Neutral citation [2024] CAT 36

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Case Nos: 1432/1/12/22
1434/1/12/22
1438/1/12/22
1439/1/12/22

23 May 2024

Before:
THE HONOURABLE LORD ERICHT
(Chair)
PROFESSOR DAVID ULPH CBE
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ADVANZ PHARMA CORP. LIMITED & OTHERS
(2) CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LIMITED & OTHERS
(3) LEXON (UK) LIMITED & ANOTHER
(4) ALLIANCE PHARMACEUTICALS LIMITED & ANOTHER

Appellants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

AND IN THE MATTER OF LEXON UK HOLDINGS LIMITED, ALLIANCE PHARMACEUTICALS LIMITED, FOCUS PHARMACEUTICALS LIMITED, MERCURY PHARMA GROUP LIMITED, CONCORDIA INVESTMENT HOLDINGS (UK) LIMITED AND MEDREICH PLC AND OTHERS

AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

BETWEEN:

COMPETITION AND MARKETS AUTHORITY

Claimant

-v-

(1) PRITESH SONPAL; (2) PETER BUTTERFIELD; (3) JOHN DAWSON; (4) MARK CRESSWELL; (5) ROLAND BROWN; (6) GRAEME DUNCAN; (7) DEBANGSHU DEY

Defendants

Heard at Salisbury Square House on 5 to 9, 15 to 26 June 2023, 26 July 2023 to 4 August 2023.

JUDGMENT (NON-CONFIDENTIAL VERSION)

APPEARANCES

Mark Brealey KC (instructed by Morgan, Lewis & Bockius UK LLP) appeared on behalf of Advanz and Mr Cresswell, Mr Brown and Mr Duncan.

Sarah Ford KC and Sarah Bousfield (instructed by CMS Cameron Mckenna Nabarro Olswang LLP) appeared on behalf of Alliance.

David Scannell KC and Charlotte Thomas (instructed by Clifford Chance LLP) appeared on behalf of the Cinven Appellants.

Aidan Robertson KC and Matthew O'Regan (instructed by Maitland Walker LLP) appeared on behalf of Lexon and Mr Sonpal.

Hannah Bernstein (instructed by Maitland Walker LLP) appeared on behalf of Mr Dey.

Christopher Buckley (instructed by Addleshaw Goddard LLP) appeared on behalf of Mr Butterfield.

Tristan Jones KC, Catherine Addy KC, Tom Leary, Daniel Cashman, Professor David Bailey and Narinder Jhittay (instructed by the legal department of the Competition and Markets Authority) appeared on behalf of the Competition and Markets Authority.

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

A. INTRODUCTION

1. In a Decision dated 3 February 2022 (the "Decision") the Competition and Markets Authority ("CMA") found that a "pay for delay" agreement was reached between Alliance and Lexon relating to Prochlorperazine 3mg buccal tablets sold in packs of 50 (the "Market Exclusion Agreement") which had as its object the restriction of competition. The CMA also found that Focus and Medreich participated in the MEA. The appellants have appealed against that Decision under section 46(1) of the Competition Act 1998, both in respect of the finding of infringement and in respect of penalties.

2. In addition, the CMA has brought proceedings in the High Court seeking disqualification orders against each of Mr Pritesh Sonpal, Mr Peter Butterfield, Mr John Dawson, Mr Mark Cresswell, Mr Roland Brown, Mr Graeme Duncan and Mr Debangshu Dey on the basis that the MEA existed and was in breach of competition law. The High Court has remitted to this Tribunal the question of whether the first condition under section 9A of the Company Directors Disqualification Act 1986 ("CDDA 1986") has been satisfied in relation to each of these directors. The first condition is "that an undertaking which is a company of which he is a director commits a breach of competition law" (section 9A(2) CDDA 1986).

3. This appeal turns on a question of fact. Did Alliance and Lexon enter a MEA, which was then implemented by two distribution agreements, one between Alliance and Focus, and the other between Focus and Lexon? If the CMA does not prove as a matter of fact that there was a MEA between Alliance and Lexon, then the CMA's case fails and the appeals must succeed.

4. The Decision is 727 pages long and is repetitive. The evidence in this appeal, both oral and documentary, was extensive. We have considered all of the Decision, all of the evidence, and all of the submissions made by the parties, and have taken these all into account in coming to our decision set out in this judgment.

B. PARTIES

5. In this judgment we adopt the definitions relating to the various corporate identities as set out by the CMA in para 1.3 of the Decision, namely:

> "Alliance" refers to an undertaking of which Alliance Pharmaceuticals Limited and Alliance Pharma plc formed part.
>
> "Focus" refers to part of an undertaking of which the following legal entities formed part:
>
> > "(a) from at least 22 June 2013 until 30 September 2014, Focus Pharmaceuticals Limited and Focus Pharma Holdings Limited;
> >
> > (b) from 1 October 2014 until 20 October 2015, Focus Pharmaceuticals Limited, Focus Pharma Holdings Limited, Mercury Pharma Group Limited, Concordia International (Jersey) Limited, Cinven (Luxco 1) S.à.r.l. (formerly Cinven (Luxco 1) S.A.), Cinven Capital Management (V) General Partner Limited and Cinven Partners LLP; and
> >
> > (c) from 21 October 2015 until at least 31 July 2018, Focus Pharmaceuticals Limited, Focus Pharma Holdings Limited, Mercury Pharma Group Limited, Concordia International (Jersey) Limited, Concordia Investment Holdings (UK) Limited, Concordia Investments (Jersey) Limited and Advanz Pharma Corp. Limited (formerly known as Concordia International Corporation);"
>
> "Lexon" refers to an undertaking of which the following legal entities formed part:
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> > "(a) from at least 7 June 2013 until 28 February 2018, Lexon (UK) Limited; and
> >
> > (b) from 1 March 2018 until at least 31 July 2018, Lexon (UK) Limited and Lexon UK Holdings Limited;"
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> "Medreich" refers to an undertaking of which the following legal entities formed part:
>
> > "(a) from at least 5 February 2014 until 11 February 2015, Medreich plc and Medreich Ltd; and
> >
> > (b) from 12 February 2015 until at least 15 February 2018, Medreich plc, Medreich Ltd, Meiji Seika Pharma Co, Ltd and Meiji Holdings Co Ltd."

6. The directors for whom the CMA seeks disqualification orders in the disqualification proceeding are set out in the following table taken from para 3.20 of the Decision:

Individual and undertaking	Role
Alliance	
John Dawson	CEO and Director (September 1996 to 30 April 2018)
Peter Butterfield	CEO (1 May 2018 to present), Deputy CEO and Chief Commercial Officer (October 2016 to April 2018), Chief Commercial Officer (end of 2015 to October 2016), Head of Western Europe (2013 to 2015), Director since February 2010
Focus/AMCo/Concordia/Advanz	
Graeme Duncan	President/Managing Director of Concordia Rx's international business (September 2016 to November 2018), Global Marketing Director and General Manager UK and Ireland (April 2015 to September 2016), Global Marketing Director (October 2014 to April 2015), Director of Focus Pharmaceuticals Limited since December 2016
Mark Cresswell	Managing Director of Focus (October 2002 to 1 October 2014)
Roland Brown	Marketing Director of Focus (October 2002 to 1 October 2014)
Lexon	
Pritesh Sonpal	Director (December 2000 to April 2021), Head of Procurement (April 2021 to present).
Medreich	
Debangshu Dey	Sales Manager (March 2006 to August/September 2017)

7. Mr Dey was not a director of Medreich plc during the time in which the MEA is said to have been entered into. He did not become a director until April 2016, and ceased to be a director in August 2017. The directors disqualification case against him is not based on actions taken by him when a director, but is based on an omission to take steps to bring the alleged anti-competitive conduct to an end upon his appointment as director.

C. THE DECISION APPEALED AGAINST

8. The CMA found that Chapter I of the Competition Act 1998 had been infringed (Decision para 8.1).

9. It found that "an agreement was reached between Alliance and Lexon relating to Prochlorperazine 3mg buccal tablets sold in packs of 50 which is a prescription only medicine ("Prochlorperazine POM") (the "Market Exclusion Agreement" or "MEA") which had as its object the restriction of competition". (Decision para 1.4).

10. It made the following findings in respect of the MEA:

> "1.28 The CMA has found that most likely by 7 June 2013, but in any event by 22 June 2013, an anti-competitive agreement was reached between Alliance and Lexon relating to Prochlorperazine POM under which Lexon would be compensated for staying out of the market. Specifically, the CMA has found that Alliance and Lexon agreed that:
>
> 1.28.1 Alliance would indirectly (through a third-party company, Focus) transfer value to Lexon by:
>
> (a) Alliance exclusively supplying Focus with a de-branded version of Alliance's Buccastem POM product at a fixed selling price, and enabling Focus to implement a series of price increases; and
>
> (b) Lexon entering into an agreement with Focus under which Lexon would (nominally) appoint Focus as the distributor of the Prochlorperazine POM product Lexon had jointly developed with Medreich, and, under that agreement, Focus sharing with Lexon the profits it earned from the sales of Alliance's Prochlorperazine POM; and
>
> 1.28.2 in return for that value transfer from Alliance, through Focus, Lexon would not enter the market with the Prochlorperazine POM that it had jointly developed with Medreich.
>
> …

> 1.30 As part of the Market Exclusion Agreement, Alliance and Lexon agreed that Lexon would be permitted to supply, through Focus, a single batch of the Lexon/Medreich Prochlorperazine POM product; this was necessary to avoid the application of the so-called Sunset Clause to Medreich's Prochlorperazine POM licence - namely that if a product is not placed on the market within three years of the date of the grant of the licence, the licence will cease to be valid."

11. Having found that the MEA existed, the CMA went on to find that Focus participated in the MEA from at least 22 June 2013 until 31 July 2018 (the "Focus Infringement Period") and Medreich participated in it from at least February 2014 until 15 February 2018 (the "Medreich Infringement Period") (Decision paras 1.6, 1.8, 1.9).

12. The CMA found (Decision para 5.153)) that the terms of the MEA between Alliance and Lexon were not recorded in a formal written contract, but the existence and terms of the MEA was established from seven categories of documentary and witness evidence which it set out in para 5.154 of the Decision. The seven categories were as follows:

    1) Documentary evidence of discussions relating to Prochlorperazine POM between Alliance and Lexon in the period prior to the MEA (Decision paras 5.158 to 5.188).

    2) The documentary evidence of an agreement that Alliance would pay Lexon (via Focus) to delay its market entry (5.189 to 5.272).

    3) The entry by Alliance and Lexon into the Implementing Agreements with Focus. (5.273 to 5.356).

    4) Subsequent conduct and documentary evidence after the Implementing Agreements supporting the existence of the MEA-Alliance (5.358 to 5.416).

    5) Subsequent conduct and documentary evidence after the Implementing Agreements supporting the existence of the MEA-Lexon (5.417 to 5.482).

6) Subsequent conduct and documentary evidence after the Implementing Agreements supporting the existence of the MEA-Focus (5.483 to 5.561).

7) Subsequent conduct and documentary evidence after the Implementing Agreements supporting the existence of the MEA-Medreich (5.562 to 5.581).

13. In addition, the Decision considers email correspondence between Mr Cresswell of Focus and Mr Sonpal of Lexon in 2014. The CMA does not rely on these documents to establish the existence of the MEA (Decision para 5.157). It finds that the correspondence is not explained by any expectation on behalf of Focus of the supply by Lexon to Focus of commercial volumes of Prochlorperazine POM and it can be plausibly explained by one or more interpretations that do not involve an expectation on the part of Lexon or Focus of the supply by Lexon to Focus of commercial volumes of Prochlorperazine POM (Decision para 5.157). It finds that the 2014 correspondence is not inconsistent with the existence of the MEA, or with Focus' participation in it (Decision para 5.619).

D. THE APPEALS AGAINST THE FINDING OF INFRINGEMENT

14. The grounds of appeal against the finding of infringement can be summarised as follows.

15. Alliance appealed on the ground that the CMA was wrong to find that Alliance was party to or aware of any MEA. The CMA's evidential case was extraordinarily thin and comprised largely of unsupported inference. The CMA wrongly sought to characterise Alliance's rational and independent commercial strategy as subsequent conduct implementing and/or evidencing the MEA.

16. Lexon appealed on the grounds that:

(a) on a proper analysis of the evidence,

(i) certain findings of fact made by the CMA and on which it based its inferences of the existence of the MEA were not supported by the evidence, and

(ii) other findings of fact that the CMA could properly make did not support the inferences drawn from them to support the conclusion that Lexon and Alliance had entered into the MEA

such that the CMA had not met its burden of proof on establishing on the balance of probabilities that Lexon was party to the MEA; and

(b) the evidence available to the CMA supported an alternative plausible explanation that did not involve Lexon being a party to an unlawful agreement or participating in an unlawful concerted practice.

17. Advanz appealed on the ground that the CMA had not proved in law and fact that during the Focus Infringement Period Focus knowingly entered into a plan to act as a conduit for a transfer of compensation from Alliance to Lexon under the MEA. The facts showed that Focus did not enter such a plan.

18. Cinven appealed on the ground that the CMA erred in its approach to the burden of proof in its assessment of the evidence pertaining to Focus's alleged participation in the MEA, in particular in so far as it:

a) relied on a narrow, carefully chosen, selection of documents (three in total) to found liability, which were in any event ambiguous;

b) failed to properly assess all the evidence in the round and properly consider exculpatory evidence, in particular correspondence in 2014; and

c) drew unwarranted inferences as to Focus' commercial incentives in circumstances where plausible explanations existed for Focus' conduct, which did not depend on any anti-competitive intent.

19. The individual directors, other than Mr Dey, associated themselves with the appeals of, and arguments advanced by, their respective companies.

20. As there was no appeal by Medreich, Mr Dey was represented as an individual. His position was that there was no MEA.

E. THE ROLE OF THIS TRIBUNAL

21. This Tribunal is required to determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal (Competition Act 1998 Schedule 8 para 3(1)).

22. The role of the Tribunal was explained by Green LJ in *Flynn Pharma Ltd and Pfizer* v *CMA* [2020] 4 All ER 934 as follows:

> "136. 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. The starting point is that competition law is treated as a species of criminal law….
>
> ***The limits of 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 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) Tribunal Rules (SI 2015/1648) ('*the Rules*').
>
> 142. The Tribunal can hear evidence, including fresh evidence not before the CMA, and make findings of both fact and law….
>
> 143. In *T-Mobile v Ofcom* [2008] EWCA Civ 1373 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. Whether an error is material will be a matter of judgment for the Tribunal. Without seeking to limit how the Tribunal might exercise that judgment call I would make certain limited observations relevant to the Grounds of Appeal of the CMA to the effect that the Tribunal should not have interfered with its fact findings.

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. An error of fact or law might not be material to the ultimate question (breach or no breach) but could be material to some significant aspect of the Decision such as duration of the breach, or geographical spread, or the number of customers or consumers affected etc. These might be relevant to penalty or remedial directions.

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....

147. Fourth, I would expect that in a judgment the Tribunal would set out its reasoning on the materiality of errors so found. If the Tribunal annulled a decision upon the basis of an error that was very slight or *de minimis* and/or gave no reasoning to justify the annulment that might be considered an error of law, subject to an appeal."

F. BURDEN AND STANDARD OF PROOF

23. The burden of proving an infringement of the Chapter I prohibition falls on the CMA. The standard of proof is the balance of probabilities (*Napp Pharmaceutical Holdings* v *DGFT* [2002] CAT 1 at para 109, *JJB Sports plc* v *Office of Fair Trading* [2004] CAT 17 at paras 197-204, *North Midland Construction* v *OFT* [2011] CAT 14 at paras 15-16, *AH Willis and Sons Ltd* v *OFT* [2011] CAT 13 at paras 45-7). Because of the presumption of innocence, any doubt as to whether a point is established on the balance of probabilities must operate to the undertaking's advantage (*Tesco Stores* v *OFT* [2012] CAT 31 at para 88).

24. In considering whether the CMA has proved its case on the balance of probabilities, it must be borne in mind that Chapter I cases often concern matters which "are in some way hidden or secret; there may be little or no documentary evidence; what evidence there may be may be quite fragmentary; the evidence may be wholly circumstantial" (*Claymore Dairies* v *OFT* [2003] CAT 18 at para 3). We acknowledge the difficulties in proving a case in such circumstances. Circumstantial evidence and inferences can play an important role in proving such a case. However, it must be borne in mind that lack of evidence of an anti-competitive agreement is not, of itself, evidence that it exists. That would be mere speculation. Where there is no evidence about a matter, any inferences about it are required to be based on, and properly deduced from, evidence which does exist. Further, if there is evidence which contradicts the existence of an anti-competitive agreement, that does not necessarily mean that the evidence has been falsely concocted to deflect from the agreement. It may simply mean that the evidence is true and there is no anti-competitive agreement at all.

25. In this case certain witnesses were not able to give evidence at the hearing for medical reasons. However, there were other witnesses to important matters and documents whose evidence was not led by the CMA. It is not enough for the CMA to say that the appellants should have led these other witnesses: the burden of proof lies on the CMA. As the CAT said in *Tesco* v *OFT* [2012] CAT 31 at para [126]:

> "If, …. the Appellants contest the meaning or significance of a document relied on by the OFT, in the absence of any witness statement from the author of the document, the Tribunal has to consider the language used in the document and seek to determine what the author meant by it. The starting point will be that the author meant what they said and said what they meant. A document is not made in a vacuum, however, and should not be construed as if it had been; we have therefore read documents against the factual background known to the parties at the time. If the Tribunal's conclusion is that a document is unclear or ambiguous, even when read in light of the prevailing circumstances and other evidence, then any doubt as to the meaning of that document must be resolved in favour of the Appellants."

26. Where the CMA has advanced a view or finding in respect of an event, matter or document, but has chosen not to lead oral evidence at the hearing from a witness who can speak to that event, matter or document, we have taken account of the lack of oral evidence from that witness in assessing whether to accept the

CMA's view of that event, matter or document, and whether the CMA has proved its case.

G. THE MARKET EXCLUSION AGREEMENT

27. The Infringement Period is said to have lasted from June 2013 until 31 July 2018 (Decision para 1.8). The Decision states that the "arrangement" (by which it means the MEA) persisted for five years and during this time "costs to the NHS increased by some 700%" (Decision para 1.18). That increase in the price paid by the NHS was shown in a graph in figure 2 of the Decision (para 3.52).

28. The table of underlying data for that graph produced by the CMA shows that on 1 November 2013 the price charged by Alliance for Prochlorperazine POM in its branded form, which had not increased for several years, was £5.65, and the Drug Tariff Price was £5.89. The Drug Tariff Price is the reimbursement price that pharmacies can claim from the NHS when fulfilling prescriptions (see para 58 below). Focus raised the price of Prochlorperazine POM in its genericised form, to £8 on 1 December 2013, with the Drug Tariff Price increasing to £9.98 on 1 January 2014. By 1 October 2014, when AMCo acquired Focus, Focus' price had risen to £9.61 and the Drug Tariff Price to £11.98. By October 2015, when Concordia acquired AMCo, the Focus price under AMCo ownership had risen to £20.61 and the Drug Tariff Price to £28.72. By the end of the alleged infringement on 31 July 2018, the Focus price under Concordia ownership had risen to £27.94 and the Drug Tariff Price to £51.03.

29. However, the evidence as to the increase in price is not central to this case. This is not an excessive pricing case. Nor is it a case about whether the Amended Alliance-Focus Distribution Agreement and the Focus-Lexon Distribution Agreement individually and in themselves broke competition law: the CMA's investigation into that matter was closed by the CMA on administrative priorities grounds (Decision para 2.39). It is a "pay for delay" case and stands or falls on the MEA: the CMA has perilled its entire Decision, and its entire explanation for a 700% increase in costs to the NHS, on proving as a matter of fact that the MEA existed.

30. In order to prove the existence of the alleged MEA requires the CMA to prove as matters of fact and on the balance of probabilities that:

1) The MEA was made most likely by 7 June 2013, but in any event by 22 June 2013;

2) The agreement was made between Alliance and Lexon;

3) Alliance and Lexon agreed that Alliance would indirectly, through Focus, transfer value to Lexon;

4) Alliance and Lexon agreed that the transfer of value would be achieved by:

(a) Alliance exclusively supplying Focus with a de-branded version of Alliance's Buccastem POM product for a fixed selling price, and enabling Focus to implement a series of price increases; and

(b) Lexon entering into an agreement with Focus under which Lexon would nominally appoint Focus as the distributor of the Prochlorperazine POM product Lexon had jointly developed with Medreich and under that agreement, Focus sharing with Lexon the profits it earned from the sales of Alliance's Prochlorperazine POM;

5) Alliance and Lexon agreed that, in return for the value transfer, Lexon would not enter the market with the Prochlorperazine POM that it had jointly developed with Medreich; and

6) Alliance and Lexon agreed that Lexon would be permitted to supply, through Focus, a single batch of the Lexon/Medreich Prochlorperazine POM product.

H. THE HEARING

31. At the hearing, the CMA led no witnesses in support of their position. In order to prove their case, they relied on written documents and on transcripts of interviews conducted by the CMA under section 26A of the Competition Act 1998.

32. The eleven days of witness evidence consisted entirely of witnesses led by the Appellants and by Mr Dey. Each witness had provided an extensive statement or statements which were adopted as evidence in chief so the oral evidence consisted of extensive cross-examination by the CMA and brief examination by other appellants and brief re-examination. Alliance led evidence from Mr Butterfield and Mr Dawson. Alliance also led evidence from Dr Chowdhury, an expert economist, to give factual evidence as to Alliance's forecasts. Lexon led evidence from Mr Sonpal. Mr Dey gave evidence on his own account and led evidence from Mr Rajeev Mehta. Advanz led evidence from Mr Cresswell, Mr Brown and Mr Duncan.

33. Mr Tweedale of Alliance and Mr Brundan of Medreich did not give evidence before us because […][✂]. No such reasons applied to Ceri Chard, Sue Wiseman or Karen Hampshire.

34. At the outset of the hearing, the CMA correctly and fairly identified in opening submissions that if we were to find the witnesses credible we should find against the CMA (Transcript Day 3 p79 line 18).

35. We found both of the Alliance witnesses to be credible and reliable.

36. Mr Butterfield and Mr Dawson were both impressive and compelling witnesses who gave their evidence in a clear and courteous manner and did not change their position in the face of rigorous cross-examination. They were both careful to distinguish their personal recollections from matters which they had learned subsequently or had worked out from looking at documents. Both of them showed a strong sense of solid business integrity. Mr Dawson was cross-examined on certain prior inconsistent statements he had made during his CMA interview. We did not find that these statements impacted adversely on his

credibility. His interview was at an early stage at which Mr Dawson was not fully informed, and he took immediate steps to correct errors by solicitors' letter to the CMA. We prefer his evidence, given on oath to us at the hearing, to what he said at interview.

37. Mr Sonpal was an entrepreneurial businessman who operated by moving quickly and doing deals to react to changes in the market. At the outset of cross-examination, the CMA drew attention to the fact that he had given a Disqualification Undertaking to the CMA further to the CMA's decision on *Nortriptyline Tablets Information Exchange* (4 March 2020). However, we note that nevertheless in the Nortriptyline appeal the CAT found Mr Sonpal to be an honest and credible witness (*Lexon* v *CMA* [2021] CAT 5 at para 53). We found him to be an honest witness who was doing his best to tell the truth. We found him to be a credible witness and in the main reliable, although there were certain matters such as the date of one of his meetings with Mr Tweedale where he was clearly not reliable.

38. Mr Cresswell and Mr Brown were entrepreneurial businessmen, with an eye for a business opportunity, and an eye to the commercial benefits to Focus of entering into distribution agreements with both Alliance and Lexon. We found them both to be credible and reliable witnesses.

39. Mr Duncan was a high level international businessman. In addition to his other duties he was temporarily standing in as interim UK Commercial Director to cover maternity leave. The focus of his attention was on his permanent duties which included projects such as the integration of Focus, the closing of Focus' premises and redundancy of its staff, the acquisition of Primegen, the sale of AMCo by its owner Cinven, the acquisition of a business in Australia, the collapse of Concordia's share price and resultant Canadian litigation, the acquisition of products from a UK company and a debt for equity swap to avoid Concordia's bankruptcy. We found him to be a credible and reliable witness. He gave clear and informed answers and explanations for documents on which he was questioned and was doing his best to assist the Tribunal.

40. Mr Dey had been brought across from India to work in the UK in a junior role. He very much saw himself as subservient to Mr Brundan and Mr Mehta. As

someone working in a foreign country and culture, he had great respect for Mr Mehta, a fellow Indian, who treated him like a son. He managed the supply chain between the UK and India and he had little involvement in, or understanding of, his company's commercial arrangements. He explained with passion that the reason why he was defending the directors disqualification proceedings against him was for his own self-respect. We accept that: he was bearing the costs of his defence personally in part, and he had no financial interest in the result of the case. His career was not as a company director and he had only briefly been a director of Medreich. We found him to be a credible and reliable witness.

41. Mr Mehta was an honest witness who was trying his best to help the Tribunal. At times his grasp of the detail was not accurate, but this is understandable as the events he was being asked about were some ten years prior to the hearing and, from 2017 to 2021, he had been undergoing a period of extremely serious ill-health and intensive medical interventions. We found him to be credible and, for the most part, reliable.

42. Dr Chowdhury's evidence was factual and largely uncontroversial.

I. PROCHLORPERAZINE

43. Prochlorperazine can be used to treat various ailments. In its 3mg buccal tablet form it is used to treat nausea and vomiting, and also migraines and dizziness. In its 5mg tablet, oral solution and injected form it can be used to treat balance problems or dizziness, prevent nausea or vomiting, treat schizophrenia, treat mania or treat anxiety in the short term.

44. The Decision and this appeal relate only to Prochlorperazine 3mg buccal tablets sold in packs of 50 which is a prescription only medicine ("POM"), known by the brand name Buccastem and available as a generic medicine, which the CMA defines as "Prochlorperazine POM" (para 3.23). We use the same definition in this judgment. The CMA has found that the relevant market is no wider than the supply of Prochlorperazine POM in the UK (para 4.3).

45. Prochlorperazine POM has five important features.

46. Firstly, Prochlorperazine POM is a prescription-only medicine. So the Decision does not apply to versions of Prochlorperazine which are available without a prescription, for example over the counter ("OTC") sales of Prochlorperazine 3mg buccal tablets sold in packs of 8 tablets to members of the public in chemists shops.

47. Secondly, the Decision applies only to 3mg tablets. So it does not apply to Prochlorperazine sold in the form of 5mg tablets.

48. Thirdly, Prochlorperazine POM is defined as being sold in packs of 50. So the Decision does not apply to the supply in different pack sizes, for example packs of 8.

49. Fourthly, Prochlorperazine POM is defined as being both a branded and a generic drug.

50. Fifthly, and most importantly, Prochlorperazine POM is defined as "buccal". Buccal means that the medicine dissolves in the mouth. So the Decision does not apply to versions of Prochlorperazine taken in tablets which are swallowed, in oral solution, or injected.

51. The Decision refers to various versions of Prochlorperazine. The following versions fall within the CMA's definition of Prochlorperazine POM:

    (a) Buccastem POM: Alliance's branded version of Prochlorperazine 3mg buccal tablets sold in packs of 50 as a branded prescription only medicine;

    (b) Alliance's generic version of Buccastem POM;

    (c) Lexon/Medreich's generic version of Prochlorperazine 3mg buccal tablets sold in packs of 50 as an unbranded prescription only medicine;

    (d) any generic version of Prochlorperazine 3mg buccal tablets in packs of 50 as an unbranded prescription only medicine

marketed by another competitor entering the market such as Primegen or Morningstar.

52. The following versions fall outside the CMA's definition of Prochlorperazine POM:

(a) Alliance's branded Buccastem P, which is buccal but is sold in packs of 8, is not a prescription only drug and can be sold over the counter.

(b) Non-buccal Prochlorperazine.

53. There are two important differences between the buccal and non-buccal versions of Prochlorperazine. In the buccal version, the drug is absorbed through the mouth where it enters the bloodstream. In the non-buccal tablet version, the tablet is swallowed and enters the bloodstream through the gut. The buccal version is particularly useful for patients who, because of vomiting, would not hold down the drug in their stomach. The tablet versions of Prochlorperazine are not interchangeable: even though they are bioequivalent, the different method of absorption means that in some prescribing situations a buccal version would be appropriate but the tablet version will not.

54. Secondly, the manufacture of a buccal prochlorperazine is more difficult than the manufacture of non-buccal. We heard evidence that manufacturers experience difficulties in manufacturing buccal Prochlorperazine.

J. THE LIFE CYCLE OF A DRUG

55. The Decision analyses the life cycle of a drug as follows:

> "1.13 There are typically three important phases in the life cycle of a drug. First, a stage of research and development where pharmaceutical companies invest significantly in the development and testing of new drugs. Second, once a drug is licensed, a stage where drug developers have the exclusive right to sell the drug for a period of time. Third, a stage where a medicine comes off patent and can be copied, allowing competition to enter the market often driving prices down significantly.
>
> 1.14 However, if that competitive entry is delayed or prevented, the drug (and so its suppliers) may be insulated from downward pricing pressure."

56. That analysis is however not the end of the story. In the UK, the price in the third stage (by which we mean the price paid by the NHS) is not left to unregulated competition.

57. In respect of branded drugs, in relation to the period of time relevant to this Decision, the price in the third stage was controlled by a voluntary agreement, the Pharmaceutical Price Regulation Scheme (the "PPRS"). This Scheme aims to ensure that safe and effective medicines are available to the NHS on reasonable terms alongside a strong, efficient and profitable pharmaceutical sector. Rather than regulating prices directly, the PPRS regulates the profit that a company can earn on sales of its branded drugs to the NHS. The company has the freedom to set the price of a new drug, but once the price is set the PPRS prevents the company from increasing it other than in certain limited circumstances. So, for example, from when Alliance acquired Prochlorperazine POM in 2009 until it de-branded in 2013, Alliance sold Prochlorperazine POM under the PPRS as a branded out of patent drug under the brand name Buccastem POM.

58. Generic drugs which have entered at stage three to compete against medicines no longer protected by patent are not included in the PPRS. The prices of generic drugs in the third stage are set by competition. This is implemented through the drug tariff. The Decision is based on the drug tariff for England and Wales (the "Drug Tariff"), albeit there is a separate drug tariff for Scotland and for Northern Ireland. The Drug Tariff governs the reimbursement price that pharmacies can claim from the NHS when fulfilling prescriptions (the "Drug Tariff Price"), and so incentivises pharmacists to purchase at a discount to the Drug Tariff Price to make a profit on dispensing. For present purposes, there are two methods for calculating the Drug Tariff Price for a particular drug. Category A prices are based on the list price of generics which are typically readily available from several sources: the price is set using a weighted average of prices from a basket of two wholesalers and up to two generic manufacturers (Decision para 3.50.1). Category C prices typically apply where a product is only available as a branded product or as a generic product from one or two sources: the price of a drug within Category C is based on a list price for a particular proprietary product, manufacturer or supplier (Decision para 3.50.2). The consequence of these

methods is that the price charged by wholesalers/manufacturers feeds into the Drug Tariff Price. If there is competition and wholesalers and manufacturers decrease their prices, then the Drug Tariff Price will go down. If there is no competition and wholesalers/manufacturers increase their prices, then the Drug Tariff Price will go up.

59. Further regulation of the market during the third stage is provided by the need to obtain Market Authorisation for a drug from the Medicines and Healthcare Products Regulatory Agency ("MHRA"). A medicinal product must be covered by a Marketing Authorisation ("MA") from the MHRA and cannot be sold without an MA. A competitor to an established drug cannot be placed on the market to compete with that drug until it has first been granted an MA.

60. The price of drugs in the third stage depends on the interaction between the PPRS, the Drug Tariff and the requirement for an MA. The branded price is fixed by the PPRS. The price of de-branded, i.e. generic, drugs is not fixed but is set by market prices and calculated in accordance with the Drug Tariff. Therefore, if a branded drug is debranded, then its price is set by the market and can be higher or lower than its previous fixed price. Pending entry by other generics it has a monopoly and so can potentially charge a monopoly price. However, if other generic drugs achieve an MA and enter the market, they can undercut that monopoly price and compete it down, and indeed, if their costs are sufficiently low, effectively drive the previously branded product from the market.

61. On the basis of the evidence we heard, if a drug which is out of patent debrands, the typical pattern is of substantial price rises followed by a rapid and deep fall (referred to as the "glide path") as generics enter into the market in order to undercut that high price. There is often a window before competitors enter the market during which, under the Drug Tariff, the de-branded drug can achieve a higher price than under the PPRS, and, if its owners wish it to, may achieve very high monopoly prices.

K. THE ALLIANCE-FOCUS DISTRIBUTION AGREEMENT AND THE FOCUS-LEXON DISTRIBUTION AGREEMENT

62. No written agreement was entered into between Alliance and Lexon.

63. There were, however, two written distribution agreements. One was between Alliance and Focus. The other was between Focus and Lexon. The CMA's position is that these distribution agreements implemented the MEA. Alliance's position is that there was no MEA and it entered into a distribution agreement with Focus as part of a unilateral strategy to de-brand in order to meet the anticipated generic entry. Lexon's position is that there was no MEA and it entered into the distribution agreement with Focus independently for commercial reasons.

(1) The terms of the Alliance-Focus Distribution Agreement

64. A distribution agreement was entered into on 4 July 2011 on Focus' standard terms template. It provided a framework for the distribution of whatever drugs Focus might distribute for Alliance, applying initially to Aspirin E/C 300mg tablets but making provision for other drugs to be added in the future. Prochlorperazine POM was added by an addendum in August 2013. It provided that Focus would not compete with Alliance in respect of drugs covered by the agreement, and granted an exclusive distributorship to Focus.

65. The Decision defines the 2011 agreement as the "Aspirin Agreement" (Decision para 3.71) and the addendum as the "Alliance-Focus Agreement" (table in para 3.53). This definition may tend to suggest to the casual reader that the 2011 agreement and the addendum are two separate legal agreements, whereas the legal position is that the "Aspirin Agreement" and the "Alliance-Focus Agreement" as both are defined by the CMA are the same legal contract in its original and amended form. It is a framework agreement which allows other drugs to be added. In this judgment we use the terms the "Original Alliance-Focus Distribution Agreement" to refer to the 2011 Agreement, the "Addendum" to refer to the addendum adding Prochlorperazine POM, and the "Amended Alliance-Focus Distribution Agreement" to refer to the Original Alliance-Focus Distribution Agreement as amended by the Addendum.

66. The terms of the Amended Alliance-Focus Distribution Agreement were as follows, with the wording added by the Addendum in respect of Prochlorperazine POM shown in italics:

> "**1 Definition of the Products**
>
> In this Agreement, "the Products" shall mean SUPPLIER'S [i.e. Alliance] generic pharmaceutical products for human use as listed in the Schedule to this Agreement plus such further products as shall be added by agreement in writing between the parties from time to time.
>
> **2 Appointment**
>
> Subject to the SUPPLIER obtaining a Marketing Authorisation for each Product, SUPPLIER appoints FOCUS to be, and FOCUS agrees to act as, an exclusive distributor of the Products in the United Kingdom during the currency of and in accordance with the terms of this Agreement.
>
> **3 Duration**
>
> Subject to all other provisions of this Agreement, this Agreement shall remain in force in respect of each Product for a period of five years starting on the date FOCUS launches the Product in question for sale in the United Kingdom (the "Initial Period") and then, unless terminated at the expiration of the Initial Period by either party giving to the other at least six months' written notice, shall continue in force until terminated by either party giving to the other like notice to take effect at any time after the Initial Period.
>
> **4 Marketing and Distribution Obligations**
>
> (1) FOCUS shall use all reasonable endeavours to market and maximise the sales of Products in the United Kingdom…
>
> (3) FOCUS shall not, without the prior written consent of SUPPLIER, during the Initial Period of this Agreement sell or market in the United Kingdom any products having the same active ingredient and pharmaceutical form as any of the Products and compete with the Products…
>
> **6 Forecasting, Ordering and Supplies**
>
> (1) Subject to all other provisions of this Agreement, FOCUS shall during the Initial Period of this Agreement and, subject to SUPPLIER being willing and able to supply the same, obtain its requirements for supplies of the Products for the United Kingdom exclusively from the SUPPLIER for the purpose of this Agreement, and SUPPLIER shall, subject to its not being prevented or prohibited by any circumstances beyond its reasonable control, supply the same to FOCUS.
>
> (2) Throughout the period of the Agreement, FOCUS shall supply SUPPLIER with a 15 month rolling forecast (to be updated *quarterly*) for its requirements for the Products to be supplied as final patient packs. The first three months of each such forecast (as updated) shall be deemed to be a firm purchase order to be confirmed by written order as required by SUPPLIER from time to time. SUPPLIER shall, subject to its not being prevented by any cause beyond its reasonable control, meet all orders that are up to or 20% in excess of the

forecast quantities, and shall use all reasonable endeavours to supply all quantities for any greater excess….

(8) FOCUS' first order for each Product shall be delivered by SUPPLIER in three months after the date of order or, if later, three months after FOCUS has given its approval for printers' proofs for labelling, packaging and any other printed materials to be used in connection with the relevant Product. All subsequent orders by FOCUS shall be delivered by SUPPLIER in three months after the date of such orders (unless otherwise agreed in writing between the parties) …

7 Prices and Payment

(1) The price for supplies of the Products shall be as stated in the Schedule of this Agreement

(2) SUPPLIER may give FOCUS at least two month's written notice to increase the price for supplies of any Products. The increase may be up to the percentage increase in SUPPLIER's costs of procuring supplies for the Product in question unless otherwise agreed between the parties. SUPPLIER must at the request of FOCUS supply evidence to support the rate of increase. Unless exceptional circumstances apply (to be demonstrated by SUPPLIER to FOCUS) …

The Schedule

Product	. .	**Supply Price**	**Minimum Order Size**
Aspirin 300mg gastro-resistant tablets in packs of 100's		£4.50	*25k packs of 100's*
Prochlorperazine Maleate 3mg buccal tablets in packs of 50's		*Initial 40k packs: £4.85* *Subsequent orders: £5.65*	*40k packs of 50's*

(2) The terms of the Focus-Lexon Distribution Agreement

67. The Focus-Lexon Distribution Agreement was recorded in written Heads of Agreement dated 1 August 2013. The Focus-Lexon Distribution Agreement was expressed to be heads of agreement outlining an agreement reached in principle and terms that would be "displayed" (sic) in any future supply agreement.

68. The Focus-Lexon Distribution Agreement contained the following terms:

"**Structure of Agreement**

Lexon will Supply FP [i.e. Focus Pharmaceuticals Limited] with Prochlorperazine 3mg Tablets from its UK MA [i.e. Marketing Authorisation] and provide all relevant documentation relating to the licence to distribute the product in the Territory [i.e. UK]

..

FP will be supplied a UK pack from Lexon. FP will then be responsible for all sales and marketing of said pack to the wholesale/Retail and Hospital market in the agreed Territory.

FP will also be responsible for the market investigation and feedback to Lexon on the Market potential in the Territory.

FP will also be responsible for the forecasting of sales volumes during the period of the agreement. FP will provide Lexon with a rolling 12 month forecast.

Terms

FP to be supplied product at a transfer price (To be agreed between FP and Lexon)

A Profit share will be in place relating to a 25% (FP)/75% (Lexon) split of profits after FP distribution costs and Cost of goods have been taken into account.

The profit share will be reconciled on a quarterly basis and FP will provide Lexon with the reconciliation by the second week of the Quarter following.

On receipt of the reconciliation Lexon will raise the appropriate invoice on FP

If FP has Sales for Prochloraperazine (sic) 3mg Tabs from any other source than Lexon Licence the same profit share will be applicable.

Period of agreement and Termination Notice period: -

The agreement will run for 5 Years from signing of Heads of agreement.

Termination Notice period will be 6 months for either party.

Exclusivity only applies if the target Forecast volumes are achieved per annum by product. – to be agreed between FP and Lexon.

…"

(3) The interaction between the two distribution agreements

69. The interaction between the Alliance-Focus Distribution Agreement and the Focus-Lexon Distribution Agreement does not support the CMA's contention that their purpose is to implement a "pay for delay" MEA between Alliance and Lexon. Far from creating an incentive for Lexon to stay out of the market, the

interaction creates an incentive for Lexon to enter the market as soon as possible, and, when Lexon does so, an incentive for Focus to distribute Lexon product in preference to Alliance product.

70. The only person who is party to both of the distribution agreements is Focus, who, of course, is not said by the CMA to have been party to the MEA. The effect of the two agreements is that (until a third party supplier enters the market) Focus has become a monopoly distributor of two products: Alliance Prochlorperazine POM and (when it became available) Lexon/Medreich Prochlorperazine POM. The latter would have a much lower transfer price to Focus than the former. There would then be two monopoly prices and two monopoly levels of profit—that earned on the Alliance product and that earned on the Lexon product. The level of monopoly profits would be much higher on the Lexon/Medreich product because the cost of goods in acquiring the Medreich product was significantly lower than its cost of goods in acquiring the Alliance product. So Focus and Lexon would have very powerful incentives to bring the Lexon/Medreich product on stream as fast as possible.

L. THE MEDREICH-LEXON JOINT VENTURE AGREEMENT

71. Before leaving the contractual documentation, we set out the provisions of one further contract, the Product Development and Profit Sharing Agreement between Medreich plc and Lexon (UK) Limited as Joint Venture Partners dated 25 February 2008 (the "Medreich-Lexon Joint Venture Agreement"). This is not one of the agreements which the CMA says implements the MEA. However, it sets out the contractual position in relation to the forwarding on to Medreich of part of the alleged "pay for delay" payments alleged to have been made by Alliance to Lexon under the MEA.

72. The Medreich-Lexon Joint Venture Agreement was entered into on 25 February 2008. The Agreement defines Medreich and Lexon as the "JV Partners." Under the agreement (i) Medreich is responsible for developing marketing authorisations and manufacturing certain named products; and (ii) Lexon is responsible for marketing and distribution of those products in the UK. Lexon and Medreich agreed to share all profits earned from the sales of products developed under the agreement 50/50.

73. Article 2.1 of the Agreement states:

> "MEDREICH shall undertake formulation development, dossier compilation in CTD format, BE study and manufacture of validation batches and other services…in respect of dosage forms of JV Partners' molecule/active ingredients, including but not limited to and any other molecule/active ingredient that may be added for development from time to time by mutual consent of the Parties (hereinafter referred to as 'the said molecules') and submit the Results to JV Partners"

74. Article 4 states:

> "ARTICLE 4- MANUFACTURING AND PROFIT SHARING
>
> In the event of JV Partners deciding to commercialize any product developed by MEDREICH under Article 2.., the JV Partners shall exclusively procure the said product manufactured at MEDREICH's manufacturing site as may be mutually agreed by the Parties upon such terms and conditions as the Parties may agree.
>
> MEDREICH will bear the costs of manufacture and delivery of medicines to the United Kingdom. This will be termed the 'Cost Price'. Lexon will be exclusively responsible for negotiating and setting the selling price for onward sales. A schedule will be prepared on a quarterly basis by Lexon providing details of the units sold and sales values achieved. Costs of manufacture and the incidental costs associated with handling the medicines in the sales territory (to include the United Kingdom and other countries) will be deducted from the sales and the resulting profit will be shared equally by the members of the JV Partners."

M. THE PARTIES' POSITIONS ON THE EXISTENCE OF THE MARKET EXCLUSION AGREEMENT BETWEEN ALLIANCE AND LEXON

75. The CMA's position was that, for the reasons set out in the Decision, the MEA existed.

76. Alliance's position was that there was no agreement between Alliance and Lexon. Alliance had pursued a unilateral strategy of de-branding Buccastem, and appointing Focus as exclusive distributor at a fixed supply price. The advantages of de-branding were (1) the costs of appointing a third party distributor with particular expertise in operating in generic markets could be accommodated by a moderate price increase rather than by reducing Alliance's own margin and (2) the "glide path" would start from a higher price. Alliance appointed Focus as distributor because it was a successful and dependable distributor with expertise in competing in generic markets and an established commercial relationship, and Focus could be trusted to raise prices moderately.

The purpose of the fixed supply price was (1) to maintain value in the product (2) avoid adverse reputational consequences of high pricing (3) avoid price volatility and (4) ease of administration. Alliance was not sacrificing profits. Alliance's internal forecasts demonstrated that it continued to anticipate competitive entry by Lexon after the point at which the CMA claims Alliance entered into the MEA.

77. Lexon's position was that there was no agreement between Alliance and Lexon. The CMA had not approached its investigation in a fair manner and had started with the pre-conceived case theory that there must have been an illegal, cartel-like agreement to explain the increase in price and had interpreted the evidence to find an infringement and reverse engineered the alleged MEA. The CMA's description of the alleged MEA had fundamental flaws:

a) there was no explanation of the value transferred from Alliance to Lexon;

b) there was no discussion, let alone agreement, on the value to be transferred to Lexon;

c) there was no explanation of how Focus and Medreich were informed of the MEA;

d) the "sunset clause" required one batch every three years, not five; and

e) the absence of any modelling of the financial aspects of the MEA.

78. The Decision sets out a chronology of events (paras 3.53 to 3.275) and then considers the evidence which the CMA says proves the existence of the MEA. In this judgment we shall follow a similar structure, firstly looking at the chronology of events up to the alleged entering into of the MEA and alleged Implementing Agreements, and then considering the evidence on which the CMA relies to prove that the MEA was entered into.

N. THE PERIOD UNTIL THE ALLEGED ENTERING INTO OF THE MARKET EXCLUSION AGREEMENT AND IMPLEMENTING AGREEMENTS IN 2013

(1) Alliance's business model

79. There was a dispute about what Alliance's business model was. Alliance's position was that it focussed on long-established, out of patent branded products which represent a modest but solid and reliable revenue stream (Butterfield First witness statement para 12; Dawson First witness statement para 8). Growth, and the focus of senior management, particularly Mr Dawson, mainly came from bringing new products into the portfolio – usually one or two each year after a significant due diligence process (Dawson First witness statement para 12). The CMA's position, on the other hand, as put in cross-examination, was that Alliance was in the business of profiting from temporary price hikes (Transcript Day 6 p99 line 18 ff) and that the investors in Alliance would have been expecting volatility (Transcript Day 6 p103 line 3). That dispute is a significant one as it goes to the heart of the question of whether Alliance entered into the Amended Alliance-Focus Distribution Agreement as an independent unilateral agreement in pursuit of a model of seeking a modest but reliable revenue and profit stream, or in implementation of the alleged MEA, sacrificing income and profit in an anti-competitive agreement to exclude Lexon's product from the market.

80. We find in favour of Alliance's position on their business model.

81. Alliance's position is supported by the history of Alliance.

82. Alliance Pharmaceuticals Limited was founded in 1996 by Mr Dawson as a branded specialty pharmaceuticals company specialising in acquiring mature pharmaceutical brands that larger pharmaceutical companies had been divesting. The initial focus was on branded prescription pharmaceuticals, but its product range was from 2010 extended to include OTC products. Mr Dawson remained as CEO until 1 May 2018 and then served as a nonexecutive director until June 2019.

83. By 2013 it had sales of around £45,000,000 and owned or licensed the rights to more than 60 pharmaceutical products. A defining feature of Alliance's business model was that it specialised in the supply of niche branded pharmaceuticals that were typically long-established, out of patent and in the main did not face generic competition because they were in small niche areas. These were brands that had typically been on the market for decades. Due to downward price revisions in the PPRS over the years, their prices were low but their profitability was adequate as they were well known by prescribers and did not require expensive promotional support.

84. Alliance focused on the acquisition and in-licensing of such products, serving a client base of a limited range of wholesalers, principally full-line wholesalers. Full-line wholesalers stock a broad range of products including smaller niche products which sell slowly but reliably. Typically Alliance did not trade with short-line wholesalers or with retailers such as chemists shops. Short-line wholesalers sell a smaller and faster-moving range of bulk products in variable quantities and at variable, frequently negotiated prices. Retail pharmacies negotiate special discount and reward schemes with generic suppliers, often based on the total purchases of all their generic products from a single supplier (i.e. retrospective discount schemes). Alliance did not have the skills or desire to trade with short-line wholesalers or with retailers or to operate commercially in multi-source generic markets, given that its business model was based on a bedrock of dependable niche products.

85. Alliance's position is also supported by the background of both Mr Butterfield and Mr Dawson, which for both of them was firmly in branded products (which give a modest and reliable income) and not in generics (which allow for large price increases and volatility).

86. Mr Butterfield had expertise in branded products, and not generics. This was demonstrated by his career. He had worked as UK Commercial Director for Cambridge Laboratories, another specialty pharmaceuticals company with a strong focus on niche brands. On the acquisition of Cambridge Laboratories by Alliance in 2010, he became a director of Alliance in order to manage the Alliance legacy assets (which included Buccastem). In 2012 he became head of

Alliance's UK business (extended to cover Western Europe in 2014) and was promoted to Chief Commercial Officer on 1 December 2015 and Chief Operating Officer/Deputy CEO in June 2017. It was also demonstrated by his wider service to the branded sector as a board member of the Association of the British Pharmaceutical Industry ("ABPI"). In that role he negotiated the 2014 PPRS with the Department of Health.

87. The commitment of Mr Dawson and Mr Butterfield to the Alliance business model was not shared by all members of Alliance staff. Lesley Jarvis, for example, had come from a generics background. She was pressing for a change of model. She saw Project Cobra not only as a defensive measure but also as an opportunity to change the model and genericise to increase the price. However, when she left that aspect of Project Cobra was dropped and it proceeded as a defensive measure only.

88. Alliance's position is also supported by the evidence as to the investors in Alliance.

89. Alliance was listed on the Alternative Investment Market ("AIM"). The different business models advanced by Alliance and the CMA were reflected in the different positions of Alliance and the CMA as to the attitude of investors in Alliance.

90. Mr Dawson's evidence was that by around 2013 Alliance's investor base was made up primarily of private investors and management shareholders. The institutions and funds these shareholders represented were generally risk averse, investing in Alliance as a pharmaceutical company with lower growth prospects but with a reliable and steady income stream and lower exposure to clinical trial results. (Witness statement para 7). Alliance had tried a different approach with Deltacortril, which Alliance had debranded in 2009 as a generic product (Prednisolone). There had been a high price rise. That had been beneficial to Alliance and had enabled it to invest in acquiring other drugs and reducing its bank debt. However, the downward "glide path" had been severe and investors were unhappy with the resulting drop in the share price. Investors wanted a steady, sustainable and profitable business in which they could hold

shares for many years, not a business with volatile profits and a volatile share price (see Dawson, Transcript Day 6, pages 218-219).

91. This is in marked contrast to the CMA's position that the investors in Alliance would have been expecting volatility. The CMA advanced no evidence from investors in support of its position. Its position was founded instead on a general para from the Corporate Finance Institute's guide to the AIM which says:

> "Investing in companies listed on the AIM offers excellent potential returns on investment, but investors need to be keenly aware of the fact that most of the stocks trading on the AIM exchange are considered to be high-risk investments and commonly experience high levels of volatility associated with the market"

92. That is a wholly speculative basis on which to challenge Alliance's account of its model. It is a warning about the AIM in the most vague and general sense and tells us nothing about the particular investors in this particular company. It is not evidence that the investors in Alliance wanted volatility, any more than the standard warning given to investors that share prices may go down would be evidence that the investors wanted the share prices to go down.

93. We accept the evidence from Mr Dawson as to the expectations of the investors. He was the person in direct contact with them in maintaining their relationship with, and investment in, Alliance. We prefer Mr Dawson's account to the speculative position put forward by the CMA. We find that Alliance's business model was focussed on products which represented a modest but solid and reliable revenue stream, profits and growth. We find that Alliance's approach to the de-branding of Buccastem POM and entry into a fixed price distribution deal with Focus (on a similar basis to the pre-existing deal regarding aspirin under the Original Alliance-Focus Distribution Agreement) was wholly in line with Alliance's established business model and the expectations of its investors, and not the sacrifice of income and profits in return for keeping Lexon out of the market.

(2) The acquisition of Prochlorperazine by Alliance, Project Cobra and Alliance's relationship with Focus (2010-2012)

94. Alliance acquired the worldwide rights to the Buccastem brand (including Buccastem 3mg tablets in both 50 pack POM and 8 pack P (OTC) formulations)

from Reckitt Benckiser in August 2009 and was granted an MA to market Buccastem (both P and POM) in the UK in February 2010.

95. From around 2010, Lexon bought the OTC Prochlorperazine product from Alliance (as a wholesaler) for resale to retail and wholesale customers, whilst Lexon purchased other products (as a wholesaler) from Alliance more generally on a regular basis.

96. A project, known as Project Cobra, was set up within Alliance to consider what to do with Buccastem. It was led by Lesley Jarvis. There were two strands to Project Cobra. The first was to look at opportunities for increased profit which could arise if Alliance de-branded Buccastem to free it from the price constraints which the PPRS imposes on branded drugs. That would have involved a change in strategy for Alliance, which until then had specialised in branded drugs and the branded market. The second was defensive, looking at how to respond to generic entry to the market for Prochlorperazine, and whether by going generic and entering into a distribution agreement with a distributor who had expertise in generics, Alliance would be better enabled to compete effectively in this different type of market. Alliance was aware of the possibility of generic entry. It was concerned that competitors who had had access to the Reckitt Benckiser data room, which contained information about Prochlorperazine, might launch a generic. It had also received market intelligence of likely generic entry of buccal Prochlorperazine POM, but not the name of the competitor.

97. On 30 March 2010 Lesley Jarvis emailed some colleagues that "I have learned today (from a 100% source) that a competitor is planning to launch a generic Buccastem 3mg 50's as a POM also a generic OTC pack in a year…" She named the competitor as one of possible three companies (not including Lexon or Medreich) and suggested that Alliance could "[f]ile for the generic form Buccastem 50's". She then worked on Project Cobra, the response to that threat. On 8 April 2010, a colleague emailed her asking some key questions about the generic opportunities for Buccastem. An internal Established Products report in May 2010 states:

> "Buccastem generic Regulatory (JS) has commenced application for Generic Prochlorperazine 3mg tabs (Buccal). Project Cobra is now progressing further and will follow after full appraisal"

98. As part of her work on Project Cobra, Ms Jarvis sought intelligence from Mr Sonpal, who was one of Alliance's customers for prochlorperazine. On 16 April 2010, she emailed Mr Sonpal, "I know you cant (sic) tell me who is going to launch a generic Prochlorperazine 3mg but do you know if it's an oral dose or Buccal version?". On the same day Mr Sonpal replied: "I think its oral dose". Ms Jarvis followed up on 2 July 2010 emailing Mr Sonpal asking, "Do you have any update on the prochlorperazine - e.g. launch date/oral/buccal version?" to which he replied on the same day, "Sorry I don't but I think it is still over a year away".

99. Alliance continued to plan (under Project Cobra) how it might respond to the launch of a generic form of Buccastem. During the third quarter of 2010, Alliance approached the MHRA with a name change request for its debranded Buccastem product, with the aim of supplying it to a third party for distribution. An internal presentation on the Alliance Operational Business Plan 2011 (Established Products) noted that the imminent generic threat might be a 5mg oral dose or buccal version but Alliance had started the generic application so they were ready to react. It would be named "Alliance Prochlorperazine Buccal 3mg tabs" and be launched in Alliance livery. It also noted that, if the generic threat caused Primary Care Trusts nationally to write prescriptions for the generic form, Alliance would need to be in a position to defend its market. Alliance's application to the MHRA to vary Alliance's MA to include generic Prochlorperazine was granted on 22 March 2011.

100. However, Alliance lacked expertise in the generic market. It lacked expertise in distributing generic drugs, developing customers for generic drugs and setting prices for generic drugs. Alliance needed to employ a specialist distributor with expertise in the distribution and marketing of generic products. As Ms Jarvis said in an internal email of 7 February 2011 "[t]he launch of the generic (be it 30's, 8's or even 50's) will be in conjunction with another partner (choice of 2) this will assist us with a generic tariff".

101. Focus was such a specialised distributor. It was a pharmaceutical company formed in 2003 with the aim of developing and distributing a range of niche generic drugs for which, ideally, Focus would own the MA and which would be

manufactured for Focus by third party manufacturers. In addition to developing and distributing its own drugs, Focus would also distribute and market the products of other pharmaceutical companies. Mr Cresswell was a founding shareholder and Managing Director. His role consisted of managing the commercial agreements, the sale and distribution of all drugs, and staff. Mr Brown was responsible for Business Development and identifying the pipeline of drugs, i.e. drugs which could be developed by Focus or distributed on behalf of other companies.

102. On 17 June 2011 Mr Brown and Ms Jarvis met to explore the possibility of Focus distributing Alliance's generic aspirin 300mg E/C product.

103. Mr Brown followed up on the meeting by email to Ms Jarvis on the 20 June 2011, confirming Focus' interest in the proposed distribution of aspirin, as well as Prochlorperazine 3mg POM if Alliance was going to proceed to de-brand Buccastem:

> "In follow-up to our meeting on possible supply of Aspirin E/C. Please find attached a simple draft supply agreement we have used before. The key terms are we are happy to **purchase exclusively from Alliance, but we would want exclusivity on distribution** […] As we discussed on Friday, we are happy to look at Distributing either Deltacortril **or Buccastem** for you if required, we would be pleased to look at a proposal" (emphasis added).

104. Mr Brown attached to that email a draft distribution agreement between Focus and Alliance. The draft was based on Focus' standard distribution agreement. It was entered into and became the Original Alliance-Focus Distribution Agreement, which was later amended by the Addendum to include Prochlorperazine POM.

105. We return to the Amended Alliance-Focus Distribution Agreement below in the context of the CMA's finding about it in the Decision. However, at this stage we note the following important points about it:

    a) Firstly, there is nothing untoward about a supplier of a generic drug entering into a distribution agreement for that drug with a specialist distributor of generic drugs;

b) Secondly, there is nothing untoward about such an agreement being based on the distributor's standard terms. It is the distributor who has the expertise in the subject matter of the agreement. Further, it is administratively and operationally more efficient for a distributor who has contracts with a number of suppliers if these contracts are in similar terms rather than being different with every supplier;

c) Thirdly, there is nothing untoward about a supplier and a distributor entering into an exclusive contract. It is no part of the CMA's decision that the Amended Alliance-Focus Distribution Agreement was of itself anti-competitive or illegal;

d) Fourthly, the discussions between Alliance and Focus were not limited to one drug, Aspirin. They included discussion about Focus becoming a distributor for other products which Focus might later genericise, in particular Prochlorperazine POM. There is nothing of itself untoward about a supplier and distributor entering into an agreement which has the capacity to be expanded in the future to include further drugs. Indeed, it makes practical sense for all of the drugs distributed by a distributor for a particular supplier to be governed by the same contractual terms and conditions; and

e) Fifthly, distribution agreements can follow different models. The model under the Original Alliance-Focus Distribution Agreement was a sale model i.e. that the distributor buys the goods from the supplier. Under that model, the distributor has to lay out the capital for stock and takes the risk that the stock is not sold. Another possible model is a consignment model, under which the supplier does not sell the stock to the distributor, but merely consigns it and continues to bear the cost of the stock until it is sold by the distributor to the ultimate customer, and also continues to bear the risk of it not being sold. There is nothing untoward about a supplier preferring the sale model to a consignment model. Indeed, the sale model is generally more advantageous to the supplier than a consignment model would be. We return to this when we consider what the

Decision says about why Alliance did not enter into a consignment distribution agreement with Creo.

106. On 29 June 2011 Ms Jarvis made a presentation to an internal Alliance meeting setting out her views on Alliance's strategy. These were not Alliance's official views, but just her personal views for discussion. She saw genericisation of Buccastem as both a response to a threat from other generic manufacturers and as an opportunity. She suggested listening for the generic threat. She put forward her idea for using the generic as an opportunity:

> "Cash play - we could work with partner to gain generic tariff, this could bring a 30 pack generic to £20 per pack v £5 brand pack for 50's.
>
> We could trigger a first to market generic of Buccastem and lead the market rather than follow"

There is no minute, document or other (written or oral) evidence which shows that Ms Jarvis' views on this generic opportunity were adopted as the strategy of Alliance.

107. Thereafter, Project Cobra seems to have gone quiet until early 2013 so we turn to look at what Lexon and Medreich had been doing in the meantime.

(3) Lexon and Medreich work towards entering the UK market for Prochlorperazine (2008-2012)

108. Lexon was a family business founded by Mr Sonpal and two of his uncles in 1995. It was a pharmaceutical wholesaler which entered the market in order to compete against the existing wholesalers by offering lower prices and a more efficient delivery service to pharmaceutical retailers. In order to do so it offered a twice-daily delivery service to its pharmacy customers (of whom there were over 2,000) delivering the whole range of pharmaceuticals covering over 7,000 items on 6 to 12 hours' notice, with prices changing on a daily or hourly basis.

109. In order to be able to supply its customers with the full range of medicines required by them at such short notice, Lexon was dependent on obtaining supplies from manufacturers and from other large wholesalers and distributors,

from parallel importers and other smaller wholesalers of the products. Lexon has approximately 500 suppliers, with whom Lexon would meet or communicate with regularly to discuss prices and the availability of stock.

110. In 2005, Mr Sonpal began to develop a Lexon range of generic products which it could offer to its retail customers and also to the market generally. He would use Lexon's knowledge in wholesale distribution to identify suitable products which were out of patent. Then Lexon would partner with a manufacturer who could make these products. The aim was to broaden Lexon's supply base and also to obtain products at lower cost than if they had bought them in from existing suppliers. However, in so doing Lexon was anxious not to upset the good relationships with its suppliers for whom it was dependent for supplies for its main business of distribution.

111. In 2005 Mr Sonpal was introduced to Medreich as a potential manufacturing partner.

112. Medreich Ltd was founded as an English company in 1995 by Mr Mehta, who was a director. In 1998 it became part of a group of companies (the "Medreich Group") with manufacturing capabilities in India. The Indian parent company was named "Medreich Ltd" with the English company being renamed "Medreich plc." The English company was run by Mr Brundan. In 2006 Mr Dey was transferred from India to the English company. At that time the English company was a small operation with only around 10 staff. Mr Dey was a junior employee who was not involved in any decision-making role until his appointment as a director on Mr Mehta's resignation as a director on 1 April 2016. Mr Dey's role was to act as Mr Brundan's assistant, carrying out supply-chain related functions implementing deals which were negotiated by Mr Brundan. The English company's role was to act as the UK sales arm of the Indian parent company. It operated as a client relationship manager setting up sales contracts with customers, passing orders back to India for manufacture and liaising between India and the UK customers on matters such as processing of orders, delivery schedules and invoicing.

113. The Medreich-Lexon Joint Venture Agreement was entered into on 25 February 2008 but at that time did not cover Prochlorperazine. In December 2008

Medreich and Lexon added further drugs to the Agreement, including Prochlorperazine 3mg buccal tablets (POM and P) and Prochlorperazine 5mg ordinary tablets.

114. In June 2010 Medreich applied for MAs to market Prochlorperazine 3mg POM and Prochlorperazine 3mg P (OTC) in the UK.

115. On 9 September 2011 Mr Brundan informed Mr Sonpal by email that Medreich felt that its MAs for Prochlorperazine 3mg and 5mg POM and Prochlorperazine 3mg OTC in the UK would be granted towards the end of 2012.

116. In email exchanges between Mr Dey and Mr Sonpal on 20 January 2012 about the expected quantity of sales of Prochlorperazine POM and Prochlorperazine OTC that should be assumed in the Medreich budget from September 2012 Mr Sonpal advised that in respect of Prochlorperazine 3mg POM he anticipated gaining 40% of the market as "if we went for more price erosion would make it less profitable".

117. In May and early June 2012, Mr Dey and Mr Sonpal exchanged a series of emails about the cost at which Prochlorperazine 3mg POM and 3mg OTC would be supplied by Medreich to Lexon. On 31 May 2012 Mr Sonpal provided Mr Dey with a forecast for Prochlorperazine 3mg POM and 3mg P (OTC), based on there being two MA holders for generic Prochlorperazine POM and Lexon's expected market share being 35%. The appraisal showed a very low cost of goods […][✂]: which would give Lexon a high profit level even if the packet price fell to an estimated £2.95 due to competition from the other generic competitor. This shows that it was in Lexon's commercial interests to enter the market as quickly as possible because its very low cost of goods meant it could achieve a high profit level even in a competitive market.

118. On 1 June 2012 Mr Sonpal emailed Mr Dey informing him that the first batch of Medreich's Prochlorperazine 3mg POM product "should be ready as close to licence landing in Medreich livery", and it might be worth speaking to Boots and other OTC contacts about the OTC product.

119. In January 2013 Mr Dey informed Mr Sonpal that the Prochlorperazine 3mg POM and P (OTC) licences would be granted within six months. Mr Brundan prepared budgets for Prochlorperazine 3mg POM and P and Mr Dey made plans to manufacture. On 30 January 2013 Mr Dey emailed colleagues at Medreich India asking about validation batch sizes for Prochlorperazine 3mg POM and OTC (and other drugs) noting that the validation batches would need to be raised "on India for AprilJune Quarter".

120. By early 2013 Mr Sonpal was becoming concerned as to the competency of Medreich as a manufacturer. He was exploring using an alternative manufacturer, Lamda, who was based in Greece. The minutes of a Lexon board meeting on 12 March 2013 record that:

> "PRS [Pritesh Sonpal] has had issues with the Medreich relationship. PRS explained now Focus pharmaceutical will also support the development or products, the development is to take place in Greece. The partnership will give Focus Pharmaceuticals exclusivity."

(4) Focus' relationship with Lexon in the period to 2013

121. We have seen above how from 2011 Focus had a relationship (which included the Original Alliance-Focus Distribution Agreement), with Alliance with regard to the distribution of Alliance's generic drugs.

122. Focus also had a relationship with Lexon.

123. In 2011 and 2012 Focus was considering projects with Lexon in respect of various products.

124. On 28 November 2012, the Focus board considered a proposal to co-develop with Lexon two other products, Erythromycin Succinate and Stearate, under a profit share agreement. The manufacturer was to be Lamda Pharma. This is recorded under the heading "New Projects" as follows:

> "Lexon Co-Developments
>
> Lexon are looking to develop 2 products (Erythromycin Succinate and Stearate) with Lamda Pharma. Lexon will fully fund the developments and with our support manage the developments. Once developed we will license for the UK and profit share with Lexon, with Lexon taking the greater share until there [sic] initial investment is recouped."

125. An email exchange between Mr Brown and Mr Sonpal on 27 November 2012 records that the profit share for the co-development products (Erythromycin Succinate and Stearate) was "Initially 75:25 in favour of Lexon whilst initial investment is recouped. Moving to 50:50 after this period."

(5) Alliance during the period from the beginning of 2013 to 22 June 2013

126. We now come to the crucial time period for the CMA's case. The Decision finds that the MEA was most likely entered into by 7 June 2013, but in any event by 22 June 2013 (Decision para 1.8). Unless the CMA proves that Alliance entered into the MEA by that time, then the CMA's case fails and this appeal must succeed. Accordingly, we must now consider whether during this period Alliance entered into the MEA, or alternatively, were merely advancing a unilateral strategy to meet the threat of generic Prochlorperazine and, so far as possible, secure the income stream in accordance with its business model. In particular, we must consider whether Mr Sonpal proposed a supply agreement for Prochlorperazine POM in a meeting with Mr Tweedale in May or early June 2013, and Alliance and Lexon entered into the MEA by 7 June 2013.

127. We also note at this stage Mr Dawson's evidence (Witness statement para 24 ff) that Alliance would have needed to appoint a distributor with expertise in generics distribution (such as Focus) and that it would have made sense for both parties to do so outside the price constraints of the PPRS, i.e. by de-branding. This would allow the distributor's selling price to its customer base, the wholesalers, to be increased to accommodate its costs and to provide it with a reasonable margin, whilst at the same time allowing Alliance to preserve its existing supply price in the short term. The alternative, retention of the branded product, would result in the distributor's costs coming out of the original branded price (since that price could not be freely increased under the PPRS) which would cut into Alliance's income from the product. Further, Alliance regarded pricing by Focus (and its successors) as its own affair. With expected competition, Focus' price increases would be short lived, and prices would inevitably fall.

128. As we have seen, in January 2013 Lexon was expecting Medreich to obtain an MA and for Lexon then to enter the market. In early 2013 Alliance resumed its

consideration of de-branding Buccastem in response to a perceived competitive threat from Lexon.

129. Mr Dawson had recruited Mr Tweedale to Alliance in 2012 and shortly thereafter Mr Tweedale replaced Lesley Jarvis as head of Established Products. Buccastem fell within Established Products. While Lesley Jarvis had previously worked in the generics industry and had been keen to genericise Alliance, Mr Tweedale was not.

130. Prior to its handover to Alistair Tweedale, Ceri Chard had been in charge of Buccastem POM (i.e. the branded equivalent of Prochlorperazine POM) at Alliance. However, her expertise was in marketing to consumers and accordingly her main responsibility was, and continued to be, for Buccastem OTC, which was sold over the counter to consumers without a prescription.

131. In around February 2013 Mr Tweedale received information from Mr Sonpal that Lexon was planning to launch Prochlorperazine imminently. On 27 February 2013 Ms Chard emailed an Alliance colleague asking her to "do a quick check on Rama for Buccastem/Prochlorperazine. Alastair has mentioned a competitor is due to bring out another line in a few weeks". Rama is a service giving information about pharmaceutical products, for example whether they have MAs.

132. On 28 February 2013 Mr Tweedale met with Creo Pharma, a distributor whom Alliance was considering using for the distribution of low-value multi-source generics. In contrast to Focus, with whom Alliance already had a commercial relationship in the context of the Original Alliance-Focus Distribution Agreement, Creo was new to Alliance. The services offered by Creo were very different from those offered by Focus. Creo were a small company who acted as a multi-source, box-shifting generic handler. They reacted to the needs of the marketplace for a product, rather than going out and getting the business for the product. They distributed products on a consignment basis without taking ownership in, or incurring any risk in respect of, the products which they distributed. At the meeting there was discussion of potential distribution of a number of products, including Prochlorperazine 3mg POM. The meeting notes state: "Buccastem - Lexon about to launch (Prochlorperazine) 3mg".

133. A launch by a competitor of 3mg buccal prochlorperazine would have implications, not only for Alliance's prescription only brand of 3mg buccal prochlorperazine in packs of 50, but also its OTC brand of 3mg buccal prochlorperazine in packs of 8. That in turn would have implications for the customer relationship between Alliance and the distributors who were its customers for the OTC brand, such as Lexon.

134. Faced with the information about a potential entrant into the market for buccal Prochlorperazine, various employees of Alliance began to consider how Alliance should react to it, in respect of both of Alliance's prescription only and its OTC versions of prochlorperazine. This was a fluid situation, and it involved the consideration of various options and possibilities. The employees did not have the authority to make decisions on behalf of Alliance: that rested with Mr Dawson at the end of the process. The fact that an option was considered by employees at this stage means only that: it does not mean that the option was approved, or would be approved, by Alliance.

135. Alliance minutes of a Consumer Community Business Team meeting on 11 March 2013 records that Alliance had:

> "received a communication regarding a potential threat of a generic competitor who is about to launch in 6 weeks. The threat has raised queries about project Cobra. A solution could be to switch to a generic name".

136. Minutes of an Alliance UK Review & Planning meeting dated 14 March 2013 note: "AT [Alastair Tweedale] has had discussions with contacts at Lexon on threat of generic prochlorperazine, look at Cobra again" and

> "AT contact at Lexon has confirmed they have a product coming out in 6 weeks, not on Rama yet. All of Lexon's licences are PLPI; this would be less of a threat. Options would be to do nothing, do a deal on Buccastem or launch Alliance generic (project Cobra); this would take 8-12 weeks. CC and AT will monitor closely and keep dialogue with Lexon open."

137. On 18 March 2013 Ms Chard emailed Mr Tweedale copied to Mr Butterfield stating:

> "Further to the meeting earlier today…
>
> Lexon have communicated their intention to launch a generic version of Buccastem.

> Having reviewed all the other products in the Lexon portfolio these have been mostly identified at PLPI licenses imported from across the EU. If this is what they progress for Prochlorperazine the situations is not as bad as if they are launching a straight generic as the prices are likely to be still quite high.
>
> Actions to progress
>
> - Karen [Hampshire] will review RAMA and IMS (euro data) to identify which products this could be and we can then assess the list price and predict at what price these could be brought to market in the UK at. Karen will continue to monitor RAMA for the appearance of the licence also.
> - Alastair [Tweedale] will make contact with Lexon again to keep dialogue open and try to gain further information.
> - We then make an assessment on the pricing required for a brand equalisation deal with either Lexon or another partner once more info is know from the points above.
>
> […]
>
> Al please let us know if you gain any further information from Pritash [sic] [Sonpal] so we can start to formalise a plan."

138. The email refers to a brand equalisation deal. A brand equalisation deal is a supply agreement aimed at incentivising pharmacies to dispense the branded product against a generic prescription. The supplier agrees with the pharmacy to offer a blended or averaged selling price where the branded medication is dispensed against both branded and generic prescriptions. The blended price is calibrated so that the pharmacy is placed in the same financial position as if it had purchased the generic for generic prescriptions and the branded for branded prescriptions, and is a way of maintaining sales volumes. Brand equalisation deals are negotiated on a per product and per pharmacy basis, and are resource intensive to manage (involving experienced sales representatives negotiating with individual pharmacies) and to operate and monitor in practice. Alliance was not well-equipped to enter into brand equalisation deals, and in order to do so would require partnering with another company such as Lexon or Focus.

139. Karen Hampshire emailed Mr Tweedale, Ms Chard and Mr Butterfield on 21 March:

> *"Please see below for a summary of the meeting yesterday and update on the latest situation.*

Lexon have communicated they have a generic license for both the 8s and 50s buccal prochlorperazine 3mg. The product is coming from India with low CoGS. We believe it may be Bukatel……

The options for Alliance now are as follows.

1) De-brand Buccastem, launch generic prochlorperazine into Category A and name price.

2) De-brand Buccastem and gain supply of generic from Lexon, launch into category A with an increase in price due to an increase in CoGS. Sell Lexon product in Alliance livery. The problem with this option is there are 2 years' worth of Buccastem M stock [Alliance's branded Prochlorperazine 3mg P (OTC) product] already manufactured.

3) Alliance to supply Lexon with generic product.

Ceri and Alastair will be meeting with Lexon in Gloucester on the 12th April to discuss supply further".

140. The CMA finds that it is evident from this email that both Alliance and Mr Butterfield were open to options that would result in a substantial increase in the price that Alliance charged for Prochlorperazine POM (Decision 5.290.4). In our view, the email cannot bear the weight which the CMA seeks to impose on it. The email is, at its highest, no more than Ms Hampshire's summary of her understanding of discussions amongst staff. It is not a final decision, but a floating of various ideas. The CMA did not lead Ms Hampshire as a witness to explain why she said what she did in the email and whether her understanding was correct. They did not lead either Ms Hampshire or Ms Chard as a witness to challenge Mr Butterfield's evidence. Mr Butterfield's evidence was that the email set out a series of possible options as an initial brainstorming on possible responses to generic entry, that none of the options was seriously considered or taken forward by Alliance's management, that no form of supply agreement with Lexon was seriously considered and that he would never have countenanced such an agreement on competition law grounds, given that, in addition to being a wholesale customer, Lexon was a potential competitor. We accept that evidence of Mr Butterfield. The fact that Mr Butterfield did not immediately reply saying that the options should be ruled out means only that, as he explained at his interview, he was letting discussion continue amongst the

junior employees, not that he was open to these options or would ultimately be in favour of them. We accept that explanation by Mr Butterfield.

141. In an email response to Ms Hampshire the same day, 21 March, Mr Tweedale indicated his preference was for Alliance to be in a position to be able to supply its own generic version of Buccastem (Prochlorperazine POM), stating that:

> "I think it would be prudent to expedite a move to a generic version with artworks approval etc to give flexibility of options. Also you may want to investigate timelines for printing componentry and potential repacking costs to generic to alleviate the brand stock issue…"

142. It was not until this point that Mr Dawson was brought up to date. Mr Butterfield forwarded this email chain to Mr Dawson and others, adding:

> "Just to keep you informed at this stage, unfortunately the Buccastem threat would appear to be real, and not a PI [parallel import] threat. We are working on our defence strategy accordingly and I'll keep you informed as this is pulled together. I am not yet convinced that our own generic is the right way to go but need to see the facts first."

Mr Dawson responded on 21 March, asking Mr Tweedale "*how much Buccastem is prescribed as brand?*", to which Ms Chard replied on 25 March 2013:

> "In general branded scripts appear to have a 40% branded - 60% generic split. This is surprisingly high and I have asked Lucy to run comparable analysis on another product to see if the results match expectations of a currently generalised product".

Mr Dawson emailed Ceri Chard with an observation on the threat of a generic version, stating "Given the uniqueness of the product and the complex generic prescriptions, such products often have a good survival of branded".

143. In April 2013, Alliance's Risks, Opportunities and Sensitivities "March 2013" Forecast notes "Risks - Existing Business" "Generic Prochlorperazine launch from May, results in Buccastem sales 20% lower than forecast" with "50%" "Probability of Occurrence."

144. In March and April 2013 Mr Tweedale had been in touch with Creo about developing a relationship between Alliance and Creo. On 9 April 2013 Mr Tweedale emailed Creo Pharma about arranging a meeting for 22 April

2013 to introduce Mr Butterfield. The email added a new matter which Mr Tweedale wanted to discuss with Creo:

> "I would also like to pick your brains regarding options for prochlorperazine now that Lexon are coming with a generic for both the 50 pack and the 8 pack in the 3mg. Is there a good time to talk?"

145. On 10 April 2013 Mr Butterfield emailed Ms Chard regarding "the upsides and challenges facing the UK business" and stating "Buccastem - What is the plan to defend against the generic threat - CC to lead with AT support". That email supports Mr Butterfield's evidence that he was concerned about a generic competitor in relation to both Alliance's prescription and OTC Buccastem and allocated the task of planning a defence to the person responsible for OTC prochlorperazine (Ms Chard) and the person responsible for prescription prochlorperazine (Mr Tweedale).

146. On 12 April 2013, a meeting was held at a hotel near Cheltenham or Gloucester, between Mr Tweedale, Ms Chard and Mr Sonpal. The Decision refers to this as the "First Meeting".

147. This is a key meeting. The CMA found that this was one of two meetings at which potential supply options relating to Prochlorperazine POM were discussed (Decision para 5.154.3).

148. Mr Sonpal's evidence at the hearing was that the meeting was to discuss Prochlorperazine OTC. Ms Chard had been brought to the meeting to be introduced to him as she was the person responsible for the OTC product. Mr Sonpal proposed that Alliance might like to buy the OTC product from Lexon because they had a much lower cost of manufacture than Alliance. Alternatively, in its capacity as a wholesaler, Lexon would consider a brand equalisation deal. There was no discussion of Prochlorperazine POM. There was no reason for him to do so as Medreich would be able to supply him at a very low cost, much cheaper than anything which Alliance could offer: as Alliance Prochlorperazine POM would be much more expensive than the Medreich Prochlorperazine POM, it would not have made commercial sense to do a deal with Alliance to buy its product.

149. Mr Tweedale did not give evidence at the hearing because […][✂] but we have his interview transcript. Mr Tweedale explained that the purpose of the meeting was to find out more information about the product that Mr Sonpal said he was going to get licensed. At the meeting Mr Sonpal said they had a licence coming. There was discussion about supply for the OTC product. No decisions were made at the meeting.

150. The CMA did not call Ms Chard to give evidence and so all we have is her account of the meeting given at her interview, unchallenged by the CMA in the witness box under oath. At interview, she stated that Mr Sonpal indicated that they had been approached by Medreich with a generic licence for Prochlorperazine POM and also OTC. Her focus was on the OTC side. She explained that Mr Tweedale went because he managed Alliance's commercial relationship with wholesalers. She did not have a huge amount of recollection of the POM product being discussed: it was a lighthearted meeting and not particularly long. Mr Sonpal was not making a proposition at the meeting, he was just communicating that he had been approached by Medreich. He was a wholesaler who purchased Buccastem and was approaching Alliance as a customer of Alliance. There was a reasonable expectation that he might have been going to stop buying Buccastem from Alliance.

151. Karen Hampshire's email of 21 March (see para 139 above) in which she says that the meeting was "to discuss supply further" does not cast any light on what was discussed at the meeting as it does not specify whether the discussion was to be of prescription or OTC Prochlorperazine, and does not specify whether the supply to be discussed was supply to Lexon by Alliance or to Alliance by Lexon. The CMA did not lead Ms Hampshire as a witness to clarify these matters.

152. Mr Sonpal's position that the supply would have been from Lexon to Alliance is consistent with Alliance's position, both in its response to the CMA's formal information request and in Mr Dawson's oral evidence at the hearing. A discussion of supply by Lexon to Alliance would make commercial sense given that Medreich's prices were expected to be substantially lower than those of Alliance's existing manufacturer. The CMA relied on Ms Hampshire's email but did not lead Ms Hampshire as a witness to establish what she meant by the

reference to supply. The CMA did not lead Ms Chard as a witness as to what happened at the meeting which she attended. In all these circumstances, we find, on the balance of probabilities and on the basis of the evidence before us, that the potential supply of Prochlorperazine POM by Alliance to Lexon in the context of a "pay for delay" agreement was not discussed at the meeting on 12 April.

153. On 16 April 2013 Mr Dey received an email from a colleague who informed him that he was chasing the MA application every week and provided him with the artworks. Mr Dey forwarded this to Mr Sonpal and commented "Still no positive feedback, but its imminent".

154. On 22 April 2013, Mr Tweedale introduced Mr Butterfield to Creo Pharma. Mr Butterfield did not initially recollect the meeting, but on seeing Creo's notes of the meeting he accepted that it did go ahead, and it was possible he only attended part of the meeting to introduce himself. The CMA did not lead any Creo personnel as witnesses as to what happened at the meeting. A manuscript note of the meeting, made by Creo, makes reference to Prochlorperazine but the meaning of the note is unclear and it refers to Prochlorperazine in general terms without specifying whether it is referring to the POM or OTC version, the latter of which is sometimes referred to as "P" as in the brand name "Buccastem P". The note says "Prochlorperazine 3mg" then there is a new line and a squiggle and it says, "P value of market." Without evidence from the Creo persons who attended the meeting, all that can be taken from the note is that prochlorperazine was mentioned at the meeting, and that it might possibly have been a mention of the OTC form because of the reference to "P" in the note.

155. In May 2013, Alliance's Risks, Opportunities and Sensitivities "April 2013" Forecast notes "Risks - Existing Business" "Generic Prochlorperazine launch from June, results in Buccastem sales 20% lower than forecast" with "50%" "Probability of Occurrence."

156. On 8 May 2013 Ms Chard emailed Alliance colleagues saying:

> "On the agenda tomorrow for the Community and consumer BTM you will see a point on the generic licence for Prochlorperazine, also known as Project Cobra. Could you please refresh where we are with this licence, advance

> warning that we will be wanting to progress this licence to launch asap in response to a generic competitor launch."

157. Also, on 8 May 2013 Mr Tweedale emailed Creo Pharma confirming that Mr Butterfield was happy with Creo's proposal. The proposal did not include Prochlorperazine. After dealing with the proposal, Mr Tweedale added: "Looks like we are going to launch Prochlorperazine as a generic so there is potential to add this into the mix in a few months. Mum's the word".

158. A UK Review and Planning meeting was held by Alliance on 16 May 2013. Prior to the meeting Ceri Chard had set out her proposals in a report dated 13 May 2013, entitled "*UK Review & Planning Meeting - Community and Consumer Products Report*" which included the following:

> "**Buccastem/Prochlorperazine**
>
> Progressing launch of generic Prochlorperazine to combat the anticipated launch of competitor product by Lexon. First available manufacture will be early August. Planning split batch of Buccastem and Prochlorperazine.
>
> Collaborating with Alastair [Tweedale] to progress this and submit to Cat [Category] A. Prochlorperazine 3mg will potentially be marketed/traded through Creo Pharma."

159. Ms Chard's suggestion that Alliance's debranded Prochlorperazine be marketed through Creo was not approved by the meeting. The Minutes of the meeting record:

> "Progress launch of own generic prochlorperazine and put into Category A. still 40% branded prescriptions so could not discontinue Buccastem.
>
> No adjustments to forecasts yet, once we know we will make changes. Mid-July for stock.
>
> CCG gain to prescribe a brand, need to be ready on this if it will be used.
>
> **Need more info., AT** [Alastair Tweedale] **set up small team to look at the options to have a set plan in place.**" (emphasis in original)

160. On 16 May 2013 Mr Butterfield emailed internally seeking to find an hour for Mr Tweedale, Mr Dawson and some other Alliance employees (but not including Ms Chard) "as soon as practicable to discuss our strategy for coping with a generic Buccastem."

161. On 21 May 2013 Ms Chard emailed a colleague copying in Mr Tweedale asking the colleague to "check … 40% of scripts are written branded", noting that "this is quite important for the planning of the introduction the generic into the market place".

162. On 23 May 2013 Mr Tweedale wrote to Alliance colleagues noting:

> "I am reviewing a contract regarding supply of a number of our generic portfolio to a specialist company (Creo) that operates exclusively in the generic market. The first product is [redacted] (others are expected to follow - [redacted] - prochlorperazine as and when)."

163. The CMA put considerable weight on this email in order to prove the existence of the MEA. We consider this further in paras 219 ff below.

(6) The alleged entering into the MEA by 7 June 2013

164. The Decision finds that the MEA was reached between Alliance and Lexon most likely by 7 June 2013 (Decision para 1.8).

165. The CMA's position is that there was a meeting in late May or early June, attended by Mr Tweedale and Mr Sonpal, at which Mr Sonpal proposed a supply agreement in relation to the POM.

166. This is a key meeting. The CMA found that this was the second of the two meetings at which potential supply options relating to Prochlorperazine POM were discussed (Decision para 5.154.3). The Decision refers to this meeting as the "Second Meeting".

167. Mr Sonpal's position is that he only attended two meetings with Alliance, the first in early February 2013 and the second on 12 April 2013 which was the one attended by Ms Chard. His evidence was that the February meeting was with Mr Tweedale. He told Mr Tweedale that he was getting a licence for the 3mg OTC Prochlorperazine. He asked if Alliance would be willing to offer Lexon a reduced price to continue buying from them, or alternatively, as Lexon was going to be able to buy the OTC product very cheaply, Alliance might be interested in buying the OTC Product from Lexon. Mr Tweedale did not think that Alliance would be interested in his proposal but agreed to consider it.

168. Mr Tweedale's position at his interview was that the Second Meeting was held about a month after 12 April, sometime in May and was more about the POM. Alliance had decided against any discussion about OTC Prochlorperazine because it was a consumer brand and the value was in the consumer's individual choice, so if a generic came along you would not necessarily expect to lose so much share. Ms Chard was doing promotional activity, building up the brand for the consumer. The meeting was about discussing if there was any option for supply with the POM. From his point of view, there was no option but, again it was just for finding out information about where and when Mr Sonpal's licence was coming from because the licence hadn't come. Mr Tweedale had decided that it was not a good idea to do a supply arrangement with someone who had a licence. He felt uncomfortable about such an arrangement from the point of view of competition law. In response to the question "So that option [OTC] was removed from the table and then there was a discussion of POM?" Mr Tweedale replied, "I can remember I think that's what happened, yes" (Interview Part 1 p29).

169. We accept Mr Tweedale's position that there was a second meeting in May. The references in contemporary Alliance documents to contact with Mr Sonpal earlier in the year do not preclude that there was also a meeting in May. Mr Tweedale's account of the timing of a meeting after the 12 April Meeting to discuss POM, without Ms Chard whose responsibility was only for OTC, is credible.

170. The CMA's position at the hearing was that the MEA was reached at the Second Meeting: that was the most likely occasion (Transcript Day 3, p97 line 6 ff). If the CMA is correct that the MEA was entered into at the Second Meeting, then there would have had to have been discussion and agreement at that meeting of a "pay for delay" agreement. That would involve discussion and agreement of what Alliance would pay in return for the delay, and that it would make such payment by transferring value to Lexon by means of agreements between Alliance and Focus and between Lexon and Focus.

171. The CMA's position is not supported by the interview of Mr Tweedale. His account of the Second Meeting makes no reference to the MEA, and the CMA

did not explore with him at the interview whether the MEA was reached at that meeting.

172. There is no direct evidence that, at the Second Meeting, there was any discussion of a transfer of value from Alliance to Lexon, nor of using Focus as a vehicle for that transfer of value. There is no direct evidence that there was any discussion of when Lexon would enter the market, nor of delaying that entry. Mr Tweedale's interview establishes no more than there was a meeting to discuss if there was any option of supply. Mr Tweedale's account of attending a meeting for intelligence gathering purposes is consistent with the intelligence gathering exercises which Mr Tweedale had been engaged in since early 2013 and which had been documented in contemporary emails and minutes. There is a world of a difference between, on the one hand, gathering intelligence as to options for supply and, on the other, concluding an agreement to exclude Lexon from supplying not only to Alliance but to the market as a whole.

173. In June 2013, Alliance's Risks, Opportunities and Sensitivities "May 2013" Forecast notes "Risks - Existing Business" "Generic Prochlorperazine launch from July, results in Buccastem sales 30% lower than forecast" with "70%" "Probability of Occurrence."

174. On 7 June 2013, in an internal Alliance email entitled "*CCG switch and Buccastem defence*", Mr Butterfield wrote to Mr Dawson and another colleague about two matters, the second of which was:

> "2) Buccastem Defence plan John and Richard - Alastair [Tweedale] has worked up a plan [on Prochlorperazine] which I'm comfortable with but I'd also like him to take you through his thoughts - if he can he'll get you both together, if not, separately. Either way we need a direction by end of play next Thursday [13 June 2013]."

175. Mr Tweedale's position at his interview was that the plan was to de-brand and give it to a distributor. That position was consistent with Mr Butterfield's evidence at the hearing. Mr Butterfield's evidence was that the plan referred to in that email was a plan that Alliance had determined independently to de-brand Buccastem and to appoint a third-party distributor to commercialise the generic product. The plan did not include any notion whatsoever of Alliance, indirectly through Focus, transferring value to Lexon, nor any understanding that Lexon

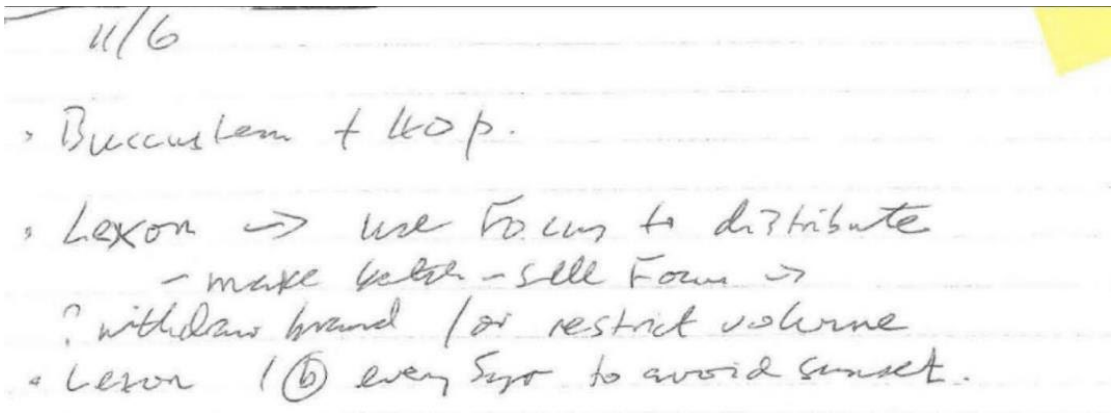
would not compete with Alliance. Had there been any suggestion to enter into any such agreement with Lexon, Mr Butterfield, as he told us at the hearing, would have rejected it and not recommended that Alliance's senior management should consider such a plan.

176. On 10 June 2013 Ms Chard raised with Alliance colleagues the international implications of de-branding:

> "[w]e have a project ongoing to plan to react to the threat of a generic Prochlorperazine 3mg buccal entrant into the UK market. One of the options we are reviewing would be to cease manufacturing the branded 50s pack and drive all sales to a generic pack produced by Alliance but sold by another partner e.g. Focus.
>
> The other major market which Buccastem is sold to is New Zealand. What impact of withdrawing the branded presentation is there for New Zealand? Could we switch to supply them the P?".

177. On 11 June 2013 Mr Tweedale and Mr Dawson had a meeting. What happened at that meeting is central to the CMA's case. At the meeting, Mr Tweedale briefed Mr Dawson on Mr Tweedale's plan. That much is certain. But what plan did he brief him on? Alliance's position is that he briefed him on a plan to debrand Buccastem and appoint a third-party distributor. The CMA's position is that the plan was the MEA.

178. Mr Dawson had little independent recollection of what happened at the meeting. But he had taken notes in notes in his notebook, which contains the following entry dated 11 June 2013:



179. At the CMA interview, Mr Tweedale's position was the defence plan was to use Focus to distribute the generic version and to withdraw the brand. The notes were Mr Dawson's and not his. When pressed to explain them, he said that he would be speculating.

180. We consider the notebook entry in detail in paras 223 ff below.

181. Ms Hampshire was continuing to check RAMA for intelligence about the grant of an MA to a competitor. On 11 June 2013, she emailed Mr Tweedale and Ms Chard to inform them "RAMA report attached, no prochlorperazine". Mr Tweedale replied, "The licence will be under the name Medreich."

(7) Alleged implementation of the Market Exclusion Agreement: Alliance and Focus (June to August 2013)

182. Mr Cresswell's evidence was that in early to mid-June 2013 Mr Tweedale approached him to discuss, in general terms, the possible distribution of Alliance's debranded Buccastem (i.e. Prochlorperazine POM). In these discussions, Alliance proposed that it would supply its Prochlorperazine POM to Focus at a fixed price, which was its existing wholesale price for its Buccastem less 12.5%, giving rise to a supply price of £5.65 per pack. We note that this is consistent with the Alliance business model as described in the evidence of Mr Butterfield and Mr Dawson: the aim, as they told us, was to maintain revenue and profits for as long as possible in the face of generic entry, using a specialist generic distributor to manage the product. Since Mr Cresswell already knew from Lexon that Medreich was facing a delay in obtaining its MA, the approach from Alliance appeared to present Focus with an ideal opportunity to get a foothold in the market as the exclusive supplier of Prochlorperazine POM. Given the delay in Lexon/Medreich obtaining an MA, he thought that it was possible that their product would not be available before late 2014 to early 2015, so Focus should get around 12-18 months to consolidate its market position before the Medreich product became available. Further, when Focus switched to the Lexon/Medreich product, the major wholesalers would allow Focus to match any price challenges from other generics then entering the market, since Focus would, by virtue of a distribution agreement with Alliance, be the existing distributor of the product and would already be

listed in their warehouse bin locations. Mr Cresswell explained that, initially, Focus would share its profit from the distribution of Alliance's product with Lexon. He expected the Lexon/Medreich product to be coming on stream within the next year or so at a price that would be significantly cheaper than Alliance's (around one-tenth of Alliance's price) and so presented a far more attractive proposition. Focus would use its distribution agreement with Alliance in the short term to launch generic Prochlorperazine POM and then switch to the cheaper Lexon product when it came on the market. Mr Cresswell agreed with Mr Tweedale to add Prochlorperazine POM to the Original Alliance-Focus Distribution Agreement. That was what Mr Cresswell communicated to Mr Brown in an email of 22 June 2013.

183. Mr Cresswell was going on holiday so his 22 June email was a quick holiday note to his colleague Mr Roland Brown (also known as "Roly") so that Mr Brown could cover for him when he was away:

> "ROLY
>
> In case Alistair rings you, the agreement Pritesh made was we initially buy at 25% off thier [sic] current trade price for the initial stock to allow us to open generic bins etc. When Alliance discontinue brand we purchase from them at current trade less 12.5% i.e. they keep the current asp and Focus sell the generic pack.
>
> Generic pricing will depend on market and Focus will set!
>
> Deal between Focus and Pritesh. 25/75% profit share in Lexon favour (as it is his licence)
>
> Volumes look higher on ethics line than I thought!
>
> We can have a chat on Monday. I am waiting on Alistair ringing me back, but have Pritesh chasing to see what is happening."

The CMA relies on that email as being evidence that Mr Sonpal had agreed the MEA with Alliance (Decision 5.197). We return to this email at paras 236 ff below.

184. On 24 June 2013 Mark Cresswell emailed Mr Sonpal under the heading "Pinewood", stating: "I take it you are not going to pinewood? Also I have still not heard back from Alistair", to which Mr Sonpal responded:

"Hi mate

Sorry no

I have sent apologies and they are expecting Roly to cover himself in fake take and do an Indian Elvis

I will chase Alistair in the morning".

185. Meanwhile, Mr Brown and Mr Cresswell were preparing for the sale of Focus, and in the summer of 2013 instructed Catalyst as corporate financiers to prepare Focus for the sale of the business.

186. Alliance's Risks, Opportunities and Sensitivities "June 2013" Forecast noted "Risks - Existing Business" "Generic Prochlorperazine launch from August, results in Buccastem sales 30% lower than forecast" with "70%" "Probability of Occurrence."

187. On 2 July 2013, there was internal Alliance email correspondence between Ms Chard, Mr Tweedale and others about the start date for the generic, how much to order and how much Buccastem would be required for export to New Zealand. Ms Chard stated, "Same demand as current Buccastem volumes, no change."

188. On 2 July 2013, Mr Butterfield and Ms Chard made arrangements to convene a meeting between them and Alastair Tweedale the following week to discuss the switch to generic Prochlorperazine.

189. On 3 July 2013, Alliance's Product Procurement Manager informed its manufacturer of Prochlorperazine that the "decision has been made to pack the majority of Buccastem 50's in the new Generic Prochlorperazine livery from the next order… The 8's pack will remain unchanged" and that they would continue with a small quantity of Buccastem packing for export markets.

190. The meeting minutes of an Alliance Consumer Community Business Team Meeting of 8 July 2013 record:

"Buccastem

39K behind budget YTD. In July ambulance service and BA are replacing stock in the emergency bags and therefore the Buccastem M may be up in sales.

Generic licence threat

AT in price negotiations at the moment. **New Zealand demand to be looked into**…."

191. Meanwhile Mr Cresswell was considering whether to enter into a distribution agreement with Alliance. On 18 July 2013 he emailed Mr Brown noting that he was:

> "doing the preparation for meeting with Alistair [sic] [Tweedale] and this [Prochlorperazine 3mg POM] looks like a good addition to our range. Assuming the brand is discontinued and we get all the prescriptions, and Alliance agree to sell to us at their current ASP of trade less 12.5% (current trade =£6.49)"

He then set out in the email Focus's potential price increase when the product was de-branded:

> "Below is based on an initial Trade price for Focus of £10 rising to £12 and then £14 and allowing 20% for wholesale to get our ASP".

The table in the email details Monthly Volumes, Focus COG, Focus ASP and Focus monthly profit (25%). He closed the email by saying that:

> "The plan is to add this to the Aspirin supply agreement to get things moving quickly, It is likely we will get some product in Aug and the generic should be available for Oct. (poss Sept)".

192. On 25 July 2013, Mr Cresswell emailed Mr Tweedale a summary of the meeting they had had earlier in the week:

> "Alastair
>
> Thanks for meeting me earlier this week […]
>
> **<u>Prochlorperazine 3mg x 50 Tabs</u>**
>
> We agreed an exclusive supply agreement for Prochlorperazine 3mg Tabs, and agreed this could be added as an amendment to the schedule of products in the already signed Distribution agreement for Aspirin 300mg Gastro-resistant Tabs. **Action AT to draft the amendment and send to MC for signing.**
>
> Generic product will be available from October 2013 - Batch size for generic pack is 80,000 packs, however this can be called off by Focus in quantities of 40,000 packs. **Action MC to raise order and send through Forecast for the next 12 months**

> The initial order for generic will be priced at £4.85 a pack and this will rise to £5.65 per pack from Jan 2014.
>
> It was also agreed that Focus could order some of the brand in September at £4.85 to allow us to open the generic bins in wholesale prior to delivery of the true generic in Oct." (emphasis in original)

193. The Notes of a Focus Sales Meeting dated 30 July 2013 state:

> *"***Prochlorperazine 3mg tabs**
>
> We have a supply agreement with Alliance on this product.
>
> **ACTION - get agreement signed and place orders in August for delivery in September/October & January - MC**
>
> **ACTION - get new EAN codes from Alliance and supply to SW - MC**
>
> **ACTION - supply Alliance with a rolling forecast - MC**" (emphasis in original)

194. On 5 August, Mr Cresswell emailed Mr Tweedale about various matters including "I will be getting the initial orders for Prochlorperazine sent over later this week, have you had chance to add the product into the agreement yet so we can get it signed as soon as possible?*"* Mr Tweedale replied the same day "I am sitting down with legal to update the contract with the new product for supply with the terms previously communicated and should be able to provide you with a copy for review this week" This was a reference to updating the existing framework contract by adding Prochlorperazine POM to the list of drugs in the Original Alliance-Focus Distribution Agreement.

195. On 6 August 2013, an Alliance Corporate Planning Manager had been reviewing sales figures generally and raised a number of queries on various drugs in an internal email headed *'FW: sales units forecast review – UK"*. Alliance's Rachel Rose replied saying:

> "Forecast figures are based on current usage and also a moderate decline as you withdraw a brand and, as a consequence, there is confusion in the market. Also if the price increases then the volumes will decline as alternatives are sought by prescribers.
>
> The forecast is 40k units for the first four months to reflect a stock build which the vendor has agreed, this is currently being documented. AT in contract negotiations with them with a view to finalise contract mid September.

> You will see a risk has been added to the risks and opps schedule in relation to these sales."

196. On 20 August 2013, Mr Cresswell chased Mr Tweedale on the legal document "Are you any further forward with the agreement yet so I can get the orders placed on you as soon as possible". The same day Mr Tweedale replied "yes Mark –most of it is done. I just need to add a clause about the hospital tender business we spoke about. Will have it to you by the end of play Thursday".

197. On 21 August, Mr Cresswell sent Mr Tweedale an email stating that Mr Tweedale would receive certain orders "to be placed on you receipt of contract (sic)". Later that day, Mr Tweedale emailed to Mr Cresswell draft legal documentation under cover of an email which said, "Please see attached the original agreement and an addendum which I believe keeps things simpler" and asking him to sign and return unless he had any comments. Mr Cresswell emailed Mr Tweedale on 22 August saying that "The signed amendment has been posted to you today".

(8) Alleged implementation of the Market Exclusion Agreement: Lexon and Focus (June to August 2013)

198. By June 2013 Lexon/Medreich had still not obtained MA for their Prochlorperazine POM. Indeed, they did not receive their MA until 9 January 2014, and even then a variation to correct a transcription error in the formula meant that the corrected version of the MA was not granted until 22 June 2016.

199. On 9 July 2013 Medreich's MA for Prochlorperazine OTC was granted by the MHRA and published on RAMA. No MA was granted for Medreich's Prochlorperazine POM at this point.

200. The publication of the MA for Prochlorperazine OTC was noted by those who were planning to enter the market for generic Prochlorperazine POM. On 10 July 2013 internal emails within one such potential competitor, Morningside, asked if the MA was for Medreich and whether Morningside was still developing, and received the reply "Yes, we are still 8 months away before we can submit". Also, on 10 July, Mr Cresswell emailed Mr Sonpal, forwarding a copy of a RAMA publication service report and stating, "I take it the Medrich

[sic] licence is yours exclusively before I send this to Alistair [sic]". The reason for Mr Cresswell's question was that only two months beforehand, Lexon had told him that the Medreich Licence for Prochlorperazine POM was delayed. Mr Cresswell now thought that if Medreich had obtained an MA for Prochlorperazine POM, he could use this to incentivise Alliance to conclude the appointment of Focus as Alliance's distributor. We accept Mr Cresswell's explanation. It is consistent with the timing of Mr Cresswell's later email of 18 July which shows that no distribution agreement had yet been reached. In that email, Mr Cresswell stated that he was doing preparation for a meeting with Mr Tweedale, that Prochlorperazine POM looked like a good addition to Focus' range, the plan was to add it to the Original Alliance-Focus Distribution Agreement to get things moving quickly.

201. As the MEA is supposed to have been entered into by June 2013 and a crucial part of the MEA is supposed to be implementation through Focus, the fact that, in July, Focus was still considering whether or not to enter into an agreement with Alliance to distribute Prochlorperazine POM is evidence against the existence of the MEA.

202. Minutes of a Lexon board meeting of 16 July 2013 record that:

> "PRS [Mr Sonpal] reported the new product developments have been going well. Recently the license for Prochlorperazine 3mg has been granted, which will be sold through Focus".

That was, of course, a reference to OTC Prochlorperazine and not Prochlorperazine POM, as the licence was only for OTC Prochlorperazine.

203. On 30 July 2013 Mr Brundan emailed Mr Sonpal copying Mr Dey in respect future commercial plans, noting that:

> "We have one 3mg license, [a colleague] spoke to the Assessor of the other 3 mg [i.e. Prochlorperazine POM] and 5 mg. These are now also signed off, and we should receive the approval copies in August positively.
>
> What is the plan now, to commercialise these; as we can start the planning for all three now.
>
> I know you were negotiating something, so please can you update us perhaps some time in August."

204. The Focus-Lexon Distribution Agreement was dated 1 August 2013.

205. Having looked at the period to August 2013, during which the CMA says the MEA and Implementing Agreements were entered into, we now turn to look at the seven categories of evidence relied on by the CMA to prove the existence of the MEA, and also to look at correspondence in 2014.

O. DOCUMENTARY EVIDENCE OF DISCUSSIONS RELATING TO PROCHLORPERAZINE POM BETWEEN ALLIANCE AND LEXON IN THE PERIOD PRIOR TO THE ALLEGED MARKET EXCLUSION AGREEMENT (DECISION PARA 5.158-188)

206. The CMA's conclusion under this category of evidence is that (para 5.188):

(1) the evidence demonstrates that in the period February to June 2013, Lexon, the potential entrant, and Alliance, the incumbent supplier, were in direct contact with each other in relation of the supply of Prochlorperazine P and POM products; and

(2) the Second Meeting included the discussion of a potential supply agreement between Alliance and Lexon in relation to the POM product.

207. The CMA's findings of fact in respect of this category of evidence are (para 5.154):

(1) Lexon informed Alliance in early 2013 that it was preparing to enter the market with Prochlorperazine;

(2) Alliance decided to maintain a dialogue with Lexon as it formulated its defence strategies, and there were two meetings 12 April 2013 (the "First Meeting") and late May or early June 2013 (the "Second Meeting") at which potential supply options relating to Prochlorperazine POM were discussed:

(3) Following the Second Meeting, Alliance's thinking regarding its response to the Lexon threat significantly changed, so that it no longer referred to the possibility of appointing Creo Pharma as a distributor but instead referred only to the supply of Prochlorperazine POM to Focus.

208. We take these findings in turn.

(1) Contact between Alliance and Lexon

209. There was no dispute that there was contact between Lexon and Alliance in relation to Prochlorperazine.

210. Alliance's position was that the contact was entirely appropriate: Lexon was an existing customer for Alliance's OTC version of Prochlorperazine and Alliance wished to gather intelligence from Lexon about the potential new generic entry to the market for Prochlorperazine. Mr Butterfield was clear in his evidence that all that Alliance was trying to do was to get the best information they could in order to react to a competitive threat, and the purpose of meeting with Lexon was to be in listening mode for verification purposes. Mr Butterfield trusted Mr Tweedale to conduct any meetings appropriately.

211. The CMA do not claim that there was anything intrinsically wrong with Lexon informing Alliance, from whom it purchased Prochlorperazine, that it was preparing to enter the market, nor in Alliance maintaining a dialogue with its customer Lexon to gather intelligence. In our view, the CMA was correct to confirm in its closing submissions that it was not part of their case that the gathering of intelligence by Alliance was unlawful (Transcript Day 18 p111). This is a "pay for delay" case, and there is no finding in the Decision that there was an unlawful exchange of information.

212. We accept the evidence of the Alliance witnesses that Alliance was engaged in intelligence gathering in respect of generic Prochlorperazine. This is supported by contemporaneous documents such as the Alliance UK Review and Planning meeting of 14 March ("CC and AT will monitor closely and keep dialogue with Lexon open") and Ms Chard's email of 18 March ("Alistair will make contact

with Lexon again and try to gain further information"). It is also supported by Mr Tweedale's 2013/14 Appraisal (see paras 288 ff below) which emphasises the importance of intelligence in being able to react to generic threats.

(2) Discussions at the First and Second Meetings.

213. We have found above that the potential supply of Prochlorperazine POM by Alliance to Lexon was not discussed at the First Meeting (see para 148 above). The evidence as to the Second Meeting does not support the CMA's allegation that the MEA was reached at that meeting. At its highest, all that the evidence about the Second Meeting establishes is that the purpose of the meeting was to discuss supply of POM in the context of intelligence gathering and that Mr Tweedale was not willing to supply to a competitor, such as Lexon, which had (or was soon to obtain) its own licence.

(3) Change in Alliance thinking about Creo after the Second Meeting

214. The CMA's position was that there was an "abrupt unexplained switch" by Alliance after the Second Meeting from using Creo as distributor to using Focus as distributor. The inference which the CMA draws from that switch is that the MEA had been entered into and so it was necessary to switch distributor to Focus in order to implement the MEA.

215. We find as a matter of fact that there was no such abrupt unexplained switch from Creo to Focus. As there was no such switch, no inference can be drawn from it.

216. Alliance's business model was that it used a distributor. One of its distributors, with whom it had had a long relationship, was Focus. As far back as June 2011, when Alliance was considering de-branding Buccastem as part of Project Cobra, there had been discussions between Alliance and Focus about Focus distributing Alliance's Prochlorperazine (see para 103 above). Focus was Alliance's distributor for Aspirin.

217. Alliance became aware of Creo in around the early part of 2013. Mr Dawson saw them as "quite new on the scene, a one-man band" and Mr Tweedale saw

them as an unknown quantity. Creo provided a different and lesser service from Focus. Creo were a multi-source, box shifting, low fee generic handler. They distributed products on a consignment basis without taking ownership in, or incurring any risk in respect of, the stock they distributed.

218. From the early part of 2013 Alliance and Creo were in discussions about the possibility of entering into a distribution agreement, and what drugs might be included in such an agreement. The focus of the discussions was on multi-source drugs, and Prochlorperazine was not a core part of the discussions. Prochlorperazine was referred to in Mr Tweedale's emails of 9 April 2013 and 8 May 2013 (paras 144 and 157 above) as only a tentative possibility. The appointment of Creo was considered at Alliance's Review and Planning meeting on 16 May. Papers prepared for the meeting suggested that Prochlorperazine could be marketed through Creo, but the decision of the meeting, as recorded in the Minutes, was that Creo be appointed to sell Prednisolone/Deltacortril only (para 159 above).

219. In seeking to establish that there had been an abrupt unexplained switch of distributor to from Creo to Focus, the CMA put particular emphasis on the Alliance internal email of 23 May 2013 (set out at para 162 above) which named the first product to be included, listed others which were expected to be included, and then stated "prochlorperazine as and when."

220. The CMA's initial position in oral closing submissions was that "as and when" meant that the inclusion of Prochlorperazine was contingent on the launch of the generic product. (Transcript Day 18 p144) If "as and when" means contingent (i.e. conditional on launch of the generic so that if the generic is launched the condition will be fulfilled and the prochlorperazine will be included in the contract) there might be some force in the CMA's position that this email supports the proposition that there had been an abrupt switch. However, that is not what "as and when" means. The Oxford Dictionary definition of "as and when" is: "at the time when (used to refer to an uncertain future event)". That accords with Mr Butterfield's evidence that "as and when" meant "it might do, it might not". All that is being said in this email is that there is uncertainty as to whether generic Prochlorperazine will be included in the

Creo contract at some time in the future. That is not redolent of an abrupt switch from a firm intention that once the generic Prochlorperazine is launched it will be definitely distributed by Creo: it is redolent of uncertainty as to whether, once the generic Prochlorperazine is launched, it will be ever be given to Creo at all.

221. There was no "abrupt unexplained switch" of distributor from Creo to Focus. There was no "switch" as Creo was just one possible distributor for generic Prochlorperazine, and Focus had also been under consideration as a possible distributor since 2011. It was not "abrupt" as even as late as 23 May 2013, Mr Tweedale had expressed uncertainty as to whether to appoint Creo to distribute Prochlorperazine by indicating that it would be included in the Creo contract "as and when". It was not "unexplained". There were good commercial reasons to prefer Focus to Creo. Unlike Focus, Creo could not provide the level of service which Alliance would require in developing and marketing Prochlorperazine POM as a new generic. Unlike Focus, Creo operated on a consignment basis. Focus was an existing Alliance distributor and had a good payment record and had performed its role well.

222. In all these circumstances, we find that there was no abrupt unexplained switch from Creo to Focus after the Second Meeting.

P. DOCUMENTARY EVIDENCE OF AN AGREEMENT THAT ALLIANCE WOULD PAY LEXON (VIA FOCUS) TO DELAY ITS MARKET ENTRY (DECISION 5.189- 5.272)

223. In order to prove that by 7 June 2013 Alliance and Lexon had reached agreement on the MEA in principle, the Decision relies on the Notebook entry by John Dawson dated 11 June 2013, the internal Focus email dated 22 June 2013, and the emails of 24 June, 10 July and 18 July 2013 (Decision para 5.154.5). The CMA finds (para 5.189) that these documents demonstrate that Alliance and Lexon had agreed that:

(1) Alliance would exclusively supply its debranded generic Prochlorperazine POM to Focus at a fixed price;

(2) Lexon would enter into an agreement with Focus in relation to Prochlorperazine POM that would enable Focus to share the profits earned

from the sales of Alliance's Prochlorperazine POM with Lexon (that is Alliance would indirectly transfer value to Lexon through Focus); and

(3) In return, Lexon would not supply commercial volumes of the product that it had jointly developed with Medreich.

(1) Mr Dawson's Notebook Entry

224. Mr Dawson's evidence was that the plan Mr Tweedale outlined to him at their meeting on 11 June 2013 was to debrand Buccastem, use Focus and sell to Focus at a price which preserved Alliance's income stream. The plan was simple: de-branding, with Focus to be Alliance's strategic partner, and fight Lexon with it. We are now required to examine the notes to see if they support Mr Dawson's evidence, or support the CMA's position that the plan discussed at the meeting was the MEA.

225. What is immediately striking about Mr Dawson's notebook entry (set out at para 178 above), regarding that meeting, is that it makes no mention of Focus sharing with Lexon the profits it earned from the sales of Alliance's Prochlorperazine. That supports Mr Dawson's oral evidence that nothing was said at the briefing meeting about Focus sharing these profits with Lexon. We accept Mr Dawson's evidence on that point. To that extent, the notebook entry is evidence against the CMA. The payment for the delay (i.e. the transfer of value from Alliance to Lexon) is a crucial element of the alleged MEA. If, at the meeting, Mr Dawson was briefed on the MEA then that crucial element would have had to have formed part of the briefing. The lack of a briefing on this crucial element is supportive of Alliance's position that the briefing was on a unilateral plan to debrand and supply to Focus.

226. Accordingly, we reject the CMA's position, as set out in its Defence (para 65) that the Notebook is clear evidence of the MEA. In its closing argument, the CMA advanced a more limited position: the Notebook entry did not need to record everything, and it recorded the mechanism of the transfer of value which was to Lexon through Focus. (Transcript Day 19 page 26)

227. Mr Dawson had no recollection of the Notebook entry. In seeking to explain the entry, he could do no more than interpret its wording in the light of his recollection of the meeting.

228. In considering the evidential value of the Notebook entry, we bear in mind that it is not a formal minute of the meeting, but just brief disjointed notes, written down during the course of the meeting, which included Mr Dawson's own thoughts while being briefed.

229. The CMA takes the view that its reading of the Notebook entry is plain (Decision para 5.204). However, in our view the meaning of the Notebook entry is not clear. It consists of fragmentary notes which require a considerable degree of interpretation.

230. The first line in the entry is "Buccastem + 40p". This is neutral as between the CMA's position and Alliance's position. It does not reflect either the Alliance plan nor the MEA as Buccastem was not increased by 40p.

231. The second line in the entry is "Lexon → use Focus to distribute". This line is ambiguous. Depending on how the ambiguity is resolved, it could support either Alliance's position that there was a unilateral plan or the CMA's position that there was a MEA. It could be a reference to the threat of Lexon entering the market, and the unilateral plan for Alliance to use Focus to distribute: that interpretation supports Alliance's position. Or it could be a reference to Alliance and/or Lexon using Focus to distribute under the MEA: that supports CMA's position.

232. The third line in the entry is "make batch- sell Focus". This line is ambiguous. It could mean that Alliance would manufacture and sell to Focus: that would support Alliance's position. Or it could mean that Lexon would make a batch and sell through Focus: that would support the CMA's position.

233. The fourth line is "? withdraw brand /or restrict volume". This line raises the issue of what Alliance will do with its Buccastem brand after genericisation: will it withdraw the brand or continue the brand but in restricted volumes. It is neutral as between Alliance's and the CMA's position, as this issue would arise under both the unilateral plan and the MEA.

234. The fifth line is "Lexon 1 [batch] every 5 [year] to avoid sunset". This line is ambiguous. There is a gap after "Lexon" and the remainder of the line could

refer back to the withdrawal or restriction of the brand and to Mr Dawson's erroneous understanding that Alliance would need to sell a branded batch every 5 years in order to keep its Market Authorisation for the branded product: that would support Alliance's position. Or it could mean that Lexon would make one batch of its product every 5 years to keep the market authorisation for that product: that would support the CMA's position.

235. The CMA finds that the Notebook entry constitutes the first record of the terms of the MEA (Decision para 5.226). The CMA has erred in making this finding. The Notebook entry does not record the terms of an MEA. The entry does not record an essential element of a "pay for delay" agreement: the payment. The Notebook entry is ambiguous and is not inconsistent with the Alliance unilateral plan. The Notebook entry has to be considered in the light of all the evidence in the case. Considering all the evidence in the round, we find that the plan which was discussed at the meeting was the unilateral Alliance plan to debrand and appoint a distributor and not the alleged MEA.

(2) Internal Focus email of 22 June 2013

236. CMA's interpretation of this email (which is set out at para 183 above) is that its unambiguous plain meaning is that:

(a) Mr Sonpal of Lexon had agreed with Alliance that:

(i) Alliance would sell its de-branded Prochlorperazine POM to Focus;

(ii) Focus would purchase Alliance's de-branded Prochlorperazine POM at a fixed price, determined by reference to a specified percentage discount to its current list price (initially 25%, before moving to 12.5%); and

(iii) Following the discontinuation of their branded product, Alliance would sell its Prochlorperazine POM to Focus at the same average selling price per pack that it had sold its Buccastem POM to wholesalers.

(b) Focus would then set the price at which it would sell Alliance's Prochlorperazine POM into the market.

(c) Focus and Lexon had agreed that Focus would pass the majority of its profits from the sale of Alliance's Prochlorperazine POM to Lexon

237. The significance of this email is that it states "the agreement Pritesh made."

238. The CMAs position is that this is evidence that there was an agreement between Alliance and Mr Pritesh Sonpal of Lexon.

239. On the other hand, the evidence of both the author of that email, Mr Cresswell, and the recipient, Mr Brown, was that "Pritesh" in the first line was a mistake and should have read "Alastair" as it referred to Mr Tweedale. Mr Cresswell's evidence was that, in the haste of writing a quick holiday note email to Roland Brown, that he mistakenly wrote "*Pritesh*" when he meant "Alastair" in the sentence "*ROLY In case Alistair* [sic] *rings you, the agreement Pritesh made* […]". He explained the context of the last sentence: Mr Sonpal was chasing Medreich to find out what was happening with the Medreich product; if the Medreich product had in fact been delayed it made sense for Focus to distribute the Alliance product in the meantime. Mr Brown's evidence was that he did not recall the email but the reference to Pritesh was clearly a mistake because Mr Sonpal was not responsible for the Amended Alliance-Focus Distribution Agreement or for the negotiation of any of its terms.

240. Mr Cresswell and Mr Brown's position, that it was a mistake, is consistent with the rest of the wording of the note. If "Pritesh" is replaced by "Alastair", the rest of the note describes agreements made by Focus with Lexon and by Focus with Alliance, and does not describe the MEA.

241. The CMA states that their reading of the 22 June email is supported by Mr Cresswell's further emails of 24 June 2013 (set out at para 184 above), 10 July 2013 (para 200 above) and 18 July 2013 (para 191 above) (Decision para 5.199).

242. In our view, the email of 24 June 2013 is of no assistance in supporting the CMA's reading of the 22 June email. The CMA found that the "Alistair" referred to on 24 June is Mr Tweedale and there was no credible alternative "Alistair" to which Mr Cresswell could be referring (Decision 5.199.1). We reject this finding. The evidence of Mr Cresswell and Mr Sonpal was that email of 24 June concerned Alastair King who worked for another company in the pharmaceuticals sector. Mr King often joined Mr Sonpal and Mr Cresswell on pharmaceutical industry golf outings. The 24 June email related to a golf event organised by Pinewood Healthcare in Ireland. The organiser had contacted Mr Sonpal and Mr Cresswell to see if they could find people to fill empty spaces at the event and this email referred to contacting Mr King for that purpose. Despite having made a finding that there was no credible alternative to the "Alistair" in the email being Mr Tweedale, the CMA did not lead Mr King as a witness to establish that he was not a credible alternative. Instead, they relied on a note made by a CMA employee and approved by Mr King of a telephone conversation between the employee and Mr King. Mr King said that he had never attended a Pinewood golf event in Ireland: he had played golf in Ireland but not at a Pinewood event. That is of no relevance to the point at issue as there was no suggestion in the evidence that he had attended. Mr King was asked whether he had ever been invited to the Pinewood event and answered that he had never been invited. He was asked if anyone else had ever asked him about attending a Pinewood golf event and he said they had not. We place little weight on that evidence. It was not given under oath. There was no cross-examination. We were not given the opportunity to observe Mr King in the witness box. As the evidence of Mr Cresswell and Mr Sonpal has raised a potential credible alternative, it is up to the CMA, on whom the onus of proving their case lies, to establish that Mr King is not a credible alternative. They have failed to lead him as a witness to do so.

243. The email refers only to golfing matters and makes no reference to work matters such as commercial negotiations or agreements. We accept the evidence of Mr Sonpal and Mr Cresswell, which was corroborated by photographs of Mr King at other industry golfing events, that this email refers to Mr King.

244. The email of 10 July is of no assistance to the CMA in supporting the CMA's reading of the 22 June email. All that the 10 July email establishes is that Mr Cresswell was sending a RAMA report to Mr Tweedale and, before he did so, checked whether the Medreich licence listed on the report was Lexon's exclusively. That does not necessarily mean that there was a MEA between Lexon and Alliance. It is also consistent with Focus checking the status of the Lexon product before entering into an agreement between Alliance and Focus, the purpose of the check being to assist Focus in making a decision as to whether it wanted to get access to Alliance product to cover the delay before the Medreich product would become available.

245. The email of 18 July is of no assistance to the CMA in supporting the CMA's reading of the 22 June email. It is consistent with the part in the 22 June email about sharing profits. But neither that part of the 22 June email nor the 18 July email assists in establishing that there was an agreement between Lexon and Alliance. That sharing of profits was the result of the interaction between the two distribution agreements and would have occurred under the distribution agreements whether or not there was also an additional agreement between Alliance and Lexon for a MEA.

246. We accept the evidence of the author and recipient of the 22 June email that "Pritesh" was a mistake and should have read "Alastair." The email has clearly been hurriedly written and contains other mistakes (the misspelling of "thier" and "Alistair") as well as this one.

Q. THE ENTRY BY ALLIANCE AND LEXON INTO THE ALLEGED IMPLEMENTING AGREEMENTS WITH FOCUS (DECISION 5.273-5.356)

247. The CMA found that the Amended Alliance-Focus Distribution Agreement and the Focus-Lexon Distribution Agreement were intended to provide for a value transfer from Alliance to Lexon. In compensation for Lexon's agreement not to enter the market:

1. Alliance agreed to supply Focus on terms that would enable Focus to retain substantial profits from the supply of the Alliance Product;

2. Focus agreed to pay to Lexon the majority of the profits earned on the sale of Alliance's product to Lexon; and

3. Focus agreed to become the exclusive supplier of both products, yet under the Alliance Focus Distribution Agreement committed to supply only the Alliance product. (Decision Para 5.273)

(1) The Amended Alliance-Focus Distribution Agreement

248. We now come to one of the central questions of fact in this case. Has the CMA proved on the balance of probabilities that Alliance did not enter into the Amended Alliance-Focus Distribution Agreement as part of a unilateral strategy to de-brand and appoint a distributor, but instead entered into the Amended Alliance-Focus Distribution Agreement in implementation of a separate agreement with Lexon, i.e. the MEA?

(a) CMA's findings as to the intention of Alliance

249. The CMA found that Alliance's intention was to transfer value from Alliance to Focus to enable Focus to compensate Lexon for its agreement not to enter the market (Decision 5.281). It gave three reasons for this finding and we deal with each in turn.

a) Sacrifice by Alliance of benefit of price increases (Decision para 5.282)

250. The CMA found that Alliance's conduct in denying itself the opportunity to implement price increases and to profit from its own decision to debrand and enabling Focus to realise the benefit of the price increases is credibly explained only on the basis that Alliance's intention was to compensate Lexon for not entering the market.

251. We reject this finding.

252. We accept the evidence of Mr Butterfield and Mr Dawson, whom we found to be credible and reliable witnesses, that the intention of Alliance in entering into the Amended Alliance-Focus Distribution Agreement was to implement its unilateral strategy to de-brand and appoint a distributor and not to implement the MEA.

253. Alliance's conduct in selling to Focus at a fixed price and allowing Focus to set the onward sales price must be seen against the background of Alliance's business model, which, as we have seen, was that its expertise was in branded and not generic, and that it focussed on products which represented a modest but solid and reliable revenue stream. By selling to Focus at the existing fixed price Alliance would preserve its existing revenue stream on Prochlorperazine POM. The extra costs of marketing generic drugs would not be met out of that revenue stream, but would be met by Focus out of a price increase to the market which would cover Focus' costs and also Focus' profit. Alliance trusted the Focus management and expected any increase in the price to be moderate. That trust was borne out by events. The original Alliance price was £5.65. On 1 December 2013 Focus raised the price to £8.00. This was a moderate increase, considering that the price had been £5.65 for many years and that the increase had to cover Focus' marketing costs. By the time that the management team which Alliance had dealt with, and trusted to keep the increases moderate, had sold out to AMCo on 1 October 2014, the price had risen only to £9.61. The subsequent rises to £27.94 were under new Focus's management, whose price policies Alliance could not have had in their contemplation when forming an intention to enter into the Amended Alliance-Focus Distribution Agreement with the then management of Focus. Moreover, it is to be expected that when a product debrands there is volatility with an increase in price and then a "glide path" to a lower price once competitors enter the market. Because of its business model Alliance's focus was on maintaining a consistent revenue stream from Prochlorperazine POM. Allowing Focus to set the prices meant that the "glide path" would start from a higher price and may, depending on the number of generic entrants, take longer to get below £5.65, so the reliable revenue stream at £5.65 could be preserved for longer.

254. There are further flaws in the CMA's finding that the only credible explanation for the fixed price is the MEA.

255. The MEA is a "pay for delay" agreement. A party entering into a "pay for delay" agreement can normally be expected to know how much it is going to cost them to achieve the delay. They will want to know what the payments will be. They will want to know whether the agreement will be cost-effective, and whether the cost of the payments will be outweighed by the value of the benefit of the delay. The fixed price in the Amended Alliance-Focus Distribution Agreement would mean that Alliance had written a blank cheque to Lexon as to the amount of the payments Alliance had to make under the MEA for the delay. The CMA's position is that Alliance was in the business of profiting from temporary price hikes (see para 79 above). The logic of that position is that Alliance would not sacrifice all of the price hike by selling at a fixed price, but would only sacrifice that proportion of the price hike which was needed to pay for the delay, and retain the benefit of the rest of the price hike. So, on the CMA's own analysis, the existence of the fixed price is a factor which points against, not in favour of, the existence of the MEA.

256. Further, in assessing the intention of Alliance in entering into the Amended Alliance-Focus Distribution Agreement, regard has to be paid to the state of knowledge of Alliance at the time when it entered the agreement.

257. At that time, Alliance's state of knowledge was that it was expecting more than one competitor to enter the market. It expected the imminent entry of Lexon, but also entry thereafter of others. This is what normally happens after a brand is genericised, and Alliance had concerns about entry by various potential competitors from an early stage in their ownership of Prochlorperazine POM (see para 96 above). Its expectation was accurate. Although Alliance did not know this at the time, Morningside were working on entering the market and expected to apply for an MA in 2014 (Morningside email of 10 July 2013 in para 200 above), and Primegen obtained an MA on 2 February 2016. A "pay for delay" agreement would not be effective to preserve Alliance's product from competition if it delayed only Lexon and not the other competitors who were about to enter the market. We find that the intention of Alliance in entering into

the Amended Alliance-Focus Distribution Agreement was to debrand and appoint a distributor (which would be a way in which Alliance could compete with various competitors entering the market) and not to implement a "pay for delay" agreement delaying entry to the market by Lexon alone (which would have left Alliance open to competition from the other expected market entrants).

258. Finally on intention, we note that in assessing the state of knowledge of Alliance it should not be assumed that Alliance had knowledge of the Focus-Lexon Distribution Agreement nor that they had knowledge that it was incompatible with the Amended Alliance-Focus Distribution Agreement. We accept Mr Dawson's evidence as to the shock and anger he experienced when he first found out (which was not until during the CMA investigation) about the existence of the Focus-Lexon Distribution Agreement, particularly as the Focus-Lexon Distribution Agreement would, if implemented, have represented a breach of Focus' obligations to Alliance under the Amended Alliance-Focus Distribution Agreement. Moreover, it could have left, at the early stages of generic entry, Alliance without support in a market on which it relied on Focus for generics expertise to negotiate sales for the Alliance product. In assessing whether Alliance's intention in entering the Amended Alliance-Focus Distribution Agreement was to pursue its own unilateral strategy or implement the MEA, it is necessary to consider all the evidence as to Alliance's knowledge and intention at the time, and not work backwards from a conclusion that Alliance entered into a MEA which then required to be implemented.

259. Taking all of the evidence in the round, we find that Alliance's intention in entering into the Amended Alliance-Focus Distribution Agreement was to pursue its unilateral strategy of de-branding and appointing a distributor in order to compete with market entry by other competitors, including Lexon.

(ii) Alliance permitted Focus to earn "huge" margins (Decision para 5.283)

260. The CMA found that the "huge" margins that Alliance permitted Focus to earn were far greater than those afforded to Alliance's other distributors and were consistent with Alliance and Focus having intended that the margins be used to compensate Lexon for its agreement not to enter the market.

261. It is undoubtedly true that the margins for Alliance's other distributors were lower than on de-branded Prochlorperazine POM. However, the CMA are not comparing 'like with like', as most of the comparisons are with distribution agreements for branded drugs. In the case of de-branded drugs, different commercial considerations apply and, as we have seen (para 253 above) Alliance had good commercial reasons for selling de-branded Prochlorperazine POM at a fixed price to a distributor and allowing the distributor to set the price and bear the costs of marketing. We do not agree that the intention of Alliance at the time it entered into the Amended Alliance-Focus Distribution Agreement was to allow Focus to have "huge" margins. As we have seen Alliance's intention was for the price increases by Focus to be modest, and it expected further generic entry in any event.

(iii) No other fixed price distribution agreements (Decision para 5.284)

262. The CMA found that the only other instance of Alliance adopting a fixed selling price and permitting its distributor to earn a substantially higher margin related to Aspirin, which was further evidence that such margins were associated with agreements that involve a competing product no longer being marketed. (Decision para 5.284)

263. We reject that finding.

264. There was clear evidence that, far from there only being one other such instance (for generic aspirin), it was the consistent business practice of Alliance. Mr Butterfield's evidence was that he regarded a fixed supply price as a typical option for a third-party distribution agreement for any significant product. He would want to give the distributor an incentive to make a margin and therefore maintain sales of commercially significant product at a reasonable level. In 2013 a fixed supply price applied in 24 of the 28 agreements (i.e. 86%) of Alliance's distribution agreements.

265. Faced with evidence that fixed supply distribution agreements were standard practice for Alliance, the CMA sought to distinguish the circumstances of other fixed-price distribution agreements and drew attention to agreements for prescription medicines which operate on a discount basis (Decision para

5.292.2). However, the fact remains that the standard practice was as described by Mr Butterfield. Agreements for branded prescription medicines, whose price is fixed under the PPRS, do not lend much support to the CMA's position as they operate in very different circumstances from a generic prescription medicine whose price is not so fixed.

266. The CMA was correct to find that the Original Alliance-Focus Distribution Agreement to distribute aspirin did not concern a situation in which Focus was appointed to improve Alliance's ability to compete with the anticipated entry of a rival (Decision para 5.173). That is of course different from the Addendum, which did concern such a situation. The aspirin situation was one where there was only one product available and an exclusive distributorship was entered into for it. The situation regarding aspirin from the respective points of view of Alliance and Focus was explained by Mr Dawson and Mr Brown. Mr Dawson explained that Alliance chose to de-brand its branded Aspirin product because the income generated by it made continuing sales non-viable within the constraints of PPRS pricing. It was a very low volume product for which there was extreme need on the part of a small number of patients. Alliance's aim was to ensure it received a sufficient level of monetary contribution to justify the continued supply of the product, rather than wanting to maximise its profits. Mr Brown's evidence was that, although Focus had an MA for that same aspirin product, its manufacturer was experiencing ongoing manufacturing failures and no longer wished to continue production, so Focus either had to withdraw from the supply of the aspirin or find a new source to buy aspirin from. Mr Brown was fine to commit exclusively to Alliance for a fixed price as that would give Alliance certainty of revenue and give Focus security of supply. The CMA did not lead any evidence from Focus' manufacturer to challenge Mr Brown's version of events. We accept the evidence of Mr Butterfield and Mr Brown. The CMA have erred in analysing the cause of the aspirin monopoly as being Focus committing not to supply its product to the market such that Alliance's aspirin would be the only product on the market (Decision 5.173). The cause of the monopoly was that Focus' manufacturer was ceasing to manufacture the aspirin product and that had reduced the two products on the market to the one product from Alliance.

(2) The Focus-Lexon Distribution Agreement

267. The CMA found that Focus agreed to share the majority of the profits earned on the sale of Alliance's product with Lexon, and that transfer can be explained only on the basis of the MEA (Decision 5.154.10).

268. We reject that finding.

269. The CMA's position was that the discussions between Focus and Lexon regarding the Focus-Lexon Distribution Agreement were contemporaneous with the discussions between Focus and Alliance regarding the Alliance-Focus Distribution Agreement (CMA Written Closings para 61.1). However, the Agreement built upon previous co-operation between Focus and Lexon which had proceeded by way of unwritten gentlemen's agreements. As we have seen in paras 123-5 above in 2012 they were working on other joint projects with the same 75% to Lexon and 25% to Focus profit share as was applied to Prochlorperazine. Both Mr Sonpal and Mr Cresswell gave evidence that there had previously also been an oral agreement between them on pipeline products such as Prochlorperazine. Although they differed as to exactly when this occurred, with Mr Cresswell and Mr Brown putting it at late 2012 or early 2013 and Mr Sonpal putting it in January or February 2013, we accept that it was before the alleged entering into of the MEA in June 2013. The purpose of the written Focus-Lexon Distribution Agreement dated 1 August 2013 was to record the oral gentlemen's agreement on Prochlorperazine in writing, as part of the process of getting Focus ready for sale. So the timing of the entering into of the Focus-Lexon Distribution Agreement can be, and is, explained other than on the basis of the MEA.

270. The 75%:25% profit share can be and is explained other than on the basis of the MEA. Profit share agreements are not unusual in the pharmaceutical industry. […][✂]. Prochlorperazine was Lexon's product, and Lexon had the MA and had developed the products with its manufacturer Medreich. Focus had the lesser role of being distributor. The 75:25 profit split was the standard split which Lexon and Focus used on other products. In these circumstances the 75% to Lexon and 25% split was not unreasonable, nor was it unusual and it was in line with the profit share split on other Focus-Lexon projects.

271. The CMA also submitted that the "Any Supplier Clause" was extremely unusual and the whole idea of entering into two conflicting agreements (i.e. the Alliance-Focus and Focus-Lexon Distribution agreements) was highly odd (Written Closings para 61.2-3). However that oddness does not mean that the Focus-Lexon Distribution Agreement was entered into in implementation of the MEA. Moreover, there would be no actual commercial conflict until supplies from Lexon to Focus became available. The effect of the two conflicting agreements is, in fact, to Focus' commercial advantage since, as we have noted above (para 70), Focus had become a monopoly distributor of two products. We accept the evidence of Mr Cresswell (Witness Statement para 54-55) and Mr Brown (Witness Statement para 45-6) to the effect that they entered into the two conflicting agreements in the expectation that, once the Lexon/Medreich Prochlorperazine POM became available, the commercial realities of the situation would mean that Alliance would not hold them to the terms of the Amended Alliance-Focus Distribution Agreement. The fact that Focus has entered into "unusual" and "odd" arrangements for its own commercial purposes does not mean there was a MEA, to which Focus was not a party, between Alliance and Lexon.

R. SUBSEQUENT CONDUCT AND DOCUMENTARY EVIDENCE AFTER THE ALLEGED IMPLEMENTING AGREEMENTS WHICH THE CMA SAYS SUPPORTS THE EXISTENCE OF THE MARKET EXCLUSION AGREEMENT-ALLIANCE (DECISION 5.358-5.416)

272. Under this heading the CMA addresses the following matters which it says provide further evidence of the existence of the MEA.

(1) Alliance's decision to debrand despite also agreeing to supply Focus at a fixed price and therefore deny itself the potential to profit from the price-increases that de-branding facilitated. (Decision para 5.359)

273. We have considered the CMA's sacrifice argument above (see paras 249 ff above). Here the CMA adds another factor in relation to sacrifice, i.e. Alliance not keeping the Buccastem brand on the market and running with both branded

and generic at the same time, so that it sacrificed the market share that could be protected by prescriptions for the branded product.

274. The CMA found that on de-branding Alliance was denying itself the benefit of prescriptions in which Buccastem rather than a generic was named ("Closed Prescriptions") in relation to which it had guaranteed sales that could not be contested by a new entrant on to the market, including Lexon (Decision para 5.361.1). De-branding was likely to result in a decline in prescriptions for Prochlorperazine POM overall, as clinicians used to prescribing Buccastem might switch to other treatments as a consequence of the confusion caused by withdrawing the brand and because its price (in the generic form) could be increased (Decision para 5.361.2). Accordingly on de-branding, Alliance pursued conduct that was expected to result in a decline in the market overall and a decline in the market share that could be protected through Closed Prescriptions. (Decision para 5.362).

275. We reject the CMA's findings.

276. The CMA's findings are undermined by their misunderstanding of the effect of de-branding on prescription medicine. The CMA's position in their written closings (para 99) was that branded scripts are largely insulated from competition from generics. They found that there was no reason for pharmacies to prefer a generic product (Decision 5.371).

277. In evidence Mr Dawson explained that Clinical Commission Groups would have reprogrammed their prescribing software prompting prescribers to switch to the generic version and leading to an inevitable decline in the branded prescribing rate (Witness statement para 21). The CMA's position on cross examination was that Mr Dawson's position on how prescribing software would work was conjecture (Transcript Day 7 p45-6).

278. We accept Mr Dawson's evidence. The CMA led no evidence which would disprove what Mr Dawson said or make good their position that it was conjecture. It seems unlikely that they could have, given that the CMA's position in this case contradicts the CMA's position in Paroxetine which was as follows:

> "To facilitate generic prescribing, GPs' prescribing software is usually able to identify if a generic product is available, so where a prescriber types in a brand name, they can use a function key to prompt them with the generic name, enabling the pharmacy to dispense any applicable product. This preference for generics in GPs' prescribing practice, when combined with the manner in which pharmacies are also incentivised to dispense generic medicines, leads to the rapid impact of generic substitutes, once they become available, on the price of brand name medicines" (*Decision of the CMA: Paroxetine* 12 February 2016 at para 3.99)

279. The finding of the CMA is further undermined by their failure to lead any evidence to support their statement that clinicians used to prescribing Buccastem POM may switch to other treatments (Decision para 5.361.2) and to specify and lead evidence regarding what other treatments they would switch to. The particular benefit to clinicians of Prochlorperazine POM is that it is buccal, that is ingested through the mouth. There were no other buccal prochlorperazine products on the market, or even with an MA, which clinicians could switch to. Instead of leading its own evidence, the CMA relied on an email from Rachel Rose dated 6 August 2013 in which she stated in very general terms "*If the price increases then the volumes will decline as alternatives are sought by prescribers*" (Decision 5.361.2) This is a very general statement about how the market generally operates and the CMA did not lead Rachel Rose to explain whether she meant there were specific alternatives to Prochlorperazine POM, and if so what she understood them to be.

(2) Alliance forecasts, which record Alliance's expectation that its forecasted sales would not be affected by entry on the part of Lexon (Decision para 5.379)

280. The CMA contends that internal Alliance sale forecasts for 2014 to 2015 record Alliance's expectation that its forecasted sales would not be affected by entry on the part of Lexon (Decision para 5.379). Alliance, on the other hand contends that the forecasts demonstrate that Alliance continued to anticipate competitive entry by Lexon after the point in June 2013 when the MEA is said to have been entered into.

281. We accept Alliance's contention and reject that of the CMA.

282. The Alliance forecasts consist of Central Forecasts (which contained expected sales predictions for each of Alliance's products) and Risk and Opportunities Schedules ("R and O Schedules"), which indicate how much reliance can be put on the Central Forecasts. The Risk and Opportunities Schedule for each month was prepared after the central forecast for that month had been prepared, with the result that when a risk or opportunity identified in a Risk and Opportunities Schedule became more likely than not to occur, it would be included in the Central Forecast for the following month.

283. The forecasts are distorted by a stock-building exercise which Alliance expected Focus to undertake by accumulating and holding a stock of 80,000 packs which it would not immediately supply to wholesalers. Figures produced by Dr Chowdhury after removing that distortion show that Alliance's July 2013 central forecast showed a 24-5% reduction in sales for 2014-16 compared with 2011-12, and that Alliance's November 2014 central forecast shows a 50% reduction in sales from 2016.

284. The R&O Schedules for March to June 2013 identified and tracked a risk arising from a launch of generic Prochlorperazine by Lexon. The March Schedule identified a risk from a May launch of a 20% drop in sales, with a probability of occurrence of 50%. The April Schedule identified the same drop and probability but from a June launch. The May Schedule identified a July launch with a 30% drop and a 70% probability. The June Schedule identified an August launch with a 30% drop and probability of 70%.

285. As the risk was now at a high level of 70%, it was considered more likely than not to occur and was accordingly transferred to the Central Forecast. That meant that going forward the Central Forecasts already took account of what Alliance saw as a high risk of a competitor entering the market, or, to put it in another way which was referred to in evidence at the hearing, the expectation of a competitor entering the market was "baked in" to the Central Forecasts.

286. In support of their contention, the CMA relied on Ms Rose's email of 6 August 2013. A colleague had been reviewing sales units and asked Ms Rose "Prochlorperazine (generic Buccastem) need adding to sales unit forecast- what have the sales figures been based on?" to which Ms Rose replied:

> "Forecast figures are based on current usage and also a moderate decline as you withdraw a brand and, as a consequence, there is confusion in the market. Also if the price increases then the volumes will decline as alternatives are sought by prescribers.
>
> The forecast is 40k units for the first four months to reflect a stock build which the vendor has agreed, this is currently being documented. AT in contract negotiations with them with a view to finalise contract mid September.
>
> You will see a risk has been added to the risks and opps schedule in relation to these sales."

287. As there is no reference in that email to competitive entry, the CMA finds it to be evidence that the decline was not based on a belief that Focus would lose market share to Lexon (Decision para 5.383.1). The CMA has not led Ms Rose to give evidence to substantiate their assertion as to what her email demonstrates. They have not led her as a witness to explain what she understood the position on entry by Lexon to be, explain the basis for her understanding or substantiate their line taken in cross examination of Mr Butterfield, that she acquired her understanding from Mr Tweedale (Transcript Day 5 p97 line 8). Instead, the CMA relies on inference. The inference is a weak one as it is not drawn from anything positive Ms Rose says in the email, but from an omission of something which the CMA (but not necessarily Ms Rose, as we have not had evidence from her to that effect) thinks she would have included, had it been true. In these circumstances, we find that the email does not assist the CMA in proving that Alliance was not expecting competitive entry from Lexon.

(3) Mr Tweedale's 2013/2014 Performance Appraisal (Decision para 5.407)

288. On 30 January 2014 Mr Tweedale had his annual performance appraisal.

289. The appraisal form, signed off by Mr Tweedale and his appraiser, Mr Butterfield, on 3 February 2014, contained a section for the key accountability of "Manage generic portfolio through pricing via wholesalers and third party contacts." In respect of Prochlorperazine POM, the comments section states:

> "The transition of one of [Alliance's] key brands into the generic market was executed in the Q3 and A4 2014. This actually generated growth for the brand/generic in 2013 over 2012 in terms of value and volume. In 2014 –dependent on sales volume being stable, margin generation for this product should be stable (if not grow further in terms of value) over 2013"

The comments section also records that:

> "Close links with the generic contacts and keeping up to date with market information is essential in being able to react effectively to on-going threats to the EP [i.e. Established Products, which included Prochlorperazine POM]"

290. The appraisal also contained a section on integrity which stated:

> "Integrity is essential to commercial activities in the UK market and the validation of projects to operate within competitor (sic) law guidelines is paramount from a corporate and personal viewpoint."

291. The appraisal also contained a self-appraisal section for Mr Tweedale to complete and in which he stated:

> "The management of external companies and individuals has ensured the value will be maintained in Prochlorperazine (EP biggest product going into 2014)"

292. The CMA found that Mr Tweedale's self-assessment in the context of his 2013/14 Performance Appraisal presented further evidence of a MEA. It found that that the only credible basis for Mr Tweedale's claim that "value would be maintained" is that he understood that the threat of generic competition had been managed (Decision para 5.407).

293. We reject that finding.

294. One must always be wary of placing too much weight on self-appraisals, as by the nature of the exercise there is a tendency for the person being appraised to put their performance in the best possible light and puff their achievements. In this particular case, the words "value would be maintained" do not get the CMA any further on the key question of establishing whether the Amended Alliance-Focus Distribution Agreement was entered into to implement a unilateral strategy to debrand and appoint a distributor or was entered into to implement a MEA. The words "value would be maintained" are explicable by the unilateral strategy. The reference to external companies and individuals is not necessarily a reference to the MEA: in dealing with the unilateral response to the generic threat, Mr Tweedale had dealt with Focus, Creo, individuals within these

companies, and also dealt with Lexon and Mr Sonpal, as a customer and in an intelligence gathering role. Mr Tweedale made clear in his interview that he was not saying that the management of Lexon and Mr Sonpal had ensured that value would be maintained: he was just referencing the fact that he had to deal with all these people (Part 2 page 120). Further, the CMA has taken the passages it relies on from the Performance Appraisal out of context: it has been selective in its quotation from the appraisal form and omitted any reference to the passage which stresses the importance of operating within competition law, which is evidence against the existence of the MEA.

S. DOCUMENTARY EVIDENCE AFTER THE ALLEGED IMPLEMENTING AGREEMENTS WHICH THE CMA SAYS SUPPORTS THE EXISTENCE OF THE MARKET EXCLUSION AGREEMENT-LEXON (DECISION 5.417 - 5.482)

295. Under this heading the CMA sets out documentary evidence and conduct of Lexon, subsequent to the conclusion of the alleged Implementing Agreements, which it says provide further evidence of the existence of the MEA (Decision para 5.417).

296. The CMA finds, on the basis of that evidence, that when Medreich was granted its licence in January 2014, Lexon did not intend to produce the Medreich product on the basis that it would instead receive profit share payments from Focus (Decision 5.433).

297. That finding does not necessarily support the existence of the MEA. The question for us is whether there was a MEA between Alliance and Lexon or a unilateral Alliance strategy and a unilateral Lexon strategy. The CMA's finding is neutral in that regard. As we have found above (paras 269 ff), receiving the profit share from Focus was something which Lexon would have expected because of the Focus-Lexon Distribution Agreement, and, in itself, does not support the existence of a MEA.

298. In any event, the CMA's finding in para 5.433 of the Decision is not borne out by the evidence relied on by the CMA, which it deals with in this part of its Decision under the following headings.

(1) Lexon Documentation which the CMA says records that Lexon anticipated earning healthy returns, and that it would not launch its own product (Decision para 5.154.13(a) and 5.419)

299. The evidence that the CMA relies on under this heading is minutes of two Lexon board meetings. The minutes of the first meeting, on 12 September 2013, state that "Mr Sonpal informed that Prochlorperazine is due to be launched next month from which healthy returns are expected." The Minutes of the second meeting on 14 January 2014 state "Mr Sonpal discussed the status of drug development. Prochlorperazine has now been launched".

300. These Minutes do not support the CMA's finding that Lexon would not launch its own product. The topic which is being discussed at the Board is that generic Prochlorperazine has been launched under the Amended Alliance-Focus Distribution Agreement. This is clear from the board papers for the September meeting, which put the minutes in context and have not been quoted by the CMA in para 5.419. These board papers state: "the supply agreement has now been signed with Alliance Pharmaceuticals for exclusive supply of generic Prochlorperazine 3mg Tabs to Focus". The launch of the Alliance generic product was of course of interest to Lexon because Lexon would share in the profit in terms of the Focus-Lexon Distribution Agreement. However, it would share in that profit under the Focus-Lexon Distribution Agreement whether or not there was an MEA. The launch of the Alliance generic by Focus was also to the commercial benefit of Lexon because it would establish the route to market for Lexon's own generic product via, in due course, that same Focus distribution route. Further, upon the inevitable entry of other generic competitors, that established route to market would be to the commercial benefit of Lexon: wholesalers would allow Lexon/Focus to match any price challenges from the new generic competitors, since Focus would be the existing distributor of the product and would already be listed in the wholesalers' warehouse bin locations. As the focus of the Lexon Board meetings was on the Alliance product, and the Lexon/Medreich product was not yet available, it is not surprising that there was no commentary in the minutes on the returns that might be generated from the Lexon/Medreich product or the timing of its launch: we do not accept the

inference drawn by the CMA in para 5.420.3 that the absence of such commentary in the minutes is supportive of the existence of the MEA.

(2) Mr Sonpal's email of 4 February 2014 (Decision para 5.154.13(b) and 5.422)

301. On 4 February 2014 Mr Brundan wrote to Mr Sonpal, copying in Mr Dey:

> "We need to initiate the commercialisation of prochlorperazine. In fact to maintain our licenses we have to have api site Inspection reports. Since we did not buy any api form [sic] the supplier since 2008, they are now not willing to let us re-audit. So we have to give a forecast to them (FIRM one for 2014 according to them).
>
> We have 3 licenses. According to me the Focus deal is on the 3 mg POM licence only? So we should start the work now to introduce the 3 mg P and the 5 mg in Medreich livery. I think we should also get ready to do the 3 mg POM as well, even if only so that Alliance cannot try to increase the Purchase price going forward. In fact their supply price is quite higher than the CGS [sic], albeit we are extremely happy with the deal on the table! We do however have to be able to sell batches at some stage either in our of [sic] Focus livery as OLS as you suggest."

Mr Sonpal responded on the same day:

> "**The 3mg POM is best left alone as we make far much more as it is. I have agree [sic] that we make a batch every 3 years and drift it into the Alliance stock** (can I have the batch size so I can plan)
>
> The 3mg P - I am hitting a brick wall and it may be worth speaking to Alliance Pharma to create a strategy going forward as the market is really small. Perhaps I can arrange a meeting with us to meet their Product manager to get her views.
>
> Can you also in the mean time provide me with a batch size, copy of artwork approved and COGs).
>
> The 5mg - its all down to COG's - when we decided to develop I was told that with Indian production then COGS should not be a problem I am currently buying in the market at 26p for a pack of 28 (Bristol) - there are many players as well so no likelihood of uplift in price. If we can make it work then happy to proceed." (emphasis added)

302. The CMA's position is that this is evidence that Mr Sonpal agreed with Alliance as part of the MEA that Focus would make a batch every three years to provide for the maintenance of the Focus/Lexon MA as regards the Sunset Clause (Decision para 5.424). However, the wording of the sentence "I have agree [sic] that we make a batch every 3 years and drift it into the Alliance stock" in Mr Sonpal's email is unclear. There is an obvious typographical error in it: it says "I have agree". The CMA seeks to correct the error by adding a "d" to the end

of "agree". Mr Sonpal seeks to correct the error by deleting "have" so that the sentence begins "I agree that". In our view the correction by Mr Sonpal is the correct one. We accept Mr Sonpal's evidence that he is agreeing to Mr Brundan's suggestion that they need to initiate commercialisation of Prochlorperazine and maintain their licences, and pointing out that, in order to maintain their licences, in addition to site inspections, they also need to produce a batch every three years. We also accept his evidence that the reference to drifting the Lexon/Medreich product was a reference to the practicalities of introducing a new generic supplier's product into the supply chain of major wholesalers. This would need to be achieved in circumstances where that new supplier (i.e. Lexon/Medreich) would not initially be in a position to supply all of Focus' requirements: until Lexon/Medreich was in a position to supply in full and consistently, the supply chain would have to include both the existing (Alliance) and new (Lexon/Medreich) product.

303. The CMA finds that Mr Sonpal's statement that "The 3mg POM is best left alone as we make far much more as it is" is clear evidence that Lexon had agreed not to supply the Medreich product on the basis that the MEA would result in Lexon and Medreich making "far much more" than competing with Alliance (Decision para 5.423). Mr Sonpal's evidence on the other hand was that in that email he was merely setting out priorities as the manufacturing facilities could not make numerous different products at once. He prioritized other products, which Medreich were far behind in supplying to him, over Prochlorperazine POM on which he was making a profit because of the profit share between Focus and Lexon on Focus' sales of Alliance product: "There was so many more priorities with other products that what I was simply saying was 'Look, we're making money from that, let's put the energy into some other product" (Transcript Day 8 p46 line 6-7). We accept the evidence of Mr Sonpal as to what he meant by that statement and reject the finding of the CMA. The CMA has erred in its supposition that Lexon would make more profit under the MEA than it would by competing with Alliance.

304. Contrary to the CMA's finding, Lexon would make more profit by competing with Alliance. Because of the much lower cost of goods for the Medreich product, Focus' profits (and consequently Lexon's profit share and Medreich's

share of that) on the supply of the Medreich product would, initially, at least, and before other generic entry, be far higher than Focus' profits (and Lexon's profit share and Medreich's share of that) on sales of the Alliance product. Accordingly, Lexon and Medreich would make more profit by competing with Alliance so that Focus would cease to distribute the Alliance product and would distribute the more profitable Medreich product instead. Mr Sonpal was well aware of this. His evidence was that the cost of any Medreich product to Focus would be far cheaper than the price from any other manufacturers, so Focus would always buy Lexon's product (Witness statement para 51), and that he expected the purchase of the Alliance product by Focus to be a temporary arrangement until Lexon was able to supply Focus with the Medreich product (Witness statement para 53). We accept that during that temporary arrangement Mr Sonpal prioritized other products.

(3) Lexon ordered only the single batch for the purpose of keeping the licence active (Decision para 5.154.13c and 5.434)

305. The CMA finds that despite Medreich's MA being granted on 9 January 2014, Lexon did not place a formal order with Medreich until 23 June 2015, and that order was for a single batch.

306. The finding is narrowly focussed on the formality of the order and is based on assertions by Medreich about its order procedures made to the CMA in the context of Medreich being granted leniency by the CMA (Decision para 5.436). Medreich asserted that it had no record of oral orders and its procedures required written orders. The CMA has taken these assertions at face value and has not led any evidence before us as to those procedures. The evidence before us as to Medreich order procedures is different from that asserted by Medreich. Mr Dey explained that it was not necessary for Lexon to place a purchase order, as Medreich only required a purchase order as and when it was ready to supply, and that a formal purchase order would not have been necessary for a Joint Venture product until the product was ready to be shipped. He also explained that it was not correct that Medreich only accepted written orders, and that he accepted telephone orders from Mr Sonpal (witness statement para 51). As no

evidence has been led before us by the CMA, to contradict the evidence we heard from Mr Dey on this matter, we accept his evidence.

307. We consider the order of 23 June 2015 below (para 347).

(4) **"[E]vidence… that in June 2015 Lexon considered itself in a commercial position to cite to Focus Medreich's resistance of a renegotiation of the profit sharing agreement in AMCo/Focus favour until such time as AMCo had secured its own MA" (Decision para 5.154.13(d))**

308. The CMA found that the evidence relating to the second profit share renegotiation provides further evidence of the existence of the MEA (para 5.482, 5.490, 5.506). We find, on the contrary, that it is strong evidence against the existence of the MEA.

309. In 2015, Lexon and Focus agreed to a change to the profit share under the Focus-Lexon Distribution Agreement, whereby the profit share was changed from Focus 25% Lexon 75% to 50:50. In our opinion, this is evidence against the existence of a MEA between Alliance and Lexon. If the MEA existed, the change to the profit share would have been a major change to the crucial term of the MEA which provided for a transfer of value from Alliance to Lexon. The alleged transfer of value by Alliance to Lexon is said by the CMA to be effected by means of the mechanism of the profit share in the Focus-Lexon Distribution Agreement. The effect of the 2015 change to the profit share under the Focus-Lexon Distribution Agreement was to reduce the value of the transfer by one third. Such a significant change to the MEA would have needed the agreement of the parties to the MEA, i.e. Alliance and Lexon. In finding that the second profit share renegotiation provides evidence of the MEA, the CMA refers entirely to negotiations between Focus and Lexon. There is no evidence before us that Alliance was involved in the renegotiation. In our view, the fact that the profit share was renegotiated between Focus and Lexon, and not between Alliance and Lexon, is strong evidence that the MEA did not exist and all that was happening was a renegotiation of the Focus-Lexon Distribution Agreement. A change to the payments made in a "pay for delay" agreement needs to be agreed by the party paying as well as the party delaying.

T. DOCUMENTARY EVIDENCE AFTER THE ALLEGED IMPLEMENTING AGREEMENTS WHICH THE CMA SAYS SUPPORTS THE EXISTENCE OF THE MARKET EXCLUSION AGREEMENT-FOCUS (DECISION 5.483 – 5.561)

310. Under this heading, the CMA sets out documentary evidence and conduct of Focus subsequent to the conclusion of the alleged Implementing Agreements which, it says, provide further evidence of the existence of the MEA.

(1) Focus' forecasts

311. The CMA found that it was clear from Focus' forecasts that Focus did not expect to receive commercial volumes of Prochlorperazine POM from Lexon (Decision para 5.484).

312. Focus' forecasts created in November 2013 for the period January to December 2014 were on the basis that its purchases of Prochlorperazine POM would be made only from Alliance. That is not surprising, as Lexon/Medreich did not have any MA at that stage. When it came round to time to prepare the 2015 forecasts, Mr Cresswell sent an email to Mr Tweedale on 24 November 2014 concerning the forecasts for 2015. Mr Cresswell said: "Just to confirm regarding the Prochlorperazine forecasts for 2015 the forecast remains as previously sent, if the expected competitor product gets launched in 2015, we can review the forecast at this point." That is clearly a reference to the Lexon product, which had not been launched by the date of the email, and we accept Mr Cresswell's evidence that the "competitor" was Lexon's product. This shows certainty on Mr Cresswell's part that he would forecast and buy the Lexon product when it became available, uncertainty as to when it would become available and a hope that it would become available in 2015.

313. We do not accept the CMA's finding that the Focus forecasts show an intention not to purchase commercial volumes of Prochlorperazine POM from Lexon. Instead, we find that the forecasts and Mr Cresswell's email show an intention by Focus to purchase the Alliance product until the Lexon product was launched, and then to purchase the Lexon product. That is evidence against the existence of the MEA.

(2) The Primegen licence grant/second profit share renegotiation

314. The CMA found that correspondence between Mr Cresswell and Mr Brown in 2015 was explicable only by reference to the MEA (Decision 5.495).

315. On 1 October 2014, AMCo acquired Focus through a share purchase agreement. The sale agreement included the payment of a deferred consideration to the vendors, including Mr Cresswell and Mr Brown (the "Earn-out"). The Earn-out depended on various matters, one of which was the continued performance of the existing business and was dependent on Focus maintaining continuity of supply of certain third-party medicines (including Prochlorperazine POM) until 31 December 2016. It is referred to in the Share Purchase Agreement as the continued supply of Prochlorperazine from *"Lexon/Alliance."* We note, therefore, that the Earn-out was not dependent on the continuing exclusion of Lexon's product under the alleged MEA: it applied whether Focus obtained its supplies from Alliance or Lexon.

316. On completion on 1 October 2014, the Focus directors resigned and AMCo personnel were appointed as directors of the business. Mr Cresswell and Mr Brown were retained as employees until 30 June 2016. AMCo proceeded to integrate Focus with its existing operations and shut down the Focus warehouse and head office. Only two employees of Focus remained, one of whom was Sue Wiseman, Focus' National Sales Manager.

317. Following the integration, Mr Cresswell and Mr Brown were put on a retainer to handle queries from AMCo but were not otherwise involved in the running of the business. Their personal focus came to be on ensuring that they managed to get the remainder of the Earn-out. They had legitimate concerns in this regard, as the continuity of the previous business was at risk. For example, one major supplier terminated its relationship as a result of unhappiness with AMCo, resulting in a segment of the Earn-out not being paid.

318. In the spring of 2015, AMCo entered into discussion with Primegen for the acquisition of its business. Primegen had applied for an MA for Prochlorperazine POM. Mr Brown recommended to AMCo that they consider acquiring this, as it could ensure that AMCo would not be reliant on either

Alliance or Lexon for product and could have security of supply, assuming AMCo could manufacture it.

319. AMCo's Chief Strategy Officer Guy Clark gave consideration to acquiring Primegen. In an email to Primegen dated 14 May 2015 he noted that "Prochlorperazine, which is an Alliance Pharma product and Focus currently distribute for a small margin." In a further email of 15 May he noted that Prochlorperazine POM "currently has no competition". That was a factually accurate statement as, by then, the Medreich product had not been launched. He set out his thinking in an email of 19 May 2015 to the company which AMCo had employed to do due diligence on the acquisition:

> "[Focus] distribute for Alliance Pharma, and make about 15% of sales as a fee, I think. We would prefer to have our own product in house and leave Alliance to manage their own product, unless they are willing for Focus to continue distributing and then we can sell the Primegen product through our AMCo/Alliaca[Boots] [sic] solus deal."

320. AMCo acquired Primegen, including its Prochlorperazine POM development on 3 June and took immediate steps towards launching it. On 4 June Mr Clark stated in an email to a colleague that "we are very keen to encourage earliest possible launch of Prochlorperazine Buccal".

321. On 11 June 2015, an AMCo employee emailed Sue Wiseman, asking for her advice in relation to whether AMCo should launch its own Prochlorperazine POM based on the Primegen MA:

> "We need to look at this product and see if it is worth us launching this into the market. I believe you have an agreement in place with this product so what we need to work out is can we leverage the potential to launch this product to get you a better deal for focus or launch it ourselves and try and get a better share of the market with lower COG's."

322. She forwarded the email Mr Brown who replied on 15 June 2015:

> "Sue forwarded on your question re: Prochlorperazine Buccal.
>
> We are currently sole supply [sic] (100% market share) of this product into the UK market through a distribution agreement [the Alliance-Focus Agreement], we make approximately 22% Gross margin. The discussions we had on the product during the acquisition [of Primegen] was to leverage the license to improve margin and secure the business long term. Mark C [Cresswell] has the relationship with the current supplier from our side."

Mr Brown then forwarded the email to Mark Cresswell who replied:

> "They will f this up!!! I will reiterate the market position to john [sic] [Beighton (AMCo)] when I speak to him on weds [sic] and if you can once again take Guy [Clark (AMCo)] through it when you speak to him. If they push alliance [sic] or lexon/medriech [sic] too much it will end up being a car crash for all".

Roland Brown then replied to Mark Cresswell:

> "I know which is why I asked Sue to send it on. Hopefully Guy or John [i.e. AMCo] will just say leave it to FOCUS, but I do not want a big meeting on it."

323. Guy Clark of AMCo forwarded Mr Brown's response to Mr Duncan and another employee of AMCo, asking for a meeting the next day. Mr Duncan responded later that evening:

> "Yep.
>
> I am aware of some of the background to this but obviously do not want to share freely around the organisation so we need to think about the best strategy and how to communicate."

324. The CMA's position is that what Mr Cresswell was worried that they would "f up" was the MEA. Mr Cresswell wanted to discuss the MEA without AMCo's General Counsel being present. The obvious explanation of Mr Cresswell's email about not sharing freely was that Mr Duncan wanted to discuss the MEA with a small group of people (Written Closings para 148).

325. We do not accept the CMA's position. We accept the evidence of Mr Cresswell and Mr Brown that they were concerned about their Earn-out. If AMCo launched its own Prochlorperazine POM, then the existing Prochlorperazine POM business from Alliance would not be maintained and the Earn-out would be reduced substantially. Support for the accounts of Mr Cresswell and Mr Brown, about their concerns about a conflict between AMCo's launch of its own Prochlorperazine POM and their Earn-out, can be found in an email by AMCo's Chief Financial Officer on 24 June 2015: "What is this about again? Is there a conflict of interest with the Focus guys?"

(3) Focus continuing to make payments to Lexon, despite the lack of receipt of any product.

326. The CMA finds that the sole credible explanation for Focus' decision, under its independent ownership until 30 September 2014 and then under AMCo's ownership from 1 October 2014, to continue making profit share payments to Lexon was that the profit share payments represented compensation, pursuant to the MEA, for Lexon not launching the product it had developed with Medreich as a competitor into the market (Decision para 5.525). The CMA also found that despite the lack of product, there was no evidence that Focus ever revisited or questioned the proposition that it should continue making profit share payments to Lexon, which is supportive of the fact that these payments were made pursuant to the MEA (Decision para 5.526).

327. We do not accept these findings. The question we have to decide is whether Alliance and Lexon entered into a MEA.

328. It is not necessary to posit a MEA to account for the payments made by Focus and AMCo to Lexon. The payments would still have been payable even if the MEA did not exist. They would still have been due under the Focus-Lexon Distribution Agreement, until such time as the Focus-Lexon Distribution Agreement was terminated on six months' notice. So long as the Focus-Lexon Distribution Agreement was in place, Focus was in a very strong position. It had created a monopoly whereby it had access to the only existing supplier of Prochlorperazine POM (Alliance) and the access to another cheaper supplier (Lexon) when Lexon was in a position to launch its product. If Focus did not terminate the Focus-Lexon Distribution Agreement, but continued to make the payments under it, it would be able to increase its profits substantially by buying the cheaper Lexon product, when it became available. If it terminated that agreement, it would be able to retain 100% of the profits from the Alliance product, but would not be able to compete against the Lexon product, which would have a far lower manufacturing cost than the Alliance product.

(4) Ms Wiseman's email of 23 March 2017.

329. On 23 March 2017, in the context of discussion about trade price increases to Well Pharmacy, including in relation to Prochlorperazine 3mg POM, Sue Wiseman was asked by a colleague in AMCo "*Shall I send a blanket email out to all my customers outlining this? Or have you done that?*" She responded:

> "No need, I've sent you all the instructions you need…. these products are only available to mainline wholesale. They do not appear on the price lists you have for Ethigen, Elite, Lexon etc.
>
> The only reason that Lexon gets Prochlorperazine Buccal Tablets is because they helped set up the supply agreement with Alliance Pharma (who also make our Aspirin EC 300mg)
>
> Well is the only customer you need to inform as per the email below."

330. The CMA finds that this email is strong evidence that an agreement had been reached between Alliance and Lexon in the form of the MEA (Decision 5.556).

331. The CMA comes to this finding despite having evidence from the author of the email that what is said in it was inaccurate.

332. At her CMA interview Ms Wiseman said that she did not know if Alliance were aware of the arrangement between Focus and Lexon. She did not have any understanding of why there was a profit share with Lexon: it wasn't something she got involved in. Lexon had been offered Prochlorperazine tablets because there was a profit share arrangement in place. Normally an exclusive product would not necessarily have been offered to small shortline customers, but as there was a profit share they did in this situation. She had no understanding as to why they were being offered to Prochlorperazine. What she said in the email was her understanding of the agreement, which she subsequently found to probably be slightly off. She subsequently found out that the profit share was because Lexon had a licence. She came to that understanding in the latter stages of her time at Concordia. She didn't recall how she came to have that different understanding. It could have been an incorrect assumption.

333. So what we have here is that the CMA is relying as strong evidence on a statement in an email which the maker of the email subsequently told them in interview that she had afterwards found out to be untrue.

334. It is for this Tribunal, not the CMA, to assess whether we accept what the witness says in the email or what the witness has said in the interview. In order for us to do that, the witness requires to give evidence before us under oath, and be examined and cross-examined. As the burden of proof is on the CMA to prove its case then it is for the CMA to lead her as a witness. As the CMA is relying on the email as "strong evidence", then it is up to the CMA to persuade us to accept that the email is correct and her account at interview is not. As the CMA has not done so, then the email is of no evidential value in proving the CMA's case and we place no weight on it.

U. DOCUMENTARY EVIDENCE AFTER THE ALLEGED IMPLEMENTING AGREEMENTS WHICH THE CMA SAYS SUPPORTS THE EXISTENCE OF THE MARKET EXCLUSION AGREEMENT-MEDREICH (DECISION 5.562-5.581)

335. Under this heading the CMA sets out documentary evidence and conduct of Medreich, subsequent to the conclusion of the alleged Implementing Agreements, which it says provide further evidence of the existence of the MEA.

(1) Production of Prochlorperazine POM in 2014

336. The CMA finds that Medreich did not seek to produce Prochlorperazine in 2014 (Decision 5.562.1). It finds that although Medreich in the UK could have placed an order with Medreich in India for production of Prochlorperazine POM on 21 March 2014, it did not do so until 23 June 2015 (Decision 5.565).

337. For that finding the CMA relies on the wording marked in bold in the email from Mr Sonpal on 4 February 2014, set out at para 301 above, in which Mr Sonpal says:

> "The 3mg POM is best left alone as we make far much more as it is. I have agree [sic] that we make a batch every 3 years and drift it into the Alliance stock (can I have the batch size so I can plan)

338. We do not accept the CMA's finding. The wording in the email does not establish that Medreich was not seeking to produce Prochlorperazine POM in 2014. It is a statement made not by a Medreich employee, but a statement made by Mr Sonpal of Lexon. It is of very little value in determining whether Medreich was attempting to produce Prochlorperazine: for that we must look at what Medreich was doing, not draw a speculative inference from a statement from someone outside Medreich. When the evidence of Medreich's attempts to manufacture Prochlorperazine POM are looked at as a whole, it is clear that Medreich faced extensive difficulties in obtaining regulatory approval for, and producing, Prochlorperazine POM. The three validation batches that Mr Mehta had ordered in the first quarter of 2014 failed to meet the licensing conditions. An application to vary the MA was made in February 2014. Further issues with Medreich's MA arose in December 2014 and were not resolved until September 2015. Medreich experienced a 15 month delay in obtaining the API from its API supplier. A further MA variation was made in May 2016. Technical difficulties resulted in the suspension of production December 2016 for a further three months. Despite chasing, there were further delays in production on the Indian side of the business in 2017.

339. The issue for us is whether Alliance and Lexon entered into the MEA. The evidence, which we accept, about the difficulties which Medreich experienced in manufacturing, undermines the CMA's position that there was a "pay for delay" agreement: there was indeed a delay, but, more likely, the cause of the delay was Medreich's licensing and manufacturing difficulties.

(2) Medreich budget forecasts

340. On 28 March 2014 Mr Brundan emailed Mr Metha regarding the amount to be invoiced on the Lexon-Medreich profit share, saying "Talked to Pritesh. As per the attached we can budget our share of the profit share per year of £300k. There is an upside for our profit of £95k, if we can get a trade price increase."

341. The CMA finds that this is evidence that Lexon agreed with Alliance that it would not supply commercial volumes of its product (Decision 5.567). We reject this finding.

342. All that this email shows is that Medreich would continue to receive profit share under the Medreich-Lexon Joint Venture Agreement. That entitlement would continue under the Medreich-Lexon Joint Venture Agreement whether or not Alliance and Lexon had entered into a MEA. The reason for the lack of commercial supply from Medreich in the forecasts was the lack of the Medreich product in 2014 due to manufacturing difficulties.

(3) Mr Brundan's email to Mr Sonpal on 7 April 2014

343. The CMA finds that an email from Mr Brundan to Mr Sonpal of 7 April 2014 provides further evidence from Medreich that supports the existence of the MEA (Decision para 5.569).

344. The email states:

> "I have been asked for a detailed analysis of how the COGS has increased now to £5.47 against a cost last quarter of £4.85. This is a product that should cost some £0.50, so we feel that Alliance are making still the lion's share at £1m a year profit, and we are getting about £220k each. Is there anything that can be used to help me corroborate the increases in the COGS from Focus perhaps. Could we please see the supplier invoices? I do not want to be difficult as it is a clever arrangement, but I am cutting a bit of a sorry figure with the management here, as I cannot explain how suddenly the supplier is going for this 13% cost increase.
>
> I remember you had mentioned something to me on this, but surely not to kick in in the second quarter and before any price increases? I thought the 2 were in some way linked?"

345. The CMA found that this email cannot be reconciled with Medreich having regarded Alliance as an independent supplier to Focus that was free to change its supply price without scrutiny from Lexon and/or Medreich and therefore supports the existence of the MEA (Decision para 570).

346. We do not accept that finding. The alleged MEA is an agreement between Alliance and Lexon to which Medreich is not alleged to be a party. Nor is Medreich a party to either of the alleged Implementing Agreements. It is no part

of the CMA's case that Medreich was a party to the MEA nor that one of the terms of the MEA was that Medreich was entitled to scrutinise the supply price under the Amended Alliance-Focus Distribution Agreement. All that Mr Brundan is doing here is examining his profit share under the Medreich-Lexon Joint Venture Agreement, as he is entitled to do. His profit share is dependent on the price charged by Alliance so if that price increases his profit share will go down: he is concerned about why there is to be a price increase when Alliance's price is already significantly above what he thinks Medreich's cost of production will be. This is a concern which he would be entitled to raise under the Medreich-Lexon Joint Venture Agreement independently of any MEA, and accordingly does not support its existence.

(4) Lexon order of 23 June 2015

347. The CMA's position is that the order placed by Lexon on 23 June 2015 was for the purpose of avoiding the Sunset Clause (Decision 5.573). It bases this on Medreich Minutes of 24 June 2015 which state "Order for Prochlorperazine has been placed on India, this is for the 1 batch required in order to keep the license active." However, evidence about the purpose of this batch does not prove that Lexon was not also seeking supply of commercial batches.

(5) Later Medreich documentary evidence

348. The CMA finds that the emails of 28 February 2017 and 21 July 2017 provide clear and compelling evidence that the MEA had been reached between Alliance and Lexon (Decision 5.574). We reject that finding.

(i) Email 28 February 2017

349. Meiji had acquired Medreich in February 2015. On 28 February 2017, an employee of Meiji emailed Mr Dey expressing concern as to delays by Medreich on product development generally and requesting details of products which had not been ordered after approval. Mr Dey replied the same day,

> "On top of my head, I only see Prochlorperazine 3mg as there is (was) only one other supplier. But that situation is changing as 2 more suppliers have come in… and we have placed order onto India which I believe has failed at

> India level. When we do profit share deals, there is no written agreement, it is gentleman word and invoices are raised based on off the record workings."

350. The key part of this email, and what, in his oral evidence, Mr Dey stressed he was trying to get across to Meiji, was that production had failed at the India level. That is consistent with the other evidence (para 338 above) as to the difficulties that Medreich had experienced in producing the product, and undermines the CMA's position that the delays in production were caused by a "pay for delay" agreement.

351. The rest of this email does not assist the CMA in proving the existence of a MEA between Alliance and Lexon. The references to profit share deals, gentleman's agreement and off the record workings are, on the balance of probabilities, references to the Medreich-Lexon Joint Venture Agreement and not the MEA.

(ii) Email of 21 July 2017

352. The CMA found an email by Mr Dey to Meiji dated 21 July 2017 (Decision para 5.777-5.591). It is important to understand the background to that email, which was part of an exchange of emails in the middle of the night between 20 and 21 July.

353. On 20 July 2017 at 23.34 UK time a person from Meiji emailed Mr Dey:

> "You mentioned that no supply has been made so far (and would remain so for more months to come…) for Prochlorperazine 3mg, but profit share income from this product is exceeding the YTD budget (June: 210k vs 97k and YTD: 355k vs 291k). Does it mean this product is so much demanded in the market now and only 5mg has been contributing so much? Then it also means loss of supply of 3mg is directly leading to loss of good business chances for us in UK market.
>
> Please correct me if my understanding is wrong."

354. Mr Dey responded:

> "profit share figures are quarterly to us maybe that is the reason for the diff.. In any case this needs to be resolved else PRitesh (sic) will be upset."

355. The person from Meiji responded:

> "Yes, I know the profit share outcome comes 1Q delay due to calculation adjustment and the figures shown in our Q1 reflects the sales of previous Q. So if you let me ask differently, has 3mg even been manufactured and supplied to the UK market? If not, profit share has been brought to us from 5mg only."

356. Mr Dey then responded at 03.22 on the 21 July with the email on which the CMA found:

> "3mg has never been manufactured or supplied .. Profit share comes from 3mg only.
>
> There is a deal in place for Medreich Not to bring 3mg in market we get royalty..
>
> But two things are crucial now:
>
> 1. The company with whom Lexon has done the deal wants to see our product failing which deal is off..
>
> 2. Secondly from regulatory perspective we need to produce 1 batch of 3mg to avoid sunset clause (sic) else we shall lose the license. As per sunset clause regulation we have to produce and sell 1 batch once every 3 years to maintain the license or else MHra will kill the license."

357. A Medreich Management Committee Meeting was held on that same day, 21 July 2017, and the minutes record:

> "Sales as of now is more important than the budget however gross profit is impacted due to pricing pressure in UK market.
>
> Mr Debangshu Dey further mentioned that deliveries for products on time from India would help like Atenolol + Nifidine - technical issue is still not resolved, Prochlorperazine has to be supplied otherwise there could be legal implications.
>
> Mr [C] mentioned that Prochlorperazine could be supplied in the month of August/September".

358. Mr Dey's evidence was that this email was sent hastily at around 3 o'clock in the morning. His purpose was to encourage Medreich to supply the product as quickly as possible.

359. Read in isolation the sentence "There is a deal in place for Medreich Not to bring 3mg in market we get royalty" could be supportive of the existence of the MEA. However, when that sentence is read in the context, it becomes apparent that whatever Mr Dey thinks he is describing it is not the alleged MEA between

Lexon and Alliance. He goes on to say, "The company with whom Lexon has done the deal wants to see our product failing which deal is off". If by "the deal" he is referring to the MEA, then what he is saying is that Alliance wants the Medreich product to be entering the market: that does not support the existence of a MEA designed to stop the Medreich product from entering the market. Further, again if "the deal" is the MEA, he is saying that if Medreich does not enter the market with its product then the MEA deal is off: it makes no sense to say that if the Lexon/Medreich product is not produced the deal to exclude the Lexon/Medreich product from the market is off. In our view this email is no more than a badly drafted attempt to explain, at 3am, the reason why Medreich was receiving profits despite not supplying product: there was a profit-share deal in place between Medreich and Lexon under which Medreich received a royalty even if Medreich had not brought the product to market. A further difficulty with the CMA's position that this email is evidence of the MEA, is that, on the very same day, Mr Dey is making statements at a meeting which are supportive of the MEA not existing and incompatible with him describing the MEA in that email. At the meeting, he is recorded as stating that Prochlorperazine has to be supplied otherwise there could be legal implications. That is incompatible with the supply of Prochlorperazine POM being excluded in the MEA. It is evidence, which we accept, that the MEA did not exist.

360. The sentence in the email, about the need to produce one batch for regulatory purposes, does not necessarily mean that there was no intention to produce commercial batches: without other evidence, it just expresses concern about what could happen if the production difficulties continued.

V. CORRESPONDENCE BETWEEN MR CRESSWELL AND MR SONPAL IN 2014

361. The CMA relies on evidence of email exchanges between Mr Cresswell and Mr Sonpal on 4 April 2014, 2 and 3 September 2014 and 4 November 2014 (the "2014 Correspondence").

362. The CMA does not rely on the 2014 Correspondence to establish the existence of the MEA but finds that they are not inconsistent with it (Decision 5.157). It finds that the correspondence is not explained by any expectation on behalf of

Lexon and/or Focus of the supply by Lexon to Focus of commercial volumes of Prochlorperazine POM; further, they can each be plausibly explained by one or more interpretations that do not involve an expectation on the part of Lexon or Focus of the supply by Lexon to Focus of commercial volumes of Prochlorperazine POM (Decision 5.157 and Decision Annex F). It finds that the 2014 Correspondence is not inconsistent with the existence of the MEA (5.619).

(1) Emails of 14 April 2014

363. On 14 April 2014, Mr Sonpal emailed Mr Cresswell:

> "Hi Mark
>
> My sincere apologies but we have been let down on this product with API.
>
> As you know the API comes from a third party and they had not built in our forecast for 3mg into their plan.
>
> I should have a further update from them in June.
>
> Once again, I do apologise for the confusion but as I am sure you can guess there is nothing short term, I can do to address the problem."

Later that day, Mark Cresswell replied:

> "Pritesh
>
> Thanks for the update I totally understand the issues and we can revisit in June when you have more information."

Mark Cresswell then further responded (2 minutes later):

> "With regard to our discussion regarding the agreement on profit share I agree with your comments, and we shall continue with the current agreement as signed in the heads of agreement."

364. API stands for Active Pharmaceutical Ingredient. This is the chemical ingredient with the medicinal effect. Medreich did not manufacture the API itself. It bought it in from a third party, then combined it with other materials to make the tablets.

365. Taken at face value, these emails are evidence against the CMA. They show that Lexon was unable to supply the Medreich Prochlorperazine as the third party supplier had not supplied the active ingredient. They show that Medreich had

included Prochlorperazine 3mg in its manufacturing forecasts. They show that this was seen as a short-term problem which, it was expected, would be overcome. They show the reason for the continuing profit share on the Alliance product was the delay in Medreich's API, and thus the profit share was not open-ended.

366. The evidence at the hearing of the witnesses who were the sender and recipient of the email, Mr Sonpal and Mr Cresswell, supported the face value of the emails.

367. In the Decision, the CMA give what they say are various plausible explanations of these emails:

(1) The exchanges could plausibly be explained on the basis that Focus were contemplating and discussing the provision of the single batch of Prochlorperazine necessary to avoid the application of the Sunset Clause (Decision Annex F.6);

(2) Lexon might have been keen to give the impression to Focus and Alliance that it could produce more product should the MEA be terminated. Lexon may have been motivated to avoid Focus seeking a greater proportion of the profit share, or Alliance seeking to decrease the profit share payment to Lexon/Medreich and/or of any party terminating the MEA (Decision Annex F.11 and F.12);

(3) The exchange may have been influenced by the authors' caution regarding what they put in writing (Decision Annex F.17); and

(4) The parties were deliberately creating a written record meant to give the impression that they were intending to supply and receive commercial volumes (Decision Annex F.17.2). The formal language used in the emails would be consistent with them being written with a view to wider scrutiny, in particular, given the unnecessary nature of the correspondence (Decision Annex F.22).

368. It is not enough for the CMA to point to various explanations which they say are plausible. The burden of proof is on the CMA. The CMA needs to persuade us that the emails do not mean what they say. We are not persuaded that any of the CMA's speculative explanations outweighs the clear wording of the emails and the evidence of Mr Cresswell and Mr Sonpal.

369. The CMA led no evidence to prove that in his email Mr Sonpal was not telling the truth about being let down by the supplier of the active ingredient. No evidence was led from the supplier of the active ingredient which could contradict or challenge Mr Sonpal's position. In the absence of any evidence to the contrary, we accept Mr Sonpal's evidence about the problems he encountered with obtaining supplies of the active ingredient.

370. We do not accept the CMA's first explanation, which is that the exchanges can be plausibly explained on the basis that the discussion was about the Sunset Batch. On their face, the emails refer to being let down in respect of the API for Prochlorperazine as a whole. They do not distinguish between being let down in respect of Prochlorperazine needed to produce a Sunset Batch rather than a commercial batch. The reference to continuing the profit share makes sense only if there was a problem with obtaining enough API for a commercial batch: if the MEA existed, and there were never going to be any commercial batches anyway, no-one would have been worried about how the lack of the API would have impacted on the profit share.

371. The CMA's second explanation is highly speculative and indeed the CMA goes no further than saying that it "might" have been the case.

372. The CMA's third explanation is again highly speculative. It seeks to explain away evidence which is unfavourable to the CMA on the basis that parties carefully crafted it to be misleading. We prefer the much simpler explanation that the emails are truthful.

373. The CMA's fourth explanation, that the parties were deliberately creating a false written record, is again entirely speculative. However, this explanation requires further comment. It is an allegation by the CMA of fraud. It is an allegation that Mr Cresswell was involved in a fraud to induce a third party to purchase the

shares of Focus on the basis of false information. More particulars of the fraud which the CMA alleges Mr Cresswell was party to emerged in cross-examination of Mr Cresswell when the CMA pursued the line, (summarised in the CMAs written closings at para 186), that Focus had been approached by a couple of potential purchasers and Mr Cresswell was aware that any purchaser would do due diligence on Focus' contracts: this gave Mr Cresswell a reason to give the impression that Focus was intending to receive commercial volumes of product. Allegations of fraud should not be made lightly. They should only be made on the basis of full and detailed evidence which gives a complete and detailed explanation of the alleged fraudulent conduct. The CMA has led no such evidence. All that it has done is speculate that there was such a fraud. Such speculation is wholly without foundation, and we wish to make it clear that Mr Cresswell leaves this hearing without any stain on his character as to having committed fraud.

374. In closing submissions, the CMA's position shifted: these emails were an agreement to continue sharing the profits even though Lexon had supplied no product and there was no indication of when it might do so (para 182). Unlike the speculative explanations in the Decision, that submission is a fair reflection of the evidence that we heard. However, that takes the CMA no further in proving its case. All that it means is that Focus and Lexon would continue to operate under the Focus-Lexon Distribution Agreement. Focus and Lexon would have to continue to operate under the Focus-Lexon Distribution Agreement in any event, even if the MEA did not exist. The CMA's submission, in itself, does not assist us with the central question which we have to answer, which is whether the CMA has proved that Alliance and Lexon entered into a MEA. In respect of that question, we find that the emails should be taken at their face value. We find that the email exchange demonstrates that the failure of Lexon to enter the market during the spring and summer of 2014 was not because of an agreement with Alliance not to enter the market, but because of manufacturing difficulties with the Medreich product.

(2) Emails of 2 and 3 September 2014 between Mr Cresswell and Mr Sonpal

375. The background to the emails of 2 and 3 September between Mr Cresswell and Mr Sonpal was that, on 22 August 2014, Mr Sonpal had emailed Mr Dey asking him to "advise batch size and landed and released COGs for prochlorperazine 3mg 50s". In order to answer that query, Mr Dey emailed a colleague in Medreich India and asked "can you advise what is the registered batch size of Prochlorperazine [sic] 3mg tablets". The Indian colleague replied on 27 August 2014 stating that "Three bathes [sic] of 500,000 are registered". On the same day, Debangshu Dey emailed another colleague in Medreich India noting:

> "There may be a possibility of doing a batch of Prochlorperazine [sic] 3mg. In the license 500,000 tablets batch size is registered. From the equipment point of view are we ok as this is not a big line and we do need small batch sizes. So if can confirm that 500k tablets is ok to manufacture will be great. Do advise."

The second Indian colleague replied on 2 September, confirming the registered batch size of 500,000 tablets, but that the minimum commercial batch size for manufacturing was 2 million tablets. Mr Dey then emailed Mr Sonpal on 2 September on the issue of the batch size, informing him that "just came to know that batch size for Prochlorperazine [sic] 3mg - 50s shd be 40k packs (2 mn tablets because of small size of tablet)."

376. Mr Sonpal forwarded Mr Dey's email of 2 September to Mr Cresswell. Mr Cresswell responded on 3 September 2014, and Lexon responded in turn. The email exchange is as follows:

Mr Dey to Mr Sonpal: "Just came to know that batch size for Prochloroperazine [sic] 3mg - 50's shd be 40K packs (2 mn tablets because of small size of tablet)."

Mr Sonpal forwards email by iPhone to Mr Cresswell with no message.

Mr Cresswell responds to Mr Sonpal by iPhone: "thanks mate I will update you on requirements soon, What would be the lead time"

Mr Sonpal responds by iPhone: "Initially, I would say 20 weeks for the first then 12weeks [sic] thereafter."

377. Taken at face value the meaning of these emails is plain and is evidence against the CMA's case. It demonstrates that Focus and Lexon expected Focus to be distributing commercial quantities of Prochlorperazine POM under the Lexon-Focus Distribution Agreement, rather than only a single Sunset Batch under the MEA. The reference to first and subsequent batches shows that the intention was to produce more than one batch: this demonstrates that what was intended was commercial manufacture of a series of commercial batches, not merely a single Sunset Batch. The reference to 40k packs of 50s is a reference to a commercial batch. Another example of 40k packs of 50 constituting a commercial batch can be found in the Alliance-Focus Distribution Agreement, which provides in the Schedule for Alliance's genericised Prochlorperazine POM to be supplied in commercial batches of 40,000 packs of 50s. The reference to Focus giving Lexon an update of its requirements demonstrates that Focus was expecting to require commercial quantities of the Medreich product from Lexon under the Lexon-Focus Distribution Agreement, rather than Focus expecting to receive only one Sunset Batch because of the MEA.

378. The evidence of Mr Cresswell and Mr Sonpal was supportive of the face value meaning of the emails.

379. In the Decision, the CMA found that the email exchange did not provide evidence of Lexon intending to supply, and Focus intending to purchase, commercial volumes of Prochlorperazine POM (Decision Annex F.23) and there were other plausible explanations (Decision Annex F.24). The first of the CMA's explanations was that it was plausible that the emails referred to the Sunset Batch (Decision Annex F.25) and that the subsequent batches were needed every three years (Decision Annex F.34). In our view, this explanation flies in the face of the actual wording of the exchange. It is distinctly implausible that Mr Cresswell and Mr Sonpal would be planning in 2014 how many weeks it would take to obtain a Sunset Batch in 2017. A further explanation was that Lexon was keen to give the impression to Focus and Alliance that it was pressing ahead with the single batch and that it could provide more product

should the MEA be terminated (F.27). In our view this explanation is entirely speculative. The CMA led no evidence that there was a prospect of the MEA being terminated. The next explanation was that Mr Sonpal's reference was a stock response, rather than evidence of what was intended in relation to Prochlorperazine (Decision Annex F.32). There was no basis in the evidence for that speculation on the part of the CMA, and we reject it entirely. The final explanation put forward by the CMA was that Mr Sonpal was contemplating ordering multiple commercial batches in order to provide for a possible (albeit ultimately unrealised) situation in which Focus' new owners ended Focus' participation in the MEA and sought, instead, to obtain commercial volumes of product from Lexon. This explanation is highly speculative and, again, there is no basis for it in the evidence. We reject it.

380. We are not persuaded that these speculative explanations advanced by the CMA outweigh the plain meaning of the emails and the evidence of Mr Sonpal and Mr Cresswell. In our view these emails are strong evidence against the existence of the MEA. They demonstrate that, far from excluding the Lexon/Medreich product from the market, Focus and Lexon were actively taking steps to supply that product to the market in commercial quantities in competition with the Alliance product.

(3) Emails of 4 November 2014

381. Focus was taken over by AMCo on 1 October 2014. AMCo asked Mr Cresswell to meet with Focus' suppliers and customers to reassure them that it was business as usual. As part of this process, Mr Cresswell met with Mr Sonpal on 3 November 2014, and confirmed the agreement made at the meeting in writing by email on 4 November 2014:

> "Pritesh
>
> Following our meeting yesterday, I am just confirming the agreement regarding prochlorperazine 3mg tabs.
>
> You have placed an order for stock and would expect the stock to arrive in early 2015, once you have a confirmed date, I can place a purchase order on you for the stock.
>
> We agreed an amendment to the profit share agreement in that up to an Asp [Average Selling Price] of £10.50 the profit share will remain

> at 25%(Focus)/75% (Lexon), over an ASP of £10.50 the profit share will become 50% (Focus)/50% (Lexon). I will amend the heads of agreement to mirror this and send on to you."

Mr Sonpal replied:

> "Hi Mark
>
> Thanks for the catch up
>
> Yes I will advise as soon as I have a firm date for availability of released product along with the exact volumes
>
> Regards the change to the profit share. Yes, I am happy to proceed with your proposal."

382. Taken at face value, these emails are evidence against the CMA. They demonstrate that Lexon and Focus are preparing to enter the market with the Lexon/Medreich product, contrary to the alleged MEA. They show that Mr Cresswell was expecting that Focus would receive commercial stock of the Lexon/Medreich Prochlorperazine POM from Lexon in early 2015.

383. The emails are consistent with the accounts of the meeting given by Mr Cresswell and Mr Sonpal in their evidence at the hearing. The emails give credibility to the evidence of Mr Cresswell and Mr Sonpal as they are contemporaneous written confirmation of their accounts of the meeting.

384. In the Decision, the CMA found that the 4 November exchange did not provide evidence that Lexon intended to supply, and Focus purchase, commercial volumes of Prochlorperazine POM (Decision Annex F.38) and that that there were at least two other plausible explanations (Decision Annex F.39).

385. The first explanation was that Lexon wished to demonstrate to Focus and Alliance its ability to make to make a single batch and more product should the MEA be terminated (Decision Annex F.40.1). We reject this speculative explanation, for which the CMA offered no evidence.

386. The second explanation is that the contents of the email were influenced by Focus' and Lexon's caution on what they put into writing, and that they would each have recognised the value of having a written record which would, if necessary, support the contention that they expected Lexon to provide

commercial volumes (Decision Annex F.43). This differs from the allegation against Mr Cresswell of fraud in relation to the purchase of Focus shares, as by this time Focus had been sold. Nonetheless, it is a straightforward allegation that Mr Cresswell and Mr Sonpal have produced false emails in order to hide the true state of affairs. This allegation is highly speculative. We prefer the simpler explanation that in the emails Mr Cresswell and Mr Sonpal were telling the truth.

387. We are not persuaded that these speculative explanations outweigh the plain meaning of the emails and the evidence of Mr Sonpal and Mr Cresswell as to what happened at the meeting on 3 November. In our view, the oral evidence from Mr Sonpal and Mr Cresswell of that meeting, supported by the contemporaneous account of the meeting in the emails of 4 November, are strong evidence against the existence of the MEA. They demonstrate that, far from excluding the Lexon/Medreich product from the market, Focus and Lexon were actively taking steps to supply that product to the market in commercial quantities in competition with the Alliance product.

Conclusion on the 2014 Correspondence

388. In summary, we find that the 2014 Correspondence constitutes strong exculpatory evidence which we accept. These emails are strong evidence against the existence of the MEA.

W. CONCLUSION ON THE ALLEGED MARKET EXCLUSION AGREEMENT

389. The CMA has perilled its Decision on proving, on the balance of probabilities, that Alliance and Lexon entered into a MEA. In order to do that, one of the matters on which the CMA must satisfy us is that, on the balance of probabilities, Alliance did not enter into the Amended Alliance-Focus Distribution Agreement as part of a unilateral strategy to meet the generic threat by de-branding and appointing a distributor, but, instead, entered it in order to implement the MEA.

390. We find that, in coming to its conclusion that the MEA existed, the CMA has made material errors, as set out above, in its assessment of the factual evidence.

391. When the documentary and witness evidence is looked at in the round, it does not demonstrate on the balance of probabilities that there was a MEA.

392. The 2014 Correspondence is exculpatory. Much of the rest of the documentary evidence does not assist in determining whether the Amended Alliance-Focus Distribution Agreement and the Focus-Lexon Distribution Agreements were entered into to implement of the MEA or for the parties' own individual commercial reasons. The documentary evidence is, to a large extent, consistent with either of these explanations, so does not, overall, prove the existence of the MEA.

393. The witnesses were credible and, on the whole, reliable. In particular, we accept the evidence of Mr Butterfield and Mr Dawson that, in entering into the Amended Alliance-Focus Distribution Agreement, they did so as part of a unilateral strategy to debrand and appoint a distributor, and not in implementation of the MEA, which did not exist.

394. Having considered all the evidence in the round, and all of the submissions made by the parties, we find that Alliance and Lexon did not enter into the MEA. There was no such agreement.

395. The rise in the price of Prochlorperazine POM in around the first year of the alleged MEA from June 2013 to October 2014, from £5.65 to £9.61 was a modest one, especially when one takes into account that prior to then, under the PPRS, there had been no price rises for many years, and the extra costs of marketing a generic product were to be met by Focus out of that price rise. It is inherent in the PPRS and Drug Tariff system that, once an out of patent drug is genericised, there can be a steep increase in its price. Whatever may have been the reason for the increase in the Drug Tariff for Prochlorperazine POM from £11.98 in October 2014 to £51.03 on 1 July 2018, it was not the alleged MEA.

X. PARTICIPATION IN THE MARKET EXCLUSION AGREEMENT BY FOCUS AND MEDREICH

396. The CMA found that Focus and Medreich breached the Chapter I prohibition by participating in the MEA (Decision paras 1.32 to 1.39). As we have held that there was no MEA, it follows that there was nothing for Focus and Medreich to participate in, and no such breach.

Y. PENALTY

397. The appellants also appeal against penalty. As we have found that there is no MEA and accordingly there was no breach of competition law, the issue of penalty does not arise.

Z. DIRECTORS DISQUALIFICATION

398. As we have found that there was no MEA, there was no breach of competition law. Accordingly we find in terms of section 9A(2) of the CDDA 1986 that, in respect of each of Mr Sonpal, Mr Butterfield, Mr Dawson, Mr Cresswell, Mr Brown, Mr Duncan and Mr Dey, the first condition has not been satisfied.

AA. CONCLUSION AND DISPOSITION

399. For reasons set out above, the appeals on behalf of all of the appellants succeed, and the Decision is set aside. This is our unanimous decision.

The Hon. Lord Ericht
Chairman

Eamonn Doran

Prof. David Ulph CBE

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 23 May 2024