

BETWEEN:-

- (1) **ELECTRICAL WASTE RECYCLING GROUP LIMITED**
(2) **CITY ELECTRICAL FACTORS LIMITED**

Claimants

- and -

- (1) **PHILIPS ELECTRONICS UK LIMITED**
(2) **GE LIGHTING LIMITED**
(3) **OSRAM LIMITED**
(4) **HAVELLS SYLVANIA UK LIMITED**
(5) **RECOLIGHT LIMITED**

Defendants

RE- RE-AMENDED PARTICULARS OF CLAIM

THE PARTIES

1. The First Claimant, Electrical Waste Recycling Limited (“EWRG”) is a company limited by shares incorporated in Scotland as Lampsafe Recycling Limited on 27 June 2000. Until 30 April 2009 its principal shareholder was CEF Holdings Limited. Its principal activity is the collection and recycling of waste materials, including gas discharge lamps, hereinafter referred to as “lamp waste” or “waste lamps”.
2. The Second Claimant, City Electrical Factors Limited (“CEF”), is a wholly-owned subsidiary of CEF Holdings Limited. It operates principally as a wholesaler of electrical goods, including lamps. It also, since 2006, produces and sells lamps under the brand name “Edison”.
3. The First, Second, Third and Fourth Defendants (described below in the alternative as “The Big Four”) are manufacturers of lamps. Between them the Big

Four hold a share in the market for the sale of lamps in the United Kingdom of approximately 80%.

4. The Fifth Defendant, Recolight Limited (“Recolight”), is a company limited by guarantee and without share capital incorporated on 1 July 2005. It operates as a not-for-profit company.
5. Recolight is a producer compliance scheme (“PCS”) established pursuant to the Waste Electrical and Electronic Equipment Regulations 2006 (“the WEEE Regulations”) which are described in more detail below and which implement the Waste Electrical and Electronic Equipment Directive (2002/96/EC) (“the WEEE Directive”).
6. According to clause 3 of its Memorandum of Association, Recolight’s principal objects on incorporation are:

“To offer, on a fair, open and non-discriminatory basis, a collection and recycling system in the United Kingdom to all interested producers, distributors and importers of waste electrical and electronic lamps, lighting and related products (together “WEEE lamps”) to enable them to fulfil their obligations under the WEEE Directive and relevant implementing legislation in the United Kingdom....

“To make arrangements for the collection, treatment, recovery and environmentally sound disposal of WEEE lamps waste in accordance with applicable European Community and United Kingdom legislation.”

7. Clause 4 of its Memorandum of Association includes as powers in furtherance of these objects:
 - “4.1 To arrange, control, manage and generally be responsible for the national collection and treatment of all WEEE lamp waste in the United Kingdom.
 - 4.2 To enter into any contracts or arrangements with independent service providers with the view to delegate the collection and treatment activities to such service providers.

- 4.4 To invoice or otherwise make charges to the participants to the collection and recycling systems for any costs and other disbursements incidental to the running of such system.
- 4.8 To enter into contractual relations with any collection and recycling body in the United Kingdom for that body to provide services for the collection and recycling of WEEE Lamps on behalf of the Company.”
8. Recolight operates an open scheme in that membership is open to any producer, manufacturer or importer of lamps. In April 2007, it had 33 members. By December 2008 it had some 54 members, which, according to Recolight’s 2008 report, it is estimated represents approximately 85% of lamps put on the market in the United Kingdom in 2008. By October 2011, it had 99 members, which the Claimants estimate represent over 90% of lamps put in the market in the United Kingdom.
9. The subscribers to Recolight’s Memorandum of Association are the First, Second, Third and Fourth Defendants and Recolight’s directors are each individual appointees of the First, Second, Third and Fourth Defendants.
10. In effect, Recolight, although it also has some ~~50~~ 95 other members which hold between them approximately ~~10%~~ 5% of the UK lamp market, acts for and on behalf of the Big Four in fulfilling their obligations under the WEEE Regulations.
11. Each of the Defendants is an undertaking for the purposes of ~~Articles 81 and 82 of the EC Treaty~~, Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”) and sections 2 and 18 of the Competition Act 1998.
12. This Claim involves ~~two~~ separate but connected markets: ~~one~~ being:
- (1) ~~the a market~~ or markets for the sale of lamps in the United Kingdom;
 - (2) ~~and the other being the a market~~ or markets for the collection and/or recycling (encompassing treatment, ~~recovery and disposal~~) of waste lamps in the United Kingdom;
 - (3) a market for the supply of PCS services to producers of lamps and/or other obligated producers in the United Kingdom.

LAMP WASTE RECYCLING IN THE UK PRIOR TO 1 JULY 2007

13. Part II of the Environmental Protection Act 1990 (“the 1990 Act”) addressed generally the collection, recycling, deposit and other forms of disposal of waste, in particular by imposing a duty of care upon those handling “controlled waste” as defined in the 1990 Act (including lamp waste, in respect of which no special provision was made).
14. The Waste Management Licensing Regulations 1994, made pursuant to the 1990 Act, created a detailed licensing régime for businesses handling waste, including lamp waste in respect of which no special provision was made.
15. The Special Waste Regulations 1996 created a particular regulatory régime for special waste, including “fluorescent tubes and other mercury containing waste”.
16. The Landfill (England and Wales) Regulations 2002 required the Environmental Agency to categorise all landfill sites as inert, non-hazardous or hazardous waste. Fluorescent tubes thereafter could only be either fully recycled and reused or disposed of in a hazardous waste landfill site. Since there were only a few such sites available in the UK it became increasingly hard and expensive to dispose of waste lamps to landfill.
17. The WEEE Directive was adopted by the European Parliament and Council on 27 January 2003. The implementing legislation in the UK, the WEEE Regulations, did not fully take effect until 2007, but from 2002 onwards the lamp and recycling industries began to prepare for and adapt to the new régime, which introduced for the first time the concept of producer responsibility for the separate collection, recycling and disposal of waste electrical and electronic equipment, including waste lamps.
18. The Special Waste Amendment (Scotland) Regulations 2004 amended and tightened in respect of Scotland the Special Waste Regulations 1996, in particular by requiring in Scotland the separation of special waste (including fluorescent lamps) from other waste.
19. The Hazardous Waste (England and Wales) Regulations 2005 imposed in England and Wales the same requirement for the separation by businesses of special waste, including lamp waste, and contained detailed provisions concerning the timing and frequency of collections and restrictions on container sizes.

20. Almost every business disposing of lamp waste had to register with the Environment Agency in England and Wales, or the Scottish Environmental Protection Agency in Scotland, as a producer, obtain a site reference number and maintain quarterly reports which were to be submitted to the Agency. Consignment notes were issued in respect of every waste collection.
21. From before 2000 onwards a competitive market (or markets) was developed for the collection and /or treatment recycling of lamp waste. A number of companies, including EWRG, offered their services on this market (or these markets) and undertakings requiring collection disposing of lamp waste paid for these services.
22. The principal category of undertakings that were engaged in disposing of waste lamps was wholesalers of new lamps. In particular, this was because wholesalers would acquire waste lamps from their customers on the occasion of the sale of new lamps when a building was re-lamped, which in general would take place every 12 to 18 months. Wholesalers were thereby lumbered with the obligation to dispose of waste lamps in accordance with the restrictions imposed by the applicable legislation.
23. The UK wholesale market consists of the following: the Rexel Group (including Hagemeyer, WF Electrical, Newey & Eyre, Rexel Senate, Denmans (c. 550 branches)); CEF (c. 400 branches); Edmundson Electrical (c. 300 branches); Electric Center (c. 150 branches); and other independent electrical wholesalers (c. 2000 outlets).
24. It is estimated that the UK market in gas discharge lamps is approximately 225 million lamps per year.
25. In the years 2001-2006, the amounts of gas discharge lamps collected in the UK for recycling increased annually as follows:

Year	Lamps recycled (millions)
2001	1
2002	1
2003	3.5
2004	10
2005	15
2006	20

26. Operators providing services on the market or markets for the collection and/or treatment recycling of lamp waste provided different types of recycling services. Some merely crushed lamps on the customer's site and some partially recycled in-house. Only four operators, including EWRG, provided a fuller collection, recovery and recycling service, and even then some of these did not have the ability to receive and treat sodium lamps.
27. Of all the companies offering services on the ~~collection and recycling~~ relevant markets, EWRG was and remains the only company with multiple recycling plants and multiple licences, the only company with a bespoke HID (high intensity discharge lamps) plant and bespoke CFL (compact fluorescent lamps) plant, and the only company with multiple distillers (3) which are of significantly greater capacity than the rest. EWRG is the only company registered in Scotland with the Scottish Environmental Protection Agency to carry out full recycling in Scotland. It is the only company to have invested in an End Cut Technology Plant to separate phosphor from lamps.
28. By virtue of this, EWRG became very successful on the collection and treatment recycling market (or markets), particularly through arrangements for the provision of services to electrical wholesalers who are the source of the vast majority of waste lamps.
29. Wholesalers not only received at their own premises the return of waste lamps from customers and users but also entered into arrangements with their customers (principally electrical contractors and large commercial and institutional users of lamps) for the collection of waste lamps directly from the premises where such waste arises, irrespective of quantity and with no *de minimis* rule in accordance with hazardous waste regulations. These arrangements were, in view of the strict regulatory control of such waste, extremely convenient and commercially attractive to the wholesalers' customers and also highly conducive to the increased proper and separate collection and recycling of waste lamps.
30. Prior to 1 July 2007, producers of new lamps had little or no interest in the collection and/or treatment recycling market or markets as they were under no obligations to collect or recycle used lamps. Producers were however considering and creating PCSs, being the regulatory mechanism through which their forthcoming producer responsibilities would be discharged under the WEEE Regulations.

THE WEEE DIRECTIVE AND THE WEEE REGULATIONS

31. The purpose of the WEEE Directive, as stated in Article 1 of the Directive, is, as a first priority, the prevention of waste electrical and electronic equipment (“WEEE”) and, in addition, the reuse, recycling and other forms of recovery of waste so as to reduce the disposal of waste. It also seeks to improve the environmental performance of all operators involved in the life cycle of electrical and electronic equipment, e.g. producers, distributors and consumers and, in particular, those involved in the treatment of WEEE.
32. Articles 5-7 of the WEEE Directive provide *inter alia* as follows:

“Article 5 Separate collection

1. Member States shall adopt appropriate measures in order to minimise the disposal of WEEE as unsorted municipal waste and to achieve a high level of separate collection of WEEE.
2. In the case of WEEE other than WEEE from private households... Member States shall ensure that producers or third parties acting on their behalf provide for the collection of such waste.

Article 6 Treatment

1. Member States shall ensure that producers or third parties acting on their behalf ... set up systems to provide for the treatment of WEEE using best available treatment, recovery and recycling techniques. The systems may be set up by producers individually and/or collectively.

...

Article 7 Recovery

1. Member States shall ensure that producers or third parties acting on their behalf set up systems either on an individual or on a collective basis ... to provide for the recovery of WEEE collected separately in accordance with Article 5.
2. ... (d) for gas discharge lamps, the rate of component, material and substance reuse and recycling shall reach a minimum of 80% by weight of the lamps.”

33. Article 9 of the WEEE Directive provides that Member States shall ensure that, by 13 August 2005, the financing of the costs of collection, treatment, recovery and environmentally sound disposal of WEEE from users other than private households from products put on the market after 13 August 2005 is to be provided for by producers. Producers and users other than private households may, without prejudice to the Directive, conclude agreements stipulating other financing methods.

34. Regulation 9 of the WEEE Regulations provides *inter alia* as follows:

“9. Financing: WEEE from users other than private households

(1) Each producer shall finance the costs of the collection, treatment, recovery and financially sound disposal of –

(a) WEEE from users other than private households arising during a compliance period from EEE put on the market in the United Kingdom on or after 13th August 2005 by that producer; and

(b) WEEE from users other than private households arising during a compliance period from EEE put on the market in the United Kingdom before 13th August 2005 (“the relevant WEEE”) where that producer is supplying new EEE that

(i) is intended to replace the relevant WEEE, and

(ii) is of an equivalent type or is fulfilling the same function as that of the relevant WEEE.

(2) Nothing in paragraph (1) shall prevent a producer from concluding an agreement whereby the parties to the agreement make alternative arrangements between themselves to finance the costs of the collection, treatment, recovery and financially sound disposal of WEEE.”

35. Regulation 10 of the WEEE Regulations imposes on a producer an obligation to belong to an approved PCS. Membership exempts the producer from compliance with Regulation 9 by shifting the obligation to the PCS.

36. Regulation 23 of the WEEE Regulations provides as follows:

“Financing: WEEE from users other than private households

(1) The operator of [a] scheme shall be responsible for financing the costs referred to in regulation 9(1) for which each scheme member is responsible under regulation 9 in any compliance period, or any part of a compliance period, during which his membership of that scheme subsists.

(2) Nothing in paragraph (1) shall prevent an operator of a scheme who is acting on behalf of a scheme member from concluding an agreement whereby the parties to the agreement make alternative arrangements between themselves to finance the costs of the collection, treatment, recovery and financially sound disposal of WEEE.”

IMPOSITION OF A “RECYCLING CHARGE” BY THE FIRST, SECOND, THIRD AND FOURTH DEFENDANTS ON SALES FROM 1ST JULY 2007 ONWARDS

37. On 1 July 2007, the first compliance period under the WEEE Regulations commenced.
38. From that date onwards, the First, Second, Third and Fourth Defendants, together with other members of the Recolight scheme, imposed on sales to wholesalers, including CEF, and other customers a separately identified so-called “recycling charge” of 15p per lamp for all types of lamps, purportedly in order to cover the costs of collection and recycling treatment by Recolight of waste lamps. Subsequently, from 3 December 2007, they introduced a standard 3p "recycling charge" per lamp for all CFLi Lamps which are commonly known as domestic compact fluorescent energy saving lamps. Save for CFLi lamps (in respect of which the lower charge of 3p per lamp continued) from 1 July 2010 both the Recolight charge to its members and the amount of the “recycling charge” on sales to customers were reduced from 15p per lamp to 10p per lamp.
39. Of the 225 million gas discharge lamps sold annually in the United Kingdom, about 150 million are integrated compact fluorescent lamps attracting a 3p charge and the remaining 75 million are other types of lamp attracting a 15p charge (10p since 1 July 2010). Recolight members enjoy about 85% 90% of that market. Thus Recolight’s annual income may be approximately calculated as: £0.15 x 75,000,000 x 85% = £ 9,562,500 £0.03 x 150,000,000 x 85% = £ 3,825,000. Recolight’s annual income from these charges has been:

2008 £8,236,903

2009 £8,137,657

2010 £8,378,234

40. The recycling charge was variously (but consistently) described:

(1) by the First Defendant as follows (by undated letter):

“.. the recycling charge to cover the cost of collection and recycling of all discharge lamps will commence on July 1st 2007 we have set the recycling charge at 15 pence per lamp which reflects the costs we expect to incur to fulfil our obligations under WEEE. Please note that this recycling charge will be shown on invoice as a separate line This recycling charge is a nett nett (sic) figure not subject to any further discount, rebate or cash settlement and will not appear in any turnover reports produced by Philips”;

(2) by the Second Defendant as follows (by letter dated 19 April 2009 2007):

“Recolight will charge GE a fixed fee for every Gas Discharge Lamp we sell into the UK market. Thus all Gas Discharge Lamps invoiced to you on or after 1st July 2007 will show a separate visible fee for the WEEE costs (the Recolight fee). This fee will not be subject to rebate or settlement ”;

(3) by the Third Defendant as follows (by letter dated 3 April 2007):

“.... Recolight will charge us a fixed amount on all our sales of Gas Discharge Lamps at a per lamp rate to cover recycling costs. Consequently all OSRAM invoices on or after [1 July 2007] will include the collection and recycling costs as a fixed visible fee, which will be shown as an additional, separate line on the invoice This cost will be invoiced to you at exactly the same level as it is charged to us The WEEE visible fee will not be included in our turnover calculations and therefore will not attract any rebate or discount”;

(4) by the Fourth Defendant as follows (by letter dated 2 April 2007):

“Recolight will charge each producer member a set fee for all discharge lamps and fixtures. The [Fourth Defendant’s] policy is

to invoice WEEE costs (Recolight fee) separately on invoice without any uplift, to ensure a fair and transparent treatment of these costs for our customers. Consequently [the Fourth Defendant] will pass on the fee for lamps and fixtures with effect from 1st July 2007".

41. However, the imposition of the “recycling charge” on the wholesalers or other customers is made independently of the recycling of waste lamps. The charge is imposed solely by reason of the sale of new lamps and is not in fact dependent on that sale being linked to the simultaneous recovery of any waste lamps by Recolight.
42. Moreover the “recycling charge” is not a prior payment in respect of the collection and recycling of the new lamp by Recolight when it subsequently becomes waste lamp at the end of its life.
43. In fact , the proceeds of the “recycling charge” are passed by the Big Four and other Recolight members to Recolight in order to create a fund to cover Recolight’s operating expenses.
44. It is generally recognised as being impractical and prohibitively expensive to distinguish between brands of lamps at the collection stage. In practice, collection of waste lamps by all operators on the collection and treatment recycling market or markets is made without discrimination as to the brand of waste lamps.
45. Recolight does not generally distinguish as to the brand of waste lamps when it arranges for the collection and treatment recovery of such waste lamps. On the contrary, it contracts for the collection and treatment recovery of all waste lamps that are delivered to the relevant collection point.
- ~~46. Another PCS Lumicom Limited (“Lumicom”), similarly constituted to Recolight, performs for the Fourth Defendant in respect of luminaires (i.e. the fittings which hold lamps and connect power to them) the same function as that performed in respect of lamps by Recolight. Lumicom is a company limited by guarantee incorporated on 6 September 2005 with objects in relation to luminaires essentially similar to those of Recolight in relation to lamps. Now and at all material times the Lighting Industry Federation Limited is and was the only member of that company. The Claimants plead further as to the relationship between the Lighting Industry Federation Limited and the First to Fourth Defendants at paragraph 62A below.~~

IMPOSITION OF THE “RECYCLING CHARGE” ON SALES OF LAMPS AND LUMINAIRES TO CEF

47. CEF, being a wholesaler, has had to pay substantial amounts by way of the “recycling charge” in respect of the acquisition of new lamps produced by the Big Four. The sums paid by CEF to each of the Big Four as “recycling charges” for lamps since 1 July 2007 are particularised in Schedule 1 annexed hereto. ~~CEF has also been required to pay a similar “recycling charge” in respect of the acquisition from the Fourth Defendant of luminaires at the rate of 20p per luminaire. The sums paid by CEF to the Fourth Defendant as “recycling charges” on luminaires since 1 July 2007 are also particularised in Schedule 1.~~
48. However, CEF is also a producer of Edison lamps, which account for approximately 45% of its sales of new lamps.
49. CEF, being a producer, has its own PCS, known as WERCS, for the purposes of fulfilling its obligations under the WEEE Regulations. WERCS and uses the services of EWRG WERCS for the collection and treatment recycling of lamp waste for which CEF is responsible. ~~all of the waste lamps and luminaires that are presented to it on the sale of new lamps and luminaires, including lamps and luminaires produced by the Big Four.~~
- ~~50. This practice is similar to Recolight’s practice of accepting the collection and recycling of all waste lamps, regardless of brand.~~
51. Pursuant to the scheme of the WEEE Regulations, the producer is liable to bear the costs of collection and treatment recycling of waste lamps and luminaires. Where the producer is a member of a PCS, that obligation is assumed by the PCS, to whom the producer will pay fees intended to reflect those costs.
- ~~52. Pursuant to that obligation, CEF is content that it bears the costs of WERCS’s activities in so far as those costs relate to the collection and recovery of waste lamps in an amount proportionate to its sales of Edison lamps. That cost is passed on in its sales to its customers.~~
- ~~53. However, the Big Four, whilst they charge CEF the “recycling charge” on all sales of their new lamps, do not contribute any of the revenue from those charges to cover the remaining costs of WERCS’s activities in so far as they relate to the collection and recycling of waste lamps and luminaires. Instead, all of the~~

~~proceeds of the Big Four's "recycling charges" are given to Recolight (for lamps) or Lumicom (for luminaires), each of which provides no services of any nature to CEF (save that Recolight does collect lamps from CEF branches in Northern Ireland).~~

~~54. Accordingly, CEF is forced to pay all the costs incurred by WERCS as well as the costs of the Big Four's "recycling charge" from which it gains no benefit or return.~~

~~55. The First, Second, Third and Fourth Defendants have, accordingly, breached their obligations under the WEEE Regulations to bear the costs of recovery of waste lamps and luminaires and have caused CEF loss and damage, being the costs incurred in paying WERCS in relation to the collection and recycling of lamps other than Edison lamps and luminaires.~~

~~56. Alternatively, CEF is entitled to restitution of all amounts of the "recycling charge" paid to the First, Second, Third and Fourth Defendants since none of the "recycling charges" paid by CEF is ever used to cover the costs of recovery of the lamps and luminaires sold to it by the First, Second, Third or Fourth Defendants. Those sums have been paid by CEF:~~

~~(1) under economic duress and illegitimate pressure, in that CEF could not obtain supplies of lamps and luminaires manufactured by the Big Four unless it paid the sums invoiced, including the separate "recycling charge"; CEF needed such supplies in order to provide a full range of available products to its customers and to compete effectively in its own market of the wholesale supply of electrical goods; and/or~~

~~(2) for no consideration; and/or~~

~~(3) on the basis that the vendor was meeting, in respect of the lamps and luminaires sold, the related costs of compliance with the WEEE Regulations when in fact that was not the case.~~

~~57. Further or alternatively, Recolight having since refused to collect waste lamps from CEF and there being in practice no collection by Lumicom of luminaires from CEF, the basis upon which the said sums were paid has failed and/or the purpose for which the said sums were paid has thereby been frustrated.~~

~~58. Further or alternatively, by payment of the said sums CEF has conferred upon each of the Big Four a benefit in circumstances whereby each of the Big Four has been unjustly enriched by CEF or should otherwise make repayment of the sums paid by way of restitution.~~

~~59. In the event, CEF is entitled:~~

~~(1) to repayment of all such sums paid since 1 July 2007; and~~

~~(2) to withhold payment of any similar sums demanded in future.~~

INFRINGEMENT OF ARTICLE 101 TFEU ~~81 EC~~ /SECTION 2 ~~1~~ OF THE COMPETITION ACT 1998

60. The arrangement or arrangements or practice whereby each of the members of Recolight ~~and Lumicom respectively~~ charge the same “recycling charge” to their customers and pass the proceeds of that charge on to Recolight ~~or Lumicom~~ to cover its respective operating expenses constitute or are the effect of an agreement or agreements between undertakings or a concerted practice or practices ~~or a decision or decisions of an association of undertakings~~ within the meaning of Article 101 TFEU ~~81~~ of the EC Treaty and Chapter I section 2 of the Competition Act 1998. ~~Pending further disclosure of the background to this arrangement, CEF is unable to specify which of an agreement, a concerted practice or a decision of an association is the applicable arrangement in each case.~~ Producers of all other categories of WEEE have included the costs of compliance with the WEEE Regulations within their internal production costs and do not provide for any similar system of recycling charges.

61. These arrangements constitute either an a restrictive agreement or agreements between the First, Second, Third and Fourth Defendants and Recolight ~~and/or Lumicom~~ or a concerted practice or practices by the First, Second, Third and Fourth Defendants.

(1) By means of their arrangements with, and/or carried out by means of, Recolight, the First to Fourth Defendants, who are rival major producers of new lamps, have avoided competing against each other in the United Kingdom on a significant element of their respective costs, namely PCS compliance services;

- (2) the First to Fourth Defendants are, and have at all material times been, fully aware that each of the others, although major rivals, would not undercut them on this element of the overall cost of supply of lamps;
- (3) the First to Fourth Defendants (or the undertakings, within the meaning of Art. 101 TFEU/section 2, to which they belong) have agreed with each other to adhere to their restrictive arrangement with and/or carried out by means of Recolight. On at least one occasion, when the Second Defendant indicated an intention to leave Recolight and to join another PCS in late 2007, the First, Third and Fourth Defendants and/or companies within their groups (and belonging to the same undertakings within the meaning of Art. 101 TFEU/section 2) exerted pressure on the Second Defendant (or the undertaking to which it belongs) to continue to adhere to Recolight in view of, among other matters:
- (i) a commitment which the Second Defendant (or the undertaking to which it belongs) had given to adhere to the restrictive arrangement;
 - (ii) the concern that the Second Defendant would or might achieve lower PCS charges for its lamps, thereby conferring on it a competitive advantage over the other lamp producer Defendants;
 - (iii) the wider market impact, in terms of the stimulation of competition between rival producers of new lamps, if the Second Defendant were to join another PCS.
- (4) the First to Fourth Defendants have, by agreement and/or a concerted practice, also colluded with each other on the form and manner in which the recycling charge element of their costs would be passed to customers as part of the price for the supply of lamps.
- (5) The matters set out above have led to higher lamp prices to customers in the United Kingdom, including CEF, than would otherwise have arisen;
- (6) CEF, as a major wholesaler, has suffered loss and damage because it has been overcharged by the First to Fourth Defendants on the sales of new lamps, and/or because CEF has sold fewer lamps because of their higher costs, and so has made lower profits.

62. Further or alternatively, if and insofar as the arrangement arises pursuant to decisions of Recolight and/or Lumicom which are imposed on their respective members, those are decisions of an association of undertakings, being, in particular, the First, Second, Third and Fourth Defendants by reason of their dominant control over Recolight's and/or Lumicom's activities.

PARTICULARS IN SUPPORT OF PARAGRAPHS 60 TO 62

62A ~~Prior to full disclosure the~~ The Claimants rely upon the following further facts and matters:

- (1) At the end of 1996 the European Parliament asked the European Commission to present proposals on a number of priority waste streams including electrical and electronic equipment. By then, by virtue of the Special Waste Regulations 1996 fluorescent lamps were already categorised as special waste in England and Wales.
- (2) By 2001 the European lighting industry generally including the First to Fourth Defendants and/or their parent companies were generally aware that a WEEE directive was proposed and that it would be necessary for the industry both to lobby as to its content and to plan and prepare for the national implementation of such a directive.
- (3) The First to Fourth Defendants are and were at all material times prominent and influential members of the Lighting Industry Federation which is the usual title of Lighting Industry Federation Limited (“the LIF”), a company limited by guarantee whose purpose is to represent the interests of the lighting manufacturers in the United Kingdom.
- (4) In March 2001 the LIF acquired an “off-the-shelf” company which it renamed “Sustainalite Limited” (hereinafter referred to as “Sustainalite”) and in which it held the only issued share.
- (5) The avowed principal purposes of Sustainalite were to represent all participants in the life cycle of lamps (producers, electrical contractors, retailers, recyclers and logistics companies) and to promote the “Recyclite Scheme” for the separate collection and treatment recycling of gas discharge lamps. Its activities included an accreditation system for lamp recyclers, who were permitted to participate in the activities of Sustainalite

but were not represented on its board, which comprised entirely nominees of the LIF. Sustainalite received from recyclers annual returns of lamps collected.

- (6) Sustainalite was in practice controlled by the First to Fourth Defendants by virtue of their influence in the LIF and their participation in the management of Sustainalite.
- (7) The WEEE Directive entered into force on 13 February 2003 and required national implementation by 13 August 2005.
- (8) During 2003 the LIF lobbied the Department of Trade and Industry on behalf of gas discharge lamp makers as to the form of the United Kingdom regulations, adopting the paper “Let There Be Light” produced by the European Lighting Companies Federation (“the ELC”, a body of which the Second Defendant and the respective European parent companies of the First Defendant, Third Defendant and Fourth Defendant formed 4 of the 8 members, representing over 90% of the European market in new lamps).
- (9) The ELC generally and more particularly through their document “Let There Be Light” sought to promote on an EU-wide basis a mandatory “a single visible fee” on a “pay as you go” basis and a single “Collection and Recycling Service Organisation” (“CRSO”) operating on behalf of all producers and appointing recyclers on the basis of competitive tenders.
- (10) The LIF further promoted the concept that the CRSO should set the single visible fee and that “market forces would be used to bring down costs of collection and treatment” and that Sustainalite (which it owned) should be the CRSO for the United Kingdom.
- (11) Both the LIF and Sustainalite made the relevant decisions entirely for the benefit of and in the interests of the producers and regardless of the effect that the above proposals would have upon the independent recycling market, in particular that the CRSO would be the only purchaser of the services of the recyclers and would set prices in the market. During 2003 Sustainalite resisted all attempts by its recycler members to participate in its management or decision-making or its lobbying of the Department of Trade and Industry.

- (12) Whilst in 2004 Sustainalite did permit token representation of recyclers on its board it remained in the control of the First to Fourth Defendants and its position did not alter in any material respect, being essentially that of the ELC and the LIF.
- (13) On 2 April 2005 Sustainalite first presented to its members the proposal of a separate entity to act as the single CRSO or compliance scheme with producer members only, with Sustainalite to continue for the purposes of registration and accreditation of suppliers, political lobbying and as an industry forum.
- (14) On 14 June 2005 Sustainalite presented to its members the creation of a compliance scheme to be called “Recolight” and which would be structured and would act in every material respect consistently with the approach of the ELC and the LIF.
- (15) On 1 July 2005 the Fifth Defendant was incorporated, ~~each of the First to Fourth Defendants holding 1 subscriber share~~ being the four subscriber members.
- (16) It is accordingly the case of the Claimants that the subsequent decisions:
- (a) of the Fifth Defendant to impose upon its scheme members a uniform charge per lamp sold (and, correspondingly, of each of the First to Fourth Defendants not to compete over this element of their costs);
 - (b) of each of the First to Fourth Defendants to pass on that charge to their respective customers in the same amount as an upfront visible “recycling charge” of the same amount;
- were in fact pre-ordained by the series of events particularised above and constitute arrangements of the kind alleged.
- (17) For the avoidance of doubt, presently and in the absence of disclosure by the First to Fourth Defendants for the period from 1 January 2001 to 28 February 2006, ~~In the premises,~~ the Claimants’ case is Claimants aver that:

- (a) the Second Defendant and the European parents of the First Defendant, Third Defendant and Fourth Defendant participated jointly in the above-mentioned decisions and policy-making of the ELC, as manifested in particular in the document “Let There Be Light”; such policy included an agreed consensus between the Second Defendant and the European parents of the First Defendant, Third Defendant and Fourth Defendant as to:
- (i) the existence of a single visible fee;
 - (ii) that the Second Defendant would pass on such visible fee to be displayed on the invoices;
 - (iii) that each of the European parents of the First Defendant, Third Defendant and Fourth Defendant would pass on such visible fee and seek to have it visibly displayed on invoices and/or instruct their European subsidiaries in each country to do likewise;
- (b) the Second Defendant thereafter acted in the manner set out below in the course of its activities within the United Kingdom in furtherance of the consensus identified in (a) above;
- (c) the European parents of the First Defendant, Third Defendant and Fourth Defendant also acted in furtherance of the consensus identified in (a) above, including by:
- (i) instructing the First Defendant, Third Defendant and Fourth Defendant to act in furtherance of the consensus identified in (a) above; and/or
 - (ii) at least informing the First Defendant, Third Defendant and Fourth Defendant of the existence of such consensus;
- (d) from 2001 onwards the First to Fourth Defendants

participated jointly in the management of Sustainalite as the vehicle for promoting ELC policy in the United Kingdom; for the avoidance of doubt, such joint participation included implementation and/or furtherance of the consensus identified in (a) above;

(e) from 2005 onwards the First to Fourth Defendants participated jointly in the promotion, direction and management of Recolight, which continued as the manifestation in the United Kingdom of ELC policy and the consensus identified in (1) above, achieving in particular:

(i) their joint ownership and control of a single PCS (when such was not compelled by the Regulations);

(ii) their combination in collective membership of a single PCS (when such was not compelled by the Regulations);

(iii) the imposition by that PCS of membership fees determined by way of a fixed charge per unit sale of new lamps (when such was not compelled by the Regulations);

(f) in the premises insofar as the First to Fourth Defendants thereafter:

(i) passed on the whole of the above-mentioned fixed charge in the price of new lamps (when such was not compelled by the Regulations);

(ii) made the act of passing-on visible by the creation of a separate invoice line stipulating a “recycling charge” in an amount exactly equal to the incremental membership fee resulting from the sale (when such was not compelled by the Regulations);

(iii) remained within a single PCS in the United

Kingdom, namely the Fifth Defendant;

such acts were not unilateral acts of each of the First to Fourth Defendants but formed part of the consensus identified in (f) (a) above;

(g) in acting in the manner set out in (f) above the First to Fourth Defendants each acted:

(i) by direct agreement *inter se*; and/or

(ii) on the instructions of their respective European parents (save in the case of the Second Defendant, which was acting directly); on the information presently available to the Claimants, the persons involved in giving such instructions include:

Mr. Frank de Leeuw (an employee of the European parent of the First Defendant and a member of the ELC “WEEE Implementation Team” and “Expert Panel Logistics” for the purposes of the practical implementation of the WEEE Directive in each member state; Mr. de Leeuw advised Recolight on the tender process during 2006 and also deputised for Recolight’s chief executive Eddie Taylor and/or acted as a “consultant” to Recolight during at least the period April 2008 to January 2009);

Mr. Rob Koppejan (an employee of the European parent of the First Defendant and a member of the ELC “WEEE Implementation Team” and Core Team and Project Team Leader WEEE Lamps, who was on 7 February 2008 appointed as a director of Recolight);

Mr. Martin de Jager (an employee of the European parent of the First Defendant and a member of the ELC “WEEE Implementation Team”

and Core Team, who was on 2 July 2009 appointed as director of Recolight in place of Mr. Koppejan);

Ms Katalin Pilinyi (an employee of the Second Defendant and a member of the ELC “WEEE Implementation Team” and Core Team);

Mr. Christoph Von Rautenfeld (an employee of the European parent of the Third Defendant and a member of the ELC “WEEE Implementation Team” and Core Team);

Mr. Christian Brehm (an employee of the European parent of the Fourth Defendant and a member of the ELC “WEEE Implementation Team” and Core Team);

and/or

- (iii) in the knowledge of the consensus identified in (a) above or in confident expectation (arising either from agreement or from the above-mentioned course of events) that each of them would act in an exactly similar manner;
- (iv) accordingly, without the need to give any consideration to absorbing any part of the cost of compliance with the Regulations through membership of a PCS and free from concern that the other Defendants as competitors would so act; and accordingly in an anti-competitive manner contrary to Article 101 of the Treaty on the Functioning of the European Union as pleaded;
- (h) further or alternatively, even if the First Defendant, Third Defendant and Fourth Defendant were unaware of the consensus reached between the Second Defendant and the European parents of the First Defendant, Third Defendant and Fourth Defendant, as identified in (1) above, insofar as the First Defendant, Third Defendant and Fourth Defendant

implemented that consensus through the acts identified in (f) above, they too infringed Article 101 of the Treaty on the Functioning of the European Union (as did the Second Defendant which acted directly in the ELC, Sustainalite and Recolight).

63. The said agreements, concerted practices or decisions have as their object or effect the prevention, restriction or distortion of competition within the common market and/or within the United Kingdom.

**PARTICULARS OF PREVENTION, RESTRICTION
OR DISTORTION OF COMPETITION**

64. The WEEE Regulations impose a duty on producers of lamps in respect of the collection, treatment, recovery and disposal of lamp waste.
65. That duty gives rise to a cost to each producer which, pursuant to the Regulations, is to be borne by the producer.
66. That cost represents a potentially significant element in the total production and operating costs of producers of new lamps.
67. In the normal course, competing undertakings sell finished goods to their customers without identifying individual elements of their production and/or operating costs.
68. By means of their arrangement for the common acquisition of PCS services from Recolight at a uniform and agreed charge per lamp, and/or identifying a putative “recycling charge” as being intended to cover the costs incurred in complying with the WEEE Regulations, and/or agreeing the extent of that charge and passing that charge directly onto customers, the members of Recolight ~~and/or~~ Lumicom have prevented, restricted or distorted any competition as between themselves in relation to that element of their costs of production. Given the significant proportion of the First, Second, Third, and Fourth Defendants’ costs represented by the 15p upfront fees (and, since 1 July 2010, the 10p upfront fee), and the homogenous nature of the First, Second, Third, and Fourth Defendants’ lamps sold in the United Kingdom, the agreements and/or decisions giving effect to the upfront fee create a significant degree of cost commonality, thereby reducing competition on price between the First, Second, Third, and Fourth Defendants in

the market for the sale of lamps in the United Kingdom. Further, given that the members of Recolight account for 85% 90% of production of lamps sold in the United Kingdom, of which some 80% is accounted for by the First, Second, Third, and Fourth Defendants, the agreements and/or decisions giving effect to the Recolight upfront fee(s) affect price competition to an appreciable extent. In the premises, Recolight, and the various arrangements giving effect to the upfront fee, constitute an anticompetitive joint venture between Recolight and the First, Second, Third and Fourth Defendants.

69. ~~Further or in the alternative, the agreement whereby all the “recycling charges” are passed on to Recolight or Lumicom respectively to cover its operating costs prevents or restricts, in practice, the First, Second, Third and Fourth Defendants from arranging for other methods of complying with its obligations under the WEEE Regulations.~~
70. ~~In particular, where lamps are sold through a wholesaler who is also a producer of lamps and has its own PCS, the First Second, Third and Fourth Defendants are prevented or restricted from entering into arrangements directly or indirectly with that PCS.~~
71. The fact that the WEEE Regulations provide that producers may act collectively does not entitle them to act in any way anti-competitively. In any event, the WEEE Regulations, based on the WEEE Directive which is secondary EC legislation, cannot override the application of the provisions of Article 81 of the EC Treaty 101 TFEU/section 2 of the Competition Act 1998.
- 71A. ~~The Defendants agreed collectively that Recolight would not collect lamps from CEF and/or Recolight, as an association of undertakings, made a decision to this effect, which decision was strongly supported by the First, Second, Third, and Fourth Defendants. In an email dated 22 June 2009, Recolight’s Chief Executive, Nigel Harvey, stated that “...[i]n the last 4 weeks they [EWRG] have attempted to invoice us for the entire recycling costs of [CEF]’s own compliance scheme (City Compliance). If we accept this our members will have subsidised/paid for the recycling of the CEF own brand (Edison).” In reply emails dated 22 June 2009, 28 June 2009, and 1 July 2009, the First, Second, Third, and Fourth Defendants agreed with Recolight’s proposal not to accept lamps from the First Claimant and noted in this connection that CEF’s Edison brand competed with lamps sold by the First, Second, Third, and Fourth Defendants. This agreement and/or decision limits CEF’s ability to compete in the following respects:~~

- ~~(1) Increasing CEF's costs compared to rival wholesalers (whose used lamps are collected free by Recolight)~~
- ~~(2) Penalising CEF for dealing in lamps other than those of Recolight's members, which has the effect of protecting Recolight members from competition from their rivals.~~
- ~~(3) Acting as a disincentive to other wholesalers to buy lamps other than those of Recolight's members, since they too would thereby lose the "free" collection service from Recolight.~~

~~71B. Recolight's upfront fee further distorts competition in recycling services. Recolight's upfront fee model has enabled Recolight to set up its own RecoNet collection service. By requiring wholesalers to pay upfront for this service, bundled with the supply of recycling and compliance services (when they purchase the Recolight members' lamps), the upfront fee and associated services have excluded and/or marginalised recycling operators who previously charged wholesalers for the provision of this service at the end of lamp life. By reserving this collection activity for itself, Recolight denies possible scale or network benefits to rival recycling schemes and PCSs, which serves to raise the costs of such schemes, giving an unfair and unjustified advantage to Recolight. This limits CEF's ability to benefit from price and non-price competition between PCSs and the ability of those PCSs to compete with Recolight, including WERCS (which is 100% owned by EWRG, which in turn was until 30 April 2009 owned and controlled by the same parent company that owns and controls CEF).~~

72. Paragraphs 46 to 52 ~~47 to 51~~ above are repeated.

73. CEF has suffered loss and damage as a result of this breach of Article ~~81-EC~~ ~~101 TFEU~~ and/or section 2 of the Competition Act.

INFRINGEMENT OF ARTICLE ~~82-EC~~ ~~102 TFEU~~ / SECTION 18 OF THE COMPETITION ACT 1998: RECOLIGHT'S ABUSIVE DEALINGS WITH EWRG

74. ~~The relevant market is the market in the United Kingdom for services for the collection and recycling (encompassing treatment, recovery and disposal) of lamp waste. In so far as that market may be subdivided on regional or local lines or as~~

~~between collection and recycling activities, no material consequence affects the following particulars:~~ The Claimants aver that:

- (1) There is a relevant market or markets for the provision of collection and/or treatment and/or recovery and/or disposal services for lamp waste in the United Kingdom. The said services are provided in particular to PCSs such as Recolight, that have obligations under the WEEE Regulations.
- (2) Recolight can and does exert market power as a purchaser of such services. It does so both directly through its commercial agreements with service providers, and indirectly by means of purchasing evidence notes from such suppliers for the purpose of demonstrating to the Environment Agency that it has discharged its obligations under the WEEE Regulations. Recolight has a dominant position in the said relevant market or markets, within the meaning of Art. 102 TFEU and s.18 of the Competition Act 1998.
- (3) Recolight has abused its dominant position on the said market or markets, by:
 - (i) adopting and maintaining an overall purchasing strategy, since around May or June 2009, the aim of which is to deprive EWRG of lamp collection and treatment business by various means;
 - (ii) further or alternatively, by refusing to purchase evidence notes or services from EWRG on fair and reasonable terms, the effect of which has been (and remains) to weaken EWRG, and if continued, eventually to force it out of the relevant market or markets.
- (4) The effect of weakening EWRG, and of eventually forcing it out of the market or markets, will be to alter the structure of competition, to deprive customers of services that they value, and/or to reduce the overall quality, choice and/or volume of collection, treatment and recovery services provided to customers.
- (5) If and insofar as necessary, it is further averred that the motivation for Recolight adopting the said exclusionary purchasing strategy against EWRG has been, or has included, the following:

- (i) Recolight and its major lamp producer members, the First to Fourth Defendants, have regarded EWRG as a business associated with a rival producer of lamps, namely CEF, and therefore as a threat to the interests of the First to Fourth Defendants.
 - (ii) The Defendants have been concerned to prevent a situation in which EWRG is in a position to offer lower cost and/or otherwise more attractive lamp collection, treatment and disposal services to CEF's own PCS scheme (WERCS), and to the actual or prospective members of that scheme. That would confer on CEF a competitive advantage over the First to Fourth Defendants in the supply of lamps. It would create pressure on the First to Fourth Defendants to leave Recolight and join WERCS in order to remove the competitive advantage.
 - (iii) One concern of the Defendants has been EWRG's contracts with major national wholesalers (such as Rexel, Edmundsons and Hagemeyer). These account for significant proportions of the waste lamps that must be collected and treated each year in order that PCS schemes to which the major lamp producers belong can discharge their obligations under the WEEE Regulations. The Defendants have been concerned that, among other matters, if EWRG secures contracts covering the majority of the electrical wholesaler collection points, then the "CEF group" would have a competitive advantage over Recolight in the supply of PCS services to lamp producers (through WERCS), and ultimately (through CEF) over the First to Fourth Defendants in the supply of lamps. This could provoke one or more among the First to Fourth Defendants to leave Recolight and join WERCS.
- (6) By reason of Recolight's abusive and unlawful conduct directed at EWRG, EWRG has suffered and continues to suffer loss and damage.

75. Whereas prior to the coming into effect of the WEEE Regulations, services were provided by recyclers to, in particular, wholesalers, since 1 July 2007 Recolight has established itself as the dominant purchaser of lamp waste recycling collection and treatment services on the relevant market or markets by placing itself between wholesalers and other waste generators and providers of collection and recycling treatment services. Recolight's members account for approximately 85% 90% of

UK lamp sales, with the First, Second, Third and Fourth Defendants alone accounting for 80%. In establishing Recolight, those members have entrusted the supply of producer compliance services to them by Recolight on an exclusive or de facto exclusive basis. These elements place Recolight in a pivotal position as a de facto monopoly buyer of lamp waste recycling services in the United Kingdom. This position affords Recolight the ability to price discriminate in its sub-contracting arrangements, and to discriminate against actual or potential competitors, such as EWRG. In the premises, Recolight acts as a “superdominant” buyer on the relevant market.

- ~~76. Further or alternatively, by reason of their control over Recolight and their interest in securing compliance collectively under the WEEE Regulations, the First, Second, Third and Fourth Defendants are, together with Recolight, jointly dominant on the market in the United Kingdom for services for the collection and recycling of lamp waste. While the First, Second, Third and Fourth Defendants are not themselves physically active in the collection and recycling of lamp waste, their entrustment of these services to Recolight, the important role played by their Directors within Recolight, and the parallelism of interest between Recolight and the First, Second, Third and Fourth Defendants in this regard makes it appropriate to treat them and Recolight as jointly dominant. The First, Second, Third and Fourth Defendants and Recolight for all practical purposes behave as a single entity on the market in so far as concerns the purchase of lamp waste recycling services and the associated supply of producer compliance services.~~
77. Recolight does not itself collect, treat, recover or dispose of lamp waste and does not have the infrastructure to do so. Rather, it contracts with providers of collection and recycling treatment services in respect of lamp waste in order to ensure the fulfilment of its members’ obligations under the WEEE Regulations.
78. Although wholesalers and their customers continue to need to dispose of have lamp waste collected and disposed of in accordance with their lawful obligations, Recolight has become the dominant purchaser of these services in view of (i) the fact that its members account for the overwhelming majority of all lamps in the United Kingdom which require to be collected and recycled in each annual compliance period in accordance with the WEEE Regulations; (ii) Recolight’s stated aim of maximising waste collection; and (iii) by offering to arrange for services to wholesalers and others for free. ~~Since Recolight’s members’ customers are charged the “recycling charge” up front on the sale of new lamps;~~

~~they naturally do not wish to pay again for the actual recovery, collection, transport and recycling services.~~

79. Hitherto EWRG charged a fee to wholesalers for its services, based on a competitive market in collection and recycling treatment services.
80. Since 1 July 2007, EWRG offers and provides its services to Recolight and also continues to offer its services to wholesalers and other lamp waste creators directly.
81. In respect of services to Recolight, EWRG sought to offer its services on similar open market terms as it had previously charged to wholesalers and other waste lamp creators. In this respect, it expected to be in a fair and open competitive tender process (an invitation to tender or “ITT” process) with other recyclers.
82. In respect of services that are continued to be provided directly to wholesalers and other waste lamp creators (“existing business arrangements”), EWRG no longer always charges such customers directly, but seeks to agree with such customers exclusive collection agreements for free and to agree separately with Recolight a fair market price for the collection and recycling treatment of the lamps on the ground that EWRG satisfies Recolight’s obligations under the WEEE Regulations.
83. Recolight has abused its dominant position ~~and/or the First, Second, Third and Fourth Defendants have abused their position of joint dominance on the market~~ as identified in paragraph 74 above ~~for collection and recycling of waste lamps in the United Kingdom by seeking to exclude EWRG from that market and/or by imposing unfair and/or discriminatory prices and conditions on EWRG and/or by excluding from collection arrangements lamps from producers that are not Recolight members~~ contrary to Article 82(a), (b) and (c) EC 102 TFEU and section 18(1) (a), (b) and (c) of the Competition Act 1998.

PARTICULARS OF ABUSE

84. Recolight has abused its dominant position as set out in paragraph 74(3) above ~~and/or the First, Second, Third and Fourth Defendants have abused their position of joint dominance~~ by means of inter alia the following conduct:

~~(i) the imposition of costly requirements upon EWRG that are not imposed upon other operators including:~~

~~(a) expensive onboard weighing and recording devices;~~

~~(b) the acceptance of difficult loads of mixed lamps without extra charge;~~

~~(c) a laborious and expensive invoice auditing régime;~~

~~followed by assertions that EWRG can no longer compete on price;~~

~~(ii) despite (i), the aggressive downward negotiation of prices in circumstances where EWRG has no alternative buyer in the market;~~

~~(iii) the requirement that EWRG should disclose its existing customer base on a confidential basis, followed by the active poaching of those customers and referral of their business to competitor companies;~~

(i) (iiia) ~~discriminatory and/or predatory and/or other illegitimate conduct in relation to EWRG's customers~~

(ii) (iv) the exclusion of EWRG from both Recolight's invitation to tender ("ITT") business and the distribution of *ad hoc* business;

(iii) (v) a refusal to deal with EWRG in relation to EWRG's existing arrangements with its customers;

(iv) (vi) exaggeration of the magnitude and significance of temporary deficiencies in the operation of the EWRG plants at Harlow and Glasgow;

(v) ~~misappropriating containers belonging to EWRG, including the lamp waste contents, and failing to pay charges for containers leased by EWRG to Recolight, since September 2010: see the counterclaim in (consolidated) claim HC11C00495.~~

- (vii) ~~greatly delayed payment of sums due to EWRG, on slender or specious grounds.~~

~~(i) imposition of discriminatory costly requirements~~

~~85. In early 2007, Recolight informed EWRG that the company that would win most business in its ITT process would need to have on-board weighing facilities and PDAs so that it could notify Recolight immediately of a collection. In response EWRG spent £134,000 on fleet extras. This was not required of or provided by other recyclers.~~

~~86. Recolight required EWRG to tender on the basis of a single price for handling mixed lamp waste. Another recycler, Wiser, was allowed to charge extra fees direct to Recolight's customers for the removal of tape and packaging and in respect of shatterproof lamps, HID lamps and sodium lamps.~~

~~87. EWRG was paid a lower price for waste consignment notes than Recolight paid to other recyclers.~~

~~88. EWRG was paid less for container rentals than Recolight paid to other recyclers.~~

~~89. Each of these obligations imposed on EWRG was unfair and/or discriminatory.~~

~~(ii) aggressive downward negotiation of prices~~

~~90. With effect from July 2007, prices were agreed between Recolight and EWRG of £600 per tonne for treatment plus transport costs in respect of its ITT business and £1500 per tonne, with reductions for volume, in respect of EWRG's existing business arrangement. A flat rate was also agreed of £600 per tonne in respect of Recyclers Collection Points, i.e. containers at EWRG sites where customers could deposit waste lamps.~~

~~91. Since then, Recolight aggressively sought to push prices downwards. In May 2008 the rate for existing business was reduced to a flat rate of £1100 per tonne and pressure was applied to reduce the rate to £900 per tonne, when in fact higher rates were being paid to other recyclers.~~

92. ~~Recolight has further during 2009 sought unilaterally and in breach of contract to categorise all collections of less than 200 kg in weight as “Recyclers Collection Point” business paid at £513 *per* tonne for treatment and without any contribution for transport instead of categorising it correctly as “Existing Arrangements” business payable at £1100 *per* tonne for collection and treatment. There is no contractual warrant whatsoever for this purported recategorisation, nor any in logic, since transport is inevitably involved in such collections; indeed Recolight are now making discrete payments to haulage contractors to perform precisely the same work of transport for which they seek to pay nothing to EWRG.~~

93. ~~This constitutes unfair and/or discriminatory behaviour by Recolight.~~

~~(iii) disclosure of customer base~~

94. ~~Recolight insisted on being given information about the identity of EWRG’s customers on the ground that it was absolutely necessary for its checking purposes and that it would make no other use of the information. Recolight expressly promised in its letter dated 25 June 2007 to EWRG that it would treat such information “on a strictly confidential basis.”~~

94A. ~~At a meeting on 29 May 2007 between Recolight (Alex Hawkins and Frank de Leeuw) and EWRG (Keith Patterson) Recolight further orally agreed that in the event (which shortly thereafter occurred) that Recolight and EWRG entered into an agreement in relation to Existing Arrangements business then Recolight would not enter into any conflicting direct arrangements with such customers during such periods. Recolight (Alex Hawkins) confirmed that agreement in writing by an e-mail to EWRG (Keith Patterson) dated 30 May 2007 0737.~~

94B. ~~In its Invitation To Tender sent to EWRG on 10 November 2008 Recolight further expressly promised at clause 1.18:~~

~~“Without prejudice to any legal obligation, the parties undertake not to reveal any information to third parties that is contained in the agreement, or any information exchanged between them during the period of the agreement. In the case of information expressly indicated to be confidential by one of the parties, these undertakings remains valid for 10 years following the ending or cancellation of the agreement. Except with the recycler's written consent, Recolight undertakes to use confidential information provided by the recycler solely for the purpose of performing its legal obligations e.g. to report. The parties are legally responsible~~

for the consequences should any of their employees violate this confidentiality undertaking.”

94C. ~~In consideration of and/or in reliance upon the above-mentioned promises and assurances EWRG entered into agreements with Recolight and provided information in the circumstances more particularly described at paragraph 80 of the reply.~~

94D. ~~In the premises, Recolight:~~

- ~~(1) expressly promised orally and in writing that Recolight would not enter into direct arrangements with EWRG’s Existing Arrangements customers as pleaded at paragraph 94A above;~~
- ~~(2) expressly orally promised not to make any approach to any customer of EWRG whose identity was revealed by EWRG to Recolight, in the circumstances pleaded at paragraph 80(7)(b) of the reply;~~
- ~~(3) expressly promised in writing not to use customer information for any purpose other than the fulfilment of Recolight’s own legal obligations, as pleaded at paragraph 94B above;~~
- ~~(4) became under a general duty in equity not to take unfair advantage of customer information provided by EWRG in the above circumstances.~~

94E. ~~In breach of the above-mentioned promises and obligations, Recolight has entered into agreements or arrangements with EWRG’s Existing Arrangements customers and/or has used the information provided by EWRG to make approaches to customers of EWRG and has thereby used the information provided by EWRG to its unfair advantage.~~

~~PARTICULARS OF CUSTOMERS~~

~~Prior to further disclosure the best particulars that EWRG can provide are as follows:~~

~~Amey Roads~~
~~ASDA / City Facilities Management~~
~~Ashfield Supplies Limited~~
~~Aurora Ltd.~~
~~Birmingham International Airport Limited~~
~~Blue Water Management Suite~~
~~Bolton MBC~~
~~De Montfort University~~
~~Dumfries and Galloway Council~~
~~East Riding of Yorkshire~~
~~Electric Centre~~
~~Environmental Storage Solutions~~
~~Foreman Recycling~~
~~Harlite Installations~~
~~Kemps Neon~~
~~Lampforce~~
~~Medlock Electrical~~
~~Merson Signs~~
~~Mews~~
~~Mico Lighting Ltd.~~
~~Planned Lighting Maintenance~~
~~Quicklight~~
~~SEC~~
~~Strathclyde University~~
~~Tayside Contract~~
~~TEP Electrical Distributors Ltd.~~
~~Thorn Lighting~~
~~Tom White Waste~~
~~Trafford MBC~~
~~WEEEcycled UK Ltd.~~
~~Whitefriars Housing~~
~~William Wilson~~

(iia)

(i) discriminatory and/or predatory and/or other illegitimate conduct in relation to EWRG's customers

95. ~~Recolight has since actively approached EWRG's customers offering to match any service that EWRG is providing. Further or alternatively, Recolight has engaged in discriminatory and/or predatory and/or other illegitimate conduct in relation to EWRG by selectively targeting actual or potential customers of EWRG. It has selectively offered special deals and inducements in order to match or beat any arrangement with EWRG, with the strategic purpose and/or the effect of starving EWRG of income.~~

PARTICULARS

96. Recolight has in particular so conducted itself in relation to the Rexel group of companies ("Rexel") with whom EWRG has, to Recolight's knowledge, a fixed term agreement for the collection and treatment of WEEE including lamp waste.
- 96A. Until 1 June 2009, Mercury Recycling Limited ("Mercury"), a waste recycler, was servicing the Rexel business. During that time, Recolight paid Mercury for the consignment (or evidence) notes that arose in relation to the Rexel business. When Rexel was re-tendering this business, Recolight agreed with Rexel to fund whichever recycler Rexel choose chose to engage. EWRG won the Rexel contract on 8 January 2009, to take effect from 1 June 2009. Since then (and despite its earlier assurances as to a non-discriminatory funding policy), Recolight has refused to pay EWRG anything for the Rexel arisings.
- 96B. Recolight ~~has~~ further offered during July 2009 to provide to Rexel either free containers or a contribution of £20 per month for each of Rexel's own containers or to purchase any containers owned by Rexel group companies on a net book value basis with payment in full being made during that financial year in an endeavour to induce Rexel to break its contractual relationship with EWRG or at any rate not to renew it. Overall, Recolight offered Rexel a commitment to match any arrangement in place with EWRG, and put forward an offer which consciously closely followed the outline of Rexel's contract with EWRG as far as possible. Recolight even offered, on top of its offer to match EWRG, to give cash for marketing support to the Rexel group, to the value of £100,000 during 2010. This had no connection at all with the subject-matter of the proposed commercial

arrangement with Rexel. Its only purpose and/or function was to serve as an inducement to Rexel to switch its business away from EWRG.

96C. Further still:

(1) in early January 2011, Mercury Recycling carried out a free of charge collection for a Rexel branch in Surrey, which was under contract with EWRG;

(2) on or around 19 January 2011, Recolight funded the Rexel arisings collected by Mercury Recycling, whilst at the same time maintaining its policy vis-à-vis EWRG that it would not fund collections at Rexel made by EWRG.

Recolight was fully aware that EWRG had a contract with Rexel.

96D. In the premises, Recolight has evinced a clear willingness to fund third parties to collect Rexel lamp waste (and has in fact done so), in breach of Rexel's contract with EWRG, whilst refusing to pay EWRG for waste from the same customer collected pursuant to a lawful contract.

97. Recolight has also approached the wholesalers Edmundsons Electrical Limited ("Edmundsons") with whom EWRG also has, to Recolight's knowledge, a fixed term agreement for the collection and treatment of WEEE including lamp waste. Recolight has told Edmundsons that Recolight will not pay for or contribute towards the cost of collections by EWRG but will give Edmundsons "anything they [EWRG] can give you" provided that Edmundsons' waste is collected by any recycler other than EWRG. Recolight stated that it was ready to discuss providing a "like for like service" to Edmundsons.

97A. Recolight's selective targeting of customers of EWRG appears to have extended beyond the Rexel and Edmundsons accounts. One of the distinctive characteristics of EWRG's service offering has consistently been that it has been prepared to make small collections of lamps from customers (i.e., generally less than 200 kilograms). In June 2009, Recolight started offering a service of small collections for customers (pursuant to which service it would treat the waste so collected without making any charge), whereas Recolight refused to pay EWRG for the treatment of any waste so collected from its customers.

98. Such Recolight's selective targeting of customers of EWRG behaviour is discriminatory, predatory and/or otherwise unfair and is designed to destroy EWRG's direct business arrangements with its existing customers with a view to Recolight taking that business and placing it out to its chosen recycler. It amounts to an abusive and discriminatory and/or otherwise illegitimate boycott against EWRG, motivated by Recolight's concerns as set out at paragraph 74(5) above, and/or its desire to remove or marginalise EWRG as an independent recycler from the market(s) and to ensure that EWRG remains in the market(s), if at all, as a supplier of services to Recolight (via tender or *ad hoc* business) and not as a direct competitor.

(iv)

(ii) **exclusion of EWRG from ITT and *ad hoc* business**

99. Recolight divided the United Kingdom into twenty regions for ITT purposes.

100. With effect from July 2007, EWRG successfully tendered for 9 of these regions. However, in three cases the contract was only for 6 months, and in all others only for 18 months.

101. By the beginning of 2009, EWRG only had contracts for four regions and these were stated to continue only until June 2009.

102. EWRG was awarded two Scottish regions for ITT business, but even there Recolight is awarding valuable *ad hoc* business to other recyclers and is not offering this business to EWRG. Further, unlike other recyclers, EWRG has no automated link to ITT collection sites. Requests by customers for collections are made to Recolight directly and in breach of agreement collections from those sites are allocated to other recyclers and not to EWRG.

103. The result is that, since June 2009, EWRG has been effectively cut out from all of Recolight's ITT business in England and Wales and is discriminated against in Scotland.

104. This treatment is unfair and/or discriminatory.

104AA. First, the decision not to award EWRG any tender regions after June 2009 (and to remove the four regions that EWRG had hitherto served) had no

good justification and was in fact taken pursuant to the wider abusive strategy of marginalising and excluding EWRG from business, described at paragraphs 74(3) and 74(5) above.

104A. Second, the decision not to award EWRG any *ad hoc* business from around April 2009 was taken pursuant to the abusive strategy of depriving EWRG of income that would permit it to provide attractive terms of service provision to major electrical wholesalers. In the circumstances particularised at paragraph 83 of the reply, at around the beginning of 2009 Recolight (Eddie Taylor) expressly orally agreed with EWRG (Keith Patterson and Alan Jackson) that it would nominate EWRG to collect all *ad hoc* business coming onto Recolight. In March 2009, Mr. Hawkins of Recolight assured Mr. Patterson of EWRG that EWRG would receive all *ad hoc* business coming onto Recolight for a quarter year, followed by a review. EWRG has since received ~~not one single~~ virtually no *ad hoc* job jobs (notwithstanding that Recolight itself estimated that the volume of *ad hoc* collections that would be needed in only four tender regions (8, 10, 11 and 14) would be equivalent to the full demands of a small to medium tender region). There were merely two jobs given to EWRG in Scotland in May 2010. This was only a few weeks after, and likely prompted by, the Claimants' Reply.

(v)

(iii) refusal to deal on existing business

105. EWRG has entered into contractual arrangements with wholesalers and other waste lamp creators on terms that EWRG will take away and treat their waste lamps and that of their trade customers free of charge in the reasonable expectation that Recolight would purchase the resulting evidence, at least at fair market rates, in order to discharge its responsibilities and those of its members under the WEEE Regulations.

105A. Recolight has abused its dominance by refusing to purchase evidence notes from EWRG since mid 2009:

(a) Recolight is obliged, under Regulation 23 of the WEEE Regulations, to finance the collection, treatment, recovery and disposal of waste for which its members are responsible under Regulation 9(1)(a) and (b).

- (b) On the face of Regulation 9(1)(a), in particular, Recolight's members must finance the costs of dealing with waste lamps which were put on the market by them on or after 13 August 2005 (i.e., now more than 6 years ago).
- (c) Within the second half of the 2009 compliance period, and in the 2010 and 2011 compliance periods, EWRG has been collecting and treating large quantities of waste lamps produced by the First to Fourth Defendants, who account for the vast majority of all new lamps placed on the market in the United Kingdom over the last 6 years at least.
- (d) Under the WEEE Regulations, these are waste lamps for which Recolight's members are directly responsible under Regulation 9(1), and therefore, by extension, for which Recolight itself is directly responsible under Regulation 23.
- (e) Recolight accordingly has a duty to finance the costs for which each of its scheme members are responsible. It has failed in its obligation under Regulation 23 by its continuing refusal to finance - on any terms - the collection and treatment operations which have been carried out by EWRG in relation to the waste lamps of the First to Fourth Defendants.
- (f) The continuing breach of Recolight's duties under the WEEE Regulations is causing EWRG severe harm, since Recolight is an indispensable trading partner for the purposes of financing EWRG's business activities in the collection and treatment of waste lamps in the United Kingdom. The continuing refusal by Recolight to finance EWRG's functions in collecting and treating the waste lamps of Recolight's producer members is not sustainable.
- (g) Recolight's conduct has been and is a breach of its duty to EWRG under Art. 102 TFEU and/or section 18 of the Competition Act 1998. Its purpose and/or ultimate effect is to weaken EWRG and/or force EWRG out of business, as referred to at paragraph 74 above and thereby to reduce competition in the collection and treatment of waste lamps in the UK. The termination of existing arrangements business at the beginning of July 2009 with EWRG in particular brought to an end (and was designed to bring to an end) arrangements which Recolight considered were assisting

EWRG to provide a free of charge lamp, general WEEE, and battery collection service to Edmundsons, Newey & Eyre, Senate and WF Electrical, and thereby to enable EWRG to secure the business of those electrical wholesalers.

(h) Recolight has breached a duty to finance EWRG's activities at least at the level which Recolight pays to other recycling companies for evidence notes.

105B. Recolight cannot objectively justify its refusal to deal on the basis of health and safety and environmental concerns relating to EWRG's treatment activities. These are not proper objective justifications since:

(a) Recolight has continued to purchase evidence notes for household waste from EWRG, without interruption, throughout 2009 up to November 2011. This includes treatment using all three plants at Harlow, Glasgow and Huddersfield, for material periods and including 2011.

(b) Recolight has, until the end of 2010, used EWRG's services without demur in relation to the treatment of waste lamps at the Glasgow plant, under the tender contract arrangements.

(c) The First Defendant has continued to use EWRG for the collection and treatment of their waste lamps which have not been placed on the market.

(d) The Fourth Defendant has continued to use EWRG for collecting and treating lamps on which it has paid a recycling charge to Recolight, and on terms that payment for EWRG's services is settled by the compliance scheme.

(e) EWRG has in 2011 reluctantly submitted to the audit upon which Recolight insists for its Harlow and Glasgow plants. The Glasgow plant was found to be "satisfactory" and to meet its minimum requirements in all respects. The Harlow plant was found to be satisfactory in all respects save one minor point, namely that the plant's PPC permit, issued on 22 November 2005, requires certain progressive improvements be made, and the auditors considered it a "major deficiency" that these had not been made - notwithstanding the Environment Agency has not, in six years,

expressed any concern on this point, nor indeed was it a matter of concern to Recolight in 2007-2009.

- (f) EWRG's activities have, moreover, also been subject to audits conducted by the wholesalers who contract with it, in pursuance of their obligations under sections 33 and 34 of the Environmental Protection Act 1990, the Environmental Protection (Duty of Care) Regulations 1991 and the Hazardous Waste (England and Wales) Regulations 2005, which ought to be considered equivalent guarantees to an audit by Recolight for these purposes.
- (g) By reason of the aforesaid, Recolight's refusal to purchase evidence notes has not been justified even by reference to Recolight's own "audit" arrangements, which it has decided to overlay on top of the general regulatory arrangements by the public authorities.
- (h) In this connection, the Claimants also refer to and rely on the matters set out at paragraphs 113 to 116 below, under the heading "Temporary deficiencies at Harlow and Glasgow plants".
- (i) Further and in any event, a dominant undertaking cannot justify its abusive refusals to deal by claiming that the behaviour is intended to enforce or enhance regulatory standards. This is a matter for the competent public authorities, not the dominant undertaking.

105C. Apart from a few days at the end of 2008 when the Environment Agency suspended EWRG's approval as an Approved Authorised Treatment Facility, EWRG has operated Approved Authorised Treatment Facilities with which Recolight should have been prepared to deal, on fair terms.

~~106. The Big Four charge these wholesalers the "recycling charge" on the sale of new lamps so that wholesalers legitimately do not expect to have to pay twice for the service.~~

~~107. In the case of Rexel Senate which EWRG acquired as a new direct customer in January 2009, Recolight has refused to pay EWRG for this service.~~

~~108. Recolight is actively seeking to encourage Rexel Senate to return to Recolight for its recovery and recycling services.~~

- ~~109. Recolight has from the outset of its dealings with EWRG refused to pay for or make any contribution towards the collection or treatment of waste lamps arising via CEF. This is so despite the fact that CEF has since 1 July 2007 paid to Recolight scheme members as “recycling charges” approximately £500,000, for which it has in these circumstances received no value whatsoever.~~
- ~~110. Recolight has adopted a similar stance in relation to waste lamps arising via the wholesaler Hagemeyer.~~
111. Further, Recolight has maintained this stance even in respect of 3 transactions on 30 April ~~2008~~ 2009 in which it in fact agreed contractually to acquire from EWRG paper evidence relating to approximately 335 tonnes of lamp waste which to its knowledge had arisen *via* CEF and/or Hagemeyer branches at a total price of ~~approximately £400,000~~ £411,596.21.

PARTICULARS

<u>Huddersfield</u>	<u>£ 66,636.35</u>
<u>Harlow</u>	<u>£231,442.75</u>
<u>Glasgow</u>	<u>£ 59,830.65</u>
	<u>£359,909.75</u>
<u>VAT @ 15%</u>	<u>£ 53,686.46</u>
	<u>£411,596.21</u>

EWRG provided the evidence to Recolight and Recolight used the evidence as part of its annual returns to the Environment Agency pursuant to the Regulations. Recolight has nevertheless invoked the provenance of the waste as a ground for withholding from EWRG all payment in respect of these transactions. ~~Recolight has further falsely informed Rexel Group (of which Hagemeyer is a part) that it has paid EWRG in respect of all collections made by EWRG from Hagemeyer.~~

- 111A. EWRG is accordingly entitled to the sum of £411,596.21 together with interest thereon pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 at the rate of 8.5% per annum amounting from 1 September 2009 to 23 December 2009 (the date of issue of these proceedings) to the sum of £10,927.03 and accruing thereafter at the daily rate of £95.85. Alternatively EWRG claims interest at the same rate and in the same amount pursuant to section 35A of the Supreme Court Act 1981.

111B. EWRG is further entitled in respect of the 3 above-mentioned transactions to compensation in the fixed sum of £100 per transaction pursuant to section 5A of the Late Payment of Commercial Debts (Interest) Act 1998, in the total sum of £300.

111C. In the circumstances more particularly described at paragraphs 70 to 73 of the reply, on 3 July 2009 Recolight terminated altogether any support of any of the Existing Arrangements business of EWRG and has since refused to purchase from EWRG any evidence arising out of such business at any price.

112. Recolight's behaviour in this respect is unfair. It is also discriminatory as it continues to engage with other recyclers in respect of direct existing customers business. In the premises, it amounts to an abuse of dominance. In relation to the three transactions on 30 April 2009, Recolight's behaviour is also in breach of contract.

(vi)

(iv) **temporary deficiencies at Harlow and Glasgow plants**

113. EWRG has three plants at Harlow, Huddersfield and Glasgow. Each is a state-of-the-art treatment plant for all types of waste lamps and is authorised under the WEEE Regulations as a treatment facility. Huddersfield is also a plant for treatment of all types of WEEE.

114. During 2008 and 2009 Recolight expressed concerns about the environmental audits that it carried out at the Harlow and Glasgow plants. On 26 June 2009, it used this as an excuse to withhold and withdraw business from EWRG in respect of the Harlow plant. In particular, Recolight purported to rely on an audit of the Harlow plant which had taken place on 25 June 2009. It had in fact decided to withdraw and withhold business in respect of that plant before the audit had taken place, as shown by an email sent at 8.32am on 25 June 2009 from Nigel Harvey to Alex Hawkins. The email set out the draft of a letter to be sent to EWRG subsequently, stating: "Following the results of the audit of your Harlow facility yesterday, and of an internal review of the performance of your company, we have concluded that Lampcare has failed to implement the operational and other changes we need...." On 16 October 2009, it raised concerns regarding the Harlow plant specifying numerous matters that needed to be addressed before it was able to consider that facility for use in the treatment of waste lamps. Such a stance is specious, since (a) (as Recolight well knew) EWRG was perfectly

capable if necessary of continuing to treat all waste lamps at its Glasgow plant alone – a process with which Recolight was manifestly content since it had in June 2009 appointed EWRG to service Recolight’s Scottish regional business in the knowledge of the results of the November 2008 audit of the Glasgow plant; and (b) in view of the matters set out at paragraph 105B above.

115. In the result, Recolight has since July 2009 denied EWRG all business save that in Scotland, an area which is relatively expensive and unpopular to service because of large transport costs and the relatively small magnitude of business to be had. The overall result, as Recolight well foresaw and intended, is that EWRG has changed from a position of market leader to seeing its business languish in a growing market.
116. Recolight’s behaviour in this respect toward EWRG is unfair and unwarranted in the circumstances. Moreover, it is discriminatory in that other recyclers contracted by Recolight are engaged without any similar plant and, indeed, some merely crush the lamps on site, with all the inherent dangers ranging from broken glass to escape of mercury vapour.

(v) Misappropriating containers and their valuable contents belonging to EWRG, and failing to pay charges for containers leased by EWRG to Recolight, since September 2010

116A. Since September 2010, Recolight has misappropriated containers belonging to EWRG (including the lamp waste contents), and has failed to pay charges for containers leased by EWRG to Recolight: see paragraphs 46 - 70 of the counterclaim in Claim HC11C00495. This conduct has contributed to damaging EWRG commercially. It is averred that the motivation for this conduct is the matters set out at paragraph 74(5) above.

~~(vii) delayed payment of sums due~~

~~117. During 2007, Recolight told EWRG that, in view of the volume of business, it required consolidated invoicing. Recolight additionally required EWRG to provide at its own considerable expense a financial audit of its business invoiced to Recolight. Recolight have since declined to pay any part of extremely large invoices until every single query has been resolved even though it was in respect of a small value and despite EWRG’s quick response to all queries.~~

~~118. By mid-March 2008 unpaid invoices amounted to approximately £865,000, causing EWRG significant cash-flow problems. Other recyclers are subject by Recolight to only a small selection of auditing on a random basis. In May of 2009 unpaid invoices totalled approximately £800,000 (including the disputed transactions referred to at paragraph 111 above).~~

~~119. Such behaviour is unfair and/or discriminatory.~~

~~INFRINGEMENT OF ARTICLE 101 TFEU / CHAPTER 1 OF THE COMPETITION ACT 1998: AGREEMENT BETWEEN THE FIRST TO FOURTH DEFENDANTS AND RECOLIGHT TO TAKE STEPS TO WEAKEN AND EXCLUDE EWRG~~

~~119. Further or alternatively to the case on abuse of dominance set out at paragraphs 74 to 118 above, the conduct of Recolight was the result of an unlawful agreement between the First to Fourth Defendants and Recolight, contrary to Article 101 TFEU and/or section 2 of the Competition Act 1998.~~

~~INFRINGEMENT OF ARTICLE 82 EC/SECTION 18 OF THE COMPETITION ACT 1998; RECOLIGHT'S ABUSIVE DEALINGS WITH CEF~~

~~119A. On 7 March 2007 in the factual circumstances more particularly set out in paragraph 46 of the reply (and in terms admitted in paragraph 72(a) of the defence and paragraph 8.1 of the rejoinder) Recolight refused to include CEF branches in its Recolight Network of its collections because CEF insisted that those collections should be made by EWRG and subject to prior satisfaction of CEF's obligations under the Regulations.~~

~~119B. This constituted an abuse by Recolight of its above-mentioned dominant position alternatively an abuse by Recolight and/or the First to Fourth Defendants of their above-mentioned position of joint dominance.~~

~~119C. By reason of the above, CEF has suffered and/or will suffer loss and damage in the manner set out in Item 2 of Part 2 of the Claimants' Amended Schedule of Loss annexed hereto.~~

RECOLIGHT'S DECISION TO COLLECT ONLY LAMPS MANUFACTURED BY ITS MEMBERS

120. In or around July 2009 Recolight ~~has~~ ordered that only waste lamps manufactured by its members should be collected in Recolight containers.
121. This constitutes an abuse of Recolight's dominant position, in particular by limiting production and/or markets to the prejudice of consumers contrary to Article 82(b) EC and section 18(1)(b) of the Competition Act 1998.
- ~~122. Alternatively this constitutes an abuse of the position of joint dominance held by the First, Second, Third and Fourth Defendants.~~

PARTICULARS OF ABUSE

123. Recolight's members account for approximately 85% 90% of the market for lamps in the United Kingdom.
124. In practice, where lamp waste is collected, this is on the occasion of a sale of new lamps, for example, when a building is being refurbished. Lamps have a life span of a few years, at most.
125. In dominating the collection of waste lamps, Recolight is seeking to ensure that only lamps produced by its members will be used in future.
126. It is generally impractical for two or more collection containers to be used at the same time. Recolight's requirement that only its members' lamps be collected would inexorably lead to wholesalers declining to sell other brands and would consequently limit sales of those brands to the prejudice of consumers.
- 126A. Whilst in or around October 2009 Recolight purported to withdraw its above-mentioned order, it indicated (in its October 2009 newsletter) that it might revisit that decision at the end of 2010. In any event, the mere general statement of an intention to withdraw that order would not of itself ensure that those to whom it was originally directed would either learn of its withdrawal or thereafter act as if the original order had not been given.

127. The Second Claimant, being a producer of Edison lamps, is likely to suffer loss and damage as a result of this breach of Article 82-EC 102 TFEU and/or section 18 of the Competition Act 1998.

PARTICULARS

127A. The natural reaction of large purchasers of lamps to the above-mentioned order would be and in fact was to ensure that thereafter they purchased new lamps produced by members of Recolight to avoid potential difficulties of end-of-life collection which might otherwise arise.

127B. Wholesalers of lamps were aware of the above-mentioned order and of its impact upon the views of purchasers and in turn would and in fact did manifest a preference thereafter to stock lamps produced by members of Recolight.

127C. The Second Claimant is unable to identify or quantify any resulting actual loss or damage to itself to date and accordingly does not pursue any claim in respect thereof. The Given Recolight's indication that it might revisit this issue the Second Claimant does however seek declaratory relief as to future conduct in the terms set out in the prayer for relief below.

127D. Further or alternatively the fact of such conduct is material to and probative of the allegation of abuse of a dominant position by Recolight. and/or the First, Second, Third and Fourth Defendants.

127E. The Second Claimant's case is that the immediate occasion for the above-mentioned order was the withdrawal by the company Megaman Limited from its membership of the Recolight scheme; indeed Recolight's July 2009 newsletter gave the above-mentioned order in the following terms:

“Check which lamps you are collecting!

Please be aware that Megaman has chosen to opt out of the Recolight compliance scheme and is no longer a member. Therefore it is crucial that you ensure you are not collecting or accepting lamps for collection which are not covered by our scheme. For a full list of members, which includes all the big lamp producers, Philips, GE, Osram and Sylvania [sic] please see our website”

127F. As already pleaded (see paragraphs 12 and 25(3) of the reply) Megaman had during its membership protested at the conduct of Recolight in terms similar to some of the complaints of the Second Claimant herein. The conduct of Recolight upon Megaman's withdrawal from membership:

(a) relied upon the dominant position occupied by Recolight and/or the First to Fourth Defendants and was an abuse of it and is thus probative of the propensity of the Defendants Fifth Defendant to act in such a way;

(b) directly affected the Second Claimant and indeed all other producers of lamps who were not members of the Recolight scheme, since the terms of the above-mentioned order were wide enough to embrace all of them.

NO OBJECTIVE JUSTIFICATION FOR ABUSIVE BEHAVIOUR

128. While the issue of objective justification is for the Defendants to raise and prove, the Claimants aver that there is no objective or proportionate justification for such actions as described above.

129. On the contrary, the reasons for the action taken by Recolight are as set out in paragraph 74(5) above. ~~in order to permit Recolight to take full control of the market in recycling waste lamps in the United Kingdom. Recolight has attacked EWRG as described above primarily because EWRG has sought to maintain and expand its business directly with wholesalers, in particular the new direct arrangements with Rexel Senate.~~

130. ~~Further, or in the alternative, Recolight's actions in so far as they concern the collection of lamps other than those produced by Recolight's members are intended to allow Recolight's members, in particular the First, Second, Third and Fourth Defendants, to increase even further their share of the lamp market in the United Kingdom.~~

EFFECT ON TRADE

131. The conduct outlined above, on the part of each of the Defendants, has an appreciable effect on trade between Member States of the European Union for the purposes of Articles 101 and 102 TFEU 81 and 82 of the EC Treaty.

132. Lamps are mostly manufactured in the Far East, but there remains some manufacturing within the European Union, including in Poland and Hungary and some Scandinavian countries. Lamps manufactured in the Far East are generally generic and are branded only after production with the name of a particular producer. Moreover, the distribution of lamps takes place across borders within the European Union.
133. Waste lamps disposed of in the United Kingdom may be and are sent to the other Member States for recycling.
134. Further or alternatively, the conduct outlined above has an effect on trade in the United Kingdom for the purposes of sections 2 and 18 of the Competition Act 1998.

TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

135. In so far as any of the alleged infringements of Article 81 EC or Article 82 EC continue on or after 1 December 2009, references in these Particulars of Claim to Article 81 EC and Article 82 EC are to be read as referring to Article 101 and Article 102 respectively of the Treaty on the Functioning of the European Union.

CLAIMANTS' LOSS AND DAMAGE

136. As a result of the infringements of Articles 101 and 102 TFEU ~~81 and 82 EC~~ and/or Sections 2 and 18 of the Competition Act 1998, the Claimants have suffered loss, for which they claim damages. ~~The Claimants intend to provide full particulars of loss (which is continuing) in due course. The Claimants rely upon the Re-Amended Schedule of Loss annexed hereto, which relates to heads of damages rather than debt.~~
- ~~136A. For the avoidance of doubt, the Claimants contend that, further or in the alternative to the more specific aspects of abuse pleaded above, the following items of loss claimed in the Amended Schedule of Loss were also caused by the general modus operandi of Recolight in further infringement of Article 82 EC/Article 102 TFEU:~~

PARTICULARS

Part 1- Losses of EWRG

Item 8 Loss of Container Rental Business

Item 9 Poaching of Customers

(in those instances, if any, where the loss of the customer was caused not by reason of any of the matters complained of at paragraph 94E above but simply by Recolight's general ability to defeat all competition in the market).

137. The Claimants further claim interest pursuant to section 35A of the ~~Supreme Court~~ ~~Senior Courts~~ Act 1981 on such damages as may be awarded at such rate and for such period as the Court deems fit.

EWRG CLAIM IN DEBT RE APRIL 2009 TENDER ACCOUNT

137A. In respect of the April 2009 tender account Recolight has withheld from EWRG the sum of £6,489.08 on the false ground that an agreed rate reduction was operative from 1 April 2009 rather than (as orally agreed between Alan Jackson of EWRG and Eddie Taylor of Recolight) 1 May 2009.

137B. EWRG is accordingly entitled to the sum of £6,489.08 together with interest thereon pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 at the rate of 8.5% per annum amounting from 1 June 2009 to 23 December 2009 (the date of issue of these proceedings) to the sum of £311.29 and accruing thereafter at the daily rate of £1.51. Alternatively EWRG claims interest at the same rate and in the same amount pursuant to section 35A of the Supreme Court Act 1981.

137C. EWRG is further entitled in respect of the above-mentioned transaction to compensation in the fixed sum of £100 pursuant to section 5A of the Late Payment of Commercial Debts (Interest) Act 1998.

138. The Claimants have complied with Sections III and IV of the Practice Direction - Pre-Action Conduct by an exchange of correspondence between their solicitors and those acting for the Defendants comprising a letter dated 23 October 2009 from the Claimants' solicitors, a reply dated 10 November 2009 from the

Defendants' solicitors and a response dated 15 December 2009. The Claimants' invitations therein to the Defendants to enter into discussions have not been the subject of any reply and the Defendants have made an outright rejection of the Claimants' claims.

AND THE CLAIMANTS CLAIM

- (1) A declaration that the arrangement whereby the First, Second, Third and Fourth Defendants procure their PCS services in respect of waste lamps in common and at a uniform and agreed charge per lamp by means of Recolight ~~the same fee to their customers as a "recycling charge" on the occasion of the sale of new lamps and pass the proceeds of that charge on to Recolight~~ constitutes an agreement between undertakings ~~or a concerted practice or a decision of an association of undertakings~~ which prevents, restricts or distorts competition within the meaning of Article 81 of the EC Treaty and, after 1 December 2009, Article 101 of the Treaty on the Functioning of the European Union and ~~Chapter I section 2~~ of the Competition Act 1998 ~~and is, accordingly, prohibited~~ and is accordingly prohibited, since it has resulted and continues to result in a situation whereby major lamp producers in the United Kingdom avoid competing with each other in respect of a significant element of their respective costs of supply of lamps, thereby raising prices to customers and consumers.
- (2) A declaration that the arrangement whereby the First, Second, Third and Fourth Defendants charge the same fee to their customers as a "recycling charge" on the occasion of the sale of new lamps constitutes an agreement between undertakings, or a concerted practice which prevents, restricts or distorts competition within the meaning of Article 81 of the EC Treaty and, after 1 December 2009, Article 101 of the Treaty on the Functioning of the European Union and Chapter I Section 2 of the Competition Act 1998.
- (2)
- (3) An injunction requiring Recolight to treat EWRG fairly and in a non-discriminatory manner in the award of contracts for the ~~recovery and recycling~~ collection and treatment of waste lamps.
- (4) A declaration that Recolight is

1. required by the WEEE Regulations to finance the collection and treatment by EWRG of relevant waste lamps of the First to Fourth Defendants arising as referred to in regulation 9 of the WEEE Regulations; and
 2. under a duty pursuant to section 18 of the Competition Act 1998 and/or Article 102 TFEU, as the dominant purchaser of collection and/or treatment services in the UK for waste lamps, to treat EWRG fairly and in a non-discriminatory manner in relation to the purchase of evidence notes relating to the collection and treatment by EWRG of waste lamps.
- ~~(3) An injunction requiring Recolight to accept and pay for the recovery and recycling of waste lamps regardless of their producer.~~
- (4A) Damages on behalf of the First Claimant, to be assessed, together with interest thereon pursuant to section 35A of the Senior Courts Act 1981
- ~~(4)~~
- (5) An order for repayment by the First, Second, Third and Fourth Defendants; respectively, to CEF of the sums particularised in Schedule 1 hereto Damages on behalf of the Second Claimant, to be assessed together with interest thereon pursuant to section 35A of the Supreme Court Senior Courts Act 1981.
- ~~(5) A declaration that each of the First, Second, Third and Fourth Defendants is obliged to continue to make supplies of lamps to CEF on normal trading terms and at normal prices but without the requirement that CEF should pay any additional “recycling charge” referable to the WEEE Regulations.~~
- (5A) A declaration that the repromulgation by Recolight of an order that only waste lamps produced by its members should be collected in its containers would be unlawful as an abuse of dominant position by Recolight contrary to Article 102 TFEU and section 18 of the Competition Act 1998 and/or the First to Fourth Defendants.
- (5B) under paragraph 111A above the sum of £411,596.21 with interest of £10,927.03 to the date of issue of these proceedings and accruing thereafter at the daily rate of £95.85 until judgment or sooner payment
- (5C) under paragraph 111B above the sum of £300;

(5D) under paragraph 137B above the sum of £6,489.08 with interest of £311.29 to the date of issue of these proceedings and accruing thereafter at the daily rate of £95.85 until judgment or sooner payment

(5C) under paragraph 137C above the sum of £100;

~~(6) Damages to be assessed.~~

~~(7) Interest.~~

(8) Costs.

(9) Further or other relief

**CONOR QUIGLEY Q.C.
CHARLES MORGAN**

**CONOR QUIGLEY Q.C.
CHARLES MORGAN**

**CONOR QUIGLEY Q.C.
CHARLES MORGAN
ROBERT O'DONOGHUE**

**JON TURNER Q.C.
CHARLES MORGAN
ROBERT O'DONOGHUE**

~~Dated the 4th day of August 2010~~

~~Dated the 4th day of March 2011~~

Dated the 22nd day of December 2011

Paul Dodds Solicitors 70 High Street East Wallsend Tyne & Wear NE28 7RH
Solicitors for the Claimants

Statement of truth

The First Claimant believes that the facts stated in these re-amended particulars of claim are true.

Signed

Name

Position

Dated

The Second Claimant believes that the facts stated in these re-amended particulars of claim are true.

Signed

Name

Position

Dated

SCHEDULE 1

SUMS PAID BY CEF TO THE BIG FOUR AS RECYCLING CHARGES ON LAMPS AND LUMINAIRES

Between 1 July 2007 and ~~30 September 2009~~ 31 December 2010 the sums paid by CEF to each of the Big Four as “recycling charges” levied on the sale of new lamps was as follows:

Philips Electronics UK Ltd.	£11,848.02	<u>£22,682.95</u>
GE Lighting Ltd.	£72,444.40	<u>£107,650.64</u>
Osram Ltd.	£75,937.14	<u>£103,212.69</u>
Havells Sylvania UK Ltd.	£240,853.20	<u>£272,520.95</u>

~~Between 1 July 2007 and 30 September 2009 the further sums paid by CEF to the Fourth Defendant as “recycling charges” levied on the sale of new luminaires was £147,362.87.~~

CEF has continued since 1st October 2009 to make similar payments of “recycling charges” on purchases of new lamps and luminaires from each of the Defendants and is still continuing to do so. ~~and will particularise and seek recovery of the further sums paid in due course.~~

Claim No. HC09CO4852
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

BETWEEN:-

- (1) ELECTRICAL WASTE
RECYCLING GROUP LIMITED**
 - (2) CITY ELECTRICAL
FACTORS LIMITED**
- Claimants**

- and -

- (1) PHILIPS ELECTRONICS
UK LIMITED**
 - (2) GE LIGHTING LIMITED**
 - (3) OSRAM LIMITED**
 - (4) HAVELLS SYLVANIA
UK LIMITED**
 - (5) RECOLIGHT LIMITED**
- Defendants**

**RE-RE-AMENDED PARTICULARS OF
CLAIM**

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