Neutral citation [2021] CAT 8

<u>IN THE COMPETITION APPEAL TRIBUNAL</u>

Case No: 1365/1/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

<u>19 April 2021</u>

Before:

ANDREW LENON QC
(Chairman)
MICHAEL CUTTING
PROFESSOR PAULINE WEETMAN

Sitting as a Tribunal in England and Wales

BETWEEN

(1) ROLAND (U.K.) LIMITED

(2) ROLAND CORPORATION

<u>Appellants</u>

-v-

COMPETITION AND MARKETS AUTHORITY

<u>Respondent</u>

Heard remotely on 9 and 10 December 2020

JUDGMENT

APPEARANCES

Daniel Piccinin (instructed by Simmons & Simmons LLP) appeared on behalf of the Appellant.

Ms Marie Demetriou QC and Mr David Bailey (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

Note: Excisions in this Judgment (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

CONTENTS

A. INTRODUCTION

1. The Appellants (together "Roland") have appealed under section 46 of the Competition Act 1998 ("the 1998 Act") from the decision of the Respondent (the "CMA") to impose a penalty of £4,003,321 for Roland UK's engaging in online resale price maintenance ("RPM") relating to electronic drumkits and associated products in the period from 7 January 2011 to 17 April 2018 (the "Decision"). Roland originally settled with the CMA, admitting both the infringement and the amount of the penalty. On this appeal Roland did not challenge the findings of primary fact or the overall finding of infringement. The appeal related exclusively to the level of the penalty which Roland contended should be reduced to £400,000.

2. Roland advanced two grounds of appeal. Ground 1 was that in its calculation of the penalty the CMA overstated the seriousness of the infringement. Ground 2 was that the discount for leniency which the CMA granted was too low and failed to reflect the fact of Roland's early cooperation with the investigation.

3. The CMA opposes both grounds. In addition, the CMA has applied to increase the penalty by removing the 20% discount which the CMA granted to Roland as a term of its settlement agreement. That application is resisted by Roland.

B. FACTUAL BACKGROUND

(1) Roland

4. Roland UK is a business based in Swansea South West Wales which is active in the supply of Roland musical instruments ("MI") in the United Kingdom. Roland UK is a private limited company registered at Companies House with a turnover of £24 million in the financial year ending December 2019 and with average annual profit in the period 2017 – 2019 of just over £400,000. Roland UK's ultimate parent company is Roland Corporation a global corporation headquartered in Hamamatsu, Japan. Roland Corporation had a turnover of just over £[…][✂] million in the financial year ending in December 2018.

(2) The Electronic Drums sector

5. According to the Decision, the musical instrument sector in the United Kingdom was estimated to be worth £428 million in 2019/2020. There were […][✂] enterprises in the UK's MI sector as a whole. Four resellers accounted for just under […][✂] of the total estimated MI retail industry revenue in 2019/20.

6. Roland UK sells electronic drum kits, components and accessories for drum kits ("the Relevant Products"). An electronic drum kit consists of a set of drum pads mounted on a stand or rack in a configuration similar to that of an acoustic drum kit layout but with rubberised or specialised cymbals. The primary sound of electronic drum kits is synthesised. Sensors on the drum pads generate an electronic signal when struck which is converted into a synthesized sound associated with the struck pad.

7. According to the Decision, Roland UK has at least a 10% to 15% share of supply of electronic drum kits in the UK. It faces competition for sales of electronic drum kits from 19 main competitors.

8. Roland UK sells almost exclusively through its selective distribution network of specialist musical instrument resellers which have entered Selective Distribution Agreements with it ("MI Resellers"). The MI Resellers ranged in number from 93 to 157 during the infringement period. They do not supply Roland instruments on an exclusive basis and market Roland's products alongside those of its competitors.

9. The Selective Distribution Agreements permit MI Resellers to sell Roland UK's drum kits provided they abide by a number of requirements including […][✂].

10. The 24 MI Resellers on which the CMA's investigation focused accounted for approximately […][✂] of Roland's UK sales of drum kits in 2017 by value. At the relevant times, the Reseller to which the Decision specifically relates ("Reseller 1") operated through a network of […][✂] shops and accounted for approximately […][✂]% of Roland's UK sales of Relevant Products.

(3) Online Sales

11. MI Resellers compete on several aspects including price, range, customer service, location and store promotions. […][✂], they are all permitted to advertise and sell online as well. The average proportion of online sales over the period 2011 to 2018 varied from 36% to 39%. Reseller 1's online presence was smaller. Its online sales were 15% of its business in 2013/1014, growing to 35% in 2017.

(4) The CMA's Investigation

12. The CMA's investigation under section 25 of the 1998 Act into a suspected competition law infringement by Roland UK began with an unannounced inspection at Roland UK's business premises on 17 April 2018. On the same day, the CMA issued compulsory information requests to Roland and to twelve of Roland's resellers requiring production of information and documents.

13. On the following day (18 April 2018), Roland indicated that it wished to apply for the CMA's leniency programme and made two senior employees available for interview. The CMA granted a provisional leniency marker. The investigation continued during the remainder of 2018, 2019 and early 2020. As part of its application for leniency, Roland made a number of oral proffers and supplied supporting documents to the CMA. From time to time, the CMA made requests for information which were responded to by Roland UK.

14. In late 2019 the CMA decided to focus its assessment on Roland's conduct with Reseller 1 and the Decision makes no findings in respect of MI Resellers of the Relevant Products other than Reseller 1.

15. On 3 March 2020 the CMA wrote to Roland to advise it of the decision to grant leniency and the level of leniency discount available. Following written submissions from Roland and a response from the CMA, on 18 March 2020 the CMA and Roland signed a leniency agreement confirming Roland's acceptance of the level of leniency discount proposed by the CMA.

16. Also on 3 March 2020, the CMA provided Roland with draft terms of settlement and a settlement timetable. On 20 March 2020 Roland made submissions to the CMA about the penalty. On 24 March 2020 Roland was sent the Statement of Objections. On 22 April 2020 Roland was sent a draft penalty calculation which included both a 20% leniency discount and a 20% settlement discount. Roland responded to the draft calculation in writing and at a settlement meeting on 29 April 2020. The final penalty calculation, which had been marginally reduced in the light of Roland's submissions, was sent to Roland on 13 May 2020 and signed on behalf of Roland on 20 May 2020 (the "Terms of Settlement").

17. Under the Terms of Settlement Roland admitted the facts and allegations of the infringement set out in the Statement of Objections and subsequently in the Decision and accepted liability to for the penalty of £6,255,189 reduced by the leniency discount and settlement discount to £4,003,321. On 21 May 2020 the CMA confirmed that it would settle the case with Roland and that it intended to proceed to issue an infringement decision. The Decision was issued on 29 June 2020.

(5) The Decision

18. The Decision sets out the CMA's conclusion, following the investigation, that Roland had infringed the prohibition in section 2(1) of the 1998 Act and/or Article 101 of the Treaty on the Functioning of the European Union ("the TFEU") by entering into a resale price maintenance agreement with Reseller 1, in respect of online sales of the Relevant Products by Reseller 1, that Reseller 1 would not advertise or sell online the Relevant Products below a price specified by Roland UK from time to time (the Minimum Price). This agreement had as its object the prevention, restriction or distortion of competition within the UK and/or between EU Member States; it may have affected trade within the UK and/or between EU Member States; and it lasted from 7 January 2011 to 17 April 2018 (the Relevant Period).

19. As appears from the Decision as a whole, however, this conclusion was not reached in a vacuum. The Decision records that Roland UK operated a wide-ranging pricing policy the purpose of which was to ensure that MI Resellers would not advertise or sell the Relevant Products online at prices below the minimum prices specified by Roland UK

from time to time ("the Roland Pricing Policy"). The CMA's view was that Roland UK intended that the Roland Pricing Policy should apply across all or at least the vast majority of its MI Reseller network including to Reseller 1.

20. The Decision includes the following findings of fact in relation to the Roland Pricing Policy.

(1) Roland's commercial aims in introducing the Roland Pricing Policy were twofold. First, it was designed to enable Roland UK's MI Resellers to achieve attractive margins through the maintenance of high and stable pricing, thus increasing the attractiveness of the Roland brand and encouraging MI Resellers to stock and sell the Relevant Products. Second, it aimed to help Roland UK secure, maintain and/or improve its UK market position in the Relevant Products relative to its competitors, in particular by maintaining the brand value of the Relevant Products.

(2) The Roland Pricing Policy was communicated through price lists Roland UK sent to its MI Resellers from time to time which specified the trade price at which MI Resellers could expect to purchase the Relevant Products from Roland UK, and set out the Minimum Price at or above which MI Resellers were expected to advertise and sell the Relevant Products online (thereby revealing the margin a MI Reseller could expect to make).

(3) The Roland Pricing Policy applied to the online pricing of all the Relevant Products and to all MI Resellers. Enforcement of the Roland Pricing Policy was focused on online pricing.

(4) Roland UK sought to monitor the Roland Pricing Policy during the Relevant Period by:

(i) regularly issuing new price lists and calling or visiting MI Resellers when new prices lists were issued with a view to ensuring compliance with the relevant new Minimum Price;

(ii) monitoring resale prices reactively, through MI Resellers reporting where other MI Resellers were not adhering to the Roland Pricing Policy; and

(iii) monitoring resale prices on a regular and proactive basis, through a subscription to InsiteTrack which provided bespoke automated daily pricing reports identifying MI Resellers who were pricing below the Minimum Price.

(5) InsiteTrack was an important monitoring and enforcement tool as it could highlight price reductions quickly and so allow for swifter intervention by Roland UK to enforce the Roland Pricing Policy. The InsiteTrack reports were sent daily to all key individuals at Roland UK involved in the monitoring and enforcing of the Roland Pricing Policy.

(6) In each instance of monitoring, Roland UK would enforce the Roland Pricing Policy by contacting the MI Resellers who were found or suspected not to be adhering to the Roland Pricing Policy and encouraging them to increase their prices to at least the Minimum Price.

(7) Once one MI Reseller changed its price, changes by other MI Resellers would follow immediately as, thanks to the internet, it would spark a chain reaction across Europe.

(8) Roland UK regularly considered imposing sanctions, and on occasions did impose sanctions, on MI Resellers for not adhering to the Roland Pricing Policy, in the form of withdrawal of discounts.

(9) Roland UK understood that its communications and interactions with its network of MI Resellers pertaining to the Roland Pricing Policy were not legal. MI Resellers had alerted Roland UK to the possibility that the implementation and enforcement of the Roland Pricing Policy was illegal and Roland UK's staff, in the light of their knowledge of the illegality of their conduct, undertook measures to conceal it. They tried to avoid creating written records and either

communicated with MI Resellers orally or used coded language to conceal communications regarding the Roland Pricing Policy and at times deleted written communications from MI Resellers.

(10) Throughout the Relevant Period, Reseller 1 generally complied with the Roland Pricing Policy as the result of a credible threat of sanctions. On multiple occasions throughout the Relevant Period, Reseller 1 reported other MI Resellers to Roland UK for advertising and/or selling the Relevant Products online at a price below the Minimum Price. This further confirmed that there was an understanding between Reseller 1 and Roland UK that the Roland Pricing Policy applied to the vast majority of MI Resellers, including Reseller 1.

21. In the section of the Decision setting out its legal assessment of Roland UK's agreement and/or concerted practice with Reseller 1, the CMA stated that it had reasonable grounds for suspecting that at least 24 other MI resellers of the Relevant Products were subject to the Roland Pricing Policy, and that MI Resellers generally complied with Roland UK's requests to adhere to the Minimum Price. However, for what were said to be reasons of administrative efficiency, and in accordance with its published Prioritisation Principles, the CMA decided to focus its findings on Reseller 1 as one of the numerous MI Resellers of the Relevant Products in order to show the existence of an agreement and/or concerted practice with Roland UK.

22. The CMA considered that the Roland Pricing Policy could only be effective in its aim of protecting MI Resellers' margins if there was general adherence to it by the vast majority of MI Resellers making online sales of the Relevant Products. While some MI Resellers occasionally sold the Relevant Products online below the Minimum Price specified by the Roland Pricing Policy, the evidence in the CMA's possession showed that overall adherence to the Roland Pricing Policy by MI Resellers was high. Based on this evidence, the CMA considered that many MI Resellers were willing to comply with the Roland Pricing Policy and other MI Resellers who may have wanted to discount online to remain competitive on price had little choice but to comply although the CMA made no findings in respect of MI Resellers of the Relevant Products, other than Reseller 1.

(6) The CMA's calculation of the Penalty

23. In accordance its published Penalty Guidance referred to at paragraph 27 below, the CMA adopted a six-step approach to the calculation of Roland's penalty. The six steps are as follows:

    (1) Calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking.

    (2) Adjustment for duration.

    (3) Adjustment for aggravating or mitigating circumstances.

    (4) Adjustment for specific deterrence (i.e., the need to deter Roland itself from further infringements) and proportionality.

    (5) Adjustment if the maximum penalty of 10% of worldwide turnover of the undertaking is exceeded and to avoid double jeopardy.

    (6) Adjustment for leniency and/or settlement discounts.

24. In summary, the CMA applied the steps as follows:

    (1) At Step 1, the CMA applied as a starting point a rate of 19% of Roland UK's relevant turnover. That percentage was the focus of Roland's first ground of appeal.

    (2) At Step 2, the CMA chose a duration multiplier of 5.5. No challenge was made to this step.

    (3) At Step 3, the CMA applied an uplift of 15% for the involvement of senior employees, a further uplift of 10% for having committed the infringement intentionally and a discount of 10% for Roland's efforts to ensure future compliance with competition law. No challenge was made to this step.

(4) The CMA made no adjustment at Step 4 for specific deterrence and proportionality. Roland's first ground of appeal (that the penalty is excessive in light of the nature and scope of the infringement) concerned this step as an alternative to the adoption of a different starting point at Step 1.

(5) No adjustment needed to be made at Step 5 to prevent the statutory cap of 10% of global turnover from being exceeded.

(6) At Step 6, the CMA first applied a 20% discount for settlement. No challenge is made to that. In relation to leniency, it granted a 100% discount for the period 7 January 2011 to 31 December 2012 and a 20% discount for the remainder of the period. The 20% discount was the subject of Roland's second ground of appeal.

C. THE RELEVANT LEGISLATION AND GUIDANCE

25. Section 36 of the 1998 Act, as amended, provides as follows:

> (1) On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 101(1), the CMA may require an undertaking which is a party to the agreement to pay the CMA a penalty in respect of the infringement.
>
> …
>
> (3) The CMA may impose a penalty on an undertaking under subsection (2)… only if the CMA is satisfied that the infringement has been committed intentionally or negligently by the undertaking.
>
> …
>
> (7A) in fixing a penalty under this section the CMA must have regard to –
>
> (a) the seriousness of the infringement concerned, and
>
> (b) the desirability of deterring both the undertaking on whom the penalty is imposed and others from-
>
> (i) entering into agreements which infringe the Chapter I prohibition or the prohibition in Article 101(1) or
>
> (ii) engaging in conduct which infringes the Chapter 2 prohibition or the prohibition in Article 102.

> (8) No penalty fixed by the CMA under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State).

26. The relevant order referred to in section 36(8) is the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259). That provides that the turnover of an undertaking for the purposes of section 36(8) is the applicable turnover for the business year preceding the date on which the decision of the CMA is taken or, if figures are not available for that business year, the one immediately preceding it.

27. Section 38 of the 1998 Act requires the CMA to prepare and publish guidance as to the appropriate amount of any penalty in respect of an infringement of the Chapter I prohibition or the prohibition in Article 101(1). That guidance must be approved by the Secretary of State and, according to section 38(8), when setting the amount of a penalty, the CMA and the Tribunal must have regard to the guidance for the time being in force under this section. The obligation on the part of the Tribunal to have regard to guidance was inserted into section 38 by the Enterprise and Regulatory Reform Act 2013. The current guidance issued by the CMA is the Guidance as to the appropriate amount of a penalty (CMA 73, April 2018) ("the Penalty Guidance").

28. Under Section 46 of the 1998 Act, a party in respect of whose conduct the CMA has made a decision may appeal against the decision. The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal. Paragraph 3(2) of Schedule 8 to the 1998 Act, as amended, provides that the Tribunal may impose or revoke, or vary the amount of, a penalty.

D. THE TRIBUNAL'S APPROACH TO PENALTY APPEALS

29. Both parties addressed us on the correct approach to be followed by the Tribunal on an appeal against a penalty imposed by the CMA under section 36 of the 1998 Act, and in particular as to the weight to be given by the Tribunal to the evaluative decisions of the CMA.

30. The Tribunal's role in section 46 appeals was considered by the Court of Appeal in *Flynn Pharma Limited and Pfizer Inc. v CMA* [2020] EWCA Civ 339. In the judgment which was the subject of the appeal, the Tribunal had found that the CMA had used the wrong methodology in concluding that certain pharmaceutical manufacturers had charged excessive prices and thereby abused their dominant position, contrary to section 18 of the 1998 Act and Article 102 of the TFEU. One of the issues in the appeal was whether the CMA should be afforded a substantial margin of appreciation with regard to the way in which it carried out its investigation. Green LJ held as follows:

> "135. To determine this ground of appeal it is necessary to be clear, from the outset, as to the difference between the judgment call that competition authorities must make under the Chapter II prohibition and article 102 FEU, and the powers of courts and tribunals called upon supervise the decisions of such authorities. The CMA wrongly elides two quite different principles. I accept that the CMA has a "margin of manoeuvre" (the terms used by the court in *Latvian Copyright* [2018] Bus LR 703) or "appreciation" or "discretion" (there is no magic in the different terms). This flows from the fact that the legal test under section 18(2)(a) of the CA 1998 and article 102(a)FEU is broad brush and necessarily confers a significant latitude upon a competition authority as to the methods and evidence bases that it resorts to in order to prove an abuse of unfair pricing. This much is well established in case law.
>
> 136. But this is quite different in principle to the question whether the Tribunal, as a supervisory judicial body, must pay deference to that exercise of judgment. Under the CA 1998 the Tribunal has a merits jurisdiction as to both law and fact and upon the basis of established case law it is not bound to defer to the judgment call of a competition authority. It is empowered under the legislation to come to its own conclusions on issues of disputed fact and law and can hear fresh evidence, not placed before the CMA, to enable it to do so. The conferral of a merits jurisdiction upon the Tribunal flows from important legal considerations relating to the rights of defence and access to a court, under fundamental rights such as article 6 of the Convention."

31. In a later passage, Green LJ pointed to the limits of the Tribunal's jurisdiction as an appellate jurisdiction:

> "141. Notwithstanding the above the jurisdiction of the Tribunal is not unfettered. This flows primarily from the fact that the appeal is not a de novo hearing but takes the decision as its starting, middle and end point. Under section 46 of the CA 1998 the appeal is "against, or with respect to," the decision and includes "whether" there has been an infringement. That focus upon the impugned decision is reflected in the procedural rules of the Tribunal. The appellant must identify the decision under appeal and set out why it is in error. The grounds must set out the "extent" to which the decision "is based on an error of fact or was wrong in law": see rule 9(4)(d) of the Tribunal Rules (SI 2015/1648) ("the Rules").

> 143. In *T-Mobile v Ofcom* [2009] Bus LR 794, para 31 it was observed that the task of the Tribunal was not to serve as a "fully equipped duplicate regulatory body waiting in the wings just for appeal". It is to "look into whether the regulator has got something materially wrong". The reference to materiality is important. The Tribunal should interfere only if it concludes that the decision is wrong in a material respect.
>
> 144. First, materiality is not an exact science. The Tribunal might be able to do no more than conclude that an error might make a difference to the final outcome or to some significant component thereof; certainty might not be possible.
>
> 145. Second, there is no fixed list of errors that the Tribunal might consider material. Case law indicates that the following might be relevant: failing to take account of relevant evidence; taking into account irrelevant evidence; failing properly to construe significant documents or evidence; drawing inferences of fact from evidence about relevant matters which are illogical or unjustified; failing adequately or sufficiently to investigate an issue that the Tribunal considers to be relevant or potentially relevant to the analysis. …
>
> 146. Third, but importantly, it is consistent with a merits appeal for the Tribunal, even having heard the evidence, to conclude that the approach taken by the CMA and its resultant findings are reasonable in all the circumstances and to refrain from interfering upon that basis. If the Tribunal considers that the findings of the CMA are reasonable it might be difficult to say that any findings that it arrives at which differ from those of the CMA are material."

32. Green LJ's judgment is consistent with previous judgments of the Tribunal concerning its role in penalty appeals. The distinction drawn by Green LJ between, on the one hand, the margin of appreciation available to the CMA in proving an infringement, and, on the other, the need for the Tribunal to scrutinise the CMA's decision without deference to the CMA's exercise of judgment, echoes the observations of the Tribunal in *Kier Group Plc and others v OFT* [2011] CAT 3 that the margin of appreciation available to the CMA in reaching its decision "*does not in any way impede or diminish the Tribunal's undoubted jurisdiction to reach its own independent view as to what is a just penalty in the light of all the relevant factors*."

33. Green LJ's further holding that the Tribunal takes the CMA's decision as its "*starting, middle and end point*" and that, having considered the evidence, the Tribunal may decide not to interfere with the decision on the basis that its findings were reasonable in all the circumstances, is consistent with approach taken by the Tribunal in *Kier,* in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13 and in other decisions, that it would not be right for the Tribunal to ignore the CMA's own approach and reasoning in the decision under challenge and that the Tribunal should

look at the matter in the round and only interfere with the CMA's decision if it concludes that the penalty was inappropriate.

34. In *G F Tomlinson Group Ltd and others v Office of Fair Trading* [2011] CAT 7, the Tribunal described the role of the Tribunal in an appeal against penalty in the following terms:

> "72 …In our judgment, the Tribunal's task is two-fold. The grounds of appeal pleaded by the Present Appellants raise a number of specific complaints about particular steps taken by the OFT in computing the fines imposed in the Decision. Part of our task is therefore to adjudicate on those specific complaints since it is important for the OFT and the parties to know where, if anywhere, we judge that the OFT has gone wrong in applying the Guidance in this case. But the other part of our task is, as the OFT accepts, to look at the matter in the round and form our own view about the appropriateness of the penalties imposed."

35. There was some difference of emphasis between the parties as to the approach to be followed by the Tribunal in reviewing evaluative assessments made by the CMA. The CMA submitted that *Flynn Pharma Limited and Pfizer Inc. v CMA* was concerned with whether the CMA had erred in applying substantive competition law whereas the present case was concerned with whether the CMA has erred in applying the parts of its guidance that require an expert evaluation, for example as to the need to deter a particular type of infringement, to which the Tribunal should give particular weight. The CMA relied on a witness statement from Ms Ann Pope, the CMA's Senior Director of Antitrust Enforcement, setting out, amongst other things, why the CMA regards RPM as an enforcement priority and responding to Roland's case that the leniency discount failed to reflect the value of its co-operation in the investigation. Roland submitted that most, if not all, appeals from the CMA involve evaluative decisions and that, as a specialist tribunal, the Tribunal is equipped to reach its own decisions and should not defer to the evaluative decisions of the CMA.

36. We consider, consistently with the authorities referred to above, that it may well be appropriate for the Tribunal to give weight to an evaluative assessment made by the CMA in relation to a matter of which the CMA has particular experience, such as the need for deterrence of a particular type of infringement because of its current prevalence or the value of the assistance provided by an applicant for leniency, provided that this

does not entail any reduction in the rigorous scrutiny to which the Tribunal is bound to subject the CMA's decision under appeal in reaching its own conclusions on the merits.

E. GROUND 1 – THE 19% STARTING POINT

(1) The Penalty Guidance

37. As noted above, in calculating the penalty for an infringement, the CMA and, on appeal, the Tribunal must have regard to the Penalty Guidance. The Penalty Guidance states that, consistently with section 36(7A) of the 1998 Act, the twin objectives of the CMA's policy on financial penalties are (1) to impose penalties which reflect the seriousness of the infringement and (2) to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them. (§1.3)

38. The Penalty Guidance in relation to Step 1 includes the following provisions:

    (1) The starting point for determining the level of financial penalty is calculated having regard to (§2.3):

        (i) the seriousness of the infringement and the need for general deterrence; and

        (ii) the relevant turnover of the undertaking.

    (2) The CMA will apply a starting point of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers). In applying the starting point, the CMA will also reflect the need to deter the infringing undertaking and other undertakings generally from engaging in that type of infringement in the future. (§2.4)

    (3) This is a case specific assessment of (§2.5):

(i) first, how likely it is for the type of infringement at issue to, by its nature, harm competition;

(ii) second, the extent and/or likelihood of harm to competition in the specific relevant circumstances of the individual case; and

(iii) finally, whether the starting point is sufficient for the purpose of general deterrence.

(4) At the first stage, the CMA considers the likelihood that the type of infringement in question will, by its nature, cause harm to competition. There is no pre-set tariff but, in making its assessment, the CMA will have reference to two principles (§2.6).

(i) First, that a 21% to 30% starting point is to be applied to the most serious types of infringement, that is those which the CMA considers are most likely by their very nature to harm competition a such as price fixing and market sharing and other non-cartel object infringements which are inherently likely to cause significant harm to competition.

(ii) Second, that a starting point of between 10% and 20% is more likely to be appropriate for certain less serious infringements and for infringements by effect.

(5) These principles do not prevent the CMA from applying a starting point of below 10% although this is likely to occur as a result of the CMA having made a downwards adjustment to reflect the particular circumstances of the case. (§2.7)

(6) At the second stage, the CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately to consumers. When making its case

specific assessment, the CMA will consider the relevant circumstances of the case. These may include, for example (§2.8):

(i) the nature of the product including the nature and extent of demand for that product;

(ii) the structure of the market including the market share(s) of the undertaking(s) involved in the infringement, market concentration and barriers to entry;

(iii) the market coverage of the infringement;

(iv) the actual or potential effect of the infringement on competitors and third parties; and

(v) the actual or potential harm caused to consumers whether directly or indirectly.

(7) Finally, the CMA will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence. In particular the CMA will consider the need to deter other undertakings, whether in the same market or more broadly, from engaging in the same or similar conduct. (§2.9)

39. The Penalty Guidance in relation to Step 4 includes the following provisions:

(1) In considering whether any adjustments should be made at this step for specific deterrence or proportionality, the CMA will consider appropriate indicators of the undertaking's size and financial position at the time the penalty is being imposed. (§2.20)

(2) The penalty figure reached after Steps 1 to 3 may be increased to ensure that the penalty to be imposed on the undertaking will deter it from breaching competition law in the future, given its specific size and financial position and any other relevant circumstances of the case. (§2.21)

(2) The approach taken in the Decision

40. In the Decision, the CMA explained that its decision to apply a starting point percentage of 19% was based on the following considerations, in summary:

(1) Nature of the infringement: RPM is a serious by object infringement although less serious than horizontal price fixing market sharing and other cartel activities which would ordinarily attach a starting point towards the upper end of the 21% to 30% range. (§5.26)

(2) Nature of the product and the extent of demand for the product: Almost 40% of the sales of the Relevant Product are online. Discounted prices on the internet can intensify price competition between resellers (online and/or offline). (§5.27)

(3) Structure of the market: Roland has a number of competitors to Roland UK in the supply of electronic drums and is the major supplier of the Relevant Products in the UK. (§5.27)

(4) Market coverage: the infringement covered all of the Relevant Products sold by Reseller 1. It had a clear effect on Reseller 1 with Roland UK seeking to prevent or restrict Reseller 1's ability to determine its own retail prices for the Relevant Products. (§5.27)

(5) Actual or potential effect of the infringement on competitors and third parties: The CMA considered that the Infringement would likely have had a wider effect in the market reducing downward pressure on the retail price of the Roland UK's electronic drums more widely, because of the Roland Pricing Policy and use of monitoring software. (§5.27)

(6) General deterrence: In setting the starting point at 19%, the CMA also took into account the need to deter other undertakings from engaging in similar infringements in the future. (§5.28)

(3) Roland's submissions

41. Roland's case under Ground 1 that the 19% of relevant turnover taken by CMA as the starting point for the penalty calculation was excessive was based on two main arguments. First, that the CMA had overstated the seriousness of RPM generally, imposing a penalty that was on a par with the penalties it imposes for much more serious horizontal infringements, and was almost three times the level that the European Commission would have applied in a case of network-wide online RPM. Second, that the CMA's penalty did not reflect the very narrow market coverage of the RPM that it found in this case, which covered less than […][✂]% of Roland's distribution network. As a result, the CMA should have used a starting point of no more than 3.5% of relevant turnover at Step 1 (instead of 19%), or applied an equivalent discount at Step 4.

Comparison with other UK cases

42. Roland referred to seven other RPM decisions issued by the CMA in the last five years, four of which were musical instrument cases, which all took 18-19% as the starting point for the penalty calculation. Roland submitted that there was nothing inherently wrong with forming a general view of a "standard tariff" but that 19% was wrong and that a more appropriate level would be roughly 7% which would be consistent with the approach taken by the French and Belgian competition authorities.

43. Roland submitted that the 19% starting point was out of line with the starting point adopted by the CMA for other more serious forms of infringing conduct. It referred to the starting point used by the CMA in a number of other recent decisions to show that the CMA uses the top of the zero to 30% range for the most serious cartel behaviour and penalties in the region of 16-23% for other serious horizontal infringements outside the context of a cartel, including future pricing information exchanges, restrictions on pricing agreed between horizontal competitors, and market sharing, all of which are aimed at restricting competition between competing suppliers.

44. Roland referred to the following decisions amongst others:

(1) *Nortriptyline* (Case 50505.2, decisions of 4 March 2020), the CMA applied a starting point of 25% for horizontal market sharing and 20% for the horizontal exchange of future price intentions. The CMA had found that the purpose of the information exchange was to facilitate horizontal price coordination, to "*maintain prices between competitors in the market or at least slow their decline*" (§7.45);

(2) *Design, construction and fit-out services* (Case 50481, decision of 16 April 2019), the CMA applied a 22% starting point for cover bidding, in which the instigator who wanted to win the contract arranged for its competitors to submit uncompetitive bids (§6.22);

(3) *Heathrow airport parking* (Case 50523, decision of 25 October 2018), the CMA applied an 18% starting point for a horizontal price fixing agreement in the form of a restrictive covenant in a lease pursuant to which a carpark operator at Heathrow agreed not to offer lower charges than Heathrow applied at its own carparks (§6.25);

(4) *Solid Fuel Products* (Case 50366-1, decision of 28 March 2018), the CMA applied a 23% starting point for market sharing, bid-rigging and exchanging pricing information between two main suppliers (§6.32);

(5) *Cleanroom laundry services and products* (Case 50283, decision of 14 December 2017), the CMA applied a starting point of 16% for horizontal market sharing (§6.48);

(6) *Galvanised Steel Tanks* (Case 9691/12, decisions of 19 December 2016), the CMA applied a 30% starting point for the main cartel (§5.26), and an 18% starting point for horizontal price information exchange (§5.31). The information exchange starting point was considered and upheld by the Tribunal on appeal. It said that "*any horizontal arrangement involving all the suppliers in the market and relating to price is likely to attract a seriousness multiplier in the upper end of the range of 0 to 30 %*" ([2017] CAT 23 §146);

(7) *Conduct in the modelling sector* (Case CE/9859-14, decision of 16 December 2016), the CMA imposed a starting point of 21% for horizontal price fixing and information sharing (§5.35).

45. Roland submitted that these comparisons suggest that the CMA considers that RPM is broadly on a par with those infringements, attracting a penalty in the middle of the range, whereas, correctly analysed, RPM is much less serious than even the cases at the bottom of the range. It submitted that a starting point of 19%, being two-thirds of the maximum penalty reserved for comprehensive horizontal cartel conduct that eliminates all competition between competing brands, was far too high and leaves no headroom in the 10% to 20% range (being the range for less serious infringements), to accommodate more serious RPM behaviours, for example those involving more market participants or covering a greater extent of the relevant market.

46. Roland also relied on the CMA's and Tribunal's decisions in *Ping Europe Limited v CMA* [2018] CAT 13, which concerned a complete, network-wide ban on online selling (rather than merely a restriction on online selling prices for one reseller), and yet attracted a starting point of only 12%.

47. Roland urged the Tribunal to follow the approach of the Tribunal in *Kier* in which the Tribunal considered the relative seriousness of the infringement in question and concluded that its seriousness had been overstated by the OFT.

> "92. As we said at the beginning of this section, our observations on the nature and seriousness of cover pricing are not aimed only at the OFT's approach at Step 1, but also have a bearing on the other steps of the process, and in particular on the fines ultimately imposed in the Decision.
>
> 93. Whilst most infringements of the Chapter I prohibition are likely to be regarded as serious, there are clearly degrees of seriousness which should be reflected in any penalty imposed. The non-statutory Step 1 range of 0-10% of relevant turnover, prescribed in the Guidance, has to cover all agreements or concerted practices sanctioned by the Chapter I prohibition. In determining the appropriate point on that scale account should be taken on a case by case basis of all the circumstances, including the nature of the offence, the harm done, and any mitigating or aggravating circumstances. It is common ground that hard-core bid rigging or price fixing agreements warrant penalties set at the upper end of the range. The OFT has characterised cover pricing as "bid rigging", but has settled on the middle of the range, namely 5%, in view of the particular characteristics of the conduct in question.

> …
>
> 114. With that preamble the Tribunal considers that in a case of "simple" cover pricing 5% of relevant turnover is, in principle, too high a starting point where the current maximum for the most heinous infringements of the competition rules is 10%. In the light of all the factors discussed above, we consider that the appropriate level is lower than the mid point of that range, since the difference between 5% and 10% does not in our opinion adequately reflect the distinction in culpability between cover pricing as practised in the construction industry in the relevant period and, say, a multi-partite horizontal price fixing or market sharing cartel. Greater headroom is required to accommodate the latter type of offence within the range currently provided by Step 1 of the Guidance."

European approach to RPM

48. Roland submitted that further useful guidance can be found in the decisional practice of the European Commission which has also been followed by the French and Belgian authorities. It referred to the number of recent decisions of the European Commission involving online RPM in which a standard starting point percentage of 7% or 8% has been applied, taken from a zero to 30% range, to reflect the seriousness of the conduct. *Asus* (Case 40465), *Denon & Marantz* (Case 40469), *Philips* (Case 40181), *Pioneer* (Case 40182) and *Guess* (Case 40428) all imposed 7% starting points, except for the *Pioneer* decision, which imposed a starting point of 8%. Each decision explained that starting point in similar terms. For example, in *Asus* at §138:

> "Resale price maintenance, by its very nature, restricts competition within the meaning of Article 101(1) of the Treaty. However, vertical agreements and concerted practices such as resale price maintenance are, by their nature, often less damaging to competition than horizontal agreements. Taking account of these factors and in light of the specific circumstances of the case, as described in section 5, the proportion of the values of sales to be taken into account is set at 7%."

49. The French Competition Authority imposed a penalty with a starting point of 7% on Apple for imposing RPM on its network of Apple Premium Resellers in its decision in case 20-D-04 of 16 March 2020. The Belgian Competition Authority imposed a penalty between 5-10% for RPM in the HM Products case (decision of 24 January 2019).

50. Roland submitted that the approach in these cases is to be preferred to that of the CMA because it is more consistent with the inherent seriousness of RPM as compared with horizontal collusion and that the Tribunal should therefore apply a 7% starting point for online RPM conduct generally.

Economic effect of RPM

51. Roland submitted that RPM is very different from horizontal restrictions in that its aim is typically, and was in this case, to enhance non-price competition with other manufacturers' products, by giving resellers an incentive to invest in promoting the RPM manufacturer's products. It noted that the Decision recognised that the commercial objectives of Roland were to enhance the profit margins earned by its resellers when selling Roland's products in particular, so as to encourage them to stock and promote its products and to demonstrate them instore and thereby to "secure, maintain and/or improve itsUK market position in the Relevant Products relative to its competitors".

52. Roland submitted that the pro-competitive aim of RPM Roland is reflected in the Commission's Guidelines on Vertical Restraints which acknowledge that "vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies". The Commission Guidelines go on (at recital 225):

> "in some situations, the extra margin provided by RPM may allow retailers to provide (additional) pre-sale services, in particular in case of experience or complex products. If enough customers take advantage from such services to make their choice but then purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level."

Roland submitted that the only anti-competitive effect supported by the CMA's findings in this case is the direct or immediate effect on pricing.

53. Roland also referred to the US Supreme Court's decision in *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877 (2007) in which the Supreme Court overturned the rule that RPM was illegal *per se* under the Sherman Act and found by a majority that RPM should instead be subject to the "rule of reason" (i.e. a case-by-case analysis of the effects of the conduct in question). The Court observed that a manufacturer usually wishes to minimise retail costs and will only wish to set minimum retail prices if it considers that the increase will lead to increased demand despite the higher prices:

> "The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses; interbrand competition reduces its competitiveness and market share

> because consumers will “substitute a different brand of the same product.”… As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the “increase in demand resulting from enhanced service . . . will more than offset a negative impact on demand of a higher retail price.”

54. Roland submitted that its case is further bolstered by the study carried out by the economic consultancy DotEcon which the CMA relies on in its Defence at §39. DotEcon found that, although removing RPM reduced prices in the case studies which it analysed, there were concerns that it also reduced pre-sales support and advice. In relation to the CMA’s *Light Fittings* RPM decision, DotEcon referred to the evidence of potential pro-competitive effects of RPM which it had found, concluding that these potential efficiency benefits of RPM might be a partially offsetting benefit to weigh against the detriment resulting from raised prices.

Scope of the infringement

55. Roland’s second main argument in support of Ground 1 was that, in accordance with the Penalty Guidance, market coverage must be taken into account in determining the Step 1 starting point. Roland submitted that the logic of the Guidance is compelling. An infringement involving RPM with one reseller was very different from RPM involving a whole network.

56. Roland submitted that it was axiomatic that the CMA can only penalise Roland for the infringement that it found and not for the wider infringements that it suspected. The decision to focus the investigation on a single reseller was a legitimate decision taken by the CMA in the interests of administrative efficiency (and without regard to the level of the penalty, which had not been decided at that stage). Having made that decision, however, it was not open to the CMA to penalise Roland as though it had conducted a full investigation and concluded that Roland had infringed in its dealings with all 24 of the resellers suspected by the CMA. Yet, according to Roland, that is in effect what the CMA has done.

57. The infringement that it found only related to Reseller 1, which accounted for only approximately […][✂]% of Roland’s distribution network, and even then only to Reseller 1’s online sales i.e. […][✂]% of its business. Even at the upper end of that

scale, the sales directly affected by the infringement therefore accounted for less than [...][✂]% of Roland's sales of the Relevant Products. In contrast, the European Commission's RPM decisions all made generalised findings of RPM in relation to "retailers", based on evidence collected from multiple individual retailers.

58. Roland contended that the CMA recognised the force of this point in the *Guitars* case (CMA decision of 29 June 2020 (fine of £4.5 million on Fender)) ("*Guitars*") in which the CMA found RPM involving only a single reseller. Although the CMA imposed a 19% starting point in *Guitars* at Step 1, when it came to Step 4, the CMA made a downwards adjustment (of redacted magnitude) to the penalty payable by Fender, in part because "the CMA's finding relates to an agreement between Fender and one reseller. As a result, the turnover directly affected by the infringement was lower than the relevant turnover" Roland submitted that the same was true in this case yet in this case the CMA made no adjustments at Step 4.

59. In order to reflect the narrow scope of the finding of infringement in this case, Roland submitted that a conservative approach would be to reduce its proposed starting point of 7% by at least half to reflect the fact that the finding of infringement only related to a small fraction of Roland's sales. Before adjustment for leniency and settlement, it would amount to approximately £1.2m, which is three times larger than Roland UK's average annual profit over the period 2017-2019. Wiping out three years' worth of profit (across all of Roland UK's product lines, and not only electronic drums) would be more than commensurate with the seriousness of the infringement found by the CMA.

Specific deterrence

60. In response to the CMA's submission that any lower starting point at Step 1 would have required an uplift at Step 4 to provide an adequate "specific deterrent effect on Roland", because the resulting penalty at Step 3 of £1.2m would have been small relative to Roland's worldwide turnover of £[...][✂] in December 2018, Roland submitted that the correct approach to increasing penalties for specific deterrence was considered by the Tribunal in *Kier*. In that case, the OFT had imposed a "minimum deterrence threshold" of 0.75% of worldwide turnover for horizontal cartelised cover pricing in

the construction industry. The Tribunal deprecated that approach on the ground, first, that worldwide turnover is far from being the only, or even best, measure of what it takes to deter a company from wrongdoing. Second, the final penalty cannot be calculated solely by reference to the need for specific deterrence, but must also be proportionate, and in particular reflect the culpability of the offender and seriousness of the offence: Roland submitted that the CMA cannot simply switch from a tailored penalty reflecting the seriousness of the infringement and the turnover in the relevant market to a measure based exclusively on worldwide turnover without reference to the actual conduct or market in which it took place.

61. Roland submitted that, as the CMA had failed to plead any analysis of specific deterrence that is consistent with the Tribunal's guidance in *Kier*, the Tribunal should simply apply whatever penalty it reaches after considering Roland's grounds of appeal, without making any upward adjustment for specific deterrence. In the alternative, if the Tribunal were minded to conduct its own analysis of specific deterrence, separate from that pleaded by the CMA, Roland submitted that the penalty of £1.2 million which it proposed would wipe out three years' worth of Roland UK's profits, across all of its product lines which, in addition to incurring the substantial and irrecoverable legal costs and management time associated with the investigation, would be a very serious matter. Even in relation to Roland Corporation, the penalty proposed (before leniency and settlement) by Roland would be approximately […][✂]% of its three-year average profit after tax. In so far as worldwide turnover across all product lines was a relevant metric, Roland's proposed penalty of […][✂]% of its global turnover would be in line with other penalties from previous cases and substantially more than the corresponding percentages in each of three recent decisions: *Fludrocortisone acetate tables* (Case No 50455, decision of 9 July 2020, fine of £2.1 million on Aspen), *Galvanised Steel Tanks (information exchange)* and *Digital piano and digital keyboard sector* (Case No 50565, decision of 1 August 2019, fine of £3.7 million on Casio) ("*Digital Pianos*").

(4) The CMA's submissions

62. The CMA submitted that it was entitled to find that a 19% starting point at Step 1 of the Penalty Calculation was appropriate for the RPM infringement committed by Roland in the circumstances of this case and that, had the CMA chosen a lower starting

point percentage, the penalty would not have constituted sufficient specific deterrence to Roland and the CMA would have had to have applied an uplift at Step 4.

63. The CMA submitted that RPM is a serious infringement by object and is so regarded by the Commission and by the UK legislature. It referred to the Commission Guidelines on Vertical Restraints which provide that RPM is a hardcore restriction giving rise to the presumption that it restricts competition and thus falls within Article 101(1) and is unlikely to fulfil the conditions of Article 101(3) for which reason the block exemption does not apply. The CMA also referred to section 2(2)(a) of the 1998 Act which states that agreements that "directly or indirectly fix purchase or selling prices or any other trading conditions" are prohibited; this provision applies just as much to vertical as to horizontal price-fixing. Whilst the Chapter I prohibition did not apply to most vertical agreements between 1 March 2000 and 30 April 2005, it always applied to vertical price-fixing agreements (which did not benefit from the exclusion order). Similarly, section 39 of the 1998 Act excludes price-fixing agreements, which includes RPM from the limited immunity from fines that is otherwise available for small agreements. The Penalty Guidance expressly treats RPM as a species of "cartel activity" for the purpose of the UK leniency programme.

64. The evidence of Ms Pope was that the CMA receives more complaints about RPM than any other type of anti-competitive behaviour. Since the CMA was established in 2014 more than a quarter of all complaints considered by the CMA's pipeline team as possible antitrust infringements related to RPM. The CMA treats RPM as an enforcement priority. There was evidence of harm arising from widespread RPM across the supply of musical instruments in the UK, including electronic drums, which was why the CMA prioritised this case and four others. Each case concluded with an infringement decision that imposed a significant financial penalty.

65. Reflecting the CMA's concern that RPM is a widespread practice for musical instruments, the CMA has sent a warning letter to over 80 suppliers and retailers of musical instruments suspected of having engaged in RPM about RPM and the need to comply with competition law. It published an open letter to suppliers and retailers on 21 June 2016, updated on 20 June 2017 to provide details of the £2.7 million fine that the CMA had imposed for RPM relating to domestic light fittings. On 29 June 2020 it

published an open letter to all suppliers and retailers of musical instruments and issued guidance to retailers stating that RPM agreements are usually unlawful and may attract a fine.

66. Ms Pope's evidence was that RPM is a particular concern when it takes place online. The CMA noted in the Decision that the ability to sell or advertise at discounted prices on the internet can intensify price competition, not only between online resellers but also between online and bricks-and-mortar resellers due to the increased transparency and reduced search costs from internet shopping. Conversely, preventing or restricting the ability for resellers to determine their own online resale prices is likely to reduce price competition and, in turn, undermine a key benefit of e-commerce.

67. The CMA referred to the DotEcon report which recorded that its decisions condemning RPM in *Bathroom Fittings* and *Light Fittings* had led to an estimated fall in prices of around 17%.

68. The CMA submitted that public enforcement against RPM is also regarded as a priority across the EU. On 9 September 2020, DG Competition reported that "*The majority of vertical cases pursued at national level since the adoption of the [Vertical Agreements Block Exemption Regulation] concerned RPM*" and that "*RPM has consistently been found to amount to a severe restriction of competition in enforcement actions taken by the Commission and NCAs since the adoption of the [Vertical Agreements Block Exemption Regulation]*" in 2010. In *Yamaha*, a case involving cross-border and price restrictions for Yamaha-branded musical instruments, the Commission stated:

> "Agreements and/or restrictive practices partitioning the national markets and fixing resale prices are, according to an extensive body of precedent of case law, contrary to the objectives of the Community. Resale price maintenance represents a drastic interference in competition, with the result that, by its nature, it constitutes, in principle, a very serious infringement of the competition rules."

Comparison with other cases

69. The CMA submitted that Roland was wrong to ask the Tribunal to interfere with the CMA's assessment of the seriousness of RPM on the basis of other forms of horizontal infringements in respect of which the CMA has imposed a starting point in the region of 16 – 23 %. This was for two reasons. First, because the starting point in each case

depends on a variety of considerations such that it is not possible simply to compare its fine with those imposed on different undertakings that committed infringements in different circumstances. Second, the CMA submits that the dichotomy drawn by Roland between RPM (which it says can have pro-competitive effects) and horizontal infringements (which it says do not) is over-simplistic. Information exchange is a less serious form of infringement than price fixing.

70. The CMA referred to the following observations of the Tribunal in *Eden Brown v OFT* [2011] CAT 8 at §78:

> "The OFT is not bound by its previous decisions as the Appellants recognise, but we accept that there should be broad consistency in the OFT's approach. However, when it comes to assessment of seriousness in this context, each case is very dependent on its facts. We agree with the OFT that the seriousness percentage is not to be approached as an exercise of box ticking of various elements, and para 2.5 of the Guidance makes clear that the enumerated factors are not the only considerations."

71. The CMA made the following observations in relation to cases singled out by Roland:

(1) In *Nortriptyline* the 20% starting point reflected the facts that, while a serious infringement, the information exchange did not remove all uncertainty on the market and did not involve all the marketing authorisation holders.

(2) In *Design*, *construction and fit-out services* the 22% starting point was based on several factors, viewed in the round including the fact that cover bidding is a serious by object infringement, that the parties were the only bidders involved in the tender for several infringements and that they covered only 14 contracts. General deterrence of cover bidding was also a relevant consideration in this case.

(3) In *Heathrow airport parking* the 18% starting point took into account the facts that competition was limited in the relevant market (by Heathrow's ownership of most nearby car parks) and that any impact of the horizontal price-fixing on consumers may have been limited.

(4) In *Solid fuel products* the 23% starting point reflected not only the serious nature of the horizontal market-sharing between two of the main suppliers, but also the

facts that there were other competitors and that the infringing conduct related to only some of the parties' customers.

(5) In *Cleanroom laundry services,* the 16% starting point took into account the facts that the unlawful market-sharing was not covert, that it had originated in the context of a long-standing and wider joint venture and may have been justified for a period and that it had not been enforced during the latter part of the infringement.

(6) In *Galvanised Steel Tanks*, the decision in respect of the exchange of information (18% starting point) related to a single meeting. and so was unlikely to have much enduring impact.

(7) In *Ping*, the 12% starting point took into account the specific circumstances of the infringement, including Ping's genuinely held intention to promote custom-fitting and the fact that its online sales ban was not secret. Ping adduced evidence to seek to demonstrate that the advancement of that custom fitting policy increased inter-brand competition considerably and was, therefore, a legitimate thing for it to be doing. The CMA accepted that the custom fitting policy was a legitimate aim. In the present case there was no evidence of pro-competitive benefits of Roland's pricing policy.

72. The CMA submitted that the Commission approach and the French and Belgian cases were of little relevance. It pointed out that the Commission does not have to take account of general deterrence when choosing a starting point at its stage one. The Commission may include in the basic amount a sum of between 15 and 25% of the value of sales in cases of hard-core cartels and does not consider proportionality as a separate step of the fining calculation. The Commission applies the 0–30% range in a different way to the CMA not just for RPM but for all competition infringements. For example, the highest starting point that the it has ever applied under the 2006 Fining Guidelines is 25% in contrast to the CMA's starting point percentage of 30% in Chapter I and II cases and has consistently applied a starting point of 18–19% in its RPM cases.

73. The CMA submitted that the *Leegin* judgment was likewise of little relevance given that US antitrust law is different from EU (and UK) competition law, not least because the latter does not recognise the "*rule of reason*" that was adopted by the majority of the Court in *Leegin*. In any event, the possibility that RPM might give rise to pro-competitive effects in certain circumstances (but not in this case) is not a relevant consideration for assessing gravity. Accordingly, the general economic features of RPM do not mean that the starting point of 19% is far too high.

Market share

74. In response to Roland's argument that the starting point of 19% failed to reflect the narrow scope of the infringement, which applied to online sales of Roland's drums sold by Reseller 1, the CMA submitted, first, that market share is only one of the relevant circumstances to be considered by the CMA at the second stage of its assessment at Step 1. Other relevant circumstances include the actual or potential effect of the infringement. It was therefore legitimate for the CMA to take account of the fact that the particular infringement had wide actual or potential effects on competition. The adherence to the pricing policy of Reseller 1, who was one of the top five resellers of Roland branded products, was highly visible to other resellers and would have had the effect of bringing other resellers into line or at least had the potential to do that which is the test in the Guidance. This was not a one-off, isolated instance of RPM, with a single reseller.

75. The CMA also submitted that it was entitled to take into account the fact that, as far as Roland's side of things is concerned, Roland was trying to do much more than simply enter into an agreement with Reseller 1, it was seeking to impose this pricing policy, generally, on all of its online resellers. There was substantial evidence showing that Roland knew that the implementation was illegal and undertook measures to conceal it.

76. The CMA submitted that Roland's reliance on *Guitars* was misplaced. Whilst the CMA took into account the fact that Fender's RPM concerned one reseller, §5.48 of *Guitars* stated that the CMA also took into account that the unadjusted Step 3 penalty would amount to a disproportionately high proportion of Fender US's profit after tax, 3-year average profit after tax and net assets and would be an excessive multiple of Fender

Europe's average annual profit. But for these indicators of Fender's size and financial position, no adjustment would have been made at Step 4 on proportionality grounds.

Deterrence

77. The CMA emphasised the twin policy objectives of the CMA's Penalty Guidance being, firstly, to impose penalties on infringing undertakings which reflect the seriousness of the infringement and, secondly, to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering ant-competitive activities from engaging in them. These objectives reflect the statutory duty in section 36 subsection (7A) of the 1998 Act to have regard to those two matters (see paragraph 25 above). These objectives are also reflected in the three-stage assessment required under the Penalty Guidance to be carried out by the CMA in fixing the starting point (see paragraph 38 above). Moreover, the third stage directly engages the CMA's enforcement expertise, requiring it to assess both the need for a general deterrent in relation to a particular type of infringement and the level at which a penalty should be set in order effectively to provide such deterrent.

78. Specific deterrence is also something that needs to be considered at Step 4. The CMA submits that the fact that Roland was trying to do something very widespread was relevant to deterrence. The CMA referred in this context to the Tribunal's decision in *Argos* in which the Tribunal held that no adjustment was needed at Stage 4 because the penalty was sufficient to act as a deterrent. It submitted that, as recorded in the Decision, the CMA considered a range of financial indicators in this regard, based on the last 3 years' worth of public accounting information, including relevant turnover, worldwide turnover, operating profit, profit after tax, net assets and dividends. CMA's Skeleton Agreement on this appeal showed the penalty as a percentage of each of these indicators.

(5) Discussion

79. Roland submitted that the fundamental issue for the Tribunal is whether the RPM infringement which was the subject of the CMA's decision was serious enough to warrant a 19% starting point, taking into account the other forms of infringement that

must be accommodated in the zero to 30% range provided for in the Penalty Guidance. We agree with that submission, subject to the qualification that the Penalty Guidance requires the starting point to be determined having regard to both the inherent seriousness of the infringement in question and the need for general deterrence.

80. In its calculation of the penalty in the Decision, the CMA characterises RPM as a serious by object infringement but one that is generally less serious than horizontal price-fixing, market-sharing and other cartel activities attracting a starting point towards the upper end of the 21% to 30% range. It is implicit in the 19% starting point that, in the CMA's eyes, the infringement in this case was less serious than cartel activities calling for a 21% to 30% penalty but not by a wide margin. Roland, while not disputing that RPM is a serious infringement, contended that it is "much less serious" than the forms of horizontal collusion attracting penalties in the region of 19% and that a starting point of 19% is therefore far too high.

81. In assessing the relative seriousness of RPM, it is necessary to consider the harm to competition which RPM causes. The immediate effect of RPM is to restrict resellers' freedom to set their own prices and to compete fully and effectively. RPM restricts intra-brand competition and tends to increase the prices paid by consumers for a particular brand. The fact that RPM leads to higher prices for consumers is supported by the empirical evidence in the DotEcon report referred to above.

82. The Vertical Guidelines identify seven respects in which RPM may restrict competition. These include, in addition to the direct effect on reseller's prices, the possibility of collusion between suppliers and between distributors, the softening of competition between manufacturers and/or distributors, the foreclosing of smaller rivals, and a reduction in dynamism and innovation at the distribution level. It is true that, as Roland submitted, only one of the harmful consequences was identified by the CMA in this case but in considering the "type of infringement" for the purposes of the Penalty Guidance at Step 1, the CMA was entitled to regard RPM as potentially having those harmful effects, irrespective of whether they were all present in this case.

83. RPM is regarded as a serious form of competitive restriction by the Commission. Recital (10) to Commission Regulation (EU) No 330/2010, conferring block exemption

on certain vertical agreements, refers to minimum sale prices as one of the "severe restrictions of competition" to which the Regulation does not apply. Vertical restrictions are regarded by the European Court of Justice as having significant restrictive potential. As Rose LJ (with whom the other members of the Court of Appeal agreed) observed in *Ping v CMA* [2020] EWCA Civ 13 at §109:

> "EU competition rules have respected to some extent a manufacturer's choices as to how best to promote its product: but only to some extent. The CJEU has never been content to rely only on the kind of 'self-regulation' to which Advocate General Wahl referred to ensure that competition is not restricted. As Ms Demetriou reminded us, the application of Article 101(1) to restrictions on intra-brand competition was considered by the Court at a very early stage, in the seminal case of Case C-56/64 *Consten and Grundig* EU:C:1966:41. That judgment established that the Court does not regard inter-brand competition as sufficient to bring about the optimal use of resources. The competition rules do not rely on suppliers 'self-regulating' by leaving them free to set the terms on which undertakings further down the distribution chain market their goods to the ultimate consumer. The retailer also has a commercial interest and expertise in marketing the goods successfully. Since *Consten and Grundig*, the dividing line between what it is legitimate for the manufacturer to decide and what must be left to the choice of the retailer has been carefully drawn. The detailed provisions of Regulation 330/2010 and the Vertical Guidelines show the drawing of boundaries between active and passive sales in exclusive distribution networks, between resale price maintenance and recommended or maximum pricing ..."

84. The potential pro-competitive effects of RPM referred to by Roland, including an increase in consumer demand resulting from an enhanced level of service provided by resellers and the promotion of interbrand competition, do not, in our view, support the conclusion that the RPM in this case was other than a serious form of infringement of competition law. Under the Vertical Guidelines there is a presumption that RPM does not generate objective economic benefits outweighing the negative effects of the restriction. Although Roland's commercial aim in introducing the Roland Pricing Policy was the legitimate one of securing, maintaining and/or improving its UK market position in the Relevant Products, as acknowledged in the Decision, there was no evidence that the RPM actually produced any pro-competitive benefits. We do not accept Roland's submission that in this case a pro-competitive aim *per se* means that an infringement without demonstrable competitive benefits should be considered as much less serious than an infringement pursued with an anti-competitive aim.

85. In assessing the seriousness of the RPM and need for general deterrence, we consider that the CMA's evidence that RPM is widespread in the UK economy and, in particular, in the musical instrument sector, is important. Moreover, as noted in the decision, RPM

is particularly damaging when it takes place online. The ability to sell or advertise at discounted prices on the internet can intensify price competition, not only between online resellers but also between online and bricks-and-mortar resellers. In our view, this evidence supports an assessment of RPM as being at the top end of the "less serious" (10% to 20%) category of infringement.

86. Roland referred to recent decisions of the CMA in which it has adopted a starting point in the 19% to 23% bracket and which related to horizontal infringements in support of its case that the 19% was an incorrect starting point because RPM is much less serious than these infringements.

87. We accept that, as the Tribunal held in *Eden Brown v OFT,* there should be broad consistency in the OFT's approach to the Penalty Guidelines and, if the starting point in this case was out of line with the CMA's approach in other decisions, this would indicate that the Guidelines may have been misapplied by the CMA. We do not, however, consider that the cases referred to by Roland support this conclusion. As the CMA submitted, each decision turned on its own facts and the assessment in each case was not solely confined to the seriousness of the type of infringement in question but also involved factors mitigating the seriousness of the infringement.

88. More fundamentally, we do not accept the premise of Roland's argument that there is necessarily a significant difference between the seriousness of RPM and the seriousness of horizontal infringements. We agree with the CMA that the dichotomy contended for by Roland is over-simplistic. For example, in *Galvanised Steel Tanks,* the relevant infringement consisted of an exchange of information at a single meeting which was not part of an ongoing series of exchanges or regular discussions which did not remove uncertainty in the market and in which there was limited evidence of any specific harm to consumers. In *Cleanroom laundry services* the CMA took account of the fact that the market sharing was not covert, that the restrictions may have been justified in competition law terms before the period under investigation began, the fact that cooperation between undertakings aimed at developing technology in innovative ways can significantly benefit consumers and the fact that the restrictions in question were not uniformly enforced throughout the relevant period.

89. We do not consider that the 12% starting point in *Ping* supports Roland's case that the starting point in this case was too high. In *Ping*, the CMA took into account the non-secretive nature of Ping's conduct and the fact that Ping's purpose in promoting custom fitting was not to restrict competition but to benefit golfers. The object of RPM is to restrict price competition, whatever the broader commercial aims of Roland in pursuing its pricing policy.

90. Similarly, we did not find the starting points used by the Commission or the French and Belgian competition authorities referred to by Roland to be of assistance. The Commission and other national competition authorities have different practices and policies and do not apply the Penalty Guidance. Sanctions imposed by national competition authorities for infringement of the EU competition rules are not harmonised, Member States being free in their choice of sanctions, as long as they are effective, proportionate and dissuasive. The CMA is entitled to take a UK specific view in the light of its own particular experience.

91. Roland's second main argument was that the starting-point was too high given the limited market coverage of the infringement found by the CMA. Reseller 1 accounted for only approximately […][✂]% of Roland's distribution network and Reseller's online sales accounted for […][✂]% of its business, so that the sales affected by the infringement accounted for less than […][✂] of Roland's sales of the Relevant Products. This argument gives rise to an issue as to whether it was permissible for the CMA to take into account the wider effects of the Roland Pricing Policy and the intention of Roland to impose the RPM on all of its online sellers when assessing the seriousness of the infringement or whether the CMA should have assessed the infringement on the basis that it was a one off, isolated instance of RPM with a single reseller.

92. In our view, the CMA was not required to proceed on the basis that the agreement with Reseller 1 was an isolated arrangement and was entitled to take into account the fact that the infringement would likely have had a wide adverse effect in the market because of the active monitoring carried out by Roland UK, Reseller 1 and others. The Penalty Guidance permits account to be taken at stage two of Step 1 of the actual or potential effect of the infringement on competitors and third parties. One of the findings of the

CMA in the Decision, accepted by Roland, is that active monitoring, and in particular the use of online price monitoring software by Roland UK and some MI Resellers to track online retail prices, increased Roland UK's ability to enforce the Roland Pricing Policy and widened its likely effects. As §5.27 of the Decision explains, this monitoring amplified the negative impact of the infringement by enabling Roland UK and certain MI Resellers to detect price reductions and secure or seek Roland UK to secure reversion to the Minimum Price more easily and quickly than would otherwise have been the case.

93. There was some force in Roland's contention that the CMA's approach to market coverage in this case appeared to be inconsistent with *Guitars*, in which at Step 4 the CMA made a downward adjustment to the penalty taking into account the fact that its finding related to an agreement between Fender and a single reseller, as a result of which the turnover directly affected was lower than the relevant turnover. The CMA pointed out that in making the downward adjustment it also took into account the proportionality of the penalty in the light of Fender's financial size and position and that, but for the indicators of Fender's size and financial position, no adjustment would have been made (and it offered to provide a witness statement to verify this contention). In our view, the fact that a different approach was taken in *Guitars* does not mean that the CMA was wrong not to make an adjustment at Step 4 to reflect market coverage in this case.

94. The CMA submitted, in support of its position that it had taken account of the limited market coverage in calculating its 19% starting point, that, if it had found that Roland had implemented RPM in respect of multiple resellers and/or in relation to in-store drum sales, that would have rendered the infringement even more serious and warranted a higher starting point than 19%. That prompted a question from the Tribunal as to what additional "headroom" would have been left for this higher starting point, had the CMA found multiple infringements, given that its Defence CMA pleads that the RPM "deserves a starting point at least at the upper end of the 10–20% range as it is a serious infringement." The CMA's answer, which we accept, was that 20% was not the upper limit for the starting point for RPM. In *Digital Pianos*, the CMA described RPM as a "so-called hardcore restriction … within the category of infringements which the CMA considers are most likely by their very nature to harm competition, and which will

generally attract a starting point between 21 and 30% of relevant turnover", though not within the category of the most serious infringements of the Chapter 1 prohibition and Article 101 TFEU such as horizontal price fixing, market sharing and other cartel activities, ordinarily attracting a starting point towards the upper end of that bracket.

95. As set out in the Penalty Guidance, Step 4 allows for an upward adjustment to the penalty to reflect the need for specific deterrence and a decrease to ensure that the level of penalty is not disproportionate or excessive. Roland did not argue that the penalty imposed by the CMA was disproportionate. The Tribunal does not consider that the penalty of £6,255,189 was excessive taking into account the financial position of Roland. It equated to […][✂]% of Roland's global turnover in the financial year ending 31 December 2018. The penalty was calculated by reference to the seriousness of the infringement and the actual conduct and market in which it took place. The starting point proposed by Roland of 3.5% or approximately £1 million was, in our view, far too low to operate as an effective deterrent.

96. In summary, having considered the matters raised by Roland, we have come to the conclusion that the 19% starting point adopted by the CMA at Step 1, being at the top end of the range for less serious infringements, was appropriate and that, in all the circumstances, this starting point did not require downward adjustment at Step 4. Although RPM is less serious than the most serious cartel infringements, RPM is nevertheless an inherently serious infringement which is particularly prevalent in the musical instrument sector and which has a harmful effect on consumers. The starting point is not out of line with the starting point adopted by the CMA in other decisions.

97. As the Tribunal noted in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1 at §502 concerning the size of penalties for infringements under the 1998 Act:

> "the sum imposed must be such as to constitute a serious and effective deterrent, both to the undertaking concerned and to other undertakings tempted to engage in similar conduct. The policy objectives of the Act will not be achieved unless this Tribunal is prepared to uphold severe penalties for serious infringements".

F. GROUND 2 – THE 20% DISCOUNT FOR LENIENCY

(1) The Leniency Guidance

98. The Penalty Guidance makes provision for the lenient treatment of undertakings coming forward with information in cartel activities including resale price maintenance. Detailed guidance to the CMA's leniency programme is contained in the document *Applications for leniency and no-action in cartel cases* ("the Leniency Guidance").

99. The Leniency Guidance includes the following provisions:

(1) The conditions for the grant of leniency, which must be met throughout the application process, are as follows (§2.7):

(a) Admission: undertakings must accept that the undertaking participated in a cartel activity, including an acceptance of an infringement of the law.

(b) Information: the applicant must provide the CMA with all non-legally privileged information, documents and evidence available to it regarding the cartel activity.

(c) Cooperation: the applicant must maintain continuous and complete cooperation throughout the investigation.

(d) Termination: the applicant must refrain from further participation in the cartel activity.

(e) Coercer test: the applicant must not have taken steps to coerce another undertaking to take part in the cartel activity.

(2) Three types of leniency are available:

(a) Type A leniency, available for the first applicant to report and provide evidence of a cartel where there is no pre-existing investigation. This attracts full immunity. (§2.9 - §2.14)

(b) Type B leniency, available for the first applicant where there is a pre-existing investigation, but prior to the statement of objections. Type B leniency provides discretionary corporate immunity from penalties or a reduction in the penalty of up to 100% and discretionary individual immunity from criminal prosecution. (§2.15 - §2.23)

(c) Type C leniency, available for the second or later applicant, prior to the statement of objections. This attracts penalty reductions up to 50%. (§2.24 - §2.32)

(3) The CMA's exercise of its discretion to grant immunity or a reduction in penalties will depend on its assessment of where the public interest lies in the particular case, weighing the benefits of gaining additional evidence by reason of a grant of leniency against the disbenefit of granting immunity or a reduction in penalties after an investigation has already commenced, resources have been expended and after the CMA may already have further fruitful lines of enquiry to pursue and some probative evidence already in its possession. (§2.18)

(4) The requirement to maintain continuous and complete cooperation implies that the overall approach to the leniency process by an applicant must be a constructive one, designed genuinely to assist the CMA in efficiently and effectively detecting, investigating and taking enforcement action against cartel conduct. (§5.4)

(5) If at any stage the applicant's representations to the CMA amount expressly or implicitly to a denial of cartel participation, the CMA will consider such representations to be inconsistent with any actual or proposed grant of leniency. (§5.10)

(6) Where an applicant continues to accept that it has been a party to cartel activity but disputes specific elements of the CMA's analysis this would not be considered inconsistent with the grant of leniency provided that they are made in a spirit of cooperation. (§5.11)

(7) There is a positive duty to inform the CMA without delay about any concerns the applicant may have as to the level of cooperation provided by any of its current or former employees or directors, including "any concerns that the applicant may have regarding the completeness and/or accuracy of any statements made by any of its current and former employees and directors during the course of the [CMA's] investigation". (§5.38)

(8) In Type B cases, the key criterion for determining the discount available will be the overall added value of the material provided by the leniency applicant. This will generally be a function of the stage at which the undertaking comes forward, the evidence already in the CMA's possession and the probative value of the evidence provided by the undertaking. The CMA will also take into account the overall level of cooperation provided. (§6.8)

(9) In Type B cases, it is possible that the value added by the application will be high, as it will be the CMA's first application in the case and, as such, even where the application does not result in a grant of corporate immunity, awards of up to 100 % are possible. However, the CMA has insufficient experience of Type B reductions in penalty to give any more guidance about the percentage reductions that are likely to be on offer in the majority of cases. That said, it should be noted that in general, awards are unlikely to be close to 100 % as the CMA would otherwise probably have granted corporate immunity to the Type B applicant. In Type C cases, however, experience suggests that applicants can generally expect to achieve discounts in the range of 25 % to 50 %. However, it is possible that low value and/or late applications may gain awards of less than 25 %. (§6.9)

(2) The approach taken in the Decision

100. Under Step 6 of the Penalty Calculation, the Decision recorded the fact that on the day after the start of the investigation, Roland approached the CMA with an application for leniency, that Roland had admitted its involvement in the infringement and signed a Leniency Agreement with the CMA (dated 18 March 2020) and that, provided Roland continued to co-operate and comply with the conditions of set out in the CMA's Leniency Guidance, as set out in the Leniency Agreement, Roland would benefit from a leniency discount of 100% for the period 7 January 2011 to 31 December 2012 inclusive and 20% for the period 1 January 2013 to 17 April 2018 inclusive.

101. The 100% discount was given on the basis of § 9.6 of the Leniency Guidance which provides that, if the finding of duration would have been shorter, or the infringement less serious, 'but for' the evidence provided by the applicant, the penalty for that applicant will be assessed against the shorter duration or less gravity that the CMA would otherwise have found. In this case the CMA only expanded its evidence gathering to include the period from 1 January 2010 to 31 December 2012 as a result of disclosures by Roland.

(3) Roland's submissions

102. Roland submitted that, having applied for leniency at such an early stage in the investigation and having cooperated throughout the investigation with, at most, trifling instances of inconvenience to the CMA, the 20% discount for the period 1 January 2013 to 17 April 2018 was inadequate.

103. Roland submitted that it had provided extensive evidence to the CMA (documentary, witness, and, crucially, its own corporate commentary on the evidence, in the form of the six "proffers") and that its leniency evidence added significant value to the CMA's investigation. In its submission to the CMA in the context of settlement discussions in March 2020 Roland referred to the following by way of examples:

(1) The fact that Roland came forward on the day after the start of the CMA's inspection of Roland's premises enabled the CMA to make use of leniency

materials submitted by Roland during the course of the CMA's inspection to inform and target the CMA's requests and investigation. For example, the CMA issued a section 26 Notice regarding communications with […][✂] which was sent two days after Roland provided details of this conduct in its marker. The CMA was also able to use this information to inform and target its subsequent review of data (for example through the application of better targeted search terms) and to consider and direct its approach to the case from an early stage.

(2) Roland provided direct and contemporaneous evidence that detailed the nature of the infringement, including evidence of the monitoring activities and the communication of minimum prices. Roland provided the CMA with 2,110 documents, of which at least 99 documents relate to Reseller 1.

(3) Roland provided evidence of the infringing conduct from mobile smartphones and tablets that would not have been available from a review of email data alone.

104. Roland submitted that the CMA was wrong to measure the value of the evidence provided by a leniency applicant only by the extent to which it supports the CMA's case. It submitted that a leniency applicant's role is to make relevant evidence available to the CMA for the CMA to evaluate in its investigation. As Ms Pope put it, the undertaking must "*provide the CMA with all non-legally privileged information, documents and evidence available to it regarding the cartel activity*". In relation to witness evidence, that meant doing the work of identifying relevant witnesses, ensuring that they understand that the undertaking wants them to provide honest and complete evidence to the CMA, and making them available to be interviewed. It (obviously) should not involve briefing them to provide evidence that supports the CMA's case irrespective of whether they believe it to be true (and the CMA's process specifically precludes this possibility). Nor should it involve ensuring that any witnesses whose evidence does not support the CMA's case are not put forward for interview. The aim is to assist the CMA to uncover the truth, not to assist the CMA to uncover what it hopes to find.

105. Roland further submitted that, in so far as the CMA's complaint is that some of the witness evidence was wrong in fact, and that further work was required to discover the

true position, that witness evidence would not have supported the CMA's case any further if Roland had not been a leniency applicant. It would still have required work for the CMA to unpick it. The difference that Roland's leniency application made was that the CMA had Roland's help to do so. Roland contended that the CMA's complaint that on two occasions Roland failed to provide certain important documents or information in response to RFIs was trivial.

106. Roland submitted that the 20% leniency discount was out of line with other decisions, including the 60% discount granted to Fender in *Guitars*. In that case, Fender first enquired about leniency three months after the investigation started. A senior Fender employee deliberately concealed evidence from the CMA for which Fender received a separate fine of £25,000. Roland submitted that it was impossible to understand how a company whose senior employee deliberately withholds evidence could receive a discount of 60% less £25,000, while a company that sought to cooperate in good faith throughout but needed to be prompted on a few occasions should receive a discount of only 20%.

107. Roland submitted furthermore that the 20% discount is the same as that given to an undertaking that offered no information at all but simply settles and only five percentage points more than the discount that Balmoral received in *Galvanised Steel Tanks* for cooperation that did not satisfy the test for leniency and five percentage points less than the "fast track offer" discount that was given in *Construction* to those who admitted liability prior to the Statement of Objections again, without providing any information at all.

108. In the *Pre-cast Concrete* case, Stanton Bonna Concrete obtained a 70% discount for Type B leniency, having approached the CMA eight months after the start of the investigation. The CMA only identified one case in which Type B leniency attracted less than a 50% discount, *National Lighting Company*, which was an older case, being decided in 2017. Even that case, however, attracted a discount of 30%, which is 50% more than was given to Roland in this case.

109. Roland submitted that a discount of at least 60%, in line with that given to Fender in *Guitars,* would be appropriate.

(4) The CMA's submissions

110. The CMA emphasised the reasons why it operates a leniency policy that provides immunity from, or discounts to, penalties for undertakings that report their involvement in secret cartel activity, including RPM, to the CMA. Those reasons are to uncover cartels that would otherwise go undetected and to encourage firms involved in wrongdoing to provide evidence and cooperate in the bringing of successful enforcement action. That is why the material from the leniency applicant must as a minimum be such that it adds significant value to the CMA's investigation.

111. Ms Pope was responsible for the decision whether Roland satisfied the conditions for obtaining Type B leniency and, if so, what level of discount should be granted. She took the decision after consultation with her team and the Senior Director of Cartels.

112. The CMA submitted that, in relation to the material provided for the period 1 January 2013 to 17 April 2018, a 20% discount was appropriate. The CMA had considered the documentary and witness evidence provided by Roland against the evidence already available to the CMA and concluded that it was of limited probative value. The documentary evidence was fragmentary and therefore ambiguous in nature. Only a limited amount of Roland's material was relevant and additional to what the CMA had already obtained from other sources and certain Roland witnesses […][✂] contradicted Roland's admission of its RPM infringement.

113. The CMA considered that Roland's overall level of cooperation was low. Ms Pope's evidence was that Roland should have been aware that, where its employees said things that ran counter to its admission of RPM, Roland was expected, as a leniency applicant, to bring this to the CMA's attention and to address it. However, Roland failed to do so on several occasions which created procedural inefficiencies. She referred, in particular, to the following sequence of events.

(1) On 4 July 2018 Roland submitted transcripts of interviews with two of its senior employees which contained evidence inconsistent with an admission of RPM. For example, one witness denied that there had ever been any control over what

price the retailer sold for and claimed that the dealer "could do whatever they wanted on price".

(2) In response to a request for clarification, on 5 November 2018 Roland submitted a 'consolidated' proffer in which it purported to clarify various matters. However, in that proffer, Roland stated that its conduct "did not extend to Roland seeking to fix the actual prices at which dealers sold Roland products to end customers."

(3) The inconsistency between these statements with the admission of an RPM infringement, meant that the CMA had to prompt Roland for further clarification in its letter dated 12 September 2019. This led Roland to provide a further proffer on 4 October 2019, in which it admitted that the practices described had "occasionally amounted to de facto RPM principally in relation to online sales".

(4) In order to try and clarify the extent of Roland's admission concerning RPM, the CMA subsequently conducted interviews with two further Roland employees who provided accounts of events that were inconsistent with Roland's leniency submissions,

(5) Roland eventually provided a clarificatory proffer on 27 January 2020, nearly two years after the investigation started, but this was only after the CMA asked Roland if, in Roland's view, the accounts provided by the interviewees were accurate and complete in a telephone call a couple of days after the interviews took place.

(6) In the light of Roland's statement, which implied that RPM was only "occasional" and the witness accounts which were inconsistent with Roland's admission of RPM, the CMA had to conduct additional evidence gathering. It did this through a further request for information to an employee of Reseller 1 in order to establish if the RPM agreement was in place throughout the period under investigation. Roland also failed on two occasions to provide certain information in response to the CMA's RFIs, as follows. In response to a request

for copies of the selective distribution agreements between Roland and Reseller 1, it failed to inform the CMA that it did not have a copy of any selective distribution agreement with Reseller 1. It also omitted to mention the fact that it provided Reseller 1 with a "quality" bonus, until prompted to correct its answer even though information about this bonus was an important part of the CMA's investigation, as Reseller 1 had told the CMA that Roland used the "quality" bonus to force compliance with the RPM policy (by threatening to remove it).

114. Ms Pope's evidence was that the circumstances of Fender in the *Guitars* investigation were materially different to the present case. Although Fender applied for leniency at a later stage in the investigation than Roland, it received a higher leniency discount because of the significant probative value of the evidence it provided and the level of its cooperation taken in the round. It provided eight consistent and very helpful probative statements from witnesses, and facilitated two further voluntary interviews with the CMA, which clarified and provided context to the limited and fragmentary documentary evidence obtained by the CMA including evidence as to the duration of the infringement and the culture of concealment within Fender without which the CMA would have had to do significant further evidence gathering and the investigation would have carried a higher risk. The concealment of notebooks from the CMA occurred before Fender applied for leniency. Upon becoming aware of the breach, Fender immediately investigated the issue, located the documents that had been concealed and provided them to the CMA.

115. Ms Pope's evidence was that the circumstances of *Pre-cast Concrete*, in which there was a criminal investigation, were materially different from the present case and that in *National Lighting Company* the CMA received two very helpful witness statements which helped to demonstrate the infringement.

(5) Discussion

116. The Leniency Guidance identifies the key criterion for determining the discount available in Type B leniency cases but little useful guidance as to how to quantify the

appropriate percentage discount, which can be anywhere between zero and 100%. There was no explanation in the Decision as to how the 20% figure was arrived at.

117. It was common ground that the value of the evidence provided by a leniency applicant should not be measured solely by reference to the extent to which it supports the CMA's case. It does not, in our view, follow that the CMA was wrong to take into account the extent to which the evidence provided by Roland assisted the CMA in establishing the infringements which Roland had admitted. If employees gave evidence that was in substance a denial of the infringement, that would be inconsistent with the "admission" condition to the grant of leniency, as the Leniency Guidance makes clear.

118. We accept the CMA's submission that, whilst making an early application for leniency gives a business a significant opportunity to assist the CMA's investigation, the speed with which a leniency application is made after the start of an investigation is not determinative of the appropriate level of the leniency discount. It is possible to apply early and not add much value or to apply later in the investigation and add a lot of value.

119. There was no challenge to Ms Pope's evidence that most of the evidence relevant to the CMA's investigation was available as a result of CMA's own evidence gathering, in particular its inspection of Roland UK's premises between 17 and 19 April 2018. It may well be that if the CMA enters the premises of an organisation suspected of RPM and takes possession of relevant documents and records, as it did in this case, it may be difficult or impossible for the organisation in question to provide material adding significant value to the evidence already obtained by the CMA. A high level of leniency discount may therefore not be available, however cooperative the organisation might be. It is clear from the materials before the Tribunal that the evidence of Roland's employees was at times inconsistent with Roland's admission of RPM. The Tribunal has no reason to doubt Ms Pope's evidence that the failure to provide clear and consistent account of Roland's role led to the need for further investigations.

120. We do not find references to other cases in which the CMA has granted leniency discounts to be particularly helpful in determining the appropriate level of discount in this case. Each case turns on its own facts; moreover there is little, if any, explanation

in the other decisions (such as *Pre-cast concrete* and *Guitars*) as to how the percentage discounts were calculated in those cases.

121. The Tribunal is not in a position to carry out a comparison of the material volunteered by Roland with the material which the CMA already had in its possession so as to assess the added value provided by Roland. For the reasons set out at paragraph 36 above, the Tribunal attaches weight to the CMA's assessment of the added value of the material volunteered by Roland and of the level of Roland's cooperation.

122. Taking into account all the evidence before it and the submissions of the parties, the Tribunal is not persuaded that the CMA's assessment of a 20% leniency discount was inappropriate and it therefore it does not propose to apply a different discount.

G. REVOCATION OF THE SETTLEMENT DISCOUNT

(1) The Investigation Guidance

123. The CMA's settlement procedure is set out in chapter 14 of the CMA's *Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (the "Investigation Guidance"). The Investigation Guidance contains the following provisions:

(1) Settlement is the process whereby a business under investigation is prepared to admit that it has breached competition law and confirms that it accepts that a streamlined administrative procedure will govern the remainder of the CMA's investigation. If so, the CMA will impose a reduced penalty on the business. Settlement, in appropriate cases, allows the CMA to achieve efficiencies through a streamlined administrative procedure, resulting in earlier adoption of any infringement decision, and/or resource savings. (§14.1 – §14.2)

(2) Settlement is a discretionary matter. Whether to settle any case is at the CMA's discretion. Moreover, there is no right or obligation to settle or enter into any settlement discussions. In determining whether a case is suitable for settlement the CMA will have regard to several factors, including whether the evidential standard for giving notice of its proposed infringement decision is met (a case

will only be settled if the standard is met) and the likely procedural efficiencies and resource savings that can be achieved. (§14.5 – §14.6)

(3) The minimum requirements for settlement are that the settling business (i) makes a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement; (ii) ceases the infringing behaviour and does not repeat it and (iii) confirms that it will pay the maximum penalty, which will reflect the application of the settlement discount to the penalty that would otherwise have been payable. (§14.7)

(4) In order to achieve the CMA's objective of resolving the case efficiently, a settling business must confirm that it accepts that, among other matters, there will be a streamlined administrative process for the rest of the investigation and that there will be an infringement decision against the settling business and that if the settling business appeals the decision it will no longer benefit from the settlement discount. (§14.8 and §14.29)

(5) The procedure for settlement includes sending a draft penalty calculation to the settling party, which is entitled to make limited representations thereon, provided that these are not inconsistent with its admission of liability. (§14.15)

(6) If settlement discussions are successful, the Senior Responsible Officer for the matter will issue an infringement decision on behalf of the CMA. In the infringement decision, the CMA will set out the total penalty less the specified settlement discount. (§14.26 – §14.27)

(7) Settlement discounts are capped at 20%. The actual discount awarded will take account of the resource saving achieved in settling that particular case at that particular stage in the investigation. The discount available for settlement pre-Statement of Objections will be up to 20% and for settlement post-Statement of Objections will be up to 10%. (§14.31)

(2) The approach taken in the Decision

124. The Decision records that the CMA considered it appropriate to grant Roland a 20% discount to reflect the fact that Roland had admitted the infringement and agreed to cooperate in expediting the process for concluding the investigation. This discount was granted on condition that Roland continued to comply with the continuing requirements of settlement as set out in the settlement agreements between Roland and the CMA.

(3) The CMA's submissions

125. The CMA submitted that its application to revoke the settlement discount raises an important point of policy for the CMA. The purpose of the settlement procedure is to incentivise undertakings which have infringed competition law to settle with the CMA thereby leading to administrative savings. These benefits are only properly realised if a settlement brings a final resolution to a case. If a settling party decides to appeal, the case is then reopened and the time and resource savings from settlement are lost. Staff who worked on the case and had been reassigned to other cases would need to be available to defend the appeal. This prevents the CMA from using those resources to tackle other restrictive practices. If the CMA's application to revoke the settlement discount is disallowed, this would send out the wrong signal and damage the integrity of the settlement process. Settlements lead to the cases being resolved more quickly to the benefit of complainants who are the victims of the anti-competitive practice concerned and consumers who are able to get the benefit of the CMA's intervention sooner. The benefit to consumers is particularly apparent in the case of RPM infringements which, when terminated, mean consumers pay less for the products in question sooner than in a contested case.

126. The CMA further submitted that there is no unfairness in revoking the settlement. The Investigation Guidance expressly states that the settlement discount will no longer apply if a settling business appeals the judgment in the Tribunal.

127. The Terms of Settlement include provisions that:

> "the Terms of Settlement will no longer apply if, following the adoption of any infringement decision, the Settling Party appeals or brings any legal challenge in

> relation to any infringement decision arising from the investigation to any court, including but not limited to the CAT"

and

> "If the Settling Party brings appeal proceedings before the CAT (including as to penalty) against any infringement decision arising from the investigation, the CMA reserves the right to make an application to the CAT to increase the penalty imposed on the Settling Party (the Settlement Penalty), such that there is no Settlement Discount, and to require the Settling Party to pay the CMA's full costs of the appeal regardless of the outcome of that appeal."

128. The CMA referred to the fact that Roland was advised by a team of lawyers from a reputable and experienced law firm throughout the investigation and the settlement process and had ample opportunity to reflect, consider its position and to make submissions, and indeed did make submissions, on the CMA's approach to calculating the penalty. This was in line with the settlement timetable in the Investigation Guidance which is designed to allow a settling party sufficient time to reflect on the draft and final penalty calculation and to take a considered view on whether to proceed with the settlement. In this case, far from the CMA putting pressure on Roland to settle, Roland itself expressed a desire for the investigation and settlement process to be dealt with quickly so that Roland knew its maximum liability under the settlement process in good time, in light of the fact that Roland was planning an IPO for later in the year. In an email to the CMA on 6 February 2020 Roland stated:

> "the timing has become particularly acute for Roland due to the very significant financial consequences that will impact the company if it cannot provide a reliable fine range to the Japanese listing authorities by the end of April and has to put its IPO on hold."

129. The CMA pointed out that it was also open to Roland at any stage to withdraw from the settlement process and to continue the investigation under the normal administrative procedure involving the appointment of a three-member case decision group, with no previous involvement in the case, who would have considered the issue of penalty afresh and also considered any representations Roland wished to make. However, Roland chose not to go down this route, but willingly signed up to the Terms of Settlement and agreed to pay the maximum penalty amount.

130. Ms Pope's evidence was that, although there were some efficiencies to be gained from settling with Roland as part of the administrative phase, Roland was a leniency party

and was therefore not contesting the substance of the alleged infringement and was already subject to an obligation of continuous cooperation with the investigation. The most significant resource saving from the settlement process was expected to be not having to defend an appeal on the level of the penalty.

(4) Roland's submissions

131. Roland submitted that the settlement of a CMA investigation under the 1998 Act is very different from the settlement of a commercial dispute. The settlement of a commercial dispute is for all time and cannot be appealed. Settlement of a CMA investigation is a procedural device, the purpose of which is to shorten the process and save costs for both sides. There is always a right of appeal.

132. Roland submitted that the settlement discount is intended to reflect the benefit accruing to the CMA in the form of the administrative savings brought about by the settlement. The CMA enjoyed all of the efficiencies of a streamlined administrative procedure that the settlement process is designed to produce, save for one: there has now been an appeal on the amount of the penalty. Ms Pope in her witness statement accepted that there were some efficiencies to be gained from settling with Roland and those have not all been lost. The settlement enabled the CMA to save time and cost in the administrative phase, notwithstanding the appeal. If there had been no settlement, the investigation would have run its full course after which there would have been an appeal. Given that the settlement actually brought benefits to the CMA, Roland should retain, at the very least, some of the corresponding discount. The appeal is narrow in scope. Roland has accepted liability and it has also accepted all of the factual analysis that supported the CMA's conclusions on penalty. Roland has only challenged the legal evaluation of the undisputed facts, and even then only in relation to seriousness and leniency. There is accordingly no basis on which the CMA can say that it has lost all of the administrative savings that it stood to derive from the 20% discount.

133. Roland submitted that there was also a policy issue at stake. Settlement should not be used in a way that becomes coercive, or that shields the CMA from proper scrutiny. If the settlement discount could always be revoked, the CMA could err and set penalties that are 20% too high without the investigated party having any recourse. The

investigated party would be given Hobson's choice: it could settle and pay a penalty that would only have been appropriate if it had not given the CMA the administrative savings of settlement, or it can appeal and pay exactly the same penalty, because the reduction on appeal would be offset by the revocation of the settlement discount. Given the costs and risks inherent in litigation, the upshot would be that the CMA could be systematically wrong by substantially more than 20% without there ever being an appeal to correct the error. That would be inconsistent with public policy.

134. Roland submitted that, if its appeal is well-founded, there would be no need to reduce the 20% settlement discount at all. Equally, given the limited scope of the appeal, if Roland's appeal fails and it has to pay the CMA's costs of the appeal, there would also be no need for a further sanction. By seeking to have the 20 % discount back as well as the costs of the appeal in any event, the CMA is "double dipping". If, as the CMA submitted, the main benefit of the settlement was avoiding an appeal on penalty, it would be wrong to allow the CMA both to recover its costs of the appeal and to revoke the 20 % settlement discount.

135. Roland noted that the Tribunal's rules do not provide for any orders revoking settlements nor do they need to. The Tribunal's function is simply to decide on what penalty it should impose on the facts of this case, given the grounds of appeal and defence put before it. In doing so, the Tribunal can give whatever weight it considers appropriate (including nil) to the fact that Roland settled with the CMA before appealing.

(5) Discussion

136. The essence of the settlement discount procedure under the Investigation Guidance, as reflected in the Terms of Settlement, is a bargain between the CMA and the settling party: the CMA agrees to accept a lower penalty than would otherwise be payable by the settling party in return for the settling party agreeing not to appeal the CMA's decision.

137. Although, as submitted by Roland, a settlement of a CMA investigation is different from a settlement concluding a commercial dispute, in that the former contemplates the

possibility of an appeal, there is, in our view, no valid reason for the Tribunal to ignore that essential bargain and permit a settling party which brings an appeal against the infringement decision to retain the benefit of the discount and thereby receive a lower penalty than it otherwise would have received.

138. There is no unfairness in holding Roland to its bargain in this case. Roland had ample opportunity to consider the penalty proposed by the CMA, which was reduced to take account of some of Roland's submissions. In signing the Terms of Settlement, Roland agreed to the imposition of a maximum penalty of £4,003,321 in full knowledge of the calculation used by the CMA and with the benefit of legal advice. Roland confirmed that it was aware that the 20% discount was being given on the basis that Roland did not appeal.

139. We accept the CMA's submission that if a settling party could retain the benefit of a settlement discount despite appealing the infringement decision, the settlement process would be undermined. Businesses would enter settlement agreements not with a view to bringing finality to an investigation but as a means of achieving an undeserved reduction in their penalty prior to an appeal aimed at achieving an even greater reduction. CMA staff who had worked on the case in question and assigned to other cases on settlement being reached would need to be taken off the other cases and redeployed to the case on appeal.

140. Roland's argument that the Tribunal should attempt to quantify the savings made by the CMA as a result of the settlement (comparing the position of the CMA after the appeal with the position it would have been in if there had not been a settlement) and allow Roland to have the benefit, if not of the whole discount, of the amount of the discount less any extra costs incurred by the CMA as a result of the appeal, gives rise to the same objections. Moreover, quantifying the savings would in itself be a potentially complex and time-consuming exercise.

141. We do not accept Roland's submission that requiring an undertaking to choose between either paying a discounted penalty on settlement and foregoing an appeal or paying the full penalty and appealing is coercive or shields the CMA from scrutiny. The settlement process is voluntary. The undertaking can choose not to accept the settlement and

thereby ensure that the penalty is scrutinised on appeal. The fact that, if it does so, the undertaking may be no better off than if it had accepted the settlement, because of the loss of the discount, does not mean that it has no choice. There is no sound basis for Roland's concern that the settlement procedure may incentivise the CMA to systematically calculate penalties which are wrong by more than 20% but which are never challenged on appeal.

142. The CMA referred the Tribunal, by way of analogy, to the decision of the Court of Appeal in *AB Volvo (Publ) and others v Ryder Limited and others* [2020] EWCA Civ 1475 dismissing an appeal from the Tribunal's ruling that it would be an abuse of process for the truck manufacturers, in subsequent follow-on damages proceedings, to deny or not admit facts that they are recorded as having accepted in the European Commission's infringement decision.

> "145. I am satisfied that the CAT was entitled to conclude, for the reasons it gave, that there would be manifest unfairness to the claimants and that the administration of justice would be brought into disrepute if the Addressees were entitled, in the follow-on proceedings, to contest the admissions they had freely made in the settlement process. The Addressees made their admissions with the benefit of procedural rights and with full knowledge of their potential future significance. Indeed, they had access to the Commission's statement of objections and to the Commission's file before commencing settlement discussions. The admissions were made to secure a 10% reduction in the fine (amounting to some €330 million) and the benefit of a shorter decision than would have resulted from a contested procedure."

143. Whilst it was not suggested that it was an abuse of process for Roland to have contested the admissions made in the settlement process, there is no unfairness in holding Roland to its agreement that, if it chose to appeal the penalty, it would lose the benefit of the settlement discount.

144. For these reasons, the Tribunal concludes that the penalty payable by Roland is to be calculated without the 20% settlement discount. This results in an increased penalty of £5,004,141.

H. CONCLUSION

145. Having considered the specific complaints about the Penalty raised by Roland, we unanimously conclude that the CMA did not go wrong in the way it applied the Penalty

Guidance and that, looking at the matter in the round, the penalty of £5,004,151 is appropriate.

Andrew Lenon Q.C. Chairman	Michael Cutting	Professor Pauline Weetman

Charles Dhanowa O.B.E., Q.C. (*Hon*) Registrar	Date: 19 April 2021

ANNEX

TABLE SHOWING PENALTY CALCULATION

<table>
<tr><th>Step</th><th colspan="2">Description</th><th>Adjustment</th><th>Figure</th></tr>
<tr><td></td><td colspan="2">Relevant turnover</td><td></td><td>£[…][✂]</td></tr>
<tr><td>1</td><td colspan="2">Starting point</td><td>x 19%</td><td>£[…][✂]</td></tr>
<tr><td>2</td><td colspan="2">Duration multiplier</td><td>x 5.5</td><td>£[…][✂]</td></tr>
<tr><td rowspan="4">3</td><td rowspan="4">Adjustment for aggravating and mitigating factors</td><td>Aggravating: Senior management involvement</td><td>+15%</td><td>+£[…][✂]</td></tr>
<tr><td>Aggravating: intent</td><td>+10%</td><td>+£[…][✂]</td></tr>
<tr><td>Mitigating: compliance</td><td>-10%</td><td>-£[…][✂]</td></tr>
<tr><td>Total after adjustment</td><td>+15%</td><td>£[…][✂]</td></tr>
<tr><td>4</td><td colspan="2">Adjustment for specific deterrence or proportionality</td><td>None</td><td>£6,255,189</td></tr>
<tr><td>5</td><td colspan="2">Adjustment to take account of the statutory maximum penalty</td><td>N/A</td><td>N/A</td></tr>
<tr><td></td><td colspan="3">Penalty after Step 5</td><td>£6,255,189</td></tr>
<tr><td rowspan="3">6</td><td colspan="2">Leniency discount</td><td>-20%</td><td>-£1,251,038</td></tr>
<tr><td colspan="3">Penalty after leniency discount</td><td>£5,004,151</td></tr>
<tr><td colspan="2">No settlement discount</td><td></td><td></td></tr>
<tr><td colspan="4">Total Penalty Payable</td><td>£5,004,151</td></tr>
</table>