OFFICE OF FAIR TRADING

Competition Act 1998

Decision of the Office of Fair Trading

No. CA98/08/2004

# Agreement between UOP Limited, UKae Limited, Thermoseal Supplies Ltd, Double Quick Supplyline Ltd and Double Glazing Supplies Ltd to fix and/or maintain prices for desiccant

8 November 2004
(Case CE/2464-03)

## SUMMARY

The Office of Fair Trading (the OFT) has concluded that UOP Limited (UOP), UKae Limited (UKae), Thermoseal Supplies Limited (Thermoseal), Double Quick Supplyline Limited (DQS) and Double Glazing Supplies Group plc (DGS) (the Parties) have been parties to an agreement and/or concerted practice that infringes the prohibition imposed by section 2 (the Chapter I prohibition) of the Competition Act 1998 (the Act).

The Parties were involved during the period from 1 March 2000[1] until at least 12 March 2003 in an overall agreement and/or concerted practice designed to fix and/or maintain minimum resale prices for desiccant manufactured by UOP, which infringes the Chapter I prohibition. This overall agreement and/or concerted practice constitutes a single infringement which comprises a number of sub-agreements and/or concerted practices.

The OFT considers that agreements and/or concerted practices between undertakings that fix prices are among the most serious infringements of the

[1] The date of the Chapter I prohibition's entry into force.

Act. Financial penalties are therefore being imposed on all of the Parties, subject to the operation of the OFT's policy to give lenient treatment to undertakings coming forward with information on price fixing cases. UKae, Thermoseal and UOP have all been granted leniency under this arrangement and have had their penalties reduced as a result.

Confidential information in the original version of this decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the decision is denoted by [**C**], by [...] or by [name deleted].

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# PART I FACTUAL BACKGROUND AND PROCEDURE

## A The Parties

UOP Limited

1. UOP Limited (UOP) a company registered in England and Wales, is a subsidiary of a US firm, UOP Limited Liability Company (UOP LLC). UOP's principal business is developing and commercialising technology for licence to the oil refining, petrochemical and gas processing industries. Its headquarters are in Des Plaines, Illinois, USA and it employs approximately 3,200 people at facilities in the United States, Europe and Asia. It is also involved in the manufacture and sale of adsorbents, catalysts and specialty chemicals. UOP's adsorbents (called molecular sieves and aluminas) are used in a variety of industries, including insulated glass (IG), refrigeration systems, air brake systems, medical oxygen concentrators and deodorising products. UOP has adsorbent production facilities in the United States, Italy, Japan, China and Germany with sales offices in 19 countries. Adsorbent products used in IG manufacture are often referred to as desiccants. Senior management decisions relating to desiccant are taken in the Milan office of UOP's parent company. The day to day decisions relating to the UK market are devolved to the European Sales Manager[2], working in the UK.

2. Officers of the company mentioned in this decision are:

Mr Tony Scullion – IG Desiccant European Sales Manager (1996-2003);

Mr Rocco Jelasi – General Manager for Europe, UOP Milan. Mr Jelasi was Mr Scullion's immediate superior from June 2001 until 12 March 2003 when the infringement ended;

Mr Abdelhak Benchikha – Sales and Marketing Manager (1996-2000); Marketing Director (2001- present) UOP Milan. Mr Benchikha was Mr Scullion's immediate superior during 2000; and

[Name deleted] – Assistant to Mr Scullion.

[2] Herbert Smith letter in support of UOP's application for leniency dated 02/07/03 - paragraphs 10-12 (Doc 484a).

UKAE LIMITED

3. UKae Limited (UKae), a company registered in England and Wales, is involved in the manufacture and distribution of components for IG units[3]. Its Managing Director during the period covered by the alleged infringement was Mr Garry Ealing. Its Sales Manager during the period was Mr Jason Williams.

THERMOSEAL SUPPLIES LIMITED

4. Thermoseal Supplies Limited (Thermoseal), a company registered in England and Wales, supplies machinery and components for IG units. Its Managing Director during the period covered by the infringement was Mr Gwain Paterson. Its Sales Manager during the period was Mr Mark Hickox.

DOUBLE QUICK SUPPLYLINE LIMITED

5. Double Quick Supplyline Limited (DQS), a company registered in England and Wales, was a subsidiary of Heywood Williams Group PLC until it was bought by Plastic Building Materials (PBM) in 2001. DQS is currently a subsidiary of PBM. Its Managing Directors during the period covered by the infringement were Mr Ray Stock (until June 2001) and Mr Mark Mitchell (from 2002 to the present). It is not clear who fulfilled this role in the latter part of 2001.

DOUBLE GLAZING SUPPLIES GROUP PLC

6. Double Glazing Supplies Group plc (DGS), a company registered in England and Wales is a supplier of components for IG units. Its Managing Director during the period covered by the infringement was Mr Derek Aucott. Mr David Aucott (Derek Aucott's son) was also a director of the company.

## B The product

7. As noted in paragraph one above, UOP produces adsorbents, sometimes known as molecular sieves. Molecular sieves are essentially used as drying and dehumidifying agents in a wide range of applications. These can be categorised into two sectors – process and manufacturing. The process sector includes natural gas dehydration and desulphurisation,

[3] 'IG units' is the industry term for 'double glazed window units'.

olefin purification and hydration, refinery feedstock purification, air separation and hydrogen purification. The manufacturing sector includes medical oxygen generation, refrigeration and air conditioning applications, air brake driers, polyurethane formulations, specialised packaging applications and IG production[4]. As noted in paragraph one above, molecular sieves used in IG production are often referred to as desiccants. The term desiccant will be used for such products throughout this decision.

8. The infringement which is the subject of this decision relates only to desiccant produced by UOP and supplied and distributed in the UK.

PRODUCT USE

9. An IG unit is composed of two or more panes of glass separated by an insulating 'dead air' space and permanently sealed using polymeric sealants. Desiccant is essentially used to keep the space dry between the two panes of glass in an IG unit. Moisture or organic solvents may be introduced into the sealed airspace during manufacture. Also, trace quantities of moisture gradually seep in to the unit over its useful life, which can be decades long. If not removed from the airspace, these contaminants can eventually condense on the interior (and inaccessible) glass surfaces when outside temperatures drop, producing unsightly 'fogging' and permanent staining of the glass. Desiccant is used to remove and tightly trap any water and/or solvents from the airspace and prevent the formation of this condensation. UOP supplies different types of desiccants depending upon whether water or water and organic vapour removal is required. The product is usually incorporated into the window unit by being poured into the 'spacer bars' (which are aluminium tubes used to hold the two panes of glass apart)[5].

10. The brand names for UOP's key desiccant products are Molsiv XL-8 (the main product), Molsiv DS2000 (the premium brand) and Molsiv HM2000 (a specialist niche product).

UOP DESICCANT PRODUCTION AND DISTRIBUTION

11. Desiccant is manufactured exclusively outside the UK. In the case of UOP, it is manufactured in Italy by another branch of the parent company. There are approximately 4,000 manufacturers of IG units in

[4] Witness Statement 1 from Mr Scullion dated 25/06/03 - paragraph 6 (Doc 484b).
[5] Letter from Herbert Smith on behalf of UOP dated 02/07/03 - paragraphs 13-15 (Doc 484a).

the UK. These manufacturers use desiccant as a component in their IG units.

12. UOP considers it necessary for desiccant manufacturers such as itself generally to supply desiccant to UK manufacturers of IG units through distributors. There are a large number of IG manufacturers in the UK and UOP believes that it would not be practicable for it to supply these manufacturers directly (UOP has one direct supply contract with a large [**C**], [name deleted]. The distributors supply IG manufacturers with a range of components necessary to produce IG units (excluding glass), including spacer bars, sealant, desiccant and window accessories[6].

13. UOP has produced desiccant since 1989. Before then UOP did not manufacture desiccant but purchased certain specialised types from another chemical manufacturer, Laporte, for use in UOP processes. In 1988, UOP's parent company, Allied Signal, and another chemical manufacturer, Union Carbide, formed a joint venture involving UOP and Union Carbide's Catalysts, Adsorbents and Process Systems division. This new company retained the name UOP. In 1989, it acquired Laporte's desiccant manufacturing facilities.

14. As a result of the joint venture with Union Carbide and the acquisition of Laporte's business in 1989, UOP went from having one UK distributor of IG desiccant to having six – UKae, Thermoseal, DGS, Solaglas Supplyline, Window Components and Frank McKee. Since that time Solaglas Supplyline has been through several takeovers and is now part of Plastic Building Materials, which is now the parent company of DQS. Window Components was acquired by DQS and Frank McKee is no longer associated with UOP. Therefore, UOP currently has four distributors: UKae, Thermoseal, DQS and DGS (see paragraphs three to six above).

15. UOP has estimated that over the past few years there have been about 12 significant distributors of desiccant to the UK IG market (the four UOP distributors, Ulmke Metals, Ashtons, Express Glazing, Magdens, Elite, AWS Limited, Titanic, Abacus and Nick Grey)[7].

16. The OFT's information indicates that UOP was the leading supplier of desiccant in the UK during the period, with a market share of at least

[6] Witness Statement 1 from Mr Scullion dated 25/06/03 - paragraphs 13 and 14 (Doc 484b).
[7] Witness Statement 1 from Mr Scullion dated 25/06/03 - paragraphs 10 and 11 (Doc 484b).

[…] [**C**] per cent. Its nearest competitor, Grace, had a share of between […] [**C**] per cent and the rest of the UK supply was shared between a number of smaller manufacturers[8].

## C Procedure

### INVESTIGATION

17. On 5 December 2002, the OFT made site visits under section 28 of the Act to a number of undertakings in relation to a suspected infringement of the Act in another UK product market. At the premises of one of those undertakings, which is also a party to the agreement and/or concerted practice that is the subject of this decision, papers were found indicating that the undertaking was involved in an arrangement to maintain resale prices for desiccant. The arrangement appeared to involve the undertaking's supplier (UOP), and UOP's UK distributors.

18. The OFT launched an investigation under section 25 of the Act on 13 February 2003. On 12 March 2003, the OFT made unannounced site visits under section 27 of the Act to all the Parties except the one referred to in paragraph 17 above. Copies of documents were taken from all the sites visited.

19. On 17, 18 and 24 July 2003, OFT officials interviewed officials from Thermoseal, UKae and UOP respectively.

20. On 17 September, 10 November and 25 November 2003, written requests for further information were made to the Parties and various third parties pursuant to section 26 of the Act. Information pursuant to these requests was received by the OFT at various stages until January 2004.

### LENIENCY

21. Total immunity from financial penalties was conditionally granted to UKae on 7 February 2003 under the OFT's leniency scheme[9]. On 26 August 2003, a reduction in the level of financial penalty of 50 per cent was conditionally granted to Thermoseal in accordance with paragraph 3.8 of the Guidance. On 27 August 2003 a reduction in the level of

[8] Ibid., paragraph 22 for UOP's figure; the figures for the other manufacturers were derived from data provided by a number of third parties.
[9] Leniency was granted in accordance with Part 3 of 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000 (OFT 423).

financial penalty of 20 per cent was conditionally granted to UOP in accordance with paragraph 3.8 of the Guidance.

RULE 14 NOTICE

22. On 29 March 2004, the OFT issued a Notice to the Parties under rule 14(1) of the OFT's procedural rules[10], setting out the facts on which the OFT relied, the matters to which it took objection, its proposed action and its reasons for it. With the exception of internal documents and any other documents to the extent that they contained confidential information, the Parties were given an opportunity to inspect the documents on the OFT's case file. Copies of the file on CD-Rom were sent with the Notice to each Party. The Parties were also given the opportunity to make written and/or oral representations in response to this Notice.

REPRESENTATIONS

23. UOP, UKae, Thermoseal, DQS and DGS made written representations in response to the Rule 14 Notice to the OFT in documents dated 24 May 2004, 21 April 2004, 24 May 2004, 21 May 2004 and 29 April 2004 respectively. In addition, UOP made oral representations to the OFT on 23 June 2004. None of the other Parties requested to make oral representations.

24. Many of the OFT's findings in the Rule 14 Notice on the substance of the infringements were uncontested by the Parties in their representations. Those areas that were disputed are discussed in Part II of the decision. The contested matters were as follows: market definition, contested by UOP (paragraphs 35-39); Thermoseal's participation in the 2002 price increase, contested by Thermoseal (paragraphs 235-250) and DQS' participation in the 'price match but not undercut' Policy, contested by DQS (146-156). With the exception of UKae, all of the Parties made representations concerning the appropriate level of any fine.

EVIDENCE AND STANDARD OF PROOF

25. In considering the standard of proof required to establish the infringement outlined in this decision, the OFT has taken note of the recent ruling by the Competition Appeal Tribunal (the Tribunal) in the

[10] Competition Act 1998 (Director's Rules) Order 2000, SI 2000/293.

*Replica Kit* appeals[11]. In particular, at paragraph 204 of the judgment, the Tribunal comments as follows:

> *'It also follows that the reference by the Tribunal to 'strong and compelling' evidence at [109] of Napp should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. 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.'*

In using the term 'strong and compelling' to describe its evidence in the decision, the OFT has followed the same principle. It considers that the evidence set out below is sufficient to overcome the presumption of innocence to which the Parties are entitled.

26. The main evidence on which the OFT's Rule 14 Notice was based and on which its infringement Decision is now based comprises:

i) copies of correspondence from UOP to each of the four distributors, and internal UOP documents, relating to the agreement and/or concerted practice referred to as the 'price match but not undercut' Policy;

ii) copies of correspondence from each of the four distributors with UOP, and distributors' internal memos, relating to the 'price match but not undercut' Policy;

iii) copies of draft agendas, meeting notes and follow up correspondence from UOP to each of the four distributors relating to the 2000 distributor meeting and subsequent co-ordinated price increase in early 2001;

iv) copies of correspondence from UKae and DGS to UOP on the above;

v) copies of correspondence from UKae, DQS and DGS and a witness statement from Thermoseal, relating to implementation of the above;

[11] *JJB Sports Plc v Office of Fair Trading, Allsports Limited v Office of Fair Trading*

vi) copies of correspondence from UOP to each of the four distributors relating to the co-ordinated price increase in 2002;

vii) copies of correspondence from UKae, DQS and DGS and a witness statement from Thermoseal, actioning the above;

viii) witness statements and general information in relation to the infringements provided by UOP, UKae and Thermoseal in support of applications for leniency; and,

ix) information, documents and/or witness statements from DQS and DGS and various third parties (including other desiccant suppliers and customers of the Parties) provided in response to requests made under section 26 of the Act.

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[2004] CAT 17, paragraph 204.

# PART II LEGAL AND ECONOMIC ASSESSMENT

## A Introduction

27. This section begins by introducing the economic and legal framework against which the OFT has considered the evidence in this case. It then sets out the evidence relating to the agreement and/or concerted practice on which the OFT relies, and analyses the significance of that evidence and the inferences that the OFT draws from it.

## B Application of Article 81 – effect on interstate trade

28. Following the entry into application of Council Regulation (EC) No 1/2003[12] on 1 May 2004, the OFT is required when applying national competition law to agreements or concerted practices between undertakings which may affect trade between Member States also to apply Article 81[13]. Since the infringing agreement and/or concerted practice was terminated before 1 May 2004, however (see paragraph 281 below), the OFT does not consider it is under a duty to apply Article 81 to the particular circumstances of this case. Moreover, given that the investigation and administrative procedure in this case were carried out exclusively under Chapter I of the Act, the OFT considers that it would be inappropriate at this late stage of the procedure to put the Parties to the additional uncertainty and expense of having to respond to further proceedings under Article 81. Accordingly, the OFT has not considered whether trade between Member States may have been appreciably affected, and this decision relates solely to whether the Chapter I prohibition of the Competition Act has been infringed.

## C The Chapter I prohibition

29. The Chapter I prohibition provides that 'agreements between undertakings, decisions by associations of undertakings or concerted practices which may (a) affect trade within the United Kingdom[14] and (b) which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited unless they are exempt in accordance with the provisions of Part I of the

[12]OJ L 1, page 1.
[13] Article 3, Regulation 1/2003.
[14] Under section 2(3) of the Act, subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK.

Act[15]. The prohibition applies in particular to agreements, decisions or concerted practices which directly or indirectly fix purchase or selling prices.

30. UOP and the four distributors are all undertakings for the purposes of the Chapter I prohibition.

## D The relevant market

31. The Commission's 'notice on the definition of the relevant market for the purposes of Community competition law'[16] defines a relevant product market as comprising, '*all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use...'.* This definition reflects the case law of the European Court. Market definition establishes the closest substitutes to the product that is the focus of the investigation. These products are usually the most immediate competitive constraints on the behaviour of the undertaking(s) controlling the product in question[17].

32. However, the OFT is only obliged to define the market where it is impossible, without such a definition, to determine whether the agreement and/or concerted practice is liable to affect trade in the UK and has as its object or effect the prevention, restriction or distortion of competition[18]. No such obligation arises in this case because it involves an overall agreement and/or concerted practice that had as its object the prevention, restriction or distortion of competition by way of fixing and/or maintaining prices. Nevertheless, market definition is the first step in the process of assessing penalties.[19]

33. For the reasons set out below, the OFT considers that the relevant product market in this case is the supply of desiccant for use in IG units,

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[15] Under section 60 of the Act, the OFT is required, in applying the Chapter I prohibition, to ensure that there is no inconsistency with either the principles laid down by the EC Treaty and the European Courts or any relevant decision of the European Courts. The OFT must also have regard to any relevant decision or statement of the Commission.
[16] OJ C 372/5, 3.12.1997. See also the Guideline 'Market Definition', March 1999 (OFT 403), paragraph 1.3.
[17] See 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty' March 2000 (OFT423), paragraph 2.3.
[18] Case T – 62/98 *Volkswagen AG v Commission* [2000] ECR ref II-2707, para 230.
[19] See 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000, (OFT423), paragraph 2.3.

specifically through distributors (see paragraphs 41 and 43 below). The OFT also considers that the relevant geographic market is the UK[20].

THE RELEVANT PRODUCT MARKET

34. The overall agreement and/or concerted practice relates to the supply and distribution of desiccant for use in IG units. As described in detail at paragraphs 7-10 above, desiccant is a chemical adsorbent material which is incorporated into the spacer bar between the two panes of an IG unit. The purpose of the desiccant is to absorb moisture that may form between the panes of glass.[21] It is mainly supplied through distributors to small manufacturers of IG units, but in some instances is also supplied directly to customers.

35. According to the solicitors acting for UOP[22]:

> *'IG desiccant is produced specifically for use in IG applications: it cannot be used for the other applications…Conversely other adsorbent products cannot be used in IG applications. There are no other products which perform the same function as and are therefore substitutable for IG desiccant.'*

36. The OFT consulted a number of parties in the industry and received similar views to the one expressed by UOP's solicitors. Some correspondents suggested the existence of limited substitutability from a product called silica gel, but indicated that this product is little used and is soon to be obsolete. There is potential supply side substitutability between different adsorbents; it is understood that the specialised machinery used to manufacture some of them can be adjusted to make adsorbents with different applications. However, it is not clear that this is a common practice with regard to desiccant used in IG units, nor which other products the machinery used to manufacture them might make. The OFT has no evidence to suggest that the market definition should be expanded to include other such products.

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[20] The relevant geographic market is defined as comprising '*the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*' (Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372/5, 3.12.1997).
[21] Letter from Herbert Smith on behalf of UOP dated 02/07/03 - paragraphs 13-15 (Doc 484a).
[22] Ibid, paragraph 21.1.

37. UOP, however, has argued that the relevant product market excludes the direct supply contract it has with [name deleted], and for the purpose of assessing the level of penalties should be restricted to the supply of desiccant through distributors only (see paragraph 12 above)[23]. It argues that the [name deleted] contract is […] [**C**]. All other UOP desiccant supplied in the UK is sold through distributors to a large number of much smaller IG unit manufacturers (see paragraphs 11-12 above). UOP further argues that it would not be possible for a UK distributor to supply […] [**C**], and that although UOP considered putting the contract out to tender, this tender would have been limited to the outsourcing of the logistics and administration of the [name deleted] contract. UOP contends that it always intended to maintain the direct supply relationship with [name deleted].

38. In support of this, UOP notes that the Commission, in its decisions in *Industrial and Medical Gases*[24] and *Unilever,*[25] had concluded that different prices reflecting different methods of distribution could indicate different markets. Finally, UOP notes that in any case the [name deleted] contract was unaffected by the infringement, which concerned desiccant sold through distributors.

39. The OFT has carefully considered UOP's arguments. On balance it remains of the view that the relevant product market is likely to include desiccant sold directly to [name deleted]. It considers that UOP's willingness to outsource the logistics and administration of the contract would indicate that UOP itself considered the distributors able, in principle, to service the contract. Therefore, the only substantive difference between the two methods of distribution would, therefore, seem to be the price. The OFT, however, does not consider that the supply of an identical product at different price levels reflecting different volumes necessarily indicates the existence of two separate markets.

40. Equally, on the supply side of the market, there would not appear to be any barriers to a manufacturer or importer of desiccant switching supply of its product from distributors to direct customers if demand from the latter increased. In their submission of 1 September 2004[26], UOP's solicitors argued that any supply side substitutability only goes one way:

[23] UOP's arguments on the market definition are set out in its Written Representations dated 24/05/04 - paragraphs 7-14 (Doc 634).
[24] 2003/207 Commission Decision of 24 July 2002 *Industrial and Medical Gases* – 700 OJ L84/1, paragraphs 55-63; and *Air Liquide/BOC* – Case M.1630.
[25] Commission Decision of 8 March 2000 – IV/M. 1802 *Unilever/Amora-Maille* – OJ C033/4.
[26] Letter from Herbert Smith on behalf of UOP to OFT dated 01/09/04 (Doc 678).

whilst UOP can and does supply both distributors and [name deleted], the distributors cannot supply [...][**C**]. The OFT does not accept that the one-way nature of supply-side substitutability is relevant to the definition of the market in this case. In order to demonstrate that supply through distributors is a separate market from direct supply by manufacturers it would be necessary to show that distributors do not face significant constraints on their pricing by the threat of direct supply. In general, this would seem unlikely to be the case. A hypothetical monopoly distributor of desiccant which tried to increase prices by 5-10 per cent above the competitive level would normally be faced with an increase in direct supply by manufacturers, at least to larger customers. Moreover, to the extent that the manufacturers continued to be unwilling to supply small customers directly, for whatever reason, one would expect it to be profitable (with prices 5-10 per cent above competitive levels) for larger customers to buy more product than they required for their own use and to resell some of it to smaller firms. The above considerations would tend to point to the conclusion that direct supply of desiccant was in the same market as supply through distributors.

41. For these reasons the OFT is not convinced that the relevant product market proposed by UOP, namely the supply of desiccant to distributors, is correct. However, the OFT accepts that the matter is arguable. Taking into account also the fact that the supply to [name deleted] by UOP did not form part of the agreement and/or concerted practice dealt with in this decision, the OFT has therefore decided to give UOP the benefit of the doubt and for the purposes of this decision to accept UOP's narrower market definition. Therefore, the relevant turnover used for the starting point in setting a penalty has not included UOP's turnover derived from the sale of desiccant to [name deleted]. This is without prejudice to the OFT's conclusions in relation to any future case involving the same or similar markets.

THE RELEVANT GEOGRAPHIC MARKET

42. There seems to be little or no difference between desiccant used in the IG industry in the UK and that used abroad. We understand that it is possible for UK manufacturers of IG units to source desiccant directly from outside the UK. However, we also understand that this does not occur in practice at present, and is unlikely to occur in the immediate future. The European market is characterised by small numbers of large suppliers of IG components and small numbers of large IG unit manufacturers. In contrast, the UK market is characterised by large numbers of small or medium IG manufacturers which are served by a

network of distributors of IG components. (Although, as noted above, UOP does supply one large customer, [name deleted], directly). Desiccant tends to be sold by the distributors to end users as part of a package of components for IG unit manufacture. It would be impractical for UK manufacturers, which buy in small amounts, to source desiccant directly from outside the UK. Since distributors supply desiccant to IG manufacturers throughout the UK, the OFT considers that the market cannot be defined more narrowly than nationally. Therefore, for the purpose of calculating penalties, the relevant geographic market is the UK.

CONCLUSION

43. As noted at paragraph 33 above, it is not necessary in circumstances where an agreement and/or concerted practice is liable to affect trade in the UK and has as its object the prevention, restriction or distortion of competition to arrive at a precise market definition in order to demonstrate an infringement of the Chapter I prohibition. The calculation of level of penalties, on the other hand, depends partly on the definition of the relevant market. For the purposes of this decision and in particular for the purpose of assessing the level of penalties, and for the reasons set out above, the OFT considers that the relevant market is desiccant supplied through distributors for use in IG units in the UK.

## E Relevant case law in relation to agreements and/or concerted practices

44. An 'agreement' does not have to be a formal written agreement to be covered by the Chapter I prohibition. The prohibition is intended to catch a wide range of agreements and/or concerted practices including oral agreements and gentlemen's agreements as, by their nature, anti-competitive agreements are rarely written down.[27]

AGREEMENTS

45. An agreement within the meaning of the Chapter I prohibition exists in circumstances where there is a concurrence of wills in that a group of undertakings adhere to a common plan that limits, or is likely to limit,

[27] See the Guideline 'The Chapter I Prohibition', March 1999 (OFT401), paragraph 2.7. See also the judgment of the European Court of Justice regarding gentlemen's agreements in Case C-42/69 *ACF Chemiefarma NV v Commission* [1970] ECR 661 (in particular paragraphs 106-114). Also the European Commission in, for example, its decision in *Citric Acid Cartel* [2002] OJ L239/18, 6 September 2002, paragraph 137.

their individual commercial freedom by determining lines of mutual action or abstention from action.[28] This is irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed. There is no requirement for the agreements to be legally binding or formal, nor contain any enforcement mechanisms. An agreement may be express or implied from the conduct of the parties.[29] As held by the European Court of First Instance (the CFI), for an agreement to exist '*it is sufficient if the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way.*'[30] Where a manufacturer adopts certain measures in the context of its ongoing contractual relations with its customers such measures will be agreements if there is an express or implied acquiescence or participation by those customers in those measures.[31]

CONCERTED PRACTICES

46. The Chapter I prohibition also applies in respect of concerted practices. A concerted practice does not require an actual agreement (whether express or implied) to have been reached. A concerted practice has been defined by the European Court of Justice (the ECJ) as:

> '*... a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.*'[32]

47. Thus, economic operators are required to maintain independence. The requirement of independence between economic operators strictly precludes:

> '*any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the*

[28] Case T-41/96 *Bayer v European Commission* [2000] ECR II-3383, paragraph 69.
[29] Case 41/69 *ACF Chemiefarma v European Commission* [1970] ECR 661 , for example, paragraphs 110-4; Case T -7/89 *Hercules Chemicals v European Commission* [1991] ECR II-1711, paragraphs 256-258.
[30] Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 256; Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, paragraph 69.
[31] Joined Cases C-2/01P and C-3/01P *Bundesverband der Arzneimittel Importeure v Bayer & Commission* OJ L084/1.
[32] Cases 48/69 *ICI v Commission* (otherwise known as 'Dyestuffs') [1972] ECR 619, paragraph 64. See also Joined Cases 40 to 48, 50, 54 to 56, 11, 113 and 114/73 *Suiker Unie and others v European Commission* [1975] ECR 1663, paragraph 26.

*course of conduct which they themselves have decided to adopt or contemplate adopting on the market.'*[33]

48. Whilst the concept of a concerted practice implies the existence of reciprocal contacts, the CFI has stated that:

'*that condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it, or at the very least, accepts it*.'[34]

49. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market.[35] The ECJ has stated that there is a presumption (which it is for the undertaking to rebut) that an undertaking which remains active on the market has taken into account information exchanged with its competitors in determining its conduct on that market.[36]

AGREEMENT 'AND/OR' CONCERTED PRACTICE

50. The ECJ has also confirmed that it is not necessary for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice[37]. The concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two. They are intended *'to catch forms of collusion having the same nature and only distinguishable from each other by their intensity and the forms in which they manifest themselves'*[38]*.* This is particularly the case in complex infringements involving a series of measures by several undertakings over a period of time which manifests itself both in agreements and concerted practices with a common objective. It is therefore not necessary for the OFT to come to a conclusion as to whether the behaviour of the Parties

[33] Joined Cases 40 to 48, 50, 54 to 56, 11, 113 and 114/73 *Suiker Unie and others v European Commission* [1975] ECR 1663, paragraph 174.
[34] Cases T-25/95 etc. *'Cimenteries CBR v Commission* [2000] ECR II-491, paragraph 1849.
[35] Case C-199/92 *P etc. Huls AG v. Commission* [1999] ECR 1-4287.
[36] Case C-199/92 *P etc. Huls AG v. Commission* [1999] ECR 1-4287, paragraph 161 et seq. and Case T-25/95 etc *Cimenteries CBR v. Commission* [2000] ECR-II 491, paragraph 1910.
[37] Case T -7/89 *Hercules Chemicals v European Commission* [1991] ECR II-1711, paragraph 264; Case T-1/89 *Rhone Poulenc v European Commission* [1991] ECR II-867, paragraph 127; Case T-305/94 *Limburgse Vinyl Maatschappij v European Commission* [1999] ECR II 931, paragraph 697.
[38] Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 131.

specifically constitutes an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition in the present case.

SINGLE INFRINGEMENT WHERE ACTS ARE IN PURSUIT OF A COMMON PLAN

51. Where a group of undertakings pursues a single plan involving at the same time agreements and/or concerted practices it is not necessary to split up the conduct by treating it as consisting of a number of separate infringements where there is sufficient consensus to adhere to a plan limiting the commercial freedom of the parties. In *Hercules*[39], the CFI stated:

> *'..the Court points out that, in view of their identical purpose, the various concerted practices followed and agreements concluded formed part of systems of regular meetings, target-price-fixing and quota-fixing.*
>
> *Those schemes were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in polypropylene. It would thus be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of a number of separate infringements. The fact is that the applicant took part – over a period of years – in an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices.'*

52. The Chapter I prohibition applies, therefore, not only to any particular agreement establishing a common plan but also to the whole continuing process of collusion in which the parties are involved. Such collusion can manifest itself in a whole series of measures and initiatives including express agreements, meetings, ongoing contact and other conduct or practices where they are aimed at influencing the conduct of others on the market[40].

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[39] One of the appeals arising out of the *Polypropylene* decision, Case T-7/89 *Hercules Chemicals v European Commission (*see footnote 27 above), paragraphs 262-3.
[40] Joined Cases 40/73 et seq. *Suiker Unie v European Commission,* paragraphs 173; Case 86/82 *Hasselblad v European Commission* [1984] ECR 883, paragraphs 24-28; Joined Cases 100-103/80 *Musique Diffusion francaise v European Commission* [1983] ECR 1825, paragraph 84; *Ford Agricultural* OJ No L20 28.1.1993 p.1, paragraphs 11-17; *Gosme/Martell-DMP* OJ No L185, 11.07.1991, p.23, paragraphs 31-32.

53. In *Anic*[41]*,* the ECJ said:

> *'When…the infringement involves anti-competitive agreements and concerted practices, the Commission must, in particular, show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.'*

54. Further, an undertaking that has taken part in an agreement and/or concerted practice through conduct of its own '*which was intended to bring about the infringement as a whole [will] also be responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement'.*[42]

55. Moreover, the fact that a party may come to recognise that in practice it can 'cheat' on the agreement and/or concerted practice at certain times does not preclude a finding that there was a continuing single overall infringement.[43]

OTHER LEGAL ISSUES RELATING TO AGREEMENTS AND/OR CONCERTED PRACTICES

56. A finding of an agreement and/or concerted practice does not require a finding that all the parties have given their express or implied consent to each and every aspect of the agreement[44] – the parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The mere fact that a party does not abide fully by an agreement which is manifestly anti-competitive does not relieve that party of responsibility for it.[45]

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[41] Another of the appeals arising out of the *Polypropylene* decision. Case C-49/92P *European Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 87.
[42] Case C-49/92P *European Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 83.
[43] Case C-246/86 *Belasco v European Commission* [1989] ECR 2117, paragraphs 10-16.
[44] Case C-49/92P *European Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 80; Case T-28/99 *Sigma Technologie di rivestimento v European Commission* [2002] ECR II-1845, paragraph 40.
[45] Case T-305/94 *et seq Limburgse Vinyl Maatschappij v European Commission,* paragraph 773; Case T-141/89 *Trefileurope v European Commission* [1995] ECR II-791, paragraphs 60 and 85.

57. Where a particular party (such as a manufacturer) holds a central position in relation to other parties (such as distributors or retailers), that party must exercise particular vigilance to prevent the concerted conduct of the kind described in this decision.[46]

58. The European Courts have previously found[47] that it can be presumed that an undertaking which has participated in discussions having as their purpose price fixing (including resale price maintenance), which is informed of prices that its competitors intend to charge and which remains on the market, could not fail to take account directly or indirectly of the information obtained about its competitors' conduct. This is particularly the case when a concerted practice occurs on a regular basis over a long period. An undertaking which knowingly adopts or adheres to collusive measures which facilitate the co-ordination of competing undertakings' behaviour infringes the Chapter I prohibition.

59. The fact that an agreement may have had as its object other aims or that it was not the subjective intention of the parties to restrict competition does not preclude a finding by the OFT that the agreement had as its object price fixing.[48]

## F Agreements and/or concerted practices involving UOP, UKae, Thermoseal, DQS and DGS

60. The OFT has concluded that the Parties have been involved in an agreement and/or concerted practice composed of five sub-agreements and/or concerted practices that amount to a single infringement, the objective of which was to fix and/or maintain resale prices.

61. We describe the five sub-agreements and/or concerted practices comprising the overall infringing agreement and/or concerted practice as follows:

[46] Joined Cases 100/80 *et seq Musique Diffusion francaise v European Commission Commission* [1983] ECR 1825*,* paragraph 75.
[47] Case C-199/92 *Huls v European Commission* paragraph 162 and Joined Cases T-25/95 and others *Cimenteries CBR v European Commission* [2000] ECR II-491, paragraph 1389.
[48] Cases 96/82 *et seq IAZ International Belgium and others v European Commission* [1983] ECR 3369 paragraph 25 and Cases 29 and 30/83 *CRAM & Rheinzink v European Commission* [1984] ECR 1679, paragraph 26.

THE 'PRICE MATCH BUT NOT UNDERCUT' POLICY

i) a continuous agreement and/or concerted practice between all the Parties that distributors of UOP desiccant would not compete with each other on price.

THE 2001 PRICE INCREASE

ii) an agreement and/or concerted practice between UOP, UKae, Thermoseal and DQS to implement a price increase for desiccant in 2001 and to co-ordinate the timing of that implementation;

iii) an agreement and/or concerted practice between UOP and DGS to implement a price increase for desiccant in 2001 and to co-ordinate the timing of that implementation;

iv) an agreement and/or concerted practice between UKae, Thermoseal and DQS to co-ordinate the precise timing of the implementation of the 2001 price increase; and

THE 2002 PRICE INCREASE

v) an agreement and/or concerted practice made between UOP and all of its distributors in January 2002 to fix the size and implementation date of a price increase in early 2002.

62. A more detailed description of these five sub-agreements and/or concerted practices follows, together with the evidence on which the OFT relies to demonstrate their existence.

THE 'PRICE MATCH BUT NOT UNDERCUT' POLICY

*What is the 'price match but not undercut' policy?*

63. The OFT has concluded that UOP, UKae, Thermoseal, DQS and DGS have been involved in an agreement and/or concerted practice to maintain and/or fix resale prices for UOP desiccant through a 'price match not undercut' policy.

64. The 'price match but not undercut' policy (the Policy)[49] was a long running understanding between UOP and its distributors prohibiting or

[49] This is a general term for what has been labelled by some of the Parties as an 'understanding', an 'arrangement' or a 'policy'.

limiting intra-brand competition. Initially, the Policy appears to have constituted a non-compete policy between UOP distributors in relation to customers. This developed into the Policy that UOP distributors could compete with each other for customers, but not on price. They were permitted to match each other's prices but not to undercut them.

65. Some of the Parties have described in witness statements the form and scope of the Policy. Mr Scullion of UOP, who was responsible for the day to day running of UOP's UK desiccant operations during the period of the infringement has stated that he believes the Policy was driven and maintained by the distributors. He said:[50]

> *'...there was an understanding between UOP distributors...This understanding was that they could match each other's price of UOP desiccant but that they did not need to undercut each other.'*

66. However, the distributors indicated that they thought the Policy was maintained at the behest of UOP. Mr Ealing, Managing Director of UKae, stated[51]:

> *'The general policy of UOP was that UOP distributors would not undercut other UOP distributors. UOP Distributors were initially encouraged to resolve any issues they may have with other UOP Distributors on the sale of UOP desiccant between themselves. However this often led to 'tit for tat' retaliation between the UOP Distributors...*
>
> *Due to this retaliation between distributors, UOP advised that distributors should contact Tony Scullion at UOP to act almost as mediator in relation to any such disputes.'*

67. Mr Paterson, Managing Director of Thermoseal, stated[52]:

> *'At the beginning UOP's policy was that distributors were not allowed to compete with each other. This changed to a price matching policy when competing against other UOP distributors...'*

68. Mr Stock, Managing Director of DQS until June 2001, stated[53]:

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[50] Witness Statement 1 by Mr Scullion dated 02/07/03 - paragraph 17 (Doc 484b).
[51] Supplemental Witness Statement by Mr Ealing dated 23/12/03 – paragraphs 27 and 28 (Doc 598).
[52] Witness Statement 1 by Mr Paterson dated 05/11/03 – paragraph 9 (Doc 539a).
[53] Witness Statement by Mr Stock dated 11/09/03 – paragraph 5 (Doc 490).

*'UOP did not like price cutting by its distributors against other distributors on the UOP product.'*

69. The OFT concludes that the aim of the Policy was artificially to maintain and protect the market price of UOP desiccant against the reductions that may have occurred under normal competitive conditions. It concludes from the statements given above that UOP, UKae, Thermoseal and DQS knew exactly what the Policy entailed. The evidence set out at paragraphs 98, 120-123 and 165-171 below also demonstrates that DGS had similar knowledge.

*The origins of the Policy*

70. A short discussion of the origins of the Policy, and of its subsequent development, should assist in understanding the events behind the infringement.

71. Although the Act commenced on 1 March 2000 and any infringement would operate from no earlier than that date, the OFT takes the view that the facts recorded in this section (and in other parts of this decision) which arose before 1 March 2000 are important for the understanding of the facts and matters at issue on and after 1 March 2000. The OFT considers that the events prior to 1 March 2000 are highly relevant as there is no evidence to suggest that the operation of the Policy changed as a result of the Act coming into force.

72. The OFT notes the view of the Tribunal expressed in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*[54]:

*'It goes without saying that there can be no infringement of the Chapter I and Chapter II prohibitions on any date earlier than 1 March 2000…Nonetheless, in a case such as the present it is impossible to understand the situation as it was during the period of alleged infringement…without also understanding how that situation arose as a result of facts arising before 1 March 2000. In our view it is relevant to take facts arising before 1 March 2000 into account for the purpose, but only for the purpose, of throwing light on facts and matters in issue on or after that date.'*

[54] *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 1, paragraph 217, [2001] Comp AR 1.

73. There is evidence to suggest that the Policy may have originated as early as 1989, when UOP acquired Laporte's desiccant manufacturing business.

74. A letter sent in November 1989[55] by Mr Scullion's predecessor, Mr Nunn, to the then UOP distributors, which included UKae and Thermoseal, may indicate the origin of the arrangement between UOP and its distributors. The letter refers to meetings with both UOP distributors and the Laporte distributors each of which, as reported by UOP:

> *'has agreed to join us and operate within the UOP distribution network under UOP rules'*.

75. The letter referred to in paragraph 74 above refers to all the recipients trusting each other to succeed in both individual and collective market objectives, '*and to this end the non competition rule must prevail*.' It continues:

> *'We have, therefore agreed, that as of today, there will be no direct competition against any Laporte distributor and vice versa. If you have any outstanding quotes, please withdraw them or find a solution, preferably by making myself and your other distributors aware of the situation.'*

76. The OFT file has several letters dating from January 1990 to March 2000, from the distributors to UOP, indicating awareness of the Policy and its rules. Some of the letters show the distributors seeking resolution or redress from UOP when undercut by a fellow distributor. There are also letters from UOP responding to these requests by undertaking to resolve the situations. There are letters where UOP is attempting to resolve disputes by seeking information from the subject of the complaint and trying to persuade them to withdraw the lower price.[56] For example, the fact that UOP was prepared to intervene in these disputes is illustrated in the letter of 19 April 1990 from Mr Nunn to Mr Ealing of UKae regarding one of its accounts[57]. In response to a complaint from DGS, Mr Nunn wrote:

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[55] Letter from Mr Nunn (Mr Scullion's predecessor) to UOP distributors dated 11/11/89 (Doc 485c).
[56] Further examples to those footnoted below are: Letter from Mr Aucott to Mr Benchikha dated 30/01/90 (Doc 485d); and Memorandum from Mr Ealing to Mr Bjergegaard dated 17/02/98 (Doc 6).
[57] Letter from Mr Nunn to Mr Ealing dated 19/04/90 (Doc 485di).

*'Please advise of the status of this account and what you have done to repair the situation…It will not be lost on you that these are DGS accounts and this situation is really rocking the boat.'*

Regarding another account with a company called [*name deleted]*, he added:

*'Please call or write advising me of your prices to [name deleted] as I believe you are undercutting us now at [name deleted]'.*

77. Another example occurred in 1991[58], where Mr Nunn intervened in a dispute in which UKae is this time complaining about DGS and another distributor, Solaglas, now part of the same group of companies as DQS. With regard to a customer, Mr Davies of UKae wrote on 21 March 1991:

*'…I enclose evidence of our supplies to [name deleted] of XL8….and you will see that they have been a customer of UKae for some time….*

*A copy invoice ex DGS, Leeds, speaks for itself at £[…]. This contravenes the co-distributor agreement, and I would ask that you contact DGS and get them to withdraw…*

*…there are two other Companies whereby I have been told the co-distributor agreement has again been broken:*

*[name deleted]*
*UKae customer supplied by DGS in Derbyshire upon our price increase recently.*

*[name deleted]*
*supplied by [name deleted].*

*I am endeavouring to obtain evidence on these two.'*

78. A further letter from Mr Davies to Mr Nunn dated 26 March 1991[59] indicated that UOP did attempt to intervene in this matter in that it had presented DGS's side of the story to UKae. Mr Davies wrote:

*'Further to our telephone conversation on Friday 22 March 1991, I note that [name deleted] at DGS is now claiming that his*

[58] Letter from Mr Davies of UKae to Mr Nunn dated 21/03/91 (Doc 485ei).
[59] Letter from Mr Davies of UKae to Mr Nunn dated 26/03/91 (Doc 485eii).

*Company supplied [name deleted] in October 1990, alleged prior to UKae supplies.'*

79. Mr Davies then sought evidence from Mr Nunn similar to that which he had supplied in his letter, to authenticate DGS' claim. Finally, Mr Nunn attempted to resolve the problem with DGS, writing to Mr Derek Aucott on 27 March 1991[60]:

> '*Please find enclosed the memo from UKae we discussed over the phone recently, I think it is self explanatory.*
>
> *Can you please intervene and settle this problem as it does not show either of us in a good light and I believe that having made a promise to co-operate, we should be seen to be acting within the spirit of that agreement.'*

80. A final example is contained in a faxed letter to Mr Paterson of Thermoseal from Mr Nunn[61]. Mr Nunn stated:

> *'DGS have called me to complain about the above company which purchases desiccant from them, HM2000 at around [...].*
>
> *This has been a problematical account as it was lost to [name deleted] for 6 weeks and then DGS spent a large amount of time regaining it. Now they are being undercut it seems by yourselves. Can you please sort this situation out for me and to [name deleted] satisfaction so we can avoid reciprocal action. Please communicate directly with [name deleted] if you need to.'*

81. In January 1996, Mr Scullion took over the post of European Sales Manager. Mr Scullion notes that he inherited his predecessor's policies. He stated:

> *'This* [price match] *system was in operation before I took over the day-to-day management of the UK IG sales operation[62].'*

82. Mr Scullion maintained the working practices of his predecessor[63], effectively continuing the arrangement between UOP and its distributors. This appears to be confirmed in a faxed letter written by Mr Scullion

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[60] Letter from Mr Nunn to Mr Aucott of DGS dated 27/03/91 (Doc 485eiii).
[61] Letter from Mr Nunn to Mr Paterson dated 18/01/93 (Doc 485g).
[62] Witness Statement 1 by Mr Scullion dated 25/06/03 - paragraph 29 (Doc 484b).
[63] Witness Statement 2 by Mr Scullion dated 17/10/03 – paragraph 14 (Doc 525a).

(and sent under the name of Mr Bjergegaard of UOP) to the four distributors offering them formal distributor contracts[64]. His aim was to encourage the distributors to source only from UOP, in return for lower prices. In this letter, he advised the distributors:

*'What we don't want to see now is a downward spiralling of prices so that we all end up back at square one, with everybody making less money. We will be maintaining a close watch on prices in the marketplace...'*

83. Mr Scullion has acknowledged in a statement that[65]:

*'These comments reflected my objective to increase volume and maintain prices at the then current levels.'*

84. The OFT notes that although the origins of the Policy are uncertain (as it is not known conclusively who initiated the Policy, or when), the material outlined above indicates that by 1997 UOP had a key role in maintaining the Policy. The OFT also notes that the distributors were all aware of the Policy from an early stage and were willing participants in maintaining the Policy.

*The Policy 2000 - 2003*

85. The OFT has concluded that the Policy continued through the period from March 2000 to March 2003. One of the key features of the Policy was that the distributors complained to UOP about undercutting (examples of this are described in further detail in paragraphs 130 et seq. below). Mr Scullion noted that[66]:

'*the complaints from distributors about undercutting kept coming through during 2000.'*

86. In October 2000, Mr Scullion invited all UOP's UK desiccant distributors to a meeting to discuss a number of issues concerning the UK IG desiccant market.[67] Mr Ealing of UKae[68], Mr Paterson of Thermoseal[69]

[64] Letter from Mr Scullion (under the name of Mr Bjergegaard) to UOP distributors dated 02/06/97 (Doc 126) - reference to Mr Scullion being the writer of the letter is at Witness Statement 1 by Mr Scullion dated 25/06/03 – paragraph 19 (Doc 484b).
[65] Witness Statement 1 by Mr Scullion dated 25/06/03 - paragraph 24 (Doc 484b).
[66] Ibid, paragraph 49.
[67] Ibid, paragraph 50.
[68] Witness Statement 1 by Mr Ealing dated 07/02/03 – paragraph 21 (Doc 3).
[69] Witness Statement 1 by Mr Paterson dated 05/11/03 - paragraph 11 (Doc 539a).

and Mr Stock of DQS[70] accepted the invitation and attended. The meeting was held at Callow Hall, a hotel in Derbyshire, on 3 November 2000[71].

87. Mr Scullion has confirmed[72] that Mr Aucott of DGS declined the invitation. He stated:

> *'I faxed Derek Aucott of DGS, dated 13 October 2000 explaining that all the other distributors have agreed to a meeting and I urged Derek Aucott to take part. Derek Aucott had a very bad personal relationship with the people of Thermoseal, and he refused to attend any meetings where Thermoseal would be present.'*

88. Mr Scullion sent a fax dated 31 October 2000 to all distributors, including DGS[73], with the heading 'MEETING'. In this fax Mr Scullion outlined the topics that were to be discussed at the meeting, one of which was 'Policing'.

89. The OFT has copies of notes prepared by Mr Scullion on some of the topics listed in this fax. Under the topic of 'Policing'[74], the notes outlined Mr Scullion's concerns about distributor undercutting and the fact that it was leading to an:

> '*...increasing number of 'tit for tats' with the overall outcome being a downward spiralling of prices.*'

90. The notes also put forward future options including *'move away from price matching to quoting [...]/ box higher'* and '*UOP referee prices'*. Mr Scullion's proposed solution in the notes was:

> *'to introduce a penalty for the company who have undercut. This would take the form of them having to pay a higher price to UOP for the amount of desiccant involved, which UOP would then pass back to the other distributor by means of selling the same quantity at a lower price, effectively subsidising the loss of earnings at that account.'*

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[70] Witness Statement by Mr Stock dated 11/09/03 – paragraph 6 (Doc 490).
[71] Further details of what was discussed at the meeting can be found at paragraphs 175 to 187 of this decision.
[72] Witness Statement 1 by Mr Scullion dated 25/05/03 - paragraph 50 (Doc 484b).
[73] Letter from Mr Scullion to Mr Derek Aucott dated 31/10/00 (Doc 138).
[74] Undated internal UOP document prepared by Mr Scullion found at UOP (Doc 164); Undated internal UOP document prepared by Mr Scullion found at UKae (Doc 76).

91. Mr Scullion stated that the set of notes '*was not provided to the distributors'*[75] and that as far as he could remember *'the 'Policing' aspect was not discussed at Callow Hall*'[76]. UOP reiterated its view in its representations that there was no evidence that policing was discussed and if it had been there was no outcome that affected the enforcement of the Policy[77].

92. However, the OFT notes that Mr Ealing at least received a copy of this document[78] and the other three attendees at the meeting all confirm that the Policy was reinforced at Callow Hall. Mr Ealing has noted[79]:

> *'One of the purposes of the Callow Hall meeting was to reinforce this policy as emphasised by the handout on policing policy provided by UOP…'*

93. Mr Paterson has noted[80]:

> *'… At that meeting* [at Callow Hall] *UOP and its UK distributors agreed on a price-matching policy…*
>
> *…Thermoseal sales executives were informed of the price-match policy agreed at Callow Hall i.e. they were to match, and not undercut, other UOP distributors prices.'*

94. Mr Stock has noted[81]:

> *'…At the meeting* [at Callow Hall]*, I recall that the main part of the discussion centred on competitor activity between the distributors…'*

95. The OFT concludes that the document headed 'Policing' was intended to be used at least as a discussion note for the meeting at Callow Hall. Mr Ealing refers to it as a 'handout' indicating that it was distributed in some form. It is also clear that at least Mr Ealing read the document, if not the other distributors present at the meeting. The fact that Mr Ealing retained the document suggests that, at least according to his

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[75] Witness Statement 1 by Mr Scullion dated 25/06/03 – paragraph 53 (Doc 484b).
[76] Ibid, paragraph 54.
[77] UOP's Written Representations dated 24/05/04 – paragraph 75 (Doc 634).
[78] Undated UOP internal document prepared by Mr Scullion found at UKae (Doc 76).
[79] Supplemental Witness Statement by Mr Ealing dated 23/12/03 – paragraph 26 (Doc 598).
[80] Witness Statement 1 by Mr Paterson dated 05/11/03) – paragraphs 11 and 13 (Doc 539a).
[81] Witness Statement by Mr Stock dated 11/09/03 – paragraph 6 (Doc 490).

understanding, it was to be taken seriously. The witness statements taken from Mr Ealing, Mr Paterson and Mr Stock indicate that discussion was held regarding the Policy at the meeting.

96. Therefore, the OFT concludes that the documents referred to above provide strong and compelling evidence that UOP, UKae, Thermoseal and DQS discussed the Policy and how to enforce it at Callow Hall and that this is likely to have had an impact on the enforcement of and commitment to the Policy by UOP, UKae, Thermoseal and DQS.

97. Although Mr Aucott did not attend the meeting at Callow Hall (see paragraphs 88 above and 202 below), he met Mr Scullion on 15 November 2000[82]. The OFT concludes that the meeting of 15 November 2000 covered much of the same ground as at Callow Hall. The topics to be discussed at the meeting were outlined in the fax dated 31 October 2000[83] with the heading 'MEETING'. The fax addressed to Mr Aucott[84] stated:

> *'If you are unable to attend I will arrange a separate meeting to appraise you of what was agreed.'*

98. The OFT concludes, therefore, that UOP and DGS discussed the Policy at the meeting on 15 November 2000.

99. After Callow Hall, Mr Scullion noted[85] that the Policy continued:

> '*The distributor understanding of only matching prices was still in place during 2001 with me now trying to referee disputes between distributors.'*

*Price Support - 2002*

100. During 2002, Mr Scullion stated that the Policy became difficult to regulate with the increased use of UOP's price support scheme[86]. The price support scheme was set up by UOP in 1998[87] and was introduced in order to maintain both price levels and market share by allowing distributors to defend business against, or win business from, UOP's

[82] Witness Statement 2 by Mr Scullion dated 17/10/03 – paragraph 9 (Doc 525a). See also the undated extract from Mr Scullion's electronic organiser (Doc 465).
[83] Letter from Mr Scullion to Mr Derek Aucott dated 31/10/00 (Doc 138).
[84] Ibid.
[85] Witness Statement 1 by Mr Scullion 25/06/03 - paragraph 59 (Doc 484b).
[86] Ibid, paragraph 67.
[87] Ibid, paragraph 35.

competitors. The scheme involved UOP giving financial support in the form of a rebate to distributors whose customers were being approached by competing manufacturers so that they could defend their existing desiccant business or win new business.

101. The price support scheme was also used as an incentive to the distributors to source their desiccant solely from UOP because they would only receive the support in those circumstances. UKae, Thermoseal and DGS all purchased desiccant solely from UOP during the period of the infringement covered by the Act, and, therefore, they were entitled to receive price support.

102. DQS, however, did not become a single source distributor until 1 January 2003. Therefore, under the terms of the price support scheme, DQS was not strictly entitled to participate in it. However, Mr Scullion has noted in a statement that he offered DQS 'unofficial' price support in 2002 in return for DQS eventually becoming a single source distributor[88].

103. The existence of price support led to UOP distributors competing for price support in relation to the same customer. Mr Scullion stated [89] that:

> *'The widespread application of the price support system led to UOP distributors competing for accounts that were already being supported by UOP through another UOP distributor.'*

104. This increased use of the price support system caused complications as illustrated in a letter dated 8 February 2002 from Mr Scullion to Mr Williams of UKae[90] regarding price support. It stated:

> *'The area we discussed was that relating to how a distributor could compete for business at customers where UOP were supporting the desiccant business at that customer through another distributor. At the moment this is unclear, and to date I have shied away from supporting two distributors at any one account, simply because of the complications that would arise. However, this is clearly unacceptable and anti-competitive as current desiccant prices often prohibit another distributor from supplying at these accounts...'.*

105. The letter continued that in order to gain support, the distributor would have to send details of the customer's name, location, the volume of

[88] Ibid, paragraph 64.
[89] Ibid, paragraph 71.
[90] Letter from Mr Scullion to Mr Williams dated 08/02/02 (Doc 46).

business and the price at which it would supply the product. It then stated:

*'While I cannot dictate that there should be no undercutting of prices I am sure you can understand the logic of not doing so.'*[91]

106. Throughout 2002, Mr Scullion found himself increasingly having to make decisions about allocating price support to UOP distributors who were competing for the same customer, even though he made it clear that the rules of the scheme did not allow this. Mr Scullion has stated[92]:

*'In late 2002, the disputes between distributors increased and I was constantly being asked to either offer price support for particular accounts (…some which were already UOP accounts), and to monitor whether UOP distributors had undercut prices (by, inter alia, using price support).'*

107. He goes on to state that[93]:

*'I tried to restore some order and to this end I drafted a fax to all distributors entitled 'Distributor Policy' which was sent out on 8 November 2002.'*

*Fax of 8 November 2002 – attempt to enforce the Policy*

108. This faxed letter[94] dated 8 November 2002 which was sent to all the distributors contained an explicit warning that breaching the Policy could lead to penalties under the price support scheme. It stated:

*'….We are often asked what controls UOP can exercise in the event that the 'common sense' approach is unintentionally undermined. The answer is that until now we have always tried to get the transgressor to amend the situation, but this is always hard to do, and inevitably all that happens is that prices continue to erode. The only way to avoid this is to ensure that we don't get our facts wrong. We therefore need to ask all of you to re-emphasise the need for your sales team to be diligent when it comes to the price of desiccant. In future if we get proven examples where one supplier has had their price undercut by another UOP distributor we will need to look at addressing the loss*

[91] Ibid.
[92] Witness Statement 1 by Mr Scullion dated 25/06/03 – paragraph 75 (Doc 484b).
[93] Ibid, paragraph 76.
[94] Letter from Mr Scullion to all distributors dated 08/11/02 (Doc 130).

*by removing the appropriate amount of support from the transgressor…and supporting the aggrieved party's customer to the same extent….'*

109. The OFT concludes that the fax was an attempt to develop the rules of the price support scheme so as to make it more difficult or unlikely for the distributors to undercut each other. Under the new rules, UOP would be able to withdraw support from a distributor if it undercut rather than matched a fellow distributor's price to a customer. This would have further increased the Policy's effectiveness in preventing any intra-brand competition between the distributors.

110. Mr Scullion's summary of this development was[95]:

*'I made it clear to distributors that if we were given proven examples where one distributor has had their price undercut by another UOP distributor at an account where price support was already in place, we may look at addressing the loss by removing the appropriate amount of price support from the transgressor and supporting the aggrieved party's customer to the same extent.'*

111. UOP has claimed that it did not take the action described in paragraphs 108-111 above to implement this new enforcement arrangement[96] and there is no evidence to suggest that it did so. The OFT has, however, concluded that the threat of financial penalties was taken seriously by UKae and, to some degree, by Thermoseal and DGS.

*Reaction of the distributors*

112. Evidence of reactions by the distributors to this fax of 8 November 2002 outlining UOP's new enforcement arrangement indicates that in at least three cases, those of UKae, Thermoseal and DGS, the threatened action was taken seriously, although only UKae appears to have accepted it unreservedly. The distributors' reactions are set out below.

UKAE

113. UKae's response indicates the strongest support for UOP's proposal amongst the distributors. Shortly after receiving the fax of 8 November

[95] Witness Statement 1 by Mr Scullion dated 25/06/03 – paragraph 76 (Doc 484b).
[96] Ibid, paragraph 81.

2002, Mr Williams wrote to Mr Scullion.[97] He affirmed that he had seen the fax and he enclosed internal UKae memoranda *'regarding our obligations'*. He added:

> *'I trust this provides you with peace of mind that UKae are still as always acting in the best interests of all concerned.'*

114. In one memorandum to which he referred, addressed to UKae's sales team, Mr Williams indicated that UOP's warning was to be taken seriously. He advised that:

> *'...every time we play a part in reducing the price of UOP product in the market we are to be penalised financially – I hope I do not have to implement a similar policy within UKae'.*

115. Further, in an internal memorandum[98] to an employee, also enclosed with this letter, Mr Williams added that*:*

> *'My separate note to all of the team will hopefully re-establish the rules when pricing UOP product in the marketplace...'*

116. The OFT concludes that the material referred to above provides strong and compelling evidence not only that UKae believed that UOP would implement its new enforcement arrangement as set out in its fax, but also that UKae itself was keen to maintain the Policy and to demonstrate to UOP its commitment to the latter[99].

THERMOSEAL

117. Mr Paterson of Thermoseal appears to have been supportive of the idea behind UOP's proposal but, having referred the 8 November 2002 fax to his solicitors, had concerns as to its legality. Mr Paterson subsequently wrote to Mr Scullion[100], saying that:

> *'whilst I applaud your efforts to try and bring some sense into the market place. There are some aspects of your fax that give rise to some concern. I have run it past my solicitors who advise me not to accept this policy.'*

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[97] Letter (enclosing internal UKae memos) from Mr Williams to Mr Scullion dated 19/11/02 (Doc 202).
[98] Ibid, page 3.
[99] Supplemental Witness Statement by Mr Ealing dated 23/12/03 – paragraphs 28-31 (Doc 598).
[100] Letter from Mr Paterson to Mr Scullion dated 06/12/02 (Doc 414).

118. The OFT is satisfied that this letter represents further evidence of Thermoseal's acceptance of and participation in the Policy. The fact that Mr Paterson passed the correspondence to his solicitors for advice is also evidence that Thermoseal took seriously UOP's proposals as set out in the 8 November fax, although Thermoseal would appear in fact to have rejected them.

DGS

119. DGS also appears to have taken UOP's proposals seriously, but nevertheless to have expressed reservations concerning them.

120. As regards DGS, Mr Scullion has stated[101] that:

> *'In a telephone conversation I had with Derek Aucott of DGS he commented that the new policy on price support was a bit 'grey'.'*

Mr Scullion expanded on this comment as follows[102]:

> *'DGS's reaction (communicated to me on the telephone) was that this was against their modus operandi, and they didn't like anything that affected (i.e.: restricted) their way of doing business. In other words, a negative reaction.'*

121. As Mr Aucott made clear in his representations in reply to the Rule 14 Notice, this did not constitute a repudiation of the Policy, however. On the contrary, he states that[103]:

> *'This was not because I thought there was anything illegal in the arrangement, quite the opposite, but because I run a fiercely independent company which likes to make and stand by its own decisions.'*

And that whilst:

> *'The UOP arrangement was against my whole marketing philosophy … because of my valued association with UOP over many years I did*

[101] Witness Statement 1 by Mr Scullion dated 25/06/03 - paragraph 78 (Doc 484b).
[102] Witness Statement 3 by Mr Scullion dated 07/01/04 - paragraph 12 (Doc 604).
[103] DGS's Written Representations dated 29 April 2004 in response to the Rule 14 Notice – paragraph 16 (Doc 631)

*not want to be seen as an 'odd man out' and felt that I had to back them in this enterprise'.*

122. Whilst Mr Aucott's representations above are ambiguous as to whether they are referring to the Policy in general or more specifically to UOP's proposed enforcement arrangement, it is clear from the above that DGS, albeit with some reluctance, accepted the Policy and at least took seriously UOP's proposals for reinforcing the Policy through the enforcement arrangement set in the fax of 8 November 2002.

DQS

123. DQS received UOP's fax but did not react because it was not eligible to receive price support at that time, and thereby the enforcement arrangement did not apply to DQS[104].

124. The OFT is satisfied, therefore, that UOP intended to reinforce its policing and enforcement of the Policy through the sanctions outlined in the enforcement arrangement set out in the fax of 8 November 2002. Although the sanctions were never put into effect, there is strong and compelling evidence that at least two of the distributors believed that they would have been.

*Retraction of the 8 November enforcement arrangement*

125. The enforcement arrangement set out in UOP's letter of 8 November 2002 and the price support scheme described above were both formally ended by letters issued by UOP to its distributors on 21 May 2003[105] and 1 July 2003[106]. These letters also formally ended the Policy. The OFT notes that UOP[107] and Thermoseal[108] have made representations that the Policy, and hence the infringements as a whole, came to an end at the time of the OFT's intervention on 12 March 2003. The OFT concludes that the Policy continued until at least 12 March 2003 (see paragraph 86 above), although it does not rule out the possibility that it continued beyond that date. Thermoseal submitted that the OFT had not proved, by strong and compelling evidence that either Thermoseal or any of the other distributors or UOP participated in the Policy after 12 March

[104] Written Representations by DQS dated 21/05/04 – paragraph 22 (Doc 633).
[105] Letter from Mr Benchikha of UOP to UOP distributors dated 21/05/03 (Doc 477).
[106] Letter from Mr Benchikha to distributors dated 01/07/03 (Doc 475).
[107] Written Representations from UOP dated 24/05/04 - paragraphs 15-20 (Doc 634).
[108] Written Representations from Thermoseal dated 27/05/04 - paragraphs 25-38 (Doc 633).

2003.[109] It stated that there was no evidence of Thermoseal complaining to UOP about undercutting during the period 12 March 2003 to 21 May 2003. In its representations, Thermoseal quotes from Mr Scullion's witness statements, outlining that he did not act as a referee during this period[110]. Moreover, Thermoseal submits that there is no legal precedent requiring a formal retraction of an infringing practice.[111]

126. Thermoseal has submitted that, by way of the letter of 6 December 2002[112] it expressed an intention to end its participation in the Policy, and that Mr Scullion's response to that letter[113] provides evidence that UOP accepted that Thermoseal wished to end its involvement in the Policy. However, as stated at paragraph 108 et seq. above, the letter in question concerned a method for enforcing the Policy, and therefore the OFT has distinguished between the enforcement arrangement outlined in that letter and the Policy as a whole. Mr Paterson's letter of 6 December 2002 provides evidence only that Thermoseal attempted to distance itself from this enforcement arrangement: it does not constitute a rejection of the Policy as a whole. Therefore, although accepting that Thermoseal did attempt to distance itself from UOP's enforcement arrangement, the OFT concludes that Thermoseal continued to participate in the Policy until at least 12 March 2003.

*Maintenance of the Policy (policing)*

127. In order for the Policy to be effective it needed to be maintained or 'policed'. The evidence below illustrates UOP's and the distributors' participation in policing the Policy.

UOP'S ROLE

128. With regards to UOP's role, Mr Ealing of UKae has commented:

> *'UOP Distributors were initially encouraged to resolve any issues they may have with other UOP Distributors between themselves.[114]*
>
> *... UOP advised that distributors should contact Tony Scullion at UOP to act almost as mediator in relation to any such disputes.[115]'*

[109] Ibid, paragraph 26.
[110] Ibid, paragraph 27.
[111] Ibid, paragraph 28.
[112] Letter from Mr Paterson to Mr Scullion dated 06/12/02 (Doc 414).
[113] Letter from Mr Scullion to Mr Paterson dated 13/12/02 (Doc 427).
[114] Supplemental Witness Statement by Mr Ealing dated 23/12/03 – paragraph 27 (Doc 598).

129. In policing the Policy, UOP's role was to act as referee. Mr Scullion would receive complaints from the distributors about undercutting. He would then investigate any complaint received to check whether it was genuine. He has stated that his response to any complaints of undercutting was:

> *'The distributor would then complain to me and sent (sic) me the 'undercutting' quote and ask me to investigate whether the quote was genuine...*[116]*;*
>
> *I would raise the complaint with the other distributor and advise the first distributor as to whether there was in fact genuine undercutting taking place...*[117]*;*
>
> *The understanding was that if there was genuine undercutting the offending distributor would withdraw the lower quote and/or match the price.'*[118]

130. Mr Ealing elaborated on the process:

> *'When receiving correspondence from Tony Scullion, the distributor is asked to address the position by increasing their pricing. If this is not done, the UOP Distributor faces the risk of withdrawal of pricing support offered by UOP on those customer accounts. In relation to our accounts with* [name deleted]*, we were asked by UOP to increase our prices as we were undercutting other UOP distributors. We complied with this as per the arrangements understood between the UOP distributors.*[119]
>
> *Where UKae was undercut by another UOP Distributor, we reported the matter to Tony Scullion as per the agreed policy*[120]*.'*

131. Documentary evidence to corroborate these statements, with regard to UOP's actions in instructing a distributor to withdraw a quote after receiving a complaint against it by another distributor, includes a fax

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[115] Ibid, paragraph 28.
[116] Witness Statement 1 by Mr Scullion dated 25/06/03 - paragraph 28.3 (Doc 484b).
[117] Ibid, paragraph 28.4.
[118] Ibid, paragraph 28.5.
[119] Supplemental Witness Statement by Mr Ealing dated 23/12/03 - paragraph 31 (Doc 598).
[120] Ibid, paragraph 32.

dated 18 September 2002 from Mr Scullion to Mr Williams of UKae[121] regarding a complaint from DGS about undercutting one of its accounts. Two DGS invoices relating to this account were attached. It stated:

'*Do as we discussed.'*

132. Mr Scullion stated with regard to this fax:

*'DGS were convinced that UKae were undercutting them at an account called [name deleted]. I was trying to referee this, and had been told by UKae that they were adamant that all they had done was to match a package price. UKae said …there was an early settlement discount to take into account, plus some price deferrals that were complicating matters…[122]'*

133. A further example of UOP's investigative activity is in a fax dated 31 October 2002[123] from Mr Scullion to Mr Ealing. It stated:

*'Understandably these three issues* [three examples of UKae undercutting other distributors] *have caused some upset, so I would be most grateful if you could investigate and let me know your side of things*.'

134. Another example of this is contained in a letter from Mr Scullion to Mr Hickox concerning a complaint against Thermoseal from DGS. It stated[124]:

*'…They* [DGS] *are playing fair, and I don't want them to lose faith in the current system…Please talk to Ian and advise him of the problem. If you can overturn this quote I would appreciate it.'*

135. Further evidence of UOP's involvement in distributor disputes is shown in examples detailed below and in the OFT's file[125]. The OFT concludes that there is strong and compelling evidence that UOP maintained the Policy through refereeing distributor disputes.

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[121] Letter from Mr Scullion to Mr Williams dated 18/09/02 (Doc 452).
[122] Witness Statement 2 by Mr Scullion dated 17/10/03 - paragraph 26 (Doc 525a).
[123] Fax from Mr Scullion to Mr Ealing dated 31/10/02 (Doc 201).
[124] Letter from Mr Scullion to Mr Hickox dated 12/04/01 (Doc 188) - (The date '1/6/99' on this doc is an error).
[125] Letter from Mr Scullion to Mr Ealing dated 17/04/00 (Doc 28) and Annex 30, Letter from Mr Scullion to Mr Aucott dated 07/02/02 (Doc 87).

PARTICIPATION BY THE DISTRIBUTORS

136. The following evidence demonstrates that all the distributors complained about undercutting, demonstrating knowledge of, and participation in, the Policy.

137. The OFT contends that all the distributors participated in the Policy through complaining to UOP if undercut. Mr Ealing noted[126]:

> *'I am aware that all the other distributors have reported to UOP breaches of UOP's policy on pricing at some time.'*

138. Thermoseal admitted that it had complained about undercutting and was also involved in undercutting. Mr Paterson has commented[127]:

> '*If Thermoseal is substantially undercut on a quote by another UOP distributor then we complain to UOP.'*

139. Mr Hickox of Thermoseal[128] noted:

> *'Certainly if I ever had any query relating to...being undercut by another UOP distributor...I just went directly to Tony Scullion and voiced my opinion to him'.*

140. Mr Stock of DQS noted that[129]:

> '*I am aware that Thermoseal, UKae and DGS did complain to Tony Scullion if they were undercut by DQS on UOP desiccant...'*

UKAE

141. The OFT concludes that UKae fully participated in the policing of the Policy. An example of a complaint made by UKae is a letter written by Mr Williams to Mr Scullion[130], in response to alleged undercutting by DGS:

> *'...it would appear* [name deleted] *of DGS has had another moment of amnesia regarding policy.*

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[126] Witness Statement 1 by Mr Ealing dated 07/02/03 – paragraph 15 (Doc 3).
[127] Witness Statement 1 from Mr Paterson dated 05/11/03 – paragraph 6 (Doc 539a).
[128] Witness Statement by Mr Hickox dated 20/10/03 – paragraph 3 (Doc 528b).
[129] Witness Statement from Mr Stock dated 11/09/03 – paragraph 5 (Doc 490).
[130] Letter from Mr Williams to Mr Scullion dated 10/04/02 (Doc 199).

*Please find enclosed a copy of a quotation dated 6 December 2001 together with a copy invoice confirming that product has been supplied in March of this year without a price increase! The price from UKae pre-increase was £[…] and is now £[…].*

*May I point out that this is the second time that* [name deleted] *has totally ignored the rules of engagement with this particular customer. Last time he reduced our price from £[…], to £[…] …'*

142. A further example of active participation in the policing of the Policy can be seen in an internal memorandum from Mr Williams to Mr Ealing. Mr Williams stated[131]:

'*Attached hereto are copies of DQS invoices where they have clearly undercut the price we currently supply.*

*Both of these have been brought to the attention of Tony Scullion, however, he has not had the courtesy to follow through and come back with a satisfactory answer. As we now have evidence can you please pursue these.'*

143. The evidence detailed above shows that UKae was keen to demonstrate to UOP its loyalty to the Policy and its determination to maintain it. In the letter quoted in paragraph 142 above, Mr Williams noted to Mr Scullion that:

*'With regard to UKae personnel complying, I have provided you with a copy of a document that has been distributed to the sale team for immediate implementation. In order to keep control this 'Price Support Request' must be completed whenever the sales price required is below our minimum selling price. It will also ensure price levels are maintained between distributors.'*[132]

144. In a letter dated 10 October 2002 to Mr Scullion complaining about breaches by DQS, Mr Williams noted[133] that:

*'UKae by your own admission (historically) are the UOP distributor which generally promotes the correct policy in the marketplace…'.*

[131] Memo from Mr Williams to Mr Ealing dated 28/06/02 (Doc 63).
[132] Letter from Mr Williams to Mr Scullion dated 10/04/02 (Doc 199).
[133] Letter from Mr Williams to Mr Scullion dated 10/10/02 (Doc 446).

145. A further example occurred in an internal memorandum from Mr Williams to Mr Ealing dated 25 February 2002[134]. Relating to 'Thermoseal Activity', Mr Williams noted:

> *'Enclosed herewith…details of prices that our (sic) currently being offered into the SE Territory. The information is self explanatory and gives me cause for concern as to where this latest price war is going to end.*
>
> *Not only are they proving to be suicidal but they have totally ignored the UOP rule and are undercutting us by […] per carton whenever we have taken business from them at a matched price.*
>
> *In addition a price increase has not been notified to Thermoseal's customers which again is not adhering to the rules. I have had a brief telephone conversation with Tony Scullion who is naturally concerned for which I enclose some notes and a letter from Tony as to the vulnerability of UKae where UOP is concerned.'*

146. This evidence suggests that UKae considered that it was the most committed of the four distributors to the Policy. However this did not prevent UKae from sometimes undercutting its competitors.

147. Further examples where UKae either showed concern or actively complained to UOP about competitors breaching the Policy can be found in the OFT's file[135].

148. The OFT has concluded that the material outlined above provides strong and compelling evidence that UKae fully participated in the policing of the Policy by actively complaining about undercutting by other distributors and encouraging UOP to investigate and resolve the situation.

THERMOSEAL

149. The OFT concludes that Thermoseal also fully participated in the policing of the Policy. Mr Paterson has stated[136]:

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[134] Memorandum from Mr Williams to Mr Ealing dated 25/02/02 (Doc 48).
[135] Memorandum from Mr Williams to Mr Ealing dated 27/03/02 (Doc 52); Letter from Mr Ealing to Mr Scullion dated 26/06/02 (Doc 62); and Letter from Mr Williams to Mr Scullion dated 19/11/02 (Doc 202).
[136] Witness Statement 1 by Mr Paterson dated 05/11/03 - paragraph 18 (Doc 539a).

*'Thermoseal, together with other UOP distributors, complained to UOP in September and October 2002 that UKae's policy of massively undercutting other distributors was destroying the market…Mark and I met with Tony Scullion on 26 November 2002 to discuss business. I complained at the meeting that UKAE were destroying the market and threatened that Thermoseal would either 'bomb the market out' or have to find another desiccant supplier.'*

150. In a letter from an Area Sales Manager of Thermoseal to Mr Scullion, the manager stated:[137]

*'In our efforts to successfully sell UOP DS 2000, I have come up against opposition to your product from both DQS and DGS, meaning that we have […] pallets of DS 2000 that we cannot sell. The account in question is [name deleted]. They were buying […] pallet per month at […] per […], but have told me that we are no longer competitive in comparison to these two competitors…Please can you help us with this issue.'*

151. The OFT concludes that the material outlined above provides strong and compelling evidence that Thermoseal fully participated in the policing of the Policy by actively complaining about undercutting by other distributors and encouraging UOP to investigate and resolve the situation.

DQS

152. The OFT concludes that DQS fully participated in the policing of the Policy. In a letter[138] to [name deleted] of UOP, Mrs Ann Williams of DQS stated:

*'Please see following copy quotes where our prices are being undercut. […] our current price £ […] UKae quote £[…]*
*[…] our current price £[…] Thermoseal quote £[…].*

*Tell Tony I would really like some answers.'*

153. DQS has made representations denying it participated in the Policy.[139] In particular, DQS has submitted that that the evidence relied on by the

[137] Letter from Mr Massey of Thermoseal to Mr Scullion dated 28/09/01 (Doc 187).
[138] Letter from Mrs Williams of DQS to [name deleted] of UOP dated 19/02/02 (Doc 223).
[139] DQS's Written Representations dated 21/05/04 - paragraphs 10-24 (Doc 633).

OFT, notably DQS' attendance at the distributors' meeting at Callow Hall and Mrs Williams' letter (referred to in paragraph 152 above[140]), was insufficient to prove that DQS participated in the Policy.

*Callow Hall*

154. As concerns the meeting at Callow Hall, DQS has argued that the OFT's allegation that its involvement (through its previous Managing Director, Mr Ray Stock) in the discussions at the Callow Hall meeting '*would have had an impact on the enforcement of and commitment to the Policy*'[141] was unsubstantiated[142].

155. DQS noted that Mr Stock accepted an invitation to and attended the Callow Hall meeting. It acknowledged that competitor activity was discussed at the meeting, together with pricing and packaging. However, DQS claimed it would not have participated in discussions on the Policy as it was not eligible to participate in the Policy itself at the date of the Callow Hall meeting[143].

*Ann Williams' letter*

156. As regards the OFT's reliance on the letter sent by Mrs Williams of DQS to [name deleted] referred to at paragraphs 152 and 153 above, DQS claims that this letter did not demonstrate that it participated in the Policy[144] stating that it was not apparent from the language used that there was any express request for price support made by Ms Williams[145]. Further, Mr Mitchell's witness statement sought to provide an alternative explanation for Mrs Williams' request. Mr Mitchell stated:

> *'There is nothing in the letter that suggests to me that Ann Williams was specifically requesting price support from UOP. It appears to me that she was merely asking for an explanation of the situation. This is the natural response I would expect from any distributor*

[140] Letter from Mrs Williams of DQS to [name deleted] of UOP dated 19/02/02 (Doc 223).
[141] OFT: Competition Act 1998 Rule 14 Notice '*Price Fixing of Desiccant*' dated 29/03/04 – paragraph 95.
[142] DQS's Written Representations dated 21/05/04 - paragraph 14 (Doc 633).
[143] Ibid, paragraph 15.
[144] Ibid, paragraph 16.
[145] Ibid, paragraph 17.

*having discovered that one of its suppliers is selling the same product at a lower price to the company's competitors."*[146]

157. Further, Mr Mitchell stated that he was aware that UOP encouraged its distributors not to undercut one another. However, as far as he was aware, DQS had not adhered to or participated in this policy.[147]

158. Finally, DQS claimed that it had actively operated against the Policy noting that UOP had received a number of complaints about DQS' pricing[148].

*The OFT's view*

159. DQS has admitted that it attended the Callow Hall meeting where the Policy was discussed. It has also accepted that it participated in the subsequent co-ordinated price increases for 2001 and 2002. The OFT considers that the price increases formed an integral part of the Policy and should be understood in the context of the commitment among the Parties not to undercut each other's increased prices. Further, as stated at paragraph 58 above, the European Courts have stated that it can be presumed that, where a party has participated in discussions having as their object price fixing and has not publicly distanced itself from policies decided at that meeting nor demonstrated that it has distanced itself from the policies, it could not fail to take account directly or indirectly of the information obtained about the competitors conduct.[149] The OFT is therefore satisfied that DQS' involvement in the discussions at the Callow Hall meeting would have contributed to the development and continuation of the Policy.

160. The OFT is also satisfied that the letter from Mrs Williams to [name deleted] dated 19 February 2002[150] is further evidence of DQS' participation in the Policy. The OFT agrees with DQS that the letter is not a request for price support[151] but does not accept that its finding that DQS participated in the Policy is dependent on DQS' eligibility for price support[152]. Rather, the OFT considers that understood in the

[146] Witness Statement by Mr Mitchell dated 20/05/04 - paragraph 12 (Doc 633i).
[147] Ibid, paragraph 17.
[148] Ibid, paragraph 24.
[149] Cases C-199/92 *Huls v European Commission* [1999] ECR I-4287, paragraph 162 and Joined Cases T-25/95 and others *Cimenteries CBR v European Commission* [2000] ECR II-491 paragraph 1389.
[150] Letter from Mrs Williams of DQS to Mrs [name deleted] of UOP dated 19/02/02 (Doc 223).
[151] DQS's Written Representations dated 21/05/04 - paragraph 17 (Doc 633).
[152] See paragraph 161.

context of all the other evidence in this case, including DQS' participation in the meeting at Callow Hall and its involvement in the co-ordinated price increases in 2001 and 2002, the fax provides strong and compelling evidence that DQS expected other distributors to observe the Policy and UOP to act against transgressors. This demonstrates that DQS' participation extended at least to the policing of the Policy. In addition, witness statement evidence includes statements that all distributors were party to the Policy (for example, see paragraphs 66–67 and 137 above).

161. In its representations, DQS claimed that it was not eligible to participate in the Policy as it had not received price support. The OFT, however, is satisfied that participation in the Policy did not depend on receiving price support from UOP. Price support and the Policy were not inextricably linked. The Policy could work and be maintained without price support and vice versa. This is evidenced by the fact that the Policy has been in place since 1989, whereas the price support scheme only started in 1998 (see paragraphs 74 and 101 above).

162. In response to DQS' point set out in paragraph 158 above, that it actively operated against the Policy, the OFT concludes that the fact that DQS may have cheated on the Policy is not sufficient to establish that it was not a party to the agreement and/or concerted practice (see paragraph 56 above). Further, the fact that the other distributors complained to UOP concerning DQS' conduct is evidence not only of DQS cheating on the Policy but also that the other distributors clearly understood DQS to have agreed to the Policy, as they would also have concluded from its participation in the Callow Hall discussions (see paragraphs 154-155 above).

163. In the light of the above, the OFT has concluded that DQS fully participated in the policing of the Policy by complaining about undercutting by other distributors and encouraging UOP to investigate and resolve the situation.

DGS

164. The OFT has concluded that DGS fully participated in the policing of the Policy. In a letter from Mr Aucott to Mr Scullion regarding undercutting by UKae and Thermoseal, it stated[153]:

*'[…]*

*'This is a long standing customer of ours. We were charging £[...]...*

*UKae quoted* ***£[...] and took the business for*** *[...]. We have had to match the price but are now only getting half the business.*

*David Moores tells me that he tried to contact you and Gary Ealing but did not have his calls returned.*

*[...]*

*Taken by Thermoseal from us at we are told [...] below ours. Can you confirm?*

*In general I am receiving rumblings from our Reps that Ukae in particular are willing to cut our prices.'* (DGS emphasis)

165. Another example of DGS' participation in the Policy is shown in an email from Mr Aucott to Mr Scullion regarding undercutting by DQS. It stated:[154]

*'We have been supplying this account with XL8 for the last 12 months @ £ [...]...*
*We notified them of a price increase to £ [...].*

*They then contact DQS who offered them a price of £ [...] below our previous price.'*

166. This was followed by a further email from Mr Aucott, which stated[155]:

*'Despite your assurances, the position at* [...] *is still the same. DQS are still supplying at £ [...].*

*Comments please.'*

167. Further evidence of DGS' participation in policing the Policy is found in a fax[156] from Mr Aucott to Mr Scullion dated 27 July 2001. Mr Aucott wrote:

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[153] Letter from Mr Aucott to Mr Scullion dated 31/08/00 (Doc 287).
[154] Emails from Mr Aucott to Mr Scullion, one of which is dated 02/05/02 (Doc 271).
[155] Ibid.
[156] Fax from Mr Aucott to Mr Scullion dated 27/07/01 (Doc 250).

*'Copy DQS invoice for information. Do you want to support?*

To which Mr Scullion replied in a manuscript comment on the note:

*'Derek, was this one of your accounts that you have lost to DQS? If yes, then no question, I will support you to get it back…'*

168. Mr Aucott then replied in a further manuscript note[157]:

*Tony, this is […] who we supplied totally for many years.*
*Lost to DQS on prices.'*

169. Other examples of similar activity from DGS can be found in the OFT's file[158].

170. The OFT has concluded that the material outlined above provides strong and compelling evidence that DGS fully participated in the policing of the Policy through complaining about undercutting from other distributors and encouraging UOP to investigate and resolve the situation.

*Conclusion*

171. The OFT has concluded that the material outlined in paragraphs 86 to 170 above provides strong and compelling evidence that all five Parties participated in the agreement and/or concerted practice known as the 'price match but not undercut' Policy from 1 March 2000 to at least 12 March 2003.

THE 2001 PRICE INCREASE

172. As set out in paragraph 61 above, the implementation of the 2001 price increase was the result of three sub-agreements and/or concerted practices. These sub-agreements and/or concerted practices are set out in detail below.

*Agreement and/or concerted practice between UOP, UKae, Thermoseal and DQS*

173. The OFT concludes that UOP, UKae, Thermoseal and DQS were party to an agreement and/or concerted practice to implement a price increase for

[157] Ibid.
[158] Letter from Mr Aucott to Mr Scullion dated 18/09/00 (Doc 253); Letter from Mr Aucott to Mr Scullion dated 06/10/00 (Doc 133).

UOP desiccant in 2001 and to co-ordinate the timing of the implementation of that increase.

174. The issue of 'Pricing' was raised in the fax dated 31 October 2000[159] (referred to in paragraph 89 above) as a topic to be discussed at the meeting at Callow Hall on 3 November 2000. The meeting and discussions relating to the 'price match but not undercut' Policy have been described at paragraphs 87 et seq. above.

175. Although it was at UOP's invitation, the OFT contends that the three distributors agreed to attend the meeting at Callow Hall and that before attending they were aware that one of the issues that was going to be raised was that of 'Pricing' (see paragraph 174 above).

176. Mr Scullion has confirmed[160] that there was a discussion at the meeting on the imposition of a four per cent price increase to the distributors for UOP desiccant. Mr Scullion has explained[161] that he was asked by UOP management to get a four per cent average increase across all the markets that he covered including the UK IG desiccant market. He proposed this price increase to the three distributors present at the meeting but they resisted the suggestion and instead demanded higher margins and asked for a price reduction.

177. He stated[162]:

> *'Because of the strongly adverse reaction to my proposal it was eventually agreed that UOP would not implement a price increase to the distributors – instead the distributors would increase their list price of UOP desiccant by 4 per cent thereby allowing them to increase their margin. The distributors also asked me to provide them with a letter which they could present to their customers as justification for their price increase.'*

178. It is unclear how this proposal of a margin increase for the distributors was reached. Mr Scullion has stated that it was the distributors' suggestion. However Mr Paterson has stated that it was Mr Scullion's suggestion and that the letter to provide to the distributors' customers was also Mr Scullion's suggestion[163].

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[159] Fax from Mr Scullion to Mr Aucott dated 31/10/00 (Doc 138).
[160] Witness Statement 1 by Mr Scullion dated 25/06/03 - paragraph 54 (Doc 484b).
[161] Witness Statement 2 by Mr Scullion dated 17/10/03 - paragraph 5 (Doc 525a).
[162] Ibid, paragraph 8.
[163] Addendum to Witness Statement 2 by Mr Paterson dated 26/11/03 - paragraph 2 (Doc 551).

179. Regardless of how the proposal was reached, Mr Ealing[164] and Mr Paterson[165] confirmed that UKae and Thermoseal agreed to implement the price increase to their customers to increase their margins.

180. Mr Stock stated[166] that he agreed to implement the price increase to DQS' customers. However, he goes on to state that DQS did not benefit from this margin increase as it is his recollection that UOP imposed its four per cent increase on DQS. This was as a result of DQS not being a single source distributor for UOP desiccant (also discussed at paragraph 103 above).

181. The OFT concludes from the evidence outlined below that the compromise was accepted by all present at Callow Hall.

182. Mr Ealing has stated[167] that:

> *'It is my recollection that this suggestion was readily accepted by those UOP distributors present at the meeting at Callow Hall. As distributors, we would have welcomed the opportunity to increase our profit margin on the sale of desiccant as the margin of profit was very small.'*

183. It was also agreed to co-ordinate the price increase. As Mr Ealing stated[168]:

> *'As the 4 per cent increase was to be explained as an increase in price from the manufacturer, it was in both the UOP distributors' and UOP's interests to ensure that the price increase was implemented into the market place at the same time by all the UOP distributors. This would reinforce the fact to customers that this price increase was due to a price increase imposed on them by UOP, the manufacturer.'*

184. It does not appear that a definite proposal for the implementation date was established at the meeting, just that the implementation of the price

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[164] Supplemental Witness Statement by Mr Ealing dated 23/12/03 – paragraph 22 (Doc 598).
[165] Witness Statement 1 by Mr Paterson dated 05/11/03 – paragraph 12 (Doc 539a).
[166] Witness Statement by Mr Stock dated 11/09/03 – paragraph 8 (Doc 490).
[167] Supplemental Witness Statement by Mr Ealing dated 23/12/03 – paragraph 9 (Doc 598).
[168] Ibid, paragraph 10.

increase should be co-ordinated and that Mr Scullion would act as the co-ordinator. Mr Paterson stated[169]:

*'Although I cannot remember this specific part of the Callow Hall discussions I believe that the distributors must have agreed an initial implementation date at Callow Hall, subject to Tony Scullion getting back to everyone to confirm, presumably after contacting DGS.'*

185. Mr Ealing stated[170]:

*'I recall that we collectively discussed the date on which the 4 per cent increase would be passed on to customers...*

*As far as I recall, no specific date was set at Callow Hall for the implementation of the price increase other than that it would be in the New Year of 2001.'*

186. Mr Scullion stated[171]:

*'...it was the consensus amongst the distributors to ask me to co-ordinate the date of the price increase (i.e. suggest a date on which their price for UOP desiccant went up). The origin for this suggested increase was the meeting at Callow Hall*.'

187. Following the meeting at Callow Hall the co-ordination of the implementation date was mainly undertaken by Mr Scullion. He was also the contact point between the three distributors and DGS, which he met shortly after the meeting.

188. Mr Scullion sent a fax dated 17 November 2000 to all UOP's distributors confirming the action points that were agreed at the meeting at Callow Hall and later agreed by Mr Aucott. In the faxes Mr Scullion sent to the three distributors[172] who attended the meeting at Callow Hall he began by stating:

*'I have now met with Derek and can confirm that he was in agreement with the majority of the issues that we discussed at Callow Hall. I can therefore minute the following actions:'*

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[169] Witness Statement 2 by Mr Paterson dated 18/10/03 – paragraph 4 (Doc 528).
[170] Supplemental Witness Statement by Mr Ealing dated 23/12/03 – paragraphs 11-12 (Doc 598).
[171] Witness Statement 2 by Mr Scullion dated 17/10/03 – paragraph 6 (Doc 525a).
[172] Letters from Mr Scullion to UKae, Thermoseal, DQS and DGS dated 17/11/00 (Docs 525b, 431, 209 and 106 respectively).

189. All versions of this fax continued with:

> *'5. Pricing:*
> *It has been unanimously agreed that there would be a 4 per cent price increase for UOP products in the UK market, to be implemented on 22nd January 2001. Please prepare your sales team for this.'*

190. It appears that after the fax of 17 November 2000 was sent there were discussions between Mr Scullion and the distributors over changing the implementation date from 22 January 2001. Mr Scullion stated[173]:

> *'I am unsure of the exact form that the initial change to the date would have taken, but it would probably have been as a result of phone calls made by me to each of the distributors (or as a result of one or more of the distributors calling me) to check that the 22 January 2001 was still their preferred date'.*

191. Mr Scullion sent a fax to all the distributors, including DGS, dated 3 January 2001[174] suggesting either 5 February 2001 or 5 March 2001 as the implementation date. The fax was sent with a letter that the distributors could provide to their customers in order to justify the price increase (as agreed at the meeting at Callow Hall). The fax to the distributors stated:

> *'…. as discussed in November last year please find attached a fax giving advice of a 4 per cent price increase for UOP desiccant. This is to allow [distributor] to implement a price increase in the market and does not represent a price increase from UOP to [distributor]. The intention is to allow [distributor] to increase margins on UOP products, and hopefully gain an added incentive to sell more product as a result. I leave it to you to liaise with your contacts as to the date that this is implemented, but all UOP distributors must apply the increase as of the same date. I would suggest that this should either be the 5th February, or if this is not possible, the 5th March.'*

192. Mr Scullion sent a further fax on 4 January 2001[175] which stated:

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[173] Addendum to Witness Statement 2 by Mr Scullion dated 03/12/03 – paragraph 5 (Doc 564).
[174] Letters from Mr Scullion to UKae, Thermoseal, DQS and DGS dated 03/01/01 (Docs 35, 413, 211 and 102 respectively).
[175] Letters from Mr Scullion to Ukae, Thermoseal and DQS dated 04/01/01(Docs 36, 426 and 212 respectively).

*'Further to my previous fax, please note that the price increase should be implemented on 5th February. This appears to be the preferred date.'*

193. Mr Scullion has confirmed[176] that the choice of 5 February 2001 was made after telephone discussions with the majority of the distributors.

194. On 8 January 2001, Mr Scullion received a fax from Mr Aucott dated 5 January 2001[177]. It stated:

*'Just a quick note to advise that due to our Group Administration policy/commitments we will not be implementing the increase to our customers until 1st March 2001.'*

195. Following this fax, Mr Scullion wrote faxes headed 'PRICE INCREASE' dated 11 January 2001 to Mr Ealing[178] and Mr Stock[179] and copied to Mr Aucott, to advise them of DGS' position:

*'Further to my earlier fax regarding the above issue, I have now heard back from DGS, who have advised that they are unable to implement the price increase until March 2001. I would therefore request that you do the same.'*

196. Mr Ealing responded in a fax dated 12 January 2001[180]:

*'Further to your fax of the 11th January 2001 in connection with the above* [price increase] *I confirm that this is absolutely out of the question, I have spoken to DQS and Thermoseal who will be putting their prices up on the 1st February 2001'.*

197. Following these discussions, copies of letters sent by UKae[181] and DQS[182] to their customers show that both distributors implemented the price increase at the beginning of February 2001 as agreed between themselves and as previously agreed with UOP. A statement provided by

[176] Addendum to Witness Statement 2 by Mr Scullion dated 03/12/03 – paragraph 7 (Doc 564).
[177] Letter from Mr Derek Aucott to Mr Scullion dated 05/01/01 (Doc 105).
[178] Letter from Mr Scullion to Mr Ealing dated 11/01/01 (Doc 37).
[179] Letter from Mr Scullion to Mr Stock dated 11/01/01 (Doc 213).
[180] Letter from Mr Ealing to Mr Scullion dated 12/01/01 (Doc 38).
[181] Letter from UKae to its customers dated 04/01/01 (part of Doc 527).
[182] Letter from DQS to its customers dated 12/01/01 (Doc 319).

Mr Paterson[183] to the OFT shows that Thermoseal also tried to implement the price increase as suggested by UOP.

198. The OFT contends that the evidence shows that Mr Scullion took the lead in the co-ordination of the implementation date through telephone discussions and through written correspondence. The contacts, which related to the preferred implementation date, began in early January 2001, as outlined in paragraphs 188-196 above.

199. The OFT concludes that the material outlined above provides strong and compelling evidence that UOP, UKae, Thermoseal and DQS from November 2000 to February 2001 were party to a sub-agreement and/or concerted practice to implement a fixed price increase on a specified date and were all aware of the importance of co-ordinating the price increase and were involved in the discussions over the setting of the implementation date.

*Agreement and/or concerted practice between UOP and DGS*

200. The OFT concludes that during October 2000 to February 2001 DGS agreed with UOP to implement a four per cent price increase at a specified time and that DGS was made aware of the discussions that had taken place between UOP and the other three distributors (as outlined in paragraph 176 et seq.).

201. As described in paragraph 88 above, relating to the Policy, DGS declined to attend the meeting at Callow Hall. However, it was sent Mr Scullion's fax dated 31 October 2000[184], to all distributors with the heading 'MEETING'. In the fax addressed to Mr Aucott[185] it also stated:

> *'If you are unable to attend I will arrange a separate meeting to appraise you of what was agreed.'*

202. In this fax Mr Scullion outlined the topics that were to be discussed at the Callow Hall meeting, one of which was 'Pricing'. Therefore, the OFT concludes that DGS was aware that the issue of pricing would be raised at that meeting.

[183] Witness Statement 1 by Mr Paterson dated 05/11/03 - paragraph 12 (Doc 539a).
[184] Fax from Mr Scullion to distributors dated 31/10/00 (Doc 138).
[185] Ibid.

203. On 15 November 2000[186], (as noted also at paragraph 98 above) Mr Scullion met with Mr Aucott. Mr Scullion stated[187]:

> *'…I therefore met with him* [Mr Aucott] *on the 15th November 2000 to debrief him about what had been discussed and what had been proposed. This would have been in a face-to-face meeting at his office in Castle Donington. I do not recall exactly what his reaction was when we met, but he would probably have expressed his dislike of the arrangement, but would have gone along with the proposals, albeit reluctantly.'*

204. Following Mr Scullion's meeting with Mr Aucott, he sent out faxes on 17 November 2000 with the heading 'Minutes of Meeting' to all four distributors[188]. In the fax he sent to Mr Aucott[189] it started:

> *'I am pleased to confirm the minutes of our recent meeting:'*

205. All versions of this fax,(see paragraph 189 above) continued with:

> *'5. Pricing:*
> *It has been unanimously agreed that there would be a 4 per cent price increase for UOP products in the UK market, to be implemented on 22nd January 2001. Please prepare your sales team for this.'*

206. The OFT concludes that Mr Scullion of UOP informed Mr Aucott of the discussions that had taken place at the earlier meeting and of the proposal for the co-ordinated price increase that had been put forward. The OFT also concludes that DGS did agree to implement a price increase at the start of 2001 and recognised the importance of co-ordinating the implementation date.

207. DGS was kept informed of the developments on the implementation date. It received the faxes (see paragraphs 191 et seq. above) from Mr Scullion dated 3 January 2001[190] and 4 January 2001[191] establishing that 5 February 2001 was the preferred implementation date.

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[186] Undated extract from Mr Scullion's electronic organizer (Doc 465).
[187] Witness Statement 2 by Mr Scullion dated 17/10/03 – paragraph 9 (Doc 525a).
[188] Letters from Mr Scullion to UKae, Thermoseal, DQS and DGS dated 17/11/00 (Docs 525b, 431, 209 and 106 respectively).
[189] Letter from Mr Scullion to Mr Aucott of DGS dated 17/11/00 (Doc 106).
[190] Fax from Mr Scullion to Mr Ealing dated 03/01/01 (Doc 34).
[191] Fax from Mr Scullion to Mr Ealing dated 04/01/01 (Doc 36).

208. In a fax dated 5 January 2001 to UOP[192], DGS replied:

> *'Just a quick note to advise that due to our Group Administration policy/commitments we will not be implementing the increase to our customers until 1st March 2001.'*

209. By informing UOP that it could not implement the price increase until 1 March 2001, DGS knew or at least ought to have known that UOP would use this information in its discussions with the other distributors and that it would potentially have an impact on when the implementation of the price increase would occur. This indicates active participation in the co-ordination of the timing of the 2001 price increase.

210. DGS was copied into the faxes Mr Scullion sent to Mr Ealing[193] and Mr Stock[194] which stated:

> *'I have now heard back from DGS, who have advised that they are unable to implement the price increase until March 2001. I would therefore request that you do the same'*.

211. Mr Scullion wrote to inform DGS of the position of the other distributors by fax[195]. He stated:

> *'I have advised the other distributors that you cannot increase prices until 1st March. They have responded that they have no option but to go ahead from 1st February.*
>
> *I would therefore request that DGS respect the position of the other distributors and do not take advantage of the delay'.*

212. After this fax, there appears to be no further correspondence between UOP and its distributors regarding the implementation of the price increase.

213. The OFT accepts that DGS did not have any direct contact with the other three distributors (it did not attend the meeting at Callow Hall in November 2000, nor did it contact the other three distributors regarding the price increase). However, the OFT concludes that DGS knew, or

[192] Fax from Mr Aucott to Mr Scullion dated 05/01/01 (Doc105).
[193] Fax from Mr Scullion to Mr Ealing dated 11/01/01 (copied to Mr Aucott) (Doc 37).
[194] Fax from Mr Scullion to Mr Stock dated 11/01/01 (copied to Mr Aucott) (Doc 213).
[195] Fax from Mr Scullion to Mr Aucott dated 04/01/01 (Doc 104) – note that the sequence of events indicates that this date is incorrect, as acknowledged by Mr Scullion in his Witness Statement 2 Addendum dated 03/12/03 – paragraph 11 (Doc. 564).

ought to have known, that its views and decisions would be communicated to the other distributors through UOP, and that its views and decisions would have an impact on the other distributors.

214. The OFT concludes that the material outlined above provides strong and compelling evidence that DGS was also party to an agreement and/or concerted practice with UOP to implement the 2001 price increase and was party through its communications with UOP to the discussions with the other distributors concerning the co-ordinated implementation of the 2001 price increase.

*Agreement and/or concerted practice between UKae, Thermoseal and DQS*

215. In addition to the above, the OFT concludes that UKae, Thermoseal and DQS were in direct contact with each other during January 2001 concerning the co-ordination of the implementation date of the 2001 price increase.

216. Before this contact took place, a fax was sent by Mr Scullion dated 21 December 2000[196] to Mr Ealing mentioning that he had spoken to Mr Paterson. In this fax, Mr Scullion stated as follows:

> *'I spoke about the proposed price increase to Gwain, who now appears to be reluctant to go ahead with an increase. I would like you to speak to him about this if you would, as everybody else is OK to go ahead with it.'*

217. However, no action appears to have been taken regarding this fax and Mr Ealing has stated[197] that he did not contact Mr Paterson at that time, and there is no evidence on the OFT's file to suggest that he did so.

218. The horizontal sub-agreement and/or concerted practice occurred after Mr Ealing[198] and Mr Stock[199] received the faxes headed 'PRICE INCREASE' sent by Mr Scullion dated 11 January 2001 (copied to Mr Aucott)[200], to advise them of DGS' position regarding the implementation date of the 2001 price increase. The faxes stated:

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[196] Letter from Mr Scullion to Mr Ealing dated 21/12/00 (Doc 33).
[197] Supplemental Witness Statement by Mr Ealing dated 23/12/03 – paragraph 16 (Doc 598).
[198] Letter from Mr Scullion to Mr Ealing dated 11/01/01 (Doc 37).
[199] Letter from Mr Scullion to Mr Stock dated 11/01/01 (Doc 213).
[200] See paragraph 188 above.

*'Further to my earlier fax regarding the above issue, I have now heard back from DGS, who have advised that they are unable to implement the price increase until March 2001. I would therefore request that you do the same.'*

219. It has been confirmed by Mr Ealing that on receipt of this fax[201], on his own initiative, he rang Mr Paterson and Mr Stock to discuss their pricing intentions. Mr Ealing has stated that:[202]

*'As a result of this fax, I recall that I telephoned both Gwain Paterson and Ray Stock on either 11 or 12 January 2001 and asked that they confirm that they would implement the 4 per cent price increase in respect of UOP desiccant as agreed in February 2001.'*

220. Mr Stock[203] also confirmed this:

*'I recall that Gary [Ealing] telephoned me... During the course of this conversation, Gary asked me if DQS was putting up its prices in respect of UOP desiccant as had been agreed at Callow Hall.'*

221. Mr Ealing then replied[204] to Mr Scullion on 12 January 2001 to inform him, that having spoken to Mr Paterson and Mr Stock, neither UKae, Thermoseal nor DQS could change the implementation date. His response stated:

*'Further to your fax of the 11th January 2001 in connection with the above* [price increase] *I confirm that this is absolutely out of the question, I have spoken to DQS and Thermoseal who will be putting their prices up on the 1st February 2001'.*

222. As described in paragraph 183 above, these three distributors recognised the importance of co-ordinating the implementation date for the four per cent price increase agreed at the meeting at Callow Hall. This led to the horizontal sub-agreement and/or concerted practice to confirm the implementation date should remain at the beginning of February 2001.

223. The OFT therefore concludes that the material outlined above provides strong and compelling evidence that there was a horizontal sub-

[201] Letter from Mr Scullion to Mr Ealing dated 11/01/01 (Doc 37).
[202] Supplemental Witness Statement by Mr Ealing dated 23/12/03 – paragraphs 17-19 (Doc 598).
[203] Witness Statement by Mr R Stock dated 11/09/03 – paragraph 8 (Doc 490).
[204] Letter from Mr Ealing to Mr Scullion dated 12/01/01 (Doc 38).

agreement and/or concerted practice between UKae, Thermoseal and DQS as regards the date on which the price increase would be implemented.

*Conclusion*

224. The OFT concludes that there were three sub-agreements and/or concerted practices relating to the co-ordination of the 2001 price increase: between UOP, UKae, Thermoseal and DQS; between UOP and DGS and between UKae, Thermoseal and DQS which were all part of the single overall infringement.

THE 2002 PRICE INCREASE

225. The OFT concludes that there was an agreement and/or concerted practice between all four distributors and UOP to increase the price of UOP desiccant in 2002 by 4.5 per cent to customers (four per cent to distributors) and that the implementation of the increase should be co-ordinated.

226. At the end of 2001 UOP informed its distributors that there would be a four per cent increase in the wholesale price of desiccant and 0.5 per cent increase in distributor margins. The implementation of this price increase was established by two faxes sent by UOP at the start of 2002, indicating that while prices to distributors would only increase by four per cent, list prices to customers should be increased by 4.5 per cent. In the first fax dated 4 January 2002, Mr Scullion wrote to all four distributors[205] announcing this price increase for UOP desiccant. He stated:

> *'We are recommending a 4.5 per cent price increase for our products as shown in the accompanying letter. Our price to you will be increasing by less than 4 per cent, so there will hopefully be an opportunity for you to increase your margin at the same time.'*

227. The accompanying letter dated 7 January 2002 [206]stated:

> *'Please note that due to significant increases in the cost of primary raw materials used in the production of molecular sieves UOP will be increasing the price of our XL-8, HM2000 and DS2000 product*

[205] Letter from Mr Scullion to distributors dated 04-07/1/02 (Docs 423 and 424).
[206] Ibid.

*ranges by approximately 4.5 per cent. This increase will take effect as of 4th March 2002.'*

228. Mr Scullion followed up this letter with a fax addressed to all four distributors dated 25 January 2002[207]:

*'Further to my letter of 4 January 2002, I would like, if possible, to coordinate the timing of your price increase. I suggest everybody advises their customers, that prices for UOP desiccant will be increasing by 4.5 per cent as of 4th March. Whilst I obviously cannot, impose this on you, doing so would avoid the usual round of 'tit for tat' exchanges that take place at the time of price increase.'*

229. Although the price increase originated from UOP, the OFT considers that the practices of the margin increase and the co-ordination of the timing of the implementation date outlined in Mr Scullion's faxes of 4 January 2002[208] and 25 January 2002[209] above, flow from the practices agreed at the meeting held at Callow Hall[210] and the meeting between UOP and DGS on 15 November 2000[211] with regard to the 2001 price increase.

230. The OFT concludes that in the context of the events surrounding the 2001 price increase, all the parties understood and agreed with the practices outlined in the correspondence referred to above. As a result the OFT contends that further discussion or agreement by the distributors was unnecessary for the 2002 price increase. As Mr Scullion stated[212]:

*'**As per 2001 increase,** however, I provided the distributors with a letter indicating that UOP prices would go up by 4.5 per cent therefore giving our distributors this opportunity to increase their prices by more than 4 per cent and therefore increase their margins. **This was provided on my initiative based on the previous example,** but was again in response to comments from the distributors about unsatisfactory margins.' (OFT emphasis)*

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[207] Letter from Mr Scullion to distributors dated 25/01/02 (Doc 93).
[208] Letter from Mr Scullion to distributors dated 04-07/01/02 (Doc 423).
[209] Letter from Mr Scullion to distributors dated 25/01/02 (Doc 93).
[210] Meeting of 3 November 2000 at Callow Hall attended by UOP, UKae, Thermoseal and DQS.
[211] Meeting of 15 November 2000 at DGS' office at Castle Donington attended by UOP and DGS.
[212] Witness Statement 1 by Mr Scullion dated 25/06/03 - paragraph 62 (Doc 484b).

231. There is no indication of further debate on this issue, however the OFT concludes from the evidence outlined below that all four distributors did implement the price increase of 4.5 per cent, and all did so at the beginning of March 2002. This provides strong and compelling evidence that all the Parties were in agreement on this matter.

*UKae*

232. As regards UKae's implementation of the 2002 price increase, on 8 January 2002, Mr Ealing wrote in an internal memorandum to Mr Williams[213]. It stated:

> *'See attached letter from Tony Scullion noting a 4.5 per cent price increase effective 4th March 2002.*
>
> *Can you please set up increase on system also advise customers, copy to me please.'*

233. In a letter dated 5 February 2002 from Mr Williams to UKae's customers[214] with the heading 'Subject – UOP Desiccant – Price Increase', he stated:

> *'....we have no alternative in passing on an increase of 4.5 per cent for UOP products with effect from Monday 4th March 2002.'*

234. Mr Ealing also confirmed[215] in a statement made to the OFT that UKae implemented the price increase on the recommended date of 4 March 2002.

*Thermoseal*

235. As regards Thermoseal's implementation of the 2002 price increase, although there is no contemporaneous documentary evidence to corroborate this, Mr Paterson has confirmed[216] that Thermoseal did implement the 2002 price increase as suggested by Mr Scullion.

236. Thermoseal has made representations denying that there was an agreement and/or concerted practice between Thermoseal and the other

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[213] Internal memo from Mr Ealing to Mr J Williams of UKae dated 08/01/02 (Doc 41).
[214] Letter from Mr Williams of UKae to customers dated 05/02/02 (Doc 44).
[215] Supplemental Witness Statement from Mr Ealing dated 23/12/03 - paragraph 24 (Doc 598).

three UOP distributors and UOP in 2002 to implement a co-ordinated price increase for UOP desiccant. In its representations, Thermoseal denied that UOP's 2002 price increase formed part of the overall infringing agreement and/or concerted practice between UOP, Thermoseal, DQS and DGS[217]. Thermoseal also alleged that the OFT had failed to show with 'strong and compelling evidence'[218] that there was a *'concurrence of wills'* between UOP, UKae, Thermoseal, DGS and DQS[219].

237. In support of this, Thermoseal cited the CFI's judgment in *Cimenteries*[220]*,* which states that:

> *'in the context of establishing the existence of a single and continuous agreement contrary to Article 81(1) EC, the fact that the objectives of certain bilateral or multilateral arrangements entered into by the undertaking concerned coincide with those of the agreement in question is not sufficient to establish the applicant's participation in the latter. Such types of conduct can only be regarded as constituent elements of the single agreement if it is established that they formed part of an overall plan pursuing a common objective, and that the undertaking was sufficiently aware of this.'*

238. Thermoseal claimed that it had not been aware that the 2002 price increase was part of the overall plan for a number of reasons[221]. Firstly, it stated that the 2002 price increase was clearly distinguishable from the 2001 price increase because no contact had been made between the distributors. Thermoseal also argued that the volume and nature of the correspondence generated by the 2001 price increase was strong and compelling evidence that any such future multilateral co-ordination of prices was very unlikely to occur so smoothly as not to generate or require any contact between the Parties. Finally, it argued that the 2002 price increase was unilaterally implemented by UOP and independent of any agreement. It noted, on the other hand, that the 2001 price increase came as a result of repeated distributor requests made to UOP.

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[216] Witness Statement 2 by Mr Paterson of Thermoseal dated 18/10/03 – paragraph 6 (Doc 528).
[217] Thermoseal's Written Representations, dated 27/05/04 - paragraphs 11-24 (Doc 633a).
[218] *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 1 at paragraph 217 [2001], Comp AR 1.
[219] Joined Cases T-25/95 and T-41/96 *Bayer v Commission* [2000] ECR II-3383.
[220] *Cimenteries CBR and Others v EC Commission* [2000] ECR II-491.
[221] Thermoseal's Written Representations, dated 27/05/04 - paragraph 17 (633a).

239. Thermoseal further submitted that it was not correct to say that the price increase had been acceptable to all distributors. It alleged that Mr Paterson had had strong misgivings regarding UOP's letter of 4 January 2002, announcing the price increase.[222] In support of this it quoted from Mr Paterson's witness statement stating that the price increase was a *'complete surprise*.'[223] It also quoted a further witness statement[224] stating that the 2002 price increase was '*disastrous*'.

240. Thermoseal also denied that the margin increase and co-ordination of the timing of the increase flowed from the practices agreed with regard to the 2001 price increase. Thermoseal submitted that its 2002 price increase was '*coincidental to those of the other distributors'*[225]*.*

241. Finally, Thermoseal claimed that Mr Ealing's statement, reproduced at paragraph 259 below, did not illustrate a link between the Policy and the co-ordination of the 2002 price increase. Thermoseal stated that it implemented the 2002 price increase only because it could not absorb the manufacturer (UOP) price increase[226].

242. The OFT is of the view that there is strong and compelling evidence of a *'concurrence of wills'* between UOP and Thermoseal in relation to the 2002 price increase. Following the quotation from *Bayer* cited by Thermoseal[227], the CFI went on to state that:

> '*a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure…and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall with in Article [81(1)] of the Treaty, the latter must be regarded as revealing an agreement between undertakings…That is the case, in particular, with practices and measures in restraint of competition, 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'.*

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[222] Letters from Mr Scullion to UOP distributors dated 04-07/01/02 (Docs 423 and 424).
[223] Witness Statement 2 by Mr Paterson dated 18/10/03 - paragraph 6 (Doc 528).
[224] Witness Statement 1 by Mr Paterson dated 05/11/03 - paragraph 17 (Doc 539).
[225] Thermoseal's Written Representations, dated 27/05/04 - paragraph 20 (Doc 633a).
[226] Ibid, paragraph 21.
[227] Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383, paragraph 71. Referred to in Thermoseal's Written Representations, dated 27/05/04 - paragraphs 12-15 (Doc 633a).

243. The OFT believes that by receiving the UOP faxes dated 4-7 January 2002 (see paragraphs 226-227 above) and 25 January 2002 (see paragraph 228 above) sent to all the distributors setting out the price increase in the context of the previous price increases and suggesting they should be co-ordinated, without objecting to the increases or repudiating these suggestions, and further by implementing the price increase as suggested, Thermoseal at the very least gave tacit acquiescence to a vertical price fixing agreement between itself and UOP. Moreover, it is clear to the OFT that all the Parties knew what UOP's faxes meant (given the context), and all complied with the request at the specified time. Indeed, in the OFT's view, this is more than 'tacit acquiescence', but rather full co-operation. In support of this view, the OFT notes the CFI's judgment in *Cimenteries* which states:

> '*When there is a document or documents indicating that a price fixing agreement has been made which includes the party concerned, that party will need to adduce specific evidence to rebut the presumption that it was involved in the alleged cartel*[228]*.*'

Although the OFT notes that Thermoseal had misgivings about the 2002 price increase[229], it considers that Thermoseal has not provided such evidence.

244. The OFT also notes that Thermoseal admits having participated in the Policy which it admits to have continued until at least 12 March 2003 (a full year after the 2002 price increases became effective)[230]. It also admits having participated in the 2001 price increase[231]. The OFT considers the 2002 price increase to be an integral part of the Policy. Indeed the Policy would require the co-ordination of the distributors' price increases, as they could not otherwise know whether they would be undercutting each other.

245. Additionally, the OFT notes that none of the other Parties disputes the OFT's conclusion that the 2002 price increase formed part of a pattern

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[228] Joined Cases T-25/95 etc., *Cimenteries CBR and others v EC Commission* [2000] ECR II-491, paragraph 1839. Note: the OFT acknowledges that in this case the documentary evidence in question does not indicate 'that a price fixing agreement has been made. Nevertheless, in circumstances such as this (i.e. where there is a document suggesting a co-ordinated price increase and the parties act accordingly) the same principle applies.

[229] Witness Statement 2 by Mr Paterson dated 18/10/03 – paragraph 6 (Doc 528).

[230] Thermoseal's Written Representations dated 27/05/04 - paragraph 16 (Doc 633a).

[231] Ibid, paragraph 17.

of continuous conduct with a common objective. Each of the distributors, Thermoseal included, could not have been unaware that UOP's suggested price increase applied not only to itself but also to the other distributors. This is clear from the fact that Mr Scullion's fax dated 25 January 2000[232] was sent not only to Thermoseal but to all of the distributors. It also followed necessarily from the Policy that if Thermoseal was to implement a 4.5 per cent price increase then the other distributors would have to do so too, at least insofar as UOP distributors were bidding for the same accounts. The OFT is therefore satisfied that there is strong and compelling evidence of a concurrence of wills between the Parties as regards the 2002 price increase.

246. The OFT also notes that Thermoseal admits having used UOP's letter to inform customers of the price increase and having taken advantage of the additional margin by applying the 4.5 per cent increase, rather than merely passing on the four per cent cost increase[233].

247. With regard to Thermoseal's submissions on the application of the judgment in *Cimenteries,* although it is indeed necessary to prove, where there are a number of bilateral and multilateral agreements between a large number of undertakings, that each agreement forms part of a single, overall infringement, the main issue (as identified by Thermoseal) is whether the agreement in question formed part of '*an overall plan pursuing a common objective, and that the undertaking was sufficiently aware of this.'*

248. The OFT has shown (in particular, at paragraphs 87-172 and 172-225 above) that: a) given the context, the clear common objective of the preceding sub-agreements and/or concerted practices was to fix prices, as was the objective of the 2002 price increase; b) each of the Parties was aware of this common objective; c) each of the Parties complied with the 2002 price increase and d) the same Parties were involved in the Policy and in both the 2001 and 2002 price increases. It is therefore difficult to see how the 2002 price increase can be regarded as having no connection to the previous sub-agreements and/or concerted practices. Equally it is difficult to see how it could be argued that the Parties were unaware of this connection, and of the common objective in these circumstances.

249. More specifically, the OFT disagrees with Thermoseal that the 2002 price increase is distinguishable from the 2001 price increase. Although

[232] Fax from Mr Scullion to UOP distributors dated 25/01/02 (Doc 93).
[233] Witness Statement 1 by Mr Paterson dated 10/04/03 – paragraph 17 (Doc539).

the OFT has not found evidence of any direct contact between the distributors relating to the 2002 price increase and acknowledges that there does not appear to be the same volume of correspondence relating to the 2002 price increase as with the 2001 price increase, as noted above, the OFT is of the view that the facts surrounding the 2002 price increase are so similar to the facts of the 2001 price increase and in line with the Policy that it is impossible to separate out the infringements into single acts. The lack of direct contact between the distributors reflects the fact that they would have been aware of each other's co-operation in the context of the 2001 price increase: there was no need for further correspondence between the distributors (see paragraphs 230-231 above). As with the 2001 price increase, UOP notified the distributors in writing of an impending increase; it provided the distributors with a similar letter to send to their customers; it provided the distributors with a margin increase and suggested a co-ordinated date of implementation. The distributors then implemented the increase as suggested.

250. Thermoseal submits that the 2001 price increase came as a result of repeated distributor requests, but that the 2002 price increase was instigated by UOP alone.[234] The OFT disagrees with this interpretation. Mr Scullion has stated that he was under instruction to implement a 4 per cent increase across all markets in 2001. It is clear that UOP was the instigator of the 2001 price increase, although the terms of it were modified by the discussions at and after Callow Hall (see paragraph 176 above).

*DQS*

251. As regards DQS's implementation of the 2002 price increase, DQS has provided the OFT with a copy of an undated letter prepared for customers[235]. It stated:

> *'We very much regret having to notify you of a price increase on the ranges of UOP and DQS desiccant stocked and distributed by DQS. With effect from March 1st 2002 prices will increase by 4.5 per cent.'*

252. Mr Mitchell has confirmed in an email[236] that this letter was sent out to DQS' customers and that DQS did implement the price increase.

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[234] Thermoseal's Written Representations, dated 27/05/04 - paragraph 17.4 (Doc 633a).
[235] Undated letter from DQS to customers (Doc 513).
[236] Email from Mr M Mitchell of DQS to the OFT dated 16/12/03 (Doc 585a).

*DGS*

253. As regards DGS' implementation of the 2002 price increase, a copy of Mr Scullion's fax of 25 January 2002[237] was faxed back to UOP from DGS on the same day with the handwritten note:

> *'Actioned as Above*
> *Best Regards*
> *Joanne*
> *(for D Aucott)'.*

254. In addition, on a signed notice to DGS' customers dated 21 January 2002[238], headed 'RE PRICE INCREASE ON ALL UOP DESICCANT', DGS stated:

> *'Unfortunately our supplier has advised us of a **4.5 per cent** price increase on the above named product [UOP desiccant] for all deliveries on or after **4th March 2002**.'*

255. Also, in the attachment of a letter from Mr Wellard of DGS to a customer dated 30 January 2002[239], there is a quote for desiccant. Under the quote it stated:

> *'***This price is subject to a 4.5 per cent price increase effective 4th March 2002***'*

256. The OFT concludes, therefore, that the evidence outlined above suggests that all four distributors did implement the 2002 price increase; that none of the distributors objected or repudiated the price increase suggested by UOP and that the distributors accepted both the size of the increase and the date recommended by UOP.

*Conclusion*

257. The OFT therefore concludes that the material outlined above provides strong and compelling evidence that there was a sub-agreement and/or concerted practice between UOP, UKae, Thermoseal, DQS and DGS to implement a price increase in 2002.

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[237] Copy of UOP letter of 25/01/01 with DGS manuscript addition (Doc 93).
[238] Letter from DGS to customers dated 21/01/02 (Doc 280).
[239] Letter from DGS to customer dated 30/01/02 (Doc 295).

SUMMARY OF FINDINGS AS TO A SINGLE AGREEMENT

258. The OFT concludes that the five sub-agreements and/or concerted practices described above formed part of a pattern of continuous conduct with a common objective (i.e. to fix and/or maintain resale prices). These agreements and/or concerted practices may thus be read together as part of a single infringement of the Act[240].

259. The following statement from Mr Ealing illustrates the link between the Policy and the co-ordination of the two price increases[241]:

> *'...it would not be in the interests of the UOP Distributors not to increase their prices. In relation to customer accounts currently supplied by a UOP Distributor, because of the manner in which the UOP distributor policy worked, a UOP Distributor could not undercut another UOP Distributor so there was no benefit in not implementing a price increase.'*

260. The OFT notes Mr Scullion's statement that the co-ordination of the price increases was to avoid *'tit for tat'* undercutting[242].

261. The OFT concludes that the Parties were all aware of each others' involvement in the overall plan, and knew that their conduct was part of an overall strategy designed to maintain the resale price of UOP desiccant. It concludes this from the evidence of the meetings at Callow Hall and at DGS' office at Castle Donington (described in paragraphs 86 et seq., 173 et seq. and 203) as well as the evidence from UOP and all the distributors on the 'policing' of the Policy (paragraph 128 et seq.) and also the implementation of the price increases (paragraph 173 et seq.).

262. The OFT also concludes that although the roles played by each Party may not have been identical, this does not detract from the fact that the relevant sub-agreements and/or concerted practices together constitute a single overall infringement.

263. The OFT concludes that the material outlined above provides strong and compelling evidence of the active participation of UOP, UKae,

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[240] The Court of First Instance has held that a series of connected agreements that pursue a common objective may be read together as one agreement see Case T-25/95 etc *Cimenteries CBR v Commission* [2000] ECR II-491, paragraphs 4019-4058.
[241] Supplemental Witness Statement by Mr Ealing dated 23/12/03 – paragraph 22 (Doc 598).
[242] Witness Statement 1 by Mr Scullion dated 25/06/03 – paragraph 55 (Doc 484b).

Thermoseal, DQS and DGS in a single infringement comprising five sub-agreements and/or concerted practices to fix and/or maintain the resale price of UOP desiccant from 1 March 2000 to 12 March 2003.

## G Application of the Chapter I Prohibition to the agreement/concerted practice

PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION

264. Section 2(1) of the Act prohibits (*inter alia*) *'agreements between undertakings…or concerted practices which…have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom'*. Accordingly, in light of the specific wording of section 2(1) of the Act, the OFT is not, as a matter of law, obliged to establish that an agreement or concerted practice has an anti-competitive effect where it is found to have as its object the prevention, restriction or distortion of competition.

265. In considering whether an agreement and/or concerted practice has as its object the prevention, restriction or distortion of competition, the OFT will consider the aims of the agreement and/or concerted practice in the economic context in which it operates. The OFT's assessment of the aims of the agreement and/or concerted practice is determined by an objective assessment of the meaning and purpose of the agreement, rather than by any consideration of the subjective intention of the parties when entering into the agreement and/or concerted practice. In this respect the OFT takes the view that, if the obvious consequence of an agreement is to prevent, restrict or distort competition, that will be its object notwithstanding that it may have other aims as well.

266. Section 2(2) of the Act states that the Chapter I prohibition applies, in particular, to agreements which '…*directly or indirectly fix*… *selling prices*…'.

267. Accordingly, any provision in an agreement and/or concerted practice which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, restricts the buyer's ability to determine the prices at which goods or services are resold by the buyer will amount to an infringement of the Chapter I prohibition.

268. To the extent that the five sub-agreements and/or concerted practices of the type referred to in this decision have as their obvious and intended consequence the restriction of the buyer's ability to determine its resale

prices, the OFT takes the view that the five sub-agreements and/or concerted practices have as their object the prevention, restriction or distortion of competition.

269. The OFT takes the view that the five sub-agreements and/or concerted practices make up a single infringement which had as its obvious and intended consequence the restriction of the ability of UKae, Thermoseal, DQS and DGS to determine their own resale prices and, therefore, had as its object the prevention, restriction or distortion of competition.

APPRECIABILITY

270. An agreement, decision or concerted practice will only infringe the Chapter I prohibition if the prevention, restriction or distortion of competition which is its object or effect is appreciable. The OFT considers that an agreement will not generally have an appreciable effect on competition if the parties' combined market share of the relevant market does not exceed 25 per cent[243]. However, the OFT will regard any agreement between undertakings which directly or indirectly fixes the resale prices of any product or service as being capable of having an appreciable effect even where the combined market share falls below the 25 per cent threshold[244].

271. The overall agreement and/or concerted practice between the Parties, by seeking to maintain resale prices, is a price-fixing agreement and is therefore considered by the OFT as being capable of having an appreciable effect on competition whether or not the Parties' combined market share in the relevant market falls below 25 per cent. The OFT therefore takes the view that the agreement prevents, restricts or distorts competition to an appreciable extent.

272. Although there may be circumstances, which will be very limited, in which price-fixing agreements may not have as their object or effect an appreciable restriction of competition, this is clearly not the case here given UOP's strong position in the supply of desiccant to the UK market (see paragraph 16 above).

273. Therefore, it is not necessary for the OFT to state at what market share, if any, it might take the view that a price-fixing agreement does not have

[243] See OFT Guideline 'The Chapter I prohibition' March 1999, OFT 401, paragraphs 2.18 and 2.19.
[244] Ibid. - paragraph 2.20.

as its object or effect an appreciable restriction of competition in this case.

## EFFECT ON TRADE WITHIN THE UNITED KINGDOM

274. The products which are the subject of the agreement and/or concerted practice are sold throughout the UK. As can be seen from the above analysis, the overall agreement and/or concerted practice between the Parties had as its object the prevention, restriction or distortion of competition in the market for these products. The agreement and/or concerted practice therefore affects trade within the UK for the purposes of the Chapter I prohibition.

## EXCLUSION

275. Article 3 of the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000[245] (the Exclusion Order), states that the *'Chapter I prohibition shall not apply to an agreement to the extent that it is a vertical agreement.'* Agreements between manufacturers and distributors are considered to be vertical agreements for the purposes of the Exclusion Order. However, the benefit of the Exclusion Order does not apply to vertical agreements that have the object or effect of restricting the buyer's ability to determine its sale price (Article 4 of the Exclusion Order).

276. For the reasons stated above, the OFT considers that the agreement amounts to resale price maintenance, and that the agreement does not benefit from the Exclusion Order.

## EXEMPTION

277. The European Community's block exemption on vertical agreements[246] may apply as a parallel exemption under the Competition Act 1998 to vertical agreements[247]. As a price fixing agreement and/or concerted practice, however, this single overall infringement does not benefit from the parallel exemption[248].

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[245] SI 2000 No. 310 as amended. For further information see 'Vertical Agreements and Restraints', March 2000 (OFT 419) .
[246] Commission Regulation (EC) No.2790/1999 of 22 December 1999 on the application of the Treaty to certain categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999.
[247] Section 10 of the Act.

278. No application for individual exemption of the agreement/and or concerted practice was made under section 4 of the Act nor have any of the Parties sought to show that the agreement and/or concerted practice met the criteria for exemption under section 9 of the Act. Had such an application been made or such a claim advanced, however, it is most unlikely that OFT would have found the agreement and/or concerted practice to have met the criteria. In particular:

i) it is extremely hard, if not impossible, to see how the fixing of prices for UOP desiccant might contribute to improving the production or distribution of goods; and

ii) it is equally difficult to see how the agreement could be said to allow consumers a fair share of the resulting benefit, if any. On the contrary, consumers were instead deprived of discounts on the goods, which might otherwise have been made available, thereby obliging them to pay more for the goods than would otherwise have been the case.

279. In the light of the above, and in the absence of any claim by the Parties that section 9 applies, the OFT does not need to consider whether any of the remaining criteria for exemption under that section are met.

## H Scope and duration of the single infringement

280. The infringement covered the sale and distribution of desiccant in the UK. As noted in paragraphs 71-85 above, the overall agreement and/or concerted practice was entered into before the Chapter I prohibition came into effect (1 March 2000). For the purposes of the Act, therefore, the infringement began on 1 March 2000. Evidence at paragraph 86 et seq. above indicates that the Policy continued until at least 12 March 2003, when the OFT made site visits to four of the Parties under section 27 of the Act, except in the case of UKae where its participation in cartel activities ended on 12 December 2002, and no later than 21 May 2003 when UOP formally informed the distributors that all former arrangements between them no longer applied. UOP and Thermoseal have represented that there is no evidence of any infringing activity after 12 March 2003[249], although it is likely that the infringement continued to affect prices after that date. The duration of the infringement must be taken into account when calculating penalties. For the purposes of this

[248] Article 4 of Regulation 2790/1999.
[249] Written Representations by UOP dated 24/05/04 - paragraphs 15-20 (Doc 634a) and Written Representations by Thermoseal dated 24/05/04 - paragraphs 25-38 (Doc 633a).

decision, the OFT is proceeding on the basis that the infringement terminated at the earliest credible date of 12 March 2003, although it does not rule out the possibility that it continued beyond that date.

**I Decision**

INFRINGEMENT OF THE ACT

281. The OFT concludes, on the basis of the strong and compelling evidence set out above, that the Parties have infringed the Chapter I prohibition by being party to an overall agreement and/or concerted practice constituting a single infringement which comprised a number of sub-agreements and/or concerted practices which have infringed the Chapter I prohibition.

# PART III – ACTION

282. This part of the decision sets out the action which the OFT is taking and its reasons for doing so.

**Directions**

283. Section 32(1) of the Act provides that if the OFT decides that an agreement, decision or concerted practice has infringed 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. No directions are necessary in this case as the OFT is satisfied that the agreements and/or concerted practices in question have ceased.

**Financial Penalties**

LEGAL BACKGROUND

284. Section 36 (1) of the Act provides that, on making a decision that the Chapter I prohibition has been infringed, the OFT may require a party to the agreement and/or concerted practice to pay a penalty in respect of the infringement. No penalty which has been fixed by the OFT may exceed ten per cent of the worldwide turnover of the undertakings calculated in accordance with the provisions of the Competition Act

(Determination of Turnover for Penalties) Order 2000[250] (as amended) (the Penalties Order).

285. As required by section 38(8) of the Act, the OFT has also had regard when determining the financial penalties of the infringing parties to its published guidance as to the appropriate amount of a penalty.[251]

286. The OFT has decided to impose a penalty on UOP, UKae, Thermoseal, DQS and DGS. The overall infringement consists of a single agreement and/or concerted practice comprising five sub-agreements and/or concerted practices between UOP and its distributors as identified in Part II of this decision. The OFT has decided to impose only one penalty on each Party and to base that penalty on the overall infringing agreement and/or concerted practice, rather than impose separate penalties in respect of each of the sub-agreements and/or concerted practices making up the infringement.

IMMUNITY FROM PENALTIES

287. Section 39(3) of the Act provides for limited immunity from penalties for small agreements, although that immunity does not apply where the agreement is a price fixing agreement. The agreement between the Parties in question is a price fixing agreement and therefore the limited immunity from penalties does not apply to the Parties.

INTENTIONAL / NEGLIGENT INFRINGEMENT

288. The OFT may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently[252], although the OFT is not obliged to specify whether it considers the infringement to be intentional or merely negligent.[253]

289. However, the Tribunal has stated that:

> *'in our judgement an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that*

[250] Section 36(8) of the Act and SI 2000/309, as amended by the Competition Act (Determination of Turnover for Penalties) Order 2004 SI 2004/1259.
[251] 'The Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000 (OFT 423).
[252] Section 36(3) of the Act.
[253] *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2001] CAT 1 at paragraphs 457 and 459.

*its conduct was of such a nature as to encourage a restriction or distortion of competition.'*[254]

290. Although the above finding was made in the context of an infringement of the Chapter II prohibition imposed by section 18(1) of the Act, the OFT considers that the same principles apply to infringements of the Chapter I prohibition. In particular, the OFT considers that an infringement of the Chapter I prohibition will have been committed intentionally if the undertaking must have been aware that the object or effect of the agreement, decision or concerted practice in question was of such a nature as to encourage a restriction or distortion of competition.

291. The OFT is satisfied that UOP, UKae, Thermoseal, DQS and DGS have all intentionally infringed the Chapter I prohibition.

*UOP*

292. UOP has argued in its representations that if its conduct amounted to an infringement, it was negligent rather than intentional. It argued that there was no evidence that UOP (acting through Mr Scullion) had been aware that its actions would have had the object or effect of restricting competition in the relevant market. It cited in particular the fact that Mr Scullion had made no attempt to conceal his actions[255].

293. The OFT notes, however, that UOP adopted and systematically implemented the Policy to fix and/or maintain resale prices for UOP desiccant. It entered into price fixing agreements and/or concerted practices with its four distributors and encouraged price fixing agreements and/or concerted practices between the distributors, including on two occasions co-ordinated price increases. Such agreements and/or concerted practices have as their object a restriction of competition within the meaning of the Chapter I prohibition.

294. There is nothing to suggest, and UOP has not argued, that the agreement and/or concerted practice was not entered into intentionally. As to the object of that agreement and/or concerted practice, the OFT believes that all of the Parties, including UOP, must have been aware that price fixing agreements and/or concerted practices of any kind, and particularly horizontal agreements, of the sort which UOP encouraged among its distributors, would have served to restrict competition.

[254] Ibid, paragraph 456.
[255] Written Representations by UOP dated 24/05/04 - paragraphs 67-69 (Doc 634a).

Moreover, the OFT considers that the intended consequences of the agreement and/or concerted practice were plainly foreseeable and must have been, and were, understood by the Parties. On all these grounds, the OFT finds UOP's conduct to have been intentional. The OFT therefore concludes that UOP intentionally infringed the Chapter I prohibition.

*UKae*

295. UKae was party to the Policy and to the 2001 and 2002 price increase sub-agreements. It also played an active role in obtaining the agreement of Thermoseal and DQS to implement the 4 per cent price increase in February 2001. Such agreements and/or concerted practices have as their objects a restriction of competition within the meaning of the Chapter I prohibition. UKae cannot have been unaware of this. The OFT, therefore, concludes that UKae intentionally infringed the Chapter I prohibition.

*Thermoseal*

296. Thermoseal has argued in its representations that its conduct was negligent rather than intentional. It argued that there was no evidence until Mr Paterson's letter of 6 December 2002 (see paragraph 117 above) expressing concern at UOP's threat to impose sanctions, to suggest that any officer of Thermoseal had been aware that its conduct would have the object or effect of restricting competition[256].

297. The OFT notes, however, that Thermoseal was party to the Policy and to the 2001 and 2002 price increase sub-agreements. It also entered into horizontal communications with one of its competitors (UKae) to establish that it would implement the four per cent price increase in February 2001. Such agreements and/or concerted practices plainly have as their object a restriction of competition within the meaning of the Chapter I prohibition. Thermoseal cannot have been unaware of this.

298. Moreover, as regards Mr Paterson's letter of 6 December 2002, the concerns expressed by Mr Paterson first were limited to UOP's proposals for the improved enforcement of the Policy and did not extend to the Policy more generally (see paragraph 117 above) and second were not related to the anti-competitive nature of UOP's proposals but to their legality.

299. The OFT therefore concludes that Thermoseal intentionally infringed the Chapter I prohibition.

*DQS*

300. DQS was party to the Policy and to the 2001 and 2002 price increase sub-agreements. It also entered into horizontal communications with one of its competitors (UKae) to establish that it would implement the 4 per cent price increase in February 2001. Such agreements and/or concerted practices plainly have as their object a restriction of competition within the meaning of the Chapter I prohibition. DQS cannot have been unaware of this. The OFT therefore concludes that DQS intentionally infringed the Chapter I prohibition.

*DGS*

301. DGS has represented that it had not been aware of the legal implications of its actions and that it trusted the judgement of its supplier, UOP, that its actions were not unlawful, and that thereby its conduct was negligent[257].

302. However, the OFT notes that DGS was party to the Policy. It was party to the 2001 and 2002 price increase sub-agreements. Such agreements and/or concerted practices plainly have as their object a restriction of competition within the meaning of the Chapter I prohibition. DGS cannot have been unaware of this. The OFT therefore concludes that DGS intentionally infringed the Chapter I prohibition.

CALCULATION OF THE PENALTIES – GENERAL POINTS

*Step 1 – starting point*[258]

303. The starting point for calculating the level of penalty is arrived at by applying a percentage rate to the relevant turnover of the undertaking, having regard to the seriousness of the infringement. The starting point may not exceed ten per cent of the 'relevant turnover' of the undertaking.

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[256] Written Representations by Thermoseal dated 27/05/04 - paragraph 49 (Doc 633a).
[257] Written Representations by DGS dated 29/04/04 - paragraphs 2, 4 and 20 (Doc 632).
[258] 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000 (OFT 423), Part 2.

304. The 'relevant turnover' is the turnover of the undertaking in the relevant product market and the relevant geographic market affected by the infringement in the undertaking's last financial year. The OFT interprets this as the last financial year preceding the end of the infringement.

305. The size of the starting point calculated from the relevant turnover depends upon the nature of the infringement.[259] The more serious the infringement, the higher the likely starting point will be. When making this assessment, the OFT also considers a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties[260]. The damage caused to consumers whether directly or indirectly is also an important consideration. The assessment is made on a case by case basis for all types of infringement, taking account of all the circumstances of the case.

TYPE OF INFRINGEMENT

306. The OFT considers price fixing to be among the most serious infringements caught by the Chapter I prohibition. The gravity of price fixing agreements will, therefore, be taken into account when calculating the starting point for the penalties of the infringing undertakings.

307. UOP and its distributors were parties to an overall agreement and/or concerted practice designed to fix and/or maintain minimum resale prices for desiccant manufactured by UOP for sale in the UK. Also, UOP encouraged or facilitated a horizontal agreement between UKae, Thermoseal and DQS to fix the date of the 2001 price increase. UKae facilitated this horizontal contact and Thermoseal and DQS participated in it. UOP also acted as a mediator between DGS and the other distributors, resulting in the co-ordination of the pricing policies of all the UOP UK distributors of desiccant.

308. UOP submitted that the alleged infringements had little or no effect on competition. It argued that competition in the supply of IG desiccant market was fierce. It stated that there was competition between a number of brands; that there was overcapacity in production and that there were low switching costs in the case of IG unit manufacturers who

[259] Ibid, paragraph 2.4.
[260] Ibid, paragraph 2.5.

could readily change the brand of desiccant they used. Finally, it stated that there were low barriers to entry for new suppliers of IG desiccant[261].

309. UOP further submitted that although it could be argued that the Policy allowed UOP to maintain its own prices to distributors which would have otherwise fallen by a greater amount than they did, this was not the case. It claimed that the distributors were constrained in the prices they set by the prices charged by UOP and that UOP could have legitimately achieved the same outcome by being firmer in setting its prices to distributors. Further it submitted that although the 2001 and 2002 price increases by distributors could theoretically have dampened price competition it was clear that this did not happen as there was subsequently considerable negotiation between distributor and customer as to price. Finally, it claimed that it had made little gain from the agreement and/or concerted practice[262].

310. Thermoseal also submitted that the overall agreement and/or concerted practice had a limited effect on competition due to the existence of vigorous competition in the desiccant market. It also submitted that customers had benefited from lower prices of desiccant due to the heavy subsidising of the UOP price support system. It emphasised that there were alternatives to UOP desiccant available. It also claimed that it had made little gain from the agreement and/or concerted practice[263].

311. DQS also submitted that if the agreement and/or concerted practice had had an effect on competition it would have been negligible. It stated that there was evidence of DQS acting competitively. It argued that the 2001 and 2002 price increases did not significantly prevent, restrict or distort competition and claimed to have received little benefit from the agreement and/or concerted practice[264].

312. DGS also submitted that the agreement and/or concerted practice had a limited effect on competition in the market and would not have affected consumers adversely. It was a response to the competitive situation and not intended to maintain artificially high margins[265].

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[261] Written Representations by UOP dated 24/05/04 - paragraph 22 (Doc 634a).
[262] Ibid.
[263] Written Representations by Thermoseal dated 24/05/04 - paragraphs 50-55 (Doc 633a).
[264] Written Representations by DQS dated 21/05/04 - paragraphs 44, 43, 32 and 39 (Doc 633).
[265] Written Representations by DGS dated 29/04/04 – paragraphs 11-13 and 15 (Doc 631).

313. Despite the above, it is clear that UOP's market share increased slightly over the period of the infringement, notwithstanding the fact that the list price of UOP desiccant remained among the highest in the market[266]. The amount of desiccant supplied to UOP's UK distributors increased from [**C**] metric tonnes to [**C**] metric tonnes during the period of infringement[267] and UOP successfully persuaded DQS from the beginning of 2003 to source desiccant from UOP alone, rather than sourcing various makes of desiccant. Moreover, the OFT does not find it credible that UOP and its distributors would have actively maintained the agreement and/or concerted practice over such a long period (see paragraphs 74 and 280 above) if it had had no effect. The OFT therefore takes the view that the overall agreement and/or concerted practice had a significant effect on the market, although it has not sought to quantify this more precisely.

314. The OFT wishes to make it clear that any horizontal contact between competitors or vertical contacts between a supplier and its distributors with a view, in each case, to co-ordinating prices is a serious infringement of the Chapter I prohibition.

315. The OFT nevertheless accepts that the impact on competition in this particular case might have been somewhat diminished as a result of the difficulties faced by the distributors in passing on the agreed price increases to all of their customers. This is reflected in the starting point for each of the Parties.

NATURE OF THE PRODUCT

316. The infringement relates to UOP desiccant for use in IG units. As described in detail above (see paragraphs 7-10 above), desiccant is a chemical adsorbent material which is poured into the spacer bar between the two panes of glass in an IG unit. The purpose of desiccant is to absorb moisture which may form between the panes of glass.

STRUCTURE OF THE MARKET

317. UOP is a worldwide manufacturer and supplier of desiccant to many different industries. It is the largest supplier of desiccant for use in IG units in the UK (see paragraph 16 above). There are no UK manufacturers of IG desiccant so all desiccant used in the UK has to be imported. The structure of the UK downstream market is said to be unusual compared to most other European countries. The UK market is

[266] Letter from Herbert Smith on behalf of UOP to OFT dated 14/10/03, Annex 5 (Doc 525e).
[267] Ibid.

characterised by four thousand small manufacturers of IG units supplied through a network of distributors. In contrast, the European market is characterised by small numbers of large customers supplied directly by the manufacturers (see paragraph 42 above).

MARKET SHARE OF THE UNDERTAKINGS INVOLVED AND ENTRY CONDITIONS

318. UOP has a relatively large share of the UK supply of desiccant. The OFT notes its market share of about [**C**] per cent in 2002. Its nearest competitor, Grace, has an estimated market share of between [**C**] per cent and the rest of the UK supply is shared between a number of smaller manufacturers[268]. Barriers to importing into the UK are low, as evidenced by recent entrants from, for example, China. With regard to the market share of the distributors, there were around 14 distributors of desiccant on the UK market supplying around 4000 IG unit manufacturers. UKae, Thermoseal, DGS and DQS, as distributors of a range of IG products, often supplied them as a package of components to IG unit manufacturers. It is difficult, therefore, to estimate the significance of their market share with regard to desiccant as a single commodity.

319. That said, the OFT's information shows, for example, that in 2002 UKae had [**C**] per cent of UOP's supply; Thermoseal, [**C**] per cent; DGS [**C**] per cent and DQS, [**C**] per cent (It is presumed that the remaining [**C**] per cent was purchased by [name deleted]). As UKae, Thermoseal and DGS sourced only from UOP, and UOP had about [**C**] per cent of the UK desiccant market in 2002, UKae, Thermoseal and DGS would have had a total share of the UK desiccant market in 2002 of [**C**], [**C**] and [**C**] per cent respectively[269]. As DQS sourced from more than one supplier its overall market share cannot be estimated with accuracy.

EFFECT ON COMPETITORS AND THIRD PARTIES

320. The effect of the infringement on UOP's competitors is very difficult to determine, although it is likely that the Policy allowed UOP to keep its distributors loyal to its product and thereby maintain its high market share against increasing competition. The effect of the infringement on other desiccant manufacturers could have been significant. The infringement is likely to have covered close to [**C**] per cent of desiccant sales in the UK.

[268] See paragraph 16 above.
[269] Witness Statement 2 by Mr Scullion dated 17/10/03, Annex 5 (Docs 525 and 525e) and Witness Statement 1 by Mr Scullion dated 25/06/03 - paragraph 69 (Doc 484b).

DAMAGE TO CONSUMERS

321. It would be extremely difficult, if not impossible, to estimate with accuracy the actual effect that the overall agreement and/or concerted practice had on consumers, given the number of unknowns. However, as noted above the OFT believes that the overall agreement and/or concerted practice restricted price competition between the distributors for desiccant in the IG package. Although desiccant forms a relatively small part of the overall cost of an IG unit to a consumer, it is highly likely that this lack of competition would have fed through to the cost of the unit to the final consumer.

CONCLUSION

322. Given the seriousness of the infringement, the OFT has decided that the starting point should be around [**C**] of the maximum possible starting point, subject to a review of the individual position of each of the Parties.

*Step 2 – adjustment for duration*

323. The starting point may be increased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement.[270]

324. For the purposes of calculating penalties, in the case of UOP, Thermoseal, DQS and DGS, the infringement lasted from at least 1 March 2000 and continued until at least 12 March 2003 - a total of three years and 11 days. Part years may be treated as full years for this purpose. However, in order to encourage undertakings to terminate infringements as quickly as possible, the OFT has decided, where necessary, to round up the duration of the final year to the nearest quarter rather than the nearest year. Therefore the length of infringement will be rounded up to 3 years and a quarter. A multiplier of 3.25 will therefore be added to these Parties' penalties. For duration with regard to UKae, see paragraph 340 below.

*Step 3 - adjustment for other factors*

325. The penalty may be adjusted as appropriate to achieve policy objectives, particularly deterring infringing undertakings from engaging in anti-

[270] 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty.', March 2000 (OFT 423), paragraph 2.7.

competitive practices[271]. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also to other undertakings which might be considering activities which are contrary to the Chapter I prohibition[272]. The OFT is of the view that deterrence is a very important policy objective in this sector and intends adjusting the level of penalty for each infringing party to reflect this. The OFT discusses in the following paragraphs the adjustment it intends to make for each Party in order to achieve effective deterrence.

*Step 4 – adjustment for aggravating and mitigating factors*

326. The basic amount of the financial penalty, adjusted as appropriate at Steps 2 and 3, may be increased where there are other aggravating factors, or decreased where there are mitigating factors[273]. Below, the OFT has indicated where it has increased or decreased the amount of the fine to take into account of such aggravating or mitigating factors.

*Step 5 – adjustment to prevent maximum penalty being exceeded and to account for other penalties or fines*

327. The final amount of the penalty calculated according to the method set out above may not exceed ten per cent of the worldwide turnover of the undertaking in the last business year. The penalty will be adjusted if necessary to ensure that it does not exceed this maximum.

*Penalty for UOP*

STEP 1 – STARTING POINT

328. UOP's turnover in the relevant product and geographic markets (i.e. the supply of desiccant through distributors in the UK) is £ [**C**] in the undertaking's financial year preceding the date when the infringement ended (1 January 2002 till 31 December 2002). The maximum starting point is, therefore, £[**C**].

329. The OFT's conclusions regarding the seriousness of this infringement are set out at paragraphs 306-322 above. With specific regard to UOP, the OFT has noted the extent of its involvement. Taking into account the seriousness of this infringement; the effect of the infringement and UOP's position in the supply of desiccant in the UK, the OFT considers a starting point of [**C**] per cent of turnover or £[**C**] to be appropriate.

[271] Ibid, paragraph 2.8.
[272] Ibid, paragraph 2.8
[273] Ibid, paragraph 2.10.

STEP 2 – ADJUSTMENT FOR DURATION

330. The OFT has outlined at paragraphs 323-324 above how it proposes to calculate any adjustment for duration. Therefore the starting point will be multiplied by 3.25, resulting in a total penalty at Step 2 for UOP of £[**C**]

STEP 3 – ADJUSTMENT FOR OTHER FACTORS

331. In its written representations, UOP has submitted that a low penalty will have a sufficient deterrent effect. It states that the adsorbent division of UOP represents a minority of its overall business.[274] The OFT is of the view that where an infringing party (or its parent) has a very large total turnover, the penalty figure reached at the end of Step 2 may not represent a significant sum for that party. In such a case the OFT may consider it appropriate to increase the party's penalty at this stage to a sum significant enough to the party to act as a sufficient deterrent, having regard, in particular, to its total turnover.

332. The OFT notes that UOP Limited is a wholly owned subsidiary of a multi-national company (UOP LLC), with a very large total turnover of about £[**C**]. Thus, whilst the figure reached at the end of Step 2 above represents a significant proportion of UOP's relevant turnover, the figure is relatively insignificant when compared with the total turnover of the parent company (substantially less than one per cent). Taking this into account, together with the very large relative size of UOP LLC (compared with that of the distributors), the OFT considers that a multiplier of 2 should be applied at this stage giving a basic amount of £[**C**]. This figure also takes into account the potential gains made by UOP as discussed in paragraph 313 above.

STEP 4 – ADJUSTMENT FOR AGGRAVATING FACTORS

333. The OFT is of the view that although it may not be uncommon for distributors to complain to a manufacturer about the discounting of other distributors, or even, in some instances, to ask the manufacturer to take action, UOP should have resisted the temptation to engage in vertical price fixing. In addition, the OFT emphasises that UOP should not have encouraged its distributors to engage in any horizontal contact and co-ordination of their pricing policies.

334. UOP called a distributor meeting at Callow Hall and set the agenda for that meeting (see paragraphs 86 and 175 above). UOP ensured that DGS, which did not attend the meeting, was informed of the discussions and persuaded it to conform to the decision reached there (see

paragraphs 97 and 201-203 above). UOP also encouraged UKae to contact fellow distributors to discuss price increases (see paragraph 216 above). The OFT also notes the tone of Mr Scullion's letters to the distributors from 1997 onwards (see paragraphs 81-82 and 128-135 above) into the period covered by the Act where he indicated UOP's aim to maintain desiccant prices. Finally, the OFT notes that the suggestion for the price increases and the co-ordination of the 2002 increase in particular initially came from UOP (see paragraphs 175-178 and 228-231 above).

335. UOP has submitted that it did not act as a leader because, for example, it maintained the Policy at the behest of the distributors and acted mainly as a conduit of information between them[275]. However, although not necessarily the instigator of the infringement, given the above evidence, the OFT takes the view that UOP played a significant role in most if not all of the activities constituting the overall agreement and/or concerted practice.

336. Additionally, the OFT notes that UOP attempted to implement the enforcement arrangement outlined in its fax to the distributors of 8 November 2002 (see paragraphs 108-111 above). UOP intended to withdraw price support from distributors who did not adhere to the Policy. UOP submitted, and the OFT accepts, the fact that the enforcement arrangement was never implemented and no action was taken against the distributors[276]. Nevertheless, although it was unsuccessful, the fact that UOP advanced it as a serious proposal is a clear indication of its commitment to and key role in the implementation of the Policy. This is further illustrated by the fact that the three distributors to which it applied, UKae, Thermoseal and DGS, took it seriously and, indeed, responded to it. The OFT regards all the actions described in the above paragraphs taken together as an aggravating factor and [**C**] the basic amount of the penalty by [**C**] per cent.

337. In its representations, UOP has submitted that no member of UOP's senior management was aware of the alleged infringements. It states that Mr Scullion, whose position within the company was not that of a senior manager, had complete discretion in his dealings with the UK distributors and did not seek senior management approval for such decisions[277]. The OFT accepts that Mr Scullion was not himself a senior

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[274] Written Representations by UOP dated 24/05/04 - paragraph 54 (Doc 634).
[275] Written Representations by UOP dated 24/05/04 - paragraphs 30-35 (Doc 634).
[276] Ibid, paragraph 76.
[277] Ibid, paragraphs 36 et seq.

manager within the company. Furthermore, although the OFT is surprised by UOP's claim that its senior management was not aware of the infringements[278], it accepts that the evidence on its file is not sufficient to enable it to prove the contrary. The OFT has, therefore, made no adjustment to the penalty to reflect the involvement of senior managers at UOP.

STEP 4 – ADJUSTMENT FOR MITIGATING FACTORS

338. UOP has made representations that it takes compliance with competition law extremely seriously. It has in place compliance programmes and seminars. It acknowledges that the conduct which took place highlighted deficiencies in the compliance programme and has, since the commencement of the OFT's investigation, taken steps to improve its competition law compliance programme. It states that it has also taken disciplinary measures [**C**] as remedial action [**C**][279]. The OFT notes this but is of the opinion that failing to ensure compliance with regard to even a reasonably small part of UOP's business for several years is unacceptable. The OFT concludes, nevertheless, that in the light of the steps subsequently taken by UOP, it is appropriate to [**C**] the amount of the penalty by [**C**] per cent.

339. The OFT is normally minded to give a reduction in a penalty when a party has co-operated with its investigation. UOP has made representations on this point[280] However, as UOP benefits from the leniency programme and as a condition of being granted leniency UOP undertook to co-operate fully with the OFT, the OFT does not consider that there should be an additional reduction in the penalties under this head to reflect UOP's co-operation.

STEP 4 - CONCLUSION

340. As a result, the total percentage added to the penalty for aggravating factors is [**C**] per cent. The total percentage deducted for mitigating circumstances is [**C**] per cent. The OFT therefore [**C**] the basic amount of the penalty by [**C**] per cent. The penalty for UOP stands at a rounded figure of £1,540,000 at Step 4.

[278] Witness Statement by Mr Jelasi, paragraphs 4-6; Annex to Written Representations by UOP dated 24/05/04 (Doc 634c).
[279] Written Representations by UOP dated 24/05/04, paragraphs 59-63 (Doc 634).
[280] Ibid, paragraphs 64-66.

STEP 5 – ADJUSTMENT TO PREVENT THE MAXIMUM PENALTY BEING EXCEEDED AND TO ACCOUNT FOR OTHER PENALTIES OR FINES

341. The OFT may not exceed ten per cent of the worldwide turnover of the undertaking in the year preceding the date the OFT makes its decision[281]. UOP's worldwide turnover for 2003 is $[**C**]. Therefore, its penalty must not exceed $[**C**]. As the penalty does not exceed this amount it is not necessary to make any adjustments to the penalty. It should also be noted that the penalty does not exceed the maximum penalty which could have been imposed prior to 1 May 2004[282], which would have been set at £[**C**][283]. Additionally, no penalty or fine has been imposed by the Commission, or by a court or other body in another Member State, in respect of the agreement and/or concerted practice covered by this decision. There is therefore no need for the OFT to take account of any such penalty or fine when setting the amount of the penalty in this case.

LENIENCY

342. UOP was granted a 20 per cent reduction in the level of a financial penalty under the OFT's leniency programme provided it complied with certain conditions. The OFT is satisfied that UOP has complied with the conditions for leniency and the financial penalty is, therefore, reduced to £1,232,000.

*Penalty for UKae*

STEP 1 – STARTING POINT

343. UKae's turnover in the relevant product and geographic markets (i.e. the supply of desiccant through distributors in the UK) is £[**C**] in the undertaking's last financial year preceding the date when the infringement ended (1 January 2002 till 31 December 2002). The maximum starting point is therefore £[**C**].

344. The OFT's conclusions regarding the seriousness of this infringement are set out at paragraphs 306-322 above. With specific regard to UKae, the

[281] The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, SI2000/309 as amended.

[282] The 2000 Penalty Order states that a penalty may not exceed ten per cent of the relevant turnover. The relevant turnover was calculated by using the applicable turnover for the business year preceding the date when the infringement ended, (the infringement that is the subject of this Decision ended in 2003, so the relevant business year was 2002). In addition, where the infringement lasted for more than 12 months the applicable turnover would be the turnover for the business years, or part thereof, preceding that identified above (in this case, 2001 and then 2000).

[283] This figure is derived from ten per cent of UOP's combined total turnover in the UK for all of 2000 £[**C**], all of 2001 £[**C**] and all of 2002 £[**C**]. The combined figure is £[**C**] hence ten per cent is £[**C**].

OFT has noted the extent of its involvement, including, in particular, in the direct horizontal contacts between itself, Thermoseal and DQS. It notes that UKae was a party to an overall agreement and/or concerted practice to fix and/or maintain minimum resale prices of desiccant manufactured by UOP. Taking into account the seriousness of this infringement, the effect of the infringement and the extent of UKae's involvement in the infringement the OFT considers a starting point of at least [**C**] per cent of turnover or £[**C**] to be appropriate.

STEP 2 – ADJUSTMENT FOR DURATION

345. UKae's participation ended on 12 December 2002. The length of its participation was 2 years, 9 months and 11 days, or 3 years if rounded up to the nearest quarter. A multiplier of 3 will therefore be added to UKae's penalty, resulting in a total penalty at Step 2 for UKae of £[**C**].

STEP 3 – ADJUSTMENT FOR OTHER FACTORS

346. As noted at paragraph 325 above, the OFT considers that it is necessary to deter undertakings from engaging in anti-competitive practices. The OFT is aware that that the figure reached at the end of Step 2 above is a significant sum for UKae relative to its relevant turnover. It also notes UKae's relatively small overall size compared to UOP (see paragraphs 331-332 above). The OFT therefore considers that, in this instance, the penalty figure of £[**C**] is sufficient to act as an effective deterrent to UKae and to other similar undertakings that might consider engaging in fixing and/or maintaining prices. The OFT does not therefore propose to increase the amount of penalty at this stage.

STEP 4 – ADJUSTMENT FOR AGGRAVATING FACTORS

347. The OFT takes the view that, as regards the 2001 price increase, UKae, through Mr Ealing, facilitated the horizontal contact between itself, Thermoseal and DQS to agree to the timing of the price increase (see paragraphs 218-223 above). Although UOP asked UKae to contact the distributors, UKae should have resisted the temptation to engage in horizontal contact of this nature. The OFT regards this as an aggravating factor and [**C**] the basic amount of the penalty by [**C**] per cent.

348. The OFT takes the view that Mr Garry Ealing represented senior management of UKae. Mr Ealing was Managing Director of UKae during the period of the infringement and was responsible for the day to day running of the business, although he was required to report to a Board. The involvement of senior management is sufficiently serious to warrant taking this into consideration as a further aggravating factor. The OFT

regards this as an aggravating factor and [**C**] the basic amount of the penalty by [**C**] per cent.

STEP 4 – ADJUSTMENT FOR MITIGATING FACTORS

349. The OFT is normally minded to give a reduction in a penalty when a party has co-operated with its investigation. However, as UKae benefits from the leniency programme and as a condition of being granted leniency UKae undertook to co-operate fully with the OFT, the OFT does not consider that there should be an additional reduction in the penalties under this head to reflect UKae's co-operation.

STEP 4 - CONCLUSION

350. As a result, the total percentage [**C**] the penalty for aggravating factors is [**C**] per cent. There is no mitigation. The OFT therefore [**C**] the basic amount of the penalty by [**C**] per cent. The penalty for UKae, therefore, stands at a rounded figure £278,000 at Step 4.

STEP 5 – ADJUSTMENT TO PREVENT THE MAXIMUM PENALTY BEING EXCEEDED AND TO ACCOUNT FOR OTHER PENALTIES OR FINES

351. The OFT may not exceed ten per cent of the worldwide turnover of the undertaking in the year preceding the date the OFT makes its decision. UKae's worldwide turnover for 2003 is £[**C**]. Therefore, its penalty must not exceed £[**C**]. As the penalty does not exceed this amount it is not necessary to make any adjustments to the penalty. It should also be noted that the penalty does not exceed the maximum penalty which could have been imposed prior to 1 May 2004[284], which would have been set at £[**C**][285]. Additionally, no penalty or fine has been imposed by the Commission, or by a court or other body in another Member State, in respect of the agreement and/or concerted practice covered by this decision. There is therefore no need for the OFT to take account of any such penalty or fine when setting the amount of the penalty in this case.

LENIENCY

352. UKae was granted 100 per cent immunity from financial penalties under the OFT's leniency programme provided it complied with the conditions

[284] The 2000 Penalty Order states that a penalty may not exceed ten per cent of the relevant turnover. The relevant turnover was calculated by using the applicable turnover for the business year preceding the date when the infringement ended, (the infringement that is the subject of this Decision ended in 2003, so the relevant business year was 2002). In addition, where the infringement lasted for more than 12 months the applicable turnover would be the turnover for the business years, or part thereof, preceding that identified above (in this case, 2001 and then 2000).

set out in paragraph 3.4 of the OFT's Guidance.[286] The OFT is satisfied that UKae has complied with the conditions for leniency and the financial penalty is reduced to zero.

*Penalty for Thermoseal*

STEP 1 – STARTING POINT

353. Thermoseal's turnover in the relevant product and geographic markets (i.e. the supply of desiccant in the UK) was £[**C**] in the undertaking's business year preceding the date when the infringement ended (1 January 2002 till 31 December 2002). The maximum starting point is therefore £ [**C**].

354. The OFT's conclusions regarding the seriousness of this infringement are set out at paragraphs 306-322 above. The OFT notes from this that Thermoseal was a party to an overall agreement and/or concerted practice to fix and/or maintain minimum resale prices of desiccant manufactured by UOP. This included direct horizontal contacts between itself, UKae and DQS. Taking into account the seriousness of this infringement, the effect of the infringement and the extent of Thermoseal's involvement in the infringement the OFT considers a starting point of [**C**] per cent of turnover or £[**C**] to be appropriate.

STEP 2 – ADJUSTMENT FOR DURATION

355. The OFT has outlined in paragraph 324 above how it proposes to calculate any adjustment for duration for Thermoseal. Therefore the starting point will be multiplied by 3.25, resulting in a total penalty for Thermoseal at Step 2 of £[**C**].

STEP 3 – ADJUSTMENT FOR OTHER FACTORS

356. As noted at paragraph 325 above, the OFT considers that it is necessary to deter undertakings from engaging in anti-competitive practices. The OFT is aware that that the figure reached at the end of Step 2 above is a significant sum for Thermoseal relative to its relevant turnover. It also notes Thermoseal's relatively small overall size compared to UOP (see paragraphs 331-332 above). The OFT therefore considers that, in this instance, the penalty figure of £[**C**] is sufficient to act as an effective

[285] This figure is derived from ten per cent of UKae's combined total turnover in the UK for all of 2000 £[**C**], all of 2001 £ [**C**] and all of 2002 £[**C**]. The combined figure is £[**C**], hence ten per cent is £[**C**].

[286] 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty.' March 2000, (OFT 423).

deterrent to Thermoseal and to other undertakings that might consider engaging in fixing and/or maintaining prices. The OFT does not therefore propose to increase the amount of penalty at this stage.

STEP 4 – ADJUSTMENT FOR AGGRAVATING FACTORS

357. The OFT takes the view that Mr Paterson was part of the senior management of Thermoseal[287]. The involvement of senior management is sufficiently serious to warrant taking this into consideration as a further aggravating factor. The OFT regards this as an aggravating factor and [**C**] the basic amount of the penalty by [**C**] per cent.

STEP 4 – ADJUSTMENT FOR MITIGATING FACTORS

358. The OFT is normally minded to give a reduction in a penalty when a party has co-operated with its investigation. However, as Thermoseal benefits from the leniency programme and as a condition of being granted leniency Thermoseal undertook to co-operate fully with the OFT, the OFT does not consider that there should be an additional reduction in the penalties under this head to reflect general co-operation.

STEP 4 - CONCLUSION

359. As a result, the total percentage [**C**] to the penalty for aggravating factors is [**C**] per cent. There is no mitigation. The OFT therefore [**C**] the basic amount of the penalty by [**C**] per cent. The penalty for Thermoseal, therefore, stands at a rounded figure of £279,000 at Step 4.

STEP 5 – ADJUSTMENT TO PREVENT THE MAXIMUM PENALTY BEING EXCEEDED AND TO ACCOUNT FOR OTHER PENALTIES OR FINES

360. The OFT may not exceed ten per cent of the world wide turnover of the undertaking in the year preceding the date the OFT makes its decision. Thermoseal's world-wide turnover for 2003 is £[**C**]. Therefore, its penalty must not exceed £[**C**]. As the penalty does not exceed this amount it is not necessary to make any adjustments to the penalty. It should also be noted that the penalty does not exceed the maximum penalty which could have been imposed prior to 1 May 2004[288], which

[287] Thermoseal has confirmed that Mr Paterson '*had final responsibility for the day to day running of its desiccant business, and did not report his actions to anyone senior to him for at least the period 1 March 2000 to 21 May 2003*' Letter from Pinsents on behalf of Thermoseal dated 27/08/04 (Doc 677).

[288] The 2000 Penalty Order states that a penalty may not exceed 10 per cent of the relevant turnover. The relevant turnover was calculated by using the applicable turnover for the business year preceding the date when the infringement ended, (the infringement that is the subject of this Decision ended in 2003, so the relevant business year was 2002). In addition, where the infringement lasted for more than 12 months the applicable turnover would be the turnover for the business years, or part thereof, preceding that identified above (in this case, 2001 and then 2000).

would have been set at £[**C**][289]. Additionally, no penalty or fine has been imposed by the Commission, or by a court or other body in another Member State, in respect of the agreement and/or concerted practice covered by this decision. There is therefore no need for the OFT to take account of any such penalty or fine when setting the amount of the penalty in this case.

LENIENCY

361. Thermoseal was granted a 50 per cent reduction in the level of a financial penalty under the OFT's leniency programme provided it complied with certain conditions. The OFT is satisfied that Thermoseal has complied with the conditions for leniency and the financial penalty is therefore reduced to £139,000.

*Penalty for DQS*

STEP 1 – STARTING POINT

362. DQS' turnover in the relevant product and geographic markets (i.e. the supply of desiccant through distributors in the UK) is £[**C**] in the undertaking's business year preceding the date when the infringement ended (1 January 2002 till 31 December 2002). The maximum starting point is therefore £[**C**].

363. The OFT's conclusions regarding the seriousness of this infringement are set out at paragraphs 306-322 above. The OFT notes from this that DQS was a party to an overall agreement and/or concerted practice to fix and/or maintain minimum resale prices of desiccant manufactured by UOP. This included horizontal contact between itself, UKae and Thermoseal. Taking into account the seriousness of this infringement, the effect of the infringement and the extent of the involvement of DQS in the infringement the OFT considers a starting point of [**C**] per cent of turnover or £[**C**] to be appropriate.

STEP 2 – ADJUSTMENT FOR DURATION

364. The OFT has outlined in paragraph 324 above how it proposes to calculate any adjustment for duration. Therefore the starting point will be multiplied by 3.25, resulting in a total penalty for DQS at Step 2 of £[**C**].

[289] This figure is derived from 10 per cent of Thermoseal's combined total turnover in the UK for all of 2000 £[**C**], all of 2001 £[**C**] and all of 2002 £[**C**]. The combined figure is £[**C**], hence 10 per cent is £[**C**].

STEP 3 – ADJUSTMENT FOR OTHER FACTORS

365. As noted at paragraph 325 above, the OFT considers that it is necessary to deter undertakings from engaging in anti-competitive practices. The OFT is aware that that the figure reached at the end of Step 2 above is a significant sum for DQS relative to its relevant turnover. It also notes DQS' relatively small overall size compared to UOP (see paragraphs 331-332 above). The OFT therefore considers that, in this instance, the penalty figure of £[**C**] is sufficient to act as an effective deterrent to DQS and to other undertakings that might consider engaging in fixing and/or maintaining prices. The OFT does not therefore propose to increase the amount of penalty at this stage.

STEP 4 – ADJUSTMENT FOR AGGRAVATING FACTORS

366. The OFT takes the view that both Mr Stock and Mr Mitchell represented senior management of DQS. Mr Stock was Managing Director of DQS until 2001. He was responsible for the full strategy of the business. He was not a statutory director. However, DQS has shown that he was a senior member of the company. Mr Mitchell was Operations Manager for DQS until the end of 2001. He replaced Mr Stock as Managing Director and was a statutory director in 2002. Responsibility for all aspects of purchasing and sales of desiccant and other IG products were delegated to Mr Mitchell and Mr Stock by the PBM board[290].

367. The involvement of senior management is sufficiently serious to warrant taking this into consideration as a further aggravating factor. The OFT regards this as an aggravating factor and [**C**] the basic amount of the penalty by [**C**] per cent.

STEP 4 – ADJUSTMENT FOR MITIGATING FACTORS

368. DQS has made representations that since the commencement of the OFT's investigation, it has issued a compliance booklet to all DQS employees and other companies within the PBM group. It states that this demonstrates that the OFT investigation into the conduct of DQS has been taken 'very seriously' and it has taken measures to ensure that all employees are in no doubt about the relation of competition law to DQS' business, so as to avoid any future investigations[291]. The OFT considers in the light of these mitigating factors it is appropriate to [**C**] the amount of the penalty by [**C**] per cent.

[290] See for example the letter from M&A Solicitors on behalf of DQS dated 09/08/04 (Doc 671).
[291] Written Representations by DQS dated 21/05/04 - paragraph 46 (Doc 633).

STEP 4 - CONCLUSION

369. As a result, the total percentage added to the penalty for aggravating factors is [**C**] per cent. The total percentage [**C**] for mitigating circumstances is [**C**] per cent. The OFT therefore [**C**] the basic amount of the penalty by [**C**] per cent. The penalty for DQS stands at a rounded figure of £109,000 at Step 4.

STEP 5 – ADJUSTMENT TO PREVENT THE MAXIMUM PENALTY BEING EXCEEDED AND TO ACCOUNT FOR OTHER PENALTIES OR FINES

370. The OFT may not exceed ten per cent of the world wide turnover of the undertaking or its parent company in the year preceding the date the OFT makes its decision. PBM, the parent company for DQS, had a world-wide turnover for 2003 of £[**C**]. Therefore, DQS' penalty must not exceed £[**C**]. As the penalty does not exceed this amount it is not necessary to make any adjustments to the penalty[292]. It should also be noted that the penalty does not exceed the maximum penalty which could have been imposed prior to 1 May 2004[293], which would have been set at £[**C**] [294]. Additionally, no penalty or fine has been imposed by the Commission, or by a court or other body in another Member State, in respect of the agreement and/or concerted practice covered by this decision. There is therefore no need for the OFT to take account of any such penalty or fine when setting the amount of the penalty in this case.

*Penalty for DGS*

STEP 1 – STARTING POINT

371. DGS' turnover in the relevant product and geographic markets (i.e. the supply of desiccant in the UK) is £[**C**] in the undertaking's business year preceding the date when the infringement ended (1 January 2002 till 31 December 2002). The maximum starting point is therefore £[**C**].

[292] Note that it would also have been unnecessary to make any adjustments to the penalty prior to the coming into force of the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

[293] The 2000 Penalty Order states that a penalty may not exceed ten per cent of the relevant turnover. The relevant turnover was calculated by using the applicable turnover for the business year preceding the date when the infringement ended, (the infringement that is the subject of this Decision ended in 2003, so the relevant business year was 2002). In addition, where the infringement lasted for more than 12 months the applicable turnover would be the turnover for the business years, or part thereof, preceding that identified above (in this case, 2001 and then 2000).

[294] This figure is derived from ten per cent of DQS' combined total turnover in the UK for all of 2000 £[**C**], all of 2001 £[**C**] and all of 2002 £[**C**]. The combined figure is £[**C**], hence ten per cent £[**C**]. The figures for 2000 and 2001 are the same because no figures were available for DQS for 2000.

372. The OFT's conclusions regarding the seriousness of this infringement are set out at paragraphs 306-322 above. The OFT notes from this that DGS was a party to an overall agreement and/or concerted practice to maintain minimum resale prices of desiccant manufactured by UOP. The OFT notes that DGS has not been found to have participated in any direct horizontal contacts with the other distributors during the period of the infringement. Moreover, particularly in relation to the 2001 price increase, DGS showed itself to have been somewhat less committed to the infringement than the other parties to the point of delaying its implementation of the price increase. The other parties to the infringement can therefore have been less certain that DGS would comply with the terms of the agreement or concerted practice. This is likely to have had the effect of somewhat lessening the impact of DGS' infringing activity on the market. The impact of its conduct on the market is therefore less certain than the other Parties. The OFT has adjusted the penalty accordingly. Taking into account the seriousness of this infringement, its effect, and the extent of DGS' involvement in the infringement the OFT considers a starting point of [**C**] per cent of turnover or £[**C**] to be appropriate.

STEP 2 – ADJUSTMENT FOR DURATION

373. The OFT has outlined in paragraph 324 above how it proposes to calculate any adjustment for duration. Therefore the starting point will be multiplied by 3.25, resulting in a total penalty for DGS at Step 2 of £[**C**].

STEP 3 – ADJUSTMENT FOR OTHER FACTORS

374. As noted at paragraph 325 above, the OFT considers that it is necessary to deter undertakings from engaging in anti-competitive practices. The OFT is aware that that the figure reached at the end of Step 2 above is a significant sum for DGS relative to its relevant turnover. It also notes DGS' relatively small overall size compared to UOP (see paragraphs 331-332 above). The OFT therefore considers that, in this instance, the penalty figure of £[**C**] is sufficient to act as an effective deterrent to DGS and to other undertakings that might consider engaging in fixing and/or maintaining prices. The OFT does not therefore propose to increase the amount of penalty at this stage.

STEP 4 – ADJUSTMENT FOR AGGRAVATING FACTORS

375. The OFT takes the view that Mr Derek Aucott, as chairman of DGS, represented senior management of DGS. The involvement of senior management is sufficiently serious to warrant taking this into consideration as a further aggravating factor. The OFT regards this as an

aggravating factor. The OFT, therefore, [**C**] the basic amount of the penalty by [**C**] per cent.

STEP 4 – ADJUSTMENT FOR MITIGATING FACTORS

376. DGS has made representations that it only participated in the infringements under pressure from UOP[295]. After analysing the evidence the OFT takes the view that there is no specific evidence of pressure from UOP directed at DGS in terms of coercive behaviour or threats. Therefore the OFT is not minded to make any [**C**] to the basic amount of the penalty by way of mitigation.

STEP 4 - CONCLUSION

377. As a result, the total percentage [**C**] to the penalty for aggravating factors is [**C**] per cent. There is no mitigation. The OFT therefore [**C**] the basic amount of the penalty by [**C**] per cent. The penalty for DGS stands at a rounded figure of £227,000 at Step 4.

STEP 5 – ADJUSTMENT TO PREVENT THE MAXIMUM PENALTY BEING EXCEEDED AND TO ACCOUNT FOR OTHER PENALTIES OR FINES

378. The OFT may not exceed ten per cent of the world wide turnover of the undertaking in the year preceding the date the OFT makes its decision. DGS' world-wide turnover for 2003 is £[**C**]**.** Therefore, its penalty must not exceed £[**C**]**.** As the penalty does not exceed this amount it is not necessary to make any adjustments to the penalty. It should also be noted that the penalty does not exceed the maximum penalty which could have been imposed prior to 1 May 2004[296], which would have been set at £[**C**][297]. Additionally, no penalty or fine has been imposed by the Commission, or by a court or other body in another Member State, in respect of the agreement and/or concerted practice covered by this decision. There is therefore no need for the OFT to take account of any such penalty or fine when setting the amount of the penalty in this case.

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[295] Written Representations by DGS dated 29/04/04 - paragraph 16 (Doc 631).

[296] The 2000 Penalty Order states that a penalty may not exceed ten per cent of the relevant turnover. The relevant turnover was calculated by using the applicable turnover for the business year preceding the date when the infringement ended, (the infringement that is the subject of this Decision ended in 2003, so the relevant business year was 2002). In addition, where the infringement lasted for more than 12 months the applicable turnover would be the turnover for the business years, or part thereof, preceding that identified above (in this case, 2001 and then 2000).

[297] As described in paragraph 318, this figure is derived from ten per cent of DGS' combined total turnover in the UK for all of 2000 £[**C**]**,** all of 2001 £[**C**] and all of 2002 £[**C**] – it is noted that these figures are based on DGS's 2002 turnover as the undertaking had no records of turnover before that date. The combined figure is £[**C**]**,** hence ten per cent is £[**C**]**.**

*Payment of penalty*

379. The OFT requires the Parties to pay the following penalties:

- UOP £1,232,000
- Thermoseal £139,000
- DQS £109,000; and
- DGS £227,000.

380. The penalties must be paid by close of banking business on Friday, 14 January. If any party fails to pay the penalty within the deadline specified above, and has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and determined, the OFT can commence proceedings to recover the amount as a civil debt.