-brand competition from the internet and could therefore achieve a higher margin than would otherwise be the case.

### **3 THE INFRINGEMENTS**

#### **A Introduction**

3.1 This part of the Decision analyses the evidence relied on by the OFT and states the inferences and conclusions that it draws from that evidence. In the sections that deal with individual elements of the Chapter I prohibition the legal principles relevant to each section are summarised at the outset. A fuller account of the legal framework is at Annexe A below, to which the summarised legal principles refer.

#### **B Undertakings**

3.2 As set out in Annexe A, an 'undertaking' for the purposes of the Chapter I prohibition, includes a business engaged in an economic activity (that is, any activity of an industrial or commercial nature) regardless of its legal status or the way in which it is financed.<sup>94</sup>

3.3 Each of the Parties was, and/or is, engaged in offering for sale mobility scooters in the UK. The OFT therefore considers that each of the Parties was, and is, engaged in an economic activity and constitutes an undertaking for the purposes of the Act.

#### **C Details of the agreements and/or concerted practices**

##### ***Summary of the relevant legal principles***

3.4 The Chapter I prohibition applies both to 'agreements' and 'concerted practices'. These concepts (summarised briefly below) are not mutually exclusive and there is no rigid dividing line between the two. The key difference is that a concerted practice may exist where there is informal co-operation without any formal agreement. Agreements and concerted practices can arise between undertakings operating at different levels of the supply chain (that is, a vertical relationship between a distributor and a retailer) and between those operating at the same level in the supply chain.<sup>95</sup>

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<sup>94</sup> See Annexe A, at paragraphs A7-A10.

<sup>95</sup> See Annexe A, at paragraph A.29.

## Agreements

- 3.5 For the purposes of the Chapter I prohibition, 'agreements' include oral agreements and 'gentlemen's agreements'. There is no requirement for an agreement to be formal or legally binding, or for it to contain any enforcement mechanisms.
- 3.6 An agreement may be inferred from the conduct of the parties, including conduct that appears to be unilateral. A measure with an apparently unilateral character can constitute an agreement restricting competition for the purposes of the Chapter I prohibition if it results from a sufficiently clear and precise manifestation of a concurrence of wills regarding the implementation of a particular line of conduct on the market.
- 3.7 Where a manufacturer adopts certain measures in the context of its ongoing contractual relations with its retailers, such measures will amount to an agreement if there is express or tacit acquiescence or participation by the retailers in those measures.
- 3.8 Although it is essential to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, it is not necessary to establish a joint intention to pursue an anti-competitive aim.<sup>96</sup>

## Concerted practices

- 3.9 As with an agreement, a concerted practice can arise between undertakings at different levels of the supply chain (that is, for example a vertical relationship between a distributor and a retailer) or between those at the same level in the supply chain.<sup>97</sup>
- 3.10 A concerted practice can be established in a situation where, even if the parties did not enter into an agreement, they knowingly substituted practical cooperation between them for the risks of competition. Each

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<sup>96</sup> See Annexe A, at paragraph A.35.

<sup>97</sup> See Annexe A, at paragraph A.29.

economic operator must determine independently the policies it intends to adopt on the market.<sup>98</sup>

- 3.11 Further, the prohibition on concerted practices prohibits, amongst other things, any 'direct or indirect contact' between undertakings, the object or effect of which is to influence the conduct on the market of an actual or potential competitor.<sup>99</sup>

#### Implementation

- 3.12 The OFT is not precluded from finding that an agreement exists in the following circumstances: where one party does not act on or subsequently implement an agreement; where one party does not respect the agreement at all times or comes to recognise that it can 'cheat' on the agreement at certain times. An undertaking may still be found to be a party to an agreement where: it played only a limited part in the setting up of the agreement; it was not fully committed to its implementation; or participated only under pressure from other parties. Further, where an agreement has the object of restricting competition, parties cannot avoid liability for the resulting infringement by arguing that the agreement was never put into effect.<sup>100</sup>

#### ***Summary of the facts and evidence***

- 3.13 On the basis of the facts and evidence referred to in the remainder of this Decision, the OFT has decided that Roma and each of the Retailers, as listed in paragraph 1.8 above, have infringed the Chapter I prohibition by entering into agreements and/or participating in concerted practices which had as their *object* the prevention, restriction or distortion of competition in relation to the supply of mobility scooters in the UK, in respect of certain mobility scooters supplied by Roma by:

- prohibiting online sales by retailers between July 2011 and April 2012; and

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<sup>98</sup> See Annexe A, at paragraphs A.26 to A.27.

<sup>99</sup> See Annexe A, at paragraph A.28.

<sup>100</sup> See Annexe A, at paragraphs A.36 to A.39.

- prohibiting online advertising by retailers of any prices between July 2011 and April 2012.

3.14 The agreements and/or concerted practices comprised the following:

- A** Roma sent a circular to its retailer network on 21 June 2011, which specified that five models of mobility scooters (the *Alcora*, *Corella*<sup>101</sup>, *Sorrento*, *Lyon* and *Granada*, hereinafter referred to as the Roma-branded Scooters) would, from 4 July 2011, be available 'in store' only.<sup>102</sup> Taken together with the other evidence available to the OFT, this effectively meant that as of 4 July 2011 retailers were not permitted to:
- sell those mobility scooters online, or
  - advertise the price of those mobility scooters online.
- B** Between July 2011 and April 2012<sup>103</sup>, at least the retailers listed in paragraph 1.8 above agreed to abide by, or acquiesced in, Roma's requests and/or instructions not to engage in price advertising or to sell the Roma-branded Scooters online, although not all retailers complied with Roma's requests at all times.
- C** Between July 2011 and April 2012, Roma continued to communicate to retailers that they were not permitted to sell the Roma-branded Scooters online and to advertise the price of those mobility scooters online.

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<sup>101</sup> The Roma-branded 'Alcora' and 'Corella' mobility scooters were replaced by the Roma-branded 'Vegas' mobility scooter, which was introduced in spring 2012. The OFT's finding is that the Prohibitions also applied to the 'Vegas' mobility scooter.

<sup>102</sup> This policy did not apply to the Shoprider-branded mobility scooters which Roma supplies (Roma stated in its circular '*Please be aware that all other sales activities involving the Shoprider part of the scooter portfolio will not change.*', see document 1624RO). See also document 1412RO.

<sup>103</sup> In April 2012, the OFT formally requested the Parties to produce specified documents and information which set out any prohibitions, conditions and criteria in respect of online sales and online price advertising. Later documents and information relevant to these matters may not have been produced to the OFT.

These agreements and/or concerted practices are further evidenced by the following:

- D Roma monitored retailer compliance with its policy. In particular, wherever Roma identified that retailers were not complying with its instructions, it would instruct that retailer to remove the pricing from the internet and/or cease selling the product on the internet.
- E Roma threatened retailers that non-compliance with its policy would result in Roma ceasing to supply them with Roma-branded Scooters.

3.15 The evidence available to the OFT and the OFT's legal assessment of that evidence is set out below. It specifically sets out the existence of agreements and/or concerted practices in respect of certain retailers. However, the existence of other potentially infringing agreements and/or concerted practices between Roma and other retailers is supported by Roma's witness interview, which indicates that there were agreements and/or concerted practices similar in content, tone and nature to those pleaded below.

## KEY ELEMENTS OF ROMA'S STRATEGY

### Roma's retailer-wide communications

3.16 The following section describes two communications from Roma which were sent to its retailer network as summarised at Point A above, rather than to certain retailers only.

### Roma's first circular

3.17 In a circular dated 21 June 2011 from the Commercial Director of Roma [name redacted], addressed and sent to Roma's dealer network,<sup>104</sup> Roma stated that it was introducing a '*brief*' which would '*allow our Dealers to maximise their ability to sell Roma Medical scooters without having to concern themselves with the fact they*

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<sup>104</sup> Documents 0082CM, 1624RO, 0153GBL, 0260BL, 1622RO (and the draft version, Document 1633RO). See document 3451WS, pages 14-15. In particular, see paragraph 3.25 of this Decision for the excerpt from the Commercial Director of Roma [name redacted]'s interview with the OFT dated 4 September 2012.

*may get undercut elsewhere, especially through the internet at a much lower price.'*

3.18 The 'brief', which was said to come into effect on 4 July 2011, required retailers:

- not to sell Roma-branded Scooters on the internet such that those products could only be sold through retail premises; and
- not to advertise or promote those mobility scooters on any retailer websites.

3.19 In particular, the instructions to retailers contained in the circular were as follows:

*'Only to offer the Roma Medical branded scooters to be sold directly through the Dealers and not offered through the internet. This will mean the scooters will not be allowed to be advertised or promoted on any Dealer websites.'*

*This will include the Alcora, Corella, Lyon, Sorrento and the Granada which are all exclusive to Roma Medical.*

*The benefit of introducing this will present the Dealer with the opportunity to sell a suite of scooters that will not be available through any other channel other than in the retailer premises. This will also allow the public to receive a more personal approach from the Dealer.'*

3.20 The circular further made clear that any retailer that did not adhere to those instructions would be contacted and informed again of what was required of them:

*'Roma Medical will commit itself to regularly review the new process to ensure it is being adhered to. Anyone who attempts to sell one of the products listed through any other channel will be contacted and informed on how we intend to sell the products.'*

3.21 In interview, Roma's Commercial Director [name redacted] confirmed that the circular of 21 June 2011 referred to above had been sent to all Roma retailers:

*'OFT: [...] 'Dear dealer' so is this a circular to all dealers?*

*Roma's Commercial Director [name redacted]: That's correct.*

*OFT: So you would've sent this document to all of your dealer networks?*

*Roma's Commercial Director [name redacted]: That's correct and I believe it would've been sent probably in the post, is this an email or is it, to get a perspective, but yeah so it would've been sent to all dealers.'*<sup>105</sup>

3.22 Roma's Commercial Director [name redacted] further confirmed that the circular requested retailers not to sell online or advertise prices online in respect of the Roma-branded Scooters.<sup>106</sup>

### **Roma's second communication**

3.23 On 18 July 2011, Roma revised its instructions to retailers so as to allow them to display images of its Roma-branded Scooters on their respective websites provided that the product image was displayed with the accompanying text '*ONLY AVAILABLE INSTORE [SIC] FROM YOUR DEALER STOCKIST*'.

3.24 However, the revised 'brief' further stipulated that:

- retailers were not able to display price information online in respect of the Roma-branded Scooters; and
- retailers were not able to sell online the Roma-branded Scooters.

3.25 In particular, the revised 'brief', which Roma's Commercial Director [name redacted] requested be communicated to retailers by each of the Area Sales Managers as soon as possible, stated the following:<sup>107</sup>

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<sup>105</sup> Document 3451WS, pages 14-15.

<sup>106</sup> Documents 3453WS (CD 3 of 5, page 2).

<sup>107</sup> Document 2003RO.

*'After a percentage of Dealers have come back to us asking on [sic] how they can promote the scooters and in the interest of supporting our partnership with the Dealers- it's been decided that we will allow the scooter images to be displayed on our Dealer websites – but under the following conditions–*

[Product image]

*ONLY AVAILABLE INSTORE FROM YOUR DEALER STOCKIST*

- *As per the above scrip [sic] which mirrors our website for each of the 5 products.*
- *No suggestion on price to be given through the Dealer website- The products are there for Marketing [sic] and awareness and not to sell direct from the site.*
- *We reserve the right to take the Roma Medical scooter part of the portfolio off a Dealer if they do not adhere to the no pricing on-line strategy.*

*ASMs- please update your customer ASAP.'*

### **Roma's website policing strategy**

3.26 The OFT has evidence that Roma implemented a strategy to monitor compliance of its retailer network by 'policing' retailer websites.<sup>108</sup> Roma's web developer/coordinator [name redacted] was tasked with this on a regular basis. Roma's web developer/coordinator [name redacted] reported his findings to Roma's Commercial Director [name redacted] and at times to Roma ASMs, who would then be tasked with raising the issue of any non-compliance with those retailers still selling or advertising prices online in respect of Roma-branded Scooters.<sup>109</sup>

3.27 In an interview with the OFT on 4 September 2012, Roma's Commercial Director [name redacted] confirmed that this review of

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<sup>108</sup> Document 3449WS.

<sup>109</sup> Ibid (Page 8).

retailer websites commenced on 6 July 2011 and this marked the beginning of the monitoring of Roma's policies.<sup>110</sup>

## THE AGREEMENTS AND/OR CONCERTED PRACTICES

### *Duration*

3.28 As set out above, the evidence demonstrates that Roma's online sales and online price advertising prohibitions were first communicated to Roma's retailer network on 21 June 2011 and that the Prohibitions were to be effective from 4 July 2011. The agreements and/or concerted practices span different periods for different Retailers. The OFT has further identified, from the available evidence, the date when each Retailer first acquiesced and/or complied with Roma's instructions/requests. The OFT finds that this marks the commencement of each Retailer's agreement and/or concerted practice with Roma. Some of the evidence described below (in the section entitled 'the Agreements and/or concerted practices between Roma and the Retailers') demonstrates retailer acquiescence and/or compliance with the Prohibitions as early as 4 July 2011. The OFT therefore finds that at its widest, the period of infringement, in relation to certain Retailers, commenced on 4 July 2011.

3.29 On the available evidence, the OFT finds that the agreements and/or concerted practices between Roma and the Retailers continued up to at least 17 April 2012, when the OFT first used its formal powers in connection with its investigation into the mobility scooters sector. When asked in an interview with the OFT, how long Roma's 'sold in store' policy remained in place, Roma's Commercial Director [name redacted] said the following:

*'Well until your colleagues came here in April this year [2012], it was in place and the majority of dealers were working to that with the small percentage of dealers that were on the repetition basis then*

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<sup>110</sup> See document 3454WS, the Commercial Director of Roma [name redacted]'s witness statement at page 17, which also states that the website monitoring was initially conducted on a daily basis, but later changed to once a week. See also evidence of Roma's web developer/coordinator [name redacted] 'monitoring' emails at paragraphs 3.44, 3.68, 3.84, 3.103, 3.112, 3.127, 3.137.

*being contacted about withdrawing the products and it was like a repetitive thing, every week or month we would inform them, they'd take the prices off and put the prices back on. But since then we are really consulting with [name redacted] our colleague, our lawyers, to find out what we can do differently because obviously it was never our intention to be devious or underhand in these things.'*<sup>111</sup>

3.30 Further evidence demonstrates that Roma's online sales and online price advertising prohibitions continued up to April 2012. For example, in an email dated 16 April 2012 in respect of the then newly introduced Roma-branded Vegas mobility scooter, which replaced the Roma-branded Alcora and Corella scooters to which the Prohibitions had applied, a Roma employee [name redacted] responded to an email from [employee name redacted] of the Retailer Discount Mobility Plus Ltd, as follows:

*'We have the new Roma Vegas, has to be (sold in store) no prices on the web site).'*<sup>112</sup>

3.31 A number of 'Call Reports' also indicate that the Prohibitions were communicated to retailers throughout March 2012 and April 2012.<sup>113</sup> A Call Report dated 16 March 2012 states that in respect of the Vegas, [retailer name redacted] was '*impressed that it will not be on the internet*'.<sup>114</sup>

3.32 The evidence described at paragraphs 3.30 and 3.31 demonstrates that Roma's strategy continued such that the Prohibitions also applied to newly introduced Roma-branded scooter models.

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<sup>111</sup> See document number 3452/WS CD 2 of 5 at page 10.

<sup>112</sup> Document number 1415RO.

<sup>113</sup> For example, see document numbers 1738RO, 0885RO, 0950RO, 0939RO, 1683RO, and 1961RO.

<sup>114</sup> Document number 1738RO.

3.33 Based on the totality of the evidence available, the OFT therefore finds that the period of Infringement continued until at least April 2012. This finding is made on the following basis:

1. the evidence at paragraphs 3.29 to 3.31 above demonstrates that Roma's policy continued until April 2012;
2. the direct evidence below (see each of the sections below entitled 'The Agreement and/or Concerted Practice between Roma and [Retailer]') demonstrates that the Retailers did comply with and/or acquiesce in Roma's instructions and/or requests between July 2011 and April 2012, albeit that certain Retailers sought to 'cheat' on the agreements and/or concerted practices at certain times; and
3. the OFT has inferred, by virtue of:
  - Roma's policy to withdraw retailer contracts for the supply of Roma-branded Scooters; and
  - the actual withdrawal of contracts with those retailers which did not comply

that the Retailers which continued to be supplied during the period July 2011 to April 2012 did comply with and/or acquiesce to Roma's requests and/or instructions.<sup>115</sup>

3.34 Although some of the evidence demonstrates that the Retailers did not fully comply with Roma's requests at all times and/or did not fully respect the agreements and/or concerted practices that are the subject of this Decision at all times throughout the period of infringement, a Retailer's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice does not preclude a finding that an agreement and/or concerted practice existed.

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<sup>115</sup> For evidence of contracts being withdrawn, see paragraphs 3.146 to 3.147 below.

**THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN ROMA AND DISCOUNT MOBILITY DIRECT LTD (DMD) (NOW CARECO (UK) LTD)**

- 3.35 The evidence available to the OFT in respect of the agreement and/or concerted practice between Roma and DMD is set out below in chronological order.
- 3.36 The OFT infers that on 21 June 2011, DMD was sent the first Roma circular described at paragraphs 3.17 to 3.22 above which stipulated that, as of 4 July 2011, retailers should not:
- sell Roma-branded Scooters on the internet such that those products could only be sold through retail premises; and
  - advertise or promote those mobility scooters on any retailer websites.
- 3.37 The evidence demonstrates that Roma sent a further communication to DMD on 7 July 2011 of the same or similar nature in which it requested DMD not to sell Roma-branded scooters online or to advertise or market those mobility scooters online. In an email of 7 July 2011 from a Roma Area Sales Manager [name redacted] to DMD, the Roma Area Sales Manager [name redacted] states:<sup>116</sup>
- 'As discussed, Roma Medical has now moved the "Roma" branded scooters to a retail only category. That is they are now not to be shown on any website Today I have spoken with [name of Roma's Commercial Director redacted] who has now confirmed that [name of retailer redacted] has moved the Roma range off it's [sic] site. Please may I ask that you remove only the: Alcora, Corella, Lyon, Sorrento and Granada from your pages.*
- Of course the Shoprider products will continue as normal and will not be affected.'*
- 3.38 On the same day, a DMD employee [name redacted] sent an email to DMD's third-party Digital Marketing Consultant [name redacted], and a

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<sup>116</sup> Document 1487RO.

Roma Area Sales Manager [name redacted] (copying in Roma's Commercial Director [name redacted] and a DMD employee [name redacted] in which he requested a DMD employee [name redacted] to:  
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*'remove the scooters that [name of Roma Area Sales Manager redacted] has mentioned in the below E-mail at your earliest convenience'*.

3.39 The OFT infers from the above communication that DMD agreed to abide by, or acquiesced in, Roma's request.

3.40 On 7 July 2011, a DMD employee [name redacted] responded to that email stating that *'[a]ll products listed in the email have been removed from .co.uk, AdWords and Google shopping.'*<sup>118</sup> This indicates that DMD had in fact complied with Roma's request by removing from DMD's sites the mobility scooters specified in a Roma Area Sales Manager [name redacted]'s email. DMD's compliance with Roma's requests and/or instructions is further evidence of DMD's acquiescence.

3.41 On 12 July 2011, Roma's Commercial Director [name redacted] sent a further email to two employees of DMD [names redacted], noting that the Sorrento scooter was *'back on the DMD site'* and asking DMD to *'please remove the product.'*<sup>119</sup> This indicates that:

- for some time between 7 July 2011 and 12 July 2011, DMD had removed the Sorrento from its website; and
- given that the email referred only to the Sorrento scooter, DMD must have removed from its website the other specified Roma-branded Scooters, as per Roma's earlier instructions, since otherwise Roma would have referred to them in addition to the Sorrento (Paragraphs 3.37 to 3.40 above demonstrate that

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<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

DMD was selling all the Roma-branded Scooters, rather than only the Sorrento).

3.42 A DMD employee [name redacted] responded to this email the same day, asking DMD's third-party Digital Marketing Consultant [name redacted] to '*remove the product at [his] earliest convenience*'. Later that day, a Roma employee [name redacted] added, by email to Roma's Commercial Director [name redacted], DMD's third-party Digital Marketing Consultant [name redacted] and a Roma Area Sales Manager [name redacted] (copying in a DMD employee [name redacted] and a Roma employee [name redacted]):

*'Could you please check all the sites including the Shoprider Depot cheap recliners etc and remove A.S.A.P as I'm getting it in the ear from Roma'*.<sup>120</sup>

3.43 The evidence summarised in paragraphs 3.38 to 3.42 above clearly demonstrates that from 7 July 2011, at the latest, DMD agreed to abide by, or acquiesced in, Roma's requests and/or instructions not to:

- sell Roma-branded Scooters on the internet; and
- advertise or promote those mobility scooters on the internet, which included any advertising of price information.

3.44 The OFT has set out below further examples of Roma's requests and/or instructions to DMD not to sell online and not to advertise online prices of Roma-branded scooters. The OFT has also set out below further examples of DMD agreeing to abide by, or acquiescing in, such requests and/or instructions. Some of that evidence demonstrates that DMD did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times.<sup>121</sup>

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<sup>120</sup> Document 1487RO.

<sup>121</sup> For example, see paragraphs 3.53 and 3.55. See also documents 2437/RO dated 2 August 2011, 2218RO dated 8 August 2011, 2171RO dated 16 August 2011, 1986RO dated 31 October 2011 and 1911RO dated 27 March 2012.

- 3.45 However, DMD's non-compliance in parts and/or 'cheating' on the agreement at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>122</sup>
- 3.46 On 3 August 2011, Roma sent DMD the second communication (described in paragraphs 3.23 to 3.25 above) in which it revised its original 'brief'. In that communication, namely an email to a DMD employee [name redacted], DMD's third-party Digital Marketing Consultant [name redacted] and a Roma Area Sales Manager [name redacted] (copying in a DMD employee [name redacted] and a Roma employee [name redacted]),<sup>123</sup> Roma's Commercial Director [name redacted] advised that further to the original 'brief', Roma had agreed to allow imagery to remain on dealer websites,
- 'but instead of specifying a price the Dealer states "sold in store".'*
- 3.47 In the same communication, Roma's Commercial Director [name redacted] further instructed DMD as follows:
- '[E]veryone needs to adhere to the process, any account we come across with online pricing will be informed that they need to withdraw their pricing ASAP from each site they are affiliated to.*
- Failure to comply will mean Roma will restrict access to the Roma Medical branded scooters...'*
- 3.48 In his email, Roma's Commercial Director [name redacted] also listed six websites which Roma believed to be affiliated to DMD. Roma requested that *'all pricing [from the six specified websites which Discount Mobility Direct Ltd operates] are withdrawn'* in respect of the Roma-branded Scooters.<sup>124</sup>

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<sup>122</sup> See Annexe A, at paragraphs A.36 to A.39.

<sup>123</sup> Document 1487RO.

<sup>124</sup> Ibid.

3.49 On 4 August 2011, DMD's third-party Digital Marketing Consultant [name redacted] responded to the Commercial Director of Roma [name redacted]'s email, in which he thanked Roma for listing those products and websites that Roma instructed to be removed, noting that *'it made removing them faster and easier.'*<sup>125</sup>

3.50 DMD's third-party Digital Marketing Consultant [name redacted] added:  
  
*'I have now removed all the products from the sites you listed. I have one query, I could not find any of the products active on the www.discount mobilitydirect.co.uk site? If you could let me know as I want to ensure we are following your requests.*

*I manage a large number of sites for DMD, so if you find any other products listed please let me know personally and I will remove them immediately.'*<sup>126</sup>

3.51 The evidence demonstrates that DMD complied with and/or acquiesced in, Roma's instructions, because it indicates that DMD had in fact complied with Roma's instructions on 3 August 2011, not to advertise prices of Roma-branded Scooters online.

3.52 In an email to DMD's third-party Digital Marketing Consultant [name redacted] on 17 August 2011, Roma's Commercial Director [name redacted] further requested and/or instructed that DMD remove price information from its website:<sup>127</sup>

*'We've been informed that our products, i.e. the Roma branded units highlighted below, are still showing on Google when you search for the scooters. Please see the following [...]*

*Can you please notify me when you've taken the above off the websites, with regard to the pricing? We are more than happy for people to communicate "sold in store" as the alternative.'*

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<sup>125</sup> Document 1515RO.

<sup>126</sup> Document 1487RO.

<sup>127</sup> Document 1487RO.

3.53 The OFT has inferred from an email of 8 September 2011 from a Roma employee [name redacted], that Roma requested and/or instructed DMD to update its websites so as to comply fully with Roma's brief on online sales and online price advertising:<sup>128</sup>

*'Following our telephone conversation this morning, I have compiled a list of the Roma Branded Scooters that are active on your website(s). I appreciate that you have disabled the links to the products from your website catalogue - i.e. if you go to <http://www.discountmobilitydirect.co.uk/> and browse the appropriate category, the scooters mentioned do not appear. However, the products still exist in your database because if the full URL to the location of the product is entered – i.e. the links below, then I can access the products through your website. The links below were all found on the top page(s) of a Google search. I do understand that when you remove content from your website, the changes do not appear immediately on Google as Google's content is only refreshed when spiders are sent through the web to update their database. However, when you access the page – the changes should have happened. Also, I have accessed these links from various computers on different ISPs and also cleared all my Temp Internet Files, Cookies etc. so [sic] no content is cached on my machine (it's all live on the internet). The email then lists 5 web addresses as follows:*

[List of 5 website addresses]

*Thank you for your assistance regarding this matter.'*

3.54 On 25 February 2012, a DMD employee [name redacted] sent the following email to Roma's Commercial Director [name redacted] and Roma's Managing Director [name redacted], regarding the Retailer Mobility Independence (also trading as British Mobility):<sup>129</sup>

*'Is he allowed to be doing this?s [sic]*

[website address given]

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<sup>128</sup> Document 1467RO.

<sup>129</sup> Document 0958RO.

[...]

The OFT infers from this email that DMD alerted Roma to an instance of a Retailer departing from Roma's online policy.

- 3.55 Roma's Commercial Director [name redacted] responded to a DMD employee's [name redacted] email on 13 March 2012 (also sent to Roma's Managing Director [name redacted] and [name redacted]), noting that DMD was advertising the Granada online for £2,999.<sup>130</sup> Roma's Commercial Director [name redacted] requested a DMD employee [name redacted] to '*put the Granada on your web page as a "sold in store" item*'. Roma's Commercial Director [name redacted] noted further:

*'I've been assured this will be dealt with today by the other party [the Retailer Mobility Independence]. Please confirm you can also make the necessary adjustment to your web page.'*

- 3.56 An OFT interview with a DMD employee on 29 August 2012 confirms that DMD had in fact acquiesced to and complied with Roma's requests not to sell online or advertise online prices, although it did not comply with Roma's requests at all times:<sup>131</sup>

A DMD employee [name redacted]: '*[...] we would say, "It is off the website," and then they would have it like saved in their favourites or something and when you save something in your favourites it will stay ... that web page will stay there even if you refresh it and then go onto it, it saves that point in time, so we would say, "Look, it's off the website," and they'd say, "No, it's not," and then we'd ... but again it was like ... it just took a period of time for us to be able to basically take them off our website, but we were less ... we would less of the times be trying to sell the product over the weekend with the Roma stuff because we didn't really see Roma as a massive ... their new range of scooters we weren't that worried about as such really. We weren't as bothered by it as the [name of supplier redacted] scenario.'*

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<sup>130</sup> Ibid.

<sup>131</sup> Document 3457WS (CD 2 of 4, page7). See also page 9 of the interview transcript.

OFT: *'So is it fair to say that you complied with their request to take prices off?'*

A DMD employee [name redacted]: *'I think we ... yeah, we complied with both of them really. It took ... you know, it took ... with all of it though it was all ... you know, we would say, "Look, we'll support it as long as everyone else does," and then it was like a domino effect. As soon as one person ... "Well he's got his price on, so I'm going to put my price on." It was like quite childish like that if someone put their price on then everyone would say, "No, no, well I'm going to do it then." And then everyone would put their price back on and then everyone would take it off again and then someone would put it back on, so it was hard for them to be able to manage it.'*

3.57 On 2 April 2012, the OFT obtained forensic screen captures ('screen shots') from DMD's website [www.discountmobilitydirect.co.uk](http://www.discountmobilitydirect.co.uk).<sup>132</sup> These screen shots capture DMD's advertisement for the Granada scooter without a price on display. The product appears with the words *'please call for our lowest price'* indicating that DMD continued to comply with Roma's online price advertising prohibition. The OFT's finding is that, without knowing the price, a customer would be precluded from making an online ('click to buy') transaction. The OFT therefore infers that DMD also continued to comply with Roma's online sales prohibition.

### **Conclusion**

3.58 In summary, the evidence demonstrates that on dates between 7 July 2011, at the latest, and April 2012 Roma and DMD were party to an agreement and/or concerted practice:<sup>133</sup>

- prohibiting DMD from selling online Roma-branded Scooters; and
- prohibiting DMD from advertising prices online in respect of those scooters.

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<sup>132</sup> See document 0427/DMD (see also document 3870/WS, supporting OFT witness statement). Annexe C, paragraph C.23 lists DMD's websites.

<sup>133</sup> See also paragraphs 3.29 to 3.33 above.

3.59 Some of the evidence demonstrates that DMD did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, DMD's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>134</sup>

### **THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN ROMA AND DISCOUNT MOBILITY SHOP LTD/MOBILITY ABROAD LTD**

3.60 The evidence available to the OFT in respect of the agreement and/or concerted practice between Roma and Discount Mobility Shop Ltd (DMS) (whose parent company is Mobility Abroad Ltd) is set out below in chronological order.

3.61 The OFT infers that on 21 June 2011, DMS was sent the first Roma circular described at paragraphs 3.17 to 3.22 above which stipulated that as of 4 July 2011, retailers should not:

- sell Roma-branded Scooters on the internet such that those products could only be sold through retail premises; and
- advertise or promote those mobility scooters on any retailer websites.<sup>135</sup>

3.62 On 6 July 2011, Roma's Commercial Director [name redacted] sent an internal email to Roma Area Sales Managers entitled '*Dealers who have the Roma branded scooters still on their websites*', in which Roma's Commercial Director [name redacted] requested Area Sales Managers to:<sup>136</sup>

*'Please contact and get back to [name of Roma's Web Developer/Coordinator redacted] and me that the following Dealers have taken off the products by close of play today-*

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<sup>134</sup> See Annexe A, at paragraphs A.36 to A.39.

<sup>135</sup> Document 3451WS, pages 14-15.

<sup>136</sup> Document 2401RO.

[...]

*4551- Discount Mobility Shop Essex. **Action** = [name of a Roma Area Sales Manager redacted]*

[...]

*If they refuse then inform them we will restrict them access to the Roma branded part of the portfolio and change their contract with us so they will not be able to purchase the products in future.'*

- 3.63 The evidence further indicates that Roma communicated its second circular dated 18 July 2011 (described at paragraphs 3.23 to 3.25) to DMS, instructing DMS not to advertise prices of the Roma-branded Scooters online and to state 'sold in store' as an alternative. On 5 August 2011, Roma's Commercial Director [name redacted] forwarded the brief to DMD described at paragraph 3.46 to Roma ASMs, stating:

*'This has also been supported by Discount Mobility Shop'.<sup>137</sup>*

The OFT infers from this email that DMS complied with and/or acquiesced in Roma's instructions in its second circular.

- 3.64 On 15 December 2011, Roma's Commercial Director [name redacted] sent an email to a DMS employee [name redacted], copying in Roma's Web Developer/Coordinator [name redacted] and [name redacted], as follows:<sup>138</sup>

*'As you know we complete a weekly revision of the internet to police how our Dealer network is adhering to the "sold in store" principle involving the Roma branded scooters. This week [name of Roma's Web Developer/Coordinator redacted], has found that you have got one outstanding product – the Alcora – that still specifies a price on your site. I believe this is possibly an oversight as all the rest of the product pricing has been withdrawn.*

*Can you please confirm this will be addressed?'*

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<sup>137</sup> Document 2594RO.

<sup>138</sup> Document 1922RO.

3.65 The evidence demonstrates that DMS complied with this request. A DMS employee [name redacted] responded to Roma's Commercial Director [name redacted]'s email of 15 December 2011 on the same day as follows:<sup>139</sup>

*'I will look into this tonight as I was under the assumption that they had all been taken off???? [sic]'*

3.66 On 16 December 2011, a DMS employee [name redacted] added in a further email to Roma's Commercial Director [name redacted]:<sup>140</sup>

*'Just to let you know that has been changed follow [sic] the below link..*

[website address given]'

3.67 The evidence summarised in paragraphs 3.63 to 3.66 above clearly demonstrates that from at the latest 5 August 2011 DMS agreed to abide by, or acquiesced in, Roma's instructions not to:

- sell Roma-branded Scooters on the internet; and
- advertise or promote those mobility scooters on any retailer websites, which included any advertising of price information.

3.68 Some of the evidence demonstrates that DMS did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, DMS's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>141</sup>

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<sup>139</sup> Document 1919RO.

<sup>140</sup> Document 2145RO.

<sup>141</sup> See documents 2401RO dated 6 July 2011 and 2437RO dated 2 August 2011.

3.69 In response to the OFT's request for information under section 26 of the Act (section 26 Notice), issued to DMS in May 2012, a DMS employee [name redacted] stated:

*'Alcora, Sorrento, Corella, Lyon, Granada and Vegas were all introduced as new scooters to the Roma range but were only to be sold in retail outlets and were not to be sold on internet only company's [sic].*

*None of these products were advertised on our site as it is internet only.'*<sup>142</sup>

3.70 The OFT issued a further section 26 Notice to DMS in October 2012. In its response, DMS confirmed that (1) Roma did instruct DMS not to sell online certain mobility scooters supplied by it, and that (2) DMS did comply with that instruction.<sup>143</sup>

3.71 DMS added in that response that DMS also complied with Roma's request not to advertise prices online of certain mobility scooters supplied by Roma.<sup>144</sup>

### ***Conclusion***

3.72 In summary, the evidence demonstrates that on dates between 5 August 2011, at the latest, and April 2012 Roma and DMS were party to an agreement and/or concerted practice by:

- prohibiting DMS from selling online Roma-branded Scooters; and
- prohibiting DMS from advertising prices online in respect of those scooters.

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<sup>142</sup> Document 0272DMS.

<sup>143</sup> See Document 3646DMS.

<sup>144</sup> In response to a question put in a section 26 Notice on whether Roma had instructed DMS not to advertise prices online of certain mobility scooters supplied by it, DMS responded that Roma had not.<sup>144</sup> The OFT notes that this is inconsistent with the evidence in paragraph 3.68 which clearly demonstrates that on 15 December 2011, Roma instructed DMS to remove the price of the Alcora scooter. The OFT therefore presumes, on the balance of the available evidence, that DMS made a mistake in their response to the section 26 Notice.

3.73 Some of the evidence demonstrates that DMS did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, DMS's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement or concerted practice existed.<sup>145</sup>

**THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN ROMA AND DISCOUNT MOBILITY PLUS LTD (DMP) AND RUTLAND MOBILITY LTD (RUTLAND)**

3.74 The evidence available to the OFT in respect of the agreement and/or concerted practice between Roma and DMP and Rutland is set out below in chronological order.

3.75 The OFT infers that Roma communicated its first circular of 21 June 2011 (described at paragraphs 3.17 to 3.22, Key Elements of Roma's Strategy) to DMP and Rutland, which stipulated that as of 4 July 2011, retailers should not:

- sell Roma-branded Scooters on the internet such that those products could only be sold through retail premises; and
- advertise or promote those mobility scooters on any retailer websites.

3.76 The OFT's inference is drawn from the following:

- i. As described at paragraphs 3.21 and 3.22, in an interview with the OFT, Roma's Commercial Director [name redacted] stated that Roma's first circular had been sent to all of its retailers, and that Roma had communicated its policy to all retailers;<sup>146</sup>
- ii. The evidence below demonstrates that Roma's second circular described at paragraphs 3.23 to 3.25 was communicated to DMP

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<sup>145</sup> See Annexe A, at paragraphs A.36 to A.39.

<sup>146</sup> Document 3451WS at pages 14-15 and 27.

and Rutland, which pre-supposes communication of the first circular; and

- iii. The documentary evidence more widely supports that Roma intended for the policy to be applied across its entire retailer network.

3.77 The OFT infers that Roma instructed DMP and Rutland through its second circular not to sell online and not to advertise prices online of Roma-branded Scooters. On 3 August 2011, Roma's Commercial Director [name redacted] sent an internal email to a Roma employee [name redacted] in which Roma's Commercial Director [name redacted] requested the Roma employee [name redacted] to use the brief to DMD (as described at paragraph 3.46) to contact a DMP and Rutland employee [name redacted].<sup>147</sup>

3.78 As part of Roma's website 'policing' strategy,<sup>148</sup> on 19 September 2011, Roma's Web Developer/Coordinator [name redacted] sent an email to Roma's Commercial Director [name redacted],<sup>149</sup> in which Roma's Web Developer [name redacted] provided *an 'updated list of dealers who still have the Roma brand on the Internet'*. Roma's Web Developer/Coordinator [name redacted] listed Rutland, in relation to the Lyon and Sorrento scooters. In the two days which followed, DMP and Rutland removed its online pricing in relation to these scooters.<sup>150</sup> On 21 September 2011, Roma's Web Developer/Coordinator [name redacted] sent a further email to Roma's Commercial Director [name redacted] providing *'a list identifying who has removed the pricing since Monday'*,<sup>151</sup> naming Rutland Mobility together with a reference to the Lyon and Sorrento. The OFT infers that this relates to the removal of those products from Rutland's website, in compliance with Roma's

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<sup>147</sup> Document 1532RO.

<sup>148</sup> See Key Elements of Roma's Strategy, paragraphs 3.26 and 3.27 above.

<sup>149</sup> Document 2090RO.

<sup>150</sup> Document 1447RO.

<sup>151</sup> Ibid.

instructions and/or requests not to sell online or advertise prices online, in respect of the Roma-branded Scooters.

3.79 The evidence indicates that by removing online prices for the Lyon and Sorrento scooters, in conjunction with Roma's strategy to police retailer websites, DMP and Rutland agreed to abide by, or acquiesced in, Roma's instructions and/or requests not to advertise prices online for Roma-branded Scooters.

3.80 On 30 September 2011, an employee presumed to be of DMP and Rutland [name redacted] sent an email to a Roma employee [name redacted] as follows:<sup>152</sup>

*'WE [sic] are listing the Alcora on to our website.*

*I see that the following sites are advertising it at the prices shown; British Mobility £498, [retailer name redacted] £530, [retailer name redacted] £545, FOS £545*

*Please can you clarify what price you would like us to advertise it at.'*

3.81 The Roma employee [name redacted] responded by email to the DMP and Rutland employee [name redacted] later that day as follows:

*'Please do not show any price, I will pass your e-mail to [name of Roma's Commercial Director redacted] to contact the said companies.'*<sup>153</sup>

3.82 The evidence summarised in paragraphs 3.78 to 3.81 above indicates that from at the latest 21 September 2011, DMP and Rutland agreed to abide by, or acquiesced in Roma's instructions not to:

- sell Roma-branded Scooters on the internet; and
- advertise or promote those mobility scooters on the internet, which included any advertising of price information.

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<sup>152</sup> Document 2029RO.

<sup>153</sup> Ibid.

3.83 A Roma Call Report also highlights DMP and Rutland's disapproval of Roma's online pricing policy. On 12 March 2012, a Roma Area Sales Manager [name redacted] wrote:

*'Rutland Mobility [...]*

*Not happy with Roma stopping the internet sales as most of there [sic] sales are off the internet.'*<sup>154</sup>

3.84 Some of the evidence demonstrates that DMP and Rutland did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, the non-compliance of DMP and Rutland in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>155</sup>

3.85 In response to the OFT's section 26 Notices, a DMP and Rutland employee [name redacted] confirmed:

- that Roma did instruct DMP and Rutland (1) not to advertise online prices of certain Roma-branded Scooters, and (2) not to sell online certain Roma-branded Scooters; and
- that DMP and Rutland did comply with Roma's instructions.<sup>156</sup>

3.86 The responses from DMP and Rutland to the OFT's section 26 Notices also demonstrate that DMP and Rutland attempted to evade Roma's online price advertising and online sales prohibitions. In relation to Roma's instructions, a DMP and Rutland employee [name redacted] stated:

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<sup>154</sup> Document 0962RO.

<sup>155</sup> For example, see documents 2218RO dated 8 August 2011, 2171RO dated 16 August 2011 and 1858RO dated 4 April 2012.

<sup>156</sup> Documents 3370DMP and 0073DMP.

*'We have had to implement technology that allows the customer to "apply" for a price on certain products in an attempt to circumvent the manufacturer's pricing policy.'*<sup>157</sup>

The DMP and Rutland employee [name redacted] later added:

*'We have always tried to find creative ways to circumvent the rules as applied but we have always complied when prompted by the manufacturers as ultimately we need to protect our relationship with the supplier going forward.'*<sup>158</sup>

3.87 The OFT finds that, notwithstanding these attempts to circumvent Roma's policy, DMP and Rutland did in fact comply with and/or acquiesce to Roma's online price advertising prohibition. DMP's and Rutland's compliance and/or acquiescence is demonstrated by a screen shot which illustrates that DMP and Rutland did not advertise price information online, as per Roma's request and/or instructions.<sup>159</sup>

Further evidence demonstrates that DMP and Rutland emailed prices to customers in response to a customer's request on the price application system. An email from DMP in response to a customer enquiry dated 23 April 2012 also demonstrates this process.<sup>160</sup> The OFT infers from such evidence that that it must have been the case that prices were not advertised on the internet.

3.88 On 2 February 2012, the OFT obtained screen shots from DMP and Rutland's website [www.mobilityscootersplus.com](http://www.mobilityscootersplus.com).<sup>161</sup> These screen shots capture DMP and Rutland's advertisements for the Sorrento, Lyon and Alcora models without prices on display, indicating that DMP

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<sup>157</sup> Document 0073DMP. See also document 0085DMP for an illustration of this price application system on DMP's website. Document 0076DMP also demonstrates how customers' price applications were responded to.

<sup>158</sup> Document 3370DMP.

<sup>159</sup> Document 0085DMP.

<sup>160</sup> Document 0076DMP.

<sup>161</sup> See documents 0128MSP, 0129MSP and 0130MSP (see also document 3870WS, supporting OFT witness statement). Annexe C, paragraphs C.44 and C.49 lists DMP and Rutland's websites.

and Rutland continued to comply with Roma's online price advertising prohibition. The OFT's finding is that, without knowing the price, a customer would be precluded from making an online ('click to buy') transaction. The OFT therefore infers that DMP and Rutland also continued to comply with Roma's online sales prohibition.

3.89 The evidence demonstrates that Roma continued to instruct DMP and Rutland in relation to its online sales and online price advertising prohibitions. On 16 April 2012, a DMP and Rutland employee [name redacted] emailed a Roma employee [name redacted] to enquire about the replacement for the discontinued Alcora scooter. The Roma employee [name redacted] responded that day, as follows:

*'[...] we have the new Roma Vegas, has to be (sold in store) no prices on the website.'*<sup>162</sup>

### ***Conclusion***

3.90 In summary, the evidence demonstrates that on dates between 21 September 2011, at the latest, and April 2012, Roma and DMP and Rutland were party to an agreement and/or concerted practice by:

- prohibiting DMP and Rutland from selling online Roma-branded Scooters; and
- prohibiting DMP and Rutland from advertising prices online in respect of those scooters.

3.91 Some of the evidence demonstrates that DMP and Rutland did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, the non-compliance of DMP and Rutland in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>163</sup>

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<sup>162</sup> Document 1415RO.

<sup>163</sup> See Annexe A, at paragraphs A.36 to A.39.

## THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN ROMA AND MOBILITY INDEPENDENCE LTD

3.92 The evidence available to the OFT in respect of the agreement and/or concerted practice between Roma and Mobility Independence is set out below in chronological order.

3.93 The evidence indicates that Roma communicated its first circular of 21 June 2011 (described at paragraphs 3.17 to 3.22, Key Elements of Roma's Strategy) to Mobility Independence, which stipulated that as of 4 July 2011, retailers should not:

- sell Roma-branded Scooters on the internet such that those products could only be sold through retail premises; and
- advertise or promote those mobility scooters on any retailer websites.

3.94 On 6 July 2011, a Roma Area Sales Manager [name redacted]) sent an email to '[first name redacted] *Independance* [sic]' (presumed to be the employee of Mobility Independence [name redacted]) in which he requested the following:<sup>164</sup>

*'As per our conversation this afternoon, can you please remove all the images, prices and information on the Roma branded scooters from your website.'*

3.95 A Roma Area Sales Manager [name redacted] sent an internal email to Roma's Commercial Director [name redacted] later that day, which indicates that Mobility Independence complied with Roma's request. The Roma Area Sales Manager [name redacted] said:<sup>165</sup>

*'They are being deleted from his site now. The Granada has gone and all the others will be off by the end of the day.'*

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<sup>164</sup> Document 1590RO.

<sup>165</sup> Ibid.

3.96 In a further email on 6 July 2011, an employee of Mobility Independence [name redacted] confirmed Mobility Independence's compliance with Roma's request:<sup>166</sup>

*'Further to your request we are in the process of removing the RMA scooters from the internet, however I believe this is a very short sighted view, not to mention legally dubious.'*

3.97 The evidence demonstrates that Roma instructed Mobility Independence in relation to its second circular described at paragraphs 3.23 to 3.25, and that Mobility Independence complied and/or acquiesced in that regard. In an internal email on 3 August 2011, Roma's Commercial Director [name redacted] requested a Roma Area Sales Manager [name redacted] to use the brief to DMD described in paragraph 3.46 to contact [first name redacted], presumed to be employee of Mobility Independence [name redacted], on the basis that Roma-branded Scooters were not to be sold online, and instead of advertising prices online, retailer websites should state 'sold in store.' A Roma Area Sales Manager [name redacted] responded to Roma's Commercial Director [name redacted] by email later that day as follows:

*'Spoke to [Mobility Independence employee's name redacted].*

*All reference to prices will be removed by the end of play today.'*<sup>167</sup>

3.98 The evidence summarised in paragraphs 3.95 to 3.97 above clearly demonstrates that from at the latest 6 July 2011 Mobility Independence agreed to abide by, or acquiesced in, Roma's instructions not to:

- sell Roma-branded Scooters on the internet such that those products could only be sold through retail premises; and
- advertise or promote those mobility scooters on the internet, which included any advertising of price information.

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<sup>166</sup> Document 1589RO.

<sup>167</sup> Document 1530RO.

- 3.99 The OFT has set out below further evidence of Roma's requests and/or instructions to Mobility Independence not to sell online and not to advertise online prices of Roma-branded scooters. The OFT has also set out below further evidence of Mobility Independence agreeing to abide by, or acquiescing in, such requests and/or instructions.
- 3.100 The evidence indicates that Mobility Independence acquiesced in and/or complied with Roma's requests and/or instructions by monitoring the compliance of other retailers with Roma's policy, and by suggesting that Mobility Independence's compliance was conditional upon other retailers complying with Roma's requests also.
- 3.101 Roma's Commercial Director [name redacted] sent an email to a Mobility Independence employee [name redacted] on 11 November 2011, which indicates that the Mobility Independence employee [name redacted] had enquired about other retailers' pricing, as follows:<sup>168</sup>

*'I am aware you would like an update from Roma concerning where the company stands in terms of competitor Dealers selling at a very low price.'*

- 3.102 On 13 March 2012, Roma's Commercial Director [name redacted] sent an email to a DMD employee [name redacted], stating that Mobility Independence would comply with Roma's online price advertising prohibition:<sup>169</sup>

*'We've contacted this account, who also trades as Mobility Independence. They have confirmed they only have one product in stock and will take the pricing off their site, however, they have commented that DMD has a price on its web page of Â£2,999 [sic].*

[...]

*I've been assured this will be dealt with today by the other party [Mobility Independence].'*

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<sup>168</sup> Document 3382BMMI.

<sup>169</sup> Document 0958RO.

3.103 Some of the evidence demonstrates that Mobility Independence did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, Mobility Independence's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>170</sup>

3.104 In response to the OFT's section 26 Notice issued to Mobility Independence, a Mobility Independence employee [name redacted] confirmed that Mobility Independence had advertised 'call for price' and '*except periodically, [Mobility Independence] would advertise [its] usual margin on Granada, and sorrento [sic] scooters, returning to call for price when challenged by Roma.*'<sup>171</sup>

### ***Conclusion***

3.105 In summary, the evidence demonstrates that on dates between 6 July 2011 and April 2012 Roma and Mobility Independence were party to an agreement and/or concerted practice by:

- prohibiting Mobility Independence from selling online Roma-branded Scooters; and
- prohibiting Mobility Independence from advertising prices online in respect of those scooters.

3.106 Some of the evidence demonstrates that Mobility Independence did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times.<sup>172</sup> However, Mobility Independence's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice at

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<sup>170</sup> For example, see documents 2437RO dated 2 August 2011, 1911RO dated 27 March 2012, 1899RO dated 3 April 2012, 1858RO dated 4 April 2012 and 1890RO dated 10 April 2012.

<sup>171</sup> Document 3380BMMI.

<sup>172</sup> See above footnote references. See also paragraph 3.102, email dated 13 March 2012 which indicates that Mobility Independence Ltd reverted to advertising a Roma-branded product with a price online.

certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>173</sup>

### **THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN ROMA AND MT MOBILITY LTD**

- 3.107 The evidence available to the OFT in respect of the agreement and/or concerted practice between Roma and MT Mobility Ltd (MTM) is set out below in chronological order.
- 3.108 On 13 July 2011, a Roma Area Sales Manager [name redacted] sent an email to a MTM employee [name redacted],<sup>174</sup> communicating Roma's first circular of 21 June 2011 (described at paragraphs 3.17 to 3.22, Key Elements of Roma's Strategy) which stipulated that as of 4 July 2011, retailers should not:

- sell Roma-branded Scooters on the internet such that those products could only be sold through retail premises; and
- advertise or promote those mobility scooters on any retailer websites.

A Roma Area Sales Manager [name redacted] said that MTM might not have received Roma's letter explaining Roma's announcement to its retailer network, and in that regard, the Roma Area Sales Manager [name redacted] requested and/or instructed MTM to:

*'remove all images and prices of the following products from your website, GRANADA, ALCORA, SORRENTO and CORELLA [sic]. We are now selling the entire ROMA [sic] portfolio to our dealer network as an in store only range.'*<sup>175</sup>

- 3.109 The evidence demonstrates that MTM complied with and/or acquiesced in Roma's request. On 14 July 2011, an MTM employee [name redacted] responded by email to the Roma Area Sales Manager

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<sup>173</sup> See Annexe A, at paragraphs A.36 to A.39.

<sup>174</sup> Document 2818RO.

<sup>175</sup> Ibid.

employee [name redacted],<sup>176</sup> advising that she had not received Roma's letter, but that MTM would '*get this changed off our websites tomorrow.*'

The MTM employee [name redacted] felt Roma's decision was '*short sighted*' and went on to list 18 links to retailers that were selling Roma-branded Scooters online. Referring to these links, the MTM employee [name redacted] asked:<sup>177</sup>

*'I presume these will be removed very soon so that everyone is on a level playing field?'*

- 3.110 The evidence indicates that Roma also communicated to MTM its second circular, described at paragraphs 3.23 to 3.25, in which Roma allowed images but no pricing to be advertised online for the Roma-branded Scooters. On 20 July 2011, a MTM employee sent a further email to a Roma Area Sales Manager [name redacted] in what the OFT infers was a response to such communication:<sup>178</sup>

*'Thanks for the phone call [sic] yesterday – I have added products back to our website and put call for pricing.'*

- 3.111 The OFT has set out below further evidence of Roma's requests and/or instructions to MTM not to sell online and not to advertise online prices of Roma-branded Scooters. The OFT has also set out below further examples of MTM agreeing to abide by, or acquiescing in, such requests and/or instructions.

- 3.112 Some of the evidence demonstrates that MTM did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times.<sup>179</sup>

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<sup>176</sup> Document 2817RO.

<sup>177</sup> Ibid.

<sup>178</sup> Document 2609RO.

<sup>179</sup> For example, see documents 1911RO dated 27 March 2012, 1899RO dated 3 April 2012, 1858RO dated 4 April 2012 and 1890RO dated 10 April 2012. An email dated 13 July 2011 (document number 2363/RO) also shows that MTM was monitored by [a retailer whose name

However, MTM's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.

3.113 In response to the OFT's section 26 Notice issued to MTM in May 2012, MTM stated that it had removed certain Roma-branded Scooters from its website when requested by Roma to do so, namely, the Corella and the Sorrento. MTM also stated in that response, that the Corella, Granada, Sorrento and Vegas mobility scooters were advertised with 'call for price,' from which the OFT infers that MTM also complied with, or acquiesced in, Roma's prohibition.<sup>180</sup>

3.114 MTM confirmed that it was also instructed by Roma not to sell online certain mobility scooters supplied by it, with which instruction MTM complied '*for 2 weeks only*'.<sup>181</sup>

3.115 In response to the OFT's further section 26 Notice issued to MTM in September 2012, MTM confirmed that it received an instruction from Roma not to advertise prices online of certain mobility scooters supplied by it, but MTM did not comply with that instruction. MTM stated:

*'Roma contacted MT and insisted MT remove all Roma branded models now "retail" only. Shortly after Roma allowed re-listing but with 'call for price.' MT currently advertises prices in defiance of Roma policy.'*<sup>182</sup>

3.116 However, the OFT notes that, notwithstanding MTM's current advertising, the totality of the evidence, including MTM's response to the section 26 Notice in May 2012, supports the finding that MTM

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has been redacted] and that MTM was found to be selling mobility scooters online. However, this predates the agreement and/or concerted practice between Roma and MTM.

<sup>180</sup> Document 0357MTM.

<sup>181</sup> Ibid.

<sup>182</sup> Document 3504MTM.

did at times comply with and/or acquiesce to Roma's requests and/or instructions not to advertise prices online.

3.117 Furthermore, the OFT obtained forensic screen captures ('screen shots') on 2 April 2012 from MTM's website [www.morethanmobility.com](http://www.morethanmobility.com).<sup>183</sup> These screen shots capture MTM's advertisements for the Sorrento and Granada models without prices on display. Both products instead appear with the words '*please call for our best price*' indicating that MTM continued to comply with Roma's online price advertising prohibition. The OFT's finding is that, without knowing the price, a customer would be precluded from making an online ('click to buy') transaction. The OFT therefore infers that MTM also continued to comply with Roma's online sales prohibition.

### ***Conclusion***

3.118 In summary, the evidence demonstrates that on dates between 14 July 2011 and April 2012 Roma and MTM were party to an agreement and/or concerted practice by:

- prohibiting MTM from selling online Roma-branded Scooters; and
- prohibiting MTM from advertising prices online in respect of those scooters.

3.119 Some of the evidence demonstrates that MTM did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, MTM's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>184</sup>

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<sup>183</sup> See documents 0375/MTM and 3868/MTM (see also document 3870/WS, supporting OFT witness statement). See Annexe C, paragraphs C.71.

<sup>184</sup> See Annexe A, at paragraphs A.36 to A.39.

## THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN ROMA AND PROTEC MOBILITY TRADING LTD

3.120 The evidence available to the OFT in respect of the agreement and/or concerted practice between Roma and Protec Mobility Trading Ltd (which also uses the trade name 'Factory Outlet Scooters'),<sup>185</sup> (Protec) is set out below in chronological order.

3.121 The OFT infers that Roma communicated its first circular of 21 June 2011 (described at paragraphs 3.17 to 3.22, Key Elements of Roma's Strategy) to Protec, which stipulated that as of 4 July 2011, retailers should not:

- sell Roma-branded Scooters on the internet such that those products could only be sold through retail premises; and
- advertise or promote those mobility scooters on any retailer websites.

3.122 A Call Report dated 6 July 2011 explains that a Roma Area Sales Manager [name redacted] visited [first name redacted], presumed to be an employee of Protec [name redacted], to '*discuss taking roma [sic] brand scooters of [sic] his website.*'<sup>186</sup>

3.123 The evidence demonstrates that Roma also communicated to Protec its second circular, described at paragraphs 3.23 to 3.25. In an internal email on 3 August 2011, Roma's Commercial Director [name redacted] sent the DMD brief described in paragraph 3.46 to a Roma Area Sales Manager [name redacted], adding the following:

*'www.factoryoutletscooters.co.uk*

*Please speak with [name of Protec employee redacted] and inform him of the brief and that it is a "one size fits all principle" as mapped out in the communication below [...]*

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<sup>185</sup> An agreement exists between Protec and FOS whereby FOS licences to Protec the website [www.factoryoutletscooters.co.uk](http://www.factoryoutletscooters.co.uk) for Protec's sole use.

<sup>186</sup> Document 1028RO.

*Let me know how you get on.*<sup>187</sup>

- 3.124 The evidence demonstrates that Protec agreed to comply with Roma's instruction, as a Roma Area Sales Manager [name redacted] responded to Roma's Commercial Director [name redacted] the same day, as follows:

*'Spoke to [name of Protec employee redacted] at Protec. He will remove all price references this evening. He's saying he didn't change them before because all the others weren't playing by the rules either.'*<sup>188</sup>

- 3.125 On 3 August 2011, Roma received an email from a retailer [retailer name redacted], alerting Roma to the fact that the Sorrento scooter was being advertised with prices on the Factory Outlet Scooters website. On 4 August 2011, Roma's Commercial Director [name redacted] responded to that retailer as follows:<sup>189</sup>

*'I've spoken to the factoryoutletscooter [sic] people and they will be withdrawing the products from their site before the end of play tomorrow.*

*FYI – anyone, and this has only happened twice to date, will have the Roma contracts restricted if they don't adhere to the new process.'*

- 3.126 On 2 February 2012, the OFT obtained forensic screen captures ('screen shots') from Protec's website [www.factoryoutletscooters.co.uk](http://www.factoryoutletscooters.co.uk).<sup>190</sup> These screen shots capture Protec's advertisements for the Alcora, Corella and Sorrento models without prices on display. These products appear instead with the words '*call for best price*' indicating that Protec continued to comply with Roma's online price advertising prohibition. The OFT's finding is

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<sup>187</sup> Document 1534RO.

<sup>188</sup> Document 2252RO.

<sup>189</sup> Document 1519RO.

<sup>190</sup> See documents 0093FOS, 0094FOS and 0095FOS (see also document 3870WS, supporting OFT witness statement). See Annexe C, paragraph C.82 for Protec's websites.

that, without knowing the price, a customer would be precluded from making an online ('click to buy') transaction. The OFT therefore infers that Protec also continued to comply with Roma's online sales prohibition.

- 3.127 Some of the evidence demonstrates that Protec did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times.<sup>191</sup> However, Protec's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.
- 3.128 In response to the OFT's section 26 Notice issued to Protec in May 2012, Protec confirmed that Roma would not permit certain mobility scooters supplied by Roma to be advertised with prices online.<sup>192</sup>
- 3.129 In response to the OFT's section 26 Notice issued to Protec in September 2012, it confirmed that:
- Roma had instructed Protec not to advertise prices online of certain mobility scooters supplied by Roma; and
  - Protec did comply with that instruction.<sup>193</sup>
- 3.130 Protec went on to state in its response that it also complied with Roma's online sales prohibition, adding that the reason behind Roma's instruction was that these scooters were to be '*sold in store only*'.<sup>194</sup>

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<sup>191</sup> For example, see documents 2437RO dated 2 August 2011, 2218RO dated 8 August 2011, 2171RO dated 16 August 2011, 1986RO dated 31 October 2011, 1911RO dated 27 March 2012, 1899RO dated 3 April 2012, 1858RO dated 4 April 2012 and 1890RO dated 10 April 2012.

<sup>192</sup> Document 2814FOS.

<sup>193</sup> Document 3638FOS.

<sup>194</sup> When questioned whether Roma had instructed Protec not to sell online certain mobility scooters supplied by it, Protec responded that Roma had not. The OFT notes that this is inconsistent with the evidence above which clearly demonstrates that Roma instructed Protec

## **Conclusion**

- 3.131 In summary, the evidence demonstrates that on dates between 3 August 2011, at the latest, and April 2012 Roma and Protec were party to an agreement and/or concerted practice by:
- prohibiting Protec from selling online Roma-branded Scooters; and
  - prohibiting Protec from advertising prices online in respect of those scooters.
- 3.132 Some of the evidence demonstrates that Protec did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, Protec's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.<sup>195</sup>

## **THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN ROMA AND GBL WHEELCHAIR SERVICES LTD**

- 3.133 The evidence available to the OFT in respect of the agreement and/or concerted practice between Roma and GBL Wheelchair Services Ltd (GBL) is set out below in chronological order.
- 3.134 On or around 21 June 2011, GBL received the first Roma circular (described at paragraphs 3.17 to 3.22, Key Elements of Roma's Strategy) which stipulated that as of 4 July 2011, retailers should not:
- sell Roma-branded Scooters on the internet such that those products could only be sold through retail premises; and
  - advertise or promote those mobility scooters on any retailer websites.

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in relation to its online sales and online price advertising policy. The OFT presumes, on the balance of the available evidence, that this inconsistency in Protec's response is a mistake.

<sup>195</sup> See Annexe A, at paragraphs A.36 to A.39.

3.135 The evidence demonstrates that Roma also communicated its second circular, described at paragraphs 3.23 to 3.25, to GBL. On 5 August 2011, Roma's Commercial Director [name redacted] sent an email to a GBL employee [name redacted], stating that the original brief had been revised to:<sup>196</sup>

*'allow the [product] imagery to remain on the Dealer websites but instead of specifying a price the Dealer states "sold in store".'*

Roma's Commercial Director [name redacted] then requested the GBL employee [name redacted] to *'ensure all pricing for the above mentioned products [certain Roma-branded Scooters] are withdrawn from your website.'*<sup>197</sup>

3.136 On 11 August 2011, a GBL employee [name redacted] responded to Roma's Commercial Director [name redacted]'s email, as follows:<sup>198</sup>

*'We are all agreed and [name of GBL employee redacted] is going to amend the prices on our website as requested. Do you have a list of the prices that you want to sell these products at?'*

The OFT infers from this exchange of emails that the GBL employee [name redacted]'s reference to 'amend' the prices 'as requested' was in fact a reference to GBL withdrawing its prices, in accordance with Roma's Commercial Director [name redacted] request dated 5 August 2011.

3.137 Some of the evidence demonstrates that GBL did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times.<sup>199</sup> However, GBL's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not

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<sup>196</sup> Document 0455RO.

<sup>197</sup> Document 0455RO.

<sup>198</sup> Document 1500RO.

<sup>199</sup> For example, see documents 2437RO dated 2 August 2011, 2218RO dated 8 August 2011, 2171RO dated 16 August 2011 and 1986RO dated 31 October 2011.

preclude the finding that an agreement and/or concerted practice existed.

3.138 In response to the OFT's section 26 Notice issued to GBL in September 2012, GBL confirmed the following:

- that Roma instructed GBL not to sell online certain mobility scooters supplied by Roma; and
- that Roma instructed GBL not to advertise prices online of certain mobility scooters supplied by it.

It was also confirmed in GBL's response to the section 26 Notice that GBL complied with Roma's instructions by amending its online pricing information to read 'sold in store'.<sup>200</sup>

3.139 On 2 April 2012, the OFT obtained forensic 'screen shots' from GBL's website [www.gblwheelchairs.com](http://www.gblwheelchairs.com).<sup>201</sup> These screen shots capture GBL's advertisements for the Alcora, Corella and Sorrento models without prices on display. The products appear with the words '*sold in store*' indicating that GBL continued to comply with Roma's online price advertising prohibition. The OFT's finding is that, without knowing the price, a customer would be precluded from making an online ('click to buy') transaction. The OFT therefore infers that GBL also continued to comply with Roma's online sales prohibition. Moreover, the words 'sold in store' demonstrate that GBL complied with Roma's requests and/or instructions not to sell Roma-branded Scooters online.

### ***Conclusion***

3.140 In summary, the evidence demonstrates that on dates between 11 August 2011 and April 2012 Roma and GBL were party to an agreement and/or concerted practice which:

- prohibiting GBL from selling online Roma-branded Scooters; and

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<sup>200</sup> Document 3472GBL.

<sup>201</sup> See documents 0360GBL, 0361GBL, 0362GBL and 0363GBL (see also document 3870WS, supporting OFT witness statement). See Annexe C, paragraph C.89 for GBL's websites.

- prohibiting GBL from advertising prices online in respect of those scooters.

3.141 Some of the evidence demonstrates that GBL did not fully comply with Roma's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, GBL's non-compliance in parts and/or 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed<sup>202</sup>

### **FURTHER SUPPORTING EVIDENCE OF AGREEMENTS AND/OR CONCERTED PRACTICES**

3.142 In its communications to retailers, Roma stipulated that it would cease to supply any retailers that did not comply with its online sales and online price advertising policy.

3.143 There is direct evidence at paragraphs 3.144 to 3.150 below, which demonstrates that Roma had communicated to three non-compliant retailers that Roma had withdrawn its Roma-branded Scooters from the relevant retailers due to non-compliance with its policy on online price advertising and online sales.

3.144 On 20 September 2011, Roma's Commercial Director [name redacted] sent an email to [retailer name redacted] (copying in [name redacted], [name redacted] and [name redacted]), entitled 'Roma Medical branded scooter pricing on the internet'. Roma's Commercial Director [name redacted] stated that as [retailer name redacted] had been made aware in the past, and with '*reference to the way in which Roma branded scooters will be "sold in store" and will replace any current pricing on our Dealer internet site*', the deadline for the withdrawal of prices (16 September 2011) from the internet had now passed.<sup>203</sup>

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<sup>202</sup> See Annexe A at paragraphs A.36 to A.39.

<sup>203</sup> Document 1428RO.

3.145 A similar email was sent by Roma's Commercial Director [name redacted] to the retailer [retailer name redacted] on 20 September 2011.<sup>204</sup>

*'In summary- the Roma branded scooters have been withdrawn from your contract until you have taken the prices off your website, this rule is being applied to all of our Dealers. The products will be added back to your contract as soon as you have supplied us with the detail that you've dealt with the issue. We need our Dealers to appreciate there will be one rule for everyone concerning the Roma branded scooters and we wish for all of our Dealers to reap the benefits of selling the products direct to the public without fear of being undercut on the internet.'*

3.146 On 7 October 2011, Roma's Commercial Director [name redacted] further informed [retailer name redacted] that:<sup>205</sup>

*'We've received an order for an Alcora- ROM 765- today from your company.*

*Unfortunately, we are not in a position to supply you with the product until you've withdrawn the pricing for all Roma branded scooters from your official website [...]*

*Once this has been done and you inform us then we will be more than happy to process all orders for future Roma branded scooters. We will hold onto this order and hopefully you can make the change to your sites so we may supply with you with the product.'*

3.147 Furthermore, in interview, an employee of Roma [name redacted], noted that Roma had ceased supplying the two retailers [retailer name redacted] and [retailer name redacted], until those retailers had

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<sup>204</sup> Document 2085RO.

<sup>205</sup> Document 1428RO.

removed certain Roma-branded Scooters from the retailers' websites.<sup>206</sup>

- 3.148 Roma made representations that it did not in fact cease supplying [retailer name redacted] and [retailer name redacted]. It stated that *'the only time it has regulated supply to these two retailers [retailer names redacted] is when there have been issues regarding the late payment of accounts'*. Roma did not make representations on whether it ceased supplying the retailer [retailer name redacted].
- 3.149 The OFT has not determined whether Roma did in fact cease to supply non-compliant retailers as a finding on this point is not necessary for deciding whether or not there were relevant agreements and/or concerted practices in place between Roma and the Retailers. The evidence above demonstrates that Roma used the threat that it would cease supplying non-compliant retailers as a mechanism to try to achieve compliance with its policy on online sales and online price advertising. The fact that Roma communicated to retailers that it would cease to supply any non-compliant retailers, placed retailers under considerable pressure to comply. Moreover, the fact that Roma communicated to two retailers that it had in fact ceased supplying them due to non-compliance with its policy, suggests that it either did or was at least prepared to implement its policy on non-compliance.
- 3.150 The OFT therefore considers that such evidence provides further support for its finding that the Retailers, at least in part, complied with Roma's policy on online sales and online price advertising, as they would otherwise have been informed that they were no longer being supplied by Roma and/or would no longer have been supplied.

## CONCLUSION

- 3.151 On the basis of the evidence set out above, the OFT's finding is that the Parties engaged in an agreement and/or concerted practice within the meaning of the Chapter I prohibition.

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<sup>206</sup> Document 3448WS (CD 1 of 1, pages 8-9). See also document 1443RO which refers to the retailer [retailer name redacted].

## **D Application of Article 101 TFEU – Effect on trade between Member States**

- 3.152 As set out in Annexe A, at paragraphs A.81 to A.86, Article 101 TFEU will apply where an agreement and/or concerted practice has the potential to affect trade between EU Member States.
- 3.153 The OFT's finding is that in the present case the agreements and/or concerted practices were not cross-border in nature, but rather were entered into by Roma (a UK-based supplier) and its UK-based Retailers. The OFT infers from the evidence currently available to it that those Retailers make no, or no material, sales to end-consumers in other Member States as mobility scooters are not easily traded across borders.<sup>207</sup> Retailers informed the OFT that the size and weight of mobility scooters leads to high freighting costs, and that repair and servicing is not possible for cross-border clients, such that mobility scooters are, by their very nature not easily traded across borders at the retail-level.<sup>208</sup> One of the largest online retailers informed the OFT that it makes no material sales to end-consumers in other Member States.<sup>209</sup>
- 3.154 Further, the evidence currently in the OFT's possession does not suggest that the agreements and/or concerted practices had the actual or potential effect of hindering (or facilitating) access by suppliers or retailers from other Member States to the mobility scooters market in the UK or any part of it.<sup>210</sup>

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<sup>207</sup> Document 3456WS (pages 10 and 11), Document 3821TI, 3824TI.

<sup>208</sup> Document 3456WS, pages 10 and 11, Document 3824TI.

<sup>209</sup> The retailer [retailer name redacted] described its cross-border sales as a: '*tiny fraction*' (see [document number redacted], pages 10 and 11).

<sup>210</sup> The OFT has been informed that the majority of retailers do not consider direct imports to constitute an alternative to purchasing from a supplier based in the UK (see Annexe B at paragraphs B.38 and B.39). The evidence currently available to the OFT does not suggest that the agreements and/or concerted practices hindered (or facilitated) suppliers in other Member States from setting up a UK-base.

3.155 On the basis of evidence currently in the possession of the OFT, therefore, the OFT's finding is that it is not possible to foresee with a sufficient degree of probability that the agreements and/or concerted practices (i) may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, or (ii) affect the competitive structure of the market, such that the OFT currently has no grounds for action under Article 101 TFEU.<sup>211</sup>

## **E Effect on trade within the UK**

3.156 As set out in Annexe A at paragraphs A.79 to A.80, the Chapter I prohibition applies to agreements which:

*'...may affect trade within the United Kingdom'.*

3.157 For the purposes of the Chapter I prohibition, the UK includes any part of the UK in which an agreement operates or is intended to operate. Effect on trade within the UK is a purely jurisdictional test to demarcate the boundary line between the application of EU competition law and national competition law.<sup>212</sup>

3.158 The OFT's finding is that the products which are the subject of the agreements and/or concerted practices are sold throughout the UK.<sup>213</sup> The OFT's finding is that the agreements and/or concerted practices therefore meet the 'effect on UK trade' test for the purposes of the Chapter I prohibition.

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<sup>211</sup> While the OFT finds no grounds for action under Article 101 TFEU against the Retailers, this does not mean that the OFT proposes to make a non-infringement decision in relation to Article 101 TFEU. In Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele 2 Polska, now Netia SA w Warszawie*, the CJ issued a judgment which clarified that, given the risk of undermining the uniform application of Articles 101 and 102, only the Commission is empowered to make a finding that there has been no breach and that national competition agencies can only decide that there are no grounds for action on their part.

<sup>212</sup> *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, at [459] and [460]. The CAT considered this again in *North Midland Construction plc v. Office Of Fair Trading* [2011] CAT 14, at [48]-[51] and [62]) but considered that it was '*not necessary [...] to reach a conclusion*'.

<sup>213</sup> Documents 3456WS, 3824TI, and 3821TI.

## **F Object of preventing, restricting or distorting competition**

3.159 The OFT finds that each of the agreements and/or concerted practices addressed in Section C above had the object of preventing, restricting or distorting competition in the supply of mobility scooters in the UK or a part of the UK.

3.160 This section sets out the basis for the OFT's finding regarding the object of those agreements and/or concerted practices, in accordance with the appropriate legal framework for assessing restrictions by object, as set out in Annexe A.

### ***Key legal principles***

3.161 In conducting this assessment, the OFT has applied Annexe A and has had particular regard to the following legal principles:

- Object infringements are those forms of collusion between undertakings that are, by their very nature, detrimental to competition.<sup>214</sup>
- The 'object' of an agreement is assessed by reference to an objective analysis of its content and purpose and of the legal and economic context of which it forms part.<sup>215</sup>
- The OFT takes the view that if the obvious consequence of an agreement is to prevent, restrict or distort competition, that will be its object for the purposes of the Chapter I prohibition, notwithstanding that it may have other aims or objectives as well.<sup>216</sup>
- The 'object' of an agreement is not assessed by reference to the parties' subjective intentions when they enter into it, but evidence of such intentions may also be taken into account.<sup>217</sup>

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<sup>214</sup> See paragraph A.42 below.

<sup>215</sup> See paragraph A.42 below.

<sup>216</sup> See paragraph A.46 below.

<sup>217</sup> See paragraph A.48 below.

## **Online sales prohibition**

- 3.162 As set out in Section C above, the OFT's finding is that Roma entered into agreements and/or concerted practices with the Retailers, which prohibited Retailers from selling online the Roma-branded Scooters. The specific content of those agreements and/or concerted practices is covered in that section and is not therefore repeated in this section.
- 3.163 The OFT's finding is that the obvious consequence of the online sales prohibition was to restrict competition between retailers, in relation to the Roma-branded Scooters, and to limit consumer choice. The OFT also finds that the agreements and/or concerted practices were, by their very nature, detrimental to competition.
- 3.164 In its representations Roma submitted that the online sales prohibition did not have as its obvious consequence the restriction of competition between retailers, as '*bricks and mortar dealers could still compete between themselves as to the price that they offered the Roma branded scooters*'.<sup>218</sup>
- 3.165 While the OFT accepts that the online sales prohibition did not *eliminate* all competition between retailers, this does not negate the OFT's finding that the obvious consequence of the online sales prohibition is the *restriction* of competition. The OFT has set out below the reasons why an online sales prohibition has as its obvious consequence the restriction of competition; and the reasons why, by its very nature, it is detrimental to competition. Further, the significance of the internet in providing a competitive constraint on retailers is clear from the contemporaneous evidence.<sup>219</sup>
- 3.166 The OFT's finding is that, by prohibiting retailers from using the internet as a sales channel, retailers were in practice restricted from accessing a wider group of end-consumers *that are situated outside of the relevant retailers' local geographic area and who would wish to make online purchases, which is liable to restrict competition. In reaching this conclusion, the OFT has had regard to the CJ's decision in Pierre Fabre, in which the CJ observed that:*

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<sup>218</sup> Roma's representations, paragraphs 5.41 to 5.42.

<sup>219</sup> See paragraph 3.187 to 3.195 below.

*'[...] by excluding de facto a method of marketing products that does not require the physical movement of the customer, the contractual clause **considerably reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It is therefore liable to restrict competition in that sector.**'*<sup>220</sup> (Emphasis added).

The CJ also noted that:

*'a contractual clause such as the one at issue in the main proceedings, prohibiting de facto the internet as a method of marketing, at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside of the physical trading area of the relevant member of the selective distribution system.'*<sup>221</sup>

3.167 The OFT has also had regard to Advocate General Mazak's Opinion in *Pierre Fabre*:

*'Moreover, while it would appear from the file before the Court that intra-mark competition is already strong given the sales of the products in a very large number of physical outlets in France, a **general and absolute ban on internet sales eliminates a modern means of distribution which would allow customers to shop for those products outside the normal catchment area of those outlets thereby potentially further enhancing intra-mark competition.** Internet sales may also enhance intra-mark competition as such sales may increase price transparency thereby permitting price comparison of the products in question. [Footnote 62:] And between the products in question and other brands (inter-mark competition).'*<sup>222</sup> (Emphasis added).

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<sup>220</sup> See paragraph A.63 below.

<sup>221</sup> See paragraph A.66 below.

<sup>222</sup> See footnote 359 and 360 at paragraph A.69 below.

3.168 Viewed from the perspective of consumers, the online sales prohibition restricted consumers' access to (and in turn choice of)<sup>223</sup> retailers from which to purchase the Roma-branded Scooters which were subject to the online sales prohibition.

3.169 As a consequence of the foregoing, and as further explained in Chapter 2 of the Decision, the online sales prohibition was liable to:

- prevent, restrict or distort intra-brand price competition, and
- restrict consumers' ease of access to a greater number of product offerings than may otherwise be available in their respective local area.

3.170 Moreover, the OFT's finding is that Roma's prohibition on online sales was not aimed at a legitimate goal capable of improving competition. The contemporaneous internal documents which immediately preceded the introduction of the prohibition (see Chapter 2 above and paragraphs 3.187 to 3.195 below under the heading 'Evidence of the parties' subjective intentions behind the online sales prohibition and online price advertising prohibition') do not refer to any need to prohibit online sales on the basis of the products' characteristics (for example, to protect the health and safety of consumers);<sup>224</sup> rather, they discuss the aims of:

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<sup>223</sup> One would expect the internet to provide more choice in two ways. First, consumers are no longer limited to 'bricks and mortar' stores in their geographic area. Second, the internet can offer alternative means of providing product and price information, and may result in competitive pricing, in particular where internet retailers face lower fixed costs.

<sup>224</sup> In interview with the OFT dated 4 September 2012 (see Document 3455/WS CD 5 of 5 p 8), Roma's Commercial Director [name redacted] was asked to clarify whether Roma considered it necessary for end-consumers to receive pre-sales advice and 'assessments' in respect of mobility scooters, in light of the following email dated 2 March 2012 to the retailer Discount Mobility Direct Ltd, in which he states that users of mobility scooters do not require a pre-sales assessment whereas users of powered wheelchairs do (see Document 0965/RO-email dated 2 March 2012 from Roma's Commercial Director [name redacted] to a Discount Mobility Direct employee [name redacted]):

*'Please also be aware that we intend to send a communication out later today to all of our Dealers that specifies that from later this month the power range of products will be only available as "sold in store" items.*

- lessening the price difference between bricks and mortar retailers and online retailers, and
- preventing retailers from being undercut as a result of the internet.

- 3.171 Roma stated in its representations that '*an assessment is required for scooters*'.<sup>225</sup> This statement is, however, inconsistent with an email sent by Roma's Commercial Director [name redacted] which stated that assessments are required for '*powerchairs*' but that '*scooters can be sold on-line without this taking place*'.<sup>226</sup>
- 3.172 Further, Roma has not stated why it is necessary to prohibit online sales in order to ensure that '*assessments*' are provided. We note that, even if it is necessary for consumers to receive an '*assessment*', it is possible for such assessments to take place even in the context of online sales (see, paragraphs 3.227 below in which the OFT provides examples of retailers providing pre-sales services at a location of the consumer's choosing (usually at home) as part of an online sale).
- 3.173 Moreover, it is instructive to note that Roma prohibited retailers from selling online the 'Roma-branded' mobility scooters but continued to allow retailers to sell its 'Shoprider' brand online. Had Roma's online sales prohibition been motivated by a need to protect the health and safety of its consumers, it would have applied the same prohibition in relation to the 'Shoprider' brand, rather than the 'Roma-brand' only,

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*We've taken this decision to ensure the public gets assessed for the correct product on a face to face basis – we appreciate scooters can be sold on-line without this taking place, but power chairs need to be suitable for the person and their environment and we wish to promote best practice*'. [Emphasis added.]

Roma's Commercial Director [name redacted] responded in interview that Roma's policy was to require pre-sales assessments for mobility scooters. No explanation was provided as to why he had suggested in the email of 2 March 2012 that this may not be necessary.

<sup>225</sup> See Roma's representations, paragraph 5.43.

<sup>226</sup> See footnote 224 above.

as the product characteristics and functionality of the Roma-branded and Shoprider-branded mobility scooters are materially the same.<sup>227</sup>

- 3.174 Roma contends in its representations that the difference in approach to online sales for Shoprider-branded mobility scooters stems from *'additional responsibilities in relation to the sale of the Roma branded scooters'*<sup>228</sup> due to its *'liability under consumer protection legislation'*<sup>229</sup>. Moreover, Roma make reference to being *'responsible for ensuring that the device meets regulatory standards as set out in the Medical Devices Regulations 2002'*<sup>230</sup>. It further notes that the *'consequences of non-compliance with the relevant regulations in ensuring that the goods conform to a particular standard are set out in section 12 of the Consumer Protection Act 1987 and amount to a criminal offence'*.<sup>231</sup> Finally, Roma states that it sought to minimise *'the risk of claims being brought against Roma for its potential liability as manufacturer'*.<sup>232</sup>
- 3.175 In response, the OFT notes first that the Consumer Protection Act 1987 and the Medical Devices Regulations 2002 only impose requirements on Roma in relation to the way in which it manufactures, constructs and packages its mobility scooters. These statutory obligations do not require Roma to place restrictions on the method by which goods are distributed, re-sold or advertised by third parties and do not require a manufacturer of mobility scooters – directly or indirectly - to prohibit online sales or online price advertising.
- 3.176 Second, the documentary evidence does not suggest that a motivation for the introduction of the Prohibitions was compliance with consumer protection legislation. There appears to be no

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<sup>227</sup> See further the section below entitled ' Exclusion or exemption'.

<sup>228</sup> Roma's representations, paragraph 5.8.

<sup>229</sup> Roma's representations, paragraph 5.8.

<sup>230</sup> Roma's representations, paragraph 5.6.

<sup>231</sup> Roma's representations, paragraph 5.7.

<sup>232</sup> Roma's representations, paragraph 5.8.

difference in terms of the required level of the sales supervision necessary to protect the health and safety of consumers for Roma-branded and Shoprider-branded mobility scooters as they have the same characteristics. The OFT therefore does not accept Roma's representations that it prohibited online sales of Roma-branded mobility scooters on the basis of its duties to protect consumers under the above-named Act and Regulations.

- 3.177 For the reasons set out above, Roma's representations do not undermine the OFT's conclusion that the obvious consequence of the online sales prohibition was a restriction of competition; nor do they undermine the OFT's conclusion that, by its very nature, it was detrimental to competition.

### ***Online price advertising prohibition***

- 3.178 As set out in Section C above, the OFT's finding is that Roma entered into agreements and/or concerted practices with the Retailers, which prohibited Retailers from advertising prices online in respect of the Roma-branded Scooters. The specific content of those agreements and/or concerted practices is covered in that section and is not therefore repeated in this section.
- 3.179 The OFT finds that the obvious consequence of the online price advertising prohibition was to restrict price competition between retailers in relation to the Roma-branded Scooters. The OFT also finds that the agreements and/or concerted practices were, by their very nature, detrimental to competition. Further, the significance of the internet in providing a competitive constraint on retailers is clear from the contemporaneous evidence.<sup>233</sup>
- 3.180 The advertising of price information allows consumers to easily access price information in order to compare the various offers available in the market and to determine which retailer, 'bricks and mortar' or otherwise, offers the best price. Where retailers are able to signal to consumers (through advertising) that their prices are lower than their competitors', they can win the custom of consumers who would otherwise have made a purchase from a higher-priced competitor. The

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<sup>233</sup> See paragraph 3.187 to 3.195 below.

prospect of increased sales will incentivise them to lower prices, thereby promoting price competition in the sector.<sup>234</sup> Such price competition in the supply of products serves as an incentive for retailers to act efficiently and ensures that lower prices are passed on to consumers.

3.181 By prohibiting retailers from advertising retail prices online, retailers who would otherwise advertise at a lower price are unable (or at least significantly less able) to signal to consumers that they are offering better value. For example, bricks and mortar stores will be unable to advertise prices online in order to attract in store sales. Therefore, such a prohibition prevents consumers from easily shopping around for lower-priced retailers (for example, through the use of 'Google shopping'). As a consequence, by reducing price transparency between retailers, a prohibition on price advertising over the internet is likely significantly to eliminate incentives on the part of retailers to engage in price competition with other retailers selling, whether online or otherwise, Roma-branded Scooters and is thereby liable to lead to consumers paying higher prices. Therefore, the prohibition on online price advertising is liable to prevent, restrict or distort competition between retailers.

3.182 In reaching this conclusion, the OFT has had regard to its decisional practice. In *Lladró*, the OFT noted that:

*'[...] retailers must not be deprived of their commercial freedom to inform potential customers of their resale prices (including discounts), such as by the use of advertising and promotional campaigns.'*<sup>235</sup>

*The advertising of resale prices, including discounts, promotes price transparency between retailers and provides a significant incentive for retailers to compete on price, including the offer of discounts. In*

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<sup>234</sup> The OFT recognises that whilst price is an important aspect, consumers will not only focus on price when purchasing a mobility scooter but will also consider and assess the relative suitability of the product's features in meeting their needs.

<sup>235</sup> 'Provided always that such advertising does not infringe the requirements of any relevant law or regulations, such as the Control of Misleading Advertisements Regulations 1988 (SI 1988/915), and subject to any territorial restrictions on advertising that may be permissible, for example, under block exemption Regulations.'

*contrast, any provision which restricts a retailer's freedom to inform potential customers of discounts which are being offered removes a key incentive for, and constitutes an obstacle to, price competition between retailers. Where recommended resale prices are provided by the supplier, any such provision makes it more likely that the recommended price will not be deviated from by retailers, thereby indirectly limiting the latter's ability to compete on price.<sup>236</sup> Such a provision has as its obvious consequence the restriction of a retailer's ability to determine its own resale prices. Accordingly, any such provision has as its object the prevention, restriction or distortion of competition.'*

The OFT did not receive representations on the above points from any of the Parties.

### ***Context in which the online sales prohibition and the online price advertising prohibition operated***

3.183 The OFT has had regard to the context in which the online sales prohibition and the online price advertising prohibition operated. The coexistence of the two prohibitions makes it relevant to assess one prohibition in the context of the other, in that the online price advertising prohibition effectively prevented any online ('click to buy') transactions from taking place, and thereby reinforced the online sales prohibition. In addition, the OFT's finding is that both prohibitions were introduced and applied at the same time in respect of the Roma-branded Scooters. As such, the context which the OFT has taken into account below is equally applicable to both prohibitions.

3.184 In its representations Roma suggests that '*there is healthy competition between dealers to the benefit of the consumer*' by virtue of it having

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<sup>236</sup> 'The Director notes that the European Court has already established that restrictions on advertising may amount to an indirect form of resale price maintenance. In Case 86/82 *Hasselblad v Commission* [1984] ECR 883, the Court upheld the Commission's finding that clauses which allowed the supplier to scrutinise the wording of dealers' advertisements as regards selling prices infringed Article 81(1) (ex Article 85(1)), on the grounds that they enabled the supplier to prevent actively competing and price-cutting dealers from advertising their activities.'

the second largest dealer network in the UK.<sup>237</sup> Roma's argument on this point fails to address the important role that the internet plays in enhancing intra-brand competition between retailers and also in increasing choice for consumers, such that the online sales prohibition and online price advertising prohibition both individually and in combination have the obvious consequence of restricting competition; and are, by their very nature, detrimental to competition.

3.185 In any event, the OFT considers that in the context of Roma's dealer network, it does not necessarily follow that its size, relative to that of other manufacturers in this sector, results in strong intra-brand competition, as such competition was in fact already restricted by Roma's use of qualitative and quantitative criteria to select retailers for its distribution network (see points set out at paragraph 3.186 below.

3.186 The OFT has considered the following key factors which provide relevant context in which the agreements and/or concerted practices operated:

- **intra-brand competition was already restricted as a result of quantitative selection criteria:** Roma's general policy not to appoint new retailers in any given geographic area that was already being serviced by an existing Roma retailer is described in paragraphs 2.22 to 2.27 above.<sup>238</sup> That policy limited the number of authorised retailers in its distribution network, as it would have tended to increase the distance between the nearest bricks and mortar retailer. In such circumstances, the internet could have played an important role in terms of enabling consumers to compare prices and increasing consumer choice.
- **intra-brand competition was already restricted as a result of qualitative selection criteria:** Roma's policy to appoint only retailers that met its qualitative criteria is described above in paragraphs 2.16-2.21. That policy limited the number of

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<sup>237</sup> Roma's representations, paragraph 5.9.

<sup>238</sup> See footnote 29, which refers to the OFT's interview with a Roma Area Sales Manager [name redacted] dated 4 September 2012.

authorised retailers in its distribution network and thereby limited consumers' choice of Roma retailers.<sup>239</sup>

- **consumers in this sector are often first-time buyers,**<sup>240</sup> such that they are likely to have a limited frame of reference in order to judge whether products on offer represent good value, and are therefore less able to generate price competition themselves by virtue of their knowledge of the sector (see Chapter 2 for further details).
- **end-consumers' restricted mobility may make it more difficult for them physically to shop around,** such that a prohibition on online price advertising can make it even more difficult for them to compare the various offers available in the market, including those from bricks and mortar retailers, and to obtain value-for-money. In addition, a prohibition on online sales can limit the availability of alternative sales channels which would be particularly important for consumers with restricted mobility. The OFT notes that the internet has played an increasingly important role in the sector as a sales channel.
- **both online sales and online price advertising were prohibited in respect of the Roma-branded Scooters.** The coexistence of both prohibitions makes it relevant to assess one prohibition in the context of the other. By prohibiting online price advertising in respect of the Roma-branded Scooters, Roma was effectively preventing online ('click to buy') transactions from taking place in respect of those mobility scooters (albeit that it also explicitly introduced a prohibition on online sales), such that the existence of the online price advertising prohibition reinforced the existence of the online sales prohibition.

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<sup>239</sup> A selective distribution system that sets qualitative selection criteria, whilst potentially leading to higher standards of service, can also limit the number and choice of retailers.

<sup>240</sup> Data from the consumer survey of the OFT's market study into the mobility aids sector in 2011 shows that around 55% of consumers who purchased mobility scooters for themselves and 45% of consumers who purchased mobility scooters on somebody's behalf were first-time buyers.

***Evidence of the parties' subjective intentions behind the online sales prohibition and online price advertising prohibition***

3.187 As set out above in paragraph 3.161 (third bullet point), whilst the OFT is not required to consider the parties' subjective intentions when entering into an agreement, it may nonetheless take them into account.

3.188 In this regard it is helpful to consider contemporaneous documents, as they support the OFT's findings that one of Roma's aims when introducing the online sales prohibition and online price advertising prohibition was to dampen competition, in particular price competition.

3.189 On 21 June 2011 Roma sent a circular to its retailer network which stated that the purpose of its policy on online sales and online price advertising was as follows:<sup>241</sup>

*'[to] allow our Dealers to maximise their ability to sell Roma Medical scooters without having to concern themselves with the fact they may get undercut elsewhere, especially through the internet at a much lower price'.*

3.190 Roma further noted in its letter circular of 21 June 2011 that the benefits of such a policy were as follows:

*'The benefit of introducing this will present the Dealer with the opportunity to sell a suite of scooters that will not be available through any other channel other than in the retailer premises. This will also allow the public to receive a more personal approach from the Dealer'.*

3.191 There are further examples of Roma communicating its aims along similar lines in its correspondence to the retailers Discount Mobility Direct Ltd and GBL Wheelchair Services Ltd:<sup>242</sup>

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<sup>241</sup> Documents 0082CM, 1624RO, 0153GBL, 0260BL, 1622RO.

<sup>242</sup> Documents 1367RO, 0145DMD (email to Discount Mobility Direct Ltd) and 0455RO (email to GBL Wheelchair Services Ltd).

*'[A]n up sell opportunity, i.e. preferring the Dealer to offer a comprehensive and thorough sale to the public whilst they maximise their margins'.*

3.192 These aims are consistent with internal Roma documents which set out Roma's desire to *'lessen the price difference between dealers and internet sellers'*. It is instructive to note (albeit only as background given that it pre-dates the period of Infringements) that, in an internal email from a Roma Area Sales Manager [name redacted] to Roma's Commercial Director [name redacted] dated 16 November 2010, the Roma Area Sales Manager [name redacted] stated the following:<sup>243</sup>

*'I spoke to [name redacted] yesterday and although [retailer name redacted] was the one they came up against this week it now appears to be happening on a regular basis. [Name redacted]'s not the only customer to complain.*

*When I checked online there are lots of different companies doing our powerchairs at silly prices. [...]*

*I know we can't price fix but surely there must be some way of lessening the price differences between dealers and the internet sellers. It would surely benefit everyone in the long term by raising margins. End users only see the large savings and because of the amounts involved don't value the benefits of local and after care service in the way they used too [sic].*

*Surely there must be some way we can find a middle ground for our customers and reassure them that we are taking this seriously.'*

3.193 See also the reference to Roma's desire to achieve *'better potential dealer margin'* in paragraphs 2.93 to 2.94 above.

3.194 These aims are further set out in an email from Roma's Commercial Director [name redacted] to the retailer Mobility Independence Ltd (also known as British Mobility) dated 11 November 2011:<sup>244</sup>

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<sup>243</sup> Document 0473RO.

<sup>244</sup> Document 1412RO.

*'I'm aware you would like an update from Roma concerning where the company stands in terms of competitor Dealers selling at a very low price.*

*Two of my colleagues have been away on a business trip since the end of last week, returning to work early next week. It's my intention to speak with them on their return to the UK about your concerns.*

*As you are aware we've communicated with all of our Dealers the fact we want everyone to make profitable sales and for no one to uncut [sic] each other on the internet through underselling the Roma branded scooters. As regards to the Shoprider part of the range we cannot enforce or replicate what we've achieved through the Roma branded product – we have total control over these products but not over the Shoprider.'*

- 3.195 An internal email from Roma's Commercial Director [name redacted] dated 16 November 2011 further sets out that Roma communicated to its retailers the following:<sup>245</sup>

*'We have written to all of our Dealers outlining the fact that we wish for everyone to withdraw the prices and specify on their site "sold in store".*

*This has many benefits that will have a positive result when selling to the public including, no frustrations when the public come into a Dealers [sic] showroom – try a product then only to purchase it cheaper from another on-line supplier. It will also enable Dealers to present the product, offer an exceptional level of service and make a more profitable sale for the time and effort they put into securing the business.'*

## **Conclusion**

- 3.196 On the basis of the evidence and for the reasons set out above, the OFT finds that the agreements and/or concerted practices between Roma and the Retailers had as their object the prevention, restriction or distortion of competition.

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<sup>245</sup> Document 1410RO. See also document 1408RO.

3.197 In view of that conclusion, the OFT is not required to demonstrate that they had that concrete effect.<sup>246</sup>

## **G Appreciability**

3.198 The OFT finds that the agreements and/or concerted practices appreciably prevented, restricted or distorted competition in the supply of mobility scooters in the UK, or a part of the UK.

3.199 As set out in Chapter 3, Section F above, the OFT finds that the *object* of the agreements and/or concerted practices was to prevent, restrict or distort competition. Following the CJ's judgment in *Expedia* (see Annexe A, paragraph A.73 below), the OFT therefore finds that the agreements and/or concerted practices appreciably prevented, restricted or distorted competition in the supply of mobility scooters in the UK, or a part of the UK, for the purposes of the Chapter I prohibition. In any event, and in the alternative, following the CJ's well-established previous case law on the notion of appreciability, the OFT finds that the agreements and/or concerted practices appreciably prevented, restricted or distorted competition in the supply of mobility scooters in the UK, or a part of the UK, on the basis that their impact on competition was not insignificant.<sup>247</sup> The reasons are set out below.

3.200 The OFT has estimated that, in 2011, Roma was one of the three largest (in terms of volume) mobility scooter suppliers in the UK, with a market share of approximately [between 10 and 15 per cent (actual figure redacted)].<sup>248</sup> Further, with the exception of the top three suppliers, each of the other suppliers in this market has a market share of between one and eight per cent, such that Roma's relative size in the market is significant. Moreover, Roma's size in the market, by reference to its annual turnover in the UK in 2011, is also substantial (£11.9 million in respect of mobility aids sales which

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<sup>246</sup> See Annexe A at paragraph A.41.

<sup>247</sup> Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295, at paragraphs 5 to 7. See also C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11145, at paragraph 50.

<sup>248</sup> See paragraph 2.13 above.

includes £3-7 million [actual figure redacted] in respect of mobility scooters sales).<sup>249</sup>

- 3.201 Roma observed in its representations that the Roma-branded Scooters that were subject to the Prohibitions '*represent only around* [under 25% (actual figure redacted)] *of Roma's mobility scooter sales*.'<sup>250</sup> The OFT notes, however, that the case-law<sup>251</sup> does not focus on the share of the market enjoyed by the products directly subject to restrictions, but on the share(s) of the relevant market(s) enjoyed by the undertakings party to the agreement/concerted practice (among other factors).
- 3.202 The OFT further notes that Roma's policy (comprising the online sales and online price advertising prohibitions) applied to Roma's entire dealer network, which is the second largest dealer network in the UK<sup>252</sup> (its dealer network comprised [between 400 to 500 (actual figure redacted)] out of an estimated 800-1200 retailers in the UK).<sup>253</sup>
- 3.203 Finally, the OFT's finding, as set out in Chapter 2, Section C, is that the online sales prohibition and the online price advertising prohibition restricted the customers to whom or the territory into which Retailers might sell goods, and therefore constituted 'hardcore' restrictions under the Commission's De minimis Notice (point 11(2)(b)).<sup>254</sup> As such, the Parties cannot rely on the De minimis Notice.

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<sup>249</sup> In *North Midland Construction v OFT* [2011] CAT 14, a case decided before the CJ's ruling in *Expedia*, the CAT took into account the substantial size of the undertakings (one of which had annual turnover of £10 million).

<sup>250</sup> Roma's representations, paragraphs 5.10 and 5.46.

<sup>251</sup> See Annex A, paragraph A.78 below.

<sup>252</sup> The largest retail network consists of [between 600 to 700 (actual figure redacted)] retailers and the third largest consists of [between 400 and 500 retailers (actual figure redacted)]. See documents [document numbers redacted].

<sup>253</sup> See document 3830RO.

<sup>254</sup> See Annex A at paragraphs A.74 and A.75.

## H Exclusion or exemption

### ***Exclusion***

- 3.204 Section 3 of the Act provides that the Chapter I prohibition does not apply to any of the cases in which it is excluded by or as a result of Schedules 1-3 of the Act. As noted above at paragraph 3.175 to 3.176, there is no evidence that the Prohibitions were necessary in order to comply with legal requirements<sup>255</sup> under the Consumer Protection Act 1987 and Medical Devices Regulations 2002.<sup>256</sup>
- 3.205 The OFT concludes that none of the exclusions provided for by section 3 of the Act applies to the Infringements.

### ***Exemption***

- 3.206 An agreement or concerted practice which restricts competition is exempt from, and does not therefore infringe, the Chapter I prohibition where it satisfies all of the following cumulative exemption conditions in section 9(1) of the Act ('the exemption conditions'), namely where it:
- (i) contributes to improving production or distribution, or promoting technical or economic progress;
  - (ii) allows consumers a fair share of the resulting benefit;
  - (iii) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and
  - (iv) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- 3.207 It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.
- 3.208 Roma did not expressly make representations on the issue of individual exemption in its representations. It did however make

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<sup>255</sup> Schedule 3 of the Act, at paragraph 5: The Chapter I prohibition does not apply to an agreement to the extent to which it is made in order to comply with a legal requirement.

<sup>256</sup> Roma's representations, paragraphs 5.6 and 5.8.

submissions of a more general nature that the Prohibitions benefit consumers as they can lead to the provision of pre- and post-sales services.

- 3.209 In light of the admission of liability which Roma provided to the OFT, the OFT has not formally treated Roma's representations as representations made under section 9 of the Act. However, for completeness, and in any event, the OFT has set out below how it would have addressed Roma's representations had they formally been treated as representations made under section 9 of the Act. For the avoidance of doubt, the party claiming the benefit of section 9(1) of the Act shall bear the burden of proving that the four conditions of that subsection are satisfied.
- 3.210 Roma's submissions did not specifically consider whether or how each of the four exemption conditions was satisfied. In addition, Roma did not provide supporting evidence in relation to any of the exemption conditions. In these circumstances, had the OFT formally treated Roma's submissions under section 9 of the Act, it is not satisfied that Roma has discharged its burden to demonstrate that each of the four cumulative exemption conditions are met.
- 3.211 For completeness, however, the OFT explains below why, in its view, the Prohibitions do not satisfy the exemption conditions in any event (the conditions to which Roma's general submission appeared to relate).
- 3.212 By way of preliminary observation, the OFT recognises the importance, in the context of mobility scooter retailing, of consumers having access to suitable pre-sales services and advice in order to ensure that they purchase products that are suitable to their needs. The OFT also recognises that post-sale services are important in the context of mobility scooter retailing. Nothing in this Decision should be seen as inconsistent with those points of principle. For the reasons set out in this Section, however, the OFT has concluded that the Prohibitions do not benefit from exemption from the Chapter I prohibition under section 9 of the Act.

*The first exemption condition: contributing to improving production or distribution, or promoting technical or economic progress*

3.213 In order to meet the first exemption condition, the Parties would need to adduce evidence that substantiates any claims on:

- (i) the nature of the claimed efficiencies,
- (ii) the link between each of the Prohibitions and the claimed efficiencies,
- (iii) the likelihood and magnitude of each claimed efficiency, and
- (iv) how and when each claimed efficiency would be achieved.<sup>257</sup>

3.214 Any claimed efficiencies must, in particular, display appreciable objective advantages of such a character as to compensate for the disadvantages or the restrictive effects which they cause.<sup>258</sup>

3.215 In its representations Roma first submitted the following:

*'internet only dealers (or primarily internet suppliers) are, to an extent, parasitic on the bricks and mortar dealer network that currently exists in the UK. Currently consumers have the benefit of inspecting products and receiving assessment and advice from the existing dealers before then 'shopping around' on the internet. Internet only dealers have clear costs savings in their business models because they do not have to provide premises open to members of the public to enable these inspection and advice facilities, or necessarily have to provide post-sales services. They are therefore able to charge lower prices'.*<sup>259</sup>

3.216 Roma appears, therefore, to be asserting that the Prohibitions prevent 'internet only dealers (or primarily internet suppliers)' from free-riding on the pre-sales services provided by 'bricks and mortar' retailers.<sup>260</sup>

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<sup>257</sup> See Guidelines on the application of Article 101(3) of the TFEU, OJ 2004 C101/97, at paragraph 51.

<sup>258</sup> See e.g. Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, at 348, and Case T-111/08 *MasterCard Inc v Commission* (judgment of 24 May 2012, not yet reported) at paragraph 206.

<sup>259</sup> Roma's representations, paragraph 4.3.2 including 4.3.2 (a).

<sup>260</sup> It should be noted that the online environment provides consumers with considerable product information (for example see [http://www.discountmobilitydirect.co.uk/f\\_scooters.aspx](http://www.discountmobilitydirect.co.uk/f_scooters.aspx)).

- 3.217 Secondly, Roma submitted that *'lower end prices will inevitably lead to a reduction in the number of bricks and mortar dealers across the UK. Customers will not therefore have the benefit of being able to inspect products and receive the required level of assessment and advice on the suitability of the products for their particular needs.'*<sup>261</sup>
- 3.218 Roma appears, therefore, to be asserting that the Prohibitions prevent *'lower end prices'* which it considers would lead to a significant number of 'bricks and mortar' stores exiting the market. Roma further submits that preventing *'lower end prices'* ensures *'the required level'* of pre- and post-sales services.
- 3.219 In response to Roma's submissions, whilst we have not concluded on the extent to which free-riding occurs in this market, had the OFT formally treated the submissions under section 9 of the Act, it would have considered that the first exemption condition had not been met for the following reasons:
- Firstly, the Prohibitions did not in fact impose requirements on retailers to provide such pre- and post-sale services.<sup>262</sup> Further, Roma has not provided or sought to provide evidence on how free-riding could be directly mitigated or eliminated as a result of either of the Prohibitions. Nor has it sought to explain the relevance of a prohibition on online price advertising in addressing free riding (or indeed other efficiencies).
  - Secondly, Roma has not sought to explain or evidence the magnitude of any benefits arising from each of the Prohibitions, and

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Consumers can use this information to inform their choices offline and thus 'bricks and mortar' stores can also free ride on the efforts of internet retailers.

<sup>261</sup> Roma's representations, at paragraphs 4.3.2 (b) and 4.4.3. Moreover, at paragraph 6.2 of its representations Roma states that it was informed by 'bricks and mortar' dealers *'that they were being consistently 'undercut' by businesses that sold exclusively or mainly via the internet, thereby threatening the existence of the widespread dealer network'*.

<sup>262</sup> The OFT has not reached a finding as to whether the provision of post-sales services can constitute an efficiency within the meaning of section 9 of the Act, which requires that the efficiency must contribute to improving production or distribution, or promoting technical or economic progress.

whether such benefits outweigh the anti-competitive disadvantages. These included potentially higher retail prices and a reduction in variety and choice for consumers. Moreover, Roma has not sought to explain why it was necessary even to restrict the online sales and price advertising activities of retailers who were in fact providing pre- and post-sales services.

- 3.220 In conclusion, Roma has not provided compelling arguments and/or sufficient substantiated evidence demonstrating that the Prohibitions contributed to improving production or distribution, or promoting technical or economic progress. In the present case, the OFT has consequently concluded that the first exemption criterion would not have been satisfied.

*The other exemption conditions*

- 3.221 Since the OFT considers that Roma has not provided sufficient substantiated evidence under the first condition, it is strictly unnecessary to consider whether the Prohibitions meet the other three conditions. However, for completeness, we note that through the course of the investigation some evidence relating to the indispensability condition has been considered by the OFT and is therefore briefly considered below. We note that Roma did not make any representations with respect to the second and fourth conditions and these are not considered below.
- 3.222 The Commission's Article 101(3) Guidelines note that the indispensability condition implies a two-fold test.<sup>263</sup> First, a restrictive agreement and/or concerted practice must be reasonably necessary in order to achieve the efficiencies claimed. Secondly, the individual restrictions of competition that flow from the agreement and/or concerted practice must also be reasonably necessary for the attainment of those efficiencies. This means that the Parties have to demonstrate that the claimed efficiencies were specific to the infringing agreements and/or concerted practices (and to the individual restrictions) in the sense that there were no other economically

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<sup>263</sup> Guidelines on the application of Article 101(3) of the TFEU, OJ 2004 C101/97, at paragraph 73.

practicable and less restrictive means of achieving the claimed efficiencies.

3.223 In this case, the OFT's view, as set out in the Statement, is that even if it were established that:

- a prohibition on online sales, and/or
- a prohibition on online advertising of all prices,

lead to the claimed efficiencies, in particular to retailers providing pre-sales services and advice and/or providing adequate post-sales service, there are less restrictive means of achieving these efficiencies.

3.224 The OFT considers for example that a selective distribution system that requires retailers to provide suitable pre-sales services and advice (and/or post-sales service), would constitute a less restrictive means of achieving the potential efficiencies.<sup>264</sup> By specifically requiring the provision of pre-sale services and advice (and/or post-sales service), the supplier can directly ensure that end-consumers receive such services and advice. In contrast, the OFT considers that an online sales prohibition and/or online price advertising prohibition are not apt to ensure such services are provided.

3.225 The OFT understands that Roma in any event only supplies retailers with a bricks and mortar showroom, such that it is not clear why it was further necessary to restrict online sales and price advertising in order to prevent free-riding.<sup>265</sup> In addition, Roma has a standard form in which the retailer must confirm that '*the product has been demonstrated prior to commissioning/delivery and is suitable for use by the person named above*'.<sup>266</sup> That form is hereinafter referred to as Roma's standard Warranty and Assessment form. The customer also has to sign the form to confirm '*the product has been demonstrated*

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<sup>264</sup> It should be noted that it would be necessary to ensure that such a system met the requirements of competition law.

<sup>265</sup> See document 3438RO.

<sup>266</sup> See Document 3453/WS (Document 3 of 5, page 10) and Document 0037/RO.

*and I am aware of it's [sic] functions.*<sup>267</sup> The Warranty and Assessment form further prompts the retailer to conduct a pre-sale assessment and states that it must be sent back to Roma to validate the warranty. The OFT understands that Roma does not currently fully enforce this policy.<sup>268</sup> However, if Roma were to do so, this in itself ought to ensure that pre-sales services (including an assessment) are provided.

- 3.226 Had the OFT formally treated Roma's submissions under section 9 of the Act, the OFT would have considered that the claimed efficiencies were not specific to the agreements and/or concerted practices here at issue.
- 3.227 Finally, the OFT understands that retailers who sell online are providing pre- and post-sale services through their showrooms and/or are finding innovative, and less restrictive, ways to provide such services to their customers (including at the consumer's location).<sup>269</sup>

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<sup>267</sup> See Document 0037/RO.

<sup>268</sup> In interview with the OFT dated 4 September 2012, there was the following exchange between the OFT and Roma's Commercial Director:

OFT: *Yeah. Yeah, I see. And did you tend to take any action if dealers didn't send it [Roma's standard Warranty and Assessment form] back?*

Roma's Commercial Director [name redacted]:

*No. Again, like the pricing, 'sold in store' and before that, you know, the verbal communication in 2010, we tried to bring awareness to what we're doing and the benefits of doing it. People don't get chastised for not sending them back to us but, as I say, most dealers can see the benefit of doing it. I think going forward, if we need to rewrite any policies, etc, it would be something that I would like everyone to do because, again, it's the common theme for all dealers to ensure the information is registered, and we'll have transparency with our customers then of what product's been sold and the person it's been sold to.*

See Document 3453/WS (Document 3 of 5, page 10 to 12).

<sup>269</sup> It should be noted that based on information received by the OFT it appears that retailers who sell online have an incentive to provide these services and ensure that customers are sold suitable mobility scooters. For example, Factory Outlet Scooters stated that *'If a dealer sells a product which is not appropriate for the customer it causes a lot of complication later. FOS does*

Such cases clearly demonstrate that the provision of these services can be achieved without the need for a prohibition on online sales and online price advertising.<sup>270 and 271</sup>

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*not sell a product even if asked for by the customer if that does not suit the customer.*' See document 3824TI.

<sup>270</sup> The examples listed below should not be considered an exhaustive list of ways in which these services could be provided. Instead they are examples based on information provided to the OFT of how they may be provided.

- i. The online retailer [retailer name redacted] has a service whereby, for an extra fee, an engineer delivers the scooter to the consumer. On delivery, the consumer can immediately test the product. If the consumer considers the product to be unsuitable, it can be returned and all monies are refunded, except for the extra fee. In addition to having a showroom, [retailer name redacted] provides advice to consumers either through its website or via advisors that consumers can call. Further, [retailer name redacted] provides post-sales support for customers through an independent contractor. (See [document number redacted], pg 12, and [document number redacted] pg 12.)
- ii. [Retailer name redacted] provides a similar service, whereby customers who pay an additional fee can have the mobility scooter delivered and set up, and can receive a product demonstration. [Retailer name redacted] also offers an additional warranty whereby a post-sales support is provided at the consumer's location. (See [document number redacted].)
- iii. [Retailer name redacted] delivers mobility scooters nationwide. It also provides product demonstrations and assessments at the consumer's location. A product demonstration is always provided with 'medium' and 'large' scooters. [Retailer name redacted] also 'have a significant pool of drivers and technicians that it can pull resource from in order to repair its mobility scooters'. [Retailer name redacted] provide this service nationwide. (See [document number redacted].)
- iv. [Retailer name redacted] provides a service whereby it will visit a customer in their home and undertake assessments there. Although [Retailer name redacted] does not sell online, if it is able to provide this kind of service away from its 'bricks and mortar' store, it is therefore unclear why retailers who sell online could not do the same. (See [document number redacted].)
- v. [Retailer name redacted] delivers and carries out an assessment at the consumer's location to ensure the scooter is adjusted to suit the customer's needs. They also have service engineers who will carry out repairs at the customer's home address. (See: [websites redacted])
- vi. The OFT has also been informed that one supplier requires online retailers to provide a demonstration to consumers free of charge before they decide whether to buy the mobility scooter. This policy would ensure that pre-sale services are provided. (See [document number redacted], pg 12.)

<sup>271</sup> The OFT notes that many of the examples listed above (in footnote 270) are optional extras; if the supplier wanted to ensure these services were provided they could make these service elements non-optional.

- 3.228 In response to some of the examples of this set out in the Statement (and here in footnote 270), Roma submitted that these *'options of course rely on a consumer having already decided on the specific product they want to purchase – the customer does not have the benefit of inspecting a range of scooters, from different manufacturers, as would be the case if it attended the premises of a local dealer.'*<sup>272</sup>
- 3.229 Roma's representations did not specifically concern the indispensability condition. In any event, although it is true that pre-sales services at the consumer's location may require that the consumer first pre-selects the mobility scooter of their choice, Roma has not provided evidence on the magnitude of this potential detriment. Further, no evidence has been provided which suggests that online retailers could not develop business models to overcome these concerns.
- 3.230 Further, the internet is not limited by space constraints, such that it can provide consumers with a greater choice of mobility scooters from each retailer and a wider range of mobility scooter retailers and their product offerings. In addition, it can provide consumers with product information that can help them make an informed choice, for example through online video tutorials.<sup>273</sup> In conclusion, for the reasons set out above, had the OFT formally treated Roma's submissions under section 9 of the Act, it would have considered that Roma has not demonstrated that the Prohibitions were indispensable to obtaining pre- and post-sales services.

#### *Application of a block exemption regulation*

- 3.231 Pursuant to section 10 of the Act, an agreement and/or concerted practice is exempt from the Chapter I prohibition if it is covered by a block exemption regulation.<sup>274</sup> The Vertical Agreements Block

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<sup>272</sup> Roma's representations, paragraph 5.48.

<sup>273</sup> As such, although consumers may only get to test one scooter, their selection would have been made on the basis of a potentially greater choice of products available online than in a local bricks and mortar store.

<sup>274</sup> See Annexe A, paragraph A.96.

Exemption Regulation ('VABER'),<sup>275</sup> which is the only conceivably relevant regulation, does not apply to agreements or concerted practices containing 'hardcore' restrictions. Among the types of restrictions listed as 'hardcore' are those that directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of the territory into which, or the customers to whom, the buyer party to the agreement, may sell the contract goods (see Article 4(b) of the VABER). (It should also be noted that restrictions that are '*black listed*' in block exemption regulations or identified as '*hardcore*' restrictions in Commission guidelines and notices are unlikely to be considered indispensable for the purposes of the third exemption condition unless there are exceptional circumstances<sup>276</sup>).

3.232 For the reasons set out in paragraphs 3.162 to 3.197 above, the OFT's finding is that the online sales prohibition and online price advertising prohibition have as their object the restriction of the territory into which, or the customers to whom, the retailer (the buyer party to the agreement) may sell Roma-branded scooters, and therefore constitute 'hardcore' restrictions within the meaning of Article 4(b) of the VABER.<sup>277</sup>

### *Conclusion*

3.233 It follows from the above that had the OFT formally treated Roma's submissions under section 9 of the Act, the case for exemption under section 9 or section 10 of the Act has not been made out.

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<sup>275</sup> Commission Regulation 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, OJ 2010 L /102/1.

<sup>276</sup> Commission Notice: *Guidelines on Vertical Restraints*, OJ 2010 C130/1, at paragraph 47.

<sup>277</sup> It is noteworthy that the Commission has indicated in the Vertical Guidelines that restrictions which limit the ability of retailers to sell products passively (thereby limiting the customers to whom the retailer can sell its products) are hardcore restrictions within the meaning of Article 4(b) of the Vertical Agreements Exemption.

## **I Conclusion on the application of the Chapter I prohibition**

3.234 The OFT finds on the basis of the evidence set out or referred to in Chapter 3 Sections A to H above that the Parties have infringed the Chapter I prohibition by participating in agreements and/or a concerted practices that had as their object the prevention, restriction or distortion of competition in the market for mobility scooters in the UK, or a part of the UK, in particular by:

- prohibiting online sales by retailers between July 2011 and April 2012, and
- prohibiting online advertising by retailers of any prices between July 2011 and April 2012.

## 4 THE OFT'S ACTION

### A Directions

4.1 Undertakings must by law comply with the Chapter I prohibition. Section 32(1) of the Act provides that if the OFT has made a decision that conduct infringes the Chapter I prohibition, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

4.2 On the evidence currently available to it, the OFT considers that the Infringements continued up to at least April 2012.<sup>278</sup> The OFT does not have evidence of a specific termination event.

4.3 The OFT gives the Parties the following directions:

- the Parties shall within 20 working days from the date of this Decision bring the Infringements to an end, to the extent that the Infringements have not already ceased;
- with effect from the date of this Decision, the Parties shall refrain from entering into agreements and/or concerted practices in relation to mobility scooters that are the same or similar in nature to those that are the subject of this Decision; and
- Roma shall within 20 working days from the date of this Decision write to each of the retailers listed in paragraph 1.8 of this Decision and any other retailers in respect of which it operates an online sales prohibition or online price advertising prohibition in relation to mobility scooters, to inform them that it no longer operates such prohibitions.

### B Penalties

#### ***General Points***

4.4 This part of the Decision sets out the action the OFT is taking and the reasons for this.

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<sup>278</sup> See paragraphs 3.28 to 3.34 above which summarises that evidence.

### ***Small agreements***

- 4.5 Section 39(3) of the Act provides that a party to a 'small agreement' is immune from financial penalties for infringements of the Chapter I prohibition. A 'small agreement' is an agreement between undertakings whose combined turnover did not exceed £20 million in the business year ending in the calendar year preceding one during which the infringement occurred.<sup>279</sup>
- 4.6 The OFT has reviewed the turnover of Roma and each of the Retailers and it considers that at all relevant times the combined turnover for each Roma-Retailer combination did not exceed £20 million.<sup>280</sup> On the basis of this turnover data the OFT is satisfied that the Parties are immune from penalties in relation to the Infringements.

### ***Conclusion in relation to the imposition of penalties***

- 4.7 For the reasons set out above, the OFT has not imposed penalties on the Parties.

Cavendish Elithorn, Senior Director, Goods and Consumer Group, for and on behalf of the Office of Fair Trading;



Ann Pope, Senior Director and joint head of the Services, Infrastructure and Public Markets Group, for and on behalf of the Office of Fair Trading; and



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<sup>279</sup> Section 39(1) and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000, SI 2000/262.

<sup>280</sup> See Annexe D.

Gaucha Rasmussen, Enforcement Director, Goods and Consumer Group, for and on behalf of the Office of Fair Trading;

A handwritten signature in blue ink, consisting of a stylized initial 'G' followed by a long horizontal stroke.

All of whom are the members of, and who together constitute, the Case Decision Group

5 August 2013  
Office of Fair Trading  
Fleetbank House  
2-6 Salisbury Square  
London EC4Y 8JX

Contact: Grahame Horgan (Project Director)  
Direct line: 0207 211 8532  
Email: [Grahame.Horgan@oft.gsi.gov.uk](mailto:Grahame.Horgan@oft.gsi.gov.uk)

## ANNEXES

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## **A LEGAL FRAMEWORK**

### **A The Chapter I prohibition and Article 101 TFEU**

- A.1 For present purposes, section 2(1) of the Act prohibits agreements and concerted practices between undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are excluded or exempt from the application of the Chapter I prohibition in accordance with the provisions of Part I of the Act.
- A.2 Article 101(1) TFEU prohibits agreements and concerted practices between undertakings which may affect trade between EU Member States and have as their object or effect the prevention, restriction or distortion of competition within the EU, unless they are exempt from the application of Article 101(1) in accordance with the provisions of Article 101(3) TFEU or they are excluded or exempt by virtue of a Regulation adopted by the European Commission or the Council of the European Union.
- A.3 This Decision concerns breaches of the Chapter I prohibition only. However, as described in Section B below, the OFT must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing consistency with the principles laid down by the TFEU, or any relevant decision of the European Courts.

### **B Application of section 60 of the Act – consistency with EU law**

- A.4 Section 60 of the Act sets out the principle that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions relating to UK competition law should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law.
- A.5 Section 60 also provides that the OFT must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing consistency with the principles laid down by the TFEU, or any

relevant decision of the European Courts.<sup>281</sup> The OFT must, in addition, have regard to any relevant decision or statement of the European Commission.<sup>282</sup>

- A.6 The provision in EU competition law closely corresponding to the Chapter I prohibition is Article 101 TFEU, on which the Chapter I prohibition is modelled. Accordingly, the case law of the European Courts and the decisional practice of the Commission concerning Article 101 TFEU are relevant when applying the Chapter I prohibition.

## **C 'Undertakings' for the purposes of EU and UK competition law**

- A.7 The Chapter I prohibition applies to agreements or concerted practices between 'undertakings'.
- A.8 The term 'undertaking' has been defined by the CJ to cover '*...every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed...*'.<sup>283</sup>
- A.9 Accordingly, the key consideration in establishing whether an entity is an undertaking is whether it is engaged in 'economic activity'. 'Economic activity' has been defined as conducting any activity '*...of an industrial or commercial nature by offering goods and services on the market...*'.<sup>284</sup>
- A.10 The term 'undertaking' encompasses any natural or legal person that carries on commercial or economic activities, regardless of legal form. It

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<sup>281</sup> The 'European Courts' include the Court of Justice (the 'CJ') (formerly the European Court of Justice) and the General Court (the 'GC') (formerly the Court of First Instance).

<sup>282</sup> The CJ recently held that national competition authorities '*may take into account*' guidance contained in non-legally binding Commission Notices (specifically the Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) [EC] (*De minimis*), OJ 2001 C368/13, but such authorities are not obliged to do so, C-226/11, Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others ('Expedia')*, judgment of 13 December 2012, as yet unreported, at paragraph 31.

<sup>283</sup> Case C-41/90 *Hofner and Elser v Macrotron* [1991] ECR I-1979, at paragraph 21.

<sup>284</sup> Case C-118/85 *Commission v Italy* [1987] ECR 2599, at paragraph 7.

includes, among others, companies,<sup>285</sup> partnerships,<sup>286</sup> individuals operating as sole traders<sup>287</sup> and trade associations.<sup>288</sup>

## D 'Single undertakings' and attribution of liability

A.11 Companies belonging to the same corporate group will often constitute a single undertaking within the meaning of the Chapter I prohibition. The fact that a subsidiary company has a separate legal personality as such does not prevent legal responsibility for its conduct being attributed to its parent company.<sup>289</sup>

A.12 A parent company can be held jointly and severally liable for an infringement committed by a subsidiary company where, at the time of the infringement, that parent company:

(i) had the ability to exercise decisive influence over the conduct of the subsidiary in question, and

(ii) actually exercised such decisive influence over that subsidiary.<sup>290</sup>

A.13 In *Durkan*, the UK's Competition Appeal Tribunal ('CAT') noted that the European Courts have established, among other things, that:

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<sup>285</sup> In all their corporate forms, including a limited partnership (see Case 258/78 *Nungesser v Commission* [1982] ECR 2015) or a trust company (see Commission Decision *Fides*, OJ [1979] L57/33, 8.3).

<sup>286</sup> Commission decision *Breeders' rights: Roses*, OJ [1985] L369/9.

<sup>287</sup> Case 35/83 *BAT Cigaretten – Fabriken GmbH v Commission* [1985] ECR 363; and Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045.

<sup>288</sup> Case 71/74 *FRUBO v Commission* [1975] ECR 563.

<sup>289</sup> Case C-48/69 *ICI v Commission* [1972] ECR 619; Case T-102/92 *Viho v Commission* [1995] ECR II-17, at paragraph 50; and Case T-112/05 *Akzo Nobel v Commission* [2007] ECR II-5049, at paragraph 58.

<sup>290</sup> Case C-97/08 P *Akzo Nobel NV v Commission* [2007] ECR II-5049, at paragraph 60. Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v European Commission*, Judgment of the General Court (Fourth Chamber) of 27 October 2010.

- a) such exercise may be indirect and can be established even where the parent does not interfere in the day to day business of the subsidiary or where it does not issue express instructions or guidelines to the subsidiary;
- b) it is not necessary to show that any influence was actually exercised as regards the infringement in question. Instead, one must look generally at the relationship between the two entities; and
- c) the factors to which regard may be had when considering the issue of decisive influence *'are not limited to commercial conduct but cover a wide range'*.<sup>291</sup>

A.14 Where a parent company owns the totality of the shares of a subsidiary company, it can generally be presumed that the parent company exerts a decisive influence over the subsidiary company's conduct and that the parent and subsidiary company constitute a single undertaking.<sup>292</sup>

A.15 This presumption is rebuttable. It is for the party in question to rebut the presumption by adducing evidence demonstrating that the subsidiary company determined its conduct independently.<sup>293</sup> The GC has indicated, among other things, that neither the fact that the subsidiary operates independently in specific aspects of its policy on the marketing of the products affected by the infringement,<sup>294</sup> nor the lack of involvement in, or knowledge of, the infringement by directors of the parent company, are sufficient, of themselves, to rebut the presumption.<sup>295</sup>

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<sup>291</sup> *Durkan Holdings Limited and others v OFT*, [2011] CAT 6 at [22].

<sup>292</sup> Case C-97/08 P *Akzo Nobel NV v Commission* [2007] ECR II-5049, at paragraph 60; Joined Cases T-71/03 etc *Tokai Carbon v Commission*, [2005] ECR II-00010, at paragraphs 59 and 60; and Case T-325/01 *DaimlerChrysler v Commission*, [2005] ECR II-03319, at paragraphs 217 to 221.

<sup>293</sup> Case C-97/08 P *Akzo Nobel NV v Commission* [2007] ECR II-5049, at paragraph 61.

<sup>294</sup> Case T-190/06 *Total SA and Elf Aquitaine SA v Commission* ECR I-0, at paragraph 64.

<sup>295</sup> Case T-189/06 *Arkema France SA v Commission* ECR I-0, (not available in English), at paragraph 100.

## **E The OFT's approach to assessing liability**

- A.16 In determining who is liable for any infringement and therefore, who can be the addressee of a Statement of Objections and/or infringement decision (and therefore subject to any financial penalty that the OFT may impose), it is necessary to identify the legal or natural persons who form part of the undertaking involved in the infringement.
- A.17 For each Party that the OFT finds has infringed the Act, the OFT has first identified the legal entity that was directly involved in the infringement during the relevant period. It has then determined whether liability for the infringement should be shared with another legal entity on the basis that both form part of the same undertaking, in which case each legal entity's liability will be joint and several.
- A.18 Where a parent company has the ability to exercise decisive influence over the commercial policy of a legal entity that was directly involved in an infringement and actually exercised such decisive influence over that legal entity, whether directly or indirectly, the OFT finds the parent company and the legal entity jointly and severally liable.
- A.19 Where a legal entity took control of a legal entity that was directly involved in the infringement during the relevant period, the OFT finds the new parent and subsidiary companies jointly and severally liable for the period during which the new parent was able to exercise decisive influence over the subsidiary.
- A.20 Finally, where a legal entity that is or was directly involved in the infringement was owned by individuals during the relevant period, liability for the infringement will not extend to those individuals.
- A.21 The Parties to whom the Decision is addressed are set out in paragraph 1.8 above. They comprise:
- the legal entities which the OFT considers had direct involvement in the infringement that is the subject of the Decision; and
  - the legal entities (if any) which the OFT considers exercised decisive influence over the legal entities directly involved in the infringement during the relevant period.

A.22 Where more than one legal entity is named in respect of a particular Party, the OFT considers that they form part of the same undertaking and should be held jointly and severally liable for the infringement.

## F Agreements and concerted practices

A.23 The Chapter I prohibition applies to 'agreements' and 'concerted practices'.<sup>296</sup> The CJ and CAT have confirmed that it is not necessary, for the purposes of finding an infringement, to characterise the arrangement in question exclusively as an agreement or as a concerted practice. The concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two.<sup>297</sup>

A.24 The OFT is therefore not required to come to a conclusion as to whether the conduct of the Parties should be specifically characterised as an agreement or as a concerted practice in order to demonstrate an infringement of the Chapter I prohibition.

### Agreements

A.25 For the purposes of the Chapter I prohibition 'agreements' include oral agreements and 'gentlemen's agreements'.<sup>298</sup> There is no requirement for an agreement to be formal or legally binding, nor for it to contain any enforcement mechanisms.<sup>299</sup> An agreement may be inferred from the conduct of the parties, including conduct that appears to be unilateral.<sup>300</sup> As held by the GC:<sup>301</sup>

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<sup>296</sup> It also applies to decisions of associations of undertakings, such as trade associations.

<sup>297</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [665] and Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraphs 130 to 132.

<sup>298</sup> Case C-41/69 *ACF Chemiefarma NV v European Commission* [1970] ECR 661 (in particular, at paragraphs 106 to 114).

<sup>299</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [658].

<sup>300</sup> Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711 at paragraph 256 to 258. See also Case T-168/01; and Case C-74/04 P *Commission v Volkswagen AG* [2006] ECR I-6585, at paragraph 37.

*'...it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way...'*

### Concerted practices

- A.26 A 'concerted practice' is a form of coordination which, whilst falling short of 'an agreement' (whether express or implied), *'knowingly substitutes practical co-operation between [the undertakings concerned] for the risks of competition'*.<sup>302</sup>
- A.27 The principle is that each economic operator must determine independently the policies it intends to adopt on the market.<sup>303</sup>
- A.28 That principle precludes, amongst other things, any 'direct or indirect contact' between economic operators, the object or effect of which is to influence the conduct on the market of an actual or potential competitor.<sup>304</sup>
- A.29 As with an agreement, a concerted practice can arise between undertakings at different levels of the supply chain (for example, in a vertical relationship between a distributor and a retailer) or between

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<sup>301</sup> Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 256.

<sup>302</sup> Case 48/69 *ICI Ltd v Commission* [1972] ECR 1969, at paragraph 64. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [151] to [153]. In particular, as held by the European Court of Justice in *ICI*: 'Article 85 [now Article 101 TFEU] draws a distinction between the concept of "concerted practices" and that of "agreements between undertakings" or of "decisions by associations of undertakings"; the object is to bring within the prohibition of that Article 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.'

<sup>303</sup> Although it has been held that this requirement does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors Case C-199/92 P etc. *Hüls AG v. Commission* [1999] ECR I-4287, at paragraph 159. See also *Argos Ltd & Littlewoods Ltd v Office of Fair Trading* [2004] CAT 24, at [702].

<sup>304</sup> Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 174. See also Case T-7/89 *Hercules Chemicals NV SA v Commission* [1991] ECR II-1711, at paragraph 258; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(v)].

those at the same level in the supply chain, as confirmed both by the CAT, in *Argos Ltd & Littlewoods*,<sup>305</sup> and the Court of Appeal.<sup>306</sup>

#### Concurrence of wills including tacit acquiescence

- A.30 A genuinely unilateral measure does not constitute an agreement restricting competition for the purposes of the Chapter I prohibition.<sup>307</sup> However, a measure with an apparently unilateral character can constitute such an agreement if it results from a sufficiently clear and precise manifestation of a concurrence of wills regarding the implementation of a particular line of conduct on the market.<sup>308</sup>
- A.31 Where a manufacturer adopts certain measures in the context of its ongoing contractual relations with its retailers, such measures will amount to an agreement if there is express or tacit acquiescence or participation by the retailers in those measures.<sup>309</sup>

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<sup>305</sup> *Argos Ltd & Littlewoods Ltd v Office of Fair Trading* [2004] CAT 24, at [702-703]. The CAT held that:

*'A key concept in the idea of a concerted practice is that of 'removing in advance any uncertainty as to the future conduct of...competitors', as a result of 'reciprocal contacts' having that object or effect.*

*In our judgment that underlying idea of 'concerted practice' is equally applicable to the vertical relationship between a supplier and a retailer.'*

<sup>306</sup> *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 28 and again at paragraph 105 where the concept of 'vertical concerted practices' is specifically mentioned.

<sup>307</sup> See Joined Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV*, at paragraphs 101 and 102. See also Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383 ('*Bayer*'), at paragraph 71 and Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 256.

<sup>308</sup> Case T-99/04 *AC-Treuhand AG v Commission* [2008] ECR II-1501 ('*Treuhand*'), at paragraph 125 (citing Joined Cases C-2/01 P and C-3/01 P *BAI and Commission v Bayer* [2004] ECR I-23, at paragraphs 96 to 102 and 141, and Case C-74/04 P *Commission v Volkswagen* [2006] ECR I-6585, at paragraph 37).

<sup>309</sup> Case C-277/87 *Sandoz Prodotti Farmaceutici v Commission* [1990] ECR I-45, at paragraph 1 of the summary decision.

A.32 In *Volkswagen II*, the CJ stated (summarising its earlier judgment in *Volkswagen I*) that:<sup>310</sup>

*'The will of the parties may result from both the clauses of the dealership agreement in question and from the conduct of the parties, and in particular from the possibility of there being **tacit acquiescence** by the dealers in a call from the manufacturer.'*

A.33 In *Bayer*, the GC held that:<sup>311</sup>

*'a distinction should be drawn between cases in which an undertaking has adopted a **genuinely unilateral measure**, and thus without the implied or express participation of another undertaking, and those in which the **unilateral character of the measure is merely apparent**. Whilst the former do not fall within Article [101(1) TFEU], the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the **tacit acquiescence** of those dealers.'* (Emphasis added)

A.34 The Commission's Guidelines on Vertical Restraints (the 'Vertical Guidelines'),<sup>312</sup> citing the judgment of the CJ in *Commission v Volkswagen AG*<sup>313</sup> and the judgment of the GC in *Bayer AG v*

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<sup>310</sup> *Volkswagen II*, at paragraph 39 (emphasis added).

<sup>311</sup> *Bayer (GC)*, at paragraph 71 (emphasis added).

<sup>312</sup> Commission Notice - *Guidelines on Vertical Restraints* OJ 2010 C130/1 replaced Commission Notice - *Guidelines on Vertical Restraints* OJ 2000 C 291/1 with effect from June 2010. For the purposes of the analysis in this Decision, the substance of the current Vertical Guidelines does not differ materially from its predecessor.

<sup>313</sup> Case C-74/04 P *Commission v Volkswagen AG* [2006] ECR I-6585.

*Commission*,<sup>314</sup> summarise the two ways (which can be used jointly) to establish acquiescence to a unilateral policy:<sup>315</sup>

*'First, the acquiescence can be deduced from the powers conferred upon the parties in a general agreement drawn up in advance. If the clauses of the agreement drawn up in advance provide for or authorise a party to adopt subsequently a specific unilateral policy which will be binding on the other party, the acquiescence of that policy by the other party can be established on the basis thereof.*

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

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

- A.35 Although it is essential to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement and/or concerted practice, it is not necessary to establish a joint intention to pursue an anti-competitive aim.<sup>316</sup>

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<sup>314</sup> Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383.

<sup>315</sup> Vertical Guidelines, at paragraph 25(a).

<sup>316</sup> Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, at paragraph 77 (upheld in Case C-501/06 P etc. *GlaxoSmithKline Services Unlimited v Commission*, [2009] ECR I-929).

## Implementation

- A.36 The fact that a party does not act on or subsequently implement, the agreement at all times does not preclude the finding that an agreement existed.<sup>317</sup> In addition, the fact that a party does not respect the agreement at all times or comes to recognise that it can 'cheat' on the agreement at certain times does not preclude the finding that an agreement existed.<sup>318</sup>
- A.37 The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties does not mean that it is not party to the agreement.<sup>319</sup>
- A.38 Further, where an agreement has the object of restricting competition (as described below), parties cannot avoid liability for the resulting infringement by arguing that the agreement was never put into effect.<sup>320</sup>
- A.39 An agreement between undertakings may be made on an undertaking's behalf by its employees acting in the ordinary course of their employment, despite the ignorance of more senior management.<sup>321</sup>

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<sup>317</sup> Case 86/82 *Hasselblad v Commission* [1984] ECR 883 at paragraph 46; and Case C-277/87 *Sandoz v Commission* [1990] ECR I-45 (summary judgment), at paragraph 3.

<sup>318</sup> Case T-141/89 *Tréfileurope v Commission*, (1995) ECR II-791, at paragraph 85; and Case C-246/86 *Belasco v Commission* [1989] ECR 2117, at paragraphs 10 to 16.

<sup>319</sup> OFT Competition law guideline on *Agreements and Concerted Practices* (OFT401), at paragraph 2.8. See also, for example, Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraph 80; Cases T-25/95 *Cimenteries CBR SA v Commission* [2000] ECR II-491, at paragraphs 1389 and 2557; and Case T-28/99 *Sigma Technologie di Rivestimento Srl v Commission* [2002] ECR II-1845, at paragraph 40.

<sup>320</sup> See, for example, Case 19/77 *Miller v Commission* [1978] ECR 131, at paragraphs 7 to 10; *French Beer* [2006] 4 CMLR 577; Case C-277/87 *Sandoz v Commission* [1990] ECR I-45; and *WANO Schwarzpulver* OJ [1978] L232/26.

<sup>321</sup> Cases 100/80 etc. *Musique Diffusion Francaise v Commission* [1983] ECR 1825, at paragraph 97. See (1) *Tesco Stores Limited*, (2) *Tesco Holdings Limited*. (3) *Tesco PLC v OFT*, [2012] CAT 31 at 62: '[...] any act by any employee could, potentially lead to an

## G Prevention, restriction or distortion of competition

A.40 As noted above, the Chapter I prohibition prohibits agreements between undertakings or concerted practices which:

*'...have as their object or effect the prevention, restriction or distortion of competition'.*

A.41 It is settled case law, at both UK and EU levels, that if an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement has had or would have any anti-competitive effects in order to establish an infringement.<sup>322</sup>

### Anti-competitive object

A.42 The CJ has held that object infringements are those forms of collusion between undertakings that are regarded to be, by their very nature, detrimental to competition.<sup>323</sup> The 'object' of an agreement is assessed by reference to an objective analysis of its content and purpose and of the legal and economic context of which it forms part.<sup>324</sup>

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*infringement attributable to the corporate employer, with whom they comprise the same undertaking'.*

<sup>322</sup> See, for example: Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, at page 342; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Portland A/S and Others v Commission* [2004] ECR I-123, at paragraph 261; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, at paragraph 125; Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* [2008] ECR I-8637, at paragraph 16; and C-226/11, Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others ('Expedia')*, judgment of 13 December 2012, as yet unreported, at paragraph 35.

<sup>323</sup> Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* [2008] ECR I-8637, at paragraph 17 and Case C-8/08 *T-Mobile Netherlands and Others v NMa*, ECR I-4529, at paragraphs 28 to 30.

<sup>324</sup> Joined cases C-501/06P etc *GlaxoSmithKline Unlimited v Commission* [2009] ECR I-9291, at paragraph 58 and Case C-8/08 *T-Mobile Netherlands BV and others v NMa* [2009] ECR I-4529, at paragraph 27 and 28. See also Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679, at paragraph 26.

A.43 The Commission's Guidelines on the application of Article 81(3) (now Article 101(3)) apply the aforementioned case law and confirm that:<sup>325</sup>

*'The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect.'*

A.44 The CAT summarised the factors which should be considered when assessing whether a restriction has as its object the restriction of competition in *Cityhook* as follows:<sup>326</sup>

*'The assessment of whether or not an agreement has as its object the restriction of competition should take into account a number of factors, including the content of the agreement, the objective aims pursued by it and, where appropriate, the way in which it is implemented.'*

A.45 In its judgment in *Irish Beef*, the CJ confirmed that the scope of object infringements should not be unnecessarily restricted. Responding to a suggestion that the concept of infringement by object should be interpreted narrowly so as to apply only to obvious restrictions such as horizontal price fixing and market sharing, the CJ stated that, on the contrary, *'...the types of agreements covered by Article [101](1)(a) to (e) [TFEU] do not constitute an exhaustive list of prohibited collusion'*.<sup>327</sup>

A.46 The OFT takes the view that where the obvious consequence of an agreement is to prevent, restrict or distort competition, that will be its object for the purposes of the Chapter I prohibition even if the agreement also had other objectives.<sup>328</sup>

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<sup>325</sup> Guidelines on the application of Article 81(3) of the EC Treaty (now Article 101(3) of the TFEU), OJ 2004 C101/97, at paragraph 22.

<sup>326</sup> *Cityhook Limited v OFT*, CAT [2007] CAT 18, at [268].

<sup>327</sup> Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* [2008] ECR I-8637, at paragraphs 22 and 23.

<sup>328</sup> Joined Cases T-374/94, etc. *European Night Services v Commission* [1998] ECR II-3141, at paragraph 136. See also, Case C-551/03 P *General Motors v Commission* [2006] ECR I-

A.47 It is relevant to note also that, in *T-Mobile*, the CJ stated that, in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the *potential* to restrict competition:<sup>329</sup>

*'in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. Whether and to what extent, in fact, such anti-competitive effects result can only be of relevance for determining the amount of any fine and assessing any claim for damages.'*

A.48 The 'object' of an agreement is not assessed by reference to the parties' subjective intentions when they enter into it.<sup>330</sup> However, the OFT may take into account evidence of the parties' subjective intention when demonstrating that an infringement has as its object the prevention, restriction or distortion of competition.<sup>331</sup>

#### Online price advertising prohibition

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3173, the Opinion of Advocate General Tizzano delivered on 25 October 2003, at paragraph 68, *'it is the very fact that an agreement obviously has an anti-competitive purpose that renders irrelevant and unimportant that it also pursues other purposes'*. See also Bellamy & Child, 'European Community Law of Competition', 6<sup>th</sup> Ed., paragraph 2-096. See also Case 96/82 *IAZ v Commission* [1983] ECR 3369, at paragraphs 22 to 25, Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* [2008] ECR I-8637, at paragraph 21 and Case C-551/03 P *General Motors BV v Commission* [2006] ECR I-3173, at paragraph 64.

<sup>329</sup> Case C-8/08 *T-Mobile Netherlands BV and others v NMa* [2009] ECR I-4529, at paragraph 31.

<sup>330</sup> Joined cases C-501/06P etc *GlaxoSmithKline Unlimited v Commission* [2009] ECR I-9291, at paragraph 58 and Case C-8/08 *T-Mobile Netherlands BV and others v NMa* [2009] ECR I-4529, at paragraph 27. See also Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679, at paragraph 26.

<sup>331</sup> *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, at [270], citing Case C-551/03 P, *General Motors BV v Commission* [2006] ECR I-3173, at paragraphs 77 and 78.

- A.49 Online price advertising restrictions (including total bans on all price advertising such as the online price advertising prohibition) can constitute object restrictions.
- A.50 In the Commission's decision on *EPI code of conduct*,<sup>332</sup> it found a comparative advertising prohibition issued by the Institute of Professional Representatives ('IPR') before the European Patent Office limited the commercial freedom of members and had the object or effect of restricting competition between members of the profession. The Commission noted in its decision that '*Providing information on the services on offer, [...], and comparative advertising, [...], are means of increasing user information to the benefit of users and are important elements of the competitive process.*'<sup>333</sup>
- A.51 On appeal, the GC upheld the Commission's decision.<sup>334</sup> The GC considered that the prohibition on comparative advertising constituted a restriction of competition for the purpose of Article 101(1) TFEU. Although the GC did not state expressly that the restriction had an anti-competitive 'object', that is implicit because it concluded that the restriction breached Article 101(1) without requiring any effects analysis. Significantly, the GC held that '*advertising is an important element of the competitive situation on any given market, since it provides a better picture of the merits of each of the operators, the quality of their services and their fees.*'<sup>335</sup>
- A.52 The Commission has also considered the application of Article 101(1) TFEU to advertising restrictions imposed by manufacturers in supply agreements in a number of investigations. In particular, see the *Hasselblad* and *Yamaha* decisions, described below. Notwithstanding that in both cases the advertising restrictions were part of a wider

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<sup>332</sup> Commission Decision IV/36.147 *EPI code of conduct*, OJ 1999 L106/14, at paragraphs 39 to 41.

<sup>333</sup> Commission Decision IV/36.147 *EPI code of conduct*, at paragraph 41.

<sup>334</sup> Case T-144/99 *Institute of Professional Representatives before the European Patent Office v Commission* [2001] ECR II-1090 ('*IPR v Commission*').

<sup>335</sup> Case T-144/99 *IPR v Commission* [2001] ECR II-1090, at paragraph 72.

strategy by the manufacturers to influence retail prices, the decisions clearly describe the anti-competitive nature of advertising restrictions.

- A.53 In *Hasselblad*<sup>336</sup> the Commission condemned a selective distribution agreement which allowed the manufacturer to prohibit adverts by a dealer containing statements that it '*can match any other retailer's selling prices*'. In addition to prohibiting particular adverts, Hasselblad had also threatened to withdraw credit facilities from dealers who did not treat prices in its retail price list as minimum selling prices and had terminated a UK dealership (Camera Care) which had advertised its products at discounted prices (and Hasselblad had threatened to terminate other dealers' agreements if they supplied that dealer themselves). Camera Care had been advertising and selling parallel imported cameras at prices below Hasselblad's recommended UK prices.
- A.54 The Commission described Hasselblad's contractual right to oversee adverts and other publicity as being, '*tantamount to a right of post-publication censorship on the part of Hasselblad (GB)*'.<sup>337</sup> The Commission found that Hasselblad's contractual right to prohibit adverts restricted competition within the meaning of Article 101(1) for the following reason:<sup>338</sup>

*'This extensive right of intervention enables Hasselblad (GB) to prevent actively competing and price-cutting dealers, particularly those who import but not through the Hasselblad distributor, from advertising their activities, the more so as Hasselblad (GB) is not required to give any justification for its censorship measures.'*

- A.55 The Commission concluded that Hasselblad's distribution policy (specifically including Hasselblad's right to prohibit adverts) '*interferes with the freedom of the authorised dealers to fix their prices, using the dealers' fear of termination of the Dealer Agreement as a means of hindering price competition between authorised dealers*'.<sup>339</sup> The

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<sup>336</sup> *Hasselblad*, OJ [1982] L161/18.

<sup>337</sup> *Hasselblad*, at recital 60.

<sup>338</sup> *Hasselblad* at recital 60.

<sup>339</sup> *Hasselblad*, at recital 66.

Commission considered that Hasselblad's policy to limit the number of qualified dealers in its distribution network and the use of its dealer agreements (including the advertising restrictions) '*as a means to influence retail prices*', amounted to restrictions of competition under Article 101(1).

- A.56 On appeal, the CJ assessed the Commission's arguments that the advertising restriction was 'tantamount to retroactive censorship which enables [Hasselblad] to prohibit dealers who are particularly active in the field of competition and prices, and more particularly those who import otherwise than through [Hasselblad's] sole distributors, from advertising their activities'.<sup>340</sup> The CJ concluded that the Commission's decision that the advertising restriction constituted an infringement of Article 101(1) was 'well founded' on the grounds that:<sup>341</sup>

*'[Hasselblad] scrutinised the wording of [dealers'] advertisements as regards selling prices and that the contested clause was drafted in such a way as to permit [Hasselblad] to prohibit such advertisements.'*

- A.57 In *Yamaha*,<sup>342</sup> the Commission objected to restrictions contained in selective distribution agreements on dealers' advertising prices different from Yamaha's list prices. In particular, the Commission was concerned by advertising restrictions which formed part of a wider policy by Yamaha to enforce resale price maintenance in a number of territories including the Netherlands and Italy.

- A.58 The Dutch dealer contracts (described as 'guidelines') prohibited dealers from advertising prices which differed from Yamaha's list prices. As to that, the Commission stated that Yamaha's guidelines:

*'clearly prevented the dealer from announcing either within or outside the shop a price other than the one established in the price list. Even if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the*

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<sup>340</sup> Case 86/82 *Hasselblad v Commission* [1984] ECR 883, at paragraph 43.

<sup>341</sup> Case 86/82 *Hasselblad v Commission* [1984] ECR 883, at paragraphs 49 and 52.

<sup>342</sup> *Yamaha* (COMP37.975), decision of 16 July 2003.

*customer the price it fixed and that such discounts, if the dealer was still willing to offer them, could not be communicated in a way contrary to the guidelines.*<sup>343</sup>

- A.59 Meanwhile, the distribution agreement with dealers in Italy prohibited dealers from publishing '*in whichever form*' prices which differed from Yamaha's official price lists. The dealers were also prohibited from reproducing advertising material and price lists different from Yamaha's official price lists. The Commission found that '*the dealers' freedom to set prices is strictly limited...Dealers cannot attract clients by advertising prices that differ from the 'published prices' of [Yamaha], nor by indicating prices in their shops different from those indicated by [Yamaha]*'.<sup>344</sup> The Commission concluded that Yamaha's agreements had the object of influencing resale prices, thereby restricting or distorting price competition.
- A.60 The OFT concluded in *Lladró*<sup>345</sup> that restricting retailers' ability to advertise prices is likely to affect price competition between them. In that decision the OFT noted that the advertising of resale prices, including discounts, promotes price transparency between retailers and provides a significant incentive for retailers to compete on price. Where provisions restrict a retailer's freedom to inform potential customers of discounts which are being offered, this removes a key incentive for, and constitutes an obstacle to, price competition between retailers. The OFT concluded in *Lladró* that the '*obvious consequence*' of price advertising restrictions is to restrict retailers' ability to determine their own sale prices and that '*any such provision has as its object the prevention, restriction or distortion of competition*'.<sup>346</sup>
- A.61 Although the aforementioned price advertising restrictions were assessed as part of a wider strategy by manufacturers to influence resale prices, the Commission's decisions in *Yamaha* and *Hasselblad* and the

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<sup>343</sup> *Yamaha* (COMP37.975), decision of 16 July 2003, at paragraph 125.

<sup>344</sup> *Yamaha* (COMP37.975), decision of 16 July 2003, at paragraph 134.

<sup>345</sup> *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, Decision of the Director General of Fair Trading, 31 March 2003 ('*Lladró*').

<sup>346</sup> *Lladró*, at paragraph 70.

*Hasselblad* CJ judgment clearly describe the anti-competitive nature of advertising restrictions. Furthermore, *IPR v Commission* contains a very clear statement by the GC that a comparative advertising ban constitutes a restriction on competition for the purposes of Article 101(1) because the restriction reduced price competition between competitors.

### Online sales prohibition

- A.62 The following decisions of the European Courts and the Commission establish that online sales prohibitions constitute restrictions by object.
- A.63 In *Pierre Fabre* the CJ considered questions referred to it from a national court concerning the application of Article 101(1) to a de facto online sales prohibition.<sup>347</sup> The CJ concluded that a de facto prohibition on authorised distributors engaging in all forms of online selling of branded cosmetics and personal care products amounted to an object restriction under Article 101(1) of the TFEU.<sup>348</sup> The CJ's reasoning on this point was as follows:<sup>349</sup>

*'by excluding de facto a method of marketing products that does not require the physical movement of the customer, the contractual clause considerably reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It is therefore liable to restrict competition in that sector.'*

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<sup>347</sup> Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Commission*, judgment of 13 October 2011 ('*Pierre Fabre*').

<sup>348</sup> The restriction in question stipulated that sales of certain cosmetics and personal care products had to be made in a physical space, in which a qualified pharmacist had to be present.

<sup>349</sup> *Pierre Fabre*, at paragraph 38. This statement is supported by the Opinion of AG Mazak delivered on 3 March 2011, in which he states at paragraph 56 that '*a general and absolute ban on internet sales eliminates a modern means of distribution which would allow customers to shop for those products outside the normal catchment area of those outlets thereby potentially further enhancing intra-mark [that is, intra-brand] competition. Internet sales may also enhance intra-mark competition as such sales may increase price transparency thereby permitting price comparison of the products in question.*'

A.64 The CJ then considered whether such a ban constituted a restriction by object in the context of a selective distribution system<sup>350</sup>, and referred to the established legal principles relevant to this assessment.<sup>351</sup>

- absent objective justification, such systems are restrictions by object,
- so long as such systems aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price they will be compatible with Article 101(1), and
- it also needs to be shown that the characteristics of the product in question necessitate such a network in order to preserve quality and ensure its proper use, and that the criteria do not go beyond what is necessary.

A.65 The CJ concluded that the characteristics of the cosmetics and personal care products did not justify restricting sales to bricks and mortar shops, given that these were non-prescription items and the alleged need to maintain the prestigious image of the products in question was not a legitimate aim. The CJ then went on to conclude that a restriction resulting in a ban on the use of the internet amounted to an object restriction. The CJ held:<sup>352</sup>

*'in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be*

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<sup>350</sup> The CJ has established that in general the organisation of a selective distribution system is not prohibited by Article 101(1) TFEU, to the extent that the following three cumulative conditions are met: (i) the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use; (ii) resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, and (iii) the criteria laid down do not go beyond what is necessary (Case C-26/76 *Metro SB-Großmärkte v Commission* [1977] ECR 1875 ('Metro (1)'), at paragraph 20 and Case C-31/80 *L'Oréal v PVBA* [1980] ECR 3775, at paragraphs 15 and 16; and Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151 ('AEG-Telefunken v Commission'), at paragraph 35.)

<sup>351</sup> *Pierre Fabre*, at paragraphs 39, 40 and 41.

<sup>352</sup> *Pierre Fabre*, at paragraph 47.

*present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and the objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.'*

A.66 The CJ noted that Pierre Fabre could potentially benefit from individual exemption under Article 101(3) but it did not consider whether the conditions under that provision were met. The CJ further noted that the selective distribution system could also potentially benefit from the VABER. It concluded that the block exemption could not apply to an agreement containing an online sales prohibition for the following reason:<sup>353</sup>

*'A contractual clause such as the one at issue in the main proceedings, prohibiting de facto the internet as a method of marketing, at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside of the physical trading area of the relevant member of the selective distribution system.'*

A.67 The CJ has held that agreements constituting selective distribution systems '*necessarily affect competition*'.<sup>354</sup> The CJ has established that in general the organisation of a selective distribution system is not prohibited by Article 101(1) TFEU, to the extent that certain conditions are met.<sup>355</sup> However, as described by the CJ in *AEG-Telefunken v Commission*, the operation of a selective distribution system will breach Article 101(1) where a manufacturer imposes additional restrictions which cannot be objectively justified:<sup>356</sup>

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<sup>353</sup> *Pierre Fabre*, at paragraph 54.

<sup>354</sup> *AEG-Telefunken v Commission*, at paragraph 33.

<sup>355</sup> See footnote 350.

<sup>356</sup> *AEG-Telefunken v Commission*, at paragraph 36.

*'Such a practice must be considered unlawful where the manufacturer, with a view to maintaining a high level of prices or to **excluding certain modern channels of distribution**, refuses to approve distributors who satisfy the qualitative criteria of the system.'* [Emphasis added]

The OFT notes from this that the CJ attached particular importance to the availability of other channels of distribution.

A.68 It is instructive to note that the French national competition authority has applied the *Pierre Fabre* judgment in another case to find that a de facto prohibition on online sales in the context of a selective distribution system constitutes a restriction by object.<sup>357</sup> In its decision the Autorité de la concurrence noted that the online sales prohibition was all the more serious because it was implemented within a context where competition had already been reduced (as the company was operating a selective distribution system).<sup>358</sup>

A.69 Moreover, the Opinion of Advocate General Mazak in *Pierre Fabre* notes the following in respect of the impact of an online sales prohibition on competition:

*'Moreover, while it would appear from the file before the Court that intra-mark competition is already strong given the sales of the products in a very large number of physical outlets in France, a*

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<sup>357</sup> Décision No. 12-D-23 du 12 December 2012 relating to the practices of Bang & Olufsen in the hi-fi and home cinema sector.

<sup>358</sup> Ibid, '*Elles sont d'autant plus graves qu'elles se sont insérées, depuis 2001, dans un contexte dans lequel la concurrence était déjà réduite, du fait du réseau de distribution sélective dans lequel elles s'intégraient. Si la légitimité d'un tel réseau n'est nullement en cause, comme le rappelle la jurisprudence citée plus haut, il n'en reste pas moins qu'il réduit la faculté qu'auraient les distributeurs de se faire concurrence en son absence et que c'est précisément cette faculté limitée de se faire concurrence que la pratique en cause vient anéantir*', at paragraph 123. Unofficial English translation: '*These [restrictions] are even more serious because they have been imposed, since 2001, in a context in which competition is already reduced, as a result of the selective distribution system in which they were integrated. Even if the legality of such a distribution system is not in question, on the basis of the case law cited above, it does at least reduce the opportunity for competition between distributors which would have taken place in their absence and it is exactly that limitation on competition which the practice in question was seeking to obtain*'.

***general and absolute ban on internet sales eliminates a modern means of distribution which would allow customers to shop for those products outside the normal catchment area of those outlets thereby potentially further enhancing intra-mark competition. Internet sales may also enhance intra-mark competition as such sales may increase price transparency thereby permitting price comparison of the products in question.***<sup>359</sup>

[Footnote 62:] *And between the products in question and other brands (inter-mark competition).*'<sup>360</sup> (Emphasis added).

A.70 The OFT notes that the Commission (albeit in the context of exemption analysis) has also acknowledged the seriousness of these types of restriction, classifying them as hard-core (for further detail on the concept of 'hard-core' restrictions see the 'Exemption' section below):

- The Commission required the deletion of an internet resale restriction when assessing the selective distribution system of Yves Saint Laurent for compatibility with Article 101(1). The Commission noted that '*a ban on Internet sales, even in a selective distribution system, is a restraint on sales to consumers which could not be covered by the 1999 regulation [now replaced by Commission Regulation No 330/2010 on the application of Article 101(3) to categories of vertical agreements]*'.<sup>361</sup>
- The Commission objected to certain aspects of the distribution system of B&W Loudspeakers Ltd including a prohibition on online selling. The Commission concluded that such clauses constituted

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<sup>359</sup> *Pierre Fabre Dermo-Cosmetique SAS v President de l'Authorite de la Concurrence and Ministrie de l'Economie, del'Industrie et de l'Emploi*, Opinion of Advocate General Mazak, delivered on 3 March 2011, Case C-439/09, at paragraph 56.

<sup>360</sup> *Pierre Fabre Dermo-Cosmetique SAS v President de l'Authorite de la Concurrence and Ministrie de l'Economie, del'Industrie et de l'Emploi*, Opinion of Advocate General Mazak, delivered on 3 March 2011, Case C-439/09, at footnote 62. *Pierre Fabre*, Advocate General's Opinion at paragraph 62.

<sup>361</sup> Commission approves selective distribution system for Yves Saint Laurent perfume, 17 May 2001, IP/01/713. Commission Regulation 2790/99, OJ 1999 L 336/21, now replaced by Commission Regulation No 330/2010 on the application of Article 101(3) to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

'hard-core' restrictions and required deletion in order for the distribution system to benefit from exemption under the VABER.<sup>362</sup>

A.71 In respect of the issue of potential justifications, the CJ has taken an unfavourable view of online selling bans. Although the CJ has considered potential justifications of online selling bans in the context of the provisions of the TFEU relating to the free movement of goods, these cases nevertheless indicate the CJ's unwillingness to accept arguments which might justify online sales bans. In particular, the CJ rejected the following justifications for bans on online selling:

- inability to provide individual advice to the customer in relation to the online supply of non-prescription medicines.<sup>363</sup> The CJ noted that it is not impossible that adequate advice and information could be provided online when a product is purchased. The CJ also noted that any risks regarding incorrect use of the product can be reduced through an increase in the number of online interactive features, which the customer must use before being able to proceed to a purchase.
- ensuring the protection of the health of customers in relation to the online supply of contact lenses.<sup>364</sup> The CJ held that the objective of ensuring protection of the health of users of contact lenses could be achieved by measures which are less restrictive than those provided for under the legislation at issue in the main proceedings. In particular, the CJ noted that customers can be advised before the first supply of contact lenses, as part of the online sales process of the lenses, by means of the interactive features on the site concerned, the use of which by the customer

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<sup>362</sup> Commission opens proceedings against distribution practices of B&W Loudspeakers, 6 December 2000, IP/00/1418 and Commission clears B&W Loudspeakers distribution system after company deletes hard-core violations, 24 June 2001, IP/02/916. Commission Regulation 2790/99, OJ 1999 L 336/21, now replaced by Commission Regulation No 330/2010 on the application of Article 101(3) to categories of vertical agreements and concerted practices OJ 2010 L 102/1.

<sup>363</sup> Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, at paragraphs 112 to 116.

<sup>364</sup> Case C-108/09 *Ker-Optika* [2010] ECR I-12213, at paragraphs 66 to 77.

must be mandatory before he can proceed to purchase the lenses. Secondly, the online operators could make available a qualified optician, at a distance, to provide individual information and advice on the use and care of the contact lenses.

## H Appreciability

A.72 An agreement will fall outside of the Chapter I prohibition if its impact on competition is insignificant. As the CJ ruled in *Völk v Vervaecke*:<sup>365</sup>

*'an agreement falls outside the prohibition in Article [101(1)] when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question'.*

A.73 In its recent judgment in *Expedia Inc v Autorité de la concurrence and others*,<sup>366</sup> the CJ considered whether a national competition authority is precluded from applying Article 101(1) to an agreement that may affect trade between Member States but which falls below the thresholds in the De minimis Notice<sup>367</sup>. In that connection, the CJ ruled that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its very nature and independently of any concrete effect that it may have, an appreciable restriction on competition.<sup>368</sup>

A.74 In any event, the OFT has also had regard to the Commission's approach as set out in the De minimis Notice (which preceded *Expedia*). This sets out that an agreement between non-competing parties (that is,

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<sup>365</sup> Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295, at paragraphs 5 to 7. See also C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11145, at paragraph 50.

<sup>366</sup> Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others ('Expedia')*, judgment of 13 December 2012, as yet unreported.

<sup>367</sup> Commission Notice on Agreements of Minor Importance OJ 2001 C368/13 ('*De minimis Notice*'). In accordance with the OFT guideline *Agreements and Concerted Practices* (OFT401, December 2004), that when determining whether an agreement has an appreciable restriction on competition, the OFT will have regard to the Commission's approach as set out in its De minimis Notice.

<sup>368</sup> *Expedia*, at paragraph 37.

undertakings which are not actual or potential competitors on any of the markets concerned) will generally have no appreciable effect on competition if the market share held by each of the parties to the agreement does not exceed 15 per cent on any of the relevant markets affected by the agreement.

- A.75 However, that approach does not apply to an agreement containing any of the restrictions on competition listed in the De minimis Notice at point 11(2) (so-called 'hardcore restrictions'). These hardcore restrictions include: restrictions on the territory into which, or the customers to whom, retailers may sell goods (point 11(2) (b)).
- A.76 Notwithstanding the potential application of the Commission's De minimis Notice, the OFT will also consider a number of factors in determining whether the Infringements are appreciable by reference to the actual circumstances of the agreement.
- A.77 The OFT has also had regard to *North Midland Construction*,<sup>369</sup> a case decided before the CJ's ruling in *Expedia*, in which the CAT took into account the following facts: (i) that the potential effects of cover pricing extended beyond the confines of the specific contract being tendered, and into similar tendering exercises to be conducted in the future; (ii) the importance of the tender in the narrowly defined market; and (iii) the substantial size of the undertakings (one of which had annual turnover of £10 million). The CAT concluded, on the basis of the above, that the potential effects could not possibly be regarded as so insignificant as not to be appreciable.<sup>370</sup>
- A.78 For completeness, the OFT has also had regard to the factors set out in the CJ's case law in relation to the distinct (jurisdictional) concept of effect on trade between Member States. Notwithstanding that the market share thresholds in the De minimis Notice (applicable at the time) were not met, the CJ has ruled in a number of cases that agreements constitute, for the purposes of that concept, an appreciable restriction, taking into consideration the following factors: the relevant parties'

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<sup>369</sup> *North Midland Construction v OFT* [2011] CAT 14 ('*North Midland Construction*').

<sup>370</sup> *North Midland Construction*, at [56] to [61].

market shares;<sup>371</sup> market structure (including competitors' market shares);<sup>372</sup> the parties' turnover;<sup>373</sup> and the importance of the brands involved.<sup>374</sup>

## I EFFECT ON TRADE

### Effect on trade within the UK

A.79 By virtue of Section 2(1)(a) of the Act, the Chapter I prohibition applies to agreements which:

*'...may affect trade within the United Kingdom'.*

A.80 For the purposes of the Chapter I prohibition, the UK includes any part of the UK in which an agreement operates or is intended to operate.<sup>375</sup> However, the test is not read as importing a requirement that the effect on trade within the UK should be appreciable. Effect on trade within the

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<sup>371</sup> In Case 19/77 *Miller v Commission* [1978] ECR 131, at paragraph 10, the CJ took into account Miller's sales of approximately 5 per cent of the total market in sound recordings in Germany, with higher market shares in other segments and held that: *'Miller's sales constitute a not inconsiderable proportion of the market [...] it must accordingly be concluded that Miller [...] is an undertaking of sufficient importance for its behaviour to be, in principle, capable of affecting trade'*. In Case T-77/92 *Parker Pen Ltd v Commission*, [1994] ECR II-0549, at paragraph 44, the CJ held: *'[...] when it is evident that the sales of at least one of the parties to an anti-competitive agreement constitute a not inconsiderable proportion of the relevant market Article [101(1) TFEU] should be applied'*.

<sup>372</sup> See Joined Cases 100 to 103/80 *Musique Diffusion Française SA and others v Commission* [1983] ECR 1825, at paragraphs 81 to 86: there, the parties argued that their market shares were only 3.38 per cent in France and 3.18 per cent in the UK, but the CJ found that the Commission had been justified in finding that the market shares were *'sufficiently large for the behaviour of the undertakings to be, in principle, capable of appreciably affecting trade between Member States'* because the market was fragmented and the parties' market shares exceeded those of most competitors. See also Cases T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141 ('European Night Services').

<sup>373</sup> See Case 19/77 *Miller v Commission* [1978] ECR 131.

<sup>374</sup> See Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295.

<sup>375</sup> Section 2(7) of the Act.

UK is a purely jurisdictional test to demarcate the boundary line between the application of EU competition law and national competition law.<sup>376</sup>

### Effect on trade between Member States

A.81 Article 101 TFEU applies to agreements which:

*'...may affect trade between [EU] Member States'.*

A.82 For the purposes of assessing whether an agreement may affect trade between EU Member States the OFT follows the approach set out in the Commission's published guidelines and the case law of the European Courts.<sup>377</sup>

A.83 The question of whether an agreement is capable<sup>378</sup> of affecting trade has been interpreted broadly in the case law of the European Courts, such that it is likely that in many cases agreements will fall within both Article 101(1) TFEU and the Chapter I prohibition.<sup>379</sup> For example, it is clear that trade between EU Member States may be affected in cases where the relevant market is national or sub-national<sup>380</sup> – as is often the case in retail markets.

A.84 An effect on trade between EU Member States means that it must impact, actual or potential, cross-border activity involving at least two Member States, whether all or part of them.<sup>381</sup> In order that trade 'may'

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<sup>376</sup> *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, at [459] and [460]. The CAT considered this again in *North Midland Construction plc v. Office Of Fair Trading* [2011] CAT 14, at [48]-[51] and [62]) but considered that it was '*not necessary [...] to reach a conclusion*'.

<sup>377</sup> Commission's Guidelines on the effect on trade concept, OJ 2004 C101/81.

<sup>378</sup> An agreement does not actually have to affect trade as long as it is capable of affecting trade (see Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035, at paragraph 78 and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, at paragraph 235).

<sup>379</sup> OFT401 Agreements and concerted practices, at paragraphs 2.22 to 2.27.

<sup>380</sup> Commission's Guidelines on the effect on trade concept, at paragraph 22.

<sup>381</sup> Commission's Guidelines on the effect on trade concept, at paragraph 21.

be affected by an agreement and/or concerted practice, the CJ has held that:<sup>382</sup>

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

A.85 The concept of 'trade' also encompasses an effect on the competitive structure of the market, for example where it eliminates or threatens to eliminate a competitor.<sup>383</sup> The application of the 'effect on trade' criterion is independent of the definition of the relevant geographic market.<sup>384</sup>

A.86 Finally, the agreement must be capable of affecting trade between Member States to an appreciable extent.<sup>385</sup> Appreciability can be assessed by reference to the market position and importance of the undertakings concerned.<sup>386</sup>

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<sup>382</sup> First stated in Case 56/65 *Société Technique Minière v Maschinenbau Ulm BmbH* [1966] ECR 235, at page 249; see further, for example, Case 209/80 *Van Landewyck v Commission* [1980] ECR 3125, at paragraph 170; Case 126/80 *Salonia v Poidamani* [1981] ECR 1563, at paragraph 12; Case 42/84, *Remia v Commission* [1985] ECR 2545, at paragraph 22.

<sup>383</sup> Commission's Guidelines on the effect on trade concept, at paragraph 20 and footnote 12.

<sup>384</sup> Commission's Guidelines on the effect on trade concept, at paragraph 22.

<sup>385</sup> See, for example, Case 22/71 *Béguélin* [1971] ECR 949, at paragraph 16.

<sup>386</sup> See Case 5/69 *Völk v Vervaecke* [1969] ECR 295, at paragraphs 5 to 7; Case 99/79 *Lancôme v ETOS* [1980] ECR 2511, at paragraph 24; Case T-77/92 *Parker Pen Ltd v Commission* [1994] ECR II-549, at paragraph 40; see also Commission's Guidelines on the effect on trade concept, at paragraph 44.

## J Burden and standard of proof

### Burden of proof

A.87 The burden of proving an infringement of the Chapter I prohibition lies upon the OFT.<sup>387</sup> However, this burden does not preclude the OFT from relying, where appropriate, on inferences or evidential presumptions. In *Napp* the CAT stated that:<sup>388</sup>

*'[t]hat approach does not in our view preclude the Director,<sup>389</sup> in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example [...] that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged'.*

### Standard of proof

A.88 The OFT is required to demonstrate that an infringement has occurred on the balance of probabilities which is the civil standard of proof.<sup>390</sup> The CAT clarified in the *Replica Kit* appeals that the OFT must provide evidence of infringements under the Act which meets the civil standard of proof.<sup>391</sup>

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<sup>387</sup> *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading ('Napp')*, [2002] CAT 1, at [95] and [100]. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [164] and [928] to [931] and *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 31, at [88].

<sup>388</sup> *Napp*, at [110].

<sup>389</sup> References to the 'Director' are to the Director General of Fair Trading. From 1 April 2003, section 2(1) of the Enterprise Act 2002 transferred the functions of the Director General of Fair Trading to the OFT.

<sup>390</sup> *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 31, at [88].

<sup>391</sup> *JJB Sports plc and Allsports Limited v OFT* [2004] CAT 17 ('Replica Kit Appeals'), at [204]. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [164] and [165].

*'The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.'*

A.89 The Supreme Court has clarified that this standard of proof is not connected to the seriousness of the infringement.<sup>392</sup> The CAT has also expressly accepted the reasoning in this line of case law.<sup>393</sup>

## **K EXCLUSION OR EXEMPTION**

### Exclusion

A.90 Section 3 of the Act provides that the Chapter I prohibition does not apply to any of the cases in which it is excluded by or as a result of Schedules 1 to 3 of the Act.

### Exemption from the Chapter I prohibition pursuant to section 9 of the Act

A.91 Agreements which satisfy the criteria set out in section 9 of the Act benefit from an exemption to the Chapter I prohibition.

A.92 Guidance on how to apply the criteria is set out in the Commission's Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU]<sup>394</sup> and, specifically in the context of distribution agreements, in its Vertical Guidelines.

A.93 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 the equivalent prohibition under EU law (Article 101(1) TFEU) by virtue of a Regulation (known as a 'block exemption' regulation).

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<sup>392</sup> *Re S-B* [2010] 2 WLR, at paragraph 34. See also *Re B* [2009] 1 AC 11, at paragraph 69.

<sup>393</sup> *North Midland Construction*, at [16].

<sup>394</sup> Commission Guidelines on the application of Article 101(3) of TFEU, OJ 2004 C101/97.

- A.94 It is for the Parties wishing to rely on these provisions to adduce evidence that the criteria are satisfied. The OFT will consider this evidence against the likely impact of the restrictive agreement on competition when assessing whether the criteria in section 9 of the Act are satisfied.
- A.95 Agreements which have as their object the restriction of competition are very unlikely to benefit from individual exemption: as the Commission has stated,<sup>395</sup> such restrictions generally fail the first two conditions (objective economic benefits and benefits to consumers) and the third condition (indispensability). However, each case ultimately falls to be assessed on its own merits.

#### Parallel exemption under application of a Block Exemption Regulation

- A.96 Section 10 of the Act provides that an agreement is exempt from the Chapter I prohibition if it is covered by a Block Exemption Regulation, or would be covered by a Block Exemption Regulation if the agreement had an effect on trade between Member States (known as 'parallel exemption'). These types of agreement are not prohibited under the Chapter I prohibition, no prior decision to that effect being required.<sup>396</sup>
- A.97 Where an agreement benefits from a parallel exemption, the OFT may nevertheless impose conditions on the exemption or cancel it (following procedures specified in the OFT's Rules) if the agreement has effects in the UK, or a part of it which are incompatible with the conditions in section 9(1) of the Act.<sup>397</sup>
- A.98 Regulation 330/2010<sup>398</sup> (known as the Vertical Agreements Block Exemption Regulation or 'VABER') taken together with section 10 of the

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<sup>395</sup> Ibid.

<sup>396</sup> OFT Guidance on Agreements and Concerted Practices, OFT 401, at paragraph 5.15.

<sup>397</sup> The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751), rule 12.

<sup>398</sup> 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 OJ 2010 L102/1.

Act therefore provides an exemption from the Chapter I prohibition for certain types of vertical agreements.

A.99 In this context, a vertical agreement is:<sup>399</sup>

- an agreement '*relating to the conditions under which the parties may purchase, sell or resell certain goods or services*'; and
- where each of the parties to the agreement '*operates, for the purposes of the agreement or the concerted practice, at a different level of the distribution chain*'.

A.100 The VABER uses the term 'buyer' to refer to a party operating at the retail level stating that it '*includes an undertaking which [...] sells goods or services on behalf of another undertaking*' (Article 1(1)(h)). The OFT has used the term 'retailer' in this Decision as a generic term to describe the downstream party to the infringement in the present case.

A.101 The VABER uses the term 'supplier' to refer to a party operating at the wholesale level that supplies goods or services to the 'buyer'.<sup>400</sup> The OFT has used the term 'manufacturer' in this Decision as a generic term to describe the upstream party to the infringement in the present case.

A.102 The VABER does not apply if the market share held by the supplier exceeds 30 per cent of the relevant market on which it sells the contract goods or the market share held by the buyer exceeds 30 per cent of the relevant market on which it purchases the contract goods.<sup>401</sup>

A.103 The VABER also does not apply to 'hardcore restrictions',<sup>402</sup> which include those which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

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<sup>399</sup> See Article 1(1)(a), of the VABER.

<sup>400</sup> See Article 1(1)(h), of the VABER.

<sup>401</sup> See Article 3(1), of the VABER.

<sup>402</sup> The term 'hardcore restriction' is used in the VABER but it is not a statutory term under the Act. The CAT addressed the meaning of 'hardcore restriction' in *Cityhook v OFT* [2007] CAT 18, at [255]: '*It appears from the European Commission's guidance that so-called 'hardcore'*

- the restriction of the territory into which, or the customers to whom, the buyer party to the agreement, [...], may sell the contract goods (Article 4(b), of the VABER); and
- the restriction of active or passive sales to end users by members of a selective distribution system<sup>403</sup> operating at the retail level of trade (Article 4(c), of the VABER).

A.104 The Vertical Guidelines provide additional guidance on how the Commission applies the VABER, including in relation to the hardcore restrictions covered by Article 4 of the VABER.<sup>404</sup> The OFT's guidance on the application of the Chapter I prohibition to vertical agreements states that the OFT will have regard to the Vertical Guidelines.

A.105 The Commission has indicated in the Vertical Guidelines that restrictions which limit the ability of retailers to sell products passively (thereby limiting the customers to whom the retailer can sell its products) are hardcore restrictions within the meaning of Article 4(b) of the VABER:<sup>405</sup>

*'In principle, every distributor must be allowed to use the internet to sell products. In general, where a distributor uses a website to sell products that is considered a form of passive selling, since it is a reasonable way to allow customers to reach the distributor.'*

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*restrictions are generally considered by it to have as their object the restriction of competition. However, it would also appear that the category of restrictions by object may extend beyond the narrow set of so-called 'hardcore' restrictions, although normally the former encompasses the latter. It therefore appears that the term 'hard-core' is used to refer to the most serious object-based infringements of Article [101(1) TFEU] and, by virtue of section 60(3) of the [Act], the Chapter I prohibition'.*

<sup>403</sup> A selective distribution system is defined in Article 1(e), of the VABER as '*a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where those distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.*'

<sup>404</sup> The Commission's *Guidelines on Vertical Restraints*, OJ 2010 C130/1, at paragraphs 47 to 57.

<sup>405</sup> Vertical Guidelines, at paragraph 52. A ban on internet sales is not specifically listed as an example of hardcore restrictions of passive selling. However, such a ban would clearly be capable of limiting a retailer's access to a greater number and variety of customers.

A.106 Furthermore, the Commission has indicated in the Vertical Guidelines that restrictions which limit the ability of retailers operating within a selective distribution system to sell to all end users are hardcore restrictions within the meaning of Article 4(c) of the VABER:<sup>406</sup>

*'Within a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet. Therefore, the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shop as a hardcore restriction.'*

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<sup>406</sup> Vertical Guidelines, at paragraph 56.

## **B THE RELEVANT MARKET(S)**

### **A Introduction**

- B.1 The OFT is not obliged to define the relevant market for the purposes of deciding whether there has been an infringement, unless it is impossible without such a definition to determine whether the agreement and/or concerted practice had as its object or effect the appreciable prevention, restriction or distortion of competition.<sup>407</sup> No such obligation arises in this case given that the Infringements constitute agreements and/or concerted practices that have as their object the restriction of competition.<sup>408</sup>
- B.2 The OFT does not need to form a view of the relevant turnover in the market affected by the Infringements for the purposes of establishing whether the financial threshold is met for imposing any financial penalties.<sup>409</sup>
- B.3 The OFT is not imposing a financial penalty in this case. Nonetheless, it has for completeness set out here the approach that it would adopt to market definition in a case in which a financial penalty were to be imposed. For the purposes of calculating the amount of a financial penalty, the relevant turnover is the turnover of the undertaking in the relevant product and geographic markets affected by the infringement in

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<sup>407</sup> Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, at paragraph 230 and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, at paragraph 74.

<sup>408</sup> This principle has also more recently been applied by the CAT in Cases 1014 and 1015/1/1/03 *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, [*'Toys'*] Judgment on Penalty, (*'[i]n Chapter I cases, unlike Chapter II cases, determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement'*, at [178]).

<sup>409</sup> See section 39 of the Competition Act and The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262) which provide limited immunity from fines in respect of 'small agreements' that infringe the Chapter I prohibition, these being all agreements (except price-fixing agreements) between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million.

the undertaking's last business year.<sup>410</sup> Therefore, the OFT must consider what products or services are most likely to account for relevant turnover for the purposes of establishing a financial penalty.

- B.4 To that effect, the OFT must be 'satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement'.<sup>411</sup> The Court of Appeal has made clear that the market which is taken for the purposes of penalty assessments may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement, rather than by a relatively exact application of principles that would be relevant for a formal analysis.<sup>412</sup>

## **B Relevant product market**

### Introduction

- B.5 For the purposes of defining the relevant market, the OFT considers the competitive pressure faced by companies active in the market. It does so by analysing the closest substitutes to the product that is the focus of the investigation, as these substitute products are usually the most immediate competitive constraints on the behaviour of the undertakings controlling the product in question.<sup>413</sup>
- B.6 By way of a starting point, the OFT considers the narrowest definition of products that are affected by the Infringements. Based on the totality of the evidence available to the OFT, the OFT's finding is that the products

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<sup>410</sup> See OFT Competition Law Guideline on *OFT's guidance as to the appropriate amount of a penalty* (OFT 423, Edition 12/04), at paragraph 2.7.

<sup>411</sup> *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 170.

<sup>412</sup> *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 173.

<sup>413</sup> OFT Competition Law Guideline 403 'Market definition', December 2004.

affected by the Infringements are new Roma-branded 'travel', 'medium' and 'large' mobility scooters.<sup>414</sup>

B.7 For the purposes of defining the market, the OFT will also consider the means of supply to consumers. That is, since the agreements and/or concerted practices prohibited the online price advertising and online sales by Retailers of those mobility scooters, the OFT will consider whether online and 'offline' retail sales of mobility scooters are part of the relevant market.

B.8 In assessing the relevant market, the OFT has had regard to a previous merger decision of the OFT and the evidence obtained in that merger investigation.<sup>415</sup>

#### Segmentation of mobility scooters

B.9 Mobility scooter retailers and suppliers informed the OFT that mobility scooters can be grouped into the following three categories:

- 'travel' mobility scooters,
- 'medium' mobility scooters, and
- 'large' mobility scooters.<sup>416</sup>

B.10 'Travel' scooters are typically lightweight and can be easily disassembled into several parts for transportation. This makes them ideal for consumers who want to take their scooter with them when they travel by other means.

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<sup>414</sup> All Roma-branded Scooters were subject to the online sales and online price advertising prohibitions, these being the following models of mobility scooters: Alcora, Corella, Granada, Sorrento and Lyon.

<sup>415</sup> OFT decision ME/2066/05 published on 13 January 2006, Completed acquisition by Sunrise Medical Inc and its subsidiaries of Lomax Mobility Limited.

<sup>416</sup> Documents: 3710PR, 3840RO, 3859DR, 3692EME, 3695HandM, 3697Inv, 3699Kymco, 3700Minic, 3845ProR, 3704SunM, 3706TGA, 3875VanOs, 3684DMD, 3822TI, 3812TI, 3821TI and 3820TI.

- B.11 'Medium' scooters are typically slightly more difficult to disassemble than 'travel' scooters. However, they are more comfortable to travel on and can travel further than 'travel' scooters. They are ideal for consumers who may need to disassemble their scooter but who generally use their scooter in their local area, rather than for travelling longer distances. 'Medium' scooters are typically capable of a maximum speed of 4 mph and fall within the definition of a Class 2 'invalid carriage', which means that these scooters are for use on pavements only.<sup>417</sup>
- B.12 'Large' scooters are heavier and more robust than other scooters. 'Large' scooters are typically capable of a maximum speed of 8mph, are fitted with lights and typically fall within the definition of a Class 3 'invalid carriage'. Class 3 mobility scooters may be used on pavements and on certain roads.
- B.13 The OFT's finding is that there are no narrower segments within these mobility scooter categories that could constitute separate 'relevant markets'. Mobility scooter suppliers and retailers confirmed that mobility scooter models within each of the three broad mobility scooter categories are very similar in terms of functionality and can be considered substitutable from the end-consumers' point of view.<sup>418</sup> This is, however, without prejudice to the fact that mobility scooter models within product categories can differ in terms of weight of parts, size and design such that the features of specific models may be more suitable to the needs of certain individuals.<sup>419</sup>
- B.14 Moreover, the OFT's finding is that retailers' decisions as to which models of mobility scooters to stock and sell is closely linked to consumers' preferences such that retailers' and consumers' preferences are closely aligned. Therefore, the OFT considers that the information

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<sup>417</sup> See the definition as set out in 'The Use of Invalid Carriages on Highways Regulations 1988' (see also the following link for further details: [www.dft.gov.uk](http://www.dft.gov.uk)).

<sup>418</sup> Document 3692EME, Document 3807Inv, Document 3840RO, Document 2813DR, Document 3721PR, Document 3765TGA, Document 3740DPH, Document 3722Kymco, Document 3704SunM, Document 3789FLU, Document 3739Minic, Document 3748AVCQ, Document 3838BL and Document 3713VanOs.

<sup>419</sup> Document 3765TGA.

obtained from mobility scooter suppliers and retailers on the closeness of substitution at the consumer level is indicative of the closeness of substitution at the retail level too. The OFT has therefore not considered the closeness of substitution at the different levels of the supply chain in further detail.

- B.15 The OFT also considered whether the three categories of mobility scooters comprise one single product market or three separate product markets.
- B.16 The majority of mobility scooter suppliers are of the view that there is limited substitutability between 'travel', 'medium' and 'large' scooters.<sup>420</sup> This is because each category is tailored to a specific set of requirements which other categories of mobility scooters might not fulfil. This view is also supported by the differences in the characteristics of mobility scooters (such as the portability, manoeuvrability, stability, the distance that the scooter can travel without the need to recharge the battery, weight, size and speed),<sup>421</sup> some of which are briefly referred to in paragraphs B.10-B.12. For example, a 'travel' scooter would not be suitable for consumers who want to travel longer distances on the scooter and/or want to use their mobility scooters on roads, while a 'large' scooter is not suitable for consumers who want a portable mobility scooter.
- B.17 In addition, the OFT understands that it is essential for retailers to stock all three categories of mobility scooters. This also suggests that scooters in different categories satisfy different consumer needs.
- B.18 On the other hand, two suppliers<sup>422</sup> were of the view that scooters of different categories are substitutable. In particular, one of the suppliers

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<sup>420</sup> Document 3692EME, Document 3840RO, Document 3765 TGA, Document 3740DPH, Document 3722Kymco, Document 3704SunM, Document 3789FLU, Document 3739Minic, Document 3748AVCQ, Document 3838BL and Document 3713VanOs.

<sup>421</sup> See for example: Document 3838BL, 2813DR, 3745AVCQ, 3740B/DPH, 3691EME, 3774FLU, 3752HandM, 3804Inv, 3722Kymco, 3739Minic, 3704SunM, 3763TGA and 3717VanOs.

<sup>422</sup> Document 2813DR and Document 3721PR.

noted that '*travel scooters are used more widely than their design was intended and have in many cases replaced the medium scooter*'.<sup>423</sup>

- B.19 The OFT's finding is that the agreements and/or concerted practices covered all Roma-branded Scooters and included all three mobility scooter categories, that is 'travel' scooters, 'medium' scooters and 'large' scooters. The OFT notes that for the purposes of this Decision it is not necessary to conclude on whether 'travel', 'medium' and 'large' mobility scooters form part of the same relevant product market or whether there are three separate relevant product markets.

#### Potential substitutes for new mobility scooters

- B.20 In the following section, the OFT first considers whether the relevant market could be defined more widely than new mobility scooters so as to include second-hand mobility scooters. It does so by reference to the potential competitive constraints on sales of new mobility scooters emanating from the sales of second-hand mobility scooters.
- B.21 Second, the OFT assesses the extent to which alternative mobility aid products could act as a substitute for, or a competitive constraint on, new mobility scooters.

#### *Second-hand mobility scooters*

- B.22 The OFT understands that second-hand mobility scooters are primarily sold through private channels rather than by commercial retailers and typically have a very low resale value relative to new scooters.<sup>424</sup> The OFT also understands that consumers who would buy a second-hand mobility scooter without warranty and consumers who buy a new mobility scooter are likely to be separate sets of consumers.<sup>425</sup>

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<sup>423</sup> Document 2813DR.

<sup>424</sup> Document 3820TI, Document 3826TI and Document 3812TI.

<sup>425</sup> [Document number redacted]: '[retailer name redacted] *does not sell second-hand products. The prices of new products became so competitive that it is better for consumers to buy a new product with a warranty than buying a second-hand product (and bear the high maintenance costs in case it breaks down).*'

B.23 In a market such as this one the OFT therefore ordinarily expects the price of new products to constrain the price of second-hand products, but not the reverse. The OFT's view that there is 'asymmetric competition'<sup>426</sup> in the market is supported by information provided by two retailers who indicated that new mobility scooters set a price ceiling for second hand scooters.<sup>427</sup> Therefore, the OFT has not included second-hand mobility scooters in the relevant product market.

*Alternative mobility aids*

B.24 The OFT has also considered whether the relevant market should include other battery-powered vehicles such as powered wheelchairs.

B.25 Indoor and outdoor powered wheelchairs are suitable for persons who have restricted mobility and who cannot propel a manual wheelchair. Powered wheelchairs and medium- and large-sized mobility scooters are governed by the same provisions of the Highway Regulations (rules 36-46). However, mobility scooter retailers agreed that powered wheelchairs and mobility scooters form separate markets.<sup>428</sup> They informed the OFT that powered wheelchairs cater for the requirements of less able consumers with disabilities for whom mobility scooters are not a viable substitute. These retailers also explained that given the specific circumstances of their users, powered wheelchairs tend to be more specifically designed for different types of disabilities and that a careful 'assessment' is required for users of powered wheelchairs. This

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[Document number redacted]: '[retailer name redacted] explained that second-hand mobility scooters tend to be sold privately or through platforms such as ebay. They have a re-sale value close to zero.'

<sup>426</sup> In this case, asymmetric competition means a situation whereby new mobility scooters provide a competitive constraint on second-hand mobility scooters, but where second-hand mobility scooters do not provide a competitive constraint on new mobility scooters.

<sup>427</sup> Document 3821TI and Document 3829TI.

<sup>428</sup> See, for example, Document 3812TI, Document 3827TI, Document 3821TI, Document 3817TI and Document 3828TI.

separation of wheelchairs and mobility scooters is also supported by previous OFT findings.<sup>429</sup>

### Means of supply of mobility scooters

- B.26 The OFT understands that mobility scooters are sold through a range of sales channels, namely bricks and mortar retail premises; the internet; mail, catalogue and telephone order; and doorstep sales. The OFT understands that a sizeable proportion of mobility scooter retailers use a combination of these sales channels, for example bricks and mortar retail premises and the internet.
- B.27 In order to define the relevant market in terms of means of supply, the OFT has considered whether online and 'offline' (that is, bricks and mortar; mail, catalogue and telephone; and doorstep) sales of mobility scooters form part of the relevant market.
- B.28 Retailers views varied on the level of competition between different sales channels, and between online and 'offline' sales in particular.
- B.29 While a few bricks and mortar retailers informed the OFT that they do not compete with online retailers,<sup>430</sup> the majority of retailer interviews highlighted that bricks and mortar outlets either compete directly on price with online retailers or price match if a customer quotes an online price.<sup>431</sup> Roma 'Call Reports' also indicate that their retailers felt the competitive constraint of online retailers.<sup>432</sup>

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<sup>429</sup> *Completed acquisition by Sunrise Medical Inc and its subsidiaries of Lomax Mobility Limited* (13 January 2006) Paragraph 6.

<sup>430</sup> [Document number redacted]: '[retailer name redacted] *does not compete on price with online retailers as internet pricing is much cheaper*'.

[Document number redacted]: '[retailer name redacted] *does not compete on price*' and '*There is no price competition with online retailers as internet prices are so low*'.

[Document number redacted]: '[retailer name redacted] *does not compete on price with online retailers.*'

<sup>431</sup> [Document number redacted]: '*the internet puts pressure on margins*'.

- B.30 The views of mobility scooter suppliers also varied on this issue. Two suppliers<sup>433</sup> stated that 'offline' prices have not been influenced by online sales and remained consistently inflated. However, the majority of mobility scooter suppliers<sup>434</sup> are of the view that online sales have put pressure on prices of 'offline' sales and have had the effect of bringing 'offline' prices down, as the internet has enabled consumers to readily compare the prices of products offered by retailers.
- B.31 The OFT also notes that the persistent difference between 'offline' and online prices, which was mentioned by two suppliers, does not mean that online and 'offline' sales of mobility scooters are not in the same relevant market as this price difference may be a result of the difference between the level of services provided by different types of retailers.

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[Document number redacted]: *'in some cases matches/honours online prices even in the retail store'*.

[Document number redacted]: *'[retailer name redacted] competes on prices with the retailers mentioned by monitoring other prices online.'*

[Document number redacted]: *'heavy price competition with other online and B&M retailers'*.

[Document number redacted]: *'[retailer name redacted] [which sells through its bricks and mortar outlet, at the doorstep and online] competes with the following B&M retailers: [retailer name redacted], [retailer name redacted], and the following online retailers: [retailer name redacted] and other retailers that have high Google rankings.'*

[Document number redacted]: *'[retailer name redacted] stressed that competition is intensive and [name redacted] [which sells through its bricks and mortar outlets, online and through its catalogue] monitor some competitors. They monitor large online retailers which would usually set the pricing ceilings in the market. While it is not possible to monitor all 'small independent retailers', [name redacted] believes that by monitoring large online suppliers, they acquire a good sense of pricing levels across the country as smaller independent retailers would be constrained by such price levels'*.

<sup>432</sup>Document 0484RO, Document 0478RO, Document 0526RO, Document0581RO, Document0567RO, Document 0472RO and Document 1477RO.

<sup>433</sup> Document 3838BL and Document 3845ProR.

<sup>434</sup>Document 3692EME, Document 3840RO, Document 3765 TGA, Document 3740DPH, Document 3722Kymco, Document 3704SunM, Document 3789FLUDocument 3748AVCQ, Document 3713VanOs, Document 2813DR, Document 3721PR and Document 3845HandM.

- B.32 In addition, the evidence suggests that the Infringements were introduced in response to online businesses impacting on the sales of 'bricks and mortar' retailers and putting pressure on the prices and margins of 'bricks and mortar' retailers with respect to Roma's mobility scooters.<sup>435</sup>
- B.33 In light of the considerations set out above, the OFT considers, on balance, that online and 'offline' sales of mobility scooters form part of the same relevant market.

## C Geographic scope

- B.34 When defining the relevant geographic market, the OFT uses a similar approach to defining the relevant product market.<sup>436</sup>
- B.35 The agreements and/or concerted practices constitute vertical agreements, which were entered into between a supplier, Roma, and the Retailers. The OFT has therefore assessed the relevant geographic market both at the supplier and retailer level.

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<sup>435</sup> For example, in Roma's 'Call Reports' we see evidence that retailers were complaining to Roma that internet retailers had impacted on sales:

Document 0581RO: *'Discussed online price procedures. Met with enthusiasm as they feel internet companies are definitely [sic] impacting on dealer sales.'*

Document 1477RO: *'Roma lost lot of business with this customer due to scooters being sold cheap on Internet.'*

Document:0567RO: *'Internet cost them a lot of lost business'*.

In addition, there is evidence that Roma was concerned about low internet prices. In an interview with the OFT on 4 September 2012, Roma's Commercial Director [name redacted] stated that (see document 3451/WS (CD 1 of 5, page 16):

*'When I joined Roma [in August 2010] a number of the Area Managers, the sales guys and dealers approached me with concerns of certain companies on the internet [that] were selling scooters at extremely low prices which made it difficult for the majority of dealers to compete. [...]*

See also paragraphs 2.46 to 2.53 above.

<sup>436</sup> OFT Competition Law Guideline 403 'Market definition', December 2004, at paragraph 4.3.

## Supplier level

- B.36 The OFT considers that the geographic scope is no narrower than national at the supplier level. This follows because suppliers have national pricing lists and supply their products across the UK.<sup>437</sup> The Infringements also cover the whole of the UK.
- B.37 Evidence of imports may initially suggest an even wider geographic scope at the supplier level as the majority of mobility scooters are imported into the UK, mainly from the Far-East. However, these imports mostly come via domestic subsidiary companies located in the UK.
- B.38 The majority of retailers do not consider direct imports to constitute an alternative to purchasing from a supplier based in the UK.<sup>438</sup> Retailers explained that direct imports would require ordering products in containers which is not a viable business strategy for small retailers. Also, delivery of products would take several months from the time of the order of the products, therefore relying on direct imports would require liquidity that most retailers do not have.<sup>439</sup> Another issue mentioned by retailers is the lack of reliability with respect to the availability of products and spare parts.<sup>440</sup>
- B.39 Even if some larger retailers source part of the mobility scooters they sell directly from the Far East (that is, not via a UK-based supplier),<sup>441</sup> these imports are considered to constitute limited alternatives to purchasing from UK-based suppliers even by them due to the unreliability of the provision of products and spare parts.<sup>442</sup> Based on this, the OFT

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<sup>437</sup> Document 3438RO.

<sup>438</sup> Document 3827TI, Document 3825TI, Document 3820TI, Document 3824TI and Document 3822TI.

<sup>439</sup> Document 3824TI and 3825TI.

<sup>440</sup> Document 3812TI.

<sup>441</sup> Document 3812TI and Document 3456WS, CD 1 of 4, pg 6.

<sup>442</sup> The largest Mobility Scooter retailer, [retailer name redacted], which accounts for 2% of mobility scooter sales, imports [figure redacted]% of its scooters directly from the Far-East or

considers the geographic scope to be no larger than national at the supplier level.

### Retail level

- B.40 Evidence from retailer interviews indicates that the geographic scope at retailer level is no wider than the UK. Although there are some exports to other European countries the evidence suggests that this is negligible, mainly due to high shipping costs.<sup>443</sup>
- B.41 The OFT understands that consumers are not likely to travel great distances to purchase mobility scooters and might only visit retailers in their respective local area. The number of and the distance between retail outlets is likely to differ significantly between local areas which suggests that the competitive conditions between retail outlets may also differ in each geographic area.
- B.42 However, the Infringements covered online Retailers who sell mobility scooters to all areas of the UK.<sup>444</sup> Even if the level of competition between bricks and mortar outlets may vary in different local areas, the evidence shows that the presence of online retailers with national business provides, and absent restrictions on online sales would provide to a greater degree, a competitive constraint on offline sellers. In addition, some of the bricks and mortar retailers have multiple showrooms with uniform pricing and marketing strategy across the UK irrespective of the number of local bricks and mortar outlets.<sup>445</sup>
- B.43 In light of the above, the OFT considers that there are elements of both local and national competition at the retail level. In this case, it is appropriate to consider the market as wider than local, on the basis of evidence that regional and national internet retailers have, to some

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Israel. However, [retailer name redacted] informed the OFT that they would not switch to import more from these countries even if the prices of UK brands went up.

<sup>443</sup> Document 3825TI, Document 3824TI and Document 3456WS, CD 1 of 4, pg 12.

<sup>444</sup> See for example document 3456WS CD 1 of 4, pg 10.

<sup>445</sup> Document 3812TI, Document 3824TI and Document 3823TI.

extent, constrained local retailers and this constraint is likely to increase over time.

### **Conclusion on the relevant market**

- B.44 In summary, for the purposes of determining the relevant turnover in the market affected by the Infringements so as to establish the amount of any financial penalties, the OFT considers that the relevant product market is the online and 'offline' sale of new mobility scooters.
- B.45 The OFT considers the relevant geographic market for the Infringements to be the UK both at the supplier and retailer level.
- B.46 This market definition is without prejudice to the OFT's discretion to adopt a different market definition in any subsequent case in the light of the relevant facts and circumstances in that case, including the purpose for which the market is defined.

## **C      **ATTRIBUTION OF LIABILITY****

### **Introduction**

- C.1      This section identifies and sets out the details of the undertakings which the OFT provisionally finds liable for the Infringements, including where applicable, the joint and several liability of the parent companies of the entities directly involved in the Infringements. The OFT considers that all of the Parties are companies engaged in economic activity and that they constitute undertakings for the purposes of the Chapter I prohibition.
- C.2      The section describes each of the undertakings' primary activities and corporate structure, including where applicable:
- i.      The websites owned, operated or used by the undertakings for the purpose of advertising or selling mobility scooters;
  - ii.     Trading names used by the undertakings in the supply of mobility scooters; and
  - iii.    The undertakings' company directors during the period of Infringements.
- C.3      In addition, the activity status of each company is provided in this section to identify whether a company is trading or non-trading, as may be the case with certain parent and/or holding companies.
- C.4      The section also sets out for each party to the Infringements, the OFT's provisional conclusions on the attribution of liability.

### **Assessing Liability**

- C.5      In determining who is liable for an infringement, and therefore, who can be the addressee of a Statement of Objections and/or an infringement decision, and subject to any financial penalty that the OFT may impose, it is necessary to identify the legal or natural persons who form part of the undertaking involved in an infringement.
- C.6      For each party which the OFT provisionally finds liable for one or both of the Infringements, it has first identified the legal entity which directly entered into an agreement and/or concerted practice with Roma. Second, the OFT has determined whether liability should be shared with another legal entity on the basis that:

- (i) that entity had the ability to exercise decisive influence, and
- (ii) actually exercised decisive influence,

over the entity directly involved in the Infringements, and in that case each legal entity's liability will be joint and several on the basis that they form part of the same undertaking.

- C.7 Where a legal entity which was directly involved in the Infringements was owned by a natural person during the period of Infringements, liability will not extend to the individual.
- C.8 The Parties to whom this Decision is addressed are named in paragraph 1.8.
- C.9 Due to the possibility that there may have been a change in the company name and/or registered address, each party's company number as recorded by Companies House, is detailed below. This Decision is to be construed as applying to the company registered with the stated company number, however named and/or irrespective of its registered address prior to, at, or subsequent to the time of the Infringements.<sup>446</sup>

### **ROMA MEDICAL AIDS LIMITED (MANUFACTURER)**

- C.10 The OFT finds on the available evidence that Roma Medical Aids Limited (Roma) entered into agreements and/or concerted practices with its Retailers in respect of Roma's online price advertising and online sales prohibitions. This Decision is also addressed to Invamed Group Limited

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<sup>446</sup> In circumstances where an entity has ceased to exist or has changed its name, consistent with case law, liability for an infringement may be attributed to the successor to that undertaking where there is functional and economic continuity between the original legal entity and the renamed entity (see Cases 29 and 30/83, *Compagnie Royale Asturienne des Mines SA and Rheinzink v Commission* [1984] ECR 1679 at paragraph 9, where the Court of Justice also stated that 'a change in the legal form and name of an undertaking does not create a new undertaking free of liability for the anticompetitive behaviour of its predecessor when, from an economic point of view, the two are identical.').

(Invamed) as Roma's parent company and which the OFT finds is jointly and severally liable for the Infringements.<sup>447</sup>

- C.11 Invamed is registered as Company Number 4084631, at York Road, Bridgend Industrial Estate, Bridgend, Mid Glamorgan CF31 3TB.<sup>448</sup>
- C.12 Roma is registered as Company Number 01869285, at the same address as Invamed.<sup>449</sup>
- C.13 Invamed and Roma are registered as 'active' companies.
- C.14 The company directors of Invamed and Roma during the period of the Infringements were and continue to be common to Invamed and Roma, these being:
- [name redacted];
  - [name redacted]; and
  - [name redacted].
- C.15 Roma operates the website [www.romamedical.co.uk](http://www.romamedical.co.uk).

### **CARECO (UK) LIMITED, FORMERLY DISCOUNT MOBILITY DIRECT LIMITED (RETAILER)**

- C.16 Careco (UK) Limited (Careco) was until 23 March 2012 registered as Discount Mobility Direct Limited (DMD).<sup>450</sup>

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<sup>447</sup> Roma is wholly-owned by Invamed.

<sup>448</sup> See document 3877RO, Fame company report for Invamed Group Limited.

<sup>449</sup> See document 3873RO, Fame company report for Roma Medical Aids Limited.

<sup>450</sup> Companies House certificates show the separate registration of both company names, together with their respective previous company names (see document numbers 3647DMD, 3648DMD and 3652DMD). In response to a section 26 Notice, the OFT was advised by Careco/DMD that both names are used to sell mobility products. However, Careco (UK) Ltd is the current registered company name which Careco/DMD uses. The company is currently in a transitory period in which it is developing its Careco brand name, whilst gradually phasing out use of the DMD brand name.

- C.17 The OFT finds on the available evidence that DMD directly entered into an agreement and/or concerted practice with Roma in relation to Roma's online price advertising and online sales prohibitions and is therefore liable for the Infringements.<sup>451</sup> However, due to the change in the registered company name to Careco, this Decision is addressed to Careco, albeit with reference to DMD as the registered company name during the period of Infringement, up to 23 March 2012, and also as it is referred to in the documentary evidence.
- C.18 As outlined in paragraphs 3.35 to 3.59 the OFT considers that Careco/DMD was involved in the Infringements between 7 July 2011, at the latest, to April 2012. This is the relevant period of Infringements for Careco/DMD.
- C.19 Careco is registered as Company Number 06831125, at Westgate Chambers, 8A Elm Park Road, Middlesex, HA5 3LA.<sup>452</sup>
- C.20 DMD is registered as Company Number 07285415, at the same address as Careco.
- C.21 The company directors of Careco/DMD during the period of Infringements were and continue to be common to Careco and DMD, these being: [name redacted] and [name redacted].
- C.22 Careco/DMD is registered as an active company.<sup>453</sup> The company's principal activity during the period of Infringements was and continues to be the retail supply of mobility products and accessories, including mobility scooters.
- C.23 Careco/DMD operates, owns or uses the following websites for the purposes of (1) advertising mobility scooters and/or (2) selling mobility scooters:<sup>454</sup>

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<sup>451</sup> See Chapter 3, Section D, Paragraphs 3.35 to 3.59.

<sup>452</sup> See document number 3878DMD, Fame company report of Careco.

<sup>453</sup> See document number 3849DMD, Fame company report of DMD.

<sup>454</sup> See document number 3652DMD.

- [www.discountmobilitydirect.co.uk](http://www.discountmobilitydirect.co.uk)
- [www.cheapmobilityonline.co.uk](http://www.cheapmobilityonline.co.uk)
- [www.discountmobilitydirect.com](http://www.discountmobilitydirect.com)
- [www.dailylivingaidsdirect.com](http://www.dailylivingaidsdirect.com)
- [www.cheapreclinerchairs.co.uk](http://www.cheapreclinerchairs.co.uk)
- [www.cheaprecliners.co.uk](http://www.cheaprecliners.co.uk)
- [www.careco.co.uk](http://www.careco.co.uk)
- [www.dmdmobility.co.uk](http://www.dmdmobility.co.uk)

### **Liability**

C.24 The OFT finds on the available evidence that Careco/DMD entered into an agreement and/or concerted practice with Roma in relation to the Infringements and as such, Careco/DMD is liable for those infringements.

### **DISCOUNT MOBILITY SHOP LIMITED AND MOBILITY ABROAD LIMITED (RETAILER)**

C.25 The OFT finds on the available evidence that Discount Mobility Shop Limited (DMS) entered into an agreement and/or concerted practice with Roma in relation to Roma's online price advertising and online sales prohibitions and is therefore liable for the Infringements.<sup>455</sup> However, this Decision is also addressed to Mobility Abroad Limited (Mobility Abroad) as the owner of DMS and which the OFT finds as jointly and severally liable for the Infringements.

C.26 The OFT finds that DMS and Mobility Abroad are jointly and severally liable, on the basis that they form part of one single undertaking, as during the period of Infringements Mobility Abroad had the ability to exercise decisive influence, and actually exercised decisive influence, over DMS for the reasons set out below:

- i. DMS was wholly-owned by Mobility Abroad; and
- ii. Both companies were under common directorship during the period of Infringement.

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<sup>455</sup> See Chapter 3, Section D, Paragraphs 3.60 to 3.73.

C.27 As outlined in paragraphs 3.60 to 3.73 the OFT finds that DMS/Mobility Abroad was involved in the Infringements between 5 August 2011, at the latest, to April 2012. This is the relevant period of Infringements for DMS/Mobility Abroad.

C.28 The company directors are common to both Mobility Abroad and DMS, these being: [name redacted] and [name redacted]. Both continued as company directors during the period of Infringement.<sup>456</sup>

***Discount Mobility Shop Limited***

C.29 DMS is registered as Company Number 7009755, at 21 Lodge Lane Grays, Essex RM17 5RY.

C.30 DMS is registered as an active company.<sup>457</sup> The OFT believes that the company's principal activity is the supply of mobility products including mobility scooters.

C.31 DMS operates, owns or uses the websites under the following names for the purposes of (1) advertising mobility scooters and/or (2) selling mobility scooters:<sup>458</sup>

- Online Mobility Shop
- Discount Mobility Shop
- Bathlift-shop

C.32 DMS also uses the following trading names in supplying mobility scooters:

- Online Mobility Shop
- Discount Mobility Shop
- Bathlift-shop

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<sup>456</sup> The OFT was advised on 4 March 2013 that DMS and Mobility Abroad have entered into voluntary liquidation proceedings. As such, the company directors' powers would have ceased. However, DMS and Mobility Abroad continue to be registered as 'active' at Companies House as at 19 March 2013.

<sup>457</sup> See document number 3850DMS, Fame company report of DMS.

<sup>458</sup> See document number 3857DMS.

### ***Mobility Abroad Limited***

- C.33 Mobility Abroad is registered as Company Number 4277883, at 21 Lodge Lane Grays, Essex RM17 5RY.
- C.34 Mobility Abroad is registered as an active company.<sup>459</sup> The OFT believes that Mobility Abroad also trades in the sale and/or supply of mobility products, independently of DMS as it uses separate trading names and websites to DMS.
- C.35 Mobility Abroad Limited operates, owns or websites under the following names for the purposes of (1) advertising mobility scooters and/or (2) selling mobility scooters:<sup>460</sup>
- South East Mobility
  - Mercury Scooters
  - Straight Stairlifts
- C.36 Mobility Abroad Limited also uses the following trading names in supplying mobility scooters:
- South East Mobility
  - Mercury Scooters
  - Straight Stairlifts

### **Liability**

The evidence indicates that DMS entered into an agreement and/or concerted practice with Roma in relation to the Infringements and is liable for those infringements. The OFT finds that as DMS's parent company, Mobility Abroad is jointly and severally liable for the Infringements.

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<sup>459</sup> See document number 3851DMS, Fame company report of Mobility Abroad.

<sup>460</sup> See document number 3857DMS.

## **DISCOUNT MOBILITY PLUS LIMITED AND RUTLAND MOBILITY LIMITED (RETAILER)**

- C.37 The OFT finds on the available evidence that Discount Mobility Plus Limited (DMP) entered into an agreement and/or concerted practice with Roma in respect of Roma's online price advertising and online sales prohibitions.<sup>461</sup> Due to the connection with Rutland Mobility Limited (Rutland), this Decision is also addressed to Rutland which the OFT considers to be jointly and severally liable with DMP for the Infringements.
- C.38 As outlined in paragraphs 3.74 to 3.91 the OFT considers that DMP and Rutland were involved in the Infringements between 21 September 2011, at the latest, to April 2012. This is the relevant period of Infringements for DMP and Rutland.
- C.39 The OFT finds that DMP and Rutland are jointly and severally liable, on the basis that they form part of one single undertaking, as during the period of Infringements:
- i. Both companies were and continue to be under common ownership;
  - ii. Both companies were and continue to be under common directorship;
  - iii. The evidence demonstrates common influence and control of both companies;
  - iv. The evidence suggests common representation of both companies in entering an agreement and/or concerted practice with Roma;
  - v. There has been common representation of both companies made to the OFT; and
  - vi. The submission of a single response to the OFT's section 26 Notice on behalf of both companies.
- C.40 In the period of Infringements, the director of DMP and Rutland has also owned the company Scooters Mobility Limited, company number 6826543. Scooters Mobility Limited is dissolved and there is no evidence that it was a party to the Infringements. For these reasons Scooters Mobility Limited is not an addressee of this Decision.

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<sup>461</sup> See Chapter 3, Section D, Paragraphs 3.74 to 3.91.

### ***Discount Mobility Plus Limited***

- C.41 DMP is registered as Company Number 05392613, at 14 All Saints Street, Stamford, Lincolnshire, PE9 2PA.
- C.42 DMP is registered as an active company,<sup>462</sup> whose principal activity during the period of Infringements was and continues to be the sale of mobility products via the internet, including mobility scooters.
- C.43 DMP's company director during the period of Infringements was and continues to be [name redacted] and [name redacted], as Company Secretary.<sup>463</sup>
- C.44 DMP operates, owns or uses the following websites for the purposes of (1) advertising mobility scooters and/or (2) selling mobility scooters:<sup>464</sup>
- [www.mobilityscootersplus.com](http://www.mobilityscootersplus.com)
  - [www.mobilityscooterbatteries.co.uk](http://www.mobilityscooterbatteries.co.uk)
  - [www.scooters-mobility.co.uk](http://www.scooters-mobility.co.uk)
- C.45 Additionally, DMP uses the following trading names for the supply of mobility scooters:
- Mobility Scooters Plus
  - Scooters Mobility

### ***Rutland Mobility Limited***

- C.46 Rutland is registered as Company Number 04825234, at 5 Park Road, Melton Mowbray, Leicestershire LE13 1TT.
- C.47 Rutland is registered as an active company whose principal activity during the period of Infringements was and continues to be the sale of mobility related products in the UK, including mobility scooters. Rutland

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<sup>462</sup> Document number 3847DMP, Fame company report for Discount Mobility Plus Limited.

<sup>463</sup> Ibid.

<sup>464</sup> See document number 3669DMP.

operates from a retail store at 5 Park Road, Melton Mowbray, Leicestershire LE13 1TT.<sup>465</sup>

- C.48 Rutland's company director during the period of Infringements was and continues to be [name redacted] and [name redacted], as Company Secretary.
- C.49 Rutland operates, owns or uses the following websites for the purposes of (1) advertising mobility scooters and/or (2) selling mobility scooters:<sup>466</sup>
- [www.rutlandmobility.co.uk](http://www.rutlandmobility.co.uk)

### **Liability**

- C.50 The OFT finds that the owner of DMP and Rutland [name redacted], exercised decisive influence over the commercial policy of both companies during the period of Infringements and therefore DMP and Rutland form part of the same economic entity. However, this Decision is not addressed to [name redacted] in accordance with paragraph C.7 above.
- C.51 The OFT further notes the evidence of decisive influence in the form of a common director between DMP and Rutland during the period of Infringements, namely the owner of DMP and Rutland [name redacted] and the Company Secretary of DMP and Rutland [name redacted]. Specifically, the documentary evidence suggests that in relation to the agreement and/or concerted practice with Roma, when representing one company, [name redacted] was simultaneously representing the other.
- C.52 Additionally, [name redacted] has represented the companies as one and the same to the OFT, namely, as Rutland being the 'retail arm' of the company and DMP being the 'online arm' of the company, notwithstanding that DMP and Rutland are separately registered companies.

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<sup>465</sup> See document number 3848DMP, Fame company report of Rutland.

<sup>466</sup> See document number 3669DMP.

- C.53 When responding to the OFT's formal Notice pursuant to section 26 of the Act, dated 25 April 2012, a single response was provided on behalf of both DMP and Rutland and it was confirmed to the OFT that the single submission represented a response on behalf of both companies.<sup>467</sup>
- C.54 The OFT therefore finds that DMP and Rutland are jointly and severally liable in respect of the Infringements.

### **MOBILITY INDEPENDENCE LIMITED (RETAILER)**

- C.55 The OFT finds that Mobility Independence Limited (Mobility Independence) entered into an agreement and/or concerted practice with Roma in relation to Roma's online price advertising and online sales prohibitions and Mobility Independence is therefore liable for the Infringements.<sup>468</sup>
- C.56 As outlined in paragraphs 3.92 to 3.106 (the Agreement and/or Concerted Practice between Roma and Mobility Independence Limited), the OFT considers that Mobility Independence was involved in the Infringements from at the latest 6 July 2011 to April 2012. This is the relevant period of Infringements for Mobility Independence.
- C.57 Mobility Independence is registered as Company Number 07452944, at Hadfield Road, North Walsham, Norfolk NR28 OBE.
- C.58 The company directors of Mobility Independence during the period of Infringements were [name redacted] and [name redacted].<sup>469</sup>

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<sup>467</sup> In total, the OFT has issued three formal Notices under section 26 of the Act. The first Notice was issued separately to DMP and Rutland. It was communicated to the OFT that DMP's response had covered a response also on behalf Rutland. Thereafter, each Notice was issued to DMP as covering both companies.

<sup>468</sup> See Chapter 3, Section D, Paragraphs 3.92 to 3.106.

<sup>469</sup> See document number 3853BMMI, Fame company record of Mobility Independence. [Name redacted] resigned as company director on 22 August 2012. [Sentence redacted.]

C.59 Mobility Independence was registered as 'active (dormant)' until March 2013.<sup>470</sup>

C.60 Mobility Independence owns, operates or uses the following websites for the purposes of (1) selling mobility scooters and/or (2) selling mobility scooters:

- [www.britishmobilityhealthcare.co.uk](http://www.britishmobilityhealthcare.co.uk)

C.61 Mobility Independence also uses the following trading names in supplying mobility scooters:

- British Mobility

### **Liability**

C.62 The OFT finds from the available evidence that Mobility Independence entered into an agreement and/or concerted practice with Roma in relation to the Infringements and as such, Mobility Independence is liable for those infringements.

### **MT MOBILITY LIMITED (RETAILER)**

C.63 The OFT finds that MT Mobility Limited (MTM) directly (and under at least one of MTM's trading names, More Than Mobility), entered into agreements and/or concerted practices with Roma in relation to Roma's online price advertising and online sales prohibitions and MTM is therefore liable for the Infringements.<sup>471</sup>

C.64 This Decision is also addressed to Hooplah Limited (Hooplah) which the OFT finds is jointly and severally liable for the Infringements on the basis

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<sup>470</sup> Ibid. A company whose status is 'active (dormant)' is active insofar as the company is registered but dormant because it is non-trading. The OFT has been unable to confirm the status of Mobility Independence [remainder of sentence redacted]. The Companies House record at 19 March 2013 states that the Company is active, but with a 'proposal to strike off' (see document number 3879BMMI).

<sup>471</sup> See Chapter 3, Section D, Paragraphs 3.107 to 3.119.

that they form part of one single undertaking as during the period of Infringements MTM was and continues to be owned by Hooplah.

C.65 As outlined in paragraphs 3.107 to 3.119 (the Agreement and/or Concerted Practice between Roma and MT Mobility Limited), the OFT finds that MTM was involved in the Infringements from 14 July 2011 to April 2012. This is the relevant period of Infringements for MTM.

C.66 Hooplah is registered as Company Number 07050678, at 17C Weston Favell Centre, Northampton NN3 8JZ.

C.67 MTM is registered as Company number 07051407, at the same address as Hooplah.

***MT Mobility Limited***

C.68 The company directors of MTM were during the period of Infringements and continue to be:

- [name redacted];
- [name redacted]; and
- [name redacted].

C.69 MTM is registered as active.<sup>472</sup> The company's principal activity is the retailing of mobility products, including mobility scooters.

C.70 MTM uses the following trading names in supplying mobility scooters:<sup>473</sup>

- More Than Mobility
- Mobility Equipment
- Mobility One
- Mobility Products 123

C.71 MTM owns, operates or uses the following websites for (1) selling mobility scooters and (2) advertising mobility scooters:

- [www.morethanmobility.com](http://www.morethanmobility.com)

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<sup>472</sup> See document 3855MTM Fame company report of MTM.

<sup>473</sup> See document numbers 3658MTM, 3659MTM.

- [www.mobilityone.co.uk](http://www.mobilityone.co.uk)
- [www.mobilityscooter.co.uk](http://www.mobilityscooter.co.uk)
- [www.morethanmobilitynorthampton.co.uk](http://www.morethanmobilitynorthampton.co.uk)
- [www.morethanmobilityplymouth.co.uk](http://www.morethanmobilityplymouth.co.uk)
- [www.mobilityequipment.co.uk](http://www.mobilityequipment.co.uk)
- [www.mobilityproducts123.co.uk](http://www.mobilityproducts123.co.uk)

C.72 MTM also owns, operates or uses a number of 'isites' which promote More Than Mobility and/or Mobility Equipment.<sup>474</sup> These include references to mobility scooters which are linked to the MTM websites [www.morethanmobility.co.uk](http://www.morethanmobility.co.uk) and [www.mobilityequipment.co.uk](http://www.mobilityequipment.co.uk).

### ***Hooplah Limited***

C.73 The company directors of Hooplah were during the period of Infringements and continue to be:

- [name redacted];
- [name redacted]; and
- [name redacted].

C.74 Hooplah is registered as active.<sup>475</sup> The principal activity of Hooplah was during the period of Infringements, and continues to be as a holding company to MTM.

### **Liability**

C.75 The evidence indicates that MTM entered into agreements with Roma in relation to the Infringements and is liable for those infringements. The OFT finds that Hooplah is jointly and severally liable for the Infringements as during the period of Infringements:

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<sup>474</sup> 'Isites' are websites which are targeted to generate online rankings and drive high-volume traffic to a main website, in order to make that website appear higher in search engines. MTM's isites promote its More than Mobility and Mobility Equipment trading names which link to MTM's 'main' websites. MTM's isites also refer to mobility scooters but do not advertise specific models and they are not ecommerce sites (see document number 3656MTM).

<sup>475</sup> See document number 3856MTM, Fame company report of Hooplah.

- i. Hooplah was and continues to be the holding company of MTM; and
- ii. There was during the period of Infringements, common decisive influence by way of common company directors.

## **PROTEC MOBILITY TRADING LIMITED (RETAILER)**

C.76 The OFT finds that Protec Mobility Trading Limited (Protec) entered into an agreement and/or concerted practice with Roma in relation to Roma's online price advertising and online sales prohibitions and is therefore liable for the Infringements.<sup>476</sup>

C.77 Protec sells mobility scooters under the trade name Factory Outlet Scooters (FOS) in which regard the evidence indicates the following:

- i. FOS is a separately registered company which has separate owners and company directors to Protec;
- ii. An agreement exists between Protec and FOS whereby FOS licences to Protec the website [www.factoryoutletscooters.co.uk](http://www.factoryoutletscooters.co.uk) for Protec's sole use;<sup>477</sup>
- iii. The contact details available on FOS's website correspond to Protec;
- iv. Protec is responsible for managing the trading activities of FOS, being the sale of mobility products.
- v. Protec represented itself as FOS in entering an agreement and/or concerted practice with Roma;
- vi. Protec has represented itself as Protec and FOS to the OFT; and
- vii. Protec has responded to the OFT's section 26 Notices on behalf of both companies.

C.78 As outlined in paragraphs 3.120 to 3.132 (the Agreement and/or Concerted Practice between Roma and Protec Mobility Trading Limited), the OFT finds that Protec was involved in the Infringements from at the latest 3 August 2011 to April 2012. This is the relevant period of Infringements for Protec.

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<sup>476</sup> See Chapter 3, Section D, Paragraphs 3.120 to 3.132.

<sup>477</sup> See document numbers 3678FOS and 3876RO, Protec's responses to section 26 Notices.

- C.79 Protec is registered as Company Number 06666560, at 18 London Road, Grantham, Lincolnshire NG31 6EJ.
- C.80 Protec's company director was, during the period of Infringements and continues to be [name redacted].
- C.81 Protec is registered as an active company.<sup>478</sup> The company's principal activity is the supply of mobility products, including mobility scooters.
- C.82 Protec owns, operates or uses the following websites for the purposes of (1) selling mobility scooters and/or (2) advertising mobility scooters:
- [www.factoryoutletscooters.co.uk](http://www.factoryoutletscooters.co.uk)

### **Liability**

- C.83 The OFT finds on the available evidence that Protec, also trading as FOS, entered into an agreement and/or concerted practice with Roma in relation to the Infringements and that Protec is liable for those infringements. The evidence indicates that the sale of mobility scooters under the FOS name, website and/or domain name were conducted by Protec and therefore the OFT does not find that FOS is liable for the Infringements. For the avoidance of doubt, FOS was not an addressee of the Statement issued on 21 March 2013.

### **GBL WHEELCHAIR SERVICES LIMITED (RETAILER)**

- C.84 The OFT finds that GBL Wheelchairs Limited (GBL) entered into an agreement and/or concerted practice with Roma in respect of Roma's online price advertising and online sales prohibitions and GBL is therefore liable for the Infringements.<sup>479</sup>
- C.85 As outlined in paragraphs 3.133 to 3.141 (the Agreement and/or Concerted Practice between Roma and GBL Wheelchair Services Limited) the OFT finds that GBL was involved in the Infringements from at the latest 11 August 2011 to April 2012. This is the relevant period of Infringements for GBL.

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<sup>478</sup> See document number 3854FOS, Fame company report of Protec.

<sup>479</sup> See Chapter 3, Section D, Paragraphs 3.133 to 3.141.

C.86 GBL is registered as Company Number 2810704, at 12 Mount Road, Hanworth, Feltham, Middlesex TW13 6AR.

C.87 The company directors of GBL during the period of Infringements were and continue to be:

- [name redacted];
- [name redacted];
- [name redacted]; and
- [name redacted].

C.88 GBL is registered as an active company.<sup>480</sup> The company's principal activity is the supply of mobility products including mobility scooters.

C.89 GBL operates, owns or uses the following website for the purposes of (1) advertising mobility scooters and/or (2) selling mobility scooters:<sup>481</sup>

- [www.gblwheelchairs.com](http://www.gblwheelchairs.com)

C.90 GBL also uses the following trading name in the supply of mobility scooters:

- The Mobility Warehouse

### **Liability**

C.91 The OFT finds that GBL entered into an agreement and/or concerted practice with Roma in relation to the Infringements and as such, GBL is liable for those infringements.

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<sup>480</sup> See document number 3852GBL, Fame company report of GBL.

<sup>481</sup> See document number 3653GBL.

## D TURNOVER INFORMATION

### Roma Medical Aids Limited

D.1 The turnover information of Roma Medical Aids Limited for the years ended 30 November 2010, 2011 and 2012 is as follows:

<b>Year ending</b>	30 November 2010	30 November 2011	30 November 2012
<b>Turnover</b>	£ [figure redacted]	£ [figure redacted]	£ [figure redacted]

### The Retailers

D.2 Turnover information for the Retailers for the relevant business years is not available at Companies House as each of the Retailers enjoys small business 'total exemption' status. The financial threshold for small business total exemption is £6m. As none of the Retailers is registered with Companies House, the OFT has inferred that each of the Retailers' turnover is less than £6m in the relevant business year. This indicates that at all relevant times the combined turnover for each Roma-Retailer combination did not exceed £20 million and is, therefore, below the threshold for the imposition of a financial penalty.<sup>482</sup>

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<sup>482</sup> See paragraphs 4.5 and 4.6 above.

## E ROMA CUSTOMER CALL SHEETS (OR CALL REPORTS)

This Annexe lists a limited selection of the internal Roma 'Call Reports' produced by Roma's Area Sales Managers from August 2010 to March 2012, summarising their discussions with retailers on Roma's online policy.

Doc reference	Call report	Date	Retailer	Quote / Relevant statement	Policy in place? Monitoring?
0484RO	[name redacted]	23.08.10	[retailer name redacted]	'Informed of RMA Online Pricing Policy which he wil [sic] support. Does not sell many scooters online but in view of above he might change.'	Yes
1028RO	[name redacted]	05.07.11	Protec	'discuss taking roma [sic] brand scooters of[sic] his website.'	Yes
			[retailer name redacted]	'roma [sic] branded not online.'	Yes
2401RO	[name redacted]	06.07.11	[retailer name redacted]	'Spoken with [retailer name redacted] and they have informed me that they have taken the Roma Corrella off their website and I have also spoken and left a Message with [name redacted] at [retailer name redacted].'	Yes
2826RO	[name redacted]	06.07.11	[first name redacted] Independe nce	'As per our conversation this afternoon, can you please remove all the images, prices and information on the Roma branded scooters from your website.'	Yes
2396RO	[name redacted]	07.07.11	[retailer name redacted]	'he assured me they would remove the Roma branded products from their site right away but were very concerned about how they could sell products they could not show images of!'	Yes
			[retailer name redacted]	'[.../...]also agreed to remove Roma branded products images from their website but once again mentioned that they had no idea how they would sell	Yes

Doc reference	Call report	Date	Retailer	Quote / Relevant statement	Policy in place? Monitoring?
				products they could not display..'	
1675RO	[name redacted]	09.07.11	[retailer name redacted]	'Had a meeting with [name redacted] and discussed issue of Roma products on the net at silly prices.'	Yes
1477RO	[name redacted]	16.07.11	[retailer name redacted]  (Dealer)  [name reacted]	'Have complied with Roma and removed ROMA branded products from website but not happy if lose sales opportunity. Are RMA going to do National advertising to help compensate?  Went over aims and objectives of RMA website and how it will better serve the dealers who support new Roma initiatives, give it time to kick in, it will be worth it to the dealer.'  agreed to run with it'	Yes
1478RO	[name redacted]	09.07.11	[retailer name redacted]	'Likes Granada and if RMA keep to shop only supply then will buy'	Yes
2575RO	[name redacted]	12.08.11	Protec (Notts)	'internet pricing'	Yes
1461RO	[name redacted]	09.09.11	MT Mobility Acct. 4185	'online pricing.'	Yes
			Protec Mobility Acct. 3445	'online pricing of roma [sic] range of scooters.'	Yes
1025RO	[name redacted]	15.07.11	British Mobility	'talk about getting roma [sic] scooters off his website.'	Yes

Doc reference	Call report	Date	Retailer	Quote / Relevant statement	Policy in place? Monitoring?
			Scooters  Acct. 3462		
0962RO	[name redacted]	12.03.12	Rutland Mobility	'Not happy with Roma stopping the internet sales as most of there [sic] sales are off the internet.'	Yes