

Competition Act 1998

Decision of the Office of Fair Trading

Mobility scooters supplied by Pride Mobility Products Limited: prohibition on online advertising of prices below Pride's RRP

CE/9578-12

27 March 2014

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 THE PURPOSE OF THIS DOCUMENT

- 1.1 By this decision, of which Annexes A to D form an integral part (the ‘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’).
- 1.2 This Decision is issued under section 31 of the Act to the Parties in accordance with Rules 4 and 5 of the OFT’s procedural rules (the OFT’s Rules).¹ 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.²
- 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 currently 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 market study into the mobility aids sector. That intelligence provided the OFT with reasonable grounds to suspect that Pride Mobility Products Limited (‘Pride’) and certain retailers had, amongst other things, entered into anti-competitive agreements and/or participated in concerted practices which prohibited retailers from advertising prices online below Pride’s RRP in respect of certain mobility scooters supplied by Pride.
- 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

¹ The Competition Act 1998 (Office of Fair Trading’s Rules) Order 2004 (SI 2004/2751). Available on the OFT’s website at www.offt.gov.uk.

² Rules 4(1)(a) and 5(2)(a) of the OFT’s Rules.

alleged agreements and/or concerted practices. The OFT further conducted voluntary witness interviews with certain retailers on 6, 7 and 29 August 2012, and with key Pride employees on 10 and 11 September 2012.

- 1.6 In October 2012, the OFT sent to Pride 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.
- 1.7 On 24 September 2013, the OFT issued to the Parties a Statement of Objections and provided them with the opportunity to make representations on the OFT's case and proposed findings which it set out: that is, that the Parties had 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 certain Pride mobility scooters in the UK. The OFT received written representations from two of the Parties: Pride and Better Mobility Limited ('Better Mobility'). Pride did not contest the facts set out in the Statement of Objections. Better Mobility contested the facts regarding the provisional finding of an agreement and/or concerted practice between itself and Pride. Neither Pride nor Better Mobility elected to make oral representations.
- 1.8 On 28 January 2014, the OFT sent a letter to the Parties in which it provided a fuller explanation of the OFT's reasoning in support of its provisional finding in the Statement of Objections that the agreements and/or concerted practices in this case did not benefit from parallel exemption, pursuant to section 10 of the Act, by virtue of the Vertical Agreements Block Exemption Regulation ('VABER'). In its letter, the OFT invited the Parties to make additional written representations relating to this point. The OFT received additional written representations from one of the Parties: Pride.

C PARTIES

- 1.9 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. *Pride Mobility Products Limited* (Manufacturer)
2. *Careco (UK) Limited* (formerly *Discount Mobility Direct Limited*) (Retailer)
3. *Discount Mobility Plus Limited/ Rutland Mobility Limited* (Retailer)
4. *Mobility 4 U Limited* (Retailer)
5. *MT Mobility Limited/Hooplah Limited* (Retailer)
6. *Robert Gregg Limited* (Retailer)
7. *Hartmond Limited* (Retailer)
8. *Milton Keynes Mobility Limited* (Retailer)
9. *Better Mobility Limited* (Retailer)

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 (in each case between Pride and each Retailer) 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 Pride, prohibiting online advertising of prices below the Recommended Retail Price ('RRP') set by Pride ('the Below-RRP Online Price Advertising Prohibition'). The duration of the agreements and/or concerted practices differs in each case, but each agreement and/or concerted practice covers some or all of the period from February 2010 to February 2012.
- 1.11 Whilst Pride's policies concerning the online advertising of prices below the RRP in respect of certain mobility scooters applied to its dealer network generally, the OFT's finding, based on the evidence in its possession, is that the Retailers³ were party to agreements and/or concerted practices with Pride in respect of the Below-RRP Online Price Advertising Prohibition. The OFT has identified the Retailers from the generality of Pride's dealer network on the basis of the strength of the evidence in its possession. While the OFT makes no findings in respect of

³ 'Retailer(s)' is defined on page 18. See also the list of Parties set out at paragraph 1.9.

other members of Pride's dealer network, no inference should be drawn from any part of this Decision that the Retailers constitute the only dealers to whom the Below-RRP Online Price Advertising Prohibition related. Likewise, this Decision should not be understood as excluding the possibility that the Below-RRP Online Price Advertising Prohibition resulted in further agreements and/or concerted practices between Pride and other members of its dealer network.

1.12 The evidence in the OFT's possession demonstrates that:

- A** While it may have been introduced earlier, Pride started to communicate the existence of the Below-RRP Online Price Advertising Prohibition to Retailers by 28 January 2010.⁴
- B** The Retailers agreed to abide by, or acquiesced in, Pride's requests and/or instructions not to advertise prices below the RRP online, although not all Retailers complied with Pride's requests and/or instructions at all times.
- C** To comply with the Below-RRP Online Price Advertising Prohibition, a Retailer could, if it did not wish to advertise the product at RRP, use the phrase 'call for best price', 'value special' or similar on its website(s). A Retailer could also comply with the Below-RRP Online Price Advertising Prohibition by not displaying any price or any such phrase on its website(s).
- D** From 25 June 2010 at the latest Pride had in place a system of monitoring whether its retailers were complying with its Below-RRP Online Price Advertising Prohibition (those retailers that were not, at times, complying with Pride's policy were referred to internally as 'internet rogues').
- E** Those Retailers which were identified as 'internet rogues' were contacted by members of the external sales team and/or their respective Area Sales Manager and requested and/or instructed to:
 - (i) remove the below-RRP price from the Retailer's website; and/or

⁴ See also paragraph 2.112. The Below-RRP Online Price Advertising Prohibition covered the following Pride mobility scooters: Colt Deluxe, Colt Executive, Colt Plus, Colt Twin, Colt XL8, Colt 9 and the Elite Traveller LX (part of the Go-Go scooter range).

- (ii) increase the online price advertising to the RRP.

Those requests and/or instructions were made by email, by telephone or in person (when sales representatives visited stores).

- F** An alternative, and higher, price structure (the 'T List') was introduced. Non-compliant Retailers were threatened with being placed on the 'T List' if they did not adhere to Pride's Below-RRP Online Price Advertising Prohibition. The 'T List' was in place by September 2010 at the latest.
- G** Pride took steps to ensure that its Retailers understood that a consequence of non-compliance with the Below-RRP Online Price Advertising Prohibition was that they could be put on a less favourable price structure and were subsequently at risk of being subject to a cessation of supply.

E SUMMARY OF THE OFT'S COMPETITION CONCERNS

- 1.13 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. Competition between retailers includes them making use of the various available channels to attract and win prospective customers, including by signalling the existence of price and non-price advantages over their competitors.
- 1.14 The provision of product and price information plays an important role in this respect. In this context, the internet can be particularly important as a means to make such information easily accessible to end-consumers,⁵ particularly those who have restricted mobility and are therefore less able to shop around by physically visiting various retail premises. Internet advertising makes it easier for retailers to attract and win (a) customers who make use of the internet to compare product offerings and prices, and (b) customers who are located in more distant territories than those

⁵ See OFT1374, 'Mobility aids, an OFT market study', (September 2011), including paragraphs 5.8, 5.20, 5.39 (and footnote 64) and 6.13. Available at <http://www.of.gov.uk/OFTwork/markets-work/mobility-aids>. See also OFT921, 'Internet shopping, an OFT market study' (June 2007), including paragraphs 2.38, 3.5 and 3.8, table 2.2 and chart 3.1. Available at <http://www.of.gov.uk/OFTwork/markets-work/internet>.

within which the retailer's bricks-and-mortar store(s) is/are easily accessible by its potential customers.⁶ A customer, particularly one with limited mobility, is more likely to make the effort to contact, to travel to, or to make a purchase from a retailer who makes use of the internet to advertise the existence of product and price advantages over rival retailers, including those located nearer to the customer's home.

- 1.15 Easy access to clear product and price information via the internet can therefore make it easier for:
- consumers to compare price information, consumers to identify retailers which offer better value for money,
 - retailers to attract and win consumers who use the internet to compare product offerings and prices, and
 - retailers to attract and win consumers located in territories beyond the retailers' bricks-and-mortar catchment areas.
- 1.16 As a result, having the freedom to advertise retail prices on the internet can intensify price competition between retailers and enable consumers to obtain better value for money.
- 1.17 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,
 - (ii) consumers are often first-time buyers, and
 - (iii) RRP's in the sector are somewhat arbitrary and/or are generally set at levels significantly higher than actual selling prices,⁷

⁶ To put point (b) another way, the internet enables retailers effectively to compete with retailers located outside of their bricks-and-mortar catchment areas.

⁷ Pride has indicated to the OFT that its RRP's are somewhat arbitrary and did not dispute that they are 'unrealistic'. (On this point, see paragraphs 2.31 and 2.32, and footnotes 39, 40 and 289.) The OFT has evidence in its possession that supports this view. Specifically, the OFT has considered the differential between Pride's RRP's and retailers' actual selling prices. Where Retailers did not comply with Pride's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times, the online prices advertised for certain Pride mobility scooters were significantly below Pride's RRP's. For example, see the 'Rogue Report' evidence for the period 18th February 2011 to 27 January 2012, where the prices displayed online by all dealers listed in these Rogue Reports were, on average, 51 per cent below the RRP for the Colt Twin and 68 per cent

the ease of access to reliable information on genuine prices can be particularly important. Therefore, increased price transparency, alongside relevant product and service information, can positively impact consumers' ability to identify the best deal for them, at low search costs. This increased price transparency and therefore an increased ability to identify potentially more price competitive retailers that consumers can buy from, is likely to strengthen price competition between mobility scooter retailers, including bricks-and-mortar retailers and hybrid retailers⁸ as well as doorstep sellers, and result in lower end-prices.⁹

- 1.18 The OFT considers that as a result of the Below-RRP Online Price Advertising Prohibition (see paragraph 1.10 and also the 'Defined Terms' at Section F below), Retailers were restricted from accessing a wider consumer base with the help of the internet. The Below-RRP Online Price Advertising Prohibition makes it more difficult for Retailers to use the internet as a channel to attract and win prospective customers. Without the freedom to advertise their below-RRP selling prices online, Retailers are hampered in using the internet as a method of marketing. Where a

discount below the RRP for the Colt Plus. This is based on an average advertised price over the period of £1,526 for the Colt Twin and £992 for the Colt Plus, and an RRP of £3,100 for both models. (See Documents 2650PR, 2654PR, 2657PR, 2659PR, 2660PR, 2661PR, 2666PR, 2667PR, 2668PR, 2670PR, 2671PR, 2672PR, 2674PR, 2675PR, 2676PR, 2677PR, 2682PR, 2683PR, 2684PR, 2685PR, 2686PR, 2687PR, 2689PR, 2691PR, 2692PR, 2693PR, 2694PR, 2847PR, 2849PR, 2850PR, 2853PR, 2854PR, 2858PR, 2859PR, 2860PR, 2861PR, 2866PR, 2868PR and 2875PR.)

Looking at one specific Retailer by way of a further example, Document 2860/PR is a Rogue Report from 9 August 2011, in which the Retailer DMD is listed as advertising five scooters below-RRP on its various websites and Ebay. DMDs advertised prices (at this time) and Pride's RRP's for these scooters were as follows: Colt Plus (advertised price of £699, which is 77.5 per cent lower than Pride's RRP of £3,100); Colt Executive (advertised price of £2,299, which is 54 per cent lower than Pride's RRP of £4,995); Elite Traveller LX (advertised price of £465, which is 74 per cent lower than Pride's RRP of £1,785); Colt XL8 (advertised price of £1,499, which is 65.1 per cent lower than Pride's RRP of £4,295); Colt Twin (advertised price of £898, which is 71.1 per cent lower than Pride's RRP of £3,100).

Further, Pride's own 'Suggested Lowest Resale Prices' as communicated to the Retailers reflect the fact that Pride's RRP's were set at levels significantly higher than actual retail prices. For example, the OFT has compared the RRP's and the Suggested Lowest Resale Prices for the Colt Twin and the Colt Plus scooter models as at March 2009. The Suggested Lowest Resale Price represented a 69 per cent discount from the RRP at that time for both the Colt Twin and the Colt Plus. (See document 3086PR and 3087PR, where the Suggested Lowest Resale Price was £950, for both the Colt Twin and the Colt Plus, while at that time the RRP was £3,040 for both models.)

⁸ That is, retailers using multiple sales channels, such as bricks-and-mortar outlets and the internet.

⁹ See footnote 53.

Retailer adopts a selling price that is below-RRP, it cannot display this price information online; it can only inform consumers as to how they might obtain this price information (e.g. instructing consumers to ‘call for best price’). Further, ‘call for best price’ instructions are likely to be far less effective in attracting interest from customers who are located in territories beyond the Retailers’ bricks-and-mortar catchment areas, or from internet customers more generally, than the displaying of actual selling prices online. Viewed another way, the Below-RRP Online Price Advertising Prohibition significantly restricts consumers from identifying and obtaining discounted prices, by shopping around via the internet, including where those consumers are unlikely to be able to access and act on price information contained in in-store or ‘shop-window’ displays or in local print or broadcast advertising.¹⁰

- 1.19 The OFT considers that, in the absence of the Below-RRP Online Price Advertising Prohibition, each Retailer of mobility scooters would be able to determine independently its own policy as regards its online advertising of prices (and to adapt itself to the existing and anticipated conduct of its competitors). In this way, each Retailer would have the freedom (should it so wish and given the incentives it faces) to attract and win customers through the online advertisement of below-RRP prices and by using the internet to signal to consumers the existence of a price advantage over its competitors. As such, this would increase the scope for intra-brand competition. The absence of the Below-RRP Online Price Advertising Prohibition would widen the territorial base and broaden the group of potential customers that the Retailer could effectively attract and win through its price signalling (versus the position in which a Retailer is limited to using in-store or other ‘offline’ means of price advertising),¹¹ thereby increasing the scope for intra-brand competition.
- 1.20 The OFT therefore considers that the Below-RRP Online Price Advertising Prohibition resulted in price competition between Retailers being prevented, restricted or distorted; and undermined the benefits of the broad geographic and demographic reach, transparency and enhanced search functions brought about by the internet and the possibilities offered, to both retailers and consumers, by e-commerce. The OFT notes

¹⁰ Note that there is no equivalent prohibition on retailers of Pride’s mobility scooters from advertising below-RRP prices in their physical bricks-and-mortar stores and/or in local print or broadcast media.

¹¹ See footnote 10.

that this prevention, restriction or distortion of competition occurred in the context of a distribution system that was selective, and where intra-brand competition had therefore already been limited. Separately, the OFT considers that, as a consequence of the Below-RRP Online Price Advertising Prohibition, end-consumers potentially paid higher prices.¹²

1.21 Further, the OFT considers that to the extent that similar prohibitions/restrictions exist in the market in relation to other suppliers and their retailers, then any prevention, restriction or distortion of competition would be further reinforced and exacerbated.¹³

1.22 The OFT is particularly concerned that in a sector, such as the present, where consumers are potentially more vulnerable, the Below-RRP Online Price Advertising Prohibition is 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
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
the Decision	This document, of which Annexes A to D form an integral part
GC	The General Court
the Infringements	The infringements which are the subject of this Decision

¹² See paragraphs 3.206 to 3.216, where we discuss Pride's subjective intentions.

¹³ On 5 August 2013, the OFT found that Roma Medical Aids Limited (Roma), a manufacturer of mobility scooters, entered into arrangements with certain UK-wide online retailers, including three of the Retailers addressed by this Decision, which prevented them from selling Roma-branded mobility scooters online and from advertising their prices online, in breach of the Chapter I prohibition of the Act. The OFT found that these practices occurred over various periods in relation to different retailers between 2011 and 2012, and prevented, restricted or distorted competition in the supply of mobility scooters in the UK. The three Retailers addressed by this Decision and who were also addressed by the Roma Decision are: Careco (UK) Limited (formerly Discount Mobility Direct Limited), Discount Mobility Plus Limited/Rutland Mobility Limited, and MT Mobility Limited/Hooplah Limited.

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 1.9
the Below-RRP Online Price Advertising Prohibition	<p>The prohibition on online advertising of prices below the RRP.</p> <p>The prohibition applied to the following models of scooters manufactured by Pride:</p> <ul style="list-style-type: none"> • Colt Deluxe • Colt Executive • Colt Plus • Colt Twin • Colt XL8 • Colt 9 • Elite Traveller LX (part of the Go-Go range of scooters)
RRP	Recommended Retail Price
Retailer/the Retailers	Each entity/the entities listed at paragraph 1.9, numbered 2 to 9.
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 1: Pride Go Go Elite Traveller LX



Figure 2: Pride Colt Plus

- 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.¹⁴
- 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.

¹⁴ 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.¹⁵

B POTENTIAL FOR CONSUMER DETRIMENT

- 2.5 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.¹⁶

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

- 2.7 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 (by helping them obtain products that represent value for money and that meet their needs), due to factors which include the following:

- **first-time purchasers:** consumers in this sector are often first-time buyers.¹⁷ 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).

¹⁵ For further information see www.mhra.gov.uk.

¹⁶ For further information see www.oft.gov.uk/shared_of/market-studies.

¹⁷ 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.

- **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 therefore be dependent, or heavily dependent, on alternative sales channels, including doorstep sales, the internet and mail and catalogue orders. A limited ability to shop around may restrict choice and prevent consumers from obtaining a better deal, thereby potentially leading them to pay higher prices for their purchases.

- 2.8 Where the only price that retailers are permitted to advertise online is the RRP, that will be the price which consumers are likely to use as a reference point on which to base their valuation of a product. This is particularly the case given the factors set out above (in paragraph 2.7).
- 2.9 Any discounts off the RRP, which certain retailers may be willing to offer consumers, risk appearing to represent 'a good deal', even if that price is not in fact an especially competitive price. In this regard, it is important to note that RRPs in the sector are somewhat arbitrary and/or are generally set at levels significantly higher than actual selling prices.¹⁸
- 2.10 The impression of a 'discount', and particularly the impression of a 'large discount' in the context of a sector where shopping around is made difficult, is likely to reduce a consumer's search efforts and to increase consumers' willingness to pay. A consumer may be particularly impressionable where he or she is a first-time buyer (or has a limited frame of reference) and expects that the RRP represents the 'going rate' at which most or all retailers will set their prices.¹⁹ This impression will be further reinforced by online price searches which seem to show widespread adherence to the RRP across the retailers' websites he or she visits. These false assumptions about the underlying market price of the product will increase the attractiveness of any 'discount' offered by giving

¹⁸ Pride has indicated to the OFT that its RRPs are somewhat arbitrary and did not dispute that they are 'unrealistic', and the OFT has evidence in its possession that supports this view. See footnote 7 and the parts of this Decision referred to there.

¹⁹ In behavioural economics, 'anchoring and adjustment', whereby a buyer anchors on the piece of price information first seen (or seen as most important) and insufficiently adjusts to (and attributes less importance to) later pieces of information, is a dominant theory which is used to explain certain consumer purchasing behaviour.

an impression of genuine value, reduce the expected benefit of further searching and thus discourage the consumer from visiting other retailers. The consequent reduction in shopping around is likely to reduce retailers' incentives to offer discounts and in turn to reduce price competition between retailers.

- 2.11 For many of those who use mobility scooters the purchase of a mobility scooter will represent a very significant expense. The potential detriment from poor purchasing decisions (including where the consumer misperceives the value of the product) is therefore likely to be high. The OFT's online research in the present investigation shows that the price of a mobility scooter can range from £349 to £5,995, depending on the 'class', brand and model of scooter.²⁰ 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.
- 2.12 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.²¹

C INDUSTRY BACKGROUND

- 2.13 There is little reliable public data available on the size of the UK mobility scooters sector, by value or volume of sales.
- 2.14 Based on the information received from the UK suppliers of mobility scooters,²² the OFT has estimated that the size of the mobility scooters

²⁰ The OFT's 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)).

²¹ 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>.

²² 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,

sector, in terms of the number of mobility scooters sold, was approximately 57,500 in 2011.²³

2.15 The OFT has estimated that Pride was the largest (in terms of unit sales) mobility scooter supplier in the UK in both 2010 and 2011, with a market share of approximately [between 26 and 31 per cent (actual figure redacted)] and [between 26 and 31 per cent (actual figure redacted)] respectively.²⁴ Pride has held this leading position consistently over the past 4 years.

2.16 In addition, Pride's size relative to that of other suppliers is significant. In both 2010 and 2011, which accounts for the majority of the period of the Infringements, the second largest supplier of mobility scooters was less than half its size (in terms of unit sales).²⁵

2.17 In addition, based on information obtained from suppliers of mobility scooters, the OFT understands that Pride is one of the few known brands amongst consumers of mobility scooters.²⁶ In an email dated 16 March 2011, Pride's Managing Director [name redacted], described Pride in the following terms,

*'the brand is well recognized as a market leader and by it's [sic] very nature is requested probably more than any other brand on the market...'*²⁷

3697Inv, 3699Kymco, 3700Minic, 3811OR, 3446PR, 3845ProR, 3841RO, 3704SunM, 3705TGA, 3813TI, and 3715VanOs.

²³ 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.

²⁴ The OFT's calculations are based on data received from the parties listed at footnote 22 above (see the documents there referred to). See also Annexe B ('The Relevant Market(s)').

²⁵ The second largest supplier's estimated market share for 2010 was approximately [between 10 and 15 per cent (actual figure redacted)], and in 2011 it was [between 10 and 15 per cent (actual figure redacted)].

²⁶ Out of the 17 UK suppliers of mobility scooters listed at footnote 22, the responses of 13 suppliers indicated that Pride was one of a small number of brands that was known amongst consumers. See Documents: 3703DPH, 3859DR, 3692EME, 3693FLU, 3695HandM, 3699Kymco, 3700Minic, 3710PR, 3845ProR, 3840RO, 3704SunM, 3706TGA and 3875VanOs.

²⁷ Email of 16 March 2011 from Pride's Managing Director [name redacted] to an employee of Mobility 4 U Limited [name redacted] (Document 2658/PR).

2.18 Further, Pride currently supplies [between 600-700 retailers (actual figure redacted)] out of an estimated 800-1,200 retailers in the UK.²⁸ This makes Pride's dealer network the largest in the UK and significantly larger than that of its competitors.²⁹

How Pride selects retailers

2.19 Pride's distribution arrangements with retailers display characteristics of a selective distribution system. While Pride'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.³⁰

Qualitative selection

2.20 The OFT's finding, based on the evidence in the OFT's possession, is that when deciding whether to open a new retail account, Pride considers whether the relevant retailer can provide end-consumers with the necessary after-sales support, by having regard to:

- the retail applicant's access to service engineers,
- the retail applicant's acceptance that it is the retailer's responsibility to service their customers' products,
- the retail applicant's willingness to undertake service training provided by Pride,
- the retail applicant's ability to provide prompt after sales service back-up, potentially also outside of their local area,
- whether the retail applicant is able to offer loan products, and
- whether the retailer has retail premises and a workshop.³¹

²⁸ Document 3713PR.

²⁹ By comparison the second largest dealer network consists of [between 400 to 500 (actual figure redacted)] retailers. See Document 3830RO.

³⁰ Quantitative selection is selection that aims to fix or limit the number of dealers in a particular geographic area.

³¹ See Document 0015/PR (referred to in interview as document MRX8) and Document 3480/WS (Pride's Managing Director's [name redacted] interview transcript, CD 1 of 5, pp 8-12).

2.21 In interview with the OFT dated 11 September 2012 Pride's Managing Director [name redacted], stated that it was Pride's policy to appoint only retailers that met certain qualitative criteria.³²

Pride's Managing Director [name redacted]: *'So if we get approached invariably what would happen they [the retail applicant] would be put in contact with the relevant area sales manager which we have five, which is North-East, North-West, Midlands, South-East and South-West, so it's split into five.'*

In interview with the OFT dated 11 September 2011, Pride's Managing Director [name redacted], confirmed that retailer applicants were required to complete a Pride application form entitled *'Application for a Credit Account, Dealer Product Support Details'* (Document 0015/PR, referred to in interview as document MRX8). That form contained the following application criteria, albeit the form stipulated that applicants would not necessarily be required to fulfil all of the listed criteria:

'1. The dealer has service engineers [yes/no]

2. Name of service engineer

3. The dealer accepts the responsibility to service their customers' products [yes/no]

[...]

5. The dealer undertakes to attend Pride Mobility Products service training [yes/no]

6. The dealer can provide prompt after sales service back up, what if it is outside your area? [yes/no]

7. The dealer is able to offer loan product: [yes/no]

[...]

N.B. It is not a condition of the account application that all the above are 'yes'.

N.B. You will be contacted to attend or send attendee on a service training course.'

Pride's Managing Director [name redacted] clarified in interview the meaning of the following statement in the application form: 'NB: It is not a condition of the account application that all the above are yes':

Pride's Managing Director [name redacted]: *'Right. The last sentence. I mean things like are you able to support the product is critical. We would not open an account if that answer would be no, for example because it's detrimental to the consumer and also Pride as a company and the brand. Things like the BHTA ... are you members of the BHTA or are you looking to become a member of the BHTA? That is not a critical yes answer.'*

Pride's Managing Director [name redacted] also noted in interview that, subject to some limited exceptions, Pride 'insisted' that all new retailers attended Pride training course[s] which were very specific to Pride's products.

³² See document 3480/WS (Pride's Managing Director [name redacted] interview transcript, CD 1 of 5, pp 10-12). For a further discussion of the qualitative criteria of the selective distribution system see the 'Exclusion or Exemption' section at paragraph 3.227 onwards.

[...]

[...] they would go to visit the relevant potential new account, go through what we would expect as Pride – the product range. Do they have premises? Can they support the product in the correct manner? We made a very conscious decision round about three/four years ago whereas by we wanted to protect the consumer in terms of having the right level of support bearing in mind we are dealing with the most vulnerable part of society – disabled and the elderly. We wanted to make sure they have their own engineering support, so in event of a breakdown obviously they will need to have a very fast response. It's no good having to wait three or four days. It's no good to the individual. Do they have their engineers? Do they have their own workshop? Do they have their own premises?'

- 2.22 In interview Pride's Managing Director [name redacted] further explained that he would review a retailer's application form together with the relevant Area Sales Manager, before deciding whether to open an account.

Quantitative selection

- 2.23 The evidence in the OFT's possession suggests that Pride prefers not to supply more than one retailer in any given catchment area, so as to 'support' Pride's appointed retailer by limiting the potential for price competition within Pride's brand.
- 2.24 In an email dated 28 July 2008 to the retailer [retailer name redacted], a Pride Area Sales Manager [name redacted] informed that retailer that their proximity to existing Pride retailers may constitute a hindrance to opening a retailer account with Pride:

*'[...] Another worry I have is that you are now opening Retail Shops [sic] in the area's [sic] where we already have a good strong Dealer base. **The last thing I want to happen is to upset Pride's current Dealers in and around the [city name redacted] Area, as you sell so cheaply on the internet** [sic] I am worried that you will start to sell at these prices in the Retail Shops [sic] you are opening.*

*This would be a bad move for Pride as **we do not want to give our exsisting** [sic] **Dealers more competition with our own products.***

*I will call you Friday and let you know the outcome of my meeting with Pride's MD.'*³³ [Emphasis added]

- 2.25 Further, again in interview with the OFT on 11 September 2012 Pride's Managing Director [name redacted] stated the following:³⁴

Pride's Managing Director [name redacted]: *'[...] Also it's very important where they are geographically because the UK's a relatively small island, [600 – 700 (actual figure redacted)] live accounts with something in the region of 1,500 mobility outlets in the UK. **What we don't want to do is open up a new account which sits a mile down the road from a very successful current account. It actually deflects the business. All you do is dilute it down,** so we get very supportive of that, so if they are too close to an existing dealer that trade very nicely with us and do things correctly in terms of support [sic] the product promoted correctly, then **we very politely decline that offer to open them up as an account.** If it sits very nicely geographically and there's a loophole there where we need to have more exposure in that area and all those ... that criteria fits then certainly we would look to open them up –'* [Emphasis added]

- 2.26 Similarly, in interview with the OFT on 10 September 2012, a Pride Area Sales Manager [name redacted], stated the following:³⁵

Pride's Managing Director [name redacted]: *'[...] We try not to, as a company, [word unclear, likely 'condense'] ourselves with too many dealers on each other's doorstep because it's not the given thing; we don't sell any more scooters, it doesn't give any more [word unclear] towards the end dealers or the end users, we don't sell any more product through that, so we tend to, certain dealers in certain areas, stick to certain products and we stick to certain dealers with our products and that's how it works really, there's room for everybody and in respect of.'*

[...]

³³ Document 0289/PR.

³⁴ Document 3480/WS (Pride's Managing Director's [name redacted] interview transcript, CD 1 of 5, page 8).

³⁵ Document 3476/WS (Pride Area Sales Manager's [name redacted] interview transcript, CD 1 of 3, pages 4-5).

Pride's Managing Director [name redacted]: *If you stretch from one end of Birmingham to the other, I've probably got about 12 to 14 dealers.*

OFT: *Right, I see. 12 to 14 in Greater Birmingham?*

Pride's Managing Director [name redacted]: *Within the Greater Birmingham area. But that's not to say that they're two miles apart from each other, you know, you're looking at one end of Birmingham going down as far as Kidderminster [the distance between Birmingham to Kidderminster is approximately 18 miles] , Stourbridge, going as north as Irdington and the middle and Solihull, so... [the distance between Stourbridge and Solihull is approximately 27 miles]*

[...]

Pride's Managing Director [name redacted]: *Yeah, it's not a condensed area. It doesn't pay you to do that, or it **doesn't pay dealers to be on each other's doorstep because they don't sell any more product, all it does is it causes bad feeling and that's how it goes.***
[Emphasis added]

- 2.27 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.³⁶

Conclusion on retailer selection

- 2.28 Pride'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 Pride's mobility scooters in this sector.
- 2.29 The OFT considers that Pride's distribution arrangements for mobility scooters constitute de facto a system of selective distribution and that in consequence intra-brand competition with respect to Pride mobility scooters had already to some extent been limited. This is important context given that it is the OFT's finding that intra-brand competition was

³⁶ See documents: 3821TI, 3822TI and 3824TI.

further restricted by the introduction of the Below-RRP Online Price Advertising Prohibition considered in this Decision.³⁷

Recent changes in the retail sector

- 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 scheme³⁸, the retail price of mobility scooters purchased through that scheme was set at the supplier's recommended retail price (RRP) minus twenty per cent.³⁹
- 2.32 The OFT was informed that the Motability scheme led to the RRP's of mobility scooters being set at a higher level, such that retailers' profit margin for each mobility scooter sold through that scheme was significant. In interview with the OFT on 11 September 2012, Pride informed the OFT

³⁷ See further paragraphs 3.204 to 3.205.

³⁸ 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.

³⁹ In interview with the OFT dated 11 September 2012, Pride's Managing Director [name redacted] stated the following (see document 3481WS, CD 2 of 5, page 3):

Pride's Managing Director [name redacted]: *The purpose of RRP was actually driven by Government through Motability scheme. In the old scheme under Route Mobility everything was judged around RRP. The higher the RRP ... because what happened was dealers would sell at RRP with a fixed ... I think at the time it was 20% discount of RRP, so the higher the RRP, 20% off of that was the bigger margin, so it's actually driven through the scheme through the Government. That's now changed and thankfully ... of July of 2010 the RRP really is a figure that doesn't mean a lot to anybody regardless of where you sit, what manufacturer.*

It was driven simply because it hyped the price of a product being purchased on a Government scheme through Motability.

OFT: *Oh so the Government's ... yeah, I don't really ... I'm not sufficiently familiar with the Motability scheme or its predecessor, so the Government ... I mean this is just again more just for clarification. The Government ... I think I understood – the Government insisted that products be sold at 20% cheaper to ...?*

[Pride's Managing Director [name redacted]: *Going back prior to 2010 ... July 2010 it used to be run by a company called Route Mobility and the system was that whatever the RRP price was they would get 20% less RRP paid to them for selling a product on the scheme, so obviously the higher the RRP the more margin they made over and above the purchase price from the manufacturer.*

that its RRP's had however remained the same following the termination of the Motability scheme.⁴⁰

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

⁴⁰ In interview with the OFT dated 11 September 2012, Pride's Managing Director [name redacted] stated the following (see document 3481WS, CD 2 of 5, page 3-4):

Pride's Managing Director [name redacted]: *Going back prior to 2010 ... July 2010 it [the Motability scheme] used to be run by a company called Route Mobility and the system was that **whatever the RRP price was they would get 20% less RRP** paid to them for selling a product on the scheme, **so obviously the higher the RRP the more margin they made over and above the purchase price from the manufacturer.***

OFT: *I see. The higher the margin ... Route Mobility made?*

Pride's Managing Director [name redacted]: *We would sell for argument's sake at £100.00 a product to a retailer ... to a dealer. That RRP was £1,000, they would get 20% discount which means it would be £800.00, which means **they're making £700.00 margin, so the higher the RRP –***

*[...] - **the margin grows.** Now that changed in July of 2010 when in fact the same operation that currently runs the car scheme took over. Very, very good. They changed all that whereas by we now negotiate or all manufacturers negotiate a price directly with Operations Motability based in (Inaudible 00:05:26) Square in London and that's what we sell the product to a retailer for, so the price ... it doesn't have anything to do with RRP now, so it's much fairer to everybody. It's fairer to Government funding, it's fairer to the consumer who's going to obviously surrender their allowance to purchase it.*

OFT: *Yeah, I see and ... so that was two years ago more or less.*

Pride's Managing Director [name redacted]: *Yes.*

OFT: *And so have your RRP's now ... have they ... did you sort of alter your RRP's in ... to reflect -*

Pride's Managing Director [name redacted]: *No.*

[...] No, RRP's stayed the same ... much the same as all manufacturers.

OFT: *And was there any particular reason for keeping them -*

Pride's Managing Director [name redacted]: *No.*

OFT: *- the same level?*

Pride's Managing Director [name redacted]: *No.*

[Emphasis added]

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.⁴¹

2.34 Some of the evidence produced to the OFT also 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.⁴²

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,

⁴¹ See also footnotes 45 and 46.

⁴² In interview with the OFT dated 29 August 2012 an employee of Discount Mobility Direct [name redacted] noted the following in relation to the recent trend in the mobility scooters retail sector (see Document 3457WS, CD 2 of 4, pages 16-17):

'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..'

- mail, catalogue and telephone order, and
- doorstep sales.⁴³

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 scooters suppliers estimated that this sales channel accounts for approximately 70-75 per cent of their sales.⁴⁴ This sales channel therefore represents the primary route to the market for suppliers in order to allow them to reach end-consumers. However, the internet has played an increasingly important role in the sector both as a sales channel⁴⁵ and a means to provide product and price information (including as a means to attract the business of consumers who may

⁴³ In this Decision the term 'doorstep sales' refers to transactions which take place when a consumer is visited by a trader in their home.

⁴⁴ The OFT estimated this from data provided in documents: 2813DR, 3692EME, 3807Inv, 3722Kymco, 3739Minic, 3442PR, 3704SunM, 3765TGA, 3713VanOs, 3845HandM and 3845ProR.

⁴⁵ Of the nine suppliers who commented on whether the number of online sales has been increasing eight of them confirmed that they had. See documents: 3807Inv, 3845ProR, 3765TGA, 3740DPH, 3722Kymco, 3845HandM, 3704SunM, 3713VanOs, 2813DR.

prefer to make a purchase offline but who use the internet to identify a competitively-priced retailer).^{46 47}

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 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 product and price information plays an important role in this respect. In this context, the internet can be particularly important as a means to make such information easily accessible to end-consumers,⁴⁸ particularly those who have restricted mobility and are therefore less able to shop around by physically visiting various retail premises. Online price advertising can

⁴⁶ 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 by Pride itself in communication with retailers:

[Document number redacted]: *"the internet is a powerful marketing / advertising tool which is here to stay which will only become stronger over time".*

Further in an interview with the OFT dated 10 September 2012, a Pride Area Sales Manager [name redacted], noted the importance of the internet for advertising (see document 3476WS, CD 1 of 3, page 17):

Pride Area Sales Manager [name redacted]: *Most dealers today have got their own website, it's not in their interest not to have their own website because it advertises their product and it gets it out there in front of people.*

⁴⁷ Where a distributor uses a website to sell products, this is generally considered to be a form of 'passive' selling rather than 'active' selling. Passive selling means responding to unsolicited requests from individual customers, including delivery of the goods to such customers, rather than actively approaching individual customers, customer groups or customers in a specific territory. See further paragraphs 51 and 52 of the Vertical Guidelines.

⁴⁸ See footnote 5.

make it easier for retailers to attract and win (a) customers who make use of the internet to compare product offerings and prices, and (b) customers who are located in more distant territories than those within which the retailer's bricks-and-mortar store(s) is/are easily accessible by its potential customers. Displaying actual selling prices on the internet can thus widen the territorial base and broaden the group of potential customers to whom the retailer is effectively able to signal its prices.

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 potentially several salespersons 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.⁴⁹

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 and the more likely it is that they will limit their search to the territories within which retailers have bricks-and-mortar stores that are easily accessible by them. This is particularly true where the consumers have limited mobility.

⁴⁹ 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, available at: www.of.gov.uk/shared_of/market-studies/mobility-aids-research.pdf).

- 2.42 Where it is difficult to ascertain the selling prices of rival retailers more distantly located from the consumer's home, and/or where price information is not readily available from the generality of retailers' websites, consumers are likely to be disincentivised from continuing to search beyond the territories within which retailers have bricks-and-mortar stores that are easily accessible by them, and/or from attempting to obtain and compare prices at all. Limited availability of price information and limited searching by consumers can reduce the incentives of firms to offer discounts and, in turn, result in consumers paying higher prices. Moreover, where consumers are less likely to engage in the search process, there is in addition the potential that they purchase products that are less suitable for their needs.
- 2.43 The use of search functions on the internet, price comparison websites and retailer listing sites such as 'Google shopping' makes shopping around easier as it requires very little effort on the part of consumers to obtain product and price information. The internet also allows consumers to involve friends, family or carers in the purchase more easily, and for those individuals to support the mobility scooter consumer's search for this information.⁵⁰

⁵⁰ The friends, family members or carers of certain mobility scooter consumers may be better able to use the internet to search for and compare prices, which can assist those consumers in identifying the best product, at the best price, and/or in gaining a sense of the range of products available in the market and an indication of the likely purchase prices. However, where price information is not readily available from the generality of retailers' websites, these individuals are (like the consumers themselves) also likely to be disincentivised from continuing to search beyond the territories within which retailers have bricks-and-mortar stores that are easily accessible by them and the consumer they are assisting, and/or from attempting to obtain and compare prices at all. 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.'*

2.44 Easy access to clear product and price information via the internet can therefore make it easier for:

- consumers to compare price information,
- consumers to identify retailers which offer better value for money,
- retailers to attract and win consumers who use the internet to compare product offerings and prices, and
- retailers to attract and win consumers located in territories beyond the retailers' bricks-and mortar catchment areas.

2.45 As a result, having the freedom to advertise retail prices on the internet can intensify price competition between retailers and enable consumers to obtain better value for money.

Conclusion on sales channels and the importance of the internet

2.46 In summary, 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 without the help of friends or family members,
- (ii) consumers are often first-time buyers, and
- (iii) RRP's in the sector are somewhat arbitrary and/or are generally set at levels significantly higher than actual selling prices,⁵¹

the ease of access to price information can be particularly important. Therefore, easier access to price information and increased price transparency, alongside relevant product and service information, can positively impact the ability of consumers to identify the best deal for them. This increased price transparency and, therefore the increased ability to identify potentially more price competitive retailers that consumers can buy from, is likely to strengthen price competition between mobility scooter retailers, including bricks-and-mortar retailers,

⁵¹ Pride has indicated to the OFT that its RRP's are somewhat arbitrary and did not dispute that they are 'unrealistic', and the OFT has evidence in its possession that supports this view. See footnote 7 and the parts of this Decision referred to there.

hybrid retailers⁵² and internet-only retailers, as well as doorstep sellers, and result in lower end-prices.⁵³

- 2.47 Given the above, the OFT is concerned that the Below-RRP Online Price Advertising Prohibition undermines the likely benefits of consumer searching and choice brought about by the internet. The OFT is particularly concerned that in a sector such as the mobility scooter sector, where consumers are potentially more vulnerable and may be less able to shop around physically, the Below-RRP Online Price Advertising Prohibition is liable to impact significantly on such consumers and to place them at a particular disadvantage.

Incentives of Pride to introduce the Below-RRP Online Price Advertising Prohibition

- 2.48 While it is not necessary in this case to consider Pride's incentives in order to conclude that there has been a breach of the Chapter I prohibition, the OFT has considered the historic and contemporaneous documentary evidence in its possession in order to understand the context in which the Below-RRP Online Price Advertising Prohibition was introduced.⁵⁴
- 2.49 As set out above, from the evidence in its possession, the OFT has inferred that bricks and mortar retailers constitute suppliers' primary route to the market, as they represent approximately 70-75 percent of suppliers'

⁵² See footnote 8.

⁵³ [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 instore.'*

[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.'*

⁵⁴ For a further discussion, see paragraphs 3.206 to 3.216, where we discuss Pride's subjective intentions.

sales.⁵⁵ 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.⁵⁶ Pride has therefore been ‘competing’ with other mobility scooter suppliers to get the Pride mobility scooters stocked and sold by retailers.⁵⁷

- 2.50 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 Pride that they were unable to compete with ‘internet prices’ and that they were losing sales and/or that margins were decreasing as a result.⁵⁸
- 2.51 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.⁵⁹

⁵⁵ See footnote 44.

⁵⁶ Documents: 3823TI, 3812TI, 3827TI, 3821TI and 3820TI.

⁵⁷ See also paragraph 2.52.

⁵⁸ In an interview with the OFT dated 11th September 2012, Pride’s Managing Director [name redacted], explained that many retail outlet stores were complaining about competition from internet retailers (Document 3481WS CD2, pp 24-25):

Pride’s Managing Director [name redacted]: ... *She [Personal Assistant to Pride’s Sales Director & Head of Marketing’s name redacted] makes reference there to three to five calls a day of complaints. That’s complaints from I believe to be retailers, not consumers, in terms of the price erosion on certain products. That’s basically what it’s referring to. It’s more and more variation in terms of the price spread on a certain product.*

Further, one retailer told Pride that (see document 2893PR): *‘Dealers are having to de-brand products to make any margin because once the consumer goes on the internet we lose a sale eg. in 2 days alone this week, we know we lost 4 sales to the internet - £1600 profit lost!! The internet is stifling the growth of your high street dealers as we are constantly battling to retain margin.’*

See also paragraph 2.91, which sets out some additional evidence of retailers continuing to complain about low website pricing after Pride introduced its ‘suggested pricing’/‘Suggested Resale Price’.

⁵⁹ See paragraphs 3.206 to 3.216 on evidence of the parties’ subjective intentions behind the Below-RRP Online Price Advertising Prohibition, in particular paragraph 3.208.

Documentary evidence in the OFT’s possession indicates that retailers are more willing to stock Pride products where they are protected from internet competition:

- 2.52 One reason why Pride introduced its Below-RRP Online Price Advertising Prohibition may have been to incentivise bricks and mortar retailers to stock and sell their products, on the basis that retailers would face reduced intra-brand competition from the internet and could therefore achieve a higher margin than would otherwise be the case.⁶⁰
- 2.53 The OFT would expect that in the absence of the Below-RRP Online Price Advertising Prohibition, Pride would be required to compete keenly on cost prices in order to incentivise retailers to stock its mobility scooters.⁶¹
- 2.54 The evidence referred to in Section D below entitled ‘Historical Background to the Infringements’ demonstrates that from April 2006 onwards Pride sought to identify ways of maintaining certain retail price points for Pride mobility scooters.
- 2.55 The OFT does not suggest that these were Pride’s sole incentives, and indeed it does not rule out that Pride may have had further aims when introducing the Below-RRP Online Price Advertising Prohibition. However, this does not prevent a finding of an infringement of the Chapter I prohibition.

D HISTORICAL BACKGROUND TO THE INFRINGEMENTS

- 2.56 The OFT is not making a finding that Pride and the Retailers have infringed the Chapter I prohibition for the period prior to February 2010.

Document 2651PR: *‘We have ordered a container of products from you on the basis that the LX remains unadvertised.’*

In addition, see document 2893PR. Although this document dates from February 2012, and is therefore not one that Pride could have considered when introducing the Below-RRP Online Price Advertising Prohibition, it does clearly set out the general tenor of retailers’ feeling regarding intra-brand competition from internet retailers. The retailer states: *‘Dealers are losing faith and the confidence to stock Prides [sic] larger scooters which is a missed sales opportunity for Pride.*

It only needs one person to bring a range of scooters into the UK for high street dealers only, this could wipe Pride out of the market – It will happen!! Dealers are desperate for a range of products they can sell that aren’t on the internet so they can make margin.’

⁶⁰ See footnote 59.

⁶¹ Evidence for the proposition that manufacturers face lesser incentives to compete on cost prices can be found in an email to Pride dated 23rd February 2012, where a retailer comments that it would be willing to pay a higher cost price in return for protection from internet competitors: *‘Other scooter importers can’t compete with the GoGo on price and quality so why discount it? If this product is not on the internet we would be happy to pay an extra £50+ per scooter.’* Document 2893PR.

However, it is nonetheless helpful to summarise the historical and contemporaneous documents in our possession and the evidence provided in interview relating to the period prior to February 2010 in order to understand the context of what followed.

Summary

- 2.57 The evidence in the OFT's possession demonstrates that Pride was concerned about low internet retail prices in respect of its mobility scooters from as early as 2006. There then followed a period from April 2006 in which Pride 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 Pride below a certain price point, and/or
 - requesting and/or instructing retailers not to advertise certain mobility scooters supplied by Pride below a certain price point.
- 2.58 The Below-RRP Online Price Advertising Prohibition emerged from or evolved out of these previous actions of Pride, and accordingly the period in which these actions were taken is important historical background to the Infringements. The Below-RRP Online Price Advertising Prohibition, which was fully operational by January 2010 (at the latest), should therefore be seen in the context of these previous actions of Pride, which are referred to below as the events leading up to the Below-RRP Online Price Advertising Prohibition.

Events leading up to the Below-RRP Online Price Advertising Prohibition

- 2.59 Paragraphs 2.60 to 2.110 below summarise the evidence in the OFT's possession in relation to the events leading up to Pride's Below-RRP Online Price Advertising Prohibition.
- 2.60 The evidence in the OFT's possession demonstrates that from as early as April 2006, Pride sought to identify ways of maintaining certain retail price points in respect of its mobility scooters.
- 2.61 In interview with the OFT dated 11 September 2012, Pride's Managing Director [name redacted] noted that Pride had been concerned about low

internet prices from as early as 2006/2007.⁶² Low internet prices were discussed in interview by Pride's Managing Director [name redacted]:

OFT: They'd be the cheapest price online?

[Pride's Managing Director's name redacted]: *Online.*

OFT: I see.

[Pride's Managing Director's name redacted]: *There's a huge price range. Again as you've obviously seen the very same product range in some cases...four digit numbers and invariably those [consumers] that have bought off the line⁶³ had bought it at the lower end of the price range [...]*⁶⁴

- 2.62 Pride's Managing Director [name redacted] explained in interview that Pride had been concerned that if retail prices were too low, consumers may not receive the necessary pre- and post-sale services.
- 2.63 Pride's Managing Director [name redacted] confirmed in interview that since approximately 2008/2009, Pride required its retailers to provide the necessary level of pre- and post-sales service to end-consumers.⁶⁵ Nonetheless, he noted in interview that Pride had been concerned that retailers' margins needed to 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, and to stay in business more generally.⁶⁶

⁶² Document 3480/WS (Pride's Managing Director's [name redacted] interview transcript, CD 1 of 5, p 25).

⁶³ The OFT understands that by the phrase 'off the line' Pride's Managing Director [name redacted] means off the internet. This interpretation is clear from the context of the discussion.

⁶⁴ Document 3480/WS (Pride's Managing Director's [name redacted] interview transcript, CD 1 of 5, p 20).

⁶⁵ Document 3480/WS (Pride's Managing Director's [name redacted] interview transcript, CD 1 of 5, p 8).

⁶⁶ Document 3480/WS (Pride's Managing Director's [name redacted] interview transcript, CD 1 of 5, pp 8-25). See in particular the following excerpt:

Pride's Managing Director [name redacted]: ' [...] *There was lots of talk about ... you're right, product was being sold in our view very cheaply. Not just ours, but as an industry.*

- 2.64 Pride's Managing Director [name redacted] stated that this is because end-consumers do not expect to pay for repair/maintenance costs within the warranty period.⁶⁷ Moreover, Pride's policy is not to reimburse retailers for the costs of labour for repairing/maintaining mobility scooters that break down during the period covered by Pride's warranty.⁶⁸
- 2.65 Pride's Managing Director [name redacted] stated that Pride had therefore sought to identify ways of addressing the issue of low retail margins.⁶⁹

For example as little as maybe £50.00 above their purchase price. Now obviously you can't deliver, do a full assessment, pre-sale, support that product in the longevity of the life of it for £50.00 overhead of a business and that's where we had concerns.

[...]

*It's just that **we were trying to put a sensible ... what we believed and the majority of retailers believed is sensible margin into the product, not fixing any margin, but a sensible margin** what would support the product within the life of it and obviously for very small amounts of ... you know, £30.00/£40.00/£50.00 it was just physically impossible to do, so hence you have this situation whereas by when a fault occurs they don't ... they're not interested. "Sorry, go elsewhere." Because they don't have the money or the knowledge to support it. Now that has to be wrong.'*

⁶⁷ Document 3480/WS (Pride's Managing Director's [name redacted] interview transcript, CD 1 of 5, p 21).

⁶⁸ Document 3480/WS (Pride's Managing Director's [name redacted] interview transcript, CD 1 of 5, page 14).

[Pride's Managing Director [name redacted]: *If it's within warranty the part is replaced FOC [free of charge]. What happens is they would order the part, it would be dispatched, it would be invoiced and when the faulty part is returned for verification it's credited, so the actual net effect is nil.*

OFT: *Yes, I see and in terms of the labour costs which are incurred ... or **the labour which is carried out by the dealer, would they be expected to bear that cost themselves?***

Pride's Managing Director [name redacted]: **Yes.**

OFT: *Yeah. They wouldn't say to you, "Well we've spent an hour -*

Pride's Managing Director [name redacted]: **No.**

OFT: *- having to repair this faulty part."*

Pride's Managing Director [name redacted]: *Absolutely not. **All the callout charge and the labour cost is at the floor of the retailer.** Our obligation is to replace the faulty component within that warranty period and the transportation of that part obviously.*

[Emphasis added]

⁶⁹ Document 3480/WS (Pride's Managing Director's [name redacted] interview transcript, CD 1 of 5, p 25.).

‘It’s just that we were trying to put a sensible [...] what we believed and the majority of retailers believed is [sic] sensible margin into the product, not fixing any margin, but a sensible margin [...]’

- 2.66 The contemporaneous evidence in the OFT’s possession summarised from paragraph 2.67 onwards sets out the ways in which Pride sought to maintain certain retail price points and/or ‘*sensible margins*’ for retailers.

Pride’s ‘suggested pricing’

- 2.67 The contemporaneous evidence in the OFT’s possession, summarised below, confirms that Pride requested and/or instructed its retailers not to advertise prices below a certain price point online. In the period 12 September 2007⁷⁰ (at the latest) to 8 May 2009⁷¹ (at the earliest) that price point was Pride’s ‘Suggested Lowest Resale Price’. Further, from at 28 January 2010⁷² (at the latest) onwards, the price point had shifted to Pride’s RRP.

- 2.68 An internal Pride document dated 11 April 2006 and entitled ‘*Internet Sellers*’ states the following:⁷³

‘In addition to the above, we [Pride] look at the price advertised for the Elite Traveller and the Celebrity range. No one is advertising the ET at less than £995

The following is a list of those advertising the Celeb’s [sic] at lower than our suggested pricing @ 11.4.06 [on 11 April 2006]

[Ten retailers are listed in the remainder of the document]’. [Emphasis added]

The OFT infers from that document that by 11 April 2006, Pride had ‘*suggested pricing*’ in place.

⁷⁰ Document 0303/PR.

⁷¹ Document 0334/PR.

⁷² Document 0332PR.

⁷³ Document 0329/PR.

Pride's requests and/or instructions to retailers in connection with its 'suggested pricing' and Pride's monitoring of that pricing

- 2.69 The OFT further infers from the evidence summarised in paragraph 2.68 above that Pride was monitoring the prices its retailers were advertising online in respect of certain Pride mobility scooters so as to identify whether any retailers were displaying prices below its '*suggested pricing*'.
- 2.70 On 14 December 2006, the Personal Assistant to Pride's Sales Director and Head of Marketing Department sent an email⁷⁴ to a Pride Area Sales Manager [name redacted], notifying him that the retailer [retailer name redacted], [region name redacted], was selling Pride's Elite Traveller scooters on eBay for £950. The Personal Assistant to Pride's Sales Director and Head of Marketing Department [name redacted] requested the Pride Area Sales Manager [name redacted] to:
- '[...] ask them to remove from ebay and if **they want to sell on the net its** [sic] **£995...you know the score**'. [Emphasis added]*
- 2.71 The Personal Assistant to Pride's Sales Director and Head of Marketing [name redacted] further stated:
- 'There is also on ebay a company called [retailer name redacted] in [region redacted] somewhere, **selling Elites at £650, I have emailed them also, but have had no response yet, I think it may be the [retailer name redacted] one again!!**'[Emphasis added]*
- 2.72 The OFT infers from the evidence summarised in paragraphs 2.70 to 2.71 that by 14 December 2006 Pride was requesting and/or instructing retailers not to sell or advertise mobility scooters below a certain price point determined by Pride.
- 2.73 On 2 May 2007, the Personal Assistant to Pride's Sales Director and Head of Marketing Department [name redacted] sent an email⁷⁵ to the Area Sales Managers, Pride's Sales Director and Head of Marketing Department [name redacted] and Pride's Managing Director [name

⁷⁴ Document 3059/PR.

⁷⁵ Document 0297/PR.

redacted], which expressed concern about the prices at which certain scooters were being advertised online by a selection of retailers:⁷⁶

'Please find below the latest Internet Advertising Prices as of today. This is getting out of hand and at a very speedy rate. I am now getting an average 3-5 calls per day of complaints about the following sites. To be honest I am totally fed up with this and cannot do this on my own, we just seem to be going around in circles.

[Lists 12 retailers and their advertised prices]

You can clearly see what happens, the next move will be that they all follow [retailer name redacted] and advertise at a pound or two cheaper than them!!! [This retailer was listed as advertising prices at £625 and £645]

We have worked so hard to keep the Elite at £995 and the Celebrity range at £995 plus and now it seems the norm is £795 for Elites and even less for [the Celebrity] X3/X4

*We need to make a decision as to whether or not we just let **them fight it out and get the backlash from other dealers who will not buy from us because our products are being trashed or we make a stand to close them all** and lose this business...your call guys. I can guarantee that with [sic] 10 minutes of me calling Mobility one and More than Mobility, **they will raise their prices in line with my request**, so they do not concern me in the slightest, I know they will play ball.*

Over to you guys, I need your decision by Friday of this week, sorry to pressure you.' [Emphasis added]

- 2.74 In interview with the OFT, Pride's Managing Director [name redacted], clarified that the complaints that the Personal Assistant to Pride's Sales Director & Head of Marketing Department [name redacted] refers to in her email of 2 May 2007, were complaints from retailers that prices were being 'eroded':

⁷⁶ The retailers identified in the email are [retailer name redacted], Mobility Buddy, [retailer name redacted], [retailer name redacted], [retailer name redacted], [retailer name redacted], [retailer name redacted], [retailer name redacted], Mobility One Limited, More Than Mobility (MT Mobility Limited), and [retailer name redacted].

Pride's Managing Director [name redacted]: [...] 'She [Personal Assistant to Pride's Sales Director & Head of Marketing Department [name redacted]] *makes reference there to three to five calls a day of complaints. That's **complaints from I believe to be retailers, not consumers, in terms of the price erosion** on certain products. That's basically what it's referring to. It's more and more variation in terms of the price spread on a certain product.'*

- 2.75 The minutes of an internal Pride sales meeting on 23 May 2007, which had been attended by Pride's Managing Director [name redacted], Pride's Area Sales Managers and others, record the following:

'INTERNET SELLING

*We will continue to monitor the internet and be seen to be actively fighting it, but in reality we will not be doing this any more [sic]. It is a very emotive subject for some dealers and the simple truth is that it cannot be controlled.'*⁷⁷

- 2.76 However, on 4 July 2007, Pride compiled a document entitled 'Pride Dealers' which listed Pride's '*Lowest Suggested Resale Price*' and its '*Recommended Retail Price*' in respect of 15 products supplied by Pride.⁷⁸ Paragraphs 2.86 to 2.90 below summarise the evidence in the OFT's possession from which the OFT infers that Pride communicated to its retailers that they should not advertise prices below the '*Lowest Suggested Resale Price*'.

- 2.77 On 11 July 2007 there was an internal conference call, the minutes of which record⁷⁹ that Pride's Managing Director [name redacted] discussed the policy of [retailer name redacted] of monitoring websites and bettering the lowest available prices. The minutes further record Pride's Managing Director [name redacted] stating the following:

*'I know we **cannot control it due to the OFT but it is devaluing our products.***

*We need to maybe approach it different [sic] **introduce a category situation.** Would you agree to this? Give it some thought to maybe **offer***

⁷⁷ Document 2909/PR.

⁷⁸ Document 2912/PR

⁷⁹ Document 0299/PR.

[retailer name redacted] a different product. We would then have more control in 6/9 months time. Whatever we do it will be difficult to control.'
[Emphasis added]

2.78 Therefore, despite the suggestion that the matter was out of Pride's control, the discussions of 11 July 2007 (whereby Pride's Managing Director [name redacted] suggested the introduction of a '*category situation*' or the offer of different products to non-compliant retailers) and those that followed continued to focus on how to address low prices on retailer websites.

2.79 On 24 July 2007, there was a day-long sales meeting. The PowerPoint slides⁸⁰ prepared for that meeting show that 15 minutes were devoted to discussing '*internet sellers*', the agreement of a '*game plan*' and how to action the '*game plan*'. The minutes of the meeting⁸¹ on 24 July 2007 reveal further detail:

'INTERNET SELLING

We will continue to monitor the internet sites and be seen to be actively fighting it, but in reality we will not be doing this any more [sic]. It is a very emotive subject for some dealers and the simple truth is that it cannot be controlled. With the exception of [retailer name redacted] they are all keeping roughly the same prices. [Pride's Managing Director's initials redacted] spoke to [individual's name redacted] of [retailer name redacted] and was told it was Company policy to advertise below the lowest. They monitor 15 sites on a weekly basis.'

2.80 Despite the suggestion that Pride would not be '*actively fighting*' the issue of low internet prices anymore, three options were set out for dealing with that issue, as follows:

'Option 1 ABC Category Dealers

Option 2 Do nothing

Option 3 Raise prices to those who do not play ball'

2.81 It was further minuted that,

⁸⁰ Document 0300/PR and document 0028/PR.

⁸¹ Document 0301/PR.

[Pride's CEO's name redacted], *wants to maintain the value of Pride's products. If we increase [retailer name redacted]'s prices then we have to understand what the risks are. Ultimately the decision has to be made by [Pride's CEO's name redacted].*

- 2.82 In interview, Pride's Managing Director [name redacted] explained the meaning of 'ABC Category Dealers', saying:⁸²

*'it basically means the same as what one of our competitors are currently doing. Where they have A, B and C categories, so if you're a **Category A** it's those that are complying to what their specific rules are, whatever they may be, and they get a favourable price, for example £100. Category B would be £200 and Category B [Pride's Managing Director [name redacted] later clarified that he meant Category C] would be £300'.* [Emphasis added]

- 2.83 The email on 2 May 2007 and minutes of meetings held on 11 and 24 July 2007 reveal that internet price discounting was of concern to Pride because it devalued the product. There was no mention in the contemporaneous documents, detailed above, of concerns about the quality of after-sales care or the expertise of retailers who were advertising prices online.

- 2.84 By the end of August 2007 Pride's monitoring of retailers advertising prices online was in full operation.

- 2.85 Minutes of a sales conference call held on 22 August 2007 reveal that Pride's Website Analyst [name redacted] was appointed.⁸³ The minutes of that meeting and of a further meeting held on 7 September 2007⁸⁴ describe that her role included the following:

*'[...] some of the job role includes **website analysis** which will be monitored weekly and that **the websites will be called if any are under priced** [sic].'*⁸⁵ [Emphasis added]

⁸² Document 3481/WS (Pride's Managing Director's [name redacted] Interview Transcript, CD 2 of 5, page 29).

⁸³ Document 3072/PR.

⁸⁴ Document 0302/PR.

⁸⁵ In an interview with the OFT dated 11 September 2012, Pride's Managing Director [name redacted] confirmed that Pride's Website Analyst's [name redacted] role was *'[...] an analysis type role to*

2.86 On 12 September 2007, Pride's Website Analyst [name redacted] sent an email⁸⁶ to all Pride sales staff and Pride's Managing Director [name redacted]. The email included a table setting out the RRP's of various Pride scooters together, in each case, with a '*Suggested Lowest Resale Price*'. Pride's Website Analyst [name redacted] stated the following in her email:

'Please find Price Scooter list below.

*To protect the profit margin of all dealers, and to ensure our customers get the necessary aftercare [sic]. **We recommend they should not sell Pride scooters below the Suggested Lowest Resale Price***'. [Emphasis added]

2.87 The email proceeds by describing the process of monitoring websites as follows:

*'I will be **monitoring 16 Websites** weekly which are **currently selling our scooters lower than this price and request that they change.***

2.88 The OFT has been provided with eleven spreadsheets entitled '*Website data*' which cover the period 24 August 2007 to 7 March 2008.⁸⁷ They record the following information in respect of certain mobility scooters, powered wheelchairs, lift chairs, manual wheelchairs, rollators and ramps:

- Pride's RRP and its '*Suggested Resale Price*',
- the price displayed on certain retailers' websites in relation to the respective Pride product, alternatively whether:
 - (i) the product was '*NOS- not on their site*', or
 - (ii) the website was displaying '*RBP- Ring for best price*'.
- the price displayed on those retailer websites in respect of Pride's competitors' products, or alternatively whether:

monitor such things, not just this but this is one of the things she was monitoring'. See document 3482/WS (Pride's Managing Director's [name redacted] Interview Transcript, CD 3 of 5, page 14).

⁸⁶ Document 0303/PR.

⁸⁷ Documents 2922/PR, 2914/PR, 2920/PR, 2919/PR, 2921/PR, 2918/PR, 2924/PR, 2917/PR, 2915/PR, 2923/PR and 2939/PR.

- (i) the product was 'NOS- not on their site', or
- (ii) the website was displaying 'RBP- Ring for best price'.

2.89 The 'Website data' spreadsheets further record an 'Internet Selling Official Stance':

'Pride Scooters are medical devices requiring a full home/ patient assessment and demonstration, with effective after care [sic] in accordance with BHTA rules and regulations. We believe that by internet promotion our products are becoming devalued. We aim to protect the profit margins of all dealers thus enabling them to provide necessary the after care [sic] cover, service back-up and maintenance as required. This can only be achieved by making sufficient profit margin.

*DO NOT SAY TO ANY DEALER THAT THEY ARE SELLING TOO CHEAP, WE CANNOT DICTATE WHAT DEALERS CAN SELL FOR. THIS IS PRICE FIXING AND IS ILLEGAL. PRESUMABLY THEY ARE IN BUSINESS TO MAKE MONEY AND THEREFORE SHOULD LOOK TO MAKE AS MUCH AS POSSIBLE.'*⁸⁸

2.90 Underneath the 'Internet Selling Official Stance' four of the eleven spreadsheets (covering the period 7 September 2007 to 12 October 2007) record a telephone script that was used by Pride's Website Analyst [name redacted] in order to contact retailers that were quoting low prices on the internet:

'Hi can I speak to the person who deals with your website prices? [...]

*The reason why I am calling is to introduce myself and talk about the prices you are quoting on your website. **Part of my role within Pride is to monitor the prices our products are being sold for by [sic] our customers on the Internet.***

*I have checked your website and have noticed that some of our **products that you are selling are being quoted below the recommended resale price.***

The recommended resale price is a guide which enables us to protect the profit margins of all dealers enabling them to provide the necessary after

⁸⁸ See all documents listed at footnote 87.

care [sic] cover, service back-up and maintenance in accordance with BHTA rules and regulations.

I will be in contact with you weekly to monitor these prices as we believe by internet promotion our products are becoming devalued.⁸⁹ [Emphasis added]

Retailers' reaction to the 'suggested pricing'/'Suggested Resale Price'

2.91 From 19 October 2007 onwards the spreadsheets also record retailers' responses to Pride's Website Analyst's [name redacted] calls. The responses demonstrate that Pride's Website Analyst [name redacted] had requested certain retailers to increase their prices. The following responses recorded in the spreadsheets are particularly relevant:

- *'Not willing to increase prices as they did last year and sold no Pride products- Requested not to be called again as there is no point'. (Recorded response of [retailer name redacted])*
- *'Prices will be taken off internet and willing to co-operate if other websites comply- Other manufacturers are selling low and will mean no Pride products are sold'. (Recorded response of [retailer name redacted])*
- *'Have tried to keep prices to suggested resale price but can't compete with other websites willing to co-operate if other websites comply'. (Recorded response of Mobility Scooters Plus [Discount Mobility Plus Ltd])*
- *'Do a price survey which shows all prices and they set prices to reflect competitors [sic] prices- Willing to co-operate to our request if other websites comply- Did a price increase recently but had no sales'. (Recorded response of [retailer name redacted])*
- *'[retailer website name redacted] and other websites is [sic] a problem and monitoring themselves daily - Willing to co-operate if other websites comply'. (Recorded response of [retailer name redacted])*

⁸⁹ See documents 2922/PR, 2920/PR, 2919/PR and 2921/PR.

- *'Other websites do not have premises and overheads- Willing to co-operate if other websites comply'. (Recorded response of [retailer name redacted])*⁹⁰

2.92 Therefore, whilst Pride's *'Internet Selling Official Stance'* stipulated that dealers should not be informed that they were *'selling too cheap'* and that Pride could not *'dictate what dealers can sell for'*, the evidence in the OFT's possession demonstrates that Pride requested retailers to set their prices at (or at least not below) certain price points, and to increase prices if necessary, in respect of certain Pride products.

2.93 In addition, certain of the above responses from retailers further suggest that certain retailers had informed Pride that they were willing to comply with Pride's request to increase prices provided that other retailers did the same.

2.94 In interview, Pride's Managing Director [name redacted] was clear that retailers were asked not to sell Pride scooters below the *'suggested lowest resale price'* (as opposed to not advertising the scooters below that price). This is demonstrated in the following exchange between the OFT and Pride's Managing Director [name redacted]:⁹¹

OFT: *'[...] Now I think a few minutes ago we were just talking about the suggested lowest resale price and actually that was that Pride requested that dealers advertise at or sell at, I'm not quite sure which.'*

[Pride's Managing Director's name redacted]: *Suggested is the price that we would like them to go no lower than.*

OFT: *In terms of selling?*

[Pride's Managing Director's name redacted]: *In terms of selling.'*

2.95 Pride's policy in respect of low internet prices is further referred to in an email chain of 24-25 October 2007 and an internal email chain of 5-6 November 2007 respectively. Both email chains suggest that if a retailer

⁹⁰ All responses recorded in document 2918/PR.

⁹¹ Document 3482/WS (Pride's Managing Director [name redacted] Interview Transcript, CD 3 of 5, page 15).

was displaying low prices online but not actually selling at that low price, they were in line with Pride's policy.

- 2.96 On 24 October 2007, the retailer [retailer name redacted] sent an email⁹² to Pride's Sales team, to alert them of a retailer selling a mobility scooter at a low price:

'Hi, I saw this item on eBay and thought you might be interested. so [sic] much for keeping prices up. your [sic] comments would be much appreciated.'

This was followed by an email from Pride's Website Analyst [name redacted] dated 25 October 2007 to two Pride Area Sales Managers [names redacted] in which she noted that the eBay retailer [retailer name redacted], had *'explained that they do not sell at this price but is there anything you can do?'*

- 2.97 On 5 November 2007, Pride's Website Analyst [name redacted] sent an email⁹³ to the sales team to request information concerning *'changes to movement'*. The subject of the email was *'Call report data vs Movements'*. A Pride Area Sales Manager [name redacted] replied, explaining that there was a retailer selling Pride scooters on eBay at prices significantly below the Suggested Lowest Resale Price.⁹⁴ A Pride Area Sales Manager [name redacted] said *'...we really need to see if we can put a stop to it or even if he gets them up to [retailer name redacted]'s price of £585.00'*. Pride's Website Analyst [name redacted] replied on 6 November 2007 to say that the eBay retailer was [individual's name redacted] of [retailer name redacted]. She further noted that [individual's name redacted] had informed her that the prices quoted online were not the true price as the price did not include after-care. No scooters were sold at the low price. Pride's Website Analyst [name redacted] stated that [individual's name redacted] was keen for something to be done about online selling and that he was willing to increase his prices if others did the same.

⁹² Document 3085/PR.

⁹³ Document 0306/PR.

⁹⁴ For example, whereas the Suggested Lowest Retail Price of Elite 4 wheel 12 amp was £995 (see document 0303/PR), it was being sold by [individual's name redacted] on eBay for £400.

2008

- 2.98 The OFT has been provided with comparatively little documentation for 2008. During his interview, Pride's Managing Director [name redacted] was asked about this. He gave the following explanation:⁹⁵

'I think what happened [...] is that after this valid attempt to go back to, you know 2007, virtually the whole of 2007 as supported here through documents, again going back on what I said a few minutes ago is that a lot of time and effort, which relates to cost was being spent to try and have some sort of what we as Pride would class as normality and sensible margins and all the rest of it as we've been discussing. At that point I felt it is better to concentrate on the growth of the business and concentrate our efforts in trying to sell the product rather than trying to have this what we would call like a nice stable playing field. If you look at our actual financial reports in 2006 we had a down turn, we did [turnover figure redacted] I think it was, 2007 it increased slightly but then if you look in 2008 onwards, 2009 is a record year, 2010. Predominantly we relaxed all of those suggested prices, suggested this, suggest that, all that was relaxed and removed.'

2009

- 2.99 Despite certain remarks in the above witness evidence, the OFT has in its possession evidence that Pride was still actively monitoring Retailers' adherence to the '*suggested lowest resale price*' in 2009. In an email⁹⁶ dated 2 March 2009 entitled '*Suggested Lowest Price*', Pride's Managing Director [name redacted] sent the Area Sales Managers a list of RRP's and '*Suggested Lowest Price[s]*' for certain Pride mobility scooters.
- 2.100 Later that day, Pride's Managing Director [name redacted] sent an email⁹⁷ instructing his employees that the '*new internet suggested lowest price structure*' would be monitored on a day-to-day basis by the internal sales team who would be checking '*the websites in question*'. The Area Sales Managers were instructed to support the internal sales team and to:

⁹⁵ Pride's Managing Director [name redacted] Interview Transcript, CD 3 of 5, page 22.

⁹⁶ Document 3086/PR.

⁹⁷ Document 0276/PR.

‘inform/enforce any changes that may need to be made to your customers [sic] structure due to lack of co-operation/understanding, in effect moving from category A to category B status’.

2.101 In interview, Pride’s Managing Director [name redacted] explained no retailers were in fact re-categorised; instead, a ‘*T List*’ was created.⁹⁸ The ‘*T List*’ is discussed at paragraph 3.225 below.

2.102 There is, additionally, evidence that Pride sent its RRP and *Suggested Lowest Price* to at least one retailer, Mobility 4 U Limited.⁹⁹

2.103 There is evidence that Pride engaged in a sophisticated process of monitoring retailers’ adherence to the internet price structure in 2009.

2.104 Internal emails dated 17, 19 and 23 March 2009 respectively from Pride’s Internal Sales Manager [name redacted] attach spreadsheets which show the *suggested lowest price* of certain scooters and the actual prices advertised on retailers’ websites.¹⁰⁰ The email of 17 March 2009 further states:

‘Please find attached Dealer Internet Pricing as at Tuesday 17 March 2009. Please can I ask you to speak to your dealers whose pricing is in red as they are still showing below our suggested lowest price.’

2.105 An email sent by Pride’s Internal Sales Manager [name redacted] to the Area Sales Managers and Pride’s Managing Director [name redacted] on 25 March 2009¹⁰¹ reveals that there was a separate price list structure on which non-compliant retailers were placed. Attached to that email was another spreadsheet showing the ‘*suggested lowest price*’ of the scooters and the actual prices advertised on retailers’ websites. Dealers selling Pride scooters on eBay were included in a distinct section.

2.106 On 30 March 2009, Pride’s Internal Sales Manager [name redacted] sent another email to the sales team and Pride’s Managing Director [name

⁹⁸ Document 3482/WS (Pride’s Managing Director [name redacted] Interview Transcript, CD 3 of 5, page 30).

⁹⁹ Document 3087/PR.

¹⁰⁰ Documents 3089/PR, 3088/PR and 3090/PR.

¹⁰¹ Document 0278/PR.

redacted].¹⁰² It included an updated spreadsheet of website data and stated that *'M4U and [retailer name redacted] have put their ET4 price back up to £595, however, [individual's name redacted] has dropped his to £574!'*.

2.107 Minutes of a Sales Meeting held on 20 July 2009 further reveal that Pride had developed a stance on website advertising, and that it would *'monitor and clamp down'* on website advertising *'otherwise it will devalue our new products'*.¹⁰³ The minutes further list the scooters affected by that stance.

2.108 An email of 31 July 2009 from Pride's Internal Sales Manager [name redacted] to a Pride Area Sales Manager [name redacted] further demonstrates that Pride was actively monitoring the advertised prices of certain scooters, and that Area Sales Managers were instructed to contact any non-adherent retailers. Pride's Internal Sales Manager [name redacted] wrote:

'Please can you ring [retailer name redacted] as they have are [sic] advertising the Colt XL8 on their website at £2400.00 and the Colt Deluxe at £1500.00'.¹⁰⁴

2.109 The evidence demonstrates that Pride's sales teams spoke to retailers about internet pricing. A Call Report for the week commencing 6 July 2009 for a Pride Area Sales Manager [name redacted] shows that on Tuesday of that week he had visited the Retailer Discount Mobility Plus. It is specifically noted that *'[Discount Mobility Plus employee's name redacted] hopes new stand against internet on pride [sic] new products works'*.¹⁰⁵

2.110 In addition, a Pride Area Sales Manager [name redacted] Call Report for the week commencing 21 December 2009 shows that on the Monday of that week he had visited the retailer [retailer name redacted]. It is specifically noted that he:

¹⁰² Document 0279/PR.

¹⁰³ Document 0281/PR and document 0026/PR.

¹⁰⁴ Document 0282/PR.

¹⁰⁵ Document 0280/PR.

'spoke to dave [sic] about pricing of colt range on internet'.¹⁰⁶

2010: The Below-RRP Online Price Advertising Prohibition

2.111 The earliest direct evidence in the OFT's possession that instructions not to advertise below-RRP prices were given to retailers is in an email of 28 January 2010 from Pride's Internal Sales Manager [name redacted] to [individual's name redacted] of [retailer name redacted] that, in relation to three internet retailers:

'we have been in contact and informed them that only the RRP is to be shown on any of the Colt range of scooters and we will be monitoring these sites to ensure this is done.'¹⁰⁷

2.112 The OFT infers from this email that the internal policy underlying Pride's Below-RRP Online Price Advertising Prohibition was in place and that it was being communicated to Retailers by 28 January 2010 at the latest, by which is meant that Pride had started to make requests and/or give instructions to Retailers to follow the Below-RRP Online Price Advertising Prohibition by this time.

Conclusion

2.113 The evidence in the OFT's possession demonstrates that Pride was concerned about low internet retail prices in respect of its mobility scooters from as early as 2006. There then followed a period in which Pride sought to identify ways of maintaining certain retail price points in respect of its mobility scooters.

2.114 Its actions in that connection included:

- requesting retailers not to price below a certain price point (from April 2006 onwards), and/or
- requesting retailers not to advertise prices below a certain price point (from October 2007 onwards).

2.115 In 2009, the year preceding that in which the Infringements began, Pride was requesting its retailers not to advertise below its 'suggested

¹⁰⁶ Document 0284/PR.

¹⁰⁷ Document 0332/PR.

pricing'/'suggested lowest resale price' and it was engaging in sophisticated monitoring of internet prices.

- 2.116 In January 2010, the Below-RRP Online Price Advertising Prohibition was operational.

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.¹⁰⁸
- 3.3 Each of the Parties was, and/or is, engaged in the supply of 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 INFRINGEMENTS

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.¹⁰⁹

¹⁰⁸ See Annexe A, at paragraphs A.7 to A.10.

¹⁰⁹ 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.¹¹⁰

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.¹¹¹
- 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 economic operator must determine independently the policies it intends to adopt on the market.¹¹²

¹¹⁰ See Annexe A, at paragraph A.35.

¹¹¹ See Annexe A, at paragraph A.29.

¹¹² See Annexe A, at paragraphs A.26 to A.29.

- 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.¹¹³

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.¹¹⁴

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 finds that the Parties have infringed the Chapter I prohibition by entering into agreements and/or participating in concerted practices (in each case between Pride and each Retailer) in respect of Pride's Below-RRP Online Price Advertising Prohibition applicable to certain mobility scooters supplied by Pride, and that these agreements and/or concerted practices had as their **object** the prevention, restriction or distortion of competition in relation to the supply of mobility scooters in the UK. In each agreement and/or concerted practice, the Retailer agreed to abide by, or acquiesced in, and/or complied with Pride's Below-RRP Online Price Advertising Prohibition. The duration of the agreements and/or concerted practices differs in each case, but each agreement and/or concerted practice covers some or all of the period from February 2010 to February 2012.
- 3.14 Whilst Pride's policies concerning the online advertising of prices below the RRP in respect of certain mobility scooters applied to its dealer

¹¹³ See Annexe A, at paragraph A.28.

¹¹⁴ See Annexe A, at paragraphs A.36 to A.39.

network generally, the OFT's finding, based on the evidence in its possession, is that at least the Retailers were party to agreements and/or concerted practices with Pride in respect of the Below-RRP Online Price Advertising Prohibition.

3.15 The evidence available to the OFT demonstrates that the agreements and/or concerted practices comprised the following:

- A** While it may have been introduced earlier, Pride started to communicate the existence of the Below-RRP Online Price Advertising Prohibition to Retailers by 28 January 2010.¹¹⁵
- B** The Retailers agreed to abide by, or acquiesced in, Pride's requests and/or instructions not to advertise prices below the RRP online, although not all Retailers complied with Pride's requests and/or instructions at all times.
- C** To comply with the Below-RRP Online Price Advertising Prohibition, a Retailer could, if it did not wish to advertise the product at RRP, use the phrase 'call for best price', 'value special' or similar on its website(s). A Retailer could also comply with the Below-RRP Online Price Advertising Prohibition by not displaying any price or any such phrase on its website(s).
- D** From 25 June 2010 at the latest Pride had in place a system of monitoring whether its retailers were complying with its Below-RRP Online Price Advertising Prohibition (those retailers that were not, at times, complying with Pride's policy were referred to internally as 'internet rogues').
- E** Those Retailers which were identified as 'internet rogues' were contacted by members of the external sales team and/or their respective Area Sales Manager and requested and/or instructed to:
 - (i) remove the below-RRP price from the Retailer's website; and/or
 - (ii) increase the online price advertising to the RRP.

¹¹⁵ See also paragraph 2.112. The Below-RRP Online Price Advertising Prohibition covered the following Pride mobility scooters: Colt Deluxe, Colt Executive, Colt Plus, Colt Twin, Colt XL8, Colt 9 and the Elite Traveller LX (part of the Go-Go scooter range).

Those requests and/or instructions were made by email, by telephone or in person (when sales representatives visited stores).

- F** An alternative, and higher price structure (the 'T List') was introduced. Non-compliant Retailers were threatened with being placed on the 'T List' if they did not adhere to Pride's Below-RRP Online Price Advertising Prohibition.¹¹⁶ The 'T List' was in place by September 2010 at the latest.
- G** Pride took steps to ensure that its Retailers understood that a consequence of non-compliance with the Below-RRP Online Price Advertising Prohibition was that they could be put on a less favourable retail price structure and were subsequently at risk of being subject to a cessation of supply.

3.16 Before presenting the evidence in relation to agreements and/or concerted practices between Pride and each of the Retailers, for clarity we have set out the OFT's approach in relation to three key aspects of that evidence: duration, 'Rogue Reports', and scooter models.

Duration

- 3.17 The OFT's finding is that the agreements and/or concerted practices between Pride and each of the Retailers span different periods for different Retailers.
- 3.18 The evidence in this Chapter demonstrates that the Retailers agreed to adhere to, or acquiesced in, Pride's requests and/or instructions concerning its Below-RRP Online Price Advertising Prohibition, although not all Retailers complied with Pride's requests and/or instructions at all times.
- 3.19 As set out in 'Historical Background to the Infringements' section, the evidence demonstrates that Pride's Below-RRP Online Price Advertising Prohibition, although it may have been introduced earlier, was fully operational by January 2010.
- 3.20 For the purposes of determining in this Decision the point at which Pride's agreement and/or concerted practice with each Retailer **commenced**, the OFT has not taken the date at which Pride's Below-RRP Online Price

¹¹⁶ See paragraph 3.225.

Advertising Prohibition was first operational. Instead, the OFT has identified, from the evidence in its possession, the earliest piece of evidence from which a Retailer's agreement to adhere to or acquiescence in and/or compliance with Pride's requests and/or instructions can be demonstrated or inferred. The date of this evidence is taken as being the 'at the latest' date for the commencement of the agreement and/or concerted practice (although it may in fact have commenced earlier).

- 3.21 Some of the evidence described below demonstrates a Retailer's agreement to adhere to or acquiescence in and/or compliance with Pride's requests and/or instructions in relation to the Below-RRP Online Price Advertising Prohibition as early as February 2010. The OFT therefore finds that at its widest, the period of infringement, in relation to certain of the Retailers, commenced in February 2010.
- 3.22 Pride's Below-RRP Online Price Advertising Prohibition may have remained in place 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.
- 3.23 For the purposes of determining in this Decision the point at which Pride's agreement and/or concerted practice with each Retailer **concluded**, the OFT has not taken the date at which Pride's Below-RRP Online Price Advertising Prohibition was last operational. Instead, the OFT has identified, from the evidence in its possession, the latest piece of evidence from which a Retailer's agreement to adhere to or acquiescence in and/or compliance with Pride's requests and/or instructions can be demonstrated or inferred. The date of this evidence is taken as being the 'at the earliest' date for the conclusion of the agreement and/or concerted practice (although it may in fact have concluded later).
- 3.24 Some of the evidence described below demonstrates a Retailer's agreement to adhere to or acquiescence in and/or compliance with Pride's requests and/or instructions as regards the Below-RRP Online Price Advertising Prohibition as late as February 2012. The OFT therefore finds that at its widest, the period of infringement, in relation to certain of the Retailers, concluded in February 2012.
- 3.25 Although some of the evidence demonstrates that the Retailers did not fully comply with Pride's requests and/or instructions 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.

Explanation of Pride's Rogue Reports

- 3.26 The OFT has evidence of a series of internal 'reports' produced by Pride in the period from June 2010¹¹⁷ to January 2012,¹¹⁸ which monitored compliance with the Below-RRP Online Price Advertising Prohibition and which were commonly described within Pride as 'Rogue Reports'.
- 3.27 In those reports, Pride identified Retailers who were advertising online prices below the RRP in respect of Pride mobility scooters. The purpose of those reports was to inform Pride's Area Sales Managers (ASMs) which of their respective Retailers, if any, they needed to contact so as to request and/or instruct the relevant Retailer to refrain from advertising prices below the RRP and thereby to comply with Pride's Below-RRP Online Price Advertising Prohibition. The reports were sent to Pride's ASMs and Pride's Managing Director, [name redacted].
- 3.28 Certain covering emails to the Rogue Reports specifically requested an ASM to contact a non-compliant Retailer in their respective area. Moreover, there is evidence of ASMs replying to those emails with an update on their subsequent discussions with the non-compliant Retailer.
- 3.29 The authors of the Rogue Reports during the period of the Infringements were Pride's Internal Sales Manager [name redacted] and a Pride Internal Sales Team Member [name redacted], whose responsibility it was to monitor the internet and to compile the Rogue Reports. Each Rogue Report provides the following information:
- The name of the company advertising prices below the RRP
 - The website on which this was advertised¹¹⁹
 - The model of scooter being advertised below the RRP

¹¹⁷ Document 2627/PR.

¹¹⁸ Document 2875/PR.

¹¹⁹ Document 2666/PR. See Discount Mobility Direct for an example of a company using multiple websites to advertise, for example eBay and Google shopping.

- The price that model was being advertised at
- The RRP of that model

3.30 Where a Retailer is listed on a Rogue Report but is then removed from the report, either partially¹²⁰ or completely, following a request and/or instruction from Pride to the Retailer to comply with its Below-RRP Online Price Advertising Prohibition, the OFT has, where appropriate, inferred that the respective Retailer thenceforth complied with that prohibition in relation to the mobility scooter models in question.

3.31 There is some evidence that, from January 2012, Pride also used Rogue Reports to monitor whether Retailers were advertising for sale online and/or advertising prices online for certain new Pride scooter models.¹²¹ This Decision makes no finding as to whether Pride and the Retailers entered into agreements and/or engaged in concerted practices in relation to any prohibition beyond the Below-RRP Online Price Advertising Prohibition. However, the OFT infers from the evidence in its possession that Pride may have, by January 2012, introduced prohibitions on online advertising and online sales in relation to certain new scooter models and that Pride also used the Rogue Reports to monitor Retailer's online advertising and online sales activity in this regard.¹²²

Scooter Models

3.32 The Rogue Reports and internal monitoring emails sent by Pride from June 2010 to January 2012 show the prices at which certain websites were advertising various models of Pride mobility scooters.¹²³ Mobility scooters can be grouped into three categories: large, medium or travel.¹²⁴

¹²⁰ By partially we meant that a Retailer may still remain listed on a Rogue Report in relation to some but not all of the previous scooter models listed.

¹²¹ See Documents 2868/PR and 2876/PR. See also footnote 189.

¹²² See Documents 2868/PR, 2876/PR and 3484/WS (Pride's Managing Director [name redacted] Interview Transcript, CD 5 of 5, page 11).

¹²³ For the avoidance of doubt, the OFT notes that not all Pride-branded mobility scooters were covered by the Below-RRP Online Price Advertising Prohibition.

¹²⁴ See Annexe B, paragraphs B.8 to B.11, for details about the different categories: large, medium and travel. The Infringements included models of mobility scooters from each of these categories.

The scooters monitored by Pride and the categories they fall within were as follows:

- Colt Deluxe - medium
- Colt Executive - large
- Colt Plus - medium
- Colt Twin - medium
- Colt XL8 - large
- Colt 9 - medium (the above scooters hereafter being called the 'Colt range')
- Elite Traveller LX - travel (part of the Go-Go scooter range)

3.33 The OFT infers that each scooter that was monitored was subject to the Below-RRP Online Price Advertising Prohibition. Further evidence set out in this Chapter substantiates this inference.

3.34 The agreements and/or concerted practices between Pride and its Retailers therefore encompass the scooter models listed above, although the precise scope of each Retailer's compliance with the Below-RRP Online Price Advertising Prohibition may differ according to (a) the models of scooter that Retailer stocked, sold and/or advertised online, and (b) the extent of that Retailer's compliance (i.e. whether it complied completely or partially¹²⁵ with the Below-RRP Online Price Advertising Prohibition).

3.35 Accordingly, in each of the following sections, where the evidence for the agreement and/or concerted practice between Pride and each of the Retailers is set out, the agreement and/or concerted practice includes the Pride's Colt range of mobility scooters and the Elite Traveller LX.

3.36 Although some of the evidence demonstrates that the Retailers did not fully comply with Pride's requests and/or instructions in relation to each and every of these scooter models at all times and/or did not fully respect the agreements and/or concerted practices that are the subject of this Decision in relation to certain scooter models throughout the period of infringement, a Retailer's non-compliance in parts and/or 'cheating' on the

¹²⁵ See footnote 120.

agreement and/or concerted practice does not preclude a finding that an agreement and/or concerted practice existed.

The Agreements and/or Concerted Practices

THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN PRIDE AND DISCOUNT MOBILITY DIRECT LIMITED ('DMD'), NOW CARECO (UK) LIMITED

Summary

- 3.37 The totality of the evidence in the OFT's possession demonstrates that Pride entered into an agreement and/or participated in a concerted practice with DMD in respect of the Below-RRP Online Price Advertising Prohibition.

Communications between Pride and DMD

10 March 2010

- 3.38 On 10 March 2010 a Discount Mobility Plus Limited (DMP/Rutland) employee [name redacted] sent an email¹²⁶ to the Pride 'Sales' inbox. The subject of the email is '*Hey web watchers!*' and the DMP/Rutland employee [name redacted] wrote:

'We are still participating in the agree [sic] price advertising for your selected products.

I have noticed that there are a few web suppliers who are not playing the same game and publishing very low prices.

[retailer name redacted]

[retailer name redacted]

Discount Mobility Direct'

- 3.39 Pride's Internal Sales Manager [name redacted], replied to the DMP/Rutland employee [name redacted] by email on the same day as follows,

'Thanks for bringing these websites to our attention, they will be contacted ASAP with regard to their pricing.

¹²⁶ Document 0337/PR.

*If you find anymore [sic], please let me know.*¹²⁷

- 3.40 The OFT infers from Pride's Internal Sales Manager's [name redacted] email and the emails below that Pride instructed DMD on or around 10 March 2010 to adhere to its Below-RRP Online Price Advertising Prohibition.

11 January 2011

- 3.41 On 11 January 2011 a DMP/Rutland employee [name redacted] sent another email to Pride's Internal Sales Manager [name redacted] informing her that DMD was advertising the Colt Plus at £699:¹²⁸

'I am sure that the Colt Plus is one of the scooters that you want price protecting.

Discount Mobility Direct are advertising at £699 which is below my cost price!!

I am a believer in a free market but if one dealer breaks ranks they either need to be pulled into line of [sic] we all will. Maybe I will have to start buying from them?'

- 3.42 Pride's Internal Sales Manager [name redacted] responded to the DMP/Rutland employee [name redacted] on 11 January 2011 as follows:¹²⁹

*'We are aware of this website [DMD] and **have requested they remove the pricing. They have been told the same as you** with regard to our policy on internet pricing on our new products and are subject to the same conditions should they not comply.'* [Emphasis added]

- 3.43 This email, and specifically the words '[we] *have requested they remove the pricing*' and '*they have been told the same as you*,' demonstrate that on or around 11 January 2011 Pride had again requested DMD not to advertise online prices below the RRP and to remove from DMD's website any prices below the RRP. Further, the OFT infers that Pride had informed DMD and DMP/Rutland of its 'internet pricing policy' more

¹²⁷ Ibid.

¹²⁸ Document 2647/PR.

¹²⁹ Ibid.

generally which related to Pride's new mobility scooters, including the Colt Plus.

8 – 10 March 2011

3.44 On 8 March 2011, Pride's Internal Sales Team Member [name redacted] sent an email to Pride's Managing Director [name redacted] attaching the updated Rogue Report for that day. In her email Pride's Internal Sales Team Member [name redacted] stated that there were '*three separate websites run by DMD that are trading under the RRP on the Colt/Elite LX...*'¹³⁰

3.45 Pride's Managing Director [name redacted] responded the same day, confirming:¹³¹

'Yet again DMD are taking the piss, we need to make a final decision on these guys, please contact them again. I will speak to [DMD employee's name redacted] on Thursday [10 March 2011].'

3.46 The OFT infers from Pride's Managing Director's [name redacted] email and surrounding circumstances, that on or around 10 March 2011, Pride again instructed DMD not to advertise prices below the RRP online.

3.47 The OFT's inference is supported by interview evidence. In an interview with the OFT dated 11 September 2012, Pride's Managing Director [name redacted] confirmed that Pride had requested DMD not to advertise prices below the RRP, and that he had spoken to a DMD employee [name redacted] in March 2011 requesting the same:¹³²

Pride's Managing Director [name redacted]: *I think so, yeah I mean he would have been told exactly the same as we told everybody else. **We would make the request to all, regardless of where they sit, that they advertise RRP or phone for best or discounted.** From that perspective yes, he has understood it perfectly well.*

¹³⁰ Document 2654/PR.

¹³¹ Document 2655/PR.

¹³² Document 3483/WS (Pride's Managing Director [name redacted] Interview Transcript, CD 4 of 5, pages 21-22).

OFT: *And just ... I don't know if you can remember back to your conversation before that email ... can you recollect that conversation you would have had with [DMD employee's name redacted]?*

Pride's Managing Director [name redacted]: *I can remember going out to a very nice restaurant actually down in Essex, I forget the name of the restaurant and we discussed it over lunch there for sure.*

OFT: *Was that in March 2011 more or less?*

Pride's Managing Director [name redacted]: *More or less yes, I'm sure that was the occasion.*

OFT: *What was discussed? The pricing policy?*

Pride's Managing Director [name redacted]: *Well **not so much the pricing policy but our request, I don't like the word policy because it isn't a policy it's a request.*** [Emphasis added]

21 March 2011

3.48 On 21 March 2011, a DMD employee [name redacted] sent an email to Pride's Managing Director [name redacted] and a Pride Area Sales Manager [name redacted]¹³³ setting out his understanding of 'Pride's new pricing policy'. A DMD employee [name redacted] stated that:

*'I hope you don't mind but **after my telephone conversation with** [Pride's Managing Director's name redacted], **followed by a meet** [sic] **with** [Pride's Area Sales Manager name redacted] **on Friday** [18 March 2011], **I thought I would note my understanding of Pride's new pricing policy.***

*As you know **we are committed to co-operate with this strategy and have removed/altered/increased all the prices on Pride products as per your instructions.***

For the sake of clarity should you notice any areas where we aren't applying your new prices, please email us with the exact details and we will attend to the problem as a matter of urgency.

¹³³ Document 2663/PR.

*As you are aware some of the website alterations can take up to 24 hours to come into effect so your understanding on this would be appreciated. **Your new policy has our full support even if we don't agree with it.***

Of course while supporting you, we would expect you to make sure that ALL other sellers adhere to the same criteria and in that regard we will monitor the market on a daily basis and advise you of any pricing that we see not adhering to your policy. We will leave it to you to then advise the retailer and make sure they comply with your wishes.

*Obviously we view Pride as an important partner and pledge to support you provided the policy is implemented unilaterally.¹³⁴ **If, after a reasonable period of time your new policy doesn't appear to be working we will discuss our thoughts with you and if necessary go back to an open market policy.** I would add here that as one of Pride's partners we have never advocated fixed pricing policy and feel the free market is always the best option. [...]* [Emphasis added]

3.49 The OFT infers the following from the DMD employee's [name redacted] email of 21 March 2011:

- that by 18 March 2011 Pride's Managing Director [name redacted] had requested and/or instructed DMD not to advertise prices below the RRP online' [DMD] *have removed/altered/ increased all the prices on Pride products as per your instructions'*,
- that a Pride Areas Sales Manager [name redacted] did the same on 18 March 2011 (the Friday before 21 March 2011) (*'followed by a meet [sic] with [Pride's Area Sales Manager's name redacted] on Friday'*).

3.50 Further, the DMD employee's [name redacted] email of 21 March 2011 demonstrates:

- that by 21 March 2011 DMD had agreed to abide by, or acquiesced in, Pride's requests and/or instructions (*'As you know we are*

¹³⁴ The OFT infers from the surrounding content of this email that the DMD employee's [name redacted] use of the word 'unilaterally' is incorrect and that he in fact meant 'uniformly'.

committed to co-operate with this strategy' and 'Your new policy has our full support'),

- that DMD had complied with Pride's request and/or instruction, by 21 March 2011, as it had *'removed/alterd/increased all the prices on Pride products as per [Pride's] instructions'*, and
- that DMD would monitor the prices at which other retailers would be advertising Pride mobility scooters (*'in that regard we will monitor the market on a daily basis and advise you of any pricing that we see not adhering to your policy'*).

3.51 In an interview with the OFT dated 11 September 2012, Pride's Managing Director [name redacted] confirmed that Pride had requested DMD not to advertise online prices below the RRP. On being asked about the content of the DMD employee's [name redacted] email dated 21 March 2011, Pride's Managing Director [name redacted] stated the following:¹³⁵

OFT: *'[...] Okay and just one very quick final question on this email, when he says removes/alterd/increased prices, is that because ... I mean I suppose I'm just trying to make sure I've understood when he uses those three words, were there certain prices they were asked simply to remove?*

[Pride's Managing Director's name redacted]: *Well remove would be ... **remove for example an Elite Traveller at £419, replace with maybe RRP as a request**, that's ... it's a combination of those.*

OFT: *Oh so what he's saying is, remove the prices which are below the RRP and either increase it to RRP or just remove the price and put something like call for best price instead?*

[Pride's Managing Director's name redacted]: *That's right and some products they did, they put RRP in and they put on there, phone for ... I think they had ... there was one they actually put 70% down'.¹³⁶*
[Emphasis added]

¹³⁵ See document 3483/WS (Pride's Managing Director [name redacted] Interview Transcript, CD 4 of 5, Page 22).

¹³⁶ The OFT infers that by '70% down', Pride's Managing Director [name redacted] is referring to the extent to which DMD was pricing below RRP online before being requested/instructed not to (whereby DMD instead price online at the RRP or use 'call for best price').

3.52 The OFT's inferences are further supported by evidence provided by a DMD employee [name redacted] in an interview with the OFT on 29 August 2012. In interview, the DMD employee [name redacted] confirmed that his understanding of the 'pricing policy' as described in a DMD employee's [name redacted] email of 21 March 2011 was that DMD should not advertise prices below the RRP online. Moreover, the OFT infers from the DMD employee's [name redacted] interview that DMD had agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition and that it had complied with that prohibition:¹³⁷

OFT: 'To [Pride's Managing Director's name redacted] and [Pride's Area Sales Manager's name redacted] who are both at Pride I think and you were copied, so you may remember this email, but certainly you were copied into it and it's entitled 'Pride Pricing Policy' and it says ... [DMD employee's name redacted], says ... he mentions an earlier telephone call with [Pride's Managing Director's name redacted] and a meeting he'd had with [Pride's Area Sales Manager's name redacted] the previous Friday and then he sets out his understanding of the new pricing policy. He says that DMD is committed to cooperating with Pride's strategy and has removed/changed/increased all the prices on Pride products as per its instructions, yeah? And that should Pride notice any areas where DMD is not applying Pride's new prices, Pride should email DMD with the exact details etc and just sort of stopping there – so can you just explain, you know, in this email ... looking at this email, what you understood Pride's new policy to be? Is that the price advertising policy?'

DMD employee [name redacted]: Yeah, so, "As you know we are committed to cooperate with this strategy and have removed ...", so that would be products that we could ... that we could no longer sell, 'altered' may well be now 'call for best price', or 'increased' would be where they've set a minimum price that we can sell at.[...]'

3.53 The OFT's inferences are supported by other passages from the interview with the DMD employee [name redacted]:

¹³⁷ See document 3457/WS (DMD employee [name redacted] Interview Transcript, CD 2 of 4, page 21). See also document 0025/PR Pride's Sales Meeting Minutes dated 16 December 2010 in which Pride states '*DMD if allowed to put price on Internet would become a [figure redacted] account overnight*'. The OFT infers from these meeting minutes that DMD were complying with its Below-RRP Online Price Advertising Prohibition potentially as early as December 2010.

OFT: ...once [Pride's Area Sales Manager's name redacted] or one of his colleagues said to you, "Look, put 'call for best price' don't advertise a particular price or a price below the RRP," did you then... would you then have gone and changed your website?

DMD employee [name redacted]: Yeah, **we'd have to change it on our website [...]** so if we... in essence, let's say we did put a price on or that something changed, then **we would have to put 'call for best price'**.

OFT: Yeah. So you continued to advertise Pride products, it's just that you didn't focus on them. Is that right? You didn't sort of completely abandon Pride?

DMD employee [name redacted]: We didn't...I'll be honest, we didn't to start...**when they first... when the 'call for best price' first came in** we didn't know how...we didn't know how successful it was going to be, or it wasn't going to be, so we didn't want to just completely...you know, **everyone was doing it, so we were like, "Right, well we're just going to put 'call for best price' like everyone else.** [Emphasis added]¹³⁸

[later in the interview:]

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

DMD employee [name redacted]: [...] **yeah, we complied with both¹³⁹ 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.' [Emphasis added]¹⁴⁰

¹³⁸ See document 3456/WS (DMD employee [name redacted] Interview Transcript, CD 1 of 4, pages 17-18).

¹³⁹ 'Both' refers to requests from both Pride and another supplier.

¹⁴⁰ See document 3457/WS (DMD employee [name redacted] Interview Transcript, CD 2 of 4, page 7).

29 March 2011

- 3.54 On 29 March 2011 a Pride Internal Sales Team Member [name redacted] emailed Pride's Managing Director [name redacted]¹⁴¹ with an updated 'Rogue Report' concerning DMD and other retailers. In that email, the Pride Internal Sales Team Member [name redacted] stated:

'Spoke to [Pride's Area Sales Manager's name redacted] and he is going to call all of the above [including DMD] and request them to change the relevant websites or google shopping.'

- 3.55 The OFT infers from this email that, on or around 29 March 2011, Pride again instructed DMD not to advertise prices below the RRP online.

27 February 2012

- 3.56 On 27 February 2012, a DMD employee [name redacted] sent an email to Pride's Managing Director [name redacted] and a Pride Area Sales Manager [name redacted].¹⁴² The subject of the email was '*PRICES*'. In that email, a DMD employee [name redacted] asked the recipients to look at a company with the website [retailer website redacted] and asked:

'can we get them putting [sic] the prices of the Go Go range up'.

- 3.57 The OFT infers from that email that on 27 February 2012, DMD was still adhering to Pride's Below-RRP Online Price Advertising Prohibition and that the agreement and/or concerted practice between Pride and DMD was still in operation at that time; DMD would otherwise not have made such a request to Pride.

- 3.58 The evidence further demonstrates that DMD monitored at least one other retailer in respect of Pride's Below-RRP Online Price Advertising Prohibition, in order to determine whether DMD is placing itself at a competitive disadvantage in complying with the prohibition.

Pride's Rogue Reports

- 3.59 On 8 March 2011, a Pride Internal Sales Team Member [name redacted] sent an email to Pride's Managing Director [name redacted] attaching the updated Rogue Report for that day. In her email the Pride Internal Sales

¹⁴¹ Document 2677/PR.

¹⁴² Document 2896/PR.

Team Member [name redacted] stated that there were '*three separate websites run by DMD that are trading under the RRP on the Colt/Elite LX...*'¹⁴³

- 3.60 On 22 March 2011 a Pride Internal Sales Team Member [name redacted] emailed Pride's Managing Director [name redacted] a copy of that day's 'Rogue Reports',¹⁴⁴ which identified retailers who were advertising prices below the RRP online. The report shows that DMD (amongst others), which had previously been advertising prices of seven mobility scooter models of Pride below the RRP,¹⁴⁵ were now only advertising prices of two models below the RRP.¹⁴⁶ The OFT infers from this that DMD was, at this point, complying with Pride's requests and/or instructions in relation to its Below-RRP Online Price Advertising Prohibition as regards the other five scooter models.
- 3.61 On 29 March 2011 a Pride Internal Sales Team Member [name redacted] emailed Pride's Managing Director [name redacted]¹⁴⁷ with an updated 'Rogue Report' which showed that DMD were advertising prices of three more models below the RRP¹⁴⁸ on Google shopping, although DMD appears, at this point, to be complying with Pride's requests and/or instructions as regards one of the previous two models,¹⁴⁹ which was no longer listed next to DMD's name in this Rogue Report.
- 3.62 On 8 April 2011 a Pride Internal Sales Team Member [name redacted] emailed Pride's Managing Director [name redacted] with the next update of the 'Rogue Report'.¹⁵⁰ This shows that the 3 models¹⁵¹ which had previously been listed on Google shopping by DMD at prices below the RRP were no longer on the 'Rogue Report'. The OFT infers that DMD was, at this point, complying with Pride's requests and/or instructions in

¹⁴³ Document 2654/PR. (The scooter models that DMD were advertising below-RRP at this point: Colt 9, Colt XL8, Colt Plus, Colt Twin, Colt Deluxe, Colt Executive and the Elite Traveller LX).

¹⁴⁴ Document 2666/PR.

¹⁴⁵ Document 2654/PR.

¹⁴⁶ Document 2666 (Scooter models: Colt Plus and Elite Traveller LX).

¹⁴⁷ Document 2677/PR.

¹⁴⁸ Ibid. (Scooter models advertised below-RRP: Colt Deluxe, Colt Executive and Colt Twin).

¹⁴⁹ Elite Traveller LX.

¹⁵⁰ Document 2682/PR.

¹⁵¹ Document 2677/PR.

relation to its Below-RRP Online Price Advertising Prohibition except as regards one scooter model¹⁵², which was still listed next to DMD's name in this Rogue Report.

3.63 In subsequent Rogue Reports, of 17 May 2011,¹⁵³ 17 June 2011¹⁵⁴ and 9 August 2011,¹⁵⁵ certain scooter models reappear next to DMD's name. The OFT infers from these that DMD had been complying with Pride's requests and/or instructions in relation to its Below-RRP Online Price Advertising Prohibition as regards those scooter models up to those respective points.

3.64 These Rogue Reports should be viewed in the context of the communications between Pride and DMD regarding Pride's Below-RRP Online Price Advertising Prohibition. The OFT infers from these Rogue Reports that following the various communications between DMD and Pride evidenced above, DMD ceased to advertise prices below the RRP online in respect of the models identified in the Rogue Reports. Where these models no longer appear in the Rogue Reports against DMD's name, the OFT infers that DMD was – at that time – complying with Pride's Below-RRP Online Price Advertising Prohibition further to Pride's requests and/or instructions.

Conclusion

3.65 The evidence set out above, when taken together, and viewed alongside the evidence examined in the 'Historical Background to the Infringements' section, demonstrates that on dates from March 2011 (at the latest) to February 2012 (at the earliest), Pride and DMD were party to an agreement and/or concerted practice which prohibited DMD from advertising prices below the RRP online for certain Pride mobility scooters.

3.66 The evidence demonstrates that, between these dates, DMD agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition. Some of the evidence demonstrates that DMD did not fully comply with Pride's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times.

¹⁵² Colt Plus.

¹⁵³ Document 2686/PR. Elite Traveller is listed.

¹⁵⁴ Document 2856/PR. Colt Executive and Colt XL8 are listed.

¹⁵⁵ Document 2860/PR. Colt Twin is listed.

However, DMD's non-compliance in parts and/or its 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.¹⁵⁶

THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN PRIDE AND DISCOUNT MOBILITY PLUS LIMITED/RUTLAND MOBILITY LIMITED ('DMP/RUTLAND')

- 3.67 The totality of the evidence in the OFT's possession demonstrates that Pride entered into an agreement and/or participated in a concerted practice with DMP/Rutland in respect of the Below-RRP Online Price Advertising Prohibition.

Communications between Pride and DMP/Rutland

10 March 2010

- 3.68 On 10 March 2010, a DMP/Rutland employee [name redacted] sent an email entitled *Hey web watchers!*¹⁵⁷ to Pride's 'Sales' inbox and stated,

'[...] We are still participating in the agree [sic] price advertising for your selected products. I have noticed that there a few web suppliers who are not playing the same game and publishing very low prices.

[retailer name redacted]

[retailer name redacted]

Discount Mobility Direct

*Please could you copy [Pride's Area Sales Manager's name redacted] on this note.'*¹⁵⁸ [Emphasis added]

- 3.69 Assessed in the context of other evidence in this section, a DMP/Rutland employee's [name redacted] email of 10 March 2010, and specifically the words 'We are still participating in the agree [sic] price advertising for your selected products', demonstrate that DMP/Rutland had agreed to abide

¹⁵⁶ See Annexe A, paragraph A.36.

¹⁵⁷ Document 0337/PR.

¹⁵⁸ See documents 0330/PR, 2624/PR and 2677/PR which demonstrate that [name redacted] was the ASM for DMP/Rutland.

by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition from 10 March 2010 at the latest.

- 3.70 In addition, the OFT infers from the words '***we are still participating in the agree [sic] price advertising***' [emphasis added], that the agreement and/or concerted practice between Pride and DMP/Rutland had been in operation prior to that time.

2 August 2010

- 3.71 On 2 August 2010, a Pride Internal Sales Team Member [name redacted] sent an email for the attention of a Rutland Mobility employee [name redacted] requesting that it amend its advertised price to the RRP:¹⁵⁹

'Please find below the internet link to your ebay item (Colt Deluxe) advertised at £1695. If you could ensure that this is changed to the current recommended retail price of £3750 as soon as possible.' [Emphasis added]

- 3.72 The evidence demonstrates that Pride requested DMP/Rutland not to advertise the price of Pride mobility scooters below the RRP online.

11 January 2011

- 3.73 In a series of emails dated 11 January 2011, between a DMP/Rutland employee [name redacted] and Pride's Internal Sales Manager [name redacted],¹⁶⁰ the DMP/Rutland employee [name redacted] said:

'[...] I am sure that the Colt Plus is one of the scooters that you want price protecting.

Discount Mobility Direct are advertising at £699 which is below my cost price!!

I am a believer in a free market but if one dealer breaks ranks they either need to be pulled into line of [sic] we all will. Maybe I will have to start buying from them? [...]' [Emphasis added]

- 3.74 The OFT infers from this statement that DMP/Rutland was, at the time of the email, complying with Pride's Below-RRP Online Price Advertising

¹⁵⁹ Document 2631/PR.

¹⁶⁰ Document 2647/PR.

Prohibition and that the agreement and/or concerted practice between Pride and DMP/Rutland was still in operation at that time; DMP/Rutland would otherwise not have made such a request to Pride.

3.75 On the same day Pride's Internal Sales Manager [name redacted] responded¹⁶¹ to a DMP/Rutland employee [name redacted] as follows:

*'[...] We are aware of this website and have requested they remove the pricing. **They have been told the same as you with regard to our policy on internet pricing on our new products and are subject to the same conditions should they not comply.***

Thank you for passing on this information.[...]' [Emphasis added]

3.76 The OFT infers from Pride's Internal Sales Manager's [name redacted] email response that by 11 January 2011 Pride had:

- instructed and/or requested DMP/Rutland not to advertise prices below the RRP online (*'they have been told the same as you with regard to our policy on internet pricing'*), and
- informed DMP/Rutland that non-compliance with its Below-RRP Online Price Advertising Prohibition would have repercussions for the retailer in question (*'[they] are subject to the same conditions should they not comply'*),

3.77 A DMP/Rutland employee [name redacted] responded¹⁶² to Pride's Internal Sales Manager [name redacted] on the same day as follows:

*'[...] I know that I am a hypocrite but **I am playing by the rules.***

I must be on a very bad pricing structure if he can afford to sell them for less than I buy.[...]' [Emphasis added]

3.78 The email, and specifically the words 'I am playing by the rules', demonstrate that DMP/Rutland had agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition and that it was at that time complying with that prohibition. DMP/Rutland's compliance with Pride's Below-RRP Online Price Advertising Prohibition can further be

¹⁶¹ Ibid.

¹⁶² Ibid

inferred by its actions of informing Pride of those retailers who were not at the time ‘playing by the rules’.

3.79 The OFT’s preliminary finding that Pride requested and/or instructed DMP/Rutland not to advertise prices online below the RRP in respect of certain mobility scooters is supported by DMP/Rutland’s response to the OFT’s section 26 Notice in April 2012.¹⁶³ DMP/Rutland wrote:

‘[...]We have been asked by Pride over many years to market certain specific products at “not less than” prices [...]

3.80 In response to the OFT’s section 26 Notice in August 2012¹⁶⁴ a DMP/Rutland employee [name redacted] wrote that they did not, ‘[...] recall either Pride making any requests with regard to RRP’. In the same response the DMP/Rutland employee [name redacted] also wrote that he had ‘[...] always tried my best to evade and avoid and [sic] restrictions that have been placed upon my company.’ However, the evidence set out above demonstrates that:

- by 10 March 2010 Pride had requested and/or instructed DMP/Rutland not to advertise prices below the RRP online,
- by 10 March 2010 DMP had agreed to abide by, or acquiesced in, Pride’s Below-RRP Online Price Advertising Prohibition,
- that DMP/Rutland did comply with Pride’s Below-RRP Online Price Advertising Prohibition.

Pride’s Rogue Reports

3.81 An internal Pride spreadsheet dated 8 May 2009¹⁶⁵ identifies DMP/Rutland as advertising 11 models of Pride mobility scooters under the RRP.

3.82 The Rogue Report of 25 June 2010¹⁶⁶ shows that the number of models DMP/Rutland was advertising below the RRP had been reduced to

¹⁶³ Document 0073/DMP.

¹⁶⁴ Document 3370/DMP.

¹⁶⁵ Document 0334/PR.

¹⁶⁶ Document 2627/PR. This is the first Rogue Report produced following the March 2010 emails between Pride and DMP.

three.¹⁶⁷ The OFT infers that this demonstrates partial compliance by DMP/Rutland with Pride's Below-RRP Online Price Advertising Prohibition.

3.83 The Rogue Report of 9 July 2010¹⁶⁸ shows that DMP/Rutland had been removed from the report altogether, from which the OFT infers complete compliance by DMP/Rutland with Pride's Below-RRP Online Price Advertising Prohibition.

3.84 The Rogue Report of 26 August 2010¹⁶⁹ sent by Pride's Internal Sales Team Member [name redacted] to a Pride Area Sales Manager [name redacted] shows that DMP/Rutland was not listed in the report. The OFT infers from this report and the surrounding circumstances that DMP/Rutland was at that time compliant with Pride's Below-RRP Online Price Advertising Prohibition: the evidence examined above at paragraph 3.71 shows that Pride had, on 2 August 2010, requested DMP/Rutland to comply with its Below-RRP Online Price Advertising Prohibition by amending the advertised price on the Colt Deluxe from £1,695 to the RRP of £3,750.¹⁷⁰

3.85 The Rogue Report of 17 September 2010 shows DMP/Rutland to be advertising one of Pride's scooters below the RRP,¹⁷¹ with the email (to a Pride Area Sales Manager [name redacted]) noting:

'Originally they were showing the ET LX @£1095 and the Colt Plus @£2995 – they have now removed the pricing for the LX and put the RRP [sic] although they are still advertising the Colt Plus @£2995'.

3.86 A further note in this email states:

*'I know from our conversation that you were contacting Rutland Mobility again. **DMP have removed their pricing.**'* [Emphasis added]

¹⁶⁷ Ibid. (Scooter models Colt Plus, Colt Deluxe and Colt 9 advertised on both DMP's websites below RRP).

¹⁶⁸ Document 2629/PR.

¹⁶⁹ Document 2636/PR.

¹⁷⁰ The Rogue Report of 26 August 2010 is the first report that follows Pride's requests and/or instructions of 2 August 2010 to increase the advertised price on the Colt Deluxe to the RRP.

¹⁷¹ Document 2640/PR.

- 3.87 The Rogue Report of 18 February 2011¹⁷² does not show DMP/Rutland to be advertising any models at prices below the RRP. The OFT infers from this Rogue Report and the surrounding circumstances that DMP/Rutland was fully compliant with the Below-RRP Online Price Advertising Prohibition at that time.
- 3.88 DMP/Rutland does not appear again in any Rogue Reports until 22 March 2011,¹⁷³ where it is listed as advertising two mobility scooters below RRP.¹⁷⁴ In the Rogue Reports of 24 March 2011,¹⁷⁵ DMP/Rutland is also listed as advertising four more scooter models below RRP.¹⁷⁶ The OFT infers from these Rogue Reports that DMD was compliant with the Below-RRP Online Price Advertising Prohibition as regards these scooter models up to these respective points. Pride continued monitoring Retailers for adherence to its Below-RRP Online Price Advertising Prohibition until January 2012. However, it is clear from the Rogue Reports that on, or around, 24 March 2011, DMP/Rutland stopped adhering to the Below-RRP Online Price Advertising Prohibition on a consistent basis in relation to six mobility scooter models. This is supported by the Rogue Reports of 25 March 2011,¹⁷⁷ 29 March 2011,¹⁷⁸ 12 April 2011,¹⁷⁹ 6 May 2011,¹⁸⁰ 17 June 2011,¹⁸¹ 15 July 2011,¹⁸² and 8 September 2011.¹⁸³
- 3.89 The Rogue Reports referred to above should be viewed in the context of the communications between Pride and DMP/Rutland regarding Pride's Below-RRP Online Price Advertising Prohibition. The OFT infers from

¹⁷² Document 2650/PR.

¹⁷³ Document 2666/PR.

¹⁷⁴ Colt Plus and Elite Traveller LX.

¹⁷⁵ Document 2668/PR.

¹⁷⁶ Colt Executive, Colt 9, Colt Deluxe, Colt XL8.

¹⁷⁷ Document 2676/PR.

¹⁷⁸ Document 2677/PR.

¹⁷⁹ Document 2683/PR.

¹⁸⁰ Document 2672/PR.

¹⁸¹ Document 2849/PR.

¹⁸² Document 2853/PR.

¹⁸³ Document 2866/PR. DMP/Rutland also appear on Rogue Reports of 13 January 2012 (Document 2868/PR) and 27 January 2012 (Document 2875/PR) in relation to three models of mobility scooters: Colt Twin, Colt Deluxe, Elite Traveller LX).

these Rogue Reports that following the various communications between Pride and DMP/Rutland evidenced above, DMP/Rutland ceased to advertise prices below the RRP online in respect of the models identified in the Rogue Reports. Where these models no longer appear in the Rogue Reports against DMP/Rutland's name, the OFT infers that DMP/Rutland was at that time complying with Pride's Below-RRP Online Price Advertising Prohibition further to Pride's requests and/or instructions.

Conclusion

3.90 The evidence set out above, when taken together, and viewed alongside the evidence examined in the 'Historical Background to the Infringements' section, demonstrates that on dates from March 2010 (at the latest) to March 2011 (at the earliest), Pride and DMP/Rutland were party to an agreement and/or concerted practice which prohibited DMP/Rutland from advertising prices below the RRP online for certain Pride mobility scooters.

3.91 The evidence demonstrates that, between these dates, DMP/Rutland agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition. Some of the evidence demonstrates that DMP/Rutland did not fully comply with Pride's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, DMP/Rutland's non-compliance in parts and/or its 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.¹⁸⁴

THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN PRIDE AND MOBILITY 4 U LIMITED ('MOBILITY 4 U')

3.92 The totality of the evidence in the OFT's possession demonstrates that Pride entered into an agreement and/or participated in a concerted practice with Mobility 4 U in respect of the Below-RRP Online Price Advertising Prohibition.

Communications between Pride and Mobility 4 U

¹⁸⁴ See Annexe A, paragraph A.36.

7 March 2011

3.93 On 7 March 2011, an employee of Mobility 4 U [name redacted] sent an email¹⁸⁵ to Pride's Managing Director [name redacted] in which she stated,

'[...] During the Roadshow I rang [Pride's Area Sales Manager name redacted] regarding the advertised price of the New ETLX on DMD Webste [sic].

We were told that it was going to be rectified.

DMD were advertising the price even lower this week end at £499.

*[Pride Area Sales Manager's name redacted] tells me that they will not be able to have any new products, well as far as I am aware the LX is one of the new products we agreed about along with the Colt Deluxe the Colt XL8 and the Executive so does that mean he cannot have any more of those because as you know that is what we agreed to at the time. **We agreed that if anyone breaks the rule of ring for best price they will not be able to buy any more.** Do you think that by not putting the price on the first page of the advert but on page two blatantly [sic] this is not advertising the price? Click for more info!.*

We have ordered a container of products from you on the basis that the LX remains un advertised [sic].

We went through this with [retailer name redacted] on the [product name redacted] now it is DMD on all the range.

We have maintained our part of the bargain like most of your dealers and are very disgruntled as this issue is being shelved. [Emphasis added]

3.94 This email, and specifically the words '*We agreed that if anyone breaks the rule of ring for best price they will not be able to buy any more*' and '*We have maintained our part of the bargain like most of your dealers*' demonstrate that Mobility 4 U agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition.

3.95 The OFT infers from the above email, and specifically the words '*We have maintained our part of the bargain like most of your dealers*', that Mobility

¹⁸⁵ Document 2651/PR.

4 U was compliant with the Below-RRP Online Price Advertising Prohibition prior to March 2011. Moreover, the OFT further infers that, by informing Pride of retailers who were not adhering to the same prohibition, Mobility 4 U was itself compliant at that time of 7 March 2011. It would not otherwise have sought to complain, in the manner in which it did, about the price advertising practices of other retailers.

22 March 2011

3.96 On 22 March 2011 an employee of Mobility 4 U Ltd [name redacted] sent an email to a Pride Area Sales Manager [name redacted].¹⁸⁶ Pride's Managing Director [name redacted] was copied into the email. The Mobility 4 U employee [name redacted] stated,

'I have taken off the prices as requested. Please note I have had them on for a week not months like many offenders'.

3.97 The OFT infers from this evidence and the surrounding circumstances that:

- Mobility 4 U had only been displaying prices below the RRP *'for a week not months'* which suggests that prior to March 2011 it was adhering to the Below-RRP Online Advertising Prohibition, and
- on or around 22 March 2011 Pride had again instructed and/or requested Mobility 4 U to remove prices that were below the RRP from the retailer's website, and
- on or around 22 March 2011 Mobility 4 U again agreed to abide by, or acquiesced in, Pride's instructions and/or requests.

3.98 Further, the email of 22 March 2011 demonstrates that on or around 22 March 2011 Mobility 4 U in fact complied with Pride's Below-RRP Online Price Advertising Prohibition.

3.99 The OFT's inferences above are supported by Mobility 4 U's response to the OFT's section 26 Notice,¹⁸⁷ in which Mobility 4 U indicated that they were asked by Pride either:

¹⁸⁶ Document 2664/PR.

¹⁸⁷ Document 3447/M4U.

- not to advertise prices below the RRP online in respect of certain mobility scooters, or
- not to advertise any price online in respect of certain mobility scooters,

but that they were '*not sure which*'. The OFT has set out in Chapter 2 above that from January 2010 Pride's Below-RRP Online Price Advertising Prohibition was in operation. There is some evidence that subsequently Pride may have introduced prohibitions on online advertising and online sales in relation to certain new scooter models,¹⁸⁸ and this may be what Mobility 4 U were referring to as potential requests not to advertise any price online in their response to the section 26 Notice. However, when this response is considered alongside the other evidence in the OFT's possession (including the contemporaneous correspondence between Pride and Mobility 4 U and the contents of Pride's Rogue Reports), the OFT considers that the communications Mobility 4 U were referring to in this instance were in fact requests and/or instructions from Pride not to advertise prices that were below the RRP, in line with Pride's Below-RRP Online Price Advertising Prohibition.

3.100 Further, in their response¹⁸⁹ to the OFT's section 26 Notice, Mobility 4 U stated that they 'did not accept to advertise as they [Pride] wished'. However, the evidence discussed in paragraphs 3.92 to 3.98 above demonstrates that Mobility 4 U had agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition and that it had complied, at least in part, with that prohibition.

Pride's Rogue Reports

3.101 The Rogue Reports for the period 25 June 2010 to 15 March 2011 do not list Mobility 4 U as advertising prices below the RRP online. The OFT infers from this, and the email from Mobility 4 U to Pride of 7 March 2011

¹⁸⁸ See, for example, Document 2876/PR, a Rogue Report of 27 January 2012, which lists retailers who are advertising the Colt Sport, Colt Pursuit and ES8 on their websites. The Rogue Report also lists retailers who were advertising the Colt Executive along with the prices they advertised. Pride's Managing Director [name redacted] states in his reply to a Pride Internal Sales Team Member's [name redacted] dated 27 January 2012, which he copied to Pride's ASMs: 'Please address all listed below as a matter of urgency, they need to be removed asap. If any of the list below can't be trusted we will need to look at our options, were they made fully aware of our request regarding the new products?'

¹⁸⁹ Document 3447/M4U.

which is referred to in paragraphs 3.93 to 3.95 above (in which Mobility 4 U stated '*We have maintained our side of the bargain*'),¹⁹⁰ that Mobility 4 U was compliant with the Below-RRP Online Price Advertising Prohibition during this period.

- 3.102 During the period 16 March 2011 to 18 March 2011¹⁹¹ Mobility 4 U was listed on the Rogue Reports as advertising 3 models under the RRP. A subsequent Rogue Report of 22 March 2011¹⁹² does not list Mobility 4 U as advertising prices below the RRP. The OFT infers from this that from 22 March 2011 Mobility 4 U again complied with Pride's Below-RRP Online Price Advertising Prohibition.
- 3.103 In the Rogue Reports of 14 April 2011¹⁹³, 4 May 2011¹⁹⁴, 20 May 2011¹⁹⁵ certain scooter models appear next to Mobility 4 U's name. The OFT infers from the addition of these scooter models to the Rogue Reports that Mobility 4 U had been compliant with the Below-RRP Online Price Advertising Prohibition up to these respective points.
- 3.104 Similarly, on 30 June 2011,¹⁹⁶ one scooter model has been added to the Rogue Report while another has been removed. The OFT infers from this that Mobility 4 U has ceased to comply with respect to the model added, but (at the same time) has started to comply in respect of the model removed.
- 3.105 These Rogue Reports should be viewed in the context of the communications between Pride and Mobility 4 U regarding Pride's Below-RRP Online Price Advertising Prohibition. The OFT infers from these Rogue Reports that following the various communications between Pride and Mobility 4 U evidenced above, Mobility 4 U ceased to advertise prices below the RRP online in respect of the models identified in the Rogue Reports. Where these models no longer appear in the Rogue Reports against Mobility 4 U's name, the OFT infers that Mobility 4 U was at that

¹⁹⁰ Document 2651/PR.

¹⁹¹ Documents 2659/PR, 2660/PR, 2661/PR. (Pride models Colt Twin, Colt XL8 and Elite Traveller).

¹⁹² Document 2666/PR.

¹⁹³ Document 2684/PR. Elite Traveller LX added.

¹⁹⁴ Document 2670/PR. Colt Twin, Colt XL8 added.

¹⁹⁵ Document 2689/PR. Colt Deluxe added.

¹⁹⁶ Document 2859/PR. Colt 9 appears and Colt Twin disappears.

time complying with Pride's Below-RRP Online Price Advertising Prohibition further to Pride's requests and/or instructions. Pride continued monitoring Retailers for adherence to its Below-RRP Online Price Advertising Prohibition until January 2012. However, it is clear from the Rogue Reports that on, or around, 30 June 2011 Mobility 4 U stopped adhering to the Below-RRP Online Price Advertising Prohibition on a consistent basis in relation to four mobility scooter models. This is supported by the Rogue Reports of 11 July 2011,¹⁹⁷ 15 July 2011,¹⁹⁸ 9 August 2011,¹⁹⁹ 12 August 2011,²⁰⁰ and 8 September 2011.²⁰¹

Conclusion

- 3.106 The evidence set out above, when taken together, and viewed alongside the evidence examined in the 'Historical Background to the Infringements' section, demonstrates that on dates from June 2010 (at the latest) to June 2011 (at the earliest), Pride and Mobility 4 U were party to an agreement and/or concerted practice which prohibited Mobility 4 U from advertising prices below the RRP online for certain Pride mobility scooters.
- 3.107 The evidence demonstrates that, between these dates, Mobility 4 U agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition. Some of the evidence demonstrates that Mobility 4 U did not fully comply with Pride'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 4 U's non-compliance in parts and/or its 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.²⁰²

THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN PRIDE AND MT MOBILITY LIMITED ('MTM')

- 3.108 The totality of the evidence in the OFT's possession demonstrates that Pride entered into an agreement and/or participated in a concerted

¹⁹⁷ Document 2858/PR. (Elite Traveller LX, Colt 9, Colt XL8 and Colt Deluxe).

¹⁹⁸ Document 2853/PR. (Elite Traveller LX, Colt 9, Colt XL8 and Colt Deluxe).

¹⁹⁹ Document 2860/PR. (Elite Traveller LX, Colt 9, Colt XL8 and Colt Deluxe).

²⁰⁰ Document 2861/PR. (Elite Traveller LX, Colt 9, Colt XL8 and Colt Deluxe).

²⁰¹ Document 2866/PR. (Elite Traveller LX, Colt 9, Colt XL8 and Colt Deluxe).

²⁰² See Annexe A, paragraph A.36.

practice with MTM in respect of the Below-RRP Online Price Advertising Prohibition.

Communications between Pride and MTM

18 February 2011

- 3.109 On 18 February 2011²⁰³ a Pride Internal Sales Team Member [name redacted] sent an email to the Pride ASMs and to Pride's Managing Director [name redacted] with that day's Rogue Report. She stated in the covering email:

'Please find attached the rogue report spreadsheet.'

Can you call your dealers as soon as possible, bearing in mind it is road show next week and you will all be attending.'

- 3.110 MTM was listed as one of the retailers in the Rogue Report.²⁰⁴ The OFT infers from this email and the surrounding circumstances that on or around 18 February 2011 Pride requested and/or instructed MTM not to advertise prices below the RRP online.

15 – 17 March 2011

- 3.111 On 15 March 2011²⁰⁵ a Pride Internal Sales Team Member [name redacted] sent an email to Pride's Managing Director [name redacted], copying in the ASMs, in which she identified that MTM was advertising the Elite Traveller LX below the RRP. In the covering email the Pride Internal Sales Team Member [name redacted] instructed the ASMs as follows:

'All of these dealers need to be contacted this week and their prices changed.'

- 3.112 The OFT infers from this email that on or around 15 March 2011 Pride requested and/or instructed MTM not to advertise prices below the RRP online.

²⁰³ Document 2650/PR.

²⁰⁴ Ibid. (Scooter model Elite Traveller LX).

²⁰⁵ Document 2657/PR.

3.113 On 17 March 2011,²⁰⁶ a Pride Internal Sales Team Member [name redacted] sent an email to Pride's Managing Director [name redacted] and the Pride ASMs and stated:

'MT Mobility...have removed their pricing for the Elite Traveller LX and this now states call for best price.'

3.114 The OFT infers from the email of 17 March 2011 that between 15 and 17 March 2011 MTM agreed to abide by, and or acquiesced to Pride's Below-RRP Online Price Advertising Prohibition and that it complied with that prohibition.

3.115 In its response to the OFT's section 26 Notice,²⁰⁷ MTM stated that it was, in Spring 2010:

'...Told to remove prices for the new range [of mobility scooters] communicated by [Pride Area Sales Manager's name redacted]'.

3.116 This supports the OFT's inference that Pride had requested and/or instructed MTM not to advertise prices that were below the RRP, although the OFT notes that Spring 2010 predates the documentary evidence cited above. The OFT also notes that MTM states that it was *'told to remove prices'*. The OFT has set out in Chapter 2 above that from January 2010 Pride's Below-RRP Online Price Advertising Prohibition was in operation. There is some evidence that subsequently Pride may have introduced prohibitions on online advertising and online sales in relation to certain new scooter models,²⁰⁸ and this may be what MTM is referring to as requests to 'remove prices' in their response to the section 26 Notice. However, without prejudice to the suggestion that Pride introduced such new prohibitions, the OFT considers that the better interpretation is that Pride had in fact requested and/or instructed MTM to 'remove' any advertised prices that were below the RRP in line with its policy at the time. Further, the OFT considers that removing prices from a website is clearly one way of complying with the Below-RRP Online Price Advertising Prohibition and that MTM may have understood, or elected to

²⁰⁶ Document 2660/PR.

²⁰⁷ Document 3504/MTM.

²⁰⁸ See footnote 189.

implement, Pride's requests and/or instructions regarding the Below-RRP Online Price Advertising Prohibition in this way.

Pride's Rogue Reports

- 3.117 The Rogue Report²⁰⁹ of 15 March 2011 lists MTM as advertising the Elite Traveller LX below the RRP. This Rogue Report was accompanied by a request from a Pride Internal Sales Team Member [name redacted] that the ASMs contact their dealers. The Rogue Report of 17 March 2011²¹⁰ does not feature MT Mobility and a Pride Internal Sales Team Member's [name redacted] covering email states that '*MT Mobility...have removed their pricing for the Elite Traveller LX and this now states call for best price*'. The OFT infers from this evidence, taken together, that MTM was complying with Pride's Below RRP Online Price Advertising Prohibition as of 17 March 2011.
- 3.118 MTM did not appear on the Rogue Reports again until 10 June 2011.²¹¹ Pride continued monitoring Retailers for adherence to its Below-RRP Online Price Advertising Prohibition until January 2012. However, it is clear from the Rogue Reports that on, or around, 10 June 2011, MTM stopped adhering to the Below-RRP Online Price Advertising Prohibition on a consistent basis in relation to seven mobility scooter models. This is supported by the Rogue Reports of 17 June 2011,²¹² 24 June 2011,²¹³ 30 June 2011,²¹⁴ 11 July 2011,²¹⁵ 9 August 2011²¹⁶ and 8 September

²⁰⁹ Document 2657/PR.

²¹⁰ Document 2660/PR.

²¹¹ Document 2847/PR. (Seven mobility scooter models are listed in this Rogue Report: Colt 9, Colt Plus, Colt Twin, Colt Deluxe, Colt XL8, Colt Executive, Elite Traveller LX).

²¹² Document 2849/PR. (Colt 9, Colt Plus, Colt Twin, Colt Deluxe, Colt XL8, Colt Executive, Elite Traveller LX).

²¹³ Document 2850/PR. (Colt 9, Colt Plus, Colt Twin, Colt Deluxe, Colt XL8, Colt Executive, Elite Traveller LX).

²¹⁴ Document 2859/PR. (Colt 9, Colt Plus, Colt Twin, Colt Deluxe, Colt XL8, Colt Executive, Elite Traveller LX).

²¹⁵ Document 2858/PR. (Colt 9, Colt Plus, Colt Twin, Colt Deluxe, Colt XL8, Colt Executive, Elite Traveller LX).

²¹⁶ Document 2860/PR (Colt 9, Colt Plus, Colt Twin, Colt Deluxe, Colt XL8, Colt Executive, Elite Traveller LX).

2011.²¹⁷ The OFT infers from this and the surrounding circumstances that between 17 March 2011 and 10 June 2011 MTM was complying with Pride's Below-RRP Online Price Advertising Prohibition.

- 3.119 These Rogue Reports should be viewed in the context of the communications between Pride and MTM regarding Pride's Below-RRP Online Price Advertising Prohibition. The OFT infers from these Rogue Reports that following the communication between Pride and MTM set out above, MTM ceased to advertise prices below the RRP online in respect of the model identified in the Rogue Reports. Where this model no longer appeared in the Rogue Reports against MTM's name, the OFT infers that MTM was – at that time – complying with Pride's Below-RRP Online Price Advertising Prohibition further to Pride's requests and/or instructions.

Conclusion

- 3.120 The evidence set out above, when taken together, and viewed alongside the evidence examined in the 'Historical Background to the Infringements' section, demonstrates that on dates from March 2011(at the latest) to June 2011 (at the earliest), Pride and MTM were party to an agreement and/or concerted practice which prohibited MTM from advertising prices below the RRP online for certain Pride mobility scooters.
- 3.121 The evidence demonstrates that, between these dates, MTM agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition. Some of the evidence demonstrates that MTM did not fully comply with Pride'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 its 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.²¹⁸

²¹⁷ Document 2866/PR. (Colt 9, Colt Plus, Colt Twin, Colt Deluxe, Colt XL8, Colt Executive, Elite Traveller LX). MTM also appeared on Rogue Reports of 13 January 2012 (Document 2868/PR) and 27 January 2012 (Document 2876/PR) in relation to the five models of mobility scooters: Colt 9, Colt Plus, Colt Twin, Colt Deluxe, Elite Traveller LX.

²¹⁸ See Annexe A, paragraph A.36.

THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN PRIDE AND ROBERT GREGG LIMITED ('ROBERT GREGG')

Summary

- 3.122 The totality of the evidence in the OFT's possession demonstrates that Pride entered into an agreement and/or participated in a concerted practice with Robert Gregg in respect of the Below-RRP Online Price Advertising Prohibition.

Communications between Pride and Robert Gregg

13 February 2010

- 3.123 On 13 February 2010, an employee of Robert Gregg²¹⁹ [name redacted] sent an email²²⁰ with a subject heading of '*Web Site cheap prices*' to a Pride Area Sales Manager [name redacted] in which he stated the following:

'Following our discussion the other week, we have removed the Colt range of scooters from our website whilst we decide how to advertise our pricing [sic]

However I'm very disappointed to still see a huge number of other websites not following Pride's policy on price advertising.

I trust these dealers will not be supplied with your products in the future.'

- 3.124 The OFT infers the following from this email:
- a. that by 13 February 2010, a Pride Area Sales Manager [name redacted] had requested and/or instructed Robert Gregg to follow Pride's Below-RRP Online Price Advertising Prohibition ('*Following our discussion the other week*'),
 - b. that by informing Pride that it had '*removed the Colt range of scooters from our website*,' Robert Gregg was confirming to Pride that it had agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition, as this was one way of complying with the Below-RRP Online Price Advertising Prohibition, and the context of

²¹⁹ Mobility Warehouse is a trading name of Robert Gregg. See Annexe C ('Attribution of Liability').

²²⁰ Document 0336/PR.

Robert Gregg's complaint (titled '*Web Site cheap prices*') demonstrates that by 13 February 2010 they understood Pride's instructions and/or requests to relate to the online advertising of below-RRP prices.

- c. that the agreement and/or concerted practice was in operation by 13 February 2010 (at the latest), as Robert Gregg would otherwise not have brought to Pride's attention the fact that other retailers were not following Pride's Below-RRP Online Advertising Prohibition,
- d. that Robert Gregg had yet to determine how, in the long term, it would continue to adhere to Pride's Below-RRP Online Price Advertising Prohibition ('*we have removed the Colt range of scooters from our website whilst we decide how to advertise our pricing*'),²²¹
- e. that Robert Gregg was in any event at that time complying with Pride's policy as it was no longer advertising prices below the RRP online ('*we have removed the Colt range of scooters from our website whilst we decide how to advertise our pricing*').

Pride's Rogue Reports

- 3.125 Robert Gregg was not included in any Rogue Reports until 13 January 2012. There is some evidence that, around this time, Pride may have introduced prohibitions on online advertising and online sales in relation to certain new scooter models.²²² The Rogue Report of 13 January 2012 identified that Robert Gregg had been displaying the image of a Colt Pursuit on its website since 4 November 2011, which the OFT infers was contrary to Pride's policy at that time.²²³ However, the Rogue Report of 13 January 2012 did not identify that Robert Gregg had been advertising prices below the RRP contrary to Pride's Below-RRP Online Price Advertising Prohibition.
- 3.126 The OFT infers from this that Pride was (and had been) monitoring Robert Gregg's online sales and advertising (since November 2011 at the latest) including for compliance with the Below-RRP Online Price Advertising

²²¹ Robert Gregg (like other Retailers) could adhere to Pride's Below-RRP Online Price Advertising Prohibition in a number of ways. For example, it could elect to remove listings of scooter models from its website on a permanent basis. Alternatively, it could list the scooters and advertised prices at the RRP, or it could advertise no prices but substitute the words 'call for best price' or similar.

²²² See paragraph 3.31.

²²³ Document 2868/PR.

Prohibition. Further, the OFT infers that Robert Gregg had in fact been complying with Pride's Below-RRP Online Price Advertising Prohibition since it had not been identified as being non-compliant in any Rogue Reports. This inference should be viewed in the context of the evidence examined in paragraphs 3.126 to 3.127 above which sets out the communications between Pride and Robert Gregg regarding Pride's Below-RRP Online Price Advertising Prohibition, alongside evidence that Robert Gregg sold the full range of Pride mobility scooters throughout 2010-2012, the period of the Infringements.²²⁴

Conclusion

- 3.127 The evidence set out above, when taken together, and viewed alongside the evidence examined in the 'Historical Background to the Infringements' section, demonstrates that on dates from February 2010 (at the latest) to January 2012 (at the earliest), Pride and Robert Gregg were party to an agreement and/or concerted practice which prohibited Robert Gregg from advertising prices below the RRP online for certain Pride mobility scooters.
- 3.128 The evidence demonstrates that, between these dates, Robert Gregg agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition. The evidence demonstrates that Robert Gregg complied fully with Pride's requests and/or instructions throughout the period in which Pride monitored compliance with its Below-RRP Online Price Advertising Prohibition through its Rogue Reports. However, even if this were not the case, and were Robert Gregg to have 'cheated' on the agreement and/or concerted practice at certain times, this would not preclude the finding that an agreement and/or concerted practice existed.²²⁵

THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN PRIDE AND HARTMOND LIMITED ('HARTMOND')

- 3.129 The totality of the evidence available to the OFT demonstrates that Pride entered into an agreement and/or participated in a concerted practice with Hartmond in respect of the Below-RRP Online Price Advertising Prohibition.

²²⁴ Document 2845/MWH.

²²⁵ See Annexe A, paragraph A.36.

Communications between Pride and Hartmond

12-13 December 2010

- 3.130 On 12 December 2010 a Pride Area Sales Manager [name redacted] sent an email to Value Mobility²²⁶ requesting the following:

'Do me a favour please and take the price off the Value Mobility Website [sic] on the Colt XL8 50 amp and Colt XL8 70amp.

You have them at £1495 for the Colt XL8 50amp and £1645 for the Colt XL8 70 amp.

*Can you please put them back to call for best price or VALUE SPECIAL [sic].'*²²⁷

- 3.131 This email demonstrates that by 12 December 2010 Pride had requested and/or instructed Hartmond not to advertise online prices below the RRP in respect of the Colt XL8 50 amp and the Colt XL8 70amp, but rather to advertise those mobility scooters alongside the words '*call for best price*' or '*VALUE SPECIAL*'. The OFT considers that removing prices from a website is clearly one way of complying with the Below-RRP Online Price Advertising Prohibition and that Hartmond may have understood, or elected to implement, Pride's requests and/or instructions regarding the Below-RRP Online Price Advertising Prohibition in this way.²²⁸

- 3.132 On 13 December 2010, an employee of Hartmond [name redacted] replied as follows:

'Will do, the site has changed appearance so the design guys must have missed this – apologies

²²⁶ Value Mobility is a trading name of Hartmond. See Annexe C ('Attribution of Liability').

²²⁷ Document 2645/PR.

²²⁸ Hartmond (like other Retailers) could adhere to Pride's Below-RRP Online Price Advertising Prohibition in a number of ways. For example, it could have advertised prices at the RRP, either with or without the words '*call for best price*' or similar. Alternatively, it could have advertised no prices online and just have displayed the words '*call for best price*' or similar. The Rogue Reports (from June 2010 to January 2012) demonstrate that Pride's monitoring during that period was concerned with online below-RRP price advertising (see paragraph 3.26 for further details on Rogue Reports).

*I will have [sic] sorted by 9.30'*²²⁹

3.133 Hartmond's email of 13 December 2010 demonstrates that it agreed to abide by, or acquiesced in, Pride's requests and/or instructions ('*Will do [...] I will have [sic] sorted by 9.30'*).

3.134 On 13 December 2010, a Hartmond employee [name redacted] then forwarded on a Pride Area Sales Manager's [name redacted] email of 12 December 2010 to another Hartmond²³⁰ employee [name redacted]. In his cover email to the Hartmond employee [name redacted], the Hartmond employee [name redacted] wrote the following,

'Please can you put these back to value specials. [sic]'

3.135 The OFT infers from this email that (subsequent to this email having been sent) Hartmond would have complied with Pride's requests and/or instructions not to advertise the price of the above-mentioned mobility scooters online and that it would have advertised the words 'value special' alongside the relevant product images instead.

3.136 On 8 June 2011, an employee of Hartmond [name redacted] sent an internal email to another employee of Hartmond [name redacted] and the 'Admin' inbox. In his email, entitled 'Pride pricing and our price match guarantee', the Hartmond employee [name redacted] forwarded a link to the website of the retailer Discount Mobility Direct, and stated the following:

'[...] These lots [sic] are annoying; they must have got a shipment of Pride scooters that they are knocking out at very low prices.'

[There is then a list of the prices of DMD and Hartmond for the following mobility scooters: Celebrity X Sport, Colt Plus, Go Go LX, Traveller 4, Traveller 3, Traveller Plus 3, Traveller Plus 4]

Can we check that we have the right trade price from pride [sic] on these? I don't think we have updated it in quite some time.'

²²⁹ Document 2645/PR.

²³⁰ Document 0166/HVM.

Also Pride make us hide our price on the Colt Plus and the Go Go LX, but let DMD display lower ones, might be worth having a go at them next time they are in.

*If we do have the right trade prices we have a problem as honouring our Price Match Guarantee will have us effectively losing money on these scooters. Unfortunately they are also offering on site warranty repairs and free insurance so we can't get out of it that way. [...]*²³¹

3.137 The OFT infers from the above that Hartmond was at that time still adhering to Pride's Below-RRP Online Price Advertising Prohibition and that the agreement and/or concerted practice between Pride and Hartmond was still in operation at that time; Hartmond would otherwise not have considered 'having a go at them [Pride]' for making Hartmond 'hide our price on the Colt Plus and the Go Go LX, but let DMD display lower ones'.

3.138 The OFT's inference is further supported by evidence provided by an employee of Hartmond [name redacted] in an interview with the OFT on 6 August 2012. In that interview, the Hartmond employee [name redacted] confirmed that he had received requests from Pride:

Hartmond employee [name redacted]: [...] *They've [Pride] always been quite happy for us to have their products there and sell them for what we want, but just don't advertise it. Don't advertise the price.*

OFT: *So the only restriction Pride has put on you as far as you're aware in terms of internet sales is the price you can display?*

Hartmond employee [name redacted]: *Yeah, "Can you take the prices off," basically and just ask for ... you know, put a ... 'ask for best price' or 'value special' or anything like that. Just don't have it in pound note terms on your screen.*²³²

3.139 Earlier on in the interview the Hartmond employee [name redacted] stated the following:

²³¹ Document 0167/HVM.

²³² Document 3502/WS (Hartmond employee [name redacted] Interview Transcript, CD 2 of 2, page 4).

Hartmond employee [name redacted]: [...] *there are emails there that say, “can you drop the price on this?” Or, “Can you put it to best...request a price?”*

OFT: *Sorry, these are your emails?*

Hartmond employee [name redacted]: *Yeah, and we’ve sort of gone along with it because it’s not been a major issue to us in the past.*²³³

- 3.140 The OFT’s inferences are further supported by the response of Hartmond dated 2 May 2012 to the OFT’s section 26 Notice dated 25 April 2012.²³⁴ In that response, Hartmond provided the OFT with documents which demonstrate that Hartmond complied with Pride’s Below-RRP Online Price Advertising Prohibition: it provided the OFT with screenshots from its website,²³⁵ which show that Hartmond did not advertise prices online in relation to the Colt XL8, the Colt Nine and the Go Go Elite Traveller LX but rather displayed the words ‘*£Value Special*’ instead against the relevant product image.²³⁶ Beneath the term ‘*£Value Special*’, the following message was displayed online:

‘Our Price is too low to publish

*We are not allowed to publish our prices [sic] for our **best price** fill in your email address and we will send it to you **within minutes** any time of day.’*

- 3.141 In its response to the OFT’s section 26 Notice, Hartmond explained²³⁷ the wording on their website in the following way:

‘This wording is one that we adopted when we were asked by manufacturers to not show prices in an effort to keep enough interest in the product.’

²³³ Document 3501/WS (Hartmond employee [name redacted] Interview Transcript, CD 1 of 2, page 13).

²³⁴ Document 0164/HVM.

²³⁵ The Hartmond website is named Value Mobility, which is a trading name of Hartmond.

²³⁶ Documents 0168/HVM and 0169/HVM.

²³⁷ Document 0164/HVM.

Pride's Rogue Reports

3.142 On 29 March 2011 a Pride Internal Sales Team Member [name redacted] sent a Rogue Report to Pride's Managing Director [name redacted] copied to the Pride ASMs, in which she identified Hartmond as advertising the Colt Twin at a price below the RRP.²³⁸ In her cover email, she stated the following:

'[Pride Area Sales Manager's name redacted]

*Mobility Partnership*²³⁹ and [retailer name redacted]

Spoke to [Pride Area Sales Manager's name redacted] and he has already called Mobility Partnership this morning but will ring them tomorrow if this has still not been changed. Regarding [retailer name redacted] as this is an outside website company [Pride Area Sales Manager's name redacted] has said he has spoken to you and will leave this till the end of the week and if not been changed by then he will call them again and request a time line. [Pride Area Sales Manager's name redacted] is more than happy to check the website Friday morning before he leaves for his appointments and call him if necessary.'

3.143 On 30 March 2011, a Pride Area Sales Manager [name redacted] sent an email to Pride's Managing Director [name redacted] attaching the updated Rogue Reports.²⁴⁰ The covering email notes that '*Value Mobility have removed Colt Twin [sic] on Google Shopping*'.

3.144 The OFT infers from these emails that Pride requested and/or instructed Hartmond not to advertise prices below the RRP online and that, following that request and/or instruction, Hartmond ceased to advertise prices below the RRP online in respect of the Colt Twin.

3.145 Hartmond do not appear on any Rogue Reports (including under the trading names Value Mobility and Mobility Partnership) after 30 March 2011, up to January 2012 (after which point the Rogue Reports in the OFT's possession cease to monitor compliance with the Below-RRP Online Price Advertising Prohibition). The OFT infers from this and the surrounding circumstances (including the communications between Pride

²³⁸ Document 2677/PR.

²³⁹ Mobility Partnership is a trading name of Hartmond. See Annexe C ('Attribution of Liability').

²⁴⁰ Document 2681/PR.

and Hartmond evidenced above) that Hartmond was complying with Pride's Below-RRP Online Price Advertising Prohibition further to Pride's requests and/or instructions after this point and up to January 2012

Conclusion

3.146 The evidence set out above, when taken together, and viewed alongside the evidence examined in the 'Historical Background to the Infringements' section, clearly demonstrates that on dates from December 2010 (at the latest) to January 2012 (at the earliest), Pride and Hartmond were party to an agreement and/or concerted practice which prohibited Hartmond from advertising prices below the RRP online for certain Pride mobility scooters.

3.147 The evidence demonstrates that, between these dates, Hartmond agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition. Some of the evidence demonstrates that Hartmond did not fully comply with Pride's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, Hartmond's non-compliance in parts and/or its 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.²⁴¹

THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN PRIDE AND MILTON KEYNES MOBILITY ('MKM')

3.148 The totality of the evidence in the OFT's possession demonstrates that Pride entered into an agreement and/or participated in a concerted practice with MKM in respect of the Below-RRP Online Price Advertising Prohibition.

Communications between Pride and MKM

28 May 2010

3.149 On 28 May 2010, the Director of MKM²⁴² [name redacted], sent an email to a Pride Area Sales Manager [name redacted] stating that:

²⁴¹ See Annexe A, paragraph A.36.

²⁴² MKM also used the trading names 'Carvercare and Mobility' and 'Carver Care'. See Annexe C ('Attribution of Liability').

*'[Carver Care employee's name redacted] contacted us with regard to taking prices off our website for your products. We will comply with this but would like to respectfully point out that our Northampton competitors www.morethanmobility.co.uk and www.mobilityequipment.co.uk are advertising even deeper discounted products than we are and we would like to see a level playing field.'*²⁴³

- 3.150 The OFT infers from this email that, on or before 28 May 2010, Pride requested and/or instructed MKM not to advertise any prices below the RRP online in relation to certain Pride mobility scooters. Moreover, this email demonstrates that MKM agreed to abide by, or acquiesced in, Pride's request and/or instruction not to advertise prices below the RRP online.
- 3.151 The OFT notes that MKM refers to Pride's request and/or instruction as being *'with regard to taking prices off our website'*. The OFT has set out in Chapter 2 above that from January 2010 Pride's Below-RRP Online Price Advertising Prohibition was in operation. There is some evidence that Pride may subsequently have introduced prohibitions on online advertising and online sales in relation to certain new scooter models,²⁴⁴ but this postdates the email evidence examined here. The OFT understands MKM's words to mean that Pride requested/instructed MKM to take action to remove from its website prices that were not compliant with Pride's Below-RRP Online Price Advertising Prohibition, rather than to take action to remove website prices generally.²⁴⁵ This view is further supported by the evidence set out below.

²⁴³ Document 0433/PR.

²⁴⁴ See footnote 189.

²⁴⁵ MKM (like other Retailers) could adhere to Pride's Below-RRP Online Price Advertising Prohibition in a number of ways. For example, it could have advertised prices at the RRP, either with or without the words 'call for best price' or similar. Alternatively, it could have advertised no prices online and just have displayed the words 'call for best price' or similar. The Rogue Reports (from June 2010 to January 2012) demonstrate that Pride's monitoring during that period was concerned with online below-RRP price advertising (see paragraph 3.26 for further details on Rogue Reports).

15 – 24 June 2010

3.152 The OFT's has also had sight of a chain of emails between 15 June 2010 and 24 June 2010,²⁴⁶ which included emails from two Directors of MKM [names redacted] and two Pride Area Sales Managers [names redacted].

3.153 On 15 June 2010 a Director of MKM [name redacted] sent the following email to the Pride Area Sales Managers [names redacted]:

'Do you know anything about [retailer website redacted]? They are the website of [retailer name redacted] and show Pride products with their prices visible. Has anyone asked them to remove the prices? I think [MKM Director's name redacted] informed you of <http://www.morethanmobility.com> based in Northampton which also has prices of Pride products visible. It is hard to compete with people who disregard the request to remove prices - can you do anything about these?'²⁴⁷

3.154 The OFT infers from this email and specifically from the words '*[i]t is hard to compete with people who disregard the request to remove prices*' that Pride had requested and/or instructed MKM not to advertise any prices below the RRP online, and to remove any pricing below the RRP from Carver Care's website, in relation to certain Pride mobility scooters.

3.155 Moreover, the OFT infers from this email and the surrounding circumstances that MKM was, at the time of the email, complying with Pride's Below-RRP Online Price Advertising Prohibition and that the agreement and/or concerted practice was still in operation at that time; MKM would otherwise not have informed Pride of two retailers who should be '*asked [...] to remove the prices*' as it was '*hard [for MKM] to compete with people who disregard the request to remove prices*'.

3.156 On 21 June 2010²⁴⁸ a Director of MKM [name redacted] emailed a Pride Area Sales Manager [name redacted] and stated the following in relation to the retailer More Than Mobility,

²⁴⁶ Document 2622/PR.

²⁴⁷ Document 2622/PR.

²⁴⁸ Document 2622/PR.

'[...] we feel it only fair that if you ask us to take our prices down, they do it as well.'

- 3.157 The OFT infers from this email that Pride had previously requested MKM not to advertise prices below the RRP online in respect of certain Pride mobility scooters and that MKM had agreed to, or acquiesced in, that request. The OFT considers that removing prices from a website is clearly one way of complying with the Below-RRP Online Price Advertising Prohibition and that MKM may have understood, or elected to implement, Pride's requests and/or instructions regarding the Below-RRP Online Price Advertising Prohibition in this way.
- 3.158 Moreover, the OFT infers from this email that MKM was, at the time of the email, complying with Pride's Below-RRP Online Price Advertising Prohibition and that the agreement and/or concerted practice was still in operation at that time; MKM would otherwise not have requested Pride that they contact MT Mobility in order to bring them in line with the Below-RRP Online Price Advertising Prohibition.
- 3.159 Although MKM's email evidence above refers to general requests/instructions from Pride to 'remove prices' or 'take [...] prices down', the OFT considers that Pride's requests/instructions to retailers, at that time, would only have been to remove prices which were non-compliant with its Below-RRP Online Price Advertising Prohibition. The OFT's inferences in this regard are supported by Pride's own internal understanding of the nature of the requests and/or instructions issued to MKM and other retailers, as seen from the evidence set out below.
- 3.160 In following up on MKM's email of 15 June 2010 (which concerned the online prices of [retailer name redacted]), a Pride Area Sales Manager [name redacted] sent an email to Pride's Internal Sales Manager [name redacted], in which he stated:
- '[retailer name redacted] of [city redacted] is [Pride's Area Sales Manager's name redacted] they do not appear to have any of the colt range on below RRP'.²⁴⁹*
- 3.161 Pride's Internal Sales Manager [name redacted] responded to that email on the same day as follows:

²⁴⁹ Document 2623/PR.

*[...] I will ask [Pride's Area Sales Manager's name redacted] to speak to them but the only model I can do anything about is the Colt 9 which has a price of £1500.00*²⁵⁰

3.162 These internal Pride emails demonstrate that Pride's own understanding of the requests and/or instructions it gave to its Retailers at this time did not seek to prevent the Retailers from displaying prices online in general, but rather sought to prevent Retailers from advertising below-RRP prices online. This is why it is vital for Pride to assess, in its monitoring of Retailers' compliance with its requests/instructions, whether a Retailer is pricing below RRP ('...they do not appear to have any of the colt range on below RRP'). Pride also sees non-compliance with its requests/instructions in these precise terms ('the only model I can do anything about is the Colt 9 which has a price of £1500.00').

3.163 The OFT infers from the above evidence, including the contemporaneous internal documents of Pride, that Pride requested/instructed MKM not to advertise prices below the RRP online, that MKM agreed to abide by, or acquiesced in, these requests/instructions, and that MKM in fact complied with these requests/instructions by removing any prices below the RRP from its website.

3.164 The OFT's inferences above are supported by MKM's responses to the OFT's section 26 Notice.²⁵¹ In that response, MKM confirmed that it was requested and/or instructed by Pride not to advertise prices below the RRP online in respect of certain mobility scooters supplied by Pride, and that MKM complied with those requests/instructions:

'We have not always complied because we did not wish to be at a disadvantage to competitors [sic]. If we had a Pride special offer in the shops, we wanted to advertise this on the net. However when Pride became persistent and threatening, we did try to comply.'

Pride's Rogue Reports

3.165 On 25 June 2010 a Pride Internal Sales Team Member [name redacted] sent an email to a Pride Area Sales Manager [name redacted] attaching

²⁵⁰ Ibid.

²⁵¹ Document 3372/Carver.

that day's Rogue Report.²⁵² The Rogue Report identified that MKM was advertising online four Pride mobility scooter models²⁵³ below the RRP.

- 3.166 On 2 July 2010 the Pride Internal Sales Team Member [name redacted] again sent the Pride Area Sales Manager [name redacted] that day's Rogue Report.²⁵⁴ The Rogue Report identified that MKM was still advertising online four Pride mobility scooter models below the RRP. The Pride Internal Sales Team Member [name redacted] stated in this email to the Pride Area Sales Manager [name redacted]:

*'Below is the list of your dealers [the list included MKM] that are trading under the RRP for the Colt Range most of which are exactly the same as last week. **If you could get in contact with these dealers as soon as possible.**'* [Emphasis added]

- 3.167 The OFT infers from this email and the surrounding circumstances that on around 2 July 2010 Pride would have contacted MKM and requested and/or instructed it not to advertise prices below the RRP online.
- 3.168 On 9 July 2010 the Pride Internal Sales Team Member [name redacted] sent the Pride Area Sales Manager [name redacted] another Rogue Report which identified that MKM was still advertising four Pride mobility scooter models online below the RRP.²⁵⁵
- 3.169 On 26 August 2010 the Pride Internal Sales Team Member [name redacted] sent the Pride Area Sales Manager [name redacted] a revised Rogue Report which identified that MKM was no longer advertising online prices below the RRP in relation to mobility scooters supplied by Pride.²⁵⁶ The OFT infers from this that MKM was at that time fully complying with Pride's Below-RRP Online Price Advertising Prohibition, following requests and/or instructions by Pride, on around 2 July 2010, not to advertise prices below the RRP online.
- 3.170 MKM does not appear on any subsequent Rogue Reports by which Pride monitored compliance with its Below-RRP Online Price Advertising

²⁵² Document 2627/PR.

²⁵³ Colt 9, Colt Deluxe, Colt XL8 and Colt Executive.

²⁵⁴ Document 2624/PR.

²⁵⁵ Document 2629/PR.

²⁵⁶ Document 2636/PR.

Prohibition. These Rogue Reports continued until 27 January 2012. There is a reference to MKM in a Rogue Report of 10 February 2012²⁵⁷ concerning the advertising of new Pride products online, from which the OFT infers that Pride had continued to monitor the internet activities of MKM and that it had not identified that MKM had been advertising prices online contrary to Pride's Below-RRP Online Price Advertising Prohibition.

- 3.171 These Rogue Reports should be viewed in the context of the communications between Pride and MKM regarding Pride's Below-RRP Online Price Advertising Prohibition. The OFT infers from these Rogue Reports and the surrounding circumstances that following the various communications between Pride and MKM evidenced above, Carver Care ceased to advertise prices below the RRP online in respect of the models identified in the Rogue Reports. Where these models no longer appear in the Rogue Reports against MKM's name, the OFT infers that MKM was – at that time – complying with Pride's Below-RRP Online Price Advertising Prohibition further to Pride's requests and/or instructions.

Conclusion

- 3.172 The evidence set out above, when taken together, and viewed alongside the evidence examined in the 'Historical Background to the Infringements' section, demonstrates that on dates from May 2010 (at the latest) to January 2012 (at the earliest), Pride and MKM were party to an agreement and/or concerted practice which prohibited MKM from advertising prices below the RRP online for certain Pride mobility scooters.
- 3.173 The evidence demonstrates that, between these dates, MKM agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition. Some of the evidence demonstrates that MKM did not fully comply with Pride's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, MKM's non-compliance in parts and/or its 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.²⁵⁸

²⁵⁷ Document 2888/PR.

²⁵⁸ See Annexe A, paragraph A.36.

THE AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN PRIDE AND BETTER MOBILITY LIMITED ('BETTER MOBILITY')

- 3.174 The totality of the evidence available to the OFT demonstrates that Pride entered into an agreement and/or participated in a concerted practice with Better Mobility in respect of the Below-RRP Online Price Advertising Prohibition.

Communications between Pride and Better Mobility

May 2011

- 3.175 On 12 May 2011, the Managing Director of Better Mobility [name redacted], sent an email to a Pride Area Sales Manager [name redacted] as follows:²⁵⁹

'We've been "called" on selling a Pride scooter recently for £100 under the RRP (I hadn't realised and changed it immediately) but why is this allowed? [four online scooter listings are then given]'

- 3.176 The OFT infers from this email that by 12 May 2011 Pride had requested and/or instructed Better Mobility not to advertise online prices below the RRP in respect of certain Pride mobility scooters. The OFT also infers from the above email that the Better Mobility's Managing Director [name redacted] amended the advertised price '*immediately*' so as to comply with Pride's Below-RRP Online Price Advertising Prohibition, and that by informing Pride that she had taken such action, Better Mobility agreed to abide by, and or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition.
- 3.177 In its written representations in response to the OFT's Statement of Objections,²⁶⁰ Better Mobility submitted that although it did '*change [its] online price very briefly*', it then changed its online price back to its previous level '*within an hour of the initial phone call*' (which the OFT infers was the same phone call referred to in the above email).²⁶¹ The OFT notes that Better Mobility accepts that it changed its online price following Pride's request and that it communicated its acceptance to

²⁵⁹ Document 2843/BM.

²⁶⁰ Submitted on 6 November 2013.

²⁶¹ The OFT infers also that this is the same phone call referred to in Better Mobility's response to the OFT's section 26 Notice. See paragraph 3.181 below.

Pride, which is consistent with the email evidence cited above. This evidence supports the OFT's finding of an agreement and/or concerted practice between Pride and Better Mobility. However, there is no evidence in the OFT's possession that Better Mobility communicated its withdrawal from the agreement, or its intention to withdraw from the agreement, to Pride.²⁶² Indeed, the email to Pride's Area Sales Manager [name redacted] on the evening of 12 May 2011 is entirely consistent with the OFT's finding of consensus: particularly Better Mobility's Managing Director's [name redacted] reference that she '*hadn't realised*' (that a Pride scooter was being advertised below-RRP on Better Mobility's website) and her confirmation that the price had been changed '*immediately*' following Pride's call. Better Mobility's Managing Director [name redacted] makes no reference in this email to Better Mobility having, earlier that day, terminated the agreement and restored its original online price.

February 2012

- 3.178 On 7 February 2012, Better Mobility's Managing Director [name redacted] sent an email to a Pride Area Sales Manager [name redacted] entitled '*ratting out*'. Better Mobility's Managing Director [name redacted] wrote the following:²⁶³

'you asked me to "rat out" any online retailers who are bastardizing [sic] prices

The Colt Nine RRP £2650

Here's a prime example - selling at £795

[retailer website address redacted]

OUR website - at RRP

http://sales.bettermobility.co.uk/catalog/product.php?CI_ID=452&Item='Pride%20Colt%20Nine%20Scooter'

²⁶² Better Mobility's response to the OFT's section 26 Notice, its email communications with Pride dated 12 May 2011 and 7 February 2012, together with Pride's Rogue Reports, support the OFT's finding that Better Mobility were party to the agreement and/or concerted practice from May 2011 (at the latest) to February 2012 (at the earliest), albeit Better Mobility may have 'cheated' on the agreement and/or concerted practice at certain times.

²⁶³ Document 2886/PR.

- 3.179 This OFT infers from this email that Better Mobility was, at that time complying with Pride's Below-RRP Online Price Advertising Prohibition and that the agreement and/or concerted practice between Pride and Better Mobility was still in operation at that time. The OFT further infers from that Better Mobility was actively monitoring other retailers' websites to monitor whether its competitors were complying with Pride's Below-RRP Online Price Advertising Prohibition and was informing Pride of any non-compliance.
- 3.180 In its representations in response to the OFT's Statement of Objections, Better Mobility submitted that this email of 7 February 2012 was sent to Pride as a *'flippant response to [Pride's Area Sales Manager's name redacted] insistence [...] that ALL Pride dealers would be made to sell at RRP'* and *'was sent in frustration as 'proof' that other dealers were not being made to advertise at RRP, and hence that Pride could not force [Better Mobility] to'*. As regards these representations, the OFT notes that, in this email, Better Mobility points to its own price as being compliant with Pride's Below-RRP Online Price Advertising Prohibition (*'OUR website – at RRP'*) and that accordingly this email is consistent with the OFT's inference that it is a direct response by a compliant Retailer to a request from Pride for intelligence on other retailers who were not complying with Pride's Below-RRP Online Price Advertising Prohibition. Further, there is nothing in this email which shows Better Mobility objecting to Pride's Below-RRP Online Price Advertising Prohibition as such. Rather, the OFT infers that Better Mobility was objecting to the perceived advantage that some retailers were deriving by **not** complying with Pride's Below-RRP Online Price Advertising Prohibition, or to the perceived inequality in Pride's monitoring and enforcement of its Below-RRP Online Price Advertising Prohibition.
- 3.181 The OFT's finding that Better Mobility was requested and/or instructed by Pride not to advertise prices below the RRP online is also supported by Better Mobility's response to the OFT's section 26 Notice. In its response Better Mobility stated the following:²⁶⁴
- 'We received a telephone call in May 2011 from a woman at Pride Mobility who informed us that they were aware that we had a particular pride scooter [...] advertised on our website for £100 less than the RRP set by Pride. This woman informed us that it was **Pride's new policy that all of***

²⁶⁴ Document 2842/BM.

their “new” scooter range were not allowed to be advertised by dealers online for any less than RRP. We were required to change this price immediately, or remove the scooter in question immediately from our website as a condition of being a Pride dealer. When she was told this was news to us, and we wanted to speak to our rep [sic] first we were informed that our account could be closed if we did not comply with their terms’. [Emphasis added]

- 3.182 Better Mobility’s response to the OFT’s section 26 Notice also describes a visit from their Pride sales representative as follows:²⁶⁵

*‘During this visit we were informed that his instruction from “above” was to tell all of his dealers that, although Pride was unable to do anything about their “older” range of scooters [...] Pride intended to **make it a policy that any “new” scooters would have to be listed at no less than RRP by any dealer, and any dealer found advertising them at less than RRP would be told to remove them immediately from their website’.*** [Emphasis added]

[...]

‘We were informed that this only applied to online sales, that we could advertise and sell any Pride scooters in our showroom for whatever price we chose’.

Pride’s Rogue Reports

- 3.183 The OFT’s inferences set out above as regards compliance by Better Mobility with Pride’s Below-RRP Online Price Advertising Prohibition are supported by Pride’s internal Rogue Reports, which at no point identify Better Mobility as advertising below-RRP prices online during the period of June 2010 to January 2012 covered by those Rogue Reports.

Conclusion

- 3.184 The evidence set out above, when taken together, and viewed alongside the evidence examined in the ‘Historical Background to the Infringements’ section, demonstrates that on dates from May 2011 (at the latest) to February 2012 (at the earliest), Pride and Better Mobility were party to an

²⁶⁵ Document 2842/BM.

agreement and/or concerted practice which prohibited Better Mobility from advertising below-RRP prices online for certain Pride mobility scooters.

- 3.185 The evidence demonstrates that, between these dates, Better Mobility agreed to abide by, or acquiesced in, Pride's Below-RRP Online Price Advertising Prohibition. Some of the evidence demonstrates that Better Mobility did not fully comply with Pride's requests and/or instructions at all times and/or did not fully respect the agreement and/or concerted practice at all times. However, Better Mobility's non-compliance in parts and/or its 'cheating' on the agreement and/or concerted practice at certain times does not preclude the finding that an agreement and/or concerted practice existed.²⁶⁶
- 3.186 The OFT notes that, in its written representations in response to the OFT's Statement of Objections, Pride did not contest the provisional findings of fact, as set out in our Statement of Objections,²⁶⁷ including those provisional findings on the existence of the eight agreements and/or concerted practices set out at pages 71 to 114 of the Statement of Objections.

D APPLICATION OF ARTICLE 101 TFEU – EFFECT ON TRADE BETWEEN MEMBER STATES

- 3.187 As set out in Annexe A, at paragraphs A.71 to A.76, Article 101 TFEU will apply where an agreement and/or concerted practice has the potential to affect trade between EU Member States.
- 3.188 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 Pride (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.²⁶⁸ 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

²⁶⁶ See Annexe A, paragraph A.36.

²⁶⁷ See also paragraph 1.7.

²⁶⁸ Document 3456WS (pages 10 and 11), Document 3821TI, 3824TI.

very nature not easily traded across borders at the retail-level.²⁶⁹ One of the largest online retailers informed the OFT that it makes no material sales to end-consumers in other Member States.²⁷⁰

3.189 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.²⁷¹

3.190 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.²⁷²

E EFFECT ON TRADE WITHIN THE UK

3.191 As set out in Annexe A at paragraphs A.69 to A.70, the Chapter I prohibition applies to agreements which:

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

3.192 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

²⁶⁹ Document 3456WS, pages 10 and 11), Document 3824TI.

²⁷⁰ The Retailer Discount Mobility Direct described its cross-border sales as a: *'tiny fraction'* (see document 3456WS, pages 10 and 11.

²⁷¹ 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 to B.40). 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.

²⁷² 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.

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.²⁷³

- 3.193 The OFT's finding is that the products which are the subject of the agreements and/or concerted practices are sold throughout the UK.²⁷⁴ 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.

F OBJECT OF PREVENTING, RESTRICTING OR DISTORTING COMPETITION

- 3.194 The OFT finds that each of the agreements and/or concerted practices described in Section D 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.
- 3.195 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

- 3.196 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.²⁷⁵

²⁷³ *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'.

²⁷⁴ Documents 3456WS and 3821TI.

²⁷⁵ See Annexe A, paragraph A.42.

- The ‘object’ of an agreement is assessed by reference to an analysis of its content, the objectives it seeks to attain and the legal and economic context of which it forms part.²⁷⁶
- The OFT takes the view that if the obvious consequence or objective 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.²⁷⁷
- 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.²⁷⁸

The Below-RRP Online Price Advertising Prohibition

- 3.197 As set out in Section C above, the OFT’s finding is that Pride entered into agreements and/or concerted practices with the Retailers, which prohibited Retailers from the online advertising of below-RRP prices in respect of certain Pride mobility scooters. The specific content of those agreements and/or concerted practices is covered in that section and is not therefore repeated in this section.
- 3.198 The OFT finds that the obvious consequence or objective of the agreements and/or concerted practices was to restrict price competition between retailers in relation to certain Pride mobility scooters. The OFT also finds that the agreements and/or concerted practices were, by their very nature, detrimental to competition.
- 3.199 The advertising of price information allows consumers to compare the various offers available in the market and to determine which retailer offers the best price. Where retailers are able to signal to consumers (through advertising) that their prices are lower than those of their competitors, they can win the custom of consumers who would otherwise have made a purchase from a higher-priced competitor. The prospect of increased sales, and the threat of price competition by rival retailers, will incentivise retailers to lower their prices, thereby promoting price

²⁷⁶ See Annexe A, paragraph A.42.

²⁷⁷ See Annexe A, paragraph A.46.

²⁷⁸ See Annexe A, paragraph A.48.

competition in the sector.²⁷⁹ 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.

- 3.200 Retailers who have the freedom to advertise their actual selling prices on the internet are better able to attract and win (a) customers who make use of the internet to compare product offerings and prices, and (b) customers who are located in more distant territories than those within which the retailer's bricks-and-mortar store(s) is/are easily accessible by its potential customers. As regards the latter, customers who are located in territories beyond the retailers' bricks-and-mortar catchment areas are less likely to be able to access or act on price information contained in in-store or 'shop-window' displays or in local print or broadcast advertising.²⁸⁰ By prohibiting retailers from online advertising of below-RRP prices, 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. Therefore, such a prohibition prevents customers from easily shopping around for lower-priced retailers (for example, through the use of 'Google shopping').
- 3.201 The Below-RRP Online Price Advertising Prohibition hampers Retailers in using the internet as a method of marketing. Where a Retailer adopts a selling price that is below-RRP, it cannot display this price information online; it can only inform consumers as to how they might obtain this price information (e.g. instructing consumers to 'call for best price'). For consumers, this makes shopping around and price comparison more difficult, and search costs are increased given the need to make a number of phone calls to retailers. For retailers, 'call for best price' instructions are likely to be far less effective in attracting interest from customers who are located in territories beyond the retailers' bricks-and-mortar catchment areas, or from internet customers more generally, than the displaying of actual selling prices online.
- 3.202 The OFT concludes that, by reducing price transparency between Retailers, and by limiting the geographic and demographic reach of

²⁷⁹ 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.

²⁸⁰ Note that there is no equivalent prohibition on retailers of Pride's mobility scooters from advertising below-RRP prices in their physical bricks-and-mortar stores and/or in local print or broadcast media.

Retailers' price signalling, the Below-RRP Online Price Advertising Prohibition is likely significantly to eliminate incentives on the part of retailers to engage in price competition with other retailers selling, whether online or otherwise, certain Pride mobility scooters and is thereby liable to lead to consumers paying higher prices. Therefore, the OFT concludes that the Below-RRP Online Price Advertising Prohibition is liable to prevent, restrict or distort competition between retailers.

3.203 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.'*²⁸¹

*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 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.'*²⁸² *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.'*²⁸³

²⁸¹ '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.'

²⁸² '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.'

²⁸³ See Annexe A, paragraph A.60.

Context in which the Below-RRP Online Price Advertising Prohibition operated

3.204 The OFT has had regard to the context in which the Below-RRP Online Price Advertising Prohibition operated.

3.205 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:** Pride's general policy not to appoint new retailers in any given geographic area that was already being serviced by an existing Pride retailer is described above in paragraphs 2.23 to 2.27.²⁸⁴ That policy limited the number of authorised retailers in its distribution network, and would have tended to increase the distance between the nearest bricks and mortar retailer, which thereby limited consumers' choice of Pride retailers. In such circumstances, the internet could have played an important role in terms of enabling consumers to compare prices across a wider set of retailers, and enabling retailers to signal their actual selling prices to potential customers who use the internet to

²⁸⁴See email dated 28th July 2008 from a Pride Area Sales Manager [name redacted] to the retailer [retailer name redacted], in which Pride explains its concerns about opening a Pride account with that retailer as it would increase local competition (Document 0289/PR):

'[...] Another worry I have is that you are now opening Retail Shops [sic] in the area's [sic] where we already have a good strong Dealer base. The last thing I want to happen is to upset Pride's current Dealers in and around the Leicester Area, as you sell so cheaply [sic] on the internet I am worried that you will start to sell at these prices in the Retail Shops [sic] you are opening.

*This would be a bad move for Pride as we **do not want to give our existing [sic] Dealers more competition with our own products.** [...]. I will call you Friday and let you know the outcome of my meeting with Pride's MD.'* [Emphasis added]

See also Document 3821/TI, where the Retailer Discount Mobility Plus (DMP) commented on the level of local competition as follows:

'There is no other B & M retail store in the same town as DMP's store. [...] the closest store [is] 10 miles away which opened recently, might be a competitor for DMP but there is "not a dramatic amount of competition".'

See also Document 3824/ TI, where the retailer Factory Outlet Scooters, provided the following comment on being asked whether manufacturers impose 'dealership conditions or criteria':

'[...] Manufacturers usually do not sell to other dealers in the same area.'

compare prices, wherever they are located, and therefore increasing consumer choice.

- **intra-brand competition was already restricted as a result of qualitative selection criteria:** Pride's policy to appoint only retailers that met its qualitative criteria is described above in paragraphs 2.20 to 2.22.²⁸⁵ That policy limited the number of authorised retailers in its

²⁸⁵ Retailer applicants were required to complete a Pride application form entitled ' *Application for a Credit Account, Dealer Product Support Details*' (Document 0015/PR, referred to in interview as document MRX8). That form contained the following application criteria, albeit the form stipulated that applicants would not necessarily be required to fulfil all of the listed criteria:

'1. The dealer has service engineers [yes/no]

2. Name of service engineer

3. The dealer accepts the responsibility to service their customers' products [yes/no]

[...]

5. The dealer undertakes to attend Pride Mobility Products service training [yes/no]

6. The dealer can provide prompt after sales service back up, what if it is outside your area? [yes/no]

7. The dealer is able to offer loan product: [yes/no]

[...]

N.B. It is not a condition of the account application that all the above are 'yes'.

N.B. You will be contacted to attend or send attendee on a service training course.'

In interview with the OFT dated 11 September 2012 Pride's Managing Director [name redacted], explained that he would review a retailer's application form together with the relevant Area Sales Manager, before deciding whether to open an account. Pride's Managing Director [name redacted] further clarified in interview the meaning of the following statement in the application form: '*NB: It is not a condition of the account application that all the above are yes*':

*'Right. The last sentence. I mean **things like are you able to support the product is critical**. We would not open an account if that answer would be no, for example because it's detrimental to the consumer and also Pride as a company and the brand. Things like the BHTA ... are you members of the BHTA or are you looking to become a member of the BHTA? That is not a critical yes answer.'*
[Emphasis added]

Pride's Managing Director [name redacted] also noted in interview that, subject to some limited exceptions, Pride '*insisted*' that all new retailers attended Pride training course[s] which were very specific to Pride's products (Document 3480/WS (Pride's Managing Director [name redacted] interview transcript, CD 1 of 5, pp 10-12).

distribution network and thereby limited consumers' choice of Pride retailers.²⁸⁶

- **consumers in this sector are often first-time buyers,**²⁸⁷ such that they are likely to have a limited frame of reference in order to determine whether products on offer represent good value, and are less able to respond to, and therefore, drive price competition themselves by virtue of their knowledge of the sector (see Chapter 2 ('Background') for further details).
- **RRPs in the sector are somewhat arbitrary and/or are generally set at levels significantly higher than actual selling prices,**²⁸⁸ and²⁸⁹ such that a prohibition on online advertising below-RRP gives a

²⁸⁶ A selective distribution system that sets qualitative selection criteria, whilst potentially leading to higher standards, can also limit the number and choice of retailers.

²⁸⁷ 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.

²⁸⁸ Pride has indicated to the OFT that its RRP's are somewhat arbitrary and did not dispute that they are 'unrealistic', and the OFT has evidence in its possession that supports this view. See footnote 7 and the parts of this Decision referred to there, including footnote 289 below.

²⁸⁹ In the interview dated 11 September 2012 (see document 3481WS, CD 2 of 5, page 3-4), there was the following exchange between the OFT and Pride's Managing Director [name redacted]:

Pride's Managing Director [name redacted]:

The purpose of RRP was actually driven by Government through Motability scheme. In the old scheme under Route Mobility everything was judged around RRP. The higher the RRP ... because what happened was dealers would sell at RRP with a fixed ... I think at the time it was 20% discount of RRP, so the higher the RRP, 20% off of that was the bigger margin, so it's actually driven through the scheme through the Government. That's now changed and thankfully ... of July of 2010 the RRP really is a figure that doesn't mean a lot to anybody regardless of where you sit, what manufacturer.

OFT: OK, so ...

Pride's Managing Director [name redacted]: *It was driven simply because it hyped the price of a product being purchased on a Government scheme through Motability....*

OFT: *And so have your RRP's now ... have they ... did you sort of alter your RRP's in ... to reflect -*

Pride's Managing Director [name redacted]: *No.*

OFT: *- the fact that -*

Pride's Managing Director [name redacted]: *No.*

OFT: *- the system came to an end?*

false sense of value. This means that consumers believe discounts represent better value than they actually do and consumers engage in less searching, softening price competition (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 advertising below-RRP can make it even more difficult for retailers to advertise and signal their actual selling prices to end-consumers, and can make it even more difficult for end-consumers to compare the various offers available in the market and to obtain value-for-money.

Pride's Managing Director [name redacted]: *No, RRP's stayed the same ... much the same as all manufacturers.*

OFT: *And was there any particular reason for keeping them -*

Pride's Managing Director [name redacted]: *No.*

OFT: *- the same level?*

Pride's Managing Director [name redacted]: *No.*

OFT: *I mean if they're unrealistic or if they're ... if virtually no-one sells at RRP ...*

Pride's Managing Director [name redacted]: *Well nobody does, no.*

OFT: *No.*

Pride's Managing Director [name redacted]: *Not even close.*

OFT: *Right. And so I just ... is there very much point in them?*

Pride's Managing Director [name redacted]: *No, none whatsoever. There is none whatsoever.*

OFT: *I was just wondering ... is there any particular reason you haven't changed them then if there's no point?*

Pride's Managing Director [name redacted]: *Not really, it's just very low on the agenda. I mean they are ... they just happen to be something that was for a purpose years gone by and nobody within the industry has bothered to put them down to ... which is probably more a realistic RRP.*

OFT: *I see.*

Pride's Managing Director [name redacted]: *They've just stayed that very, very high level as they were set within the old Motability scheme.*

Evidence of the parties' subjective intentions behind the Below-RRP Online Advertising Prohibition

- 3.206 As set out above in paragraph 3.196 above, whilst the OFT is not required to consider the parties' subjective intentions when entering into an agreement, it may nonetheless take them into account.
- 3.207 In this regard, it is helpful to consider contemporaneous documents as they support the OFT's finding that one of the aims pursued by Pride when introducing the Below-RRP Online Price Advertising Prohibition was to dampen competition, in particular price competition from retailers advertising its mobility scooters online.
- 3.208 It is instructive to note (albeit only as background given that it pre-dates the period of the Infringements) that Pride was concerned about online advertising of low prices from 2nd May 2007, as demonstrated by an internal email sent to several Pride employees²⁹⁰ from the Personal Assistant to Pride's Sales Director & Head of Marketing [name redacted]), which stated the following:
- 'Please find below the latest Internet Advertising Prices as of today. This is getting out of hand [...].'*
- 'We have worked so hard to keep the Elite at £995 and the Celebrity range at £995 plus and now it seems the norm is £795 for Elites and even less for X3/X4. We need to make a decision as to whether or not we just let them fight it out and get the backlash from other dealers who will not buy from us because our products are being trashed or we make a stand to close them all and lose this business...your call guys.'*** ²⁹¹ [Emphasis added]
- 3.209 In interview, Pride's Managing Director [name redacted] clarified that *'we have worked so hard'* related to Pride's steps to prevent online advertising of prices below a certain level for the relevant scooters: *'I believe that was something at the time whereas by [sic] we were requesting again for people to advertise not less than that'*. In response the OFT asked: *'So is it right to say that the requests had started back in 2007? These requests*

²⁹⁰ Email from Personal Assistant to Pride's Sales Director & Head of Marketing [name redacted] sent to following Pride employees: [Five Area Sales Managers' and the Sales Director & Head of Marketing names redacted] (copied to Pride's Managing Director [name redacted]).

²⁹¹ Document 0297/PR.

*[...] to advertise at RRP?’ Pride’s Managing Director [name redacted] responded: ‘On that one product I believe it was, yes’.*²⁹²

3.210 Further, minutes from an internal sales meeting on 24th July 2007 show that there was a discussion about a retailer, [retailer name redacted], advertising low internet prices: *‘With the exception of [retailer name redacted] [...] they are all keeping roughly the same prices. [...] [Pride CEO’s name redacted] wants to maintain the value of Pride’s products. If we increase [retailer name redacted] prices then we have to understand what the risks are. Ultimately the decision has to be made by [Pride CEO’s name redacted]’.*²⁹³

3.211 Pride’s aim to dampen price competition from retailers advertising online is evident from the minutes of an internal sales meeting held on 20th July 2009 in which reference is made to Pride’s intention to *‘monitor and clamp down’* on internet advertising *‘otherwise it will devalue our new products’.*²⁹⁴

3.212 Additionally, the minutes from an internal sales meeting on 16th December 2010 refer to Pride’s aim to keep prices at the RRP:

*‘Internet pricing: ...trying to protect the Colt range of scooters, last 2/3 months amount of dealers falling outside of our requests is growing, OFT does not allow us to stop selling to any dealer [...] because they are not abiding to our requests. **We are very keen to keep at RRP** [...] need to decide what will generate the most sales. DMD if allowed to put price on Internet would become a [figure redacted] account overnight. Complaints from those good guys who stick to our requests. We need to decide what is best for Pride [...] decide how to have our biggest revenue gain and try to uphold the brand name.’*²⁹⁵ [Emphasis added]

3.213 There are examples of Pride communicating its aim to reduce price competition from the internet by preventing the online advertising of prices below the RRP in its correspondence with its retailers. For example, Pride sent an email to Mobility 4 U on 7th March 2011, as follows:

²⁹² Document 3481/WS (Pride’s Managing Director [name redacted] transcript, CD2 of 5, p 25).

²⁹³ Document 0028/PR Pride Sales Meeting Minutes dated 24 July 2007.

²⁹⁴ Document 0026/PR Pride Sales Meeting Minutes dated 20 July 2009.

²⁹⁵ Document 0025/PR Pride’s Sales Meeting Minutes dated 16 December 2010.

*'we are continuing to attempt to **hold pricing to an acceptable level which both protects the brand and maintain margin for the retail** [...] we are trying to keep the Elite Traveller LX away from being advertised below RRP with success in most areas 'phone for best price' or 'phone for discounted price. [...] I will do every thing [sic] possible to keep the ET LX from the web at prices below RRP'.²⁹⁶ [Emphasis added]*

- 3.214 Pride's aim behind the Below-RRP Online Price Advertising Prohibition was to ensure that its products were protected from price competition coming from the internet. A retailer, Better Mobility, recalled that Pride's *"new" scooter range were not allowed to be advertised by dealers online for less than RRP*, and that *'any dealer found advertising them at less than RRP would be told to remove them immediately from their website. **We were informed that this only applied to online sales, that we could advertise and sell any pride scooters in our showroom for whatever price we chose. [...] We should advertise them at full RRP [...] we would "reap the rewards" as no one would be selling these scooters online anywhere, they would keep the profit high***'.²⁹⁷ [Emphasis added]
- 3.215 The OFT concludes from the evidence summarised above that it was Pride's intention to introduce the Below-RRP Online Price Advertising Prohibition to reduce price competition from the internet in order to protect its brand and maintain retailer margins, thereby enabling Pride to achieve its 'biggest revenue gain', by maintaining demand for and sales of its products.²⁹⁸
- 3.216 In interview, Pride's Managing Director [name redacted] also referred to Pride's concern that its products were being sold *'very cheaply'* on the internet and that *'we would request that people purely advertise at RRP*'.²⁹⁹ Although Pride's Managing Director [name redacted] provided witness evidence which sought to establish that Pride's aim behind the Below-RRP Online Price Advertising Prohibition was the protection of consumers by ensuring the provision of pre-sales and after-sales services, he was unable to provide a convincing account on how the

²⁹⁶ Document 2651/PR.

²⁹⁷ Document 2842/BM (Better Mobility letter response to Section 26 Notice).

²⁹⁸ See paragraph 3.212 above and Document 0025/PR Pride's Sales Meeting Minutes dated 16 December 2010.

²⁹⁹ Document 3480/WS (Pride's Managing Director [name redacted] transcript, CD 1 of 5, p 25).

prohibition would achieve this averred aim.³⁰⁰ Indeed Pride's Managing Director [name redacted] noted that there would be '*no assurances*'³⁰¹ that retailers advertising at RRP or above would in fact provide pre and after sales care to customers.

Conclusion

3.217 On the basis of the evidence and for the reasons set out above, the OFT finds that the agreements and/or concerted practices between Pride and each of the Retailers had as their object the prevention, restriction or distortion of competition.

3.218 In view of that conclusion, the OFT is not required to demonstrate that they had that concrete effect.³⁰²

G APPRECIABILITY

3.219 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.

3.220 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.63), 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 (in *Völk*) 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

³⁰⁰ For a further discussion see the 'Exclusion or Exemption' section from paragraph 3.227 onwards, where the OFT's finding is that this averred aim would have been better served through the use of Pride's selective distribution system and also that the extent of the use of that selective distribution system is inconsistent with Pride's stated aim.

³⁰¹ Document 3481/WS (Pride's Managing Director [name redacted] transcript, CD 2 of 5, pp 2-3).

³⁰² See Annexe A, at paragraph A.41.

UK, on the basis that their impact on competition was not insignificant.³⁰³
The reasons are set out below.

- 3.221 The OFT notes that the case law³⁰⁴ 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).
- 3.222 The OFT has estimated that Pride was the largest³⁰⁵ (in terms of unit sales) mobility scooter supplier in the UK in 2010 and 2011, with a market share of approximately [between 26 and 31 per cent (actual figure redacted)] and [between 26 and 31 per cent (actual figure redacted)] respectively.³⁰⁶ Pride has held this leading market position consistently over the past 4 years and according to evidence collected by the OFT, Pride's market share has increased from 2008 to 2011.³⁰⁷
- 3.223 In addition, Pride's size relative to that of other suppliers is significant. In both 2010 and 2011 the second largest supplier of mobility scooters was

³⁰³ 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.

³⁰⁴ See Annexe A, paragraphs A.62 to A.68.

³⁰⁵ Documents: 3684DMD 3703DPH, 3859DR, 3692EME, 3693FLU, 3695HandM, 3697Inv, 3699Kymco, 3845ProR, 3840RO, 3704SunM, 3706TGA, 3875VanOs. In Case T-77/92 *Parker Pen Ltd v Commission*, ECR [1994] II-00549, the CJ considered whether the market shares of both parties are relevant for determining appreciability. In that case Parker Pen (the manufacturer) sought to establish that its export ban had no appreciable effect on trade because the one distributor who was party to the agreement under investigation had a market share significantly below the applicable De minimis threshold. The CJ held in that: "... 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."

³⁰⁶ The OFT's calculations are based on data received from the following parties: Advanced Vehicle Concepts Ltd., Betterlife Healthcare, 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, 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.

³⁰⁷ In terms of volume Pride's estimated market share rose from [between 20 and 25 per cent (actual figure redacted)] to [between 26 and 31 per cent (actual figure redacted)] from 2008 to 2011.

less than half its size (in terms of unit sales).^{308 309} Moreover, Pride's size in the market, by reference to its annual UK turnover in 2011, is also substantial (£14.5 million³¹⁰ in respect of mobility aids sales which includes [£7 million to £11 million (actual figure redacted)]³¹¹ in respect of mobility scooters sales).³¹²

3.224 In addition, based on information obtained from suppliers of mobility scooters, the OFT understands that Pride is one of the few known brands amongst consumers of mobility scooters.³¹³ In an email Pride's Managing Director [name redacted] described Pride in the following terms, '*the brand is well recognized as a market leader and by it's [sic] very nature is requested probably more than any other brand on the market...*'.³¹⁴ Further, Pride currently supplies mobility scooters to [600-700 retailers (actual figure redacted)] out of an estimated 800-1,200 retailers' of mobility scooters in the UK.³¹⁵ This makes Pride's dealer network the largest in the UK and significantly larger than that of its competitors.³¹⁶

³⁰⁸ The second largest supplier's estimated market share for 2010 was approximately [between 10 and 15 per cent (actual figure redacted)], and in 2011 it was [between 10 and 15 per cent (actual figure redacted)].

³⁰⁹ In Joined cases C-100 to 103/80 *Musique Diffusion Française SA and others v Commission*, ECR [1983] 1825, at paragraphs 81 to 86, the parties argued that their market shares were only 3.38 per cent in France and 3.18 per cent in the UK, however the CJ noted 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 very fragmented, the parties' market shares exceeded those of most competitors and their turnover figures were high.

³¹⁰ Equipment for the Disabled, Key Note Report, Pg. 39, 2012.

³¹¹ See document 3446PR.

³¹² In *North Midland Construction*, 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).

³¹³ Out of the 17 UK suppliers of mobility scooters listed at footnote 22, the responses of 13 suppliers indicated that Pride was one of a small number of brands that was known amongst consumers. See Documents: 3703DPH, 3859DR, 3692EME, 3693FLU, 3695HandM, 3699Kymco, 3700Minic, 3710PR, 3845ProR, 3840RO 3704SunM, 3706TGA and 3875VanOs.

³¹⁴ Email of 16 March 2011 from Pride's Managing Director [name redacted] to an employee of Mobility 4 U Limited [name redacted] (Document 2658/PR).

³¹⁵ Document 3713PR.

³¹⁶ By comparison the second largest dealer network consists of [between 400 to 500 (actual figure redacted)] retailers. See Document 3830RO.

3.225 The OFT considers that Pride's strategy in relation to implementing the Below-RRP Online Price Advertising Prohibition was intended to apply to the whole dealer network and was widespread, going well beyond the Retailers named in this Decision:

- (i) The overall strategy could only have worked if the majority of retailers adhered to it. As described at paragraphs 3.26 to 3.30 above, Pride monitored its retailers' websites to assess which were advertising certain of its Pride-branded scooters below-RRP online. A Pride employee regularly prepared a list of non-compliant websites (referred to as 'internet rogues'). When asked for advice by a Pride Internal Sales Team Member [name redacted] on how to deal with specific 'internet rogues', Pride's Managing Director [name redacted] responded that *'if a Dealer continues to advertise below RRP then there [sic] price structure will change to the T List, just make sure that the relevant sales guy is informed prior to any change, **one rule for all**'* [emphasis added].³¹⁷
- (ii) The Below-RRP Online Price Advertising Prohibition had the potential to encompass all dealers within Pride's network and indeed Pride's monitoring and enforcement of the Below-RRP Online Price Advertising Prohibition extended far wider than the Retailers addressed by this Decision. Moreover, there is no evidence in the OFT's possession to suggest that certain retailers were exempt from the application of, or from Pride's monitoring and enforcement of, the Below-RRP Online Price Advertising Prohibition. The Rogue Reports in the OFT's possession do not only cover the eight Retailers addressed by this Decision. To take one illustrative example from June 2011, a Rogue Report lists 27 retailers actively being monitored through the Rogue Reports for compliance with the Below-RRP Online Price Advertising Prohibition at this time.³¹⁸
- (iii) Furthermore, retailers were themselves monitoring the Below-RRP Online Price Advertising Prohibition. In some cases, these retailers contacted Pride to let them know about their competitors' advertising activities and request that Pride enforce the Below-RRP Online Price Advertising Prohibition against the competitors. For example, an employee of Discount Mobility Direct [name redacted] contacted

³¹⁷ Document 2641/PR.

³¹⁸ Document 2850/PR.

Pride on 21 March 2011 stating *'Of course while supporting you, we would expect you to make sure that ALL other sellers adhere to the same criteria and in that regard we will monitor the market on a daily basis and advise you of any pricing that we see not adhering to your policy. We will leave it to you to then advise the retailer and make sure they comply with your wishes'*.³¹⁹

- 3.226 Finally, the OFT's finding, as set out in Chapter 3, Section D, is that the Below-RRP Online Price Advertising Prohibition restricted the customers to whom or the territory into which retailers may sell goods, and therefore constituted a 'hardcore' restriction under the De minimis Notice (point 11(2)(b)).³²⁰ As such, the Parties cannot rely on the Commission's De minimis Notice.

H EXCLUSION OR EXEMPTION

Exclusion

- 3.227 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.
- 3.228 None of the exclusions provided for by section 3 of the Act applies to the Infringements.

Exemption

- 3.229 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 of the Act ('the exemption conditions'), namely where it:

³¹⁹ Document 2663/PR. Other examples include, a Director of Milton Keynes Mobility Limited [name redacted] contacted a Pride Area Sales Manager [name redacted] on 28 May 2010 pointing out that her competitors were *'advertising even deeper discounted products'* and that *'we would like to see a level playing field'* (Document 0433/PR); an employee of Discount Mobility Plus Limited [name redacted] contacted Pride on 11 January 2011 in relation to the advertising activities of its competitor, Discount Mobility Direct Ltd (Document 2647/PR); an employee of Mobility 4 U Ltd [name redacted] contacted Pride's Managing Director [name redacted] on 7 March 2011 in relation to the advertising activities of Discount Mobility Direct Ltd (Document 2651/PR).

³²⁰ See Annexe A at paragraphs A.64 to A.65.

- (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.

3.230 It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim. In the absence of such evidence, the OFT is not required to provide detailed reasoning capable of demonstrating why the benefit of exemption does not apply to the agreements/concerted practices that it has found prevent, restrict or distort competition.

3.231 In its written representations in response to the OFT's Statement of Objections, Pride claimed that the Below-RRP Online Price Advertising Prohibition qualifies for exemption under Section 9 of the Act. Pride did not, however, provide evidence that directly addressed whether any, or all, of the four exemption conditions are satisfied. Elsewhere in its written representations, Pride made general arguments (as part of its rebuttal of the OFT's finding of an infringement by object), regarding what it considered to be the '*pro-competitive effects*' of the Below-RRP Online Price Advertising Prohibition.³²¹ Pride also cross-referred, in its representations on Section 9 of the Act, to what it called the '*particular concerns that drove the adoption*' of the Below-RRP Online Price Advertising Prohibition.³²² The OFT has noted the potential relevance of these submissions to the exemption conditions set out in Section 9 of the Act, in the same way that it has treated the aims of the agreements/concerted practices (as set out above in the section entitled 'Evidence of the parties' subjective intentions behind the Below-RRP Online Price Advertising Prohibition' at paragraphs 3.206 to 3.216) as potentially relevant to the application of the Section 9 test.

³²¹ See Pride's written representations at paragraphs 46 to 49.

³²² Which are contained in paragraphs 9 to 15 of Pride's written representations ('Background to the Alleged Infringement').

3.232 We have given consideration to whether information in the OFT's possession that is relevant to the purpose of the agreements suggests that the agreements might benefit from an individual exemption in this case. Although the conditions are cumulative and each of them needs to be met, for present purposes we have considered only the indispensability condition, according to which an agreement must not impose restrictions which are not indispensable to the attainment of the benefits created by that agreement.

3.233 The OFT has treated the provision of pre-sales and post-sales services and advice as one potential objective or intended benefit of the Below-RRP Online Price Advertising Prohibition. Pride's written representations in response to the OFT's Statement of Objections raised, at various points, arguments correlating the maintenance of retailer margins through the Below-RRP Online Price Advertising Prohibition with the provision of high-quality pre-sales and post-sales services which, Pride stated, might be detrimentally affected in the absence of the Below-RRP Online Price Advertising Prohibition. Pride submitted that the Below-RRP Online Price Advertising Prohibition was its response to concerns expressed by its stockists about:

*'the undermining of the economic viability of their provision of excellent end-user assistance services (both pre-sales and after-sales), including showroom facilities that provide end-users with opportunities to see, try, and make an informed choice between, different makes (i.e. competing brands) and models of scooters. In particular, Pride and its service-oriented stockists were concerned about the availability of such service quality and showrooms being substantially reduced as a result of the advertising practices of certain retailers (most especially retailers focused on making online sales) that were seeking to lure customers to themselves by advertising online low headline prices for particular scooters.'*³²³

3.234 Pride also submitted that the risk of it not implementing the Below-RRP Online Price Advertising Prohibition was that:

'if service-oriented, showroom-based stockists ceased to be able to earn sufficient margin across a sufficient number of sales to cover their overhead costs, the service and choice provided by such stockists would,

³²³ Pride's written representations at paragraph 9.

*in time, cease to be accessible to end-users living in some geographical areas.*³²⁴

- 3.235 While the OFT recognises the importance, in the context of purchase of mobility scooters, of consumers having access to the right level of pre-sales and post-sales services and advice in order to ensure that end-consumers purchase products that are suitable to their needs,³²⁵ in this case, the OFT's view is that the imposition of the Below-RRP Online Price Advertising Prohibition is unlikely to be justified for the reasons set out below.

The third exemption condition: indispensability

- 3.236 The Vertical Guidelines note that the indispensability exemption condition implies a two-fold test.³²⁶ First, a restrictive agreement and/or concerted practice must be reasonably necessary in order to achieve the benefits 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 benefits. This means that the Parties would have to demonstrate that the infringing agreements and/or concerted practices, and the restriction of competition flowing from such agreements and/or concerted practices, were necessary to achieve the claimed benefits, in the sense that there were no other less restrictive means of achieving the claimed benefits.
- 3.237 By specifically requiring its dealer network to provide pre-sales and post-sale services and advice, a supplier can directly ensure that end-consumers receive such services and advice. The OFT's finding is that a Below-RRP Online Price Advertising Prohibition is not specific to achieving any benefits of that nature, and is not apt to ensuring that such services and advice are provided, especially in light of the fact that the Below-RRP Online Price Advertising Prohibition did not apply to all

³²⁴ Pride's written representations at paragraph 47.

³²⁵ The OFT also recognises the provisions of the British Healthcare Trades Association (BHTA) Code of Practice for the Healthcare and Assistive Technology Products and Services industry (December 2013), including those at paragraphs 8.2 and 8.16 (on pre-contractual and point of sale information) and 13.7 (on internet sales). However, the OFT does not consider that anything in the BHTA Code of Practice requires (or legitimises) the Below-RRP Online Price Advertising Prohibition, nor does the Code prevent or restrict the sale of mobility scooters online or the advertising of product and price information about mobility scooters online.

³²⁶ Guidelines on the application of Article 101(3) of the TFEU, OJ 2004 C101/97, at paragraph 73.

scooter models supplied by Pride. Accordingly, the OFT considers that the Below-RRP Online Price Advertising Prohibition, and the restriction of competition that flows from it, are not reasonably necessary for the attainment of these potential benefits.

- 3.238 The OFT's finding is that even if it were established that the Below-RRP Online Price Advertising Prohibition was capable of ensuring that retailers provided pre-sales and post-sales services and advice, there are less restrictive means of achieving these benefits. The OFT considers for example that a selective distribution system (which is appropriately designed and implemented, as well as properly monitored and enforced),³²⁷ that requires retailers to provide suitable pre-sales and post-sales services and advice may constitute a less restrictive means of achieving these benefits for reasons which are set out below.³²⁸
- 3.239 The OFT understands that retailers who sell online (including by advertising their product and price information online) are capable of providing pre-sales and post-sales services and advice through their showrooms and/or are finding innovative, less restrictive, ways to provide pre-sales and post-sale services to their customers (including at the consumer's location).³²⁹ Such cases clearly demonstrate that the

³²⁷ The OFT considers that the current qualitative criteria within Pride's selective distribution system are unlikely to be sufficient to ensure the provision of pre- and post-sales services. For example:

- The criteria in Pride's dealer application form (document 0015PR) are not compulsory. This is reflected by a statement made below the criteria: '*N.B. IT IS NOT A CONDITION OF THE ACCOUNT APPLICATION THAT ALL THE ABOVE ARE 'YES'.*' Further, the OFT notes that these criteria are not reflected in the underlying terms and conditions. As such, these criteria may have been difficult to enforce after the application had been accepted.
- The criteria in the document are also generic and vague. For example, they fail properly to outline the full obligations with respect to the supply of repair and maintenance services. This means that, even if the criteria were compulsory, they are unclear in terms of what was actually expected of retailers.
- The criteria do not cover pre-sale services and are therefore unable to ensure their provision.
- Finally, the OFT has no evidence that the criteria were strictly enforced after the application was initially accepted. This is reflected in the evidence from Pride's Managing Director's [name redacted] witness statement (see document 3840WS, pages 23-24, and document 3841WS, pages 5-6).

³²⁸ It should be noted that it would be necessary to ensure that such a system complied with competition law in all other relevant respects.

³²⁹ It should be noted that based on information in the OFT's possession it appears that retailers, however they sell, have an incentive to provide these services and ensure that customers are sold

provision of these services can be achieved without the need for the Below-RRP Online Price Advertising Prohibition.³³⁰

3.240 In its written representations in response to the OFT's Statement of Objections, Pride stated that the Below-RRP Online Price Advertising Prohibition was responsive to a legitimate fear regarding the '*long-term*

suitable mobility scooters. For example, [retailer name redacted] stated that '*If a dealer sells a product which is not appropriate for the customer it causes a lot of complication later. [Retailer's name redacted] does not sell a product even if asked for by the customer if that does not suit the customer.*' See [document number redacted].

³³⁰ 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 DMD 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, DMD provides advice to consumers either through its website or via advisors that consumers can call. Further, DMD provides post-sales support for customers through an independent contractor. (See document 3457WS, CD2 of 4, pg 12, and document 3456 WS, CD1 of 4, 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] provides this service nationwide. (See [document number redacted].)
- iv. Better Mobility Limited provides a service whereby it will visit a customer in their home and undertake assessments there. Although Better Mobility Limited 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 3824TI).
- 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]).

The OFT notes that many of these examples involve optional extras. If the supplier wanted to ensure these services were provided, it could make these service elements non-optional.

- 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.)

*sustainability of its ‘bricks-and-mortar’ stockists’ that itself stemmed from a fear of ‘competition between Pride stockists [taking] place principally by means of retailers offering alluring ‘special price deals’ online’.*³³¹

- 3.241 The concerns of Pride and some of its retailers about certain retailers promoting themselves online on the basis of discounted prices appear to be premised on an assumption that the advertisement of discounted prices online is accompanied by lower service quality.³³² However, the OFT considers that the ability of retailers to promote themselves online on the basis of discounted prices can also be attributable, for example, to innovation and the reduction of costs by those retailers (including the costs of ‘offline’ advertising) and/or to the economies of scale brought about by the use of the internet (as a tool to reach a greater number and variety of consumers).
- 3.242 The Parties have not adduced evidence to establish how the Below-RRP Online Price Advertising Prohibition satisfies the four exemption conditions set out in Section 9 of the Act, including in particular the third exemption condition on indispensability.
- 3.243 The OFT’s finding on the basis of the evidence in its possession is that the Below-RRP Online Price Advertising Prohibition is not indispensable for the provision by the Retailers (either individually or generally) of pre-sales and post-sales services and advice to consumers of Pride’s mobility scooters. Accordingly, the agreements and/or concerted practices in question do not benefit from individual exemption under Section 9 of the Act.

Application of a block exemption regulation

- 3.244 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.³³³ The Vertical Agreements Block Exemption Regulation (‘VABER’)³³⁴ does not apply to so-called ‘hardcore’

³³¹ Pride’s written representations at paragraph 15.

³³² See Pride’s written representations at paragraph 20.

³³³ See Annexe A, paragraph A.86.

³³⁴ 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 provides an exemption from the Chapter I prohibition for certain types of vertical agreements.

restrictions. These include restrictions 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 (Article 4(b), of the VABER). We note also 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 by the Commission unless there are exceptional circumstances.³³⁵

3.245 The OFT notes that Article 4(b) of the VABER refers to the ‘restriction’ of sales and the OFT understands this to be a wider concept than the outright prohibition of sales. Accordingly, it is not necessary for the OFT to establish that an agreement and/or concerted practice constitutes an absolute territorial protection, or an absolute protection of certain customer groups, as regards the contract goods in order to establish that the agreement and/or concerted practice falls outside of the block exemption. An agreement and/or concerted practice will **also** fall outside of the block exemption where it is found to **restrict**, directly or indirectly, the way in which retailers sell to territories or customer groups.³³⁶

3.246 The OFT notes that the EU Courts have referred to the need to interpret block exemptions ‘strictly’ or ‘narrowly’.³³⁷ In addition, in *Pierre Fabre*, the Court of Justice noted:³³⁸

[...] as an undertaking has the option, in all circumstances to assert, on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU, thus enabling its rights to be protected, it is not necessary

³³⁵ Vertical Guidelines, at paragraph 47 onwards and in particular paragraphs 50 to 55.

³³⁶ By analogy, Article 101 TFEU (ex Article 81 EC) applies to partial restrictions of competition. See, for example, Case T-451/08 *Stim v Commission*, judgment of 12 April 2013, at paragraph 94: ‘[...] it must be observed, from the outset, that the application of Article 81 EC to the conduct of an undertaking is not subject to a finding of the exclusion of all forms of competition, since partial restrictions are sufficient to incur sanctions for the breach of that provision.’

³³⁷ ‘Strictly’ in Cases T-24/93, etc, *Compagnie Maritime Belge Transports v Commission* [1996] ECR II-1201, [1997] 4 CMLR 273, para 48; and in Cases T-191/98 *Atlantic Container Line v Commission* (‘TACA’) [2003] ECR II-3275, [2005] 4 CMLR 1283, para 568; ‘narrowly’ in Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, [2004] 4 CMLR 1346, para 164 (appeal on other grounds dismissed, Case C-167/04P [2006] ECR I-8935, [2006] 5 CMLR 1303).

³³⁸ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Commission*, judgment of 13 October 2011), at paragraph 57.

to give a broad interpretation to the provisions which bring agreements or practices within the block exemption.'

3.247 Accordingly, it would be inappropriate to interpret Article 4 of the VABER, which defines the scope of the block exemption granted by Article 2, broadly. Article 4 should be interpreted in a manner consistent with the intended scope of the block exemption, as per recital 10 to the VABER, which states:

'This Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not indispensable to the attainment of the efficiency-enhancing effects. In particular, vertical agreements containing certain types of severe restrictions of competition such as minimum and fixed resale-prices, as well as certain types of territorial protection, should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the undertakings concerned.'

3.248 In interpreting the VABER, the OFT (and any court) must also have regard to statements of the European Commission, including the Vertical Guidelines (see section 60(3) of the Act). In this regard, the OFT notes that the Vertical Guidelines:

- Explain, at paragraph 51, that general advertising that reaches customers in other territories, or in other customer groups, is a form of passive selling.³³⁹
- Explain, at paragraph 52, that
 - the internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods, and therefore certain restrictions on the use of the internet are dealt with as (re)sales restrictions;
 - a retailer's use of a website in order to sell products is a form of passive selling (since it is a reasonable way to allow customers to reach the distributor); and

³³⁹ Passive selling means responding to unsolicited requests from individual customers, including delivery of the goods to such customers, rather than actively approaching individual customers, customer groups or customers in a specific territory.

- restrictions which limit the ability of retailers to sell products passively (given their capability to limit the retailers' access to a greater number and variety of customers) are hardcore restrictions within the meaning of Article 4(b) of the VABER.

- 3.249 The OFT's finding, for the reasons set out above (particularly in paragraphs 1.13 to 1.22, 2.38 to 2.47 and 3.194 to 3.203) is that the Below-RRP Online Price Advertising Prohibition had as its object the restriction of the territory into which and/or the customers to whom, the retailer (the buyer party to the agreement) may sell certain of Pride's mobility scooters, and therefore constitutes a 'hardcore' restriction within the meaning of Article 4(b) of the VABER.³⁴⁰
- 3.250 The OFT finds that the object of the Below-RRP Online Price Advertising Prohibition was to restrict the **territories** into which the Retailers could sell Pride's mobility scooters. The Below-RRP Online Price Advertising Prohibition makes it harder for Retailers to attract and win customers who are located in more distant territories than those within which the Retailer's bricks-and-mortar store(s) is/are easily accessible by its potential customers. A customer, particularly one with limited mobility, is less likely to make the effort to contact, to travel to, or to make a purchase from a more distantly located Retailer who cannot make use of the internet to advertise the existing of price advantages over rival retailers, including those located nearer to the customer's home.
- 3.251 The OFT also finds that the object of the Below-RRP Online Price Advertising Prohibition was to restrict the **customers** to whom Retailers may sell Pride's mobility scooters. The Below-RRP Online Price Advertising Prohibition makes it harder for Retailers to attract and win customers who use the internet to compare prices and to search for where they might get the best price.
- 3.252 The OFT has also taken account of evidence of the subjective intentions of the Parties,³⁴¹ which supports the OFT's finding that one of the aims pursued by Pride when introducing the Below-RRP Online Price Advertising Prohibition was to shield bricks-and-mortar stores from the intra-brand price competition that would otherwise be stimulated by e-commerce. The OFT also notes that Pride did not seek to introduce an

³⁴⁰ See also paragraphs A.86 to A.96.

³⁴¹ See paragraphs 3.206 to 3.216.

equivalent prohibition that prevented Retailers from advertising below-RRP prices in their bricks-and-mortar stores and/or in local print/broadcast media, presumably because such 'offline' advertising channels do not have the same geographic and demographic reach, and therefore the same sales potential, as internet advertising.³⁴²

- 3.253 The Below-RRP Online Price Advertising Prohibition makes it more difficult for Retailers to use the internet as a channel to attract and win prospective customers. Without the freedom to advertise their below-RRP prices online, Retailers are hampered in using the internet as a method of marketing. Where a Retailer adopts a selling price that is below-RRP, it cannot display this price information online; it can only inform consumers as to how they might obtain this price information (e.g. instructing consumers to 'call for best price').
- 3.254 Further, 'call for best price' instructions (or similar) are likely to be far less effective in attracting interest from customers who are located in territories beyond the Retailers' bricks-and-mortar catchment areas, or from internet customers more generally, than the displaying of actual selling prices online. Passive sales by virtue of online advertising would be more likely (or likely greater in number) where the retailer is able to advertise its actual selling prices online (and thus signal the existence of price advantages over its competitors) rather than relying on potential customers to take some additional positive step in order to acquire this price information (for example, by making a telephone enquiry in response to a 'call for best price' instruction displayed on a website). The Below-RRP Online Price Advertising Prohibition means that consumers are prevented from simply going online and browsing the actual selling prices for certain Pride mobility scooters.³⁴³
- 3.255 In summary, the OFT considers that the (passive) sales potential of a website is severely impaired when one of its strongest features – the provision of competitive price information – is restricted by the Below-RRP

³⁴² On the importance of the internet in the provision of product and price information, and as a means to make such information easily accessible to consumers, see OFT1374, 'Mobility aids, an OFT market study', (September 2011), including paragraphs 5.8, 5.20, 5.39 (and footnote 64) and 6.13. Available at <http://www.oft.gov.uk/OFTwork/markets-work/mobility-aids>. See also OFT921, 'Internet shopping, an OFT market study' (June 2007), including paragraphs 2.38, 3.5 and 3.8, table 2.2 and chart 3.1. Available at <http://www.oft.gov.uk/OFTwork/markets-work/internet>.

³⁴³ The Below-RRP Online Price Advertising Prohibition stops users of the internet from browsing prices other than RRP's for those mobility scooter models covered by the prohibition.

Online Price Advertising Prohibition. Accordingly, the OFT considers that the Below-RRP Online Price Advertising Prohibition limits the freedom of Retailers to (passively) sell certain models of Pride mobility scooters (specifically by limiting the territories into which and/or the customers to whom Retailers can sell the scooter models subject to the Below-RRP Online Price Advertising Prohibition), and as a result constitutes a hardcore restriction within the meaning of Article 4(b) of the VABER.

- 3.256 It does not affect the above findings that potential customers, despite the existence of the Below-RRP Online Price Advertising Prohibition, may be able to visit a retailer's website, to contact the retailer and enquire about its prices, and ultimately to make a purchase from the retailer. While this is a form of passive selling, it is not the only (or even the main) form of passive selling that is made possible (or made easier) via the internet. For the reasons set out in this section and elsewhere in foregoing sections of this Decision, the OFT's finding is that the Infringements do not benefit from block exemption under the VABER.

I CONCLUSION ON THE APPLICATION OF THE CHAPTER I PROHIBITION

- 3.257 The OFT finds on the basis of the evidence set out, or referred to, in Chapter 3, Sections A to I above that the Parties have infringed the Chapter I prohibition by participating in agreements and/or 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, by prohibiting the advertising of below-RRP prices online in respect of certain Pride mobility scooters between February 2010 and February 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 February 2012.³⁴⁴ Moreover, 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, in relation to mobility scooters, agreements or concerted practices that are the same or similar in nature to those that are the subject of this Decision; and
 - Pride shall within 20 working days from the date of this Decision write to each of the Retailers listed in paragraph 1.9 of this Decision and any other retailers in respect of which it operates a Below-RRP Online Price Advertising Prohibition in relation to mobility scooters, to inform them that it no longer operates such a prohibition.

B PENALTIES

- 4.4 Section 36(1) of the Act provides that on making a decision that an agreement or concerted practice has infringed the Chapter I prohibition, the OFT may require an undertaking which is a party to the agreement or concerted practice to pay the OFT a penalty in respect of that infringement.

³⁴⁴ See paragraphs 3.17 to 3.25 on duration of the Infringements.

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 the one during which the infringement occurred.³⁴⁵
- 4.6 The OFT has reviewed the turnover of Pride and each of the Retailers and it considers that at all relevant times the combined turnover for each Pride-Retailer combination did not exceed £20 million.³⁴⁶ 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.

James MacBeth, Project Director, Services, Infrastructure and Public Markets 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;

³⁴⁵ Section 39(1) and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000, SI 2000/262.

³⁴⁶ See Annexe D, where the turnover of Pride and each of the Retailers is given for the years 2009, 2010, 2011 and 2012.

Gaucha Rasmussen, Enforcement Director, Goods and Consumer Group, for and on behalf of the Office of Fair Trading;

All of whom are the members of, and who together constitute, the Case Decision Group.

27 March 2014

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ANNEXES

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.³⁴⁷ The OFT must, in addition, have regard to any relevant decision or statement of the European Commission.³⁴⁸

- 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...*'.³⁴⁹
- 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...*'.³⁵⁰
- A.10 The term 'undertaking' encompasses any natural or legal person that carries on commercial or economic activities, regardless of legal form. It

³⁴⁷ 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).

³⁴⁸ 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.

³⁴⁹ Case C-41/90 *Hofner and Elser v Macrotron* [1991] ECR I-1979, at paragraph 21.

³⁵⁰ Case C-118/85 *Commission v Italy* [1987] ECR 2599, at paragraph 7.

includes, among others, companies,³⁵¹ partnerships,³⁵² individuals operating as sole traders³⁵³ and trade associations.³⁵⁴

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.³⁵⁵
- 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.³⁵⁶
- A.13 In *Durkan*, the UK’s Competition Appeal Tribunal (‘CAT’) noted that the European Courts have established, among other things, that:
- 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

³⁵¹ 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).

³⁵² Commission decision *Breeders’ rights: Roses*, OJ [1985] L369/9.

³⁵³ Case 35/83 *BAT Cigaretten – Fabriken GmbH v Commission* [1985] ECR 363; and Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045.

³⁵⁴ Case 71/74 *FRUBO v Commission* [1975] ECR 563.

³⁵⁵ 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.

³⁵⁶ 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.

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*'.³⁵⁷

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.³⁵⁸

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.³⁵⁹ 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,³⁶⁰ 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.³⁶¹

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 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 the infringement.

³⁵⁷ *Durkan Holdings Limited and others v OFT*, [2011] CAT 6 at [22].

³⁵⁸ 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.

³⁵⁹ Case C-97/08 P *Akzo Nobel NV v Commission* [2007] ECR II-5049, at paragraph 61.

³⁶⁰ Case T-190/06 *Total SA and Elf Aquitaine SA v Commission* ECR I-0, at paragraph 64.

³⁶¹ Case T-189/06 *Arkema France SA v Commission* ECR I-0, (not available in English), at paragraph 100.

- 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 Infringements during the relevant period. It has then determined whether liability for the Infringements 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 Infringements 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 Infringements was owned by individuals during the relevant period, liability for the Infringements will not extend to those individuals.
- A.21 The Parties to whom the Decision is addressed are set out in paragraph 1.9. They comprise:
- the legal entities which the OFT considers had direct involvement in the Infringements that are 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 Infringements 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 Infringements.

F AGREEMENTS AND CONCERTED PRACTICES

- A.23 The Chapter I prohibition applies to ‘agreements’ and ‘concerted practices’.³⁶² 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.³⁶³
- 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’.³⁶⁴ There is no requirement for an agreement to be formal or legally binding, nor for it to contain any enforcement mechanisms.³⁶⁵ An agreement may be inferred from the conduct of the parties, including conduct that appears to be unilateral.³⁶⁶ As held by the GC:³⁶⁷

‘...it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way...’

³⁶² It also applies to decisions of associations of undertakings, such as trade associations.

³⁶³ *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.

³⁶⁴ Case C-41/69 *ACF Chemiefarma NV v European Commission* [1970] ECR 661 (in particular, at paragraphs 106 to 114).

³⁶⁵ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [658].

³⁶⁶ 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.

³⁶⁷ Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 256.

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*’.³⁶⁸
- A.27 The principle is that each economic operator must determine independently the policies it intends to adopt on the market.³⁶⁹
- 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.³⁷⁰
- 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 those

³⁶⁸ 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.’

³⁶⁹ 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].

³⁷⁰ 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)].

at the same level in the supply chain, as confirmed both by the CAT, in *Argos Ltd & Littlewoods*,³⁷¹ and the Court of Appeal.³⁷²

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.³⁷³ 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.³⁷⁴
- 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.³⁷⁵
- A.32 In *Volkswagen II*, the CJ stated (summarising its earlier judgment in *Volkswagen I*) that:³⁷⁶

³⁷¹ *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.'

³⁷² *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.

³⁷³ 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.

³⁷⁴ 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).

³⁷⁵ Case C-277/87 Sandoz Prodotti Farmaceutici v Commission [1990] ECR I-45, at paragraph 1 of the summary decision.

³⁷⁶ *Volkswagen II*, at paragraph 39 (emphasis added).

*‘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:³⁷⁷

*‘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’),³⁷⁸ citing the judgment of the CJ in *Commission v Volkswagen AG*³⁷⁹ and the judgment of the GC in *Bayer AG v Commission*,³⁸⁰ summarise the two ways (which can be used jointly) to establish acquiescence to a unilateral policy:³⁸¹

‘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.

³⁷⁷ *Bayer* (GC), at paragraph 71 (emphasis added).

³⁷⁸ *Guidelines on Vertical Restraints*, Commission Notice OJ 2010 C130/1, replaced *Guidelines on Vertical Restraints*, Commission Notice OJ 2000 C291/1 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.

³⁷⁹ Case C-74/04 P *Commission v Volkswagen AG* [2006] ECR I-6585.

³⁸⁰ Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383.

³⁸¹ Vertical Guidelines, at paragraph 25(a).

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.³⁸²

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.³⁸³ 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.³⁸⁴
- 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

³⁸² 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).

³⁸³ 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.

³⁸⁴ 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.

may have participated only under pressure from other parties does not mean that it is not party to the agreement.³⁸⁵

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.³⁸⁶

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.³⁸⁷

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.³⁸⁸

³⁸⁵ 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 Tecnologie di Rivestimento Srl v Commission* [2002] ECR II-1845, at paragraph 40.

³⁸⁶ 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.

³⁸⁷ 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 infringement attributable to the corporate employer, with whom they comprise the same undertaking'.

³⁸⁸ 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

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.³⁸⁹ The ‘object’ of an agreement is assessed by reference to an analysis of its content, the objectives it seeks to attain and the legal and economic context of which it forms part.³⁹⁰

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:³⁹¹

‘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:³⁹²

‘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

Expedia Inc v Autorité de la concurrence and Others (‘*Expedia*’), judgment of 13 December 2012, as yet unreported, at paragraph 36.

³⁸⁹ 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.

³⁹⁰ 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.

³⁹¹ *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.

³⁹² *Cityhook Limited v OFT*, CAT [2007] CAT 18, at [268].

contrary, ‘...the types of agreements covered by Article [101](1)(a) to (e) [TFEU] do not constitute an exhaustive list of prohibited collusion’.³⁹³

A.46 The OFT takes the view that where the obvious consequence or objective 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.³⁹⁴

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:³⁹⁵

‘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.³⁹⁶ However, the OFT may take into account evidence of the parties’ subjective intention when

³⁹³ Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* [2008] ECR I-8637, at paragraphs 22 and 23.

³⁹⁴ 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-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’, 6th 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.

³⁹⁵ Case C-8/08 *T-Mobile Netherlands BV and others v NMa* [2009] ECR I-4529, at paragraph 31.

³⁹⁶ 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.

demonstrating that an infringement has as its object the prevention, restriction or distortion of competition.³⁹⁷

The Below-RRP Online Price Advertising Prohibition

- A.49 Online price advertising restrictions can constitute object restrictions.
- A.50 In the Commission's decision on *EPI code of conduct*,³⁹⁸ 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.*'³⁹⁹
- A.51 On appeal, the GC upheld the Commission's decision.⁴⁰⁰ 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*'.⁴⁰¹
- 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 strategy by

³⁹⁷ *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, at [270], cites Case C-551/03 P, *General Motors BV v Commission* [2006] ECR I-3173, at paragraphs 77 and 78.

³⁹⁸ Commission Decision IV/36.147 *EPI code of conduct*, OJ 1999 L106/14, at paragraphs 39 to 41.

³⁹⁹ Commission Decision IV/36.147 *EPI code of conduct*, at paragraph 41.

⁴⁰⁰ Case T-144/99 *Institute of Professional Representatives before the European Patent Office v Commission* [2001] ECR II-1090 ('*IPR v Commission*').

⁴⁰¹ Case T-144/99 *IPR v Commission* [2001] ECR II-1090, at paragraph 72.

the manufacturers to influence retail prices, the decisions clearly describe the anti-competitive nature of advertising restrictions.

A.53 In *Hasselblad*⁴⁰² 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)*’.⁴⁰³ The Commission found that Hasselblad’s contractual right to prohibit adverts restricted competition within the meaning of Article 101(1) for the following reason:⁴⁰⁴

‘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*’.⁴⁰⁵ The 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

⁴⁰² *Hasselblad*, OJ [1982] L161/18.

⁴⁰³ *Hasselblad*, at recital 60.

⁴⁰⁴ *Hasselblad*, at recital 60.

⁴⁰⁵ *Hasselblad*, at recital 66.

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’.⁴⁰⁶ 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:⁴⁰⁷

‘[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*,⁴⁰⁸ 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 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.’*⁴⁰⁹

- A.59 Meanwhile, the distribution agreement with dealers in Italy prohibited dealers from publishing ‘in whichever form’ prices which differed from

⁴⁰⁶ Case 86/82 *Hasselblad v Commission* [1984] ECR 883, at paragraph 43.

⁴⁰⁷ Case 86/82 *Hasselblad v Commission* [1984] ECR 883, at paragraphs 49 and 52.

⁴⁰⁸ *Yamaha* (COMP37.975), decision of 16 July 2003.

⁴⁰⁹ *Yamaha* (COMP37.975), decision of 16 July 2003, at paragraph 125.

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]*'.⁴¹⁰ 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*⁴¹¹ 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*'.⁴¹²

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 *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.

H APPRECIABILITY

A.62 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*:

⁴¹⁰ *Yamaha* (COMP37.975), decision of 16 July 2003, at paragraph 134.

⁴¹¹ *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*').

⁴¹² *Lladró*, at paragraph 70.

*‘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’.*⁴¹³

- A.63 In its recent judgment in *Expedia Inc v Autorité de la concurrence and others*,⁴¹⁴ 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.⁴¹⁵ 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.⁴¹⁶
- A.64 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, 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.65 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)).

⁴¹³ 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.

⁴¹⁴ Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others* (*‘Expedia’*), judgment of 13 December 2012, as yet unreported.

⁴¹⁵ 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.

⁴¹⁶ *Expedia*, at paragraph 37.

- A.66 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.67 The OFT has also had regard to *North Midland Construction*,⁴¹⁷ 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.⁴¹⁸
- A.68 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' market shares;⁴¹⁹

⁴¹⁷ *North Midland Construction v OFT* [2011] CAT 14 ('*North Midland Construction*').

⁴¹⁸ *North Midland Construction*, at [56] to [61].

⁴¹⁹ In Case C-19/77 *Miller v Commission* ECR [1978] 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*, ECR [1994] 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*'.

market structure (including competitors' market shares);⁴²⁰ the parties' turnover;⁴²¹ and the importance of the brands involved.⁴²²

I EFFECT ON TRADE

Effect on trade within the UK

A.69 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.70 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.⁴²³ 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 UK is a purely jurisdictional test to demarcate the boundary line between the application of EU competition law and national competition law.⁴²⁴

Effect on trade between Member States

A.71 Article 101 TFEU applies to agreements which:

'...may affect trade between [EU] Member States'.

A.72 For the purposes of assessing whether an agreement may affect trade between EU Member States the OFT follows the approach set out in the

⁴²⁰ See joined cases C-100 to 103/80 *Musique Diffusion Française SA and others v Commission*, ECR [1983] 1825, at paragraphs 81-86: 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.

⁴²¹ See case C-19/77 *Miller v Commission* ECR [1978] 131.

⁴²² See case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295.

⁴²³ Section 2(7) of the Act.

⁴²⁴ *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*'.

Commission's published guidelines and the case law of the European Courts.⁴²⁵

A.73 The question of whether an agreement is capable⁴²⁶ 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.⁴²⁷ For example, it is clear that trade between EU Member States may be affected in cases where the relevant market is national or sub-national⁴²⁸ – as is often the case in retail markets.

A.74 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.⁴²⁹ In order that trade 'may' be affected by an agreement and/or concerted practice, the CJ has held that: ⁴³⁰

'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.75 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.⁴³¹ The application of the 'effect on trade' criterion is independent of the definition of the relevant geographic market.⁴³²

⁴²⁵ Commission's *Guidelines on the effect on trade concept*, OJ 2004 C101/81.

⁴²⁶ 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).

⁴²⁷ OFT401 Agreements and concerted practices, at paragraphs 2.22 to 2.27.

⁴²⁸ Commission's *Guidelines on the effect on trade concept*, at paragraph 22.

⁴²⁹ Commission's *Guidelines on the effect on trade concept*, at paragraph 21.

⁴³⁰ 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.

⁴³¹ Commission's *Guidelines on the effect on trade concept*, at paragraph 20 and footnote 12.

⁴³² Commission's *Guidelines on the effect on trade concept*, at paragraph 22.

- A.76 Finally, the agreement must be capable of affecting trade between Member States to an appreciable extent.⁴³³ Appreciability can be assessed by reference to the market position and importance of the undertakings concerned.⁴³⁴

J BURDEN AND STANDARD OF PROOF

Burden of proof

- A.77 The burden of proving an infringement of the Chapter I prohibition lies upon the OFT.⁴³⁵ However, this burden does not preclude the OFT from relying, where appropriate, on inferences or evidential presumptions. In *Napp* the CAT stated that:⁴³⁶

[t]hat approach does not in our view preclude the Director,⁴³⁷ 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.78 The OFT is required to demonstrate that an infringement has occurred on the balance of probabilities which is the civil standard of proof.⁴³⁸ The CAT clarified in the *Replica Kit* appeals that the OFT must provide

⁴³³ See, for example, Case 22/71 *Béguelin* [1971] ECR 949, at paragraph 16.

⁴³⁴ 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.

⁴³⁵ *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].

⁴³⁶ *Napp*, at [110].

⁴³⁷ 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.

⁴³⁸ *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 31, at [88].

evidence of infringements under the Act which meets the civil standard of proof.⁴³⁹

'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.79 The Supreme Court has clarified that this standard of proof is not connected to the seriousness of the alleged infringement.⁴⁴⁰ The CAT has also expressly accepted the reasoning in this line of case law.⁴⁴¹

K EXCLUSION OR EXEMPTION

Exclusion

- A.80 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.81 Agreements which satisfy the criteria set out in section 9 of the Act benefit from an exemption to the Chapter I prohibition.
- A.82 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)]⁴⁴² and, specifically in the context of distribution agreements, in its Vertical Guidelines.
- A.83 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).

⁴³⁹ *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].

⁴⁴⁰ *Re S-B* [2010] 2 WLR, at paragraph 34. See also *Re B* [2009] 1 AC 11, at paragraph 69.

⁴⁴¹ *North Midland Construction*, at [16].

⁴⁴² *Guidelines on the application of Article 101(3) of the TFEU*, OJ 2004 C101/97.

- A.84 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.85 Agreements which have as their object the restriction of competition are very unlikely to benefit from individual exemption: as the Commission has stated,⁴⁴³ 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.86 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.⁴⁴⁴
- A.87 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.⁴⁴⁵
- A.88 Regulation 330/2010⁴⁴⁶ (known as the Vertical Agreements Block Exemption Regulation or 'VABER') provides an exemption from the Chapter I prohibition for certain types of vertical agreements.
- A.89 In this context, a vertical agreement is:⁴⁴⁷

⁴⁴³ Ibid.

⁴⁴⁴ OFT Guidance on Agreements and Concerted Practices, OFT 401, at paragraph 5.15.

⁴⁴⁵ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751), rule 12.

⁴⁴⁶ 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.

⁴⁴⁷ See Article 1(1)(a), of the VABER.

- 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.90 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(s)' in this Decision as a generic term to describe the downstream parties to the Infringements in the present case.

A.91 The VABER uses the term 'supplier' to refer to a party operating at the wholesale level that supplies goods or services to the 'buyer'.⁴⁴⁸ 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.92 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.⁴⁴⁹

A.93 The VABER also does not apply to 'hardcore restrictions',⁴⁵⁰ 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:

- 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).

⁴⁴⁸ See Article 1(1)(h), of the VABER.

⁴⁴⁹ See Article 3(1), of the VABER.

⁴⁵⁰ 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' 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 'hardcore' 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.*'

- A.94 In *Pierre Fabre*, the Court of Justice noted:⁴⁵¹
- [...] as an undertaking has the option, in all circumstances to assert, on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU, thus enabling its rights to be protected, it is not necessary to give a broad interpretation to the provisions which bring agreements or practices within the block exemption.’
- A.95 The Vertical Guidelines provide additional guidance on how the Commission applies the VABER, including in relation to the hardcore restrictions covered by Article 4(b) of the VABER.⁴⁵² In interpreting the VABER, the OFT (and any court) must also have regard to statements of the European Commission, including the Vertical Guidelines (see section 60(3) of the Act). 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.96 The Commission has indicated in the Vertical Guidelines that the hardcore restriction in Article 4(b) may result from ‘indirect measures aimed at inducing the distributor not to sell to [certain customers or to customers in certain territories]’.⁴⁵³ Further, the Vertical Guidelines indicate that restrictions which limit the ability of retailers to sell products passively (given their capability to limit the retailers’ access to a greater number and variety of customers) are hardcore restrictions within the meaning of Article 4(b) of the VABER:⁴⁵⁴
- A.97 The VABER is considered further at paragraphs 3.244 to 3.256, above.

⁴⁵¹ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Commission*, judgment of 13 October 2011), at paragraph 57. Additionally, the EU Courts have spoken of the need to interpret block exemptions ‘strictly’ or ‘narrowly’. ‘Strictly’ in Cases T-24/93, etc, *Compagnie Maritime Belge Transports v Commission* [1996] ECR II-1201, [1997] 4 CMLR 273, para 48; and in Cases T-191/98 *Atlantic Container Line v Commission* (‘TACA’) [2003] ECR II-3275, [2005] 4 CMLR 1283, para 568; ‘narrowly’ in Case T-67/01 *JCB Service v Commission* [2004] ECR II-49, [2004] 4 CMLR 1346, para 164 (appeal on other grounds dismissed, Case C-167/04P [2006] ECR I-8935, [2006] 5 CMLR 1303).

⁴⁵² Vertical Guidelines, at paragraphs 50 to 55.

⁴⁵³ Vertical Guidelines, at paragraph 50.

⁴⁵⁴ Vertical Guidelines, at paragraph 52.

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.⁴⁵⁵ 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.⁴⁵⁶
- B.2 The relevant turnover is the turnover of the undertaking in the relevant product and geographic markets affected by the infringement in the undertaking's last business year.⁴⁵⁷ 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.3 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'.⁴⁵⁸ 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.⁴⁵⁹

⁴⁵⁵ See 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.

⁴⁵⁶ 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].

⁴⁵⁷ See OFT's guidance as to the appropriate amount of a penalty (OFT 423, September 2012), at paragraph 2.7.

⁴⁵⁸ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 170

⁴⁵⁹ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 173.

B RELEVANT PRODUCT MARKET

Introduction

- B.4 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.⁴⁶⁰
- B.5 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 preliminary finding is that the products affected by the Infringements are certain Pride 'travel', 'medium' and 'large' mobility scooters.⁴⁶¹
- B.6 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.7 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.⁴⁶²

Segmentation of mobility scooters

- B.8 The OFT has benefited from conversations with and information received from a large number of mobility scooter retailers and suppliers throughout its investigation. These retailers and suppliers informed the OFT that mobility scooters can be grouped into the following three categories:

⁴⁶⁰ OFT Competition Law Guideline 403 'Market definition', December 2004.

⁴⁶¹ The Pride scooter models covered by the Below-RRP Online Price Advertising Prohibition are the Colt Deluxe, Colt Executive, Colt Nine, Colt Plus, Colt Twin, Colt XL8, and the Elite Traveller LX.

⁴⁶² OFT decision ME/2066/05 published on 13 January 2006, Completed acquisition by Sunrise Medical Inc and its subsidiaries of Lomax Mobility Limited.

- ‘travel’ mobility scooters,
- ‘medium’ mobility scooters, and
- ‘large’ mobility scooters.⁴⁶³

- B.9 ‘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.
- B.10 ‘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.⁴⁶⁴
- B.11 ‘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.12 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.⁴⁶⁵
- B.13 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

⁴⁶³ See documents: 3710PR, 3840RO, 3859DR, 3692EME, 3695HandM, 3697Inv, 3699Kymco, 3700Minic, 3845ProR, 3704SunM, 3706TGA, 3875VanOs, 3684DMD, 3822TI, 3812TI, 3821TI and 3820TI.

⁴⁶⁴ See the definition as set out in ‘The Use of Invalid Carriages on Highways Regulations 1988’.

⁴⁶⁵ See documents: 3692EME, 3807Inv, 3840RO, 2813DR, 3721PR, 3765TGA, 3740DPH, 3722Kymco, 3704SunM, 3789FLU, 3739Minic, 3748AVCQ, 3838BL and 3713VanOs.

the needs of certain individuals.⁴⁶⁶ In addition there is evidence that there is some brand awareness in the market, in particular with respect to Pride mobility scooters, which may impact on consumer choice.⁴⁶⁷

- 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.⁴⁶⁸ Therefore, the OFT considers that the information 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.⁴⁶⁹ 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), some of which are briefly referred to in paragraphs B.9 to B.11].⁴⁷⁰ For example, a 'travel' scooter would not be suitable for consumers who want to travel longer distances on their scooter and/or want to use their mobility scooters on roads, while a 'large'

⁴⁶⁶ Document 3765TGA.

⁴⁶⁷ Out of the 17 UK suppliers of mobility scooters listed at footnote 22, the responses of 13 suppliers indicated that Pride was one of a small number of brands that was known amongst consumers. See Documents: 3703DPH, 3859DR, 3692EME, 3693FLU, 3695HandM, 3699Kymco, 3700Minic, 3710PR, 3845ProR, 3840RO, 3704SunM, 3706TGA and 3875VanOs.

⁴⁶⁸ See, for example, documents 3821TI and 3824TI.

⁴⁶⁹ See documents: 3692EME, 3840RO, 3765 TGA, 3740DPH, 3722Kymco, 3704SunM, 3789FLU, 3739Minic, 3748AVCQ, 3838BL and 3713VanOs.

⁴⁷⁰ See, for example, documents: 3838BL, 2813DR, 3745AVCQ, 3740B/DPH, 3691EME, 3774FLU, 3752HandM, 3804Inv, 3722Kymco, 3739Minic, 3704SunM, 3763TGA and 3717VanOs.

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 suppliers⁴⁷¹ were of the view that scooters of different categories are substitutable. In particular, one of the suppliers noted that ‘travel scooters are used more widely than their design was intended and have in many cases replaced the medium scooter’.⁴⁷²
- B.19 The OFT’s finding is that the agreements and/or concerted practices covered certain Pride 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. The OFT further notes that each of the agreements and/or concerted practices constitute ‘small agreements’ within the definition of section 39 of the Act, whether the relevant market is defined so as to include all three categories of mobility scooters or to constitute three separate 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.

⁴⁷¹ See documents: 2813DR and 3721PR.

⁴⁷² Document 2813DR.

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.⁴⁷³ 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.⁴⁷⁴
- 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. Information provided by two retailers, who indicated that new mobility scooters set a price ceiling for second hand scooters,⁴⁷⁵ is consistent with the view that there is asymmetric competition.⁴⁷⁶ Therefore, the OFT has not included second-hand 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

⁴⁷³ See documents: 3820TI, 3826TI and 3812TI.

⁴⁷⁴ [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).*'

[Document number redacted]: '[Document 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.*'

⁴⁷⁵ See documents: 3821TI and 3829TI.

⁴⁷⁶ In this case asymmetric competition is where a new mobility scooter provides a competitive constraint on second-hand mobility scooters. However, second-hand mobility scooters are not a competitive constraint on new mobility scooters.

and mobility scooters form separate markets.⁴⁷⁷ 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 separation of wheelchairs and mobility scooters is also supported by previous OFT findings.⁴⁷⁸

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 retailers informed the OFT that their 'offline' sales channel does not compete with online retailers,⁴⁷⁹ the majority of retailer interviews highlighted that their 'offline' sales channel either compete directly on price with online retailers or price match if a customer quotes an online

⁴⁷⁷ See, for example, documents: 3812TI, 3827TI, 3821TI, 3817TI and 3828TI.

⁴⁷⁸ *Completed acquisition by Sunrise Medical Inc and its subsidiaries of Lomax Mobility Limited* (13 January 2006) Paragraph 6.

⁴⁷⁹ [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.'

price.⁴⁸⁰ Documentary and witness statement evidence also indicate that Pride's 'bricks and mortar' retailers felt the competitive constraint of online retailers.⁴⁸¹

⁴⁸⁰ [Document number redacted]: *'the internet puts pressure on margins'*.

[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 [retailer 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', [retailer 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.'*

⁴⁸¹ In an email to Pride one of Pride's retailers highlighted the amount of competition 'bricks and mortar' retailers face from internet retailers (Document 2893PR):

'We as dealers are of the opinion Pride are jeopardising the future of high street dealers and Prides products, by allowing the brand to be hugely discounted on the internet ie sold at prices we as dealers can't compete ...

The internet is stifling the growth of your high street dealers as we are constantly battling to retain margin ...

Does Pride not wonder how their Representatives feel when they go into dealers and are constantly being told that they can't compete with the internet ...

It only needs one person to bring a range of scooters into the UK for high street dealers only, this could wipe Pride out of the market - It will happen!! Dealers are desperate for a range of products they can sell that aren't on the internet so they can make margin ...

Other scooter importers can't compete with the GoGO on price and quality so why discount it? If this product is not on the internet we would be happy to pay an extra £50+ per scooter.'

Further, in an interview with the OFT dated 11th September 2012, Pride's Managing Director [name redacted], explained that many retail outlet stores were complaining about competition from internet retailers (Document 3481WS CD2, pg 24-25):

OFT: OK. OK, we'll turn that one over. The next email is a document ... it's document 0297, it's from [PA to Pride's Sales Director & Head of Marketing's name redacted] to the area sales managers I believe, copying you in, 2 May 2007 entitled 'Internet Pricing' and she says, "Please find below the latest internet advertising prices as of today. This is getting out of hand and at a very speedy rate.

- B.30 The views of mobility scooter suppliers also varied on this issue. Two suppliers stated that ‘bricks and mortar’ prices have not been influenced by online sales and remained consistently inflated.⁴⁸² However, the majority of mobility scooter suppliers are of the view that online sales have put pressure on prices of ‘bricks and mortar’ sales and have had the effect of bringing ‘bricks and mortar’ prices down, as the internet has enabled consumers to readily compare the prices of products offered by retailers.⁴⁸³
- 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.⁴⁸⁴ One possible cause of the price difference may be the different levels of service provided by different types of retailers.
- B.32 In addition, the evidence suggests that the Below-RRP Online Price Advertising Prohibition was introduced in response to online businesses

I’m getting on average three to five calls per day of complaints about the following sites.” And she says she’s totally fed up of this. “I can’t do this on my own. We just seem to be going round in circles.” And then she lists various dealers/web companies with their prices for particular Pride products I think ... Pride scooters.

Pride’s Managing Director [name redacted]: Yes.

OFT: Then she says, “You can clearly see what happens. The next move will be that they all follow [retailer name redacted] and advertise at a pound or two cheaper than them. We have worked so hard to keep the Elite at £995.00 and the Celebrity range at £995.00 plus. Now it seems the norm is £795.00 for Elites and even less for the X3/X4.” And just pausing there. Can I just ask you first of all can you explain what’s going on in [Personal Assistant to Pride’s Sales Director & Head of Marketing’s name redacted] email?

Pride’s Managing Director [name redacted]: *Yeah, I think this was the very start of the concern if you will from the retailers ... the retail outlet stores. She makes reference there to three to five calls a day of complaints. That’s complaints from I believe to be retailers, not consumers, in terms of the price erosion on certain products. That’s basically what it’s referring to. It’s more and more variation in terms of the price spread on a certain product.*

⁴⁸² See documents: 3838BL and 3845ProR.

⁴⁸³ Out of a total of 16 suppliers 12 stated that online prices put pressure on the prices of ‘bricks and mortar’ retailers. See documents: 3692EME, 3840RO, 3765TGA, 3740DPH, 3722Kymco, 3704SunM, 3789FLU, 3748AVCQ, 3713VanOs, 2813DR, 3721PR and 3845HandM.

⁴⁸⁴ See documents: 3845ProR and 3807Inv.

putting pressure on the prices and margins of bricks and mortar retailers with respect to Pride's mobility scooters.⁴⁸⁵

- 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.⁴⁸⁶

- B.35 The agreements and/or concerted practices constitute vertical agreements, which were entered into between a supplier, Pride, and the Retailers. The OFT has therefore assessed the relevant geographic market both at the supplier and retailer level.

Supplier level

- B.36 While formal definition of the market is not necessary for the purposes of this Decision, the evidence in the OFT's possession suggests that the geographic scope of the market is likely to be national at the supplier level.
- B.37 The geographic scope of the market at the supplier level is not likely to be narrower than national. This follows because pricing does not vary due to geographic location with the UK and suppliers supply their products across the UK. The OFT notes also that the Infringements cover the whole of the UK.
- B.38 The OFT considered whether evidence of imports may suggest a wider than national geographic scope at the supplier level, as the majority of mobility scooters are imported into the UK, mainly from the Far-East.

⁴⁸⁵ We see evidence of both dealers complaining about the internet to Pride and Pride appearing concerned about the situation. See the 'Historical Background to the Infringements' section and in particular paragraphs 2.73 and 2.74. Further, Pride's written representations in response to the OFT's Statement of Objections confirm, at paragraph 15, that Pride was concerned about the effect that competition from online retailers (or competition between Pride stockists 'principally by means of retailers offering alluring 'special price deals' online') could have on offline prices and the 'economic viability of its service-oriented 'bricks and mortar' stockists'.

⁴⁸⁶ OFT Competition Law Guideline 403 'Market definition', December 2004, at paragraph 4.3.

However, these imports mostly come via domestic subsidiary companies located in the UK.

- B.39 The majority of retailers do not consider direct imports to constitute an alternative to purchasing from a supplier based in the UK.⁴⁸⁷ 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.⁴⁸⁸ Another issue mentioned by retailers is the lack of reliability with respect to the availability of products and spare parts.⁴⁸⁹
- B.40 Even if some larger retailers source a proportion of the mobility scooters they sell directly from the Far East (that is, not via a UK-based supplier),⁴⁹⁰ these imports are considered, even by the retailers, to constitute limited alternatives to purchasing from UK-based suppliers due to the unreliability of the provision of products and spare parts.⁴⁹¹ Based on this, the OFT considers the geographic scope to be no larger than national at the supplier level.

Retail level

- B.41 While formal definition of the market is not necessary for the purposes of this Decision, the evidence in the OFT's possession suggests that in the relevant context of this case, the geographic scope of the market is likely to be national at the retailer level.
- B.42 Evidence from retailer interviews indicates that the geographic scope at retailer level is no wider than the UK. Although there are some exports to

⁴⁸⁷ See documents: 3827TI, 3825TI, 3820TI, 3824TI and 3822TI.

⁴⁸⁸ See documents: 3824TI and 3825TI.

⁴⁸⁹ Document 3812TI.

⁴⁹⁰ Document 3812TI and Document 3456WS, CD 1 of 4, pg 6.

⁴⁹¹ 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 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.

other European countries the evidence suggests that this is negligible, mainly due to high shipping costs.⁴⁹²

B.43 The Infringements covered online Retailers who sell mobility scooters to all areas of the UK.⁴⁹³ The evidence shows that the presence of online retailers with national business provides a competitive constraint on offline sellers, which would be larger absent the Below-RRP Online Price Advertising Prohibition. In addition, some of the bricks and mortar retailers have multiple showrooms with uniform pricing and marketing strategy across the UK.⁴⁹⁴

B.44 In light of the considerations set out above, the OFT considers that there are elements of both local and national competition at the retail level. In this case, it may be appropriate to consider the market as wider than local, on the basis of evidence that regional and national internet retailers have, to some extent, constrained local retailers and this constraint is likely to increase over time.

D CONCLUSION ON THE RELEVANT MARKET

B.45 In summary, the OFT concludes that the relevant product market is the online and 'offline' sale of new mobility scooters.

B.46 The OFT concludes that the relevant geographic market for the Infringements is the UK, both at the supplier and retailer level.

B.47 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.

⁴⁹² Document 3825TI, Document 3824TI and Document 3456WS, CD 1 of 4, pg 12.

⁴⁹³ See for example document 3456WS CD 1 of 4, pg 10 and document 3817TI.

⁴⁹⁴ Documents: 3812TI, 3824TI and 3823TI.

C ATTRIBUTION OF LIABILITY

A INTRODUCTION

C.1 This section identifies and sets out the details of the undertakings which the OFT 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 each 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 undertakings' company directors during the period of Infringements;
- ii. Trading names used by the undertakings in the supply of mobility scooters; and
- iii. The websites owned, operated or used by the undertakings for the purpose of advertising or selling mobility scooters.

C.3 The section also sets out, for each party to the Infringements, the OFT's conclusions on the attribution of liability. 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.

Assessing Liability

C.4 In determining who is liable for an infringement, and therefore, who can be the addressee of 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.5 For each party which the OFT finds liable for the Infringements, it has first identified the legal entity which directly entered into an agreement and/or concerted practice with Pride. 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.6 Where a legal entity which was directly involved in the Infringements was owned by a natural person during the period of the Infringements, liability will not extend to that individual.
- C.7 The Parties to whom this Decision is addressed are named in paragraph 1.9.
- C.8 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.⁴⁹⁵

B PRIDE MOBILITY PRODUCTS LIMITED (MANUFACTURER)

- C.9 The OFT finds on the available evidence that Pride Mobility Products Limited (Pride) entered into an agreement and/or concerted practice with each of the Retailers in relation to Pride's Below-RRP Online Price Advertising Prohibition and is therefore liable for the Infringements.
- C.10 Pride is registered as Company Number 03287297, at 32 Wedgewood Road, Bicester, Oxfordshire OX26 4UL.⁴⁹⁶

⁴⁹⁵ 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.')

⁴⁹⁶ Document 3903PR. Fame company report of Pride Mobility Products Limited.

- C.11 The company directors of Pride during the period of the Infringements were and continue to be, [name redacted], as Managing Director, and [name redacted], as CEO and Company Secretary.⁴⁹⁷
- C.12 A third current company director, [name redacted], was appointed as after the period of the Infringements.
- C.13 Pride is registered as an 'active' company.⁴⁹⁸
- C.14 Pride operates the website www.pride-mobility.co.uk.

Liability

- C.15 The OFT finds on the available evidence that Pride entered into an agreement and/or concerted practice with each of the Retailers in relation to Pride's Below-RRP Online Price Advertising Prohibition and is therefore liable for the Infringements.

C 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).⁴⁹⁹
- C.17 The OFT finds on the available evidence that DMD directly entered into an agreement and/or concerted practice with Pride in relation to Pride's Below-RRP Online Price Advertising Prohibition and is therefore liable for the Infringement.⁵⁰⁰ 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

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

⁴⁹⁹ Companies House certificates show the separate registration of both company names, together with their respective previous company names (see document numbers 3647/DMD, 3648/DMD and 3652/DMD). 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) Limited 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.

⁵⁰⁰ See paragraphs 3.37 to 3.66.

of Infringement, up to February 2012, and also as it is referred to in the documentary evidence.

- C.18 As outlined in paragraphs 3.37 to 3.66 the OFT considers that Careco/DMD was involved in the Infringement in respect of the Below-RRP Online Price Advertising Prohibition, on dates from March 2011 (at the latest) to February 2012 (at the earliest). This is the relevant period of the Infringement for Careco/DMD.
- C.19 Careco is registered as Company Number 06831125 at Westgate Chambers, 8A Elm Park Road, Middlesex, HA5 3LA.⁵⁰¹
- 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 Infringement 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.⁵⁰² The company's principal activity during the period of Infringement 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:⁵⁰³
- www.discountmobilitydirect.co.uk
 - www.cheapmobilityonline.co.uk
 - www.discountmobilitydirect.com
 - www.dailylivingaidsdirect.com
 - www.cheapreclinerchairs.co.uk

⁵⁰¹ See document number 3878/DMD, Fame company report of Careco (UK) Limited.

⁵⁰² Document 3849DMD. Fame company report of Discount Mobility Direct Limited.

⁵⁰³ Document 3652DMD.

- www.cheaprecliners.co.uk
- www.careco.co.uk
- www.dmdmobility.co.uk

C.24 Careco/DMD uses the following trading names in the supply of mobility scooters:⁵⁰⁴

- Discount Mobility Direct
- Careco

Liability

C.25 The OFT finds on the available evidence that Careco/DMD entered into an agreement and/or concerted practice with Pride in relation to the Infringement and as such, Careco/DMD is liable for that infringement.

D DISCOUNT MOBILITY PLUS LIMITED AND RUTLAND MOBILITY LIMITED (RETAILER)

C.26 The OFT finds on the available evidence that Discount Mobility Plus Limited (DMP) entered into an agreement and/or concerted practice with Pride in respect of Pride's Below-RRP Online Price Advertising Prohibition and is therefore liable for the Infringement.⁵⁰⁵ Due to its 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 Infringement.

C.27 As outlined in paragraphs 3.67 to 3.91 the OFT considers that DMP and Rutland were involved in the Infringement from March 2010 (at the latest) to March 2011 (at the earliest). This is the relevant period of Infringement for DMP and Rutland.

C.28 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 Infringement:

⁵⁰⁴ Ibid.

⁵⁰⁵ See paragraphs 3.67 to 3.91.

- 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 Pride;
- 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.29 In the period of Infringement, 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 Infringement. For these reasons Scooters Mobility Limited is not an addressee of this Decision.⁵⁰⁶

Discount Mobility Plus Ltd

- C.30 DMP is registered as Company Number 05392613, at 14 all Saints Street, Stamford, Lincolnshire, PE9 2PA.
- C.31 DMP is registered as an 'active' company, whose principal activity during the period of Infringement was and continues to be the sale of mobility products via the internet, including mobility scooters.⁵⁰⁷
- C.32 The company directors of DMP during the period of the Infringement were and continue to be [name redacted] and [name redacted], as Company Secretary.⁵⁰⁸

⁵⁰⁶ See document 3669/DM.

⁵⁰⁷ See document number 3847/DMP, Fame company report of Discount Mobility Plus Limited and document 3821TI.

⁵⁰⁸ Ibid.

C.33 15. DMP owns, operates or uses the following websites for the purposes of (1) advertising mobility scooters and/or (2) selling mobility scooters:⁵⁰⁹

- www.mobilityscootersplus.com
- www.mobilityscooterbatteries.co.uk
- www.scooters-mobility.co.uk

C.34 Additionally, DMP uses the following trading names for the supply of mobility scooters:

- Mobility Scooters Plus
- Scooters Mobility

Rutland Mobility Limited

C.35 Rutland is registered as Company Number 04825234, at 5 Park Road, Melton Mowbray, Leicestershire LE13 1TT.

C.36 Rutland is registered as an active company,⁵¹⁰ whose principal activity during the period of Infringement was and continues to be the sale of mobility related products in the UK, including mobility scooters. Rutland operates from a retail store at 5 Park Road, Melton Mowbray, Leicestershire LE13 1TT.

C.37 The company directors of Rutland during the period of the Infringement were and continue to be [name redacted] and [name redacted], as Company Secretary.

C.38 Rutland owns, operates or uses the following websites for the purposes of (1) advertising mobility scooters and/or (2) selling mobility scooters:⁵¹¹

- www.rutlandmobility.co.uk

⁵⁰⁹ See document number 3669/DMP.

⁵¹⁰ See document number 3848/DMP, Fame company report of Rutland Mobility Limited.

⁵¹¹ See document number 3669/DMP.

Liability

- C.39 The OFT finds that [name redacted], as owner of DMP and Rutland, exercised decisive influence over the commercial policy of both companies during the period of the Infringement 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.6 above.
- C.40 The OFT further notes the evidence of decisive influence in the form of a common directors between DMP and Rutland during the period of Infringement, namely [name redacted] and [name redacted], as Company Secretary. Specifically, the documentary evidence suggests that in relation to the agreement and/or concerted practice with Pride, when representing one company, [name redacted] was simultaneously representing the other.
- C.41 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.
- C.42 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.⁵¹²
- C.43 The OFT therefore finds that DMP and Rutland are jointly and severally liable in respect of the Infringement.

E MOBILITY 4 U LIMITED (RETAILER)

- C.44 The OFT finds on the available evidence that Mobility 4 U Limited (M4U) directly entered into an agreement and/or concerted practice with Pride in

⁵¹² 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 on behalf Rutland. Thereafter, each Notice was issued to DMP as covering both companies.

relation to Pride's Below-RRP Online Price Advertising Prohibition and is therefore liable for the Infringement.⁵¹³

- C.45 As outlined in paragraphs 3.92 to 3.107, the OFT considers that M4U was involved in the Infringement from June 2010 (at the latest) to June 2011 (at the earliest). This is the relevant period of Infringement for M4U.
- C.46 M4U is registered as Company Number 04416225, at Unit D, Securiparc, Wimsey Way, Somercotes, Alferton, Derbyshire DE55 4HG.⁵¹⁴
- C.47 The company directors of M4U during the period of Infringement were and continue to be [name redacted] and [name redacted].⁵¹⁵
- C.48 M4U is registered as an 'active' company,⁵¹⁶ and its principal activity was and continues to be the supply of mobility products, including mobility scooters.⁵¹⁷
- C.49 M4U Ltd operates, owns or uses the following websites for the purposes of (1) advertising mobility scooters and/or (2) selling mobility scooters:⁵¹⁸
- www.mobilitybuddy.co.uk
- C.50 M4U Ltd also uses the following trading names for the purposes of supplying mobility scooters:⁵¹⁹
- Mobility Buddy

Liability

- C.51 The OFT finds on the available evidence that M4U entered into an agreement and/or concerted practice with Pride in relation to the Infringement and that M4U is liable for that infringement.

⁵¹³ See paragraphs 3.92 to 3.107.

⁵¹⁴ See document number 3860/M4U, Fame company report of Mobility 4 U Limited.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid.

⁵¹⁷ See Document 3680/M4U: Unaudited statements years ending December 2010 and December 2011.

⁵¹⁸ Document 3679M4U.

⁵¹⁹ Ibid.

F MT MOBILITY LIMITED/HOOPLAH LIMITED (RETAILER)

- C.52 The OFT finds on the available evidence that MT Mobility Limited (MTM) entered into an agreement and/or concerted practice with Pride in relation to Pride's Below-RRP Online Price Advertising Prohibition and is therefore liable for the Infringement.⁵²⁰
- C.53 This Decision is also addressed to Hooplah Limited (Hooplah) which the OFT finds is jointly and severally liable for the Infringement on the basis that Hooplah and MTM form part of one single undertaking. MTM was, during the period of Infringement, and continues to be owned by Hooplah and, during the period of the Infringement, there was common decisive influence by way of common directors.
- C.54 As outlined in paragraphs 3.108 to 3.121, the OFT finds that MTM was involved in the Infringement in respect of the Below-RRP Online Price Advertising Prohibition, on dates from March 2011 (at the latest) to June 2011 (at the earliest). This is the relevant period of Infringement for MTM.
- C.55 Hooplah is registered as Company Number 07050678, at 17C Weston Favell Centre, Northampton NN3 8JZ.⁵²¹
- C.56 MTM is registered as Company Number 07051407, at the same address as Hooplah.⁵²²

MT Mobility Ltd

- C.57 The company directors of MTM during the period of Infringement were and continue to be:⁵²³
- i. [name redacted];
 - ii. [name redacted]; and
 - iii. [name redacted].

⁵²⁰ See paragraphs 3.108 to 3.121.

⁵²¹ Document 3856MTM. Fame company report of Hooplah Limited.

⁵²² Document 3855MTM.

⁵²³ Ibid.

- C.58 MTM is registered as an active company.⁵²⁴ MTM's principal activity during the period of Infringement was the supply of mobility products including mobility scooters.⁵²⁵
- C.59 MTM uses the following trading names in supplying mobility scooters:⁵²⁶
- More Than Mobility
 - Mobility Equipment
 - Mobility One
 - Mobility Products 123
- C.60 MTM owns, operates or uses the following websites for (1) selling mobility scooters and (2) advertising mobility scooters:⁵²⁷
- www.morethanmobility.com
 - www.mobilityone.co.uk
 - www.mobilityscooter.co.uk
 - www.morethanmobilitynorthampton.co.uk
 - www.morethanmobilityplymouth.co.uk
 - www.mobilityequipment.co.uk
 - www.mobilityproducts123.co.uk
- C.61 MT Mobility Ltd also owns, operates or uses a number of 'isites' which promote More Than Mobility and/or Mobility Equipment.⁵²⁸ These include

⁵²⁴ Ibid.

⁵²⁵ Document 3657MTM. See Directors Report.

⁵²⁶ See document numbers 3658/MTM and 3659/MTM.

⁵²⁷ Ibid.

⁵²⁸ 'Isites' are websites which are targeted to generate online ranking and drive high-volume traffic to a main website, in order to make that website appear higher in search engines. MTM's websites promote its More than Mobility and Mobility Equipment trading names which link to MTM's main websites. MTM's websites also refer to mobility scooters but do not advertise specific models and they are not ecommerce sites (see document number 3656/MTM).

references to mobility scooters which are linked to the MTM websites www.morethanmobility.co.uk and www.mobilityequipment.co.uk.

Hooplah Limited

- C.62 The company directors of Hooplah during the period of the Infringement were and continue to be:⁵²⁹
- i. [name redacted];
 - ii. [name redacted]; and
 - iii. [name redacted].
- C.63 Hooplah Ltd is registered as an active company.⁵³⁰ The principal activity of Hooplah, during the period of Infringement, was and continues to be as a holding company to MTM.

Liability

- C.64 The evidence demonstrates that MTM entered into an agreement and/or concerted practice with Pride in relation to the Infringement and MTM is therefore liable for that infringement. The OFT finds that Hooplah is jointly and severally liable for the Infringement as: during the period of the Infringement:
- i. Hooplah was, during the period of the Infringement, and continues to be the holding company of MTM; and
 - ii. There was, during the period of Infringement, common decisive influence by way of common directors.

G ROBERT GREGG LIMITED (RETAILER)

- C.65 The OFT finds that Robert Gregg Limited (Robert Gregg), trading as Mobility Warehouse,⁵³¹ directly entered into an agreement and/or

⁵²⁹ See document 3856MTM. Fame company report of Hooplah Limited.

⁵³⁰ Ibid.

⁵³¹ Document 3663MW.

concerted practice with Pride in respect of Pride's Below-RRP Online Price Advertising Prohibition and is therefore liable for the Infringement.⁵³²

- C.66 As outlined in paragraphs 3.122 to 3.128, the OFT considers that Robert Gregg/Mobility Warehouse was involved in the Infringement in respect of the Below-RRP Online Price Advertising Prohibition, from February 2010 (at the latest) to January 2012 (at the earliest). This is the relevant period of Infringement for Mobility Warehouse.
- C.67 Robert Gregg is registered as Company Number 05149148, at 4 Carlton Business Centre, Station Road, Carlton, Nottingham NG4 3AA.⁵³³
- C.68 The company directors during the period of Infringement were and continue to be [name redacted] and [name redacted].⁵³⁴
- C.69 Robert Gregg is listed as an 'active' company.⁵³⁵ The company's principal activity during the period of the Infringement was the retailing of mobility aids.⁵³⁶
- C.70 Robert Gregg/Mobility Warehouse owns, operates or uses the following websites for the purposes of advertising mobility scooters:⁵³⁷
- www.mobilitywarehouse.co.uk⁵³⁸
- C.71 The OFT notes that during the period of the Infringement, until March 2011, Robert Gregg/Mobility Warehouse also operated the website www.advancemobility.co.uk for the purposes of advertising and/or selling mobility scooters.⁵³⁹

⁵³² See paragraphs 3.122 to 3.128.

⁵³³ Document 3865MW. Fame company report of Robert Gregg Limited

⁵³⁴ Ibid.

⁵³⁵ Ibid.

⁵³⁶ See document 3662MWH, Abbreviated Accounts for Robert Gregg Limited.

⁵³⁷ Robert Gregg/Mobility Warehouse advised the OFT that it does not sell products online (See Document 2844.

⁵³⁸ See document 3663/MWH.

⁵³⁹ Ibid.

- C.72 The OFT has been informed that Robert Gregg/Mobility Warehouse ceased trading on 31 November 2013 and the company was being dissolved.⁵⁴⁰

Liability

- C.73 The OFT finds on the available evidence that Robert Gregg/Mobility Warehouse entered into an agreement and/or concerted practice with Pride in respect of the Infringement and as such, Robert Gregg/Mobility Warehouse is liable for that infringement.

H HARTMOND LIMITED (RETAILER)

- C.74 The OFT finds on the available evidence that Hartmond Limited (Hartmond) directly entered into an agreement and/or concerted practice with Pride in respect of Pride's Below-RRP Online Price Advertising Prohibition and is therefore liable for the Infringement.⁵⁴¹
- C.75 As outlined in paragraphs 3.129 to 3.147, the OFT considers that Hartmond was involved in the Infringement from December 2010 (at the latest) to January 2012 (at the earliest). This is the relevant period of Infringement for Hartmond.
- C.76 Hartmond is registered as Company Number 06275524, at 58A Stockholm Road, Sutton Fields Industrial Estate, Hull, North Humberside HU7 0XW.⁵⁴²
- C.77 The company directors during the period of the Infringement were and continue to be:
- i. [name redacted]
 - ii. [name redacted]
 - iii. [name redacted]
 - iv. [name redacted]

⁵⁴⁰ Email from Robert Gregg/Mobility Warehouse to the OFT, dated 9 February 2014.

⁵⁴¹ See paragraphs 3.129 to 3.147.

⁵⁴² Document 3864HVM. Fame company report of Hartmond Limited.

- C.78 Hartmond is registered as an active company,⁵⁴³ whose principal activity during the period of the Infringement was the supply of mobility products, including mobility scooters.⁵⁴⁴
- C.79 Hartmond owns, operates or uses the following websites to (1) advertise mobility scooters and/or (2) sell mobility scooters:
- www.valuemobility.co.uk
 - www.themobilitypartnership.co.uk
 - www.trademobility.org
- C.80 Hartmond also uses the following trading names in the supply of mobility scooters:
- Value Mobility
 - The Mobility Partnership
 - Trade Mobility
 - Yorkshire Mobility

Liability

- C.81 The OFT finds that Hartmond entered into an agreement and/or concerted practice with Pride in respect of the Infringement and as such, Hartmond is liable for that infringement.

I MILTON KEYNES MOBILITY LIMITED (RETAILER)

- C.82 The OFT finds on the available evidence that Milton Keynes Mobility Limited (MKM) entered into an agreement and/or concerted practice with Pride in relation to the Below-RRP Online Price Advertising Prohibition and is therefore liable for the Infringement.⁵⁴⁵

⁵⁴³ Ibid.

⁵⁴⁴ Document 3810/HVM, unaudited financial statements of Hartmond Limited.

⁵⁴⁵ See paragraphs 3.148 to 3.173.

- C.83 As outlined in paragraphs 3.148 to 3.173, the OFT considers that MKM was involved in the Infringement from May 2010 (at the latest) to January 2012 (at the earliest). This is the relevant period of Infringement for MKM.
- C.84 MKM is registered as Company Number 04809881, at 26 High Street, Newport Pagnell, Buckinghamshire, MK16 8AQ.⁵⁴⁶
- C.85 MKM's company directors during the Infringement were and continue to be [name redacted] and [name redacted].⁵⁴⁷
- C.86 MKM is registered as an active company, whose principal activity during the period of Infringement was the supply of mobility products including mobility scooters.
- C.87 MKM owns, operates or uses the following websites for the purposes of (1) advertising mobility scooters, and(2) selling mobility scooters:
- www.carvercare.co.uk
- C.88 MKM also uses the following trading names in the supply of mobility scooters:
- Carvercare & Mobility
 - Carver Care

Carver Care and Mobility Limited

- C.89 Carver Care and Mobility Limited is a company which shares common directors and owners with MKM, as detailed in paragraph C.83 above. Carver Care and Mobility Limited is registered as Company Number 05284915, at Cintra House, 5 Christchurch Road, Winchester, Hampshire SO23 9SR.
- C.90 Carver Care and Mobility Limited is registered as an 'active (dormant)' (non-trading) company which is not a parent or subsidiary of MKM.⁵⁴⁸ Carver Care and Mobility Limited is not engaged in economic activity and

⁵⁴⁶ Document 3861CC Fame company report of Milton Keynes Mobility Limited.

⁵⁴⁷ Ibid.

⁵⁴⁸ Document 3862 Fame company report of Carver Care and Mobility Limited.

was not engaged in economic activity during the period of the Infringement.⁵⁴⁹

- C.91 Some of the evidence described in this Decision refers to ‘Carver Care’ as it is a trading name and website domain name of MKM. However, Carver Care and Mobility Limited is a separately registered company which is not an addressee of this Decision.

Liability

- C.92 The OFT finds that MKM entered into an agreement and/or concerted practice with Pride in respect of the Infringement and as such, MKM is liable for that infringement.

J BETTER MOBILITY LIMITED (RETAILER)

- C.93 The OFT finds on the available evidence that Better Mobility entered into an agreement and/or concerted practice with in respect of Pride’s Below-RRP Online Price Advertising Prohibition and is therefore liable for the Infringement.⁵⁵⁰
- C.94 As outlined in 3.174 to 3.186, the OFT considers that Better Mobility was involved in the Infringement from May 2011 (at the latest) to February 2012 (at the latest). This is the relevant period of Infringement for Better Mobility.
- C.95 Better Mobility is registered as Company No. 06344317, at Aldbury House, Dower Mews, 108 High Street, Berkhamsted, Hertfordshire, HP4 2BL.⁵⁵¹
- C.96 The company directors of Better Mobility during the period of Infringement were and continue to be [name redacted] and [name redacted].⁵⁵²

⁵⁴⁹ Documents 3665/Carver and 3666/Carver, Dormant Accounts for years ending December 2010 and December 2011.

⁵⁵⁰ See paragraphs 3.174 to 3.186.

⁵⁵¹ Document 3908/BM. Fame company report of Better Mobility.

⁵⁵² Ibid.

C.97 The company is registered as an 'active' company,⁵⁵³ whose principal activity during the period of Infringement was the supply of mobility products including mobility scooters.

C.98 Better Mobility owns, operates or uses the following websites for the purposes of (1) advertising mobility scooters and/or (2) selling mobility scooters:

- www.bettermobility.co.uk

Liability

C.99 The OFT finds on the available evidence that Better Mobility entered into an agreement and/or concerted practice with Pride in relation to the Infringement and as such, Better Mobility is liable for that infringement.

⁵⁵³ Ibid.

D TURNOVER INFORMATION/SMALL AGREEMENTS

Pride Mobility Products Limited (Manufacturer)

D.1 The turnover information of Pride Mobility Products Limited for the years ended 31 December 2009, 2010, 2011 and 2012 is as follows:⁵⁵⁴

Year ending	31 December 2009	31 December 2010	31 December 2011	31 December 2012
Turnover	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]

The Retailers

D.2 The financial statements and/or estimates received from the Retailers reflect the total turnover for the business years ended at various dates in 2009 to 2012. The Companies House reports referred to in this Annexe reflect that each of the Retailers enjoys small business 'total exemption' status. As such, the turnover information for the Retailers is not publicly available. Furthermore, some Retailers have been unable to produce finalised accounts to the OFT and as such the OFT has relied on unaudited accounts and/or estimates provided by the Retailers.

Careco (UK) Limited, formerly Discount Mobility Direct Limited

D.3 The turnover information of Discount Mobility Direct Limited for the years ended 31 March 2009, 2010, 2011 and 2012 is as follows:⁵⁵⁵

⁵⁵⁴ Document 3446/PR. Turnover details provided by Pride. See also Document 3903, Pride's Fame company report.

⁵⁵⁵ This is on the basis of unaudited financial statements prepared on behalf of Discount Mobility Direct Ltd by Morgan Berkeley Ltd. See documents 3649/DMD, 3650/DMD and 3651/DMD.

Year ending	31 March 2009	31 March 2010	31 March 2011	31 March 2012
Turnover	£0 ⁵⁵⁶	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]

D.4 On 23 March 2012, Discount Mobility Direct Limited changed its name to Careco (UK) Limited. The turnover stated for the year ended 31 March 2012 is provided in the unaudited financial statements for Careco (UK) Limited.⁵⁵⁷

Discount Mobility Plus Limited/Rutland Mobility Limited

D.5 The total turnover information of Discount Mobility Plus Limited for the years ended 31 March 2009, 2010, 2011 and 2012 is as follows:⁵⁵⁸

Year ending	31 March 2009	31 March 2010	31 March 2011	31 March 2012
Turnover	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]

D.6 The turnover information of Rutland Mobility Limited for the years ended 31 July 2009, 2010, 2011 and 2012 is as follows:⁵⁵⁹

⁵⁵⁶ DMD was incorporated on 26 February 2009 and started trading with effect from 1 April 2009. See document 4422/DMD.

⁵⁵⁷ Document 3649/DMD.

⁵⁵⁸ This is on the basis of unaudited financial statements prepared on behalf of Discount Mobility Plus Ltd by Duncan & Toplis, Chartered Accountants. See documents 3671/DMP, 3675/DMP and 3676/DMP.

⁵⁵⁹ This is on the basis of unaudited financial statements prepared on behalf of Rutland Mobility Ltd by Duncan & Toplis, Chartered Accountants, and on information supplied by a DMP/Rutland employee [name redacted] See documents 3670/DMP, 3677/DMP and 4413/DMP.

Year ending	31 July 2010	31 July 2010	31 July 2011	31 July 2012
Turnover	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]

Mobility 4 U Limited

D.7 The turnover information for Mobility 4 U Limited for the years ended 31 December 2009, 2010, 2011 and 2012 is as follows:⁵⁶⁰

Year ending	31 December 2009	31 December 2010	31 December 2011	31 December 2012
Turnover	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]

MT Mobility Limited/Hooplah Limited

D.8 The turnover information for MT Mobility Limited for the years ended 31 October 2009, 2010, 2011 and 2012 is as follows:⁵⁶¹

Year ending	31 October 2009	31 October 2010	31 October 2011	31 October 2012
Turnover	No accounts available ⁵⁶²	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]

⁵⁶⁰ Documents 3680/M4U and 4424/M4U. Unaudited financial statements for years ended 31 December 2010, 2011 and 2012.

⁵⁶¹ Documents 3657/MTM and 4412/MTM. Unaudited financial statements for years ended 31 October 2010, 2011 and 2012. See also documents 4410/MTM and 4411/MTM.

⁵⁶² MT Mobility started trading in November 2009. See documents 4410/MTM and 4411/MTM.

D.9 The turnover information for Hooplah Limited for the years ended 31 October 2009, 2010, 2011 and 2012 is as follows:⁵⁶³

Year ending	31 October 2009	31 October 2010	31 October 2011	31 October 2012
Turnover	£0	£0	£0	£0

Robert Gregg Limited trading as Mobility Warehouse

D.10 The turnover information for Robert Gregg Limited for the years ended 31 March 2009, 2010, 2011 and 2012 is as follows:⁵⁶⁴

Year ending	31 March 2009	31 March 2010	31 March 2011	31 March 2012
Turnover	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]

Hartmond Limited

D.11 The turnover information for Hartmond Limited for the years ended 30 June 2009, 2010, 2011 and 2012 is as follows:⁵⁶⁵

⁵⁶³ Hooplah Ltd's principal activity during this period of review was as a holding company. See documents 3655/MTM and 4411/MTM.

⁵⁶⁴ Documents 3662/MWH, 4414/RG and 4428/RG. Annual report and abbreviated accounts for the years ended 31 March 2009, 2011 and 2012.

⁵⁶⁵ Documents 3810/HVM, 4426/HAR, 4427/HAR, 4429/HAR and 4430/HAR. Unaudited financial statements for the years ended 30 June 2011 and 2012, and Hartmond's sales figures for 2009.

Year ending	30June 2009	30 June 2010	30 June 2011	30 June 2012
Turnover	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]

Milton Keynes Mobility Limited

D.12 The turnover information for Milton Keynes Mobility Limited for the years ended 31 December 2009, 2010, 2011 and 2012 is as follows:⁵⁶⁶

Year ending	31 December 2009	31 December 2010	31 December 2011	31 December 2012
Turnover	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]

Better Mobility Limited

D.13 The turnover information for Better Mobility Limited for the years ended 30 September 2009, 2010, 2011 and 2012 is as follows:⁵⁶⁷

Year ending	30 September 2009	30 September 2010	30 September 2011	30 September 2012
Turnover	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]	£ [turnover information redacted]

⁵⁶⁶ Document 4423/MKM. Profit and loss accounts for the years ended 31 December 2009, 2010, 2011 and 2012.

⁵⁶⁷ Documents 4418/BM, 4419/BM, 4420/BM and 4421/BM. Unaudited financial statements for the years ended 30 September 2009, 2010, 2011 and 2012.