Neutral citation [2021] CAT 5

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1344/1/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

25 February 2021

Before:

PETER FREEMAN CBE QC (*Hon*)
(Chairman)
PAUL LOMAS
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

IN THE MATTER OF THE APPEAL

BETWEEN

LEXON (UK) LIMITED

Appellant

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

AND IN THE MATTER OF LEXON (UK) LIMITED

AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

BETWEEN

COMPETITION AND MARKETS AUTHORITY

Claimant

-v-

PRITESH SONPAL

Defendant

Heard remotely on 16-20 November 2020

JUDGMENT

APPEARANCES

Mark Brealey QC (instructed by Maitland Walker LLP) appeared on behalf of the Appellant and the Defendant.

Mr Josh Holmes QC, Mr David Bailey and Mr James Bourke (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent and the Claimant.

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A. SUMMARY

1. This is an appeal against the Decision by the Competition and Markets Authority ("CMA") of 4 March 2020 finding infringements of Article 101(1) of the Treaty on the Functioning of the European Union and Chapter I of the Competition Act 1998 by several companies including Lexon (UK) Limited ("Lexon"). Those infringements consisted of engaging in a concerted practice by exchanging sensitive strategic commercial information relating to the supply in the UK of the pharmaceutical product, Nortriptyline. This product is normally sold in tablet form.

2. Lexon is primarily a pharmaceutical wholesaler, specialising in the supply of generic pharmaceuticals, although it also has interests in manufacturing. Its co-founder and principal director, Mr Pritesh Sonpal, is the subject of an application by the CMA for a competition disqualification order under section 9A of the Company Directors Disqualification Act 1986. Assessment of the First Condition of this provision was transferred to the Tribunal by order of the High Court on 15 September 2020.

3. Lexon was found in the Decision to have engaged in exchanges of information over a ten month period from July 2015 to May 2016 with two other undertakings, King Pharmaceuticals Limited and its associate Praze Consultants Limited (together "King") and Alissa Healthcare Research Limited ("Alissa").

4. The exchanges consisted of email messages, phone calls and a meeting in a London hotel. Evidence as to their content and significance was provided to us from what appears in the CMA's Decision, by witness statements in these proceedings, from transcripts of interviews made by the CMA during its administrative process and from the oral testimony of Mr Sonpal and Mr James Harvey, an economics expert retained by Lexon.

5. King was a significant supplier of Nortriptyline, having "de-branded" the product (i.e. moved it to generic status) in 2010. In the five years up to 2015, King and another company (Auden McKenzie, later acquired by Actavis), were (apart from parallel imports) the only two authorised suppliers of Nortriptyline to the UK market. During this time, Lexon took its supplies of Nortriptyline, as a wholesaler, mainly from King.

6. In 2008, Lexon established a profit-sharing joint venture with Medreich (an Indian manufacturer with a UK subsidiary) to develop and make Nortriptyline for sale in the UK. Once the necessary marketing authorisation had been obtained in 2015 it was agreed that the joint venture would not only supply Medreich's and Lexon's own requirements but would also supply Nortriptyline to Teva (an international generics group) for resale under Teva's own livery in the UK. Lexon negotiated the terms of supply to Teva, which included supply at a transfer price and a share of Teva's profits on the resale of Nortriptyline.

7. These arrangements, which increased the number of authorised suppliers of Nortriptyline, led to downward pressure on prices, which had risen to a notably high level under the previous duopoly. Alissa's entry to the market, planned for 2016, would further increase this downward pressure.

8. The Decision found that the concerted practice was an 'infringement by object' within the meaning of Article 101 and Chapter I of the Competition Act 1998. It further found that the overall objective of the concerted practice was to maintain, or slow the decline in, the price of Nortriptyline, which it defined as the Price Maintenance Objective, or "PMO".

9. Lexon claimed that the CMA had wrongly interpreted the law, misconstrued the content and purpose of the information exchanges and failed properly to take account of their economic context.

10. Lexon claimed that the information exchanges would not allow the achievement of the Price Maintenance Objective, as defined by the CMA, as they did not have the objective of maintaining prices, did not include specific information about prices and because any information given was either already public or was largely historic and general in nature. Lexon also claimed that the real world market conditions made the alleged infringement impossible, as the parties served different customers and did not have sufficient market power significantly to affect market prices, which were in any case falling quickly throughout the period of the alleged infringement.

11. The CMA said that its Decision contained a correct application of the law and a proper assessment of the content, objectives and context of the exchanges of information it had identified.

12. We find that the CMA correctly assessed the exchanges of information as a concerted practice contrary to Article 101(1) TFEU and Chapter I of the Competition Act 1998 on the basis that they had as their object the restriction of competition.

13. We find that the information exchanges included information of a commercially sensitive nature which should not have been exchanged between competitors; and that they had as their objective the reduction of strategic uncertainty for the parties in relation to pricing conditions and trends, the likely behaviour of actual or potential competitive suppliers and, and the behaviour of customers, all of which were likely to affect price levels in the market.

14. We find nothing in the legal and economic context of the information exchanges to negate or cast doubt on this conclusion. We therefore dismiss this Ground of Appeal.

15. Lexon's second ground of appeal (relating to the duration of the single and continuous infringement found by the CMA) was not pursued.

16. Lexon's third ground of appeal related to the penalty of some £1.2 million which the CMA had applied to it. We find nothing to question in the CMA's assessment of the penalty applicable to Lexon, either in relation to the individual steps in the calculation or "in the round". We dismiss this ground of appeal also.

17. Finally, we have considered whether the requirements of the First Condition of the proceedings under the Company Directors Disqualification Act 1986 were fulfilled. As we have found that a company, namely Lexon, of which Mr Sonpal was at the relevant time a director, had committed an infringement of EU and UK competition law, we find these requirements to have been met.

18. Our decision on the appeal and the reasons for it are contained in the full judgment that follows.

B. INTRODUCTION

19. On 4 March 2020, the Competition and Markets Authority ("the CMA") issued a decision in Case 50507.2 Nortriptyline Tablets (Information Exchange) ("the Decision") addressed to four companies, Alissa Healthcare Research Limited ("Alissa"), King Pharmaceuticals Limited and Praze Consultants Limited (together "King"), and Lexon.

20. In the Decision, the CMA found that Lexon infringed the Chapter I prohibition under the Competition Act 1998 ("CA 1998") and Article 101 of the Treaty on the Functioning of the European Union ("TFEU") by exchanging information about prices, volumes, timing of supplies and entry plans with the objective to maintain the prices of Nortriptyline Tablets in the United Kingdom ("UK") or at least slow their decline. The CMA imposed a fine of £1,220,383 on Lexon.

21. On 11 May 2020, Lexon appealed against the Decision under section 46 of the CA 1998 ("the Appeal").

22. On 27 August 2020, the CMA issued proceedings in the High Court seeking a Competition Disqualification Order ("CDO") against Mr Pritesh Sonpal pursuant to section 9A of the Company Directors Disqualification Act 1986 ("CDDA 1986") ("the CDDA Claim").

23. On 15 September 2020, the High Court (Marcus Smith J) made an order, pursuant to Regulation 2 of The Section 16 Enterprise Act 2002 Regulations 2015 (S.I. 2015/1643), transferring the First Condition as defined by section 9A CDDA 1986 ("the First Condition") to the Tribunal so that it could be heard and determined alongside the Appeal ("the Transferred Proceeding").

24. This is the Tribunal's judgment on Lexon's Appeal and the First Condition.

C. FACTUAL BACKGROUND

(1) The Appellant: Lexon

25. Lexon is primarily a wholesaler of pharmaceutical products to retail pharmacies. Lexon's annual turnover at the time of the Decision was £201 million. Approximately £15 million of that turnover was generated from sales by Lexon to other wholesalers or to pharmacy groups which distribute products to their own shops themselves.

26. In 2005, Lexon first engaged in developing its own generic medicines. On 25 February 2008, as part of this commercial strategy to develop its own generic medicines, Lexon entered into a 'Product Development and Profit Sharing Agreement' ("the Joint Venture Agreement") with Medreich Plc and its Indian parent company Medreich Limited (together "Medreich"). Pursuant to that agreement:[1]

    (1) Medreich was responsible for developing Marketing Authorisations ("MAs") and manufacturing a range of pharmaceutical products including Nortriptyline.

    (2) In the event that Lexon and Medreich decided to commercialise any product developed by Medreich, Lexon committed to procure that product exclusively from its Medreich partners.

    (3) Medreich was reimbursed for its costs of manufacture and development of Nortriptyline.

    (4) Lexon was exclusively responsible for negotiating and setting the selling price for onward sales in the UK and elsewhere.

    (5) Profits on sales were to be shared by Lexon and Medreich.

27. In July 2015, and in accordance with the Joint Venture Agreement, Medreich concluded an agreement with the UK subsidiary of the Israeli generics supplier Teva Pharmaceuticals Industries Limited ("Teva") for supply by Medreich of own label

[1] Where material, the Joint Venture Agreement is discussed in more detail below.

Nortriptyline to Teva for resale to retail pharmacies in the UK, particularly through Teva's retail pharmacy scheme known as "TevaOne" (the "Teva Supply Agreement"). The terms of the Teva Supply Agreement were negotiated and agreed with Teva exclusively by Lexon, as provided by the Joint Venture Agreement.[2]

28. Under the Teva Supply Agreement:

(1) Medreich supplied Teva with Nortriptyline at a transfer price negotiated and agreed with Teva by Lexon. Teva was free to set its own resale prices.

(2) Medreich received, in addition to the transfer price, a significant share of Teva's profit on its sales of Nortriptyline in the UK.

(3) Medreich applied to vary the terms of its MA to allow Teva to sell Nortriptyline under its own label in the UK.

(4) Teva provided quarterly reconciliation statements to Lexon and Medreich showing its average sales prices and volumes of Nortriptyline and any profit share due to Medreich.

29. Under the Joint Venture Agreement, Lexon received a significant share of the profits earned by Medreich under the Teva Supply Agreement.

(2) Nortriptyline[3]

30. Nortriptyline is an unbranded generic prescription-only medicine used to treat depression.[4] In the UK, Nortriptyline is mainly sold in tablet form. Until March 2017, when the 50mg presentation was introduced, Nortriptyline tablets were sold in 10mg and 25mg strength packs. The 10mg tablets are the most common strength of

[2] Decision paragraphs 3.31-3.34

[3] Lexon does not challenge the CMA's explanation in the Decision of: (i) the product (Decision, Section 3B, paragraphs 3.11-3.13); (ii) the operation of the market for the supply of Nortriptyline in the UK prior to and during the infringement period (Decision, Section 3C, paragraphs 3.14-3.63); (iii) the product market definition (Decision, Section 4A, paragraphs 4.4-4.7); or the geographic market definition (Decision, Section 4B, paragraphs 4.8-4.10).

[4] It is also used to treat some cases of neuropathic pain and nocturnal enuresis.

Nortriptyline dispensed, accounting for around 67% by volume of all Nortriptyline dispensed between 2012 and 2017.[5]

31. The National Health Service ("NHS") is the main purchaser of Nortriptyline in the UK. In 2015, the NHS spent £38 million on Nortriptyline.

D. THE DECISION

32. The Decision comprises 213 pages. It is divided into seven sections.

(1) Sections 1-4 of the Decision

33. **Section 1** is a ten-page introduction to and executive summary of the Decision. It sets out the addressees of the Decision, gives a brief explanation of Nortriptyline[6], the market conditions at the time, and summarises the infringement found by the CMA.

34. The CMA stated at paragraphs 1.7 and 1.8 of the executive summary:

> "1.7 The exchanges of information concerning prices, volumes, timing of supplies and entry plans occurred via email and text messages, telephone conversations and, on one occasion, a face-to-face meeting between directors of all three companies held at a hotel in London. The Parties exchanged information about prices, volumes, timing of supplies and entry plans with the objective to maintain the prices of Nortriptyline Tablets in the UK or at least slow their decline (the 'Price Maintenance Objective').
>
> 1.8 As set out in this Decision, the Competition and Markets Authority ('CMA') has found that the Parties engaged in a concerted practice (or series of concerted practices) by which they knowingly substituted practical cooperation between them for the risks of competition. Specifically:
>
> (a) King, Lexon and Alissa exchanged competitively sensitive strategic information on pricing, volumes, timing of supplies and entry plans in relation to the supply of Nortriptyline Tablets in the UK (see paragraphs 5.56 to 5.97 and 5.104 to 5.105). The exchange of information reduced strategic uncertainty in the market and was capable of influencing the Parties' conduct on the market;
>
> (b) Each of the Parties took account of the information exchanged with their competitors for the purposes of determining their conduct on the market (see paragraphs 5.98 to 5.103 and 5.106);

[5] Decision paragraph 3.54 and Figure 1.
[6] The Decision refers to the product as "Nortriptyline Tablets" throughout. We prefer to use the name "Nortriptyline" alone, on the basis that it is mainly dispensed in tablet form in the UK.

(the 'Information Exchange')."

35. In respect of the infringement, the executive summary states:

(1) Lexon participated in the infringement during the period from 27 July 2015 to 27 May 2016.[7]

(2) Lexon's conduct had the object of restricting competition in the supply of Nortriptyline Tablets in the UK: Decision, paragraph 1.10:

> "1.10 … the Information Exchange had the object of restricting competition in the supply of Nortriptyline Tablets in the UK, having regard to its:
>
> (a) Legal and economic context (see section 5D). The legal and economic context in which the Information Exchange took place was one in which the product in question (Nortriptyline Tablets) was homogenous in nature, with price as the key driver of competition; immediately before the Information Exchange the market was highly concentrated, competition was muted and prices had increased significantly; and the entry of the Lexon/Medreich JV Product and the potential entry of Alissa increased the intensity of competition and uncertainty in the market. This created opportunities for customers to 'play off' suppliers against one another, putting downward pressure on prices. King, Lexon and Alissa were actual or potential competitors and they each stood to gain if prices remained the same or decreased more slowly; and
>
> (b) Content and objectives (see sections 5E and 5F). Specifically, the Parties shared competitively sensitive strategic information concerning pricing, volumes, timing of supplies and entry plans. The CMA has found that the object of the Information Exchange was to maintain the prices of Nortriptyline Tablets in the UK or at least to slow their decline. The Parties thereby sought to create conditions of competition which did not correspond to the normal conditions of the market."

(3) Lexon's conduct amounted to a single and continuous infringement of the Chapter I prohibition and Article 101 TFEU for which the CMA decided to impose a financial penalty.[8]

[7] Decision, paragraph 1.9(c).
[8] Decision, paragraphs 1.11-1.13.

36. **Section 2** ('The CMA's investigation') describes the key procedural steps taken by the CMA during its investigation. It notes that on 18 September 2019, the CMA settled the case with Alissa and King after they each signed terms of settlement admitting that they had infringed Chapter I CA 1998 and Article 101 TFEU and agreed to accept a maximum penalty.[9]

37. **Section 3** ('the Factual Background') sets out the factual background to the Decision. It gives information about the companies and individuals involved (Section 3A) and the product in question, Nortriptyline Tablets (Section 3B). It explains how the market for the supply of Nortriptyline Tablets in the UK operated prior to and during the infringement period (Section 3C) and sets out key events that took place prior to the infringement (Section 3D).

38. In section 3E ('The conduct under investigation'), the CMA describes communications between participants in the market for the supply of Nortriptyline Tablets in the UK. This section (at Section 3E(I)) sets out discussions between King, Lexon and Alissa from 27 July 2015 to 27 May 2016.[10] There are six subsections of Section 3E(I), five of which are of particular relevance to Lexon's appeal:

    (a) Discussions between King and Lexon between July 2015 and March 2016: Decision, paragraphs 3.80-3.110.

    (b) Discussions between King, Lexon and Alissa in March 2016: Decision, paragraphs 3.110-3.133.

    (c) Meeting between King, Lexon and Alissa at the Landmark Hotel in London on 23 March 2016: Decision, paragraphs 3.134-3.145.

    (e) Discussions between King, Lexon and Alissa in April 2016: Decision, paragraphs 3.158-3.168.

[9] Decision, paragraph 2.40. See also paragraphs 2.9-2.13 for the procedural steps regarding Lexon some of which are discussed where relevant below.
[10] Decision, paragraphs 3.80-3.186.

(f) Discussions between King, Lexon and Alissa in May 2016: Decision, paragraphs 3.169-3.186.

39. The content of these discussions is described in greater detail in Part H of this judgment

40. **Section 4** ('Market Definition') defines the relevant product and geographic markets. The CMA considered that when applying the Chapter I prohibition and Article 101(1) TFEU, it was not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement in question has as its object or effect the appreciable prevention, restriction or distortion of competition. The CMA nonetheless formed a view of the relevant market in this case in order to calculate the relevant turnover for each of the addressees of the Decision, or the purposes of calculating the penalty. The CMA found that the relevant market was no wider than the supply of Nortriptyline Tablets in the UK.

(2) Section 5 of the Decision: The CMA's Legal assessment of the Information Exchange

41. **Section 5** sets out, in considerable detail, the CMA's legal assessment and conclusion that the addressees engaged in a concerted practice, or a series of concerted practices, by exchanging competitively sensitive strategic information on pricing, volumes, timing of supplies and entry plans in relation to the supply of Nortriptyline Tablets in the UK ('the Information Exchange'), with the object of restricting competition in the supply of Nortriptyline Tablets in the UK.

42. After an introduction in Section 5A, Sections 5B and 5C set out the relevant legal provisions (Chapter I CA 1998 and Article 101 TFEU), and the burden and standard of proof applied in the Decision.

43. Section 5D sets out the CMA's findings on the economic and legal context of the infringement. Nortriptyline was an off-patent, unbranded, homogeneous product. Price was the key driver of competition. Immediately before the Information Exchange, the market was highly concentrated, competition was muted and prices had increased significantly. The entry of the 'Lexon/Medreich JV Product' (that is Nortriptyline

manufactured and supplied by Medreich pursuant to the Joint Venture Agreement) and the potential entry of Alissa increased the intensity of competition and uncertainty in the market. The CMA found that this created opportunities for customers to 'play off' suppliers against one another, putting downward pressure on prices. King, Lexon and Alissa were actual or potential competitors and they each stood to gain if prices remained the same or decreased more slowly.

44. In Section 5E, the CMA assessed the Information Exchange as a concerted practice. The CMA found that the addressees participated in a concerted practice (or series of concerted practices), specifically that they shared competitively sensitive strategic information on pricing, volumes, timing of supplies and entry plans.

45. In Section 5F, The CMA considered information exchange as a by object infringement. The CMA found that the concerted practice comprising the Information Exchange had the object of preventing, restricting or distorting competition. The exchanges reduced uncertainty in the market for the purpose of maintaining the prices of Nortriptyline Tablets in the UK or at least to slow their decline (the Price Maintenance Objective). The CMA further concluded that the addressees sought to create conditions of competition which did not correspond to the normal conditions of the market.

(3) Section 6 of the Decision: Attribution of liability

46. In **section 6**, the CMA found that Lexon was directly involved in the infringement from 27 July 2015 to 27 May 2016 for the reasons set out in Section 3E of the Decision. The CMA attributed liability to Lexon for the infringement and the financial penalty which the CMA decided to impose.[11]

(4) Section 7 of the Decision: The CMA's action

47. In **section 7**, the CMA concluded that Lexon and the other addressees participated in a concerted practice (or series of concerted practices) which had as its object the prevention, restriction or distortion of competition in the UK and thereby infringed the

[11] Decision, paragraph 6.14.

Chapter I prohibition and Article 101(1) TFEU. A total penalty of £1,220,383 was imposed on Lexon for its involvement in the infringement.

48. Key passages from these sections are examined in more detail later in this judgment.

E. THE APPEAL AND THE TRANSFERRED PROCEEDING

(1) Overview

49. In its Notice of Appeal ("NoA") filed at the Tribunal on 11 May 2020, Lexon challenged the Decision on three grounds:

(1) The CMA had failed to prove that Lexon exchanged information with the objective of maintaining prices. The content of the information exchanged did not support such an objective, particularly when assessed in its economic context.

(2) The CMA erred in finding that Lexon was party to a single and continuous agreement from 27 July 2015 to 27 January 2017.

(3) The CMA erred in its calculation of the penalty by:

(i) wrongly including Lexon's share of profit from Medreich derived from the Teva Supply Agreement in its calculation of Lexon's relevant turnover;

(ii) applying a starting point of 20% of this combined turnover as regards seriousness at Step 1 of its penalty calculation; and

(iii) applying a disproportionate uplift of 75% at Step 4 of its penalty calculation.

50. The focus of this judgment is primarily on Grounds 1 and 3. Ground 2 was not pursued at the Hearing, as explained in Part J below.

(2) The Transferred First Condition of the CDDA Claim

51. The First Condition also falls to be determined by the Tribunal (see paragraphs 22 and 23 above). This is addressed in Part M below.

(3) Evidence

(a) Witness of fact: Mr Pritesh Sonpal

52. Mr Sonpal is a co-founder and a director of Lexon. He gave evidence on behalf of Lexon. He is the subject of the application for disqualification as a director referred to above. In addition to his evidence to the CMA, to which we also refer, Mr Sonpal provided two written witness statements in these proceedings. He also gave oral evidence and was cross-examined by remote video link from the offices of Maitland Walker LLP in Minehead.

53. We found Mr Sonpal to be an honest and credible witness who appeared willing to respond openly and candidly under cross-examination, even when the response was not always in his favour, although sometimes showing a tendency to want to state his overall case in response to each question.

(b) Expert economic evidence: Mr James Harvey

54. Mr Harvey is a Director and co-founder of Economic Insight Limited, an economics consultancy. Mr Harvey gave evidence as an expert on behalf of the Applicant. He provided two written reports and gave oral evidence in cross-examination by remote video link from his firm's office in Old Broad Street, London.

55. Mr Harvey's reports as originally filed did not contain the necessary acknowledgment that he understood and accepted his obligations to the Tribunal as an expert. One of his written reports was not accompanied by a signature. These matters had to be remedied at the Hearing. The Tribunal attaches great importance to the need for expert evidence to offer objective opinion and not merely to represent the point of view of the party on whose behalf it is presented.

56. We had no reason to doubt Mr Harvey's competence or expertise but, for reasons explained in Parts H and I below, we did not accept the main conclusions he drew from the evidence he presented to us in this case.

F. THE LEGAL FRAMEWORK[12]

57. Article 101 TFEU provides:

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
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> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
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> (b) limit or control production, markets, technical development, or investment;
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> (c) share markets or sources of supply;
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> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
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> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

58. Article 101(2) provides that prohibited agreements are void. Pursuant to Article 101(3), the prohibition in Article 101(1) can be declared inapplicable to agreements which fulfil certain criteria, in particular that they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.

59. The Chapter I prohibition under the CA 1998 is materially the same as the prohibition under Article 101 TFEU and we therefore do not refer to it separately below unless the context requires.[13]

60. Section 60 CA 1998 requires that the CMA and the Tribunal on this appeal ensure so far as possible that questions arising under the Chapter I prohibition in relation to

[12] The legal framework set out in this judgment is the law as it was in force prior to 11pm on 31 December 2020.
[13] The Chapter I prohibition requires an effect on trade within the UK, whereas Article 101 requires an effect on trade between EU member states. The conditions for individual exemption under section 9 CA 1998 mirror those in Article 101(3).

competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising under EU law. This includes consistency with the case law of the Court of Justice and General Court: see *Balmoral v CMA* [2017] CAT 23 ("***Balmoral CAT***") paragraph 35.

61. Notwithstanding the departure of the United Kingdom from the European Union on 31 January 2020 and the expiry of the transition period on 31 December 2020 it is not disputed that this case falls to be determined in accordance with EU law in force prior to 31 December 2020, and that section 60 CA 1998, as then in force, applies.

62. The present appeal is an "appeal on the merits" under section 46 CA 1998 against a CMA infringement decision in which a financial penalty was imposed. The nature of the Tribunal's role in a section 46 appeal was explained in some detail by the Court of Appeal in the recent case of *Flynn Pharma Limited and Pfizer Inc. v CMA* [2020] EWCA Civ 339: see in particular paragraphs 135-147 per Green LJ. For present purposes, we note the following:[14]

(1) 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 of the CMA.

(2) It is empowered by 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.

(3) The conferring 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 European Convention on Human Rights.

(4) However, the Tribunal's jurisdiction is not unfettered.

[14] See also, sections 2 and 3 of Schedule 8 to the CA 1998. These sections are also reflected in Competition Appeal Tribunal Rules 2015.

(5) An appeal under section 46 CA 1998 is "*against, or with respect to*," the decision and includes "*whether*" there has been an infringement. It is not a *de novo* hearing but one that takes the decision under appeal as its starting, middle and end point.

(6) An appellant must identify the decision under appeal and set out why it is in error. The grounds of appeal must set out the "*extent*" to which the decision "*is based on an error of fact or was wrong in law*".

(7) The Tribunal is required to consider the appeal by reference to the grounds of appeal.

(8) The Tribunal can hear evidence, including fresh evidence not before the CMA, and make findings of both fact and law. The Tribunal is empowered to ensure that the right to adduce new evidence is not abused.

(9) 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.

(10) 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.

(11) If the Tribunal considers that the findings of the CMA are reasonable it might be difficult to say that any findings at which it arrives, which differ from those of the CMA, are material.

(12) The Tribunal has a full merits jurisdiction. It has the power to receive, hear and assess fresh evidence. Circumstances could therefore arise where the Tribunal found that, on the evidence before the CMA, the CMA arrived at a reasonable conclusion, but that on the basis of the new evidence before the Tribunal, the CMA's conclusions were wrong.

(13) If the Tribunal annulled a decision on 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.

63. We have had these considerations very much in our minds in approaching the assessment in this case. We begin with our own assessment of the economic context in which the CMA found the infringement in question and then proceed to examine the facts of the case. Our findings as to the economic context in Part G below, and our assessment of the facts in the following Part H, inform and underpin our legal assessment in the later parts of this judgment.

G. THE ECONOMIC CONTEXT

(1) The significance of the economic context in this case

64. It is common ground in this appeal that the assessment of whether an infringement of the competition rules has occurred requires consideration of the economic context, although the parties take different positions on what this consideration should comprise, and what its significance should be. We therefore examine some specific aspects of the conditions of the UK market for Nortriptyline that are important for our assessment.

(2) The UK Nortriptyline market prior to 2015

65. The Decision (paragraphs 3.58 to 3.62) describes the increases in manufacturer selling prices and NHS Reimbursement prices for Nortriptyline after King's decision to de-brand the product in October 2010. In the period from January 2011 to May 2014, average prices charged by King and the only other supplier Auden McKenzie for 10mg tablets increased from just over £10 to almost £50, and for 25mg tablets the increase was from £20 to over £60. No explanation in terms of rising costs was given to us for these substantial increases in price.

66. In the subsequent period (2014-2015) prior to the start of the infringement found by the CMA in this case, King and Auden McKenzie engaged in market-sharing conduct that breached the Article 101 and Chapter I prohibition, and the CMA so found in a decision

issued at the same time as the Decision in the present case.[15] During this period, prices rose still higher, reaching average selling prices of £60 and £90 for 10mg and 25mg tablets respectively.[16]

67. There is little doubt that prices in the market during this period were substantially in excess of the costs of supply. For example, Mr Sonpal noted in his First Witness Statement ("Sonpal 1") that the cost-related transfer prices contained in the Joint Venture Agreement were 85p for 10mg tablets and £1.26 for 25mg tablets, and at the Hearing Mr Sonpal said that current (2020) prices for the 10mg tablet stood at around £1.[17]

68. Whatever was the reason for the price increases that took place between 2011 and 2014, it is evident that neither competition between King and Auden McKenzie, nor other competitive influences such as buyer power and/or the threat from parallel imports or potential entry, prevented these increases from taking place and being sustained in the market. Price levels increased still further during the period of the market-sharing infringement between King and Auden McKenzie in 2014-15. As paragraph 3.62 of the Decision notes, the price increases in the Nortriptyline market contributed to a substantial increase in the total NHS expenditure on the product, from £6.3m in 2011 to £38m in 2015.[18]

69. The fact that prices in the market had reached such elevated levels without, so far as we are aware, anyone claiming that there was any corresponding increase in costs is an important part of the context of the current case as it shows that there was a very large potential for prices to fall if effective competition was restored to the market.

[15] Decision of the CMA dated 4 March 2020 in Case 50507.2 Nortriptyline Tablets (Market Sharing). This decision has not been appealed.
[16] These prices exclude the prices charged by King and Auden McKenzie for (respectively) the 10mg and 25mg tablets in sales to Lexon and which formed a part of the market-sharing infringement.
[17] Hearing, Day 3, p. 34, line 17 – p.35, line 12.
[18] NHS Reimbursement prices are higher than manufacturer selling prices, and there was also a volume increase in demand for Nortriptyline over this period, but these factors do not detract from the finding that substantially increased prices were paid by the NHS.

(3) Market changes in 2015-16

70. After the market-sharing infringement between King and Auden McKenzie had ceased, and Lexon, in conjunction with Medreich, had obtained an MA for the product, it was reasonable to expect a downward correction in market price levels. The Decision (paragraph 5.29) and evidence from a number of market participants (including Lexon[19]) confirms this.

71. A further change in the market during this period arose from the sale of Auden McKenzie's UK business to Actavis in May 2016. The Decision (paragraph 5.30) notes King's view that Actavis was likely to compete more aggressively than had Auden McKenzie.

(4) The arrangements with Teva

72. The Joint Venture Agreement, concluded in February 2008 (see paragraph 26 above), was the contractual basis for the manufacture of Nortriptyline by Medreich in India and supply to Medreich and Lexon for sale in the UK. It also provided the basis for the supply of Nortriptyline by Medreich to Teva for sale in the UK under its own livery (see paragraphs 27 and 28 above). These arrangements are an important part of the economic context for the assessment of the conduct in this case.

73. Lexon was contractually committed to purchase its supplies of Nortriptyline from Medreich once Medreich had obtained the necessary MA. These new arrangements took effect in July 2015, although Lexon did on occasions (for example in August 2015) purchase wholesale supplies of Nortriptyline from King.

74. In his written evidence, Mr Sonpal characterised the appearance of Medreich in July 2015 as a new UK MA holder for Nortriptyline, as increasing the number of independent suppliers from two to five. This refers to the fact that Medreich undertook to supply its product both to Lexon and to Teva but was also free to supply on its own account (via an undertaking called Medpro).

[19] Sonpal 1, paragraph 11.

75. The detailed position was more complicated. Supplies from Medreich to Lexon took place at agreed transfer prices of 85p and £1.26 for 10mg and 25mg tablets,[20] whereas supplies from Medreich to Teva, as negotiated between Lexon and Teva, used transfer prices of £16.20 and £27.00 respectively for 10mg and 25mg tablets.[21] The fact that Teva's Nortriptyline business during the infringement period operated on the basis of input costs that were some twenty times higher than those that applied to Medpro and Lexon could reasonably be expected to have had an impact on Teva's business conduct.

76. Mr Sonpal stated that he had no knowledge of Teva's purchase volumes and that he had "*no influence on Teva at all*".[22] However, as noted above, Mr Sonpal had negotiated the transfer prices between Medreich and Teva and, prior to the signing of the Teva Supply Agreement, Mr Sonpal had also seen Teva's projected UK volumes for Nortriptyline. For example, on 23 March 2015 an email from Petra Page of Teva to Mr Sonpal set out Teva's forecast Nortriptyline volumes over three years.[23] Mr Sonpal forwarded this email to Medreich on the same day, stating "*Those volumes are around 20% of the market which is line with their scheme*".[24]

77. One year later, on 9 March 2016, an email from Mr Dey at Medreich to Mr Sonpal stated that the volume supplied to Teva "*is only for the Base scheme*", and that "*they did try to ask for more but we had refused*". He then stated, "*I keep Teva hand to mouth*" and indicated that this restriction on Teva volumes was intended to discourage Teva from selling "*on the open market*" to customers outside those in the TevaOne scheme. This same email chain also included a 17 July 2015 email from Teva to Medreich that set out Teva's monthly volumes under different scenarios. Taken together, these pieces of evidence indicate that Lexon and Medreich together had an understanding that Teva's volumes would be limited to a level that corresponded to Teva's customary Nortriptyline requirements under its TevaOne discount scheme, and the email from Mr Dey suggests that attempts by Teva to increase sales above these levels had been resisted by Medreich.

[20] Sonpal 1, paragraph 24.
[21] See Schedule 2 to the Teva Supply Agreement.
[22] Sonpal 1, paragraph 57.
[23] Page 91 of document SKM_C25820051112130.
[24] Page 90-91. For the TevaOne scheme see paragraphs 27 and 28 above.

78. Hence, there are indications that, under the arrangements between Lexon, Medreich and Teva, there were price and volume constraints on Teva's freedom to compete in the Nortriptyline market. These arrangements had a potentially significant impact both on Lexon's incentives in the market and on Teva's activities in the market, as well as explaining why information passed from Teva to Lexon.

79. As regards incentives, Mr Harvey, on Lexon's behalf, accepted that some 35 to 40% of the total profit from any Teva Nortriptyline sale would flow through to Lexon under the arrangements[25] and Mr Sonpal accepted that Lexon's profit share from Teva was a more important part of its total commercial returns on Nortriptyline than Lexon's own-account sales.[26] It follows that, as a result of the arrangements between Lexon, Medreich and Teva, Lexon had a commercial interest in the size and profit margins of Teva's Nortriptyline sales, and hence the price, and this is another material factor in assessing the economic context.

80. The administration of the Teva profit share under the Teva Supply Agreement also involved Teva submitting to Lexon and Medreich quarterly reports on its Nortriptyline sales volumes and average prices. Whilst these were historic sales, they nonetheless provided an element of transparency between Lexon and Teva that would not normally be present in a relationship between independently competing firms.

(5) Lexon's awareness of competitive conditions

81. It is evident that Lexon was aware of the links between market prices and volumes in a commodity market such as Nortriptyline, and of the ways in which individual suppliers' conduct – in relation both to pricing and output levels – could affect overall market prices. Lexon was also aware that retail and wholesale prices moved in step with each other. It is equally evident that the arrangements between Lexon, Medreich and Teva were central to Lexon's interests in how competition worked in the Nortriptyline market.

[25] Hearing, Day 3, p.110, line 11.
[26] Hearing, Day 3, p.33, line 23.

82. Lexon's awareness of the existence of high profits, and the commercial benefits of not acting in a way that would destabilise the prices that generated them, is reflected in the internal email from Zoe Nicholls of Lexon sent on 28 August 2015, which stated:

> ".. he [Mr Sonpal] would like to push on nortriptyline 10mg and 25mg but in a discrete manner. We have a very low-cost price on these items and we make a massive profit. However, he doesn't want us to go out aggressively with it and to bring down the market price."[27]

83. The high profitability of the Nortriptyline market during the infringement period, Lexon's appreciation of how the market behaviour of each supplier could affect the position of the others, and its understandable commercial desire to avoid conduct that would cause prices to fall rapidly, do not in themselves constitute an infringement of competition law. They do, however, provide an important part of the context within which we assess the overall significance of the information exchanges.

(6) Summary of our conclusions on the economic context

84. In summary, we find that the economic context was one of falling market prices, after a period of sustained price increases, providing a strong incentive to delay so far as possible the downward pressure on prices that came from the new market entry and competition brought about by Lexon, Medreich and Teva, as well as by Actavis and, later, Alissa. That three of these new entrants were enabled in part by Lexon's own actions does not alter these incentives. Nortriptyline was a commodity product, very sensitive to price differences, and there was evidence that customers switched between suppliers on the basis of cheaper prices and that retail prices followed movements in wholesale prices. Lexon had a degree of influence over Teva's market behaviour and a commercial interest in Teva's sales through its share of the joint venture profits.

(7) **The CMA's Price Maintenance Objective**

85. It is helpful at this stage to set out our understanding of the significance of the so called the Price Maintenance Objective (or "PMO"), which the CMA used as the focus of its infringement finding (see Part D above). Lexon claims, as we examine later, that the CMA failed to substantiate its findings with regard to the PMO.

[27] Hearing, Day 2, p.21, lines 6-7.

86. The CMA found in the Decision that the anticompetitive object of the parties' conduct had the objective of keeping prices high or, more relevantly for present purposes, slowing the reductions in prices that were occurring and were likely to continue as a result of increased competition. It described this as the PMO. The facts that price levels in the market from the start of the infringement period described in the Decision were likely to be moving down, and that the starting prices (and, as it appears, margins) were exceptionally high, both affect the way in which evidence of pricing behaviour during the period in question may be interpreted.

87. Whilst the CMA's PMO refers specifically to "price", a proper consideration of price, in the economic context, requires consideration of the inter-relationship between market prices and market volumes in a commodity market. In the present case, in evaluating the information exchanges and the conduct and commercial motivations of the parties, it is necessary to consider information on both pricing decisions and volumes. It is not the case that an objective of slowing the decline in market prices needs to be pursued exclusively through the exchange of information about prices. Indeed, there is ample evidence that events such as volume shortages or increased volume supplies into the Nortriptyline market were likely to impact pricing levels in the market.

H. THE INFORMATION EXCHANGES DESCRIBED IN THE DECISION

88. We now set out our detailed understanding of the information exchanges described in the Decision.

(1) The "Chats"

89. Paragraphs 3.77 to 3.206 of the Decision ("the Conduct Under Investigation") describe the communications between Lexon, King and Alissa constituting the unlawful exchanges of information between the parties at issue in this appeal. In the proceedings before the Tribunal, the communications that involved Lexon were categorised into seventeen chats that took place over a period from 27 July 2015 to 27 May 2016 (the "Chats"). The delineation between the Chats is not always clear cut. We address them in the order in which they were presented to us but group some of the chats together

where the concerns to which they relate are inter-linked. In each case, we first set out the content of the communications as they appear in the Decision, and then note and assess further arguments and evidence presented by Lexon and the CMA in connection with them. We then give our overall assessment of these communications.

(a) Chats 1-3 and 5 (27 July – 2 November 2015)

90. In these four Chats, King asked Lexon about the threat posed by Teva, and Lexon responded by providing information about Teva's stock availability.

(1) Chat 1: On 27 July 2015, Dr Hallwood of King emailed Mr Sonpal asking Lexon for the prices at which it supplied Teva. Mr Sonpal replied within ten minutes, saying "*As I said before I was doing an own label for them and only a limited volume to cover their scheme*."

(2) Chat 2: In July/August 2015, Dr Hallwood reported that Teva will supply Bestway/Coop. Mr Sonpal assured him that Teva had only "*1 batch*" of Nortriptyline, again implying that Lexon was Teva's source. Mr Sonpal also offered to buy some of King's product "*even at higher cost*" if King's loss of this customer created a surplus.

(3) Chat 3: On 24 September 2015, Mr Sonpal assured Dr Hallwood that he would not be supplying Nortriptyline to Teva for the next three weeks. Then (in response to a request from Dr Hallwood) Mr Sonpal strengthened this by saying that he would ensure that Teva received no more supply before "*late October*" (a period of four to five weeks). Dr Hallwood then contacted a senior employee at Auden McKenzie in order to let Auden McKenzie know that Teva would be out of stock in this period.[28]

(4) Chat 5: On 2 November 2015, Dr Hallwood emailed Mr Sonpal to ask whether Teva was back in stock, and Mr Sonpal emailed back to confirm that it was.

[28] Decision, paragraph 3.95.

91. The CMA's view was that this exchange revealed confidential, strategically important, information to King about Teva's ability to compete with King. It noted that King used this information about Teva's stock shortage to harden King's bargaining position in ongoing negotiations with Bestway/Coop, encouraging King to revert to the prices King had previously charged to this customer. King also sought to take advantage of Teva's inability to supply in the short term by requesting a six-month commitment from the customer.

92. Lexon, however, argued that:

(1) Lexon did not provide the information requested in Dr Hallwood's email that instigated Chat 1 but instead gave vague information that was "*meaningless*" to King.

(2) The information supplied was false, since Lexon had no contractual control over Teva's supply from Medreich. Moreover, the fact that Teva's volumes were limited to the TevaOne scheme did not disclose any meaningful information on Teva's volume limits from Medreich and did not prevent Teva from supplying to customers outside that scheme.

(3) Information on Teva's stock position was publicly available to industry participants through Teva's published stock lists, which were regularly updated and circulated to pharmacies.

(4) Mr Sonpal described his commitment not to supply Nortriptyline to Teva until late October as a "*flippant remark*" and said that he could not deliver on any such promise.[29]

(5) The CMA's concerns made no commercial sense because Lexon benefited from Teva making sales of Nortriptyline and had no interest in restricting supply to Teva or in helping King to make such sales at Teva's expense.

[29] See Sonpal 1, paragraph 72.

(6) King would have no certainty of winning this contract even if Teva was unable to compete for it, as other competitors such as Actavis remained present in the market; and there was no assurance of any lasting impact on price even if in this instance King did win the contract in question.

(7) King's actual negotiating stance with Bestway/Coop related to a period that extended beyond the end of the October 2015 date at which it was alleged that Teva would be out of stock.

Our assessment of Chats 1-3 and 5

93. In our view, these Chats regarding Teva's stock position did include strategically sensitive information, as found by the CMA. Teva and King were direct competitors in the Nortriptyline market, and the knowledge or belief on King's part that Teva was unable to win sales from King for a defined period of time was plainly capable of affecting King's pricing conduct in the market in a manner consistent with the CMA's findings. The information exchanged related to volumes rather than prices but would still affect prices (and commercial behaviour).

94. As regards the objections raised by Lexon:

(1) The argument that Lexon did not have contractual control over Teva volumes does not go to the point. In his communications with King Mr Sonpal clearly intended to convey the impression that Teva's supply could be controlled by Lexon, and King appeared to find that credible. The fact that this might have been a false impression does not eliminate the concern that the information exchanged could have had an anticompetitive object. The extent to which Lexon was actually able to exert some influence over the volumes supplied to Teva remains unclear, but that is a secondary consideration in this context. The effect of the communication was to incentivise King to act in a way that reduced price pressure in the market, benefiting each of King, Lexon and Teva.

(2) We accept that some aspects of the information provided by Lexon to King were not precise. For example, it is not clear how much Nortriptyline was included

in "*1 batch*", and what was meant by "*a limited volume to cover their* [Teva's] *scheme*" as Teva might expand its scheme. However, the most plausible interpretation of these communications was that Lexon wanted to reassure King that the threat from Teva was limited. The fact that they did not provide specific details does not mean that they carried no weight in affecting King's likely conduct.

(3) Lexon's argument that it had no interest in denying Teva sales volumes also misses the point. Mr Sonpal readily accepted that, through both its own Nortriptyline sales and its profit share on Teva's sales, Lexon had a commercial incentive not to allow market prices to fall too fast, and that there was a link between the quantity of Nortriptyline released onto the market and the market price. In any case, the act of telling King that Teva was out of stock did not in itself have any impact on Teva's ability to make such sales.

(4) The information provided by Lexon in these Chats was not in the public domain, let alone in King's possession. In particular, the (even if false) assurance that Lexon controlled supplies to Teva, and Mr Sonpal's explicit commitment to extend the period over which Teva would be out of stock until late November, could not have been derived from Teva's published stock lists.

(5) Whilst it is true that King would have to compete with suppliers other than Teva even if Teva were out of stock, eliminating Teva from King's concerns (even if for only a few weeks) could well have affected the competitive dynamic and hardened King's negotiating strategy in dealing with Bestway/Coop. Indeed, the evidence from King's actual bargaining stance appears to show that this was the case. Moreover, Teva was a major player in the market.

(6) Finally, the fact that King's reported negotiations with Bestway/Co-op sought to commit the customer for a longer period than that in which Lexon had said that Teva would be out of stock is fully consistent with the CMA's concerns. King would naturally use Teva's short term inability to supply to secure a commercial and supply advantage over a longer period, when Teva might again be back in stock.

(b) Chat 4 (21 October 2015)

95. On 21 October 2015, Dr Hallwood emailed Mr Sonpal saying that King had not made any sales through Alliance Unichem for the last ten days, and that he feared that Actavis had done a deal to supply this customer. He asked if Mr Sonpal had a contact at Actavis. Mr Sonpal responded by suggesting a contact name at Actavis, and (later) by saying he would get the contact's number from the relevant Lexon account manager.

96. There is no evidence on how if at all this was followed up, and Lexon denied that this exchange contained any transfer of competitively sensitive information.

Our assessment of Chat 4

97. We would have attached no great significance to this Chat in isolation but, in context, see it as part of, consistent with, and even corroborating, a continuing correspondence and relationship in which Lexon and King shared commercial information with each other.

(c) Chat 6 (10 December 2015)

98. Dr Hallwood asked Lexon to help his understanding of market volumes/shares. Mr Sonpal replied with data on the volumes of Lexon and Teva sales of 25mg tablets (482 and 1,637 respectively) and promised to make enquiries. Dr Hallwood responded by saying that the main problem must therefore be parallel imports.

99. The CMA's case was that this sharing of market intelligence provided useful information for King to take into account when assessing competitive threats, and this interpretation was confirmed by Mr Sonpal's statement that he was "*trying to reassure*" King.[30]

100. Lexon denied that this exchange contained any strategically important information and claimed that linking information about parallel imports to the CMA's concerns was speculative. Lexon also noted that the information Mr Sonpal provided on Lexon and

[30] Transcript of CMA 14 March 2018 interview with Mr Sonpal, p. 162, lines 18-20.

Teva 25mg tablet sales was incorrect and that, as Mr Sonpal stated, the numbers provided at the time were much lower than the actual numbers: (994 and 1,841).[31]

Our assessment of Chat 6

101. Lexon's provision of information that was intended to reassure King about the relative significance of threats from parallel imports and from rival UK suppliers is clearly capable of reducing strategic uncertainty in the market. Lexon's attempt to reassure King that increased volumes came from parallel trade rather than from competing UK suppliers supports the existence of communications that were likely to permit King to harden its pricing or competitive positioning in the market to Lexon's direct benefit.

102. We do not consider that the fact that the evidence provided by Mr Sonpal was inaccurate makes any difference to these concerns. Reporting lower volume numbers for 25mg tablet sales by Lexon and Teva than the actual figures would tend to reassure King that Lexon and Teva were not responsible for the increased availability of product in the market.

(d) Chat 7 (21 December 2015)

103. On 21 December, Dr Hallwood asked Mr Sonpal for his help to understand parallel import volumes and price. Mr Sonpal responded with market intelligence on the credibility of parallel import offers. In response, Dr Hallwood commented, "*So much for Actavis sorting this issue out*."

104. The CMA maintained that, since parallel imports were an obvious potential destabilising external force on the Nortriptyline market, such an exchange of information on parallel import volumes and availability could help the UK suppliers to reduce uncertainty and obtain a better understanding of each other's volumes and pricing conduct.

[31] Sonpal 1, paragraph 78.

105. Lexon argued that King could have obtained this from other sources, since information provided to King by Lexon on this parallel import offer was widely available in an industry "flyer" that had been sent to many market participants.

Our assessment of Chat 7

106. Whilst this information could possibly have been obtained from other public sources, there is still value to competitors in checking their individual market intelligence.

107. King would gain some reassurance from knowing that parallel imports (rather than the activities of Teva and/or Lexon) were the source of the current market disruption, and/or that Lexon so believed. Such reassurance would reduce the likelihood of King making an aggressive response against Teva or Lexon. This serves to corroborate the broader evidence on the existence of a relationship between Lexon and King under which competitive uncertainty was reduced.

(e) Chats 8 and 9 (9-11 March 2016)

108. On 9 March 2016, Dr Hallwood contacted both Lexon and Alissa citing market reports of specific price offers and information on competition between Medreich and Teva (which had been received by him from Craig Bowen - a consultant to King). Dr Hallwood observed that "*(t)he market looks completely destabilised*".

109. Mr Rob Davies of Alissa responded the same day, commenting that the claimed prices "*seem ridiculously low*", and adding:

> "To assist in any conversation today I will tell you now that I am looking to take a modest 20% share. That's all I have geared up for and hope things don't become a free for all."

110. Mr Sonpal appears to have responded to Dr Hallwood's email by contacting Mr Debangshu Dey at Medreich. On 9 March, Mr Dey confirmed to Mr Sonpal that Medreich's supplies to Teva were constrained to a volume level that was equivalent to the historic purchases of customers in the TevaOne scheme plus three other customers (Well, Manor and Lincoln). Mr Dey added that, because of this volume limitation, Teva would not have capacity to sell to Alliance, explaining that:

> "Because we hold back on giving Teva stock, they have been chasing us for stocks when they go low, so not sure if they are selling in Open market."

He added the assurance that "*I keep Teva hand to mouth*".

111. On 11 March, Mr Sonpal then sent an email to Dr Hallwood and Mr Davies to deny (based on a conversation that had taken place between Mr Sonpal and Colum McGee at Teva) that Teva had been in discussion with Well (i.e. Bestway/Coop), and to assure Dr Hallwood that:

> "I have a minimum transfer price to Teva which also means they would be selling at a loss. This is backed up by an average selling price report I receive monthly"

He also said:

> "I can't stop you from matching fictitious prices but I think it is a crazy" (sic).

112. The CMA said that the above exchanges showed an exchange of strategically sensitive information that could contribute to the infringement it had found. The information on Teva's volumes reduced the uncertainty facing King when deciding how to respond to this customer's requests for a price reduction, and the information on Teva's input costs could reassure King that it did not need to cut its prices to meet the buyer's claims of low price offers from Teva.

113. In response, Lexon argued that:

(1) The information concerned related to Teva's, and not to Lexon's, business.

(2) The assertion that the Teva transfer prices were above the cited Teva selling prices was untrue (and that in any event it would be open to Teva to sell at a cash loss if it chose to do so, for example if it risked holding out of date stock).[32]

(3) The information on Teva's volumes did not preclude Teva from increasing supply, since the actual volumes potentially within the TevaOne scheme were open-ended and depended on how much Nortriptyline pharmacies who bought from this scheme happened to order.

[32] See Mr Harvey's oral evidence: Hearing, Day 3, p.65, lines 21-25.

(4) Mr Sonpal's advice on "fictitious prices" was merely an opinion, and not concrete information at all.

(5) Asking King not to believe the "fictitious" advice had no connection with any anti-competitive object.[33]

(6) Mr Sonpal's assurance was seeking to confirm that the low prices cited by Mr Bowen came from Actavis not Teva. King would still need to respond to low Actavis prices, just as it would to Teva prices.

(7) The information from Alissa was irrelevant because Alissa was not even active in the Nortriptyline market at this time.

(8) Dr Hallwood's statement that he had no option but to match prices confirmed that King had no market power and was obliged to price competitively by the fear of losing sales not only to Teva but also to Actavis.[34]

Our assessment of Chats 8 and 9

114. The CMA's concerns about the exchange of strategic information are justified. These Chats arose from King's concern that the "*market looks completely destabilised*". There was a clear motive for Lexon to seek to reassure King to reduce King's uncertainty and to discourage King from competing with what it termed "fictitious prices". Information provided to King from credible sources about the ability of Teva to compete aggressively for King's customers and the likely future conduct of Alissa were both capable of reducing uncertainty and affecting King's stance in negotiations with customers.

115. As regards the objections raised by Lexon:

(1) The fact that information provided to King by Lexon related to Teva's, and not to Lexon's, business, does not mean that it was not of strategic value to King.

[33] Hearing, Day 4, pp. 65-8.
[34] Hearing, Day 4, p. 59 and PH email of 08:45 on 11 March 2016.

Indeed, given the volume of supply from Teva, it was arguably of more value than information about Lexon's sales. Teva and King were plainly close competitors for wholesaler customers. Moreover, Lexon, through its indirect share in Teva's profits, had a strong interest in both King and Teva keeping prices higher than they would otherwise have been.

(2) The fact that the actual Teva transfer prices were below the cited Teva selling prices does not mean that King would not believe the (false) information provided by Lexon. The argument that Teva might in a specific case choose to sell at or below its input prices cannot be altogether discounted, but input costs would in general affect Teva's output prices, and neither Lexon nor Mr Harvey (in his oral evidence) offered any reason to expect that Teva would choose to make a cash loss on its Nortriptyline sales (or that it faced any actual risk of holding out-of-date stock for a product that Medreich had only recently started to produce). In his oral evidence, Mr Sonpal referred to the transfer price to Teva as a "floor price" for Teva's Nortriptyline pricing.[35]

(3) Whilst the information provided by Medreich on Teva's volume limits is not completely concrete, there is a clear implication from the factual material that Medreich sought to constrain Teva's volumes in a way that reduced its ability to sell to customers beyond those to whom it had traditionally sold.

(4) It would be reasonable for King to take seriously Mr Sonpal's advice that the reported Teva prices were "fictitious". Even if it was subjective, this information was highly credible given King's reasonable belief that Lexon had direct knowledge of Teva's purchase prices.

(5) We do not find it credible for Lexon to claim that, by telling King that the Teva price information was "fictitious", it was simply telling King that the low price came from Actavis not Teva. Mr Bowen's initial information was that the low prices were from Teva (possibly also from Medreich) and whilst saying that Actavis could match King's prices, there was no specific threat from Actavis referred to. Whilst the threat from Actavis could not be discounted, Lexon's

[35] Hearing, Day 2, p. 30.

information would, in our view, have provided useful reassurance to King about Teva's pricing.

(6) As to Dr Hallwood's statement that he had to match prices and Lexon's argument that this showed that King had to price competitively, it does not seem to us likely that a major customer would necessarily switch its entire business from one supplier to another, as Lexon claims, and that whilst the potential loss of a major customer such as Alliance would no doubt be a significant concern to King, the information provided by Lexon would still help King to assess the likelihood of that threat occurring.

(7) The information from Alissa indicated its willingness to limit the disruption caused by its (at this time imminent) entry into the Nortriptyline market. This contributed to reducing strategic uncertainty in the market even if Alissa was a potential rather than actual player at this time, as beliefs about future competition can easily affect conduct in the present.

(f) Chats 10-12 (23 March 2016)

116. These Chats related to the meeting which took place between Dr Hallwood, Mr Sonpal and Mr Davies at the Landmark Hotel on 23 March, at which the CMA claims that the participants discussed falling prices.[36] There are no written or recorded minutes of the conversation, but the CMA obtained interview evidence from those present (Decision paragraph 5.75.)

117. Dr Hallwood told the CMA that his intention was to discuss *"market dynamics and what's gonna happen in the future"* and that "*we talked in general terms about volumes".* He said that Mr Davies thought the price per pack would be down to £5 by *"the end of 2017".*

118. Mr Davies told the CMA he had been "*pumped"* by Dr Hallwood for information as to when Alissa would be entering the market, but that he had declined to tell him. He also said:

[36] Decision, paragraph 3.140.

> "I believe Pritesh (Sonpal)'s commercial activity will show that he's gone out into the market place and he's done his own thing and likewise, we did as well"[37]

119. Mr Sonpal told the CMA that Dr Hallwood thought Lexon was reducing prices but that he had confirmed Lexon's market strategy had not changed; it was "*business as usual from me in so much that my strategy hasn't changed at all…*"; he also said that Dr Hallwood "*wanted to speak to Rob (Davies) about Nortriptyline and what his aspirations were";* and that Mr Davies had sought to reassure King and Lexon that he was not intending to destabilise prices:

> "What [he] is gonna try to do is to say '…I've spent a lot of money on developing this product. You know I'm not out to-to ruin the market price', you know and again that would have been the nature of the conversation".

120. Mr Sonpal confirmed what he had told the CMA in his written and oral evidence to the Tribunal. Cross-examined by Mr Holmes for the CMA, Mr Sonpal agreed that the general fall in market prices was discussed [38] and that he had told the others that "*it was business as usual*" from him, by which he meant "*Lexon's pricing and customer strategy had not changed".*[39]

121. That prices in general were discussed appears to be confirmed by the fact that, after the meeting, Mr Sonpal sent Wavedata price information to Dr Hallwood. The sending of this information (which was publicly available to Wavedata subscribers) was intended to confirm that actual market price levels were above the levels that had been cited by King in the discussions prior to the meeting and presumably, given that the purpose of the meeting was to discuss pricing, at the meeting also.

122. The CMA concluded that the meeting had clearly discussed pricing and other market conditions as well as potential market entry; such discussions between competitors, focusing on market pricing concerns were, by their nature, highly likely to be seen as an infringement, and the CMA argued that it would be perverse if the absence of detailed information on the content of the meeting (which itself was indicative of its clandestine nature) precluded the CMA from raising an objection to it.

[37] Quoted in Sonpal 1 (at paragraph 94).
[38] Hearing, Day 2, p.117, lines 15-20.
[39] Hearing, Day 2, p.118, lines 6-22.

123. Lexon contended that the meeting had been proposed by King and that it had been used by Dr Hallwood to "pump" Mr Davies and Mr Sonpal for information about the market and Alissa's entry plans. Mr Sonpal said that he had agreed to the meeting because he had hoped it would be a chance to confront Craig Bowen (who did not, in the event, attend the meeting) about the inaccurate feedback he had provided to King, and because he had a customer relationship with King and was a personal friend of Mr Davies[40]. He also argued that the Wavedata pricing information was readily available market research data that could have been obtained by King from other sources at minimal cost.

124. Lexon also claimed that Mr Sonpal's reference to "business as usual" was intended to show Lexon's independence and continued contribution to competing prices down, rather than maintaining them.

Our assessment of Chats 10-12

125. There is no contemporaneous account of the content of the meeting between King, Alissa and Lexon at the Landmark Hotel. However, the interview evidence obtained by the CMA from all three attendees and Mr Sonpal's evidence in the present case provide a substantial degree of evidence of what occurred. That included a discussion of current and future Nortriptyline price levels, reassurance as to Lexon's market and pricing strategy and the future intentions of Alissa as a potential supplier of Nortriptyline.

126. The fact that King might have instigated the meeting and taken the initiative in asking questions about the actual and potential business conduct of the other two participants does not mean that their responses could not constitute infringements by them. The fact that Mr Sonpal wanted to reassure Dr Hallwood as to Lexon's business intentions and that he sent Wavedata pricing information to him immediately after the meeting, apparently to confirm a discussion that had taken place about market prices, further underlines this. We do not consider that the fact that the Wavedata information was (for a fee) publicly available alters this finding.

[40] Hearing, Day 4, p.69.

127. What Mr Sonpal meant by his reference to "business as usual" is the subject of dispute. Mr Sonpal maintained that he meant no more than an assurance that he would continue "*as an independent company carrying on its business as before*", that is, as a small supplier to a retail business. Lexon denied that this amounted to a commitment not to "*trash the market*"[41] and argued this was simply an assertion of normal independent market behaviour. Mr Sonpal's evidence was that he intended to confirm that Lexon would not "*flood the market*" and would keep to its strategy of "*supplying its retail customer base*".[42]

128. However, in the context of an admitted discussion about market prices and competitive conditions, such an assurance of non-disruptive behaviour, and of maintaining, on this premise, a well-known commercial strategy of not expanding supplies outside the retail sector, was bound to have significance for King and Alissa and their understanding of market dynamics. It is also consistent with the other assurances that Lexon gave during the information exchanges that it would not act as a disruptive "maverick" player.

129. We do not regard as credible Lexon's claim that Mr Sonpal attended this meeting solely as a customer of King rather than as a competitor. We address specifically whether Lexon could reasonably be viewed as only a customer of, rather than competitor to, King later in this judgment (see Part I). Suffice it to say here that Mr Sonpal's own account of what was discussed does not suggest to us that he considered Lexon to be a customer of King rather than a supplier. We referred earlier to Lexon's separate interest in the evolution of the market arising from its entitlement to a share of Teva's profits on the sale of Nortriptyline.

130. In essence, the evidence we have seen establishes, in our view, that the purpose of the meeting was to discuss the current market situation and that Mr Sonpal himself wished to reassure Dr Hallwood that the prices being attributed to Teva were "fictitious" in order to dissuade King from responding competitively, leading to further price falls in the market; and that Alissa wished to reassure the other parties that its intention was not to disrupt the market.

[41] Hearing, Day 4, p. 73.
[42] Hearing, Day 2, p.120, lines 3-4.

131. Mr Sonpal's subjective intentions in relation to the meeting are in this context irrelevant. What matters is whether, considered objectively, the meeting had a purpose to restrict or distort the market and hence to affect conditions of competition. Even assuming that Mr Sonpal was correct in saying that he had no specific anticompetitive intention in attending the meeting, it ought to have been clear to him that participation in a meeting between competitors to discuss falling prices and other market conditions carried unacceptable risks of infringing competition law.

(g) Chat 13 (25 April 2016)

132. On 25 April 2015, Dr Hallwood emailed Mr Sonpal to report feedback from a customer (Peak) that Teva was acting as a price aggressor ("*Looks like Teva are still playing silly pricing games*"). His email identified specific prices (£32 for 10mg and £29 for 25mg) that Peak had cited, suggesting that Teva was responsible for these prices. Mr Sonpal replied by seeking to reassure King and claiming (falsely) that Lexon had weekly reports on Teva activity. He assured Dr Hallwood that Teva was "*playing ball*" and Teva was "*not the ones destabilising the market*".

133. The CMA said that Lexon's intention was to reassure King that Teva was not undermining the market by cutting prices and that it intended to discourage King from reacting on price in a way that would further destabilise the market.

134. Lexon argued that in this exchange no information was actually sent from Lexon to King, and that Mr Sonpal's reassuring words had no strategic value (and that King might have disbelieved Lexon in view of its reported ongoing suspicions about Lexon's conduct).

Our assessment of Chat 13

135. In his written evidence, Mr Sonpal confirmed that the meaning of "playing ball" here was as follows: "*By this I meant that Teva were not undermining the market by selling at very low prices*".[43]

[43] Sonpal 1, paragraph 102.

136. We conclude that the object of this exchange was to reduce the intensity of competitive price rivalry (or pro-competitive uncertainty) between King and Teva. Whilst the information from Mr Sonpal to Dr Hallwood is in the nature of an assurance rather than concrete or verifiable market data, that is irrelevant. Moreover, there is no reason to consider that King did not believe Lexon's claim to be in possession of confidential data on Teva's Nortriptyline business. The object of the exchange was clearly to reduce uncertainty and to reduce the risk of further reductions in prices in the market, to the benefit of both parties and Teva.

(h) Chat 14 (27 April 2016)

137. On 27 April 2016, Dr Hallwood emailed Mr Sonpal and Mr Davies to note that the Drug Tariff price for Nortriptyline had not changed for May. Mr Sonpal did not respond to the content of the email but instead referred to his contact with Actavis, stating that Actavis was "*only supplying AAH and their scheme which is around 30% of the market in total*". Mr Davies then emailed in response to this, stating that Actavis was also supplying Day Lewis and Sigma.

138. The CMA said that this information exchange provided strategically important information to King on the conduct of Actavis, a potentially important competing supplier. Specifically, it argued that Lexon's intention seems to have been to reassure King that Actavis would concentrate on supply to its existing customers rather than seeking new opportunities. The suggestion that Lexon and Alissa contributed their market intelligence about Actavis added an extra concern for the CMA.

139. Lexon claimed that information on the customers normally supplied by Actavis was already known in the market, and therefore that this exchange did not add any new information, strategic or otherwise, and as such that it could not have reduced market uncertainty or be the basis for a finding of infringement.

Our assessment of Chat 14

140. We do not accept Lexon's claim that the information provided by Mr Sonpal on Actavis in this chat was already widely known in the market, since Lexon and Alissa provided

contradictory information in these email exchanges. This strongly suggests that the exchange of feedback from both Lexon and Alissa played a role in reducing the market uncertainty facing King. There is no obvious, legitimate, explanation for this information exchange and none was offered. Even if Actavis was not prepared to compromise or soften its competition (which cannot be known from the evidence before us) this attempt by Lexon to manage competition by speaking with the main players is fully consistent with the CMA's findings.

141. More generally, the exchanges establish a willingness of all the players involved to pool market intelligence with the object of reducing market uncertainty. We note that the exchange appears to be incomplete as Mr Sonpal did not reply to the question asked by Dr Hallwood but instead referred to Actavis's supply operations.

(i) Chat 15 (12 May 2016)

142. On 12 May 2016 Dr Hallwood emailed Mr Sonpal and Mr Davies to ask whether a price quoted to a wholesaler customer (McKeevers) originated from Teva. Mr Sonpal responded by assuring him that this price came from Currentmyth, a trader that received its supplies from AAH and Well (i.e. not from Lexon or Teva).

143. The CMA said that Lexon's clear intention was to show that Lexon was not acting as a "maverick", and as such that this exchange was intended to offer reassurance to King and discourage it from implementing a vigorous price response.

144. Lexon argued that the information on the source of this price quote was widely available from an industry circular, and that in any event the prices concerned (from wholesaler Currentmyth) were still in the market irrespective of the source. Hence, eliminating Lexon and/or Teva as the source of this discounted price did not reduce the market uncertainty or the competitive constraints acting on King.

Our assessment of Chat 15

145. In isolation, the information exchanged in this incident would not appear to create a major impact on competition and could plausibly have been obtained by King from its

own market feedback. However, it is corroborative of the CMA's finding that Lexon was engaged in a course of conduct with the object of reassuring King that it and Teva were not acting as "mavericks". In a market where the limited number of suppliers makes collusive behaviour attractive, the risk of "maverick" behaviour by one supplier carries a serious risk of destabilising any possible collusive behaviour. Thus, even if Lexon's response did not lead directly to King adjusting its response to this specific price offer, it nonetheless provided welcome reassurance to King that neither Lexon nor Teva was acting to disrupt the market.

(j) Chat 16 (23 May 2016)

146. On 23 May 2016, Dr Hallwood forwarded an email to Mr Sonpal from a customer (Neon) reporting that Actavis was currently offering prices of £22.80 for both strengths of Nortriptyline. Dr Hallwood complained that Actavis was competing against its own parallel imported product. Mr Sonpal responded by telling him that the source of this market information ("Ben" at Phoenix) was unreliable.

147. The CMA said that Mr Sonpal's intention was to reassure King and that this was indicative of Lexon's desire to discourage King from reacting on price. When asked to explain his motivation in an interview with the CMA during the administrative procedure, Mr Sonpal explained that "*By talking about it one only drives the market down*."[44]

148. Lexon contended that no strategically important information was exchanged here, and that the competitive constraints on King were unaffected by Mr Sonpal sharing his opinions with Dr Hallwood.

Our assessment of Chat 16

149. Our assessment here is similar to that for Chat 15 above. The exchange of information may have had little or no immediate impact but was indicative of Lexon's attempts to discourage King from reacting to unconfirmed reports about lower market prices. It

[44] CMA interview of Mr Sonpal of 14 March 2018, p.258, line 23-p.259, line 8.

also illustrates the nature of the relationship and communications between the two competitors.

(k) Chat 17 (27 May 2016)

150. King provided information and complained about Actavis' Nortriptyline pricing, saying, "*someone should give them a call*". Mr Sonpal did not, on the evidence, specifically reply to King in response to this suggestion, but provided Drug Tariff information to Dr Hallwood.

151. The CMA said that this incident revealed a culture of communication between the market players and an attempt to exchange information so as to manage competition and limit outbreaks of aggressive competition.

152. Lexon argued that no exchange of information took place. In particular, the Drug Tariff prices were publicly known (and related - in effect – to prices that were three months old).

Our assessment of Chat 17

153. There is no evidence that anyone acted on King's proposal to call Actavis. Nevertheless, and whether or not specific information was exchanged here, the fact that a call to Actavis was seen as the immediate response (and that no denial or refusal was issued) corroborates the CMA's view that there existed a culture of coordination and communication in this market, rather than one of competition.

(2) The Tribunal's overall assessment of the information exchanges

(a) Mr Sonpal's evidence under cross-examination

154. Mr Sonpal provided written evidence as to his interpretation of the Chats particularly in his two witness statements. He also gave oral evidence and was cross-examined by Mr Holmes for the CMA on his written evidence to the Tribunal and also on the

interviews previously given to the CMA during the administrative procedure. The following points emerged from this cross-examination:[45]

(1) Mr Sonpal recognised that Lexon had a clear commercial incentive to limit Teva's sales to the volumes historically associated with the TevaOne scheme.

> "Q: So Mr Dey (of Medreich) is here confirming to you that Teva was kept low on stock so that it could only supply its own scheme and not compete more widely; that's right, isn't it?
>
> A: That was – yes" [46]

(2) Mr Sonpal reaffirmed what he had previously told the CMA, namely that:

> "(T)he best way to maximise on profitability in the market is to respect your -- respect the competition".[47]

(3) Mr Sonpal explained that by this he meant not provoking his competitors by putting too much supply into the market:

> "Q: You didn't want to flood the market; that's right isn't it?
>
> A: It would be obvious that a competitor would respond. I wasn't actually directly involved in what wholesale prices were, who was playing who off against who, but it's obvious knowing the market place that the greater the supplier (sic), the lower the price."[48]

(4) Mr Sonpal showed a clear appreciation of the risk that if any one supplier in the market started to price aggressively, this would trigger reactions from others in the market as they protected their market shares and volumes, leading to falls in price levels. Hence, he did not deny the statement he had previously made to the CMA:

> "If I suddenly start flooding the market with product the market will just come down…" [49]

(5) Mr Sonpal appreciated that Lexon's commercial interest was in stable market prices and did not wish to be seen as a "maverick" in the market. He said:

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[45] Hearing, Day 2, pp. 25-42.
[46] Hearing, Day 2, p.40, lines 20-23.
[47] Hearing, Day 2, p.27, lines 14-14.
[48] Hearing, Day 2, p.28, lines 13-17.
[49] Hearing, Day 2, p.31, lines 16-17.

> "I would like to maintain market pricing in all the products I sell. I am not- I used the word earlier on, I am not a maverick."[50]

(6) Mr Sonpal maintained, however, that his interest in market stability was because of Lexon's position as a wholesaler for other products besides Nortriptyline and a wish not to upset his suppliers.

> "So when I refer to being a maverick…I'm very conscious that my core business was Lexon as a wholesaler to retail pharmacy and I didn't want to upset my supplier relationships." [51]

(7) Mr Sonpal was aware that retail prices for Nortriptyline were closely linked to wholesale prices, i.e. that a fall in one would bring about a fall in the other price.

> "Q: (Mr Lomas) "…(Y)ou would presumably see the prices reducing both at the level of sale into the retail market and at the level at which Teva and others were selling into the wholesale market, in other words the trend in prices …was directionally the same?
>
> A: Yes."[52]

(8) Mr Sonpal confirmed that Lexon would seek out profitable opportunities to trade between the wholesale and retail channels:

> "Where we have effectively a cheaper cost of product we would offer those to other wholesalers as well."[53]

(9) Mr Sonpal knew that King would not supply Lexon with Nortriptyline once Lexon had entered the market through the Medreich deal. He did not deny the statement previously made to the CMA that:

> "… I knew King wouldn't supply me because he'd put two fingers up at me because he'd say, well, you've got your own licence now."[54]

(10) Whilst some reduction in price levels was seen as an inevitable consequence of the entry of a new supply source (i.e. Medreich), Mr Sonpal did not want prices to fall too quickly.

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[50] Hearing, Day 2, p.120, lines 10-11.
[51] Hearing, Day 2, p.32, lines 11-13.
[52] Hearing, Day 3, p.49, lines 9-17.
[53] Hearing, Day 2, p.7, lines 22-24. See also Day 2 p.81 line 8 – p.82 line 13.
[54] Hearing, Day 2, p.29, lines 5-6.

> "Q: So, you had a strong interest that prices should not crash quickly in this market. That's right, isn't it?
>
> A: Crash quickly is correct." [55]

(11) Mr Sonpal specifically did not want prices to wholesalers to fall below the levels that would, given the transfer prices in the Teva Supply Agreement (£16 and £27 for 10mg and 25mg tablets), prevent Teva from making a profit. Hence:

> "As soon as they (Teva) launched the product there would be a reduction in the market price automatically as a new entrant to the market. So…knowing that the prices are likely to fall, there should still be enough of a gap between the base price and to allow for that profit share to work."[56]

(12) Mr Sonpal had agreed indicative volumes with Teva prior to the implementation of the supply arrangements agreed between Lexon, Medreich and Teva which matched historic TevaOne scheme volumes. He then communicated volumes for Teva's requirements to Medreich which were slightly lower than these volume forecasts:

> "Q: You specify a figure a little bit below that, don't you?
>
> A: I do. I don't know why I did that though."[57]

(13) Mr Sonpal stated he did not know whether Medreich would limit Teva to these volumes, but we note that in March 2016 he received communication from Medreich that confirmed Medreich had done so, despite the fact that Teva had been asking Medreich for higher volumes.

> "Q: They (Teva) did ask for more but we (Medreich) refused….Do you agree?...
>
> A: No. I wasn't aware that they'd asked for more, that's the first I'd heard of it" [58]

(14) In communicating with King on Teva volumes, Mr Sonpal used language that gave the clear impression that it was Lexon itself that controlled these volumes.

[55] Hearing, Day 2, p.31, lines 23-25.
[56] Hearing, Day 2, p.37, line 25 – p.38 line 4.
[57] Hearing, Day 2, p.39, line 15.
[58] Hearing, Day 2, p.40, lines 4-6.

> "Teva would not even have the volumes to supply Alliance as they don't get enough from me"[59]

Mr Sonpal ascribed this inaccuracy to "*poor English*"[60].

155. It is clear from these statements that Lexon recognised that it had a strong commercial incentive not to flood the market so as to allow prices to fall too fast, and that it understood the risk that unilateral "maverick" conduct could trigger competitor reactions that could cause market prices to fall to the detriment of all suppliers; it is also clear that Lexon exerted some influence (though not control) over Teva's competitive conduct, at the very least through being able to influence the price and volumes of supply to Teva (and claimed to King that it had that influence). Lexon knew there were commercial benefits from monitoring developments in the Nortriptyline market, and that intelligence on supply volumes could affect competitive conduct in the market. As Mr Sonpal put it in his written evidence:

> "It is a market in which the gathering of market intelligence as to market availability is very important".[61]

156. We have considered very carefully Mr Sonpal's explanations of his position on Lexon's market conduct, his concern to serve his retail customer base and his desire as a wholesaler not to put at risk his relations with Teva or other manufacturers and suppliers. We do not, however, think these explanations are sufficient to alter the fact that the information Lexon provided and received in this case, viewed objectively, was capable of harming competition. As we have said, subjective intentions are not relevant when considering the objective content and purpose of the exchanges of information.

(b) Lexon's criticisms of the CMA's assessment

157. Lexon made some strong criticisms of the CMA's characterisation of the Chats. These factors, Lexon asserted, meant not only that there was no illegal exchange of information, but that the CMA had not even established the existence of a concerted practice.

[59] Hearing, Day 2, p.41 lines 4-6.
[60] Hearing, Day 2, p.41, line 24.
[61] Sonpal 1, paragraph 16.

158. These objections are referred to, and considered, in our assessment of the individual Chats but, for the sake of clarity, we restate here the main points of criticism and our assessment of them.

159. Lexon said first that the content of the Chats was too insubstantial to constitute an infringement. Much of the content was in the nature of casual remarks or mere gossip and did not impart any information of commercial significance. Any commercial information provided by Lexon was vague and imprecise, very general in nature and often incorrect, sometimes deliberately so.

160. Our assessment shows that, on the contrary, information of potential substance and significance was transferred. For example, the information on volumes supplied under the Joint Venture Agreement to Teva would have been commercially valuable to King and could not have been obtained from public sources, as would also have been the case for the reassurances given by Lexon as to Teva's pricing and Alissa's statements as to future intentions. This applies even if, as claimed, some of the information provided by Lexon was deliberately false (as with specific volume figures) or misleading (as with the extent of Lexon's influence over Teva's volumes).

161. Lexon also said the Chats were too infrequent to form any meaningful information exchange, far less to establish an illegal concerted practice. We note there was a gap of nearly three months in early 2016 but the resumption of contact in March 2016 seems very much to have picked up from where the parties had left things in December 2015. We do not accept Lexon's criticism that the Chats taken as a whole were too infrequent.

162. Lexon also claimed that much of the information exchanged was already in the public domain. We found that whilst this may be true in some instances, for example in relation to the Drug Tariff prices or the Wavedata price information, exchange of publicly available information on an apparently confidential basis can still provide valuable reassurance, particularly when accompanied, as here, by confidential opinions on other market players that would not normally be made public.

163. Finally, Lexon maintained that many of the alleged exchanges were initiated by Dr Hallwood and that Mr Sonpal merely responded, attempting to divert the inquiries by

providing incorrect or very general market information. Mr Sonpal emphasised in his oral evidence that Dr Hallwood was very insistent and not easily diverted. Nevertheless, whatever Mr Sonpal's motives in responding, the evidence we have seen shows a pattern of conduct that is consistent with an exchange of valuable commercial information between competing undertakings and it is of no great significance whether the information provided was in response to an inquiry and was in every case correct. The critical point is that Mr Sonpal engaged in these communications, not that Dr Hallwood initiated them.

164. Taking all these matters into account, we are satisfied that the criticisms made by Lexon of the CMA's assessment are not sustainable on the facts. We deal with Lexon's claim that its own weak market position meant it could not have intended to influence market prices, and the claim that it could not be a competitor of King or Alissa because it served a different customer base, in Part I below.

(c) Summary of our overall assessment of the Chats

165. We have examined in considerable detail the content of the information exchanges identified by the CMA and found to constitute an infringement in the Decision. In summary, this content shows that Lexon, King and, later, Alissa engaged in the exchange of sensitive commercial information over a protracted period, without any obvious, legitimate, commercial justification for doing so. Their behaviour was not consistent with that of independent competitors, separately determining their commercial behaviour in the market. The scope of the information exchanged covered present and future strategy, relationships with customers and suppliers, volumes (particularly from Teva), new entry and prices being offered or quoted to customers by Teva, Actavis and others. It enabled the parties to adjust their commercial position on the market and reduced the inherent uncertainty in the competitive process.

166. We now turn to Lexon's Grounds of Appeal.

I. GROUND 1 (MAIN GROUND OF APPEAL): NO OBJECT INFRINGEMENT

(1) Introduction

167. Lexon described this ground of appeal as its "overall" ground of appeal. It said that the CMA had failed to prove that Lexon exchanged information with the objective of maintaining prices of Nortriptyline or slowing their decline. Lexon contended that the content of the information exchanged did not support such an objective, particularly when assessed in its economic context.

(2) The parties' submissions

(a) Lexon

168. Lexon argued that the scope of an object-based infringement had to be interpreted restrictively and the CMA did not do so in the Decision; and that the CMA was not entitled, in an object-based case, to infer an infringing object by looking at the economic context but, rather, must find the object within the statement (or behaviour) of the parties to the alleged infringement which was said to constitute the infringement.

169. Lexon submitted that there was no such object established on the facts. Lexon argued further that the economic context could only reinforce or neutralise the impact of any object-based infringement and could not create the object that was the subject of an infringement.

170. Lexon said that the CMA could not succeed in an object-based case if it was clear that, in the real world, the conduct in question could not have an adverse, or a sufficiently adverse, effect on competition in the market concerned. Lexon submitted that the conduct that was alleged against it could not, in the relevant market conditions in this case, have had that necessary effect.

171. First, Lexon said that this was because the type of information being communicated was, for various reasons, not sufficient to establish the existence of a concerted practice (for example because it related to the conduct of a third party or was not future pricing information). Secondly, Lexon contended that the nature of the market, with its

structure of wholesalers and retailers, the size of the other parties present in it and the commercial nature of the activities of the undertakings alleged to have participated in the infringement, prevented any possible impact on competition in that market arising from the behaviour alleged to constitute the infringement.

172. Thirdly, Lexon argued that there was no legal authority establishing that the type of conduct which was alleged to have occurred in this case constituted an infringement; there was no legal precedent for the conduct in question to have been found to infringe competition law. Lexon said there needed to be a proper legal basis for concluding that a particular type of conduct, in the light of experience, had the necessary effect on competition. Lexon conceded, however, that it was not arguing that there was some form of *de minimis* exception, or lack of appreciable effect, for the kind of infringement alleged.

173. Finally, Lexon argued that in this case the object-based infringement must be proved by reference to the PMO referred to in the Decision because that was the basis upon which the Decision proceeded. The information exchanges at issue did not refer to, and thus could not have as their objective, the maintenance of prices. Moreover, it was implausible, given the parties' weak market position, and the existence of significant competitive constraints, that the exchanges of information could have had any significant influence on the prices of Nortriptyline, or could have had that as their objective.

(b) The CMA

174. The CMA's case can be summarised as follows:

(1) The CMA had correctly applied the law as to the relationship between the conduct alleged to be an infringement by object and the question of whether it had, or needed to have, any sufficient effect on the market concerned.

(2) The Decision correctly characterised that conduct as a concerted practice comprising an information exchange which was intended to maintain, or slow the decline of, prices in the market.

(3) Just as with any agreement or concerted practice, the behaviour at issue had first to be interpreted in its commercial context to identify the object (or objective) of the factual elements that constituted it. This was a different exercise from the subsequent legal requirement to form a view on whether the object of this behaviour, once identified, met the legal test for being an object infringement, when seen in its legal and economic context.

(4) In an object-based case, it was sufficient to show that the agreement or behaviour fell within a class which could have an adverse effect on competition and, in this case, it clearly did. Indeed, it fell within the class of communications which detracted from the quality of competition itself, because some competitors in the market had consciously substituted coordination of behaviour for competition and reduced the inherent strategic uncertainty in, and necessary for, the competitive process. This case was well within the scope of established case law.

(5) The CMA accepted that, if it could be shown that a pattern of behaviour, although seemingly having the object of distorting competition within Article 101(1) TFEU, had, on the facts and in the economic circumstances, absolutely no prospect whatsoever of having an effect on competition, then an object-based infringement could not be sustained, but submitted this was not such a case.

(6) The CMA further argued that it was not necessary to find a precise legal authority condemning the exact nature of the conduct in question. It was sufficient if it fell within a broad category which experience, economic theory and legal authority had found to infringe – and in this case that conduct did so.

(7) The CMA said that Lexon had misunderstood the significance of its PMO finding. This did not mean that the infringement found by the CMA consisted of an information exchange that focused exclusively on prices. Instead, it meant that the information exchange had as its object a lessening of uncertainty as to the market and pricing intentions of the parties and others, and as to the future level and timing of market entry, which would all be expected to have an effect on price levels in the market.

(c) Matters not disputed by the parties

175. In relation to the legal principles concerning infringements by object, it was common ground between Lexon and the CMA that in order for an infringement by object to be made out, it was necessary to examine the content of the relationships between the parties, the nature of the object of their behaviour, and the economic context in which that behaviour operated. What was in issue was the way in which these different assessments interacted and how the legal principles applied to the precise facts of the present case.

(3) Discussion: Legal Principles

176. In this sub-section we (i) set out the law on infringements of competition by object; (ii) discuss more specifically the cases arising in the context of information exchanges; and (iii) set out some of the key considerations arising from the case law.

177. Lexon and the CMA focused on and relied in their submissions (both written and oral) on a limited number of authorities. What follows in this sub-section places particular emphasis on those authorities.

(a) The law on object infringement: general principles

178. The Court of Justice in its judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184 ("***Dole***") summarised the key principles regarding infringements by object. At paragraphs 112-118 of *Dole*, the Court, relying on well-established case law, explained:

> "112 […] it must be recalled that, to come within the prohibition laid down in Article [101]1(1) [TFEU], an agreement, a decision by an association of undertakings or a concerted practice must have 'as [its] object or effect' the prevention, restriction or distortion of competition in the internal market.
>
> 113 In that regard, it is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.
>
> 114 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.

> 115 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101]1(1) [TFEU], to prove that they have actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.
>
> 116 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for the purpose of determining whether such conduct is covered by that defined in Article [101]1(1) [TFEU], it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent.
>
> 117 According to the case-law of the Court, in order to determine whether a type of coordination between undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article [101]1(1) [TFEU], regard must be had, inter alia, to its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.
>
> 118 In addition, although the parties' intention is not a necessary factor in determining whether a type of coordination between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account."

179. The authority relied on by the Court for each of the propositions at paragraphs 113-118 of *Dole* is paragraphs 49-54 of its seminal judgment in *Groupement des cartes bancaires (CB)* v *Commission*, C-67/13 P, EU:C:2014:2204 ("***Cartes Bancaires***") and the cases cited in those paragraphs.

180. The Court in *Cartes Bancaires* also referred favourably to the Opinion of Advocate General Wahl, to which we were taken by both Lexon and the CMA, albeit with different interpretations.

181. For present purposes, we highlight the following points emphasised by Wahl AG in his Opinion:

(1) The advantages of the restriction by object approach include predictability, certainty, a deterrent effect and procedural economy (paragraph 35).

(2) Those advantages only materialise if restriction by object is closely defined (paragraph 36).

(3) The distinction between object and effect arises because certain forms of conduct are, by their very nature, harmful to the proper functioning of competition (paragraph 39).

(4) For an object-based infringement, there must be a detailed examination of the nature of the agreement (or concerted practice) in question, separate from any consideration of its effects (paragraph 40).

(5) Even a serious restriction of competition, such as horizontal price fixing, need not inevitably be an infringement of competition if the parties hold only a tiny share of the market concerned (paragraph 42).

(6) Consideration of the economic and legal context to identify the anticompetitive object is to be clearly distinguished from demonstrating the anticompetitive effects. The context can only neutralise or reinforce the examination of the terms of the agreement and cannot remedy a failure to identify an anticompetitive object (paragraph 44).

(7) Only when experience based on economic analysis shows that a restriction is constantly prohibited is it reasonable to penalise it directly as an object infringement. This should be reserved to conduct whose harmful nature is proven and easily identifiable in the light of experience and economics. Classification as an agreement that is restrictive by object should be circumscribed and only applied to an agreement which inherently presents a degree of harm without the need to show adverse effects, because the negative impact on competition appears highly likely (paragraphs 55, 56 and 57).

182. The well-established principles, described in *Dole*, have recently been referred to by the Court of Justice in its judgment in *Gazdasági Versenyhivatal v Budapest Bank Nyrt*, C-228/18, EU:C:2020:265 (*"**Budapest Bank**"*), in particular paragraphs 33-40, 51, 54,

76 and 86 of that judgment. As in *Cartes Bancaires*, the Court referred favourably to the Opinion of the Advocate General (in this case Bobek AG).

183. For present purposes we highlight the following points from the Court's judgment in *Budapest Bank*:[62]

(1) According to the settled case-law of the Court since the judgment of 30 June 1966, *LTM* (56/65, EU:C:1966:38), the alternative nature of that requirement (object or effect), as shown by the conjunction "or", leads, first of all, to the need to consider the precise object of the agreement (paragraph 33).

(2) The essential legal criterion for ascertaining whether an agreement involves a restriction of competition by object is the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not necessary to assess its effects (paragraph 37).

(3) Regard must be had to the content, objectives and the economic and legal context. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (paragraph 51).

(4) The concept of restriction of competition by object must be interpreted restrictively. The concept of restriction of competition by object can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition for it to be found that there is no need to examine their effects, as otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of competition. The fact that the types of agreements envisaged in Article 101(1) TFEU do not constitute an exhaustive list of prohibited collusion is, in that regard, irrelevant (paragraph 54).

[62] In addition to the passages from *Dole* cited at paragraph 178 above.

(5) In order to justify an agreement being classified as a restriction of competition by object, without an analysis of its effects being required, there must be sufficiently reliable and robust experience (paragraph 76).

(6) An agreement or concerted practice will only be classified as a restriction by object if "*in the light of its wording, its objectives and its context, [it] can be regarded as posing a sufficient degree of harm to competition*" (paragraph 86).

184. In addition to the paragraphs expressly referred to by the Court,[63] the Opinion of Bobek AG includes the following points, which were relied on by Lexon:

(1) In an object-based case, the competition authority must first identify the content and objective of the agreement to establish whether it falls within the category of those whose harmful nature, in the light of experience, is easily identifiable. It must then verify that this is not called into question by the economic and legal context (paragraph 42).

(2) There can be a tension between this consideration of the economic context and a full effects analysis (paragraph 44).

(3) There would be no justification for prohibiting an agreement which, despite belonging to a category which would normally be regarded as anticompetitive, was, because of some circumstance, clearly incapable of producing any harmful effect or might even be pro-competitive (paragraph 48).

(4) This consideration of the economic context simply requires the authority to check at a rather basic level whether there are any legal or factual circumstances that prevent the agreement or practice in question from restricting competition. This is in the nature of a "basic reality check" (paragraph 49).

185. For completeness we also refer to paragraphs 36-38 of the Court of Appeal's judgment in *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13.

[63] Paragraph 76 of *Budapest Bank* refers to paragraphs 54 and 63 to 73 of the Opinion of Advocate General Bobek of 5 September (EU:C:2019:678).

("Ping CoA"). We note that those paragraphs of Rose LJ's judgment (with which the other judges agreed) refer, *inter alia*, to paragraphs 49-53 and 57-58 of the judgment in *Cartes Bancaires*. The principles set out in those paragraphs of the Court of Appeal's judgment are those that we have described above and we therefore do not repeat them.

(b) The law on object infringement: information exchange

186. The *Cartes Bancaires, Budapest Bank* and *Ping CoA* cases concern situations where the terms of the agreement are clearly set out in writing and may have had some otherwise legitimate purpose besides an illegal restrictive object. In the present case, the assessment of whether there is an infringement by object must be made in the context of a concerted practice involving the exchange of information. For this purpose, in addition to the *Dole* and *Balmoral CAT* judgments, the following authorities where infringements by object have been considered in that context were referred to by the parties:

(1) *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, EU:C:2009:343 ("***T-Mobile***") ;

(2) *Philips v Commission*, T-762/14, EU:T:2016:738 ("***Philips GC***");[64] and

(3) *Balmoral v CMA* [2019] EWCA Civ 162 ("***Balmoral CoA***").[65]

187. The principles that we draw from these authorities are as follows:

(1) Each economic operator must determine independently the policy which it intends to adopt including the choice of the persons and undertakings to which it makes offers or sells: (*T-Mobile*, paragraph 32; *Dole*, paragraph 119; *Philips GC*, paragraph 60; *Balmoral CAT*, paragraph 38; and *Balmoral CoA*, paragraph 17).

[64] An appeal of this judgment was subsequently dismissed by the Court of Justice: C-98/17 P, EU:C:2018:774 ("***Philips CJ***").
[65] The *Balmoral CAT* judgment arose in the context of a s.46 appeal brought by Balmoral Tanks against a decision by the CMA in circumstances where the (object) infringement in question was a one-off exchange of information at a single meeting on 11 July 2012. On appeal, the Court of Appeal rejected all four grounds of appeal advanced by Balmoral: see *Balmoral CoA*, paragraphs 33, 36, 39 and 45-47.

(2) This requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does however strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of competition in the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market: (*T-Mobile*, paragraph 33; *Dole*, paragraph 120; *Philips GC*, paragraph 61; *Balmoral CAT*, paragraph 38; and *Balmoral CoA*, paragraph 17).

(3) The exchange of information between competitors is incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted: (*T-Mobile*, paragraph 35; *Dole*, paragraph 121; *Balmoral CAT*, paragraphs 39, 82 and 119; and *Balmoral CoA*, paragraph 17).

(4) An exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object: (*T-Mobile*, paragraph 41; *Dole*, paragraph 122; *Philips GC*, paragraph 62; and *Balmoral CAT*, paragraph 50).

(5) Article 101 TFEU is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such (and therefore, in order to find that a concerted practice has an anticompetitive object, there does not need to be a direct link between that practice and consumer prices): (*T-Mobile*, paragraphs 38 and 39; and *Dole*, paragraph 125).

(6) The concept of a concerted practice, as it derives from the actual terms of Article 101(1) TFEU, implies, in addition to the participating undertakings concerting

with each other, subsequent conduct on the market and a relationship of cause and effect between the two. Subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. Such a concerted practice is caught by Article 101(1) TFEU, without the need to establish the existence of anticompetitive effects on the market: (*T-Mobile*, paragraph 51; *Dole*, paragraphs 126-127; *Philips GC*, paragraphs 64-65; and *Balmoral CAT*, paragraphs, 40, 44, 46 and 119).

(7) The fact that information exchanged with competitors could be gathered in the market does not prevent it from giving rise to an infringement. That information could enable participants to be aware of the relevant information more simply, rapidly and directly than they would from participating in the market: (*Balmoral CAT*, paragraphs 43 and 122).

(8) An exchange of information on a single occasion can potentially give rise to a concerted practice: (*T-Mobile*, paragraph 59; *Balmoral CAT*, paragraph 46; and *Balmoral CoA*, paragraph 18).

(4) Our Assessment

188. Having considered the relevant legal principles and the parties' submissions, we now give our legal assessment of the exchanges of information identified by the CMA.

(a) Key questions to be considered

189. The following questions need to be addressed in order to assess the CMA's findings and Lexon's objections to them:

(1) What was the content of the exchanges of information?

(2) Was the conduct identified of a nature to cause serious harm to competition?

(3) Did the CMA correctly assess the legal and economic context?

(4) Were Lexon and King direct competitors?

(5) Was an inference wrongly drawn from the economic context?

(6) Was there sufficient experience of the infringing conduct to assess its nature?

(7) Should the CMA have conducted a full effects analysis?

(8) Was the concept of 'infringement by object' interpreted too broadly in this case?

(9) Was there an infringement established in terms of the CMA's Price Maintenance Objective?

190. We examine these questions in turn, starting with our assessment of the content of the exchanges of information.

(b) What was the content of the exchanges of information?

191. Our findings of fact in relation to the information exchanges that were identified are set out in Part H of this judgment. Those findings make it clear (in summary) that:

(1) Lexon, King and (subsequently) Alissa engaged, over a protracted period in an exchange of sensitive commercial information.

(2) The information included indications of future commercial strategy including that of new entrants, customer/supplier relationships, volumes of supply from Teva and possible controls on that supply, views on market dynamics, prices that were being quoted and offers to delay supplies to Teva, whether or not that information was always completely accurate or was sometimes claimed to be intended to mislead.

(3) The exchange of information occurred when market prices, under a duopoly, had increased dramatically. The arrival of new market entrants was depressing

prices rapidly; Lexon was the architect of the bulk of those new entrants; Lexon derived commercial benefit from both Teva's and its own sales (those by Teva being more material); and the parties clearly had a strong interest in slowing the decline of prices in the market.

(4) Nortriptyline was a commodity product. This meant that there was a high potential to expand sales by being marginally more competitive on price than a competitor; and there was a clear relationship between the prices paid by retailers and wholesalers, which moved in step.

(5) Whilst the information exchanges may have benefited the parties' commercial interests, nothing suggested that these exchanges had any legitimate purpose under competition law. In particular, it was not shown that these discussions were necessary as a result of the previous supply relationship between King and Lexon.

192. We conclude from this that the content of the information exchanges is clear and strongly demonstrates that they had an anticompetitive object. This involved, at the very least, reducing uncertainty in the market, reducing customers' ability to play one supplier off against another and providing reassurance as to the actual and likely future intentions of actual or potential suppliers of Nortriptyline, all of which could reasonably be expected to affect prices in the market.

(c) Was the conduct identified of a nature to cause serious harm to competition?

193. It is then necessary, in accordance with the case law we have described, to consider whether the information exchanges were by their nature likely to cause serious harm to competition. We conclude that they were.

194. Communications of this kind fall clearly within the scope of behaviour considered to be a concerted practice which by its nature can be expected to cause harm to competition and thus constitute an infringement by object. This is true as regards the jurisprudence to which we have already referred (see e.g. *T-Mobile, Dole, Philips GC,*

Balmoral CAT and Balmoral CoA). It is also consistent with both economic theory and the decisional practice of competition authorities and, therefore, as we discuss below, consistent with "experience".

195. Such conduct damages the fabric of competition by substituting coordination for competition and by reducing the level of uncertainty inherent in the competitive process. The behaviours that have been established have the necessary capacity to produce an anticompetitive effect, in particular the slowing of price decline in the market, and we find the CMA was correct to draw this conclusion.

(d) Did the CMA correctly assess the legal and economic context?

196. It is necessary next to consider whether the CMA's conclusion as to the harmful nature and content of the information exchanges was negated by an examination of the legal and economic context.

The CMA's actual assessment

197. The CMA considered the legal and economic context of the information exchanges together (in Section 5D of the Decision[66]). Its consideration of the "Legal Framework"[67] consisted of a discussion on whether the parties were direct competitors, and particularly on the status of Alissa as a potential competitor, which Lexon contested. We follow the CMA's approach and consider the legal and economic context together, concentrating on the points of dispute raised by Lexon.

198. Lexon contended that the CMA had not correctly considered the economic context of the information exchanges and had wrongly concluded that they could have an anticompetitive effect; the CMA had failed to analyse sufficiently the likely effects of the information exchanges in the "real world" situation on the market.

199. We do not agree with Lexon's contentions. In our view, the CMA's examination of market conditions was sufficient to ensure that the harmful nature of the information

[66] Decision paragraphs 5.14-5.40.
[67] Decision paragraphs 5.14-5.23.

exchanges was not negated by their economic context. This examination[68] was very much in the nature of the "basic reality check" described by Bobek AG in *Budapest Bank*. It included: the nature of demand for the product; the number and identity of suppliers; the level of market concentration; the limited nature of competition prior to 2015; the launch of the 'JV Product' by Medreich and Lexon; the homogeneous commodity nature of the product; the downward pressure on prices from 2015; the arrival of Actavis as a supplier, having acquired the business of Auden McKenzie; and the future entry of Alissa and the increase in potential competition.

200. The CMA's conclusion on the legal and economic context, (set out at paragraph 5.40 of the Decision and repeated at paragraph 1.10(a) in the executive summary[69]) was as follows:

> "The legal and economic context in which the Information Exchange took place was one in which the product in question (Nortriptyline Tablets) was homogeneous in nature, with price as the key driver of competition; immediately before the Information Exchange the market was highly concentrated, competition was muted and prices had increased significantly; the entry of the Lexon/Medreich JV Product and the potential entry of Alissa increased the intensity of competition and uncertainty in the market. This created opportunities for customers to 'play off' suppliers against one another, putting downward pressure on prices. King, Lexon and Alissa were actual or potential competitors and they each stood to gain if prices remained the same or decreased more slowly."

201. This examination by the CMA of market conditions was in our assessment clearly sufficient for the CMA to conclude that the seriously harmful nature of the conduct in question was not negated by its economic and legal context.

The nature of the information exchanged

202. We also reject the reliance placed by Lexon on paragraph 54 of the Court of Justice's judgment in *Asnef-Equifax and Administración del Estado*, C-238/05, EU:C:2006:734 ("***Asnef-Equifax***")[70] in claiming that the CMA's assessment failed to take account of the type of information exchanged. We do so for reasons analogous to those put forward by Advocate General Kokott in *Dole*.

[68] Decision paragraphs 5.24-5.40.
[69] See paragraph 35 above.
[70] NoA, paragraph 85; Reply, paragraph 50; Lexon Skeleton, paragraphs 10 and 21; and Hearing, Day 1.

203. In *Dole*, the appellants sought to rely on *Asnef-Equifax*, advancing similar arguments to those put forward by Lexon. The General Court rejected those arguments. On appeal, Dole's arguments in this respect were also rejected by the Court of Justice: see *Dole*, paragraphs 111-135.[71]

204. In her Opinion in *Dole*, Advocate General Kokott stated:

> "120. […] the present case differs fundamentally from the case of *Asnef-Equifax*, to which Dole has referred and which related to the Spanish credit information exchange system. This is because the primary purpose of an exchange of information about the creditworthiness of borrowers, such as in the case of Asnef-Equifax, is to enhance the functioning of the market and to create equal conditions of competition for all credit providers, without one market operator in any way disclosing to its competitors the conditions which it intends to offer to its customers. The effect of an exchange of information such as that at issue here, which essentially relates to the factors relevant to the setting of expected quotation prices and price trends, is exactly the opposite: by means of that exchange, the undertakings involved disclose to their competitors — at least to some extent — their intended conduct on the market and sensitive information connected to their future price ideas. This is quite obviously capable of removing uncertainties concerning the intended conduct of the participating undertakings and allows conditions of competition to be created which do not correspond to the normal conditions of the market in question."

205. That explanation applies with equal force in the present case. *Asnef-Equifax* provides no useful authority for the situation we have to consider. The information exchanges between Lexon, King and Alissa had no obvious, legitimate, commercial purpose and instead were obviously "*capable of removing uncertainties*" (in the words of Kokott AG)[72] and preventing normal competition. The present case differs fundamentally from the situation in *Asnef-Equifax*.

The claimed impossibility of any anticompetitive effect

206. Lexon's further complaint, supported by Mr Harvey's evidence, was that the conduct in question was simply incapable of having any anticompetitive effect, and therefore could not be harmful to competition. This complaint overlaps with Lexon's argument that the CMA should have conducted a full effects analysis, which we deal with below. Our observations there on Mr Harvey's evidence are equally applicable here.

[71] The arguments formed the fifth part of Dole's third ground of Appeal. See in particular paragraphs 127-135.
[72] See also paragraph 122 of the Court's judgment in *Dole* referred to at paragraph 187(4) above.

207. We do not think it can seriously be contended, given the market information set out above, that the information exchanges in this case were incapable of having any significant effect on the market. We find that an effect on competition was likely to occur and the capacity for that to be the case was clearly established by the CMA in the Decision.

(e) Were Lexon and King direct competitors?

208. Lexon also complains that it did not compete directly with King. Lexon argued that direct competition between it and King was reduced or eliminated by (i) the history of a supplier/wholesaler relationship, (ii) the small overlap in their customer base, and (iii) Lexon's own very small market position. In consequence Lexon claimed that any exchange of information between Lexon and King could not be anticompetitive in nature or effect.

209. The supplier/wholesaler relationship, which the CMA noted did not continue after August 2015, is acknowledged in the Decision (at paragraph 5.38). The CMA emphasised, however, that despite this history prior to the period of the infringement, the relationship between the two undertakings during the infringement period was "horizontal", i.e. as competing suppliers. Moreover, it is clear from the evidence that any "verticality" must have ceased to be a significant factor once Medreich was in a position to supply Nortriptyline to the UK market from July 2015 onwards.

210. This is particularly clear from the fact that under the Joint Venture Agreement,[73] as explained in Part G above, Lexon agreed to purchase its requirements of Nortriptyline exclusively from Medreich, thus preventing Lexon from buying in future from King. Mr Sonpal also made it clear in his oral evidence that King was fully aware that Lexon had its own source of supply and henceforward had no desire to deal with Lexon as a customer.[74]

211. We therefore do not consider that it would be right to view Lexon and King as customer and supplier at the material time. Rather, it is clear that they were competitors in relation

[73] See Part B above.
[74] See Part H above (see also Hearing Day 2, p. 29).

to the sale of Nortriptyline in the UK during the relevant period, apart from the short period up to the end of August 2015[75], when both relationships could be said to apply. Moreover, Teva was a direct competitor of King and Lexon's interests in the market included the success of Teva and protecting its share of profit from the Teva Supply Agreement.

212. Lexon also argued that there was only limited customer overlap between King, supplying mainly a major wholesaler, and Lexon, supplying mainly independent retailers. However, it is clear from Lexon's own evidence that Lexon also supplied wholesalers, so that there was an appreciable overlap in customer categories at least.[76] Moreover, given that this was a commodity product, and therefore very sensitive to price divergences, there was nothing to prevent either party from supplying each other's customers if the price difference justified it.

213. Mr Harvey accepted in his oral evidence that the question of who the parties *could have* supplied was as relevant as who they did supply.[77] He offered no evidence to show that there would be any impediment to each party supplying each other's customers if a price divergence emerged to make this commercially attractive. Mr Harvey also agreed that King and Lexon had an incentive to coordinate their conduct even if they had a different customer focus.[78]

214. The claim that Lexon's market share was small (estimated by Mr Harvey at 4-5%) fails to take account of Lexon's interest in its joint venture with Medreich and the contract to supply substantial volumes to Teva for sale in the UK. Lexon received a substantial (approximately 35-40%) share of the profits from Teva's sales. Teva accounted for up to 30% of Nortriptyline sales in the UK. Taken together, this amounted to a significant presence on the market, comparable to King's share of 12-30% during the relevant period.

215. Mr Harvey expressed the opinion that there was no price parallelism between King's and Lexon's prices, partly on account of their supplying different market segments but

[75] We note Mr Sonpal also referred to supplies in September and October 2015, but the quantities are unclear.
[76] Harvey 1, Table 3.
[77] Hearing, Day 3, p. 96.
[78] Hearing, Day 3, p. 98.

also from a visual inspection of a chart showing average selling prices. In his oral evidence,[79] however, he admitted that the evidence for this was weak and he did not pursue this opinion with any conviction. Mr Sonpal acknowledged that wholesale and retail prices moved together, and that King and Teva were direct competitors.[80]

216. We therefore reject Lexon's claim that the level of direct competition between Lexon and King was too low for any exchange of commercially sensitive information between them to be capable of restricting competition during the infringement period.

(f) Was an inference wrongly drawn from the economic context?

217. Lexon claimed that the CMA used its examination of market conditions to infer that the information exchanges had an anticompetitive object, in other words that the CMA had only established an anticompetitive object by inference from the context, breaking the "content, object, context approach" required by law.

218. We can find no basis for this claim. We agree that it is clear from the jurisprudence we have discussed that a competition authority must find the factual elements of an object infringement within the behaviour of the parties to the alleged infringement: it is not entitled to find an effect in a market and then use that to infer an anticompetitive object to a given course of conduct and proceed solely on an object infringement basis. But that is not what happened on the facts before us and that is not the basis upon which the CMA proceeded in the Decision.

219. Any set of communications or course of behaviour has to be considered and interpreted in the actual marketplace and not examined in a vacuum or in other hypothetical circumstances differing from the market in question. To do otherwise would risk placing a wrong interpretation on the communications or behaviours.

220. It is also often necessary, as the Court of Justice has observed on many occasions, to piece together the nature of an illegal agreement or practice from often fragmentary

[79] Hearing, Day 3, pages 113-4.
[80] See Sonpal 1, paragraph 33.

written evidence. Thus, in *Philips CJ*, for example, the Court referred at paragraph 59 to:

> "…(T)he case law that the existence of anticompetitive practices or agreements must, in most cases, be inferred from a number of coincidences or indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (judgment of 26 January 2017, *Commission v Keramag Keramische Werke*, C-613/13 P, EU:C:2017:49, paragraph 51 and the case law cited)."

221. In our judgment, the CMA did no more than the normal exercise of seeking to understand the meaning of the communications that occurred within the broad structure of the Nortriptyline market and the roles of the players in it. Having so construed the communications they identified an anticompetitive object from those communications themselves, rather than inferring one from the market context and attributing it to the undertakings.

222. That anticompetitive object was supported by the evidence of Mr Sonpal as to the parties' intentions. Mr Sonpal was clear that the undertakings involved were concerned at the speed with which prices were falling in the market, and that all had a commercial interest in slowing that decline. The content of the information exchanges was clearly capable of affecting the pricing and wider commercial decisions of the undertakings concerned and there is no other credible explanation than that this was their object.

223. We therefore reject Lexon's arguments in this respect.

(g) Was there sufficient experience of the infringing conduct to assess its nature?

224. We next consider Lexon's claim that the information exchange in this case was novel and without any precedent and therefore could not be held to be an infringement by object.

225. For an infringement by object, it is necessary that the anticompetitive capacity that is the source of concern must be within experience and not be entirely novel or theoretical. However, we are not persuaded that an infringement by object based on an information exchange can only be found to exist where the precise nature of the exchanges, and the

information contained, fall exactly within the terms of a prior legal authority. That would be an excessive constraint to impose on the doctrine. We consider that the jurisprudence shows that it is sufficient if the exchanges at issue fall within categories that are already sufficiently established by case law or by clear economic theory and agency decisional practice.

226. For example, the Opinion of Advocate General Kokott in *Lundbeck v Commission,* C-591/16 P*,* EU:C:2020:428 explains at paragraph 156:

> "it is not necessary, in order to classify an agreement as a restriction of competition by object, that the same type of agreement has been found unlawful in the past. The role of experience and, therefore, foreseeability in that regard do not [….] concern the specific category of agreement in a particular sector, but the fact that it is established that certain forms of collusion […] are in general and in the view of the experience gained, so likely to have negative effects on competition that it is not necessary to demonstrate that they have had such effects in the particular case in hand."

227. However, in this case, it is not necessary to explore the outer reaches of this boundary. The facts we have found above fall classically within the areas which established legal authority, economic theory and competition authority decisional practice have consistently determined as infringing. This is so on the basis that the conduct had the capacity to affect competition in the marketplace and that it undermined the fabric of competition, not least by reducing the uncertainty inherent in, and essential to, the competitive process. As the Tribunal in *Balmoral CAT* explained at paragraph 41:

> "The strictness of the law in this regard reflects the fact that it is hard to think of any legitimate reason why competitors should sit together and discuss prices at all."

228. In addition, as we said earlier, we reject Lexon's claim that the level of direct competition between Lexon and King meant that exchange of information between them could not restrict competition. Consequently, it cannot seriously be contended, as Mr Sonpal sought to do on several occasions, that these discussions were necessary as part of (historic) vertical supply arrangements, that is by Lexon having previously acted as a wholesaler for King.

(h) Should the CMA have conducted a full effects analysis?

229. Lexon claimed, relying on Mr Harvey's evidence, that the CMA, having failed to establish infringement by object, should have conducted a full effects analysis. This

would have shown that the information exchanges were unlikely to have any significant effect on the market.

230. Lexon also argued strongly that, by failing to take account of competitive constraints in considering whether there was infringement by object, whilst accepting that Alissa was a potential competitor, the CMA had conducted an incoherent analysis that was, in Mr Brealey QC's words, "*all at sea*"[81].

231. We do not agree that the CMA should have conducted a full effects analysis. It follows from our earlier conclusions that it was not legally necessary or appropriate for the CMA to conduct such an analysis, that is to seek to establish that the infringing conduct in question was likely to have a significant effect on the market. All that was necessary for the CMA was to undertake a sufficient examination of market conditions to establish whether the conduct was incapable of having a material effect on the market, as a "*basic reality check*" as described by Bobek AG in *Budapest Bank*. We find that this was done, and that the Decision contains sufficient material clearly to meet that requirement and to permit an object-based approach in this case.

232. In any event, and without prejudice to that conclusion, Mr Harvey's evidence did not convince us that the information exchanges were incapable of having a significant effect on the market. We note, in particular, the following significant limitations:

(1) First, Mr Harvey adopted an unduly narrow approach to his assessment, focusing on information exchanges that specifically involved price and volume information, as opposed to broader strategic information, and on information relating to Lexon's own business, rather than, for example, that of Teva. This meant the focus of his expert view was severely limited.

(2) Secondly, some of his conclusions were unconvincing, even within the narrow scope of his assessment. For example, Mr Harvey concluded that the fact that Lexon and King supplied different customers meant that co-ordination between them would have little impact on competition. But, in oral evidence before the Tribunal, he accepted that Nortriptyline was a commodity product, that the

[81] Hearing, Day 1, p.43 line 18.

parties competed in the same relevant market, had incentives to coordinate and could have supplied each other's customers. We explained earlier why we do not accept that the different customer bases of King and Lexon removed their incentives to coordinate or the possible effect of such coordination.

(3) Thirdly, Mr Harvey's conclusion that the evidence of price behaviour in general was not consistent with collusive behaviour was not convincing. Before the Tribunal, Mr Harvey appeared to accept that the evidence he had put forward was consistent with either collusive or non-collusive behaviour.[82]

233. For these reasons, we do not accept Mr Harvey's evidence in this respect and, as a consequence, reject Lexon's arguments in reliance on it.

234. It follows that we also cannot accept Lexon's claim that the CMA's approach to considering competitive constraints was incoherent. The CMA's consideration of the legal framework and its "basic reality check" of the economic context required it to consider, amongst other things, whether the parties to the information exchanges could be considered as actual or potential competitors. As we have discussed in sub-sections (d) and (e) above, the CMA rightly concluded that King and Lexon were, at the material time, actual competitors and further that, as the holder of an MA, with a declared intention of entering the market in the near future, Alissa should be regarded as a potential competitor of King and Lexon, (as well as of Medreich and Teva).

235. Lexon's claim that the CMA should have gone on to consider the position of other competitors (principally Actavis and Teva) must fail for the reasons given above. First, the CMA did not, in our view, fail to establish an infringement by object, so the need to move to a full analysis of effects did not arise. Secondly, competition between King and Lexon and Alissa's potential impact on the incentives and market prospects of King and Lexon were taken into account by the CMA in establishing an infringement by object, as was the existence of Actavis as a competitor. Thirdly, the CMA also considered Teva's influence on the market, which was not that of a completely independent competitor, but was instead dependent on receiving supplies from

[82] Hearing Day 3, pp. 115-6.

Medreich under the Joint Venture Agreement in circumstances where Lexon was able to influence the volumes supplied to Teva and set the base transfer price.

236. We therefore do not find that the CMA adopted an illogical or incoherent approach to the consideration of competitive constraints.

(i) Was the concept of infringement by object interpreted too broadly in this case?

237. The parties agreed that the concept of infringement by object should be interpreted restrictively but Lexon argued that the CMA had interpreted it too broadly in this case. We disagree.

238. We have already found that the CMA was correct that the infringing conduct in this case fell well within the recognised categories of conduct that by their very nature were likely to cause serious harm to competition. The Decision's conclusion, therefore, does not apply too broad an interpretation of the scope of the term infringement by object.

(j) Was there an infringement in terms of the CMA's Price Maintenance Objective?

239. Finally, we consider Lexon's claim that the CMA had not proved its case on the so-called Price Maintenance Objective. Lexon argued that the Decision was based solely on the Price Maintenance Objective (PMO) as defined in paragraph 1.7 of the Decision, and that the broader findings made in paragraphs 1.8 and elsewhere in the Decision also depended on the PMO. Lexon argued that if the evidence did not support that objective, the Decision must be overturned.

240. Lexon said that the CMA had not established that the exchanges of information had the object of maintaining (or slowing the decline of) prices and that the content of the exchanges contained no reference to any specific price. As Lexon said in its Notice of Appeal, "*it is difficult to understand how the information communicated from July 2015 – March 2016 can be related to prices at all*". [83]

[83] See Lexon NoA paragraph 5.

241. Lexon said it was not enough for the CMA to show that the exchanges of information removed market uncertainty. To show the existence of the PMO, there had to be a clearly demonstrated objective of maintaining or slowing the decline of prices. Not only was such an objective not apparent from the content of the information exchanges, but an objective of influencing price levels significantly would have been quite implausible for the parties, given their relatively weak market positions and the significant competitive constraints in the market.

242. The CMA emphasised that the PMO, as expressed in the Decision, included the slowing of a decrease in prices, which was the market situation at issue here. Moreover, the Decision was framed in sufficiently broad terms to cover the exchange of information to alter the conditions of normal competition by reducing market uncertainty, both generally and in terms of specific market entry possibilities and the credibility of specific price offers, all of which contributed to slowing the decline in prices.

243. Mr Holmes for the CMA further suggested in his oral closing submissions that if the Tribunal, contrary to his contentions, found the Decision to have been drafted in too narrow terms, it could, on a full merits appeal, substitute its own finding of infringing conduct in whatever terms it considered appropriate.

244. We do not accept Lexon's claims on this point. It is clearly for the CMA to draft a decision as it sees fit in the light of its findings and its analysis of the law. We examined in Part G above the significance of the Price Maintenance Objective as used by the CMA as the focus of its infringement finding and concluded that, in this market context, reducing strategic uncertainty and coordination on matters such as volumes and market entry, as well as prices in some instances, could reasonably be expected to have an effect on price levels applying in the market.

245. It follows from this that there was no requirement for the information exchanged in this case to include specific price information, whether relating to the products supplied by the parties or otherwise, in order to establish an objective of slowing a decline in market prices. It follows that these were sufficient grounds for the CMA to have determined that the exchanges of information at issue had the objective of slowing the decline in prices.

246. It is also clear from the Decision that the CMA did not intend to limit its infringement findings to the specific exchange of information on the parties' own or any other specific prices. In this aspect of its submissions, Lexon appears to have relied on an overly-narrow interpretation of the terms of paragraph 1.7 of the Decision. We set out this paragraph in full in Part D[84]. The relevant part for present purposes reads as follows:

> "…The parties exchanged information about prices, volumes, timing of supplies and entry plans with the objective to maintain the prices of Nortriptyline tablets in the UK or at least slow their decline (the 'Price Maintenance Objective')"

This clearly envisages a situation, as the CMA correctly contends, where exchange of information on a range of matters relevant to market behaviour and structure will ultimately affect price levels in the market, and in this case slow their decline.

226. We also note that, as the CMA contended, paragraph 1.7 forms part of the executive summary and the contents of the Decision as a whole should be considered, in particular its Sections 5D-5F, when judging its meaning and content.

247. We therefore do not consider that the CMA erred in its approach on this point in the Decision. However, for the avoidance of doubt, even had Lexon succeeded in its submissions on this point, we would have found that, on the facts before us, the information exchanges between Lexon and King and/or Alissa between 27 July 2015 and 27 May 2016 had as their object the prevention, restriction or distortion of competition within the meaning of Article 101(1) TFEU and Chapter I CA 1998 under existing case law.

(5) Conclusion on Ground 1

248. We find that the CMA correctly applied the law on infringement by object and was justified in finding that the exchanges of information it had identified constituted, by their content and nature, a concerted practice with the object of restricting competition between the parties and between the parties and others.

[84] See paragraph 35 above.

249. For these reasons we reject Lexon's appeal under Ground 1, which was presented as its main ground of appeal. We set out in the Appendix our conclusions on Ground 1 in relation to the list of issues in dispute, as agreed between the parties.

J. GROUND 2 – LEXON WAS NOT PARTY TO A SINGLE AND CONTINUOUS INFRINGEMENT

250. Lexon argued in the NoA[85] that it was wrongly accused of being party to a "*single and continuous infringement*" extending from 27 July 2015 to 27 January 2017, covering both Relevant Period 1 and 2 as identified in the Decision. Lexon accepted that the penalty imposed by the CMA had been imposed in respect only of 'Relevant Period 1' (i.e. to 27 May 2016) but said the Decision in paragraphs 5.158 to 5.167 found that it had infringed over the longer period.

251. The CMA in its Defence asserted that this was a mis-reading of the Decision, referring in particular to paragraph 5.4 of the Decision, which, the CMA said, made it quite clear that the finding of infringement by Lexon was in relation to 'Relevant Period 1' from 27 July 2015 to 27 May 2016.[86]

252. Lexon made no reference to this Ground in either its Reply or Skeleton Argument. At the Hearing, Counsel for Lexon, Mr Brealey QC, accepted that there was no substance to Ground 2 and that Ground 2 was no longer pursued.[87]

253. It is accordingly not necessary for us to rule on the point. We observe, however, that it is quite clear to us that the infringement found by the CMA in relation to Lexon was for the period 27 July 2015 to 27 May 2016.

[85] NoA, paragraphs 7, 112-115.
[86] Defence, paragraphs 264-268. See also CMA Skeleton, paragraph 5(b).
[87] Hearing, Day 5, p.75, lines 21-25.

K. GROUND 3 – PENALTY

(1) Introduction

254. In relation to the penalty imposed by the CMA there are essentially three questions arising from Lexon's appeal on this ground:

(i) Was the CMA wrong to include Lexon's share of profit from the supply to Teva under the Joint Venture Agreement in its calculation of Lexon's relevant turnover?

(ii) Was the CMA wrong to apply a starting point of 20% as regards seriousness under Step 1 of the Penalty Guidance?

(iii) Was the uplift at Step 4 of Lexon's Step 3 penalty of £637,363 by 75% to £1,220,383 disproportionate?

(2) The parties' submissions

255. In respect of (i), Lexon argued that the profit share which it received from Nortriptyline sales by Teva under the Joint Venture Agreement should not be included in the calculation of annual turnover for the purposes of Step 1. This was argued on the basis that it did not qualify as turnover of the Product because Lexon had no control over Teva's sales volume or prices.

256. In response, the CMA argued that it had calculated the relevant turnover from Lexon's most recent audited accounts, which included the relevant earnings. Turnover in this context meant all turnover of the Product, however it was earned in the relevant market. There were no exceptional circumstances justifying exclusion of these amounts from the calculation.

257. In respect of (ii), Lexon argued that the percentage applied by the CMA as a starting point was not justified; that Lexon's and Teva's market shares should not be combined as a basis for the percentage uplift; and that, in any event, the infringement in question did not justify such a high percentage applied to turnover. Under the Penalty Guidance

(paragraph 2.6), the alleged infringement was a "less serious object infringement" which had caused no harm to competition so that a 10% starting point should have been applied.

258. The CMA stated in response that the infringement was much more serious than Lexon claimed and that it had a substantial degree of discretion as to the appropriate starting point percentage to apply. In this case, it was justified to apply a percentage just below the upper range of 21-30%.

259. In respect of (iii), Lexon argued that the deterrence uplift at Step 4 was unfair and disproportionate taking into account the fact that King had been given an uplift of only 50%, when King had been the instigator of the alleged infringement and had been involved for a much longer period than Lexon.

260. The CMA responded that the deterrence uplift must be sufficient to deter the undertaking in question. The penalty calculated at Step 3 (£697,362) was only 0.35% of Lexon's world-wide turnover, 8.53% of its post-tax profits and 2.01% of its net assets. A significant uplift was therefore justified to act as a deterrent against future infringements by Lexon. King's financial scale was much smaller in comparison, and the fine imposed on King was proportionately much greater. King's role as instigator and the greater the length of its involvement were taken into account at Steps 2 and 3.

(3) Legal principles

261. Section 36 CA 1998, as amended, provides (so far as relevant) as follows:

> "(1) On making a decision that conduct has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 101, the CMA may require the undertaking concerned to pay the CMA a penalty in respect of the infringement.
>
> […]
>
> (3) The CMA may impose a penalty on an undertaking under subsection (1) or (2) only if the CMA is satisfied that the infringement has been committed intentionally or negligently by the undertaking.
>
> […]
>
> (7A) in fixing a penalty under this section the CMA must have regard to –

(a) the seriousness of the infringement concerned, and

(b) the desirability of deterring both the undertaking on whom the penalty is imposed and others from-

(i) engaging in conduct which infringes the Chapter 1 prohibition or the prohibition in Article [101].

[…]

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

262. The test under section 36(3) was discussed by the Tribunal in *Argos and Littlewoods v OFT* [2005] CAT 13:

> "221. […] an infringement is committed intentionally for the purpose of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition."

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

264. Under Section 38 of the CA 1998, the CMA is required to prepare and publish guidance as to the appropriate amount of any penalty in respect of an infringement of the Chapter I or Article 101 TFEU prohibitions. That guidance must be approved by the Secretary of State and according to section 38(8) when setting the amount of a penalty, the CMA and the Tribunal must have regard to the guidance currently in force. At the time of the Decision, this was the "*Guidance as to the appropriate amount of a penalty*" (CMA 73, April 2018) adopted by the CMA Board (the "Penalty Guidance").

265. Paragraph 3(2) of Schedule 8 to the CA 1998, as amended, provides that, on an appeal against penalty, the Tribunal may confirm or set aside the decision which is the subject of the appeal and may impose or revoke, or vary the amount of, a penalty.

266. The Tribunal's role in relation to penalty appeals was considered in *Balmoral CAT*. Referring to, and applying the judgment in, *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3 ("***Kier***"), the Tribunal in *Balmoral CAT* explained at paragraph 134 that:

> "[…] the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, particularly in view of the undertaking's right under Article 6(1) of the European Convention on Human Rights to have the penalty reviewed afresh by an impartial and independent tribunal. The Tribunal's comments in *Kier* that it would not be right for the Tribunal to ignore the CMA's own approach and reasoning in the decision under challenge and that it should recognise a margin of appreciation afforded to the CMA in the application of its guidance are still relevant. The Tribunal in *Kier* clarified that the reference there to the CMA's margin of appreciation is not intended to restrict the intensity of the Tribunal's review of the penalty decision. Rather it indicates that "the Tribunal's role is not minutely to analyse each step of the Guidance but rather to consider the matter in the round, and on that basis, assess whether the final penalty is appropriate.": see paragraph 75 of *Kier*. The Tribunal went on:
>
> > "76. The "margin of appreciation" to which the Tribunal there refers does not in any way impede or diminish the Tribunal's undoubted jurisdiction to reach its own independent view as to what is a just penalty in the light of all the relevant factors. In these circumstances any debate about the scope of any margin of appreciation becomes somewhat sterile. The Guidance reflects the OFT's chosen methodology for exercising its power to penalise infringements. It is expressed in relatively wide and non-specific language, which is open to interpretation, and which is clearly designed to leave the OFT sufficient flexibility to apply its provisions in many different situations. Provided the penalty ultimately arrived at is, in the Tribunal's view, appropriate it will rarely serve much purpose to examine minutely the way in which the OFT interpreted and applied the Guidance at each specific step. As the Tribunal said in Argos (above), the Guidance allows scope for adjusting at later stages a penalty which viewed in isolation at an earlier, provisional, stage might appear too high or too low.
> >
> > 77. On the other hand if, as in all the Present Appeals, the ultimate penalty appears to be excessive it will be important for the Tribunal to investigate and identify at which stage of the OFT's process error has crept in. Assuming the Guidance itself is unimpugned (and in the Present Appeals there has been no attack on it), the imposition of an excessive or unjust penalty is likely to reflect some misapplication or misinterpretation of the Guidance."

267. The Tribunal in *Balmoral CAT* further explained at paragraph 135 that:

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

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

268. This approach to penalty assessment been cited with approval and applied by the Tribunal in subsequent cases: see e.g. *Ping Europe Limited v Competition and Markets Authority* [2018] CAT 13 at paragraph 237 and *Royal Mail v Ofcom* [2019] CAT 27 at paragraphs 771-773.[88]

(4) The Tribunal's assessment of the penalty

269. We note that Lexon does not challenge the CMA's power to impose a penalty in this case nor does it make any criticism of the substance of the Penalty Guidance. Its appeal concerns the application of the Penalty Guidance in correctly assessing the starting point and the uplift for deterrence.

(a) Step 1: the inclusion of Lexon's share of profit from the supply under the Lexon/Medreich joint venture arrangements to Teva in the calculation of relevant turnover

270. On the issue of the correct starting point, Lexon first objects to the inclusion of Lexon's share of profit from the supply of Nortriptyline to Teva under the Teva Supply Agreement pursuant to the Joint Venture Agreement in the calculation of Lexon's relevant turnover. On this we agree with the CMA's position that what matters is the turnover earned on the relevant market, however this has come about. This appears to accord with the view taken by Lexon itself in preparing its annual accounts and we see little room for argument on the point.

271. It is true that the Penalty Guidance acknowledges that in "exceptional circumstances" a different figure may be used "as reflecting the true scale of an undertaking's activities

[88] We note that subsequent appeals in the *Balmoral* and *Ping* cases, including as to penalty, were dismissed by the Court of Appeal. See *Balmoral CoA* [2019] EWCA Civ 162 and *Ping CoA* [2020] EWCA Civ 13.

in the relevant market" (Penalty Guidance paragraph 2.12) but that is the opposite of what is in consideration here. The economic reality (reflected in the annual accounts) is that Lexon shares in the profits derived from the Joint Venture Agreement supplying the Product to Teva and therefore not to take account of this would understate the true scale of Lexon's activities in the relevant market. We also note that the position of Teva was a central issue on the facts and that the objective of slowing the decline in prices benefited Lexon more through the impact on its profit share from Teva's sales than through its own direct sales. We therefore reject this argument.

(b) Step 1: 20% starting point

272. The above considerations apply correspondingly to Lexon's claim that Teva's market share should not be combined with that of Lexon for the purpose of calculating the percentage uplift for the purposes of Step 1. We find no fault in the CMA's approach in this respect.

273. Lexon questions the percentage applied as the starting point to reflect the seriousness of the infringement. We note that 20% is at the top of the range applied by the CMA to "certain, less serious object infringements, and for infringements by effect". The higher range of 21-30% is the starting point generally applied to "cartel activities, such as price-fixing and market sharing and other non-cartel object infringements which are inherently likely to cause harm to competition". (Penalty Guidance paragraph 2.6).

274. We previously decided that the CMA's findings of infringement were justified and that Lexon was party to a concerted practice in which commercially sensitive market information was exchanged between actual or potential competitors over a significant period.

275. We therefore conclude that the CMA was fully justified in setting 20% of annual turnover as the appropriate starting point for its penalty assessment.

(c) Step 4: the uplift

276. On the issue of the uplift for deterrence at Step 4 we do not find that an uplift of 75%, in the circumstances applying to Lexon, was unjustified or disproportionate. The CMA had calculated a figure of £697,362 at the end of Steps 1-3 as provided in the Penalty Guidance. It then had to consider whether a penalty of this amount would fulfil the purpose of dissuading Lexon from breaking the law in the future. This can only be assessed by reference to how significant such a sum would be in the light of an undertaking's other activities and its overall financial position. Taking into account the very small proportion of Lexon's world-wide turnover accounted for by sales of the Product, the relative unimportance of the Product in Lexon's sales portfolio, and the (albeit higher) proportion of its post-tax profits attributable to sales of the Product, together with the small share it represented of its net assets, the CMA considered the Step 3 sum to be insufficient without a substantial uplift. We find no fault with this assessment or with the amount of uplift applied.

277. As to proportionality, the difference in uplift percentage between King (50%) and Lexon (75%) is neither unfair nor disproportionate. Lexon has a far higher annual turnover than King and is altogether a larger and more diverse operation. The seriousness of the relative contributions of King and Lexon to the infringement was taken into account in Steps 2 and 3, against which Lexon raises no objection. An uplift of 75% applied to Lexon in this case does not seem to us to be disproportionate. We therefore reject Lexon's claim on these aspects also.

278. In addition to examining Lexon's specific complaints we are also required to satisfy ourselves that, viewed in the round, the penalty of £1,220,383 is appropriate in all the circumstances of the case. Lexon argues that the infringement found by the CMA was not of sufficient seriousness to justify such a penalty, being either novel in terms of restriction by object or insignificant in its economic effects.

279. These points are, however, in essence a resubmission of Lexon's arguments on the substance of the CMA's findings, which we have rejected. We found that the CMA's Decision on infringement was correct and that the infringement in question was of a significant degree of seriousness. We find a penalty of some £1.2 million in a business

where Lexon realised very substantial profits over a significant period in clear breach of the law to be amply justified.

(5) Conclusion on Ground 3

280. For those reasons, we reject Lexon's appeal in relation to the penalty imposed by the CMA in the Decision and dismiss Ground 3.

L. OUR OVERALL CONCLUSION ON THE APPEAL

281. For the reasons given in this judgment, it is our unanimous conclusion that the Appeal be dismissed in its entirety.

M. THE TRANSFERRED PROCEEDING: THE FIRST CONDITION OF THE CDDA CLAIM

(1) Background

282. In addition to Lexon's Appeal, the Tribunal has also considered an important issue concerning the personal position of Mr Sonpal.

283. The CMA, as part of its overall action against the parties to the infringement the subject of the Appeal, sought competition disqualification orders in the High Court under section 9A CDDA 1986 against individual directors, including Mr Sonpal. Dr Hallwood of King and Mr Davies of Alissa gave undertakings not to serve as company director for periods of seven and two years respectively,[89] but Mr Sonpal contests the CMA's claim in the proceedings commenced by the CMA.

284. As explained above at paragraph 23, by order of the High Court (Marcus Smith J) of 15 September 2020 the determination of the First Condition (as defined by section 9A(2) of the CDDA) was transferred to this Tribunal pursuant to regulation 2 of the Section 16 Enterprise Act 2002 Regulations 2015 (S.I. 2015/1643).

[89] Mr Davies' undertaking has recently been suspended on account of the Covid-19 pandemic.

285. On 17 September 2020, the Chairman ordered that the Transferred Proceeding be heard and determined together with the Appeal under the same case number and by reference to the Decision. The Chairman also ordered that the evidence and arguments advanced by and on behalf of Lexon and the CMA in the Appeal should stand as evidence and arguments advanced by and on behalf of Mr Sonpal and the CMA respectively in the Transferred Proceeding. The order of 17 September 2020 was made with the consent of the parties.

286. The First Condition to be determined by the Tribunal is whether Lexon, a company of which Mr Sonpal was and is a director, has committed a breach of competition law, as defined by section 9A(4) CDDA 1986.

287. The relevant provisions of competition law for the purposes of the CDDA 1986 include Article 101 TFEU and Chapter I CA 1998.

(2) The Tribunal's Determination

288. We have expressly considered, as part of our consideration of the Appeal, the issue of Lexon's breach of Article 101 TFEU and Chapter I CA 1998 and concluded that the Appeal fails in its entirety. Consequently, the CMA's Decision stands and Lexon's infringement of competition law is confirmed.

289. It is not contested that Mr Sonpal was at all material times a director of Lexon. This is confirmed not only in the Decision and the evidence there relied on[90] but also in Mr Sonpal's evidence to the Tribunal[91] and the orders of the High Court and of this Tribunal referred to above. Consequently, the requirements of the First Condition, as transferred to us by the High Court, are fulfilled, and we determine accordingly.

290. As with our conclusion on Lexon's Appeal, this determination is unanimous.

[90] Decision paragraph 3.10 and footnote 30 citing Mr Sonpal's first interview with the CMA.
[91] Sonpal 1, paragraph 1.

Peter Freeman CBE QC (*Hon*) Paul Lomas Derek Ridyard
Chairman

Charles Dhanowa OBE QC (*Hon*) Date: 25 February 2021
Registrar

APPENDIX

Conclusions on Ground 1 by reference to the agreed List of Issues[92]

1. **Issue 1**: whether the CMA erred in law as to the meaning of an infringement by object:

    (a) by failing to assess whether there was a real degree of certainty that the conduct at issue would actually distort the market;

    (b) by finding an infringement in the absence of experience of past distortions of competition resulting from similar conduct in the past;

    (c) in the manner in which the CMA had regard to the economic context of the conduct at issue;

    (d) by failing to have any, or any adequate, regard to (i) the nature of the information exchanged (ii) the importance of the information for fixing prices and/or (iii) the frequency of the information exchanges.

2. In relation to **Issue 1** we find that:

    (1) **Issue 1(a)** - In the approach that it took, as set out in the Decision, the CMA did meet the necessary legal test.

    (2) **Issue 1(b)** - The conduct established on the facts was sufficiently within the scope of previous decisions and experience to be an infringement by object.

    (3) **Issue 1(c)** - The CMA had appropriate regard to the economic context both as regards interpreting and putting in context the actual behaviours alleged to be infringements by object and as regards considering whether competition in the market concerned could have been sufficiently restricted or distorted by those behaviours.

[92] The List of Issues, as agreed by counsel for both the CMA and Lexon and filed with the Tribunal on 10 November 2020.

(4) **Issue 1(d)** - The CMA did adequately understand and have regard to these factors and that it was right in its conclusions.

3. **Issue 2**: Whether the CMA erred by failing properly to assess the economic context of the information exchanges, and in particular whether the CMA did not have proper regard to any or all of the following matters:

(a) the actual suppliers of nortriptyline;

(b) Lexon's position as a wholesaler and its vertical supply relationship with King (and Alissa) including whether they were actual competitors in the supply of nortriptyline;

(c) the small volume of sales made by Lexon;

(d) the difference in King and Lexon's core customer base, respectively wholesalers and retail pharmacies;

(e) the extent to which market prices and volume were publicly available at the time;

(f) the fall in nortriptyline prices at the start of the alleged infringement; and/or

(g) Alissa's market position.

4. In relation to **Issue 2** we find that these sub-issues raise a number of points addressed above in the judgment. As already explained, we find that in relation to each sub-issue the CMA both properly understood and assessed the economic context and did have proper regard to the factors listed as Issues 2(a)-(g).

5. **Issue 3**: Whether the CMA was wrong to decide that the information exchanges between Lexon and King and/or Alissa between 27 July 2015 and 27 May 2016 had:

(a) as their object the restriction of competition within the meaning of Article 101(1) TFEU; and/or

(b) as their objective the maintenance of prices (or slowing their decline) within the meaning of Article 101(1).

6. In relation to **Issue 3** we find that for the reasons set out above, the CMA was not wrong to so decide. On the facts, the information exchanges did have this object and this objective.