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Decision

Infringement by Economy Energy, E (Gas and Electricity) and Dyball Associates of Chapter I of the Competition Act 1998 with respect to an anti-competitive agreement

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The Gas and Electricity Markets Authority has found that Economy Energy, E (Gas and Electricity) and Dyball Associates entered into an agreement and/or concerted practice to share markets and/or allocate customers between Economy Energy and E (Gas and Electricity) in relation to the supply of gas and electricity to domestic customers in Great Britain. This agreement and/or concerted practice had as its object the prevention, restriction or distortion of competition.

Contents

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [✂].

The names of some individuals mentioned in the description of the infringement in the original version of this Decision have been removed from the published version on the public register. Names have been replaced by a general descriptor of the individual's role.

Some footnotes refer to information obtained during the investigation. Footnotes beginning 'EP' refer to information obtained from/concerning EGEL, footnotes beginning 'EE' to information obtained from/concerning Economy and 'DL' to information obtained from/concerning Dyball.

1. Introduction and executive summary

1.1. By this Decision, the Gas and Electricity Markets Authority (the "**Authority**")[1] has concluded that the persons listed in paragraph 1.2 below have infringed the prohibition imposed by section 2(1) of the Competition Act 1998 (the "**CA98**") (the "**Chapter I prohibition**").

The Parties

1.2. This Decision is addressed to:

1.2.1. Economy Energy Trading Limited (in administration) (company number 07513319), a company incorporated in England whose registered address is 4 Hardman Square, Spinningfields, Manchester, M3 3EB;

1.2.2. Economy Energy Holdings Limited (company number 09493277), a company incorporated in England which owns 100% of the shares in Economy Energy Trading Limited and whose registered address is 3mc Siskin Drive, Middlemarch Business Park, Coventry, England, CV3 4FJ (together with its subsidiaries, including Economy Energy Trading Limited, this company forms an undertaking referred to as "**Economy**" below);

1.2.3. E (Gas and Electricity) Limited (company number 08520118), a company incorporated in England with a registered address at T3 Trinity Park, Bickenhill Lane, Birmingham, England, B37 7ES;

1.2.4. E Holdings Ltd (company number 09701430), a company incorporated in England which owns 100% of the shares in E (Gas and Electricity) Limited and has the same registered address (together with its subsidiaries, including E (Gas and Electricity) Limited, this company forms an undertaking referred to as "**EGEL**" below);

1.2.5. Dyball Associates Limited (company number 03051103), a company incorporated in England whose registered address is 4 Beech Avenue, Worcester, Worcestershire, WR3 8PZ; and

1.2.6. Dyball Holdings Limited (company number 10029620), a company incorporated in England on 26 February 2016, which owns 100% of the shares in Dyball Associates Limited. Its registered address is 5 Deansway, Worcester, Worcestershire, England, WR1 2JG (together with its subsidiaries, including Dyball Associates Limited this company forms an undertaking referred to as "**Dyball**" below),

which, in this Decision, are referred to singularly as a "**Party**" and collectively as the "**Parties**".

The Infringement

1.3. The Authority has found that Economy, EGEL and Dyball entered into an agreement and/or concerted practice to share markets and/or allocate customers between Economy and EGEL in relation to the supply of gas and electricity to domestic customers in Great Britain (the "**Infringement**"). Under the Infringement, Economy, EGEL and Dyball agreed that neither Economy and EGEL, nor their sales agents, would actively target customers already supplied with gas and/or electricity by the

[1] The Authority is the government regulator for gas and electricity markets in Great Britain, created under statute, and the governing body of Ofgem. For the purpose of this notice, the term also refers to Ofgem as it represents the Authority.

other but each other's existing customers would be allowed to switch between the two businesses if they pro-actively sought to do so. The agreement and/or concerted practice was supported by the Parties sharing commercially sensitive and strategic information, in the form of details of their current customers. The Infringement existed from, at the latest, January 2016 until, at the earliest, the date of the Authority's first investigatory steps in this investigation in September 2016 (the "**Relevant Period**"). This agreement and/or concerted practice had as its object the prevention, restriction or distortion of competition.

1.4. Dyball was party to the Infringement and intended to contribute, and did contribute, to the common objectives pursued by Economy and EGEL. Dyball did this by facilitating the sharing of markets and allocation of customers between Economy and EGEL, through its own conduct in designing, implementing and maintaining software systems that allowed the acquisition of certain customers to be blocked and customer lists to be shared, and by, itself, sharing customer lists and instructions to block particular customers from switching between Economy and EGEL. Dyball was aware of the actual conduct planned and/or put into effect by Economy and EGEL in pursuit of the objective of sharing markets and/or allocating customers. Therefore, Dyball participated as a facilitator in the Infringement.

1.5. Based on the evidence available to the Authority, the conduct referred to in the preceding paragraphs does not benefit from a relevant exemption under the CA98.

1.6. Section 36 of the CA98 provides that the Authority may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of the Chapter I prohibition. The Authority has found that the Parties committed the Infringement at least negligently and has decided to impose financial penalties of £200,000 on Economy, £650,000 on EGEL and £20,000 on Dyball. Section 8 sets out the detail of this Decision in relation to financial penalty.

2. Glossary

2.1. In this Decision, the following terms shall have the definitions set out below. Where in this Decision it is helpful for the reader to reference a defined term in the text, such term may also be defined in the text.

AEC – adverse effect on competition.

API – application programming interface. This is a means of exposing some of a computer programme's internal functions to the outside world. This allows applications to share data without requiring developers to share all of their software's code. In essence, a programme's API defines the proper way for a developer to request data and services from that programme, allowing programmes to interact.

Article 101(3) Guidelines – European Commission guidelines on the application of Article [101](3) of the Treaty on the Functioning of the European Union.[2]

Authority – the Gas and Electricity Markets Authority.

BSC – the Balancing and Settlement Code is a legal document which defines the rules and governance for the balancing mechanism and imbalance settlement processes of electricity in Great Britain. It is established under National Grid Electricity Transmission Plc's electricity transmission licence. Each electricity supply licensee is required to be a party to the BSC.

[2] Official Journal of the European Union C 101, 27/04/2004, pages 97 to 118.

CA98 – Competition Act 1998.[3]

CAT – the Competition Appeal Tribunal.

Chapter I prohibition – the prohibition, contained in section 2(1) of the CA98, of agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

CJEU – the Court of Justice of the European Union, consisting of the Court of Justice and the General Court, established by articles 251 to 256 of the Treaty on the Functioning of the European Union.

CMA – the Competition and Markets Authority.

CMA Rules – the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 (SI 2014/458).

CRM – customer relationship management. Systems and applications that are designed to manage and maintain a business' customer relationships, track engagements and sales, and provide actionable data. The CRM systems used by Economy and EGEL were developed by Dyball.

CSM – customer service manager. This is a system, developed by Dyball for Economy and EGEL, to manage the relationship between each of those companies and their respective customers, as an update to Economy's and EGEL's CRM systems.

Demerger Agreement – a contract entitled "*Demerger Agreement relating to Economy Energy Trading Limited*" between Lubna Khilji, Paul Cooke, Economy and EGEL and dated 28 August 2014.[4]

[✂], a workforce management software provider to Economy.

ECOES – the Electricity Central Online Enquiry Service database provides data and statistics on the energy industry. It provides a centralised database for 32 million MPANs and is updated by all Distribution Network Operators on a daily basis. Access to ECOES is available to suppliers, distributors, supplier agents (e.g., meter operators and data collectors) and commercial, non-domestic customers with at least two meter points (but only for sites that they currently occupy). Some other parties may request access to ECOES data.[5] In order to obtain access, third parties must complete an application process, sign a licence agreement and pay any agreed fees and charges. All users of ECOES information are subject to an annual information security audit. ECOES contains information about every domestic and commercial electricity meter in the UK. The database contains two pieces of vital information about business and domestic customers: the MPAN and the current supplier.

ELEXON – is a not-for-profit company created to fulfil the role of the Balancing and Settlement Code Company under the BSC. It procures and provides services to administer and implement the balancing and settlement rules that enable and support the wholesale market in electricity. To do this, ELEXON compares contracts to buy and sell electricity in the wholesale market with actual volumes.

EMI – the Energy Market Investigation was an investigation into competition in the energy market in Great Britain conducted by the CMA pursuant to a reference to the CMA by the Authority. The CMA published its final EMI report in June 2016.

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[3] Certain provisions of Part I of the CA98 apply to the Authority by virtue of section 36A of the Gas Act 1986 and section 43 of the Electricity Act 1989.
[4] A copy of the signed agreement is on the case file under document reference EP0356.
[5] We note the evidence gathered by the CMA in the course of its EMI suggesting that PCWs were refused access to the ECOES database (see section 13 of the findings section of the EMI report, particularly paragraph 13.335).

[✂], a sales agency acting for Economy.

Enforcement Guidelines – Ofgem's enforcement guidelines, published on 10 October 2017.

[✂] [✂], a sales agent acting for EGEL.[6]

GSP – grid supply point, meaning a point at which gas is taken from the high pressure gas transmission system into a local, lower pressure gas distribution system or electricity is taken from the higher voltage transmission system into a local, lower voltage electricity distribution system.

Infringement – see paragraph 1.3.

Joint Response – Economy and EGEL's response dated 24 July 2018 to the Statement of Objections.[7]

[✂], a sales agency acting for EGEL.

Letter of Facts – a letter of facts sent by the Authority to the Parties in January 2019 setting out evidence which it considers supports the objections set out in the Statement of Objections and which may be relied upon by the Authority to establish that the Infringement has been committed.

MPAN – a meter point administration number is used to identify an individual electricity supply point. The MPAN system was introduced in 1998, in order to help make competition in the energy market easier, and to simplify administration generally. The MPAN is a 21-digit number used to uniquely identify a customer's electricity supply, tariff and supply structure. This number is needed by electricity suppliers to undertake the processes required to allow a customer to switch to that supplier. It also confirms the location of the supply point and the current supplier, as well as the supplier history for the previous 5 years. ELEXON maintains a database of all MPANs. The equivalent for gas supply is an MPRN.

MPRN – a meter point registration number is a 10-digit number used to uniquely identify a point where gas is taken from the distribution network, an individual gas supply point. It will also identify the current registered gas supplier of the premises at that supply point. The equivalent for electricity supply is an MPAN. Xoserve maintains a database of all MPRNs.

MPxN – this term is used in certain correspondence with Dyball and in CRM systems developed by Dyball to refer to either an MPAN or MPRN, or both.

PCW – Price comparison website. A website that offers price comparison and switching services.

Penalties Guidance – the CMA's "*Guidance on the appropriate amount of a penalty*" (CMA73, published on 18 April 2018).

PPM – prepayment meter(s).

Procedural Officer's Decision – decision 2018/1 of the Authority's Procedural Officer, dated 23 May 2018 and taken pursuant to CMA Rule 8(1) in response to an application to the Authority's Procedural Officer made in March 2018 requesting that certain aspects of the investigation be reviewed.[8]

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[6] Document reference EP0104. For more information on the role of EGEL's sales agents, see the Authority's notice dated 15 January 2018 of its decision to impose a financial penalty on EGEL pursuant to section 30A (3) of the Gas Act 1986 and 27A(3) of the Electricity Act 1989: https://www.ofgem.gov.uk/system/files/docs/2018/01/notice_of_decision_to_impose_a_financial_penalty_on_e_gas_and_electricity_ltd_15_january_2018.pdf

[7] Document reference JR0001. Dyball provided a separate response to the Statement of Objections that is not covered by this defined term.

[8] That decision was published on the Authority's website:

PSC – person with significant control. The PSC register includes information about the individuals who own or control companies including their name, month and year of birth, nationality, and details of their interest in the company. Since 30 June 2016, UK companies (except listed companies) have been required to declare this information when issuing their annual confirmation statement to Companies House. A person of significant control is someone who holds more than 25% of shares or voting rights in a company, has the right to appoint or remove the majority of the board of directors or otherwise exercises significant influence or control. A summary of the Parties' statutory filings under the PSC regime is included in appendix 2 to this Decision.

Relevant Period – the duration of the Infringement as described in paragraph 1.3 of this Decision.

SCOGES - the Single Centralised On-Line Gas Enquiry Service. This is a database in which Xoserve publishes registration data on behalf of all gas network companies. It comprises similar data for gas as contained in the ECOES database for electricity.

Section 26 Notice – a notice requiring the production of documents or the provision of information pursuant to powers in section 26 of the CA98.

Six Large Energy Firms – British Gas,[9] E.ON UK,[10] SSE,[11] npower,[12] EDF Energy[13] and ScottishPower.[14]

SMEs – small and medium-sized enterprises.

Statement of Objections – the Authority's Statement of Objections dated 29 May 2018.

Supplier – a person licensed by the Authority to sell gas and/or electricity to domestic and non-domestic customers.

TFEU – the Treaty on the Functioning of the European Union.

Xoserve – a joint venture between gas transporters delivering transportation transactional services to support the operation of the British gas market. Those services include billing, managing the booking of capacity, running the gas settlement systems and managing the change of supplier process. Xoserve is responsible for creating new MPRNs in response to requests from gas shippers, transporters or utility infrastructure providers. It maintains a database of all MPRNs, to which industry participants have access.

3. Jurisdiction

3.1. The Authority has concurrent jurisdiction with the CMA to apply and enforce the Chapter I prohibition, so far as it relates to the carrying on of the following activities:

3.1.1. commercial activities connected with the generation, transmission or supply of electricity or the use of electricity interconnectors; or

https://www.ofgem.gov.uk/system/files/docs/2018/10/procedural_officer_decision_dated_23_may_2018.pdf.

[9] British Gas Trading Limited, a company owned by Centrica plc.
[10] E.ON Energy Solutions Limited, a company owned by E.ON UK plc, which is owned by E.ON SE.
[11] Scottish and Southern Energy plc.
[12] RWE npower plc, a company owned by RWE AG.
[13] EDF Energy plc, a company owned by EDF S.A.
[14] A company owned by Iberdrola S.A.

3.1.2. the supply to any premises of gas which has been conveyed to those premises through pipes, or activities that are ancillary to such supply.[15]

3.2. The matters described in this Decision relate to these activities.

3.3. For the reasons set out in sections 5 and 7 below, the matters concerned by this Decision relate to agreements, decisions or concerted practices of the kind mentioned in section 2(1) of the CA98.

3.4. The requirements of the concurrency regime are met as the Authority has consulted with the CMA prior to exercising functions under the CA98 and, subsequently on 12 August 2016, the CMA agreed that the Authority should exercise its concurrent functions under Part I of the CA98 in respect of the conduct described below, in accordance with the Competition Act 1998 (Concurrency) Regulations 2014.

4. The investigation

4.1. This section sets out the origin of this investigation and an overview of the investigatory steps.

Launch of the investigation

4.2. In April 2016 and May 2016, the Authority received information from anonymous sources which, along with market switching data, caused it to have reasonable grounds for suspecting that Economy and EGEL had infringed the Chapter I prohibition.[16]

4.3. In August 2016, the Authority opened a formal investigation under the CA98 following consultation with the CMA, as described above. When writing to the Parties to inform them of the investigation, the Authority offered to meet with the Parties to discuss the reasons for having done so.

Evidence-gathering

4.4. In September 2016, the Authority took its first investigatory measures using powers under both section 26 and section 27 of the CA98. In particular:

4.4.1. The Authority's staff entered the premises of both Economy and EGEL using the power to enter business premises without a warrant and without having given notice, as provided for in section 27 of the CA98. During (in the case of one of the Parties) and shortly after (in the case of the other Party) the inspections, Section 26 Notices were issued;

4.4.2. Lubna Khilji (the managing director of Economy) and Paul Cooke (the managing director of EGEL) were each served personally with a Section 26 Notice.

4.5. During these inspections, the Authority obtained relevant information and documents. The Authority also forensically imaged IT material from relevant servers and other electronic devices held at the respective Parties' premises. Those forensic

[15] Section 36A of the Gas Act 1986 and section 43 of the Electricity Act 1989 set out the scope of the Authority's concurrent jurisdiction to enforce certain provisions of the CA98, including the Chapter I prohibition. Where the matter to be investigated falls within the scope of the Authority's CA98 jurisdiction, both the Authority and the CMA have powers to investigate a suspected infringement of the Chapter I prohibition, although only one authority may exercise powers in relation to a particular case.
[16] Document references WB1 to WB5.

images were kept by the Parties' respective legal advisers and have not been reviewed by the Authority.

4.6. On the same day as the inspections at the premises of Economy and EGEL, the Authority served a Section 26 Notice on *[✂]*, a company acting as a sales agent for Economy. It also served notice, pursuant to section 27 of the CA98, on *[✂] [✂]*, a company acting as a sales agent for EGEL, to produce documents to the Authority at the company's premises several days later.

4.7. Documents produced at the inspections indicated that Dyball may have played a role in the Infringement. In October 2016, following consideration of those documents, the Authority concluded that it had reasonable grounds for suspecting that Dyball was party to the Infringement. The Authority then served a Section 26 Notice on that undertaking and, on 13 and 14 October 2016, conducted an inspection, with notice, at Dyball's business premises using its powers under section 27 of the CA98.

4.8. In January 2017, the Authority interviewed two of Dyball's directors (Andrew Dyball and *[✂]*) on a voluntary basis. In March 2017, it interviewed *[✂] [✂]*, using powers to ask questions contained in section 26A of the CA98.

4.9. At the end of March 2017, a further Section 26 Notice was served on each of Economy and EGEL, again requesting documents and information including information about how each company was funded and set up, as well as details of any changes to ownership and controlling interest of the company from the date of incorporation to the date of the Authority's notice.

4.10. In correspondence throughout this period, the Authority offered to meet with the Parties for "state of play" meetings.

4.11. In April 2017, EGEL's lawyers wrote to the Authority, claiming that Economy and EGEL should be regarded, for the purposes of competition law, as forming part of a single undertaking, such that the Chapter I prohibition was not applicable to any market sharing/customer allocation agreement between the Parties because Economy and EGEL formed part of the same undertaking.[17] No corroborating evidence was provided with this submission to substantiate this claim. Accordingly, the Authority issued a Section 26 Notice to require EGEL to provide documents substantiating its claim. In June 2017, the Authority also invited Mr Cooke to attend an interview on a voluntary basis, which he accepted. During that interview, Mr Cooke answered questions on EGEL's submissions to the Authority.

4.12. Ms Khilji, however, refused to meet on a voluntary basis to discuss the claims made by EGEL.

4.13. In September 2017, EGEL wrote to the Authority again, providing further information about the alleged links between Ms Khilji, Mr Cooke, EGEL and Economy.[18] In response to this, in October 2017, the Authority sought information and documents in relation to the matters alleged by EGEL from Ms Khilji and Mr Cooke, using Section 26 Notices, and from EGEL and Economy, using powers under section 27 of the CA98.

4.14. In November and December 2017, Economy wrote to the Authority to explain that it considered that Economy and EGEL constitute a single undertaking for the purposes of EU and UK competition law and its reasons for holding that view. On 7 December

[17] Document reference EP0337.
[18] Document reference EP0364.

2017, the Authority met with Economy's lawyers to better understand the legal points made in that submission.

4.15. Given the nature of Economy's submission, the Authority also asked to meet with Ms Khilji on a voluntary basis to allow her the opportunity explain the factual points underlying the argument advanced by Economy. Ms Khilji declined that invitation.

4.16. Given Ms Khilji's refusal to answer questions on a voluntary basis and in order to examine the factual basis of the Parties' argument before issuing a Statement of Objections, in January 2018, the Authority interviewed Ms Khilji and *[✂]* (a director of Economy) using powers to ask questions contained in section 26A of the CA98. The Authority also interviewed relevant individuals connected with EGEL ([EGEL Senior Manager 2] and [EGEL Senior Manager 1]) using the same powers.

4.17. On 27 March 2018, Economy made a complaint to the Authority's Procedural Officer pursuant to CMA Rule 8(1). The Procedural Officer's Decision was issued on 23 May 2018.

The Statement of Objections

4.18. On 29 May 2018, the Authority issued a Statement of Objections to the Parties, pursuant to section 31A of the CA98. On 24 July 2018, Economy and EGEL provided joint written representations in response to the Authority's Statement of Objections (the "**Joint Response**"). Both prior and subsequent to the Joint Response, Economy and EGEL corresponded with the Authority through separately instructed lawyers. On 26 July 2018, written representations were received from Dyball. The legal representatives of Economy and EGEL then attended an oral hearing on the Authority's Statement of Objections on 9 November 2018 and Dyball attended an oral hearing for the same purpose on 12 November 2018. After the hearings, the Authority sent clarificatory questions to Economy and EGEL to which they replied on 23 November 2018. In January 2019, the Authority issued a Letter of Facts to which Economy and EGEL provided a joint response on 27 February 2019.

4.19. On 15 March 2019, the Authority sent the Parties draft penalty calculations. On 27 March 2019, Economy Energy Trading Limited and EGEL sent separate written representations to the Authority and each attended a separate meeting to offer oral representations on 8 April 2019. Subsequently, the Authority has requested further financial information from EGEL. Dyball declined to offer either written or oral representations on its draft penalty calculation and Economy Energy Holdings Limited has not responded. Further financial information was also gathered from Economy Energy Holdings Limited.

Regulatory investigations

4.20. At the same time as opening this investigation, the Authority opened investigations into each of Economy Energy Trading Limited and E (Gas and Electricity) Limited in relation to suspected breaches of certain provisions of their gas and electricity supply licences. Those suspected breaches concerned, separately, each undertaking's sales practices and are of relevance to this Decision because they are referred to in procedural complaints made by the Parties.[19]

4.21. In January 2018, the Authority found that E (Gas and Electricity) Limited had breached a number of the conditions of its licence and closed its investigation.[20] The

[19] See appendix 3 to this Decision and document references PC0001 to PC0004.
[20] As a result of that finding, the Authority imposed a financial penalty on EGEL and EGEL agreed to pay £260,000

investigation into Economy Energy Trading Limited came to an end when it ceased trading in January 2019 and the Authority revoked its licences in order to appoint a "supplier of last resort" to ensure the continued supply of energy to its customers. Given that Economy Energy Trading Limited no longer held a relevant licence, the Authority brought its investigation into its sales practices to an end.

5. Facts

Parties under investigation[21]

Economy

5.1. Economy Energy Trading Limited is a private limited company, in administration. Since 6 February 2019, its registered address is that of its administrators, in Manchester. Previously, its registered office and centre of operations had been in Coventry.

5.2. It had a turnover of £133.7 million in the financial year ended 31 March 2017 and a turnover of £56.9 million in the preceding financial year, ended 31 March 2016. During the 2016-2017 financial year, the company had a monthly average of 106 employees and the equivalent figure for the 2015-2016 financial year was 74. On 8 November 2018, the company extended its accounting reference period ending 31 March 2018 so as to end on 30 September 2018. At the date of this Decision, the company's full accounts for this period were not publicly available. The Authority has been told by one of the company's administrators that they have no plans to finalise those accounts.[22]

5.3. Until January 2019, it was active in the supply of gas and electricity to domestic customers and held a gas supply licence and an electricity supply licence. At 31 March 2016, it had approximately 108,000 customers,[23] around 88% of whom had a prepayment meter ("**PPM**"). It reported that it had 305,000 customers in December 2017.[24]

5.4. Economy Energy Trading Limited has no subsidiaries and all of its share capital is held by Economy Energy Holdings Limited, since the transfer of those shares from Lubna Khilji in March 2015. Ms Khilji has been a director of the company since its incorporation in February 2011. It currently has one other director: John McKenzie. From November 2013 until May 2014, Paul Cooke was a director of this company and Angela Beardsmore was a director from March 2015 until August 2016. Trevor Foster was a non-executive director and chairman of the board from March 2015 until June 2018.

5.5. Economy Energy Trading Limited entered administration on 14 January 2019.

5.6. Economy Energy Holdings Limited is also a private limited company. Ms Khilji is its only director and she owns 100% of its shares. The company has identified Ms Khilji

in voluntary redress. These investigations are mentioned in correspondence between the Authority and the Parties' legal advisers, including in a letter from *[✂]* dated 8 February 2018 (see document reference EE0513).

[21] Most of the information contained under this heading comes from documents filed by the Parties at Companies House.

[22] Transcript of the hearing on a proposed penalty that took place on 8 April 2019, page 12, at G/H.

[23] *Ibid.*

[24] See the company's annual report and financial statements for the year ended 31 March 2017, filed with Companies House in December 2017, page 1, which gives customer figures on 31 March 2017 and in December 2017. At the date of entering administration, Economy had roughly 235,000 customers.

as its "*ultimate controlling party*".[25] On 31 March 2016, it had twelve subsidiaries, nine of which were dormant. Three of the subsidiaries held energy supply licences but, of them, only Economy Energy Trading Limited was trading.

5.7. At the date of this decision, Economy Energy Holdings Limited has not entered administration.

5.8. Documents initially filed with Companies House by Economy Energy Trading Limited and Economy Energy Holdings Limited stated that only Ms Khilji was, from 6 April 2016,[26] a "*person with significant control*" (a "**PSC**") over those companies.[27] On 27 July 2018, Economy Energy Holdings Limited informed Companies House that Ms Khilji and Mr Cooke were equal shareholders in that company and that they had been PSCs since 6 April 2016.[28] On 7 December 2018, Economy Energy Trading Limited notified Companies House that Ms Khilji was not and, in fact, had not been a PSC in respect of Economy Energy Trading Limited. Instead, the company notified Companies House that – rather than Ms Khilji – it was Economy Energy Holdings Limited that had been the relevant PSC since the entry into force of the PSC regime on 6 April 2016.

5.9. During the Relevant Period, Economy marketed its products mostly through face-to-face sales, using tablet devices loaded with a sales app, but also using telesales. When selling face-to-face, sales agents visit prospective customers at their homes, using lists of target customers on the sales app populated using MPAN and MPRN data, or approach potential customers in venues such as shopping centres.[29]

5.10. Economy also had small but growing numbers of sales through its own website and from home movers. During the Relevant Period, Economy was developing the use of PCWs as a sales channel. PCWs became a more significant source of customers for Economy towards the end of 2016.[30]

EGEL

5.11. E (Gas and Electricity) Limited is a private limited company, with its registered address and centre of operations in Birmingham. It had a turnover of £95.5 million in the financial year ended 31 March 2017 and £39.2 million in the preceding financial year. During the 2016-2017 financial year, it had a monthly average of 87 employees and the equivalent figure for the 2015-2016 financial year was 43.[31]

5.12. E (Gas and Electricity) Limited was incorporated in May 2013 as "*Lorimer Power Ltd*". Its name was changed in June 2014 to "*EPower Supply Limited*". It was changed

[25] See Economy Energy Holdings Limited's annual report and financial statements for the year ended 31 March 2017, as filed with Companies House on 22 December 2017.
[26] This was the date from which companies were required to find out if there is anyone who had significant control over the company and, if so, to identify them, keep a record of the fact and notify Companies House.
[27] Document references EE0507, EE0508, EE0509, EE0510 and EE0511. The PSC regime is described in more detail in the glossary to this Decision.
[28] See Appendix 2 to this Decision for a full list of the respective Parties' PSC filings and paragraph 7.40.6.3, below, for their significance to this Decision.
[29] Further, Economy's telesales agencies would use doorstep lead generation (i.e., potential customers would be approached on the doorstep and asked whether they would be interested in a telesales call). Further information about the manner in which Economy organised its sales is given in a recent judgment concerning a contractual dispute between Economy and a sales agency (*Green Deal Marketing Southern Limited v Economy Energy Trading Limited and ors* [2019] EWHC 507 (Ch)).
[30] Document reference EE0296.
[31] This figure is taken from E (Gas and Electricity) Limited's "*Annual Report and Financial Statements for the year ended 31 March 2016*", filed with Companies House in February 2017, page 10.

again in November 2014 to "*E (Generation and Supply) Limited*" and, then, to its current name in December 2014.[32]

5.13. It is active in the supply of gas and electricity to domestic customers and holds a gas supply licence and an electricity supply licence. It reported that, in December 2017, it had just below 250,000 customers.[33] On 31 March 2016, it had more than 70,000 customers, almost all or all of whom had a PPM.[34]

5.14. From 25 July 2014 until 31 August 2016, Paul Cooke owned all of the shares in this company. On that date, he transferred those shares to E Holdings Ltd. Mr Cooke holds 100% of the shares in E Holdings Ltd and is its only director. He is also E (Gas and Electricity) Limited's only director and acts as its managing director. From 4 July 2016 until 22 January 2018, Claudia Proffitt was also a director of E (Gas and Electricity) Limited.

5.15. For the year ended 31 March 2016, E Holdings Ltd filed accounts for a dormant company and, for the year ended 31 March 2017, it reported income totalling £5,000, in the form of interest from shares in the group undertakings.

5.16. Documents filed by E (Gas and Electricity) Limited with Companies House prior to the Authority issuing its Statement of Objections state that E Holdings Ltd was, from 6 April 2016, a "*person with significant control*" over E (Gas and Electricity) Limited.[35] Those documents make no reference to any other person as having significant control over the company. Throughout December 2018 and January 2019, there were 11 statutory filings with Companies House amending the registered PSC(s) for the EGEL companies in respect of the Relevant Period,[36] with the result that both Ms Khilji and Mr Cooke are now registered as PSCs in respect of EGEL during the Relevant Period.

5.17. In turn, documents filed by E Holdings Ltd identify Mr Cooke as, from 6 April 2016, a person "*with significant control*" over that company.[37] Those documents make no reference to any other person as having significant control over the company.

5.18. During the Relevant Period, EGEL marketed its products through face-to-face sales, using tablet devices loaded with a sales app,[38] whilst developing a small but growing number of sales via PCWs.[39] EGEL's face-to-face sales were carried out in a similar fashion to Economy's sales, with external sales agents visiting potential customers in their homes and showing them a comparison, on a tablet device, between EGEL's tariff for that property and the tariffs of other suppliers.[40]

Economy and EGEL (submissions to the effect that they form part of the same undertaking)[41]

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[32] EGEL was originally incorporated by Dyball as an "*off-the-shelf*" supplier. It was acquired by Mr Cooke in 2014, from which point Andrew Dyball had no further ownership rights in the company nor involvement in its management. Dyball provided, and continues to provide, support services to EGEL.
[33] This information is also taken from the company's annual report and financial statements for the year ended 31 March 2017, as filed with Companies House in December 2017 and appears to gives customer figures in December 2017.
[34] This information was included in information reported to the Authority by EGEL as part of its social reporting obligations.
[35] Document references EP0724 and EP0727.
[36] Further information on those filings is given in Appendix 2 to this Decision.
[37] Document references EP0725, EP0726 and EP0728.
[38] Document references EW0004, EW0005 and EW0006 give a detailed description of how face-to-face sales, using sales apps, are done. Also EP0334 gives a description of EGEL's sales channels.
[39] Document references EP0234 and EP0334.
[40] Document references EW0004, EW0005 and EW0006.
[41] The account of Economy's and EGEL's arguments given in this section is a summary of submissions made by

5.19. Each of Economy and EGEL have submitted that they form part of a single undertaking for the purposes of competition law. Economy and EGEL have asked the Authority to look beyond the legal shareholdings in each of Economy and EGEL during the Relevant Period, which showed no common legal ownership.

5.20. In response to the Authority's first information request regarding how each of Economy and EGEL was structured, no reference to common ownership was made by either Party.[42]

5.21. EGEL's response included the following statement: "[EGEL] *arose from an off the shelf company called Lorimer Power Ltd which was set up by Andrew Dyball and Alison Hughes. Mr Paul Cooke purchased the entire issued share capital of Lorimer Power Ltd in July 2014 and* [EGEL] *began trading under its current name in December 2014. There has been no change in ownership or controlling interest since Mr Cooke purchased the company in July 2014*".[43] Economy's response made no reference to Mr Cooke having any ownership or controlling interest in Economy, although it did refer to the initial investment in Economy having come from Ms Khilji and Mr Cooke and it mentioned that Mr Cooke's parents held a small number of shares in Economy between February 2012 and March 2014.[44]

5.22. The Parties became aware of the Authority's investigation in September 2016 and EGEL approached the Authority in late April 2017 to claim that it formed part of a single undertaking with Economy.[45] Economy raised the same argument in similar terms in November 2017, 14 months after having been made aware of the Authority's investigation and eight months after the Authority's March information request.[46] No explanation has been given for this delay in raising what appears to be an obvious and fundamental point if, indeed, Economy and EGEL have been owned and operated in the manner suggested in the submissions subsequently put to the Authority.[47] Neither has a convincing explanation been offered as to why this point was not mentioned by either party when asked about ownership and control by the Authority in March 2017. The Parties' submissions on the point have developed over time, with a material expansion of the purported factual basis for its case on this point being advanced in February 2018, [48] and further developments since. In these circumstances, the Authority has considered all of the evidence gathered and submissions made on this point.

5.23. The documentary evidence and industry data the Authority has gathered concerning the Relevant Period is consistent with Economy and EGEL being separate undertakings. That evidence is discussed in greater detail in section 7, below, and consists of the following:

Economy's and EGEL's lawyers, as well as information provided by officers and employees of each company during voluntary and mandatory interviews.

[42] For the Authority's information requests, see document reference EE0289, page 4, in respect of Economy and document reference EP0321, page 4, in respect of EGEL. The respective responses, received from the Parties' specialist competition lawyers, can be found at document references EE0299, pages 1 and 2, and EP0331, page 1.

[43] Document reference EP0331.

[44] Document reference EE0299.

[45] A note from *[✂]*, on behalf of EGEL (document reference EP0337). This note was provided in response to an information request in which the Authority sought information about the manner in which the Parties were owned and controlled.

[46] Document reference EE0408.

[47] Economy has claimed that Ms Khilji mentioned her connection with Mr Cooke and EGEL to the case team during the Authority's inspection of Economy's offices in September 2016, although it has been unable to substantiate this statement.

[48] Document reference EE0419.

5.23.1. Unambiguous statements made by Economy in a letter and a follow-up e-mail to the Authority in October 2014 to the effect that Mr Cooke had no connection with Economy and EGEL was a competitor;

5.23.2. The terms of the Demerger Agreement dated August 2014, by which Ms Khilji and Mr Cooke separated their business interests;

5.23.3. Senior managers at each company did not regard the businesses as forming part of the same group;

5.23.4. Statements made by Mr Cooke at interview in which he explained that EGEL is his and Economy is Ms Khilji's;

5.23.5. Economy and EGEL compete against each other for customers based, on amongst other elements, clear evidence of switching between the companies;

5.23.6. Companies House filings that stated, until after the Statement of Objections was issued, that Ms Khilji ultimately controls Economy and only Mr Cooke controls EGEL;

5.23.7. Economy and EGEL having distinct brands on the market, operating from separate premises, each with its own workforce and are presented as unconnected businesses on the market and to other entities with which they contract;

5.23.8. An e-mail sent by Ms Khilji to Mr Cooke saying "*LP is now entirely yours*";[49] and

5.23.9. EGEL's senior managers referred to "*our anti-competitive behaviour*" in an internal e-mail dated March 2016, suggesting that senior managers recognised that their behaviour was anti-competitive and that Economy and EGEL were separate businesses.

5.24. Economy and EGEL rely upon a number of common arguments in seeking to establish that they formed part of a single undertaking during the Relevant Period, including the circumstances in which EGEL was established. However, Economy has provided only a small number of documents, of limited relevance, created after the date of the Demerger Agreement to support its claims. Several hundred contemporaneous documents provided by EGEL show little or no involvement by Ms Khilji in decisions taken at EGEL.[50]

5.25. Economy and EGEL have submitted that the Authority should take "*a holistic approach*" when considering whether they formed part of a single undertaking for the purposes of competition law during the Relevant Period. In support of such an approach, Economy and EGEL submit that common ownership of Economy and EGEL; a common project established by Mr Cooke and Ms Khilji; and the totality of personal, economic and legal links existing between Economy and EGEL, mean that at all relevant times EGEL could not, and did not, determine its own conduct independently from Ms Khilji or Economy, and Economy could not, and did not, determine its own conduct independently from Mr Cooke and EGEL. Further, Economy and EGEL submit that Ms Khilji and Mr Cooke have been a couple for many years and have children together. As a result, Economy and EGEL conclude that the two companies formed part of a single economic unit at all material times.

[49] It is clear that "LP" refers to Lorimer Power Limited, the name of E (Gas and Electricity) Limited at that time.
[50] Document references EP0455 to EP0721.

5.26. Specific claims made by Economy and EGEL in support of that conclusion are the following:

5.26.1. Ms Khilji actually exercised decisive influence or control over EGEL and Mr Cooke actually exercised decisive influence or control over Economy: Economy and EGEL rely upon Ms Khilji's purported involvement in several commercial decisions taken by EGEL, almost all of which took place in 2014, and unsubstantiated claims of assistance given by Mr Cooke in a number of staffing decisions at Economy. Economy and EGEL also refer to a brief secondment by an EGEL employee, who had recently been employed by Economy, back to Economy to develop a sales strategy, following the lifting of a sales ban imposed for regulatory infringements. Economy has also pointed to the fact that Mr Cooke may have arranged meetings for Economy with professional advisers in relation to a corporate restructuring of Economy in early 2015 and to a role he played in an intellectual property dispute in 2014 and early-2015.

5.26.2. The separate incorporation and operation of Economy and EGEL was intended to diversify risk within a single undertaking:

5.26.2.1. Economy and EGEL contend that, on 22 May 2014, Ms Khilji had declared that she held 20,050 of her 40,075 shares in Economy[51] on trust for Mr Cooke.[52]

5.26.2.2. Economy and EGEL also submit that, since 6 April 2016, Mr Cooke holds half of his shares in EGEL on trust for Ms Khilji and Ms Khilji holds half of her shares in Economy on trust for Mr Cooke. Economy and EGEL have provided the Authority with copies of trust documents to substantiate this claim.

5.26.2.3. Economy and EGEL contend that they are, and (throughout the Relevant Period) were, a single undertaking based upon a common economic project being followed by Ms Khilji and Mr Cooke in circumstances where they jointly own 100% of the shares of the two companies.[53]

5.26.2.4. EGEL submits that this common economic project arose because Economy and EGEL are to be properly regarded as "*a family business that constitutes a single economic unit for the purposes of EU and UK competition law*".[54]

5.26.2.5. By way of explanation for why Economy and EGEL are separately incorporated and are presented as unconnected businesses on the market and to other entities with which they contract, Economy and EGEL submit that this separation is intended to "*hedge*" against the risk of either business failing.[55] Economy and EGEL have also suggested that the purported

[51] At the time, Ms Khilji owned 40,075 in Economy Energy Trading Limited, with the remaining 25 shares being owned by Mr Cooke's parents, according to documents filed with Companies House. Mr Cooke's parents transferred the remainder of the shares in Economy Energy Trading Limited to Ms Khilji on 16 July 2014, meaning that, at that date, Ms Khilji held half of her shares on trust for Mr Cooke. Ms Khilji declared the trust on 22 May 2014 (see document reference EE0383, page 7) and Mr Cooke and Ms Khilji extinguished the trust on 28 August 2014 (see clause 3.5 of the Demerger Agreement).
[52] The Authority notes that the subsequent Demerger Agreement, dated 28 August 2014, purports to record the terms on which Ms Khilji and Mr Cooke separated their business interests. Under its terms, that declaration of trust ceased to have effect from the date of the Demerger Agreement (See clause 3.5(a) of the Demerger Agreement, read with reference to paragraph (B) of the "*Background*" section and the definition of "*Sale Shares*"). The Authority also notes that this was more than 18 months before the beginning of the Relevant Period.
[53] Document reference EE0419, page 6.
[54] Document reference EP0337.
[55] Document reference EP0337, paragraph 4.10.

separation of business interests in 2014, shortly after the Authority had imposed a provisional order on Economy to prevent it from acquiring new customers,[56] was also intended to reduce the risk of "*regulatory intervention*".[57]

5.26.2.6. In EGEL's first submission to the Authority on this point, EGEL claimed that this hedging strategy meant that EGEL "*would consciously adopt a different purchasing and operating model to Economy Energy*".[58] In a subsequent submission, EGEL clarified that the difference in purchasing meant that EGEL purchased energy in advance whilst Economy tends to purchase on the spot market. The difference in operation concerned Economy's use of telesales as its primary route to market, whilst EGEL did not sell over the telephone.[59]

5.26.2.7. In further correspondence, EGEL no longer referred to telesales constituting a form of operational diversification/risk hedging, focussing instead upon differences in the companies' approaches to energy procurement and adding reference to sourcing smart meters from different providers.[60]

5.26.2.8. Economy has referred to the pursuit of "*differentiated marketing, sales and supply strategies*" as a means of risk diversification.[61]

5.26.3. Ms Khilji assisted EGEL in establishing itself on the market;

5.26.4. The Demerger Agreement should be ignored;

5.26.5. Economy's decision to sell mobile phones was a strategic decision, relating to Economy's business and was taken in conjunction with Mr Cooke;

5.26.6. Economy and EGEL co-operated in respect of smart meters;

5.26.7. Staff transferred and were seconded between Economy and EGEL;

5.26.8. EGEL's senior management had an informal practice of waiting 24 hours after Mr Cooke took a strategic decision before implementing that decision on the implied understanding that Mr Cooke may wish to discuss it with Ms Khilji.

5.26.9. Ms Khilji and Mr Cooke both held negative joint control over Economy and EGEL.

5.26.9.1. As an alternative to Economy and EGEL being a single undertaking based upon a common economic project, Economy says that negative joint control could be presumed when there is 50% ownership. Economy contends that

[56] This was a response to regulatory failings by Economy which concerned a risk of domestic customers being off electricity and/or gas supply during cold weather due to Economy not meeting certain regulatory requirements and customers being blocked from switching away from Economy when they requested to do so, for reasons that were not compliant with the provisions its licences. More information on the Authority's provisional order can be found here: https://www.ofgem.gov.uk/publications-and-updates/economy-energy-provisional-order.
[57] The Joint Response, paragraph 2.25(a) and (b), and the transcript of the oral hearing that took place on 9 November 2018 (document reference JR0026), page 8 (at F), page 40 (at H) and page 44 (at G). As well as the provisional order discussed above, the Parties may be referring to an investigation by the Authority into whether Economy was complying with standard licence conditions 23, 24 and 25, which is explained here: https://www.ofgem.gov.uk/publications-and-updates/investigation-economy-energy-s-compliance-its-obligations-under-gas-and-electricity-supply-licences-standard-licence-conditions-23-24-and-25.
[58] *Ibid*, pages 4 to 5.
[59] Document reference EP0344, paragraphs 1.4 and 1.5.
[60] Document reference EP0364, paragraphs 4.2 and 4.3.
[61] Document reference EE0382, paragraph 2.5.

Ms Khilji and Mr Cooke exercise common control over Economy and EGEL, that are companies run by a "*common law partners*".[62]

5.26.9.2. Economy and EGEL submit that negative joint control arises because Mr Cooke holds half of his shares in EGEL on trust for Ms Khilji and Ms Khilji holds half of her shares in Economy on trust for Mr Cooke,[63] and the trust documents creating that arrangement contain undertakings by the trustee to, amongst other things, exercise all voting and other rights and powers attached to the relevant shares as directed by the beneficial owner of those shares.[64]

5.27. Since the Authority issued its Statement of Objections, Economy and EGEL have made numerous, occasionally contradictory changes to their filings with Companies House regarding the application of the PSC regime for those companies in respect of the Relevant Period. Those filings are set out in appendix 2 to this Decision.

5.28. The Authority has analysed those submissions, in light of the relevant legal framework, in section 7, below.

Whistle-blowers

5.29. Throughout its investigation, the Authority received unsolicited information from employees of one of the Parties or of an associated business, alleging wrongdoing by Economy Energy Trading Limited. While those whistle-blowers alleged wrongdoing that related to breaches of Economy Energy Trading Limited's licence (rather than to breaches of competition law), certain statements concerned the personal relationship between Ms Khilji and Mr Cooke. The information provided was considered by the Authority when opening a number of regulatory investigations into Economy Energy Trading Limited's conduct in relation to its customers and, because the Parties had made submissions in the present investigation to the effect that the personal relationship between Ms Khilji and Mr Cooke is relevant to deciding whether the Parties have infringed the Chapter I prohibition, it was also included on the Authority's file in this present case.[65] However, for reasons set out in section 7, below, the Authority does not consider that the personal relationship between Ms Khilji and Mr Cooke is relevant to the question of whether Economy and EGEL form separate undertakings for the purposes of the Chapter I prohibition.

Dyball

5.30. Dyball Associates Limited is a private limited company based in Worcester and had an exemption from filing full accounts in the financial year ended 31 December 2016. It was incorporated in 1995 and states that it "*provides software and consultancy services to the UK Electricity and Gas markets*".[66] It also provides so-called "*off-the-shelf supply business*" services, by which it obtains licences to supply gas and electricity in Great Britain for shelf companies, ready for an entrepreneur (for

[62] Document reference EE0419, page 5.
[63] Document reference EE0383.
[64] The Authority understands that neither Ms Khilji nor Mr Cooke has directed the use of such rights and powers. In addition, this claim conflicts with the statutory filings previously made by Economy and EGEL with Companies House concerning "*persons with significant control*" over each business (see paragraphs 5.8, 5.16 and 5.17, above).
[65] Economy and EGEL have claimed that this information is exculpatory in nature and that, by not disclosing that information at the time of issuing its Statement of Objections, the Authority infringed the Parties' rights of defence. The Authority has addressed that claim in Appendix 3 to this Decision.
[66] See the company's website: http://www.dyballassociates.co.uk/.

example) to use that shelf company to start an energy supply business. This avoids the entrepreneur needing to go through many of the formalities and regulatory processes of market entry before beginning to trade.

5.31. Its sole director is Andrew Dyball and its company secretary is Alison Hughes. It appears to have no subsidiaries and is wholly owned by Dyball Holdings Limited.

5.32. In the financial year ended 31 December 2016, the company had a monthly average of 21 employees.

5.33. Dyball Holdings Limited is also a private limited company based in Worcester and is exempt from reporting full accounts but its unaudited annual accounts for the year ended 31 December 2016 show turnover of over £1.9 million.[67] Alison Hughes is also its company secretary and its directors are Andrew Dyball, Paul Fox, Gareth Rushton and Paul Wainwright. Upon its incorporation, in February 2016, Andrew Dyball, Gareth Rushton, Paul Wainwright and Paul Fox each owned a quarter of its issued shares.

5.34. Documents filed by Dyball Associates Limited with Companies House state that Dyball Holdings Limited was, from 6 April 2016, a "*person with significant control*" over Dyball Associates Limited.[68] Dyball Holdings Limited has stated to Companies House that it knows or has reasonable cause to believe that there is no legal entity with significant control over that company. The companies' filings make no reference to any other person as having significant control over either company.

Legal and industry context

5.35. In this section, we describe the regulatory regime and industry in which the Infringement took place.

5.36. Under the Gas Act 1986 and the Electricity Act 1989, certain activities concerning gas and electricity may only be carried out in the UK with a licence (unless they have received a relevant exemption or benefit from an applicable exemption).

5.37. An electricity supply licence allows a licensee to supply electricity to premises, either to domestic and non-domestic premises, or to non-domestic premises only. A gas supply licence allows a licensee to supply gas to any premises through pipes, either to domestic and non-domestic premises, or non-domestic premises only.

5.38. The following paragraphs give an overview of the retail supply of gas and electricity to domestic customers in Great Britain. In this context, retail supply means the supply to end-users – be that to domestic or non-domestic premises.

5.39. Retail supply and generation markets are where most competition takes place in the energy sector. Gas and electricity retail supply markets have common features, since the products are often sold together by retailers (or "**suppliers**") through "dual fuel" tariffs. Moreover, the regulatory regime applying to retail supply generally applies equally to gas and electricity. Therefore, for the purposes of this document, we refer to the retail supply of energy rather than referring to the supply of gas and electricity separately.

5.40. In the first quarter of 2016, the Six Large Energy Firms supplied energy to over 80% of the domestic customers in Great Britain. In relation to the retail supply of energy, there were around 43 suppliers selling electricity and/or gas to domestic customers

[67] Document reference DL0325.
[68] Document reference DL0335, page 3.

at the beginning of the Relevant Period. During the Relevant Period, the largest suppliers to domestic customers outside of the Six Large Energy Firms were Utility Warehouse, First Utility and Ovo Energy.

5.41. During the Relevant Period, there were three primary means of payment for energy consumed. Most customers had (and continue to have) a choice as to whether to pay by standard credit (i.e., by paying on receipt of a bill) or direct debit. By contrast, prepayment was not generally a choice on the part of the customer: all customers on PPMs must pay by prepayment and PPMs were generally installed where a customer had a poor payment history or lived in rented accommodation.[69] Nearly all PPM customers were on more expensive standard variable tariffs, reflecting the very restricted choice of non-standard tariffs available to them.[70]

5.42. In the context of its EMI report (which was published in June 2016), the CMA received evidence to suggest that PPM customers are acquired through more expensive marketing channels, such as face-to-face (doorstep) sales and telesales, relative to direct debit customers.[71] The CMA gathered evidence to suggest that PPM customers are generally harder to access and less responsive to approaches by suppliers and so cost more to acquire. The CMA considered that this greater expense reduced suppliers' incentives to compete to acquire PPM customers.[72]

5.43. In its EMI report, the CMA also found that PPM customers included higher proportions of people with a range of demographic characteristics that are associated with low levels of engagement in the domestic retail energy markets, notably: low levels of income; low levels of education; living in social rented housing; and having a disability. In addition, the CMA found that PPM customers faced higher barriers to accessing and assessing information and additional actual and perceived barriers to switching. The CMA considered that low levels of engagement by PPM customers may have, in part, been influenced by the lower gains from switching available to this group.[73]

5.44. The CMA went on to find that, as a result, PPM customers were less engaged than direct debit customers, particularly in terms of whether they have ever considered switching energy supplier or are likely to consider switching in the next three years, and their awareness of their ability to switch.[74] In turn, this lower engagement by

[69] See paragraph 105 of the CMA's summary of its "*Energy market investigation – Final Report*", dated 24 June 2016 and available here: https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf. See also paragraphs 3.37, 8.127, 8.268 and 9.96 of the findings section of the final EMI report.
[70] See paragraph 110 of the CMA's summary section of its final EMI report, and paragraphs 3.39, 8.170, 8.173, 8.178 and 9.20 of its findings.
[71] See appendix 9.6 to the EMI report, as well as section 9 of the findings section of the final report.
[72] See section 9 (particularly, paragraphs 9.423, 9.437, 9.441, 9.455 and 9.476) of the findings section of the EMI report.
[73] For more information on the adverse effect on competition identified by the CMA in its energy market investigation in respect of PPM customers, see the CMA's notice accompanying its "prepayment charge restriction" order (available electronically at https://assets.publishing.service.gov.uk/media/5849486eed915d0b12000063/energy-market-notice-price-cap-order.pdf). Appendix 9.6 to the EMI report sets out more detail, analysis and evidence on the specific demographic characteristics of PPM customers, compared with customers who pay by direct debit. Paragraph 8.253 of the findings section of the EMI report explains the lower gains available to PPM customers for switching. Section 9 of the findings section of the EMI report (specifically, pages 446 to 524 of the report) concern customer inactivity and lack of engagement with the market.
[74] See paragraphs 8.26, 8.108, 9.285, 9.564, 11.81, 14.15 and 20.7 of the findings section of the CMA's final EMI report, and appendix 9.6 to the EMI report. See also paragraphs 139 to 141 and 147 of the CMA's summary section of its EMI report.

PPM customers with the market contributes to the higher acquisition costs and the softened incentives for suppliers to compete to acquire PPM customers.[75]

5.45. In terms of customer profile, the Authority understands that, during the Relevant Period, the Six Large Energy Firms were not generally targeting PPM customers.[76] Whilst the Six Large Energy Firms have large numbers of legacy PPM customers, few PPM customers were actively switching to those suppliers.[77]

Sales channels[78]

5.46. Suppliers use a range of acquisition channels to gain new customers, including those which may be considered 'active' moves on the part of the customer (such as face-to-face sales, telesales and PCWs) and or 'passive' (including home moves or new home purchases).[79] Particular customer groups will be more or less responsive to particular sales methods. In addition, particular sales methods have become more or less important over time. For example, the CMA has found that the use of PCWs had increased over the five years leading up to its EMI report, published in June 2016, but its importance as an acquisition channel varies considerably between suppliers.[80]

5.47. There are substantial differences between the acquisition channels of the Six Large Energy Firms. For example, for two of the Six Large Energy Firms acquiring customers who move into newly-built homes and white-label partnerships were important acquisition channels during the period covered by the CMA's EMI, while PCWs accounted for a small proportion of acquisitions. In contrast, the remaining (four) Six Large Energy Firms (i.e., EDF, RWE, E.ON and Scottish Power) all used PCWs, and in some cases telesales channels, extensively and did not use white-label partnerships or relationships with the property industry to the same extent.[81]

5.48. An important new development in the years immediately preceding the Relevant Period was the expansion in the use of PCWs as a means of acquiring domestic customers.[82] The importance of PCWs to suppliers as a source of customer acquisitions has generally increased over that period, but varies significantly between suppliers.[83] For example, in 2015, the proportion of total acquisitions to the Six Large

[75] See paragraph 9.457 of the findings section of the EMI report.
[76] See, for example, paragraph 98(b) and 106 of the findings section of the CMA's EMI final report. See also paragraphs 8.70 and 8.72 of the body of the final report. Those findings relate to the withdrawal from doorstep selling by the Six Large Energy Firms. The actual and perceived barriers to switching affecting PPM customers are also described in a CMA document produced in the context of the EMI, dated 7 December 2016 and entitled "*The Energy Market Investigation (Prepayment Charge Restriction) Order 2016 - Notice of making an Order under section 161 of the Enterprise Act 2002 issued under section 165 of, and Schedule 10 to, the Enterprise Act 2002*". Those barriers led to a reduction in competition for PPM customers (see paragraphs 3.38 to 3.40 and 8.289 of the findings section of the CMA's EMI final report). This, in turn, means that proactive targeting of PPM customers, such as by doorstep sales, is often necessary to cause such customers to switch supplier. The CMA was sufficiently concerned about outcomes for PPM customers that it imposed a price cap for energy sold to those customers.
[77] See paragraphs 8.270 to 8.271 of the CMA's EMI final report on the growing importance of smaller suppliers to competition for PPM customers, and paragraphs 8.272 to 2.290 on the limited competition by the Six Large Energy Firms for PPM customers. See also Ofgem's "*Prepayment review: understanding supplier charging practices and barriers to switching*" dated 23 June 2015, which found that competition appears weaker for PPM customers than for customers who pay by direct debit. That review was conducted because, in 2014, Ofgem identified PPM customers as a priority are for its Consumer Vulnerability Strategy, which aims to protect and empower customers in vulnerable situations.
[78] Much of the information in this section is taken from Economy's and EGEL's description of their sales (see document references EE0215 and EP0331).
[79] See footnote 76 of the CMA's EMI final report.
[80] See paragraphs 108 and 109 of the summary of the CMA's EMI final report.
[81] See paragraph 8.161 of the CMA's EMI final report.
[82] See paragraph 8.162 of the CMA's EMI final report.
[83] The CMA noted that E.ON acquisitions in its home-moves channel include acquisitions from its relationships with letting agents.

Energy Firms facilitated by a PCW ranged from close to zero to around 70% of gas and electricity acquisitions.[84]

5.49. In contrast to these sales trends, since entering the retail energy sector, both Economy and EGEL targeted residential customers across the UK with gas and electricity PPMs by using face-to-face sales agents and, for Economy, telesales and offering an initially low price tariff. This more direct strategy is intended to attract customers primarily from the Six Large Energy Firms.

5.50. Face-to-face sales are described in documents gathered by the Authority in the context of the current investigation.[85] As explained above, face-to-face sales are carried out by sales agents visiting potential customers in their homes or in public places, such as at the entrances to supermarkets, and showing them a comparison, on a tablet device, between the potential customer's current energy tariff at their property, the tariffs of other suppliers and the cheapest tariff of the supplier for whom the agent works.

5.51. The sales agent's tablet device will generally have been populated with information about the customer's property and current tariff, derived from the ECOES and SCOGES databases.[86] These databases include certain data to assist suppliers in the transfer of customers (allowing pre-registration checking of the MPAN/MPRN, address and meter serial number).[87] When conducting door-to-door sales, the sales agent is provided with a list of properties to visit.

5.52. As well as this information, the sales agent will ask for other information from the potential customer to determine their estimated current monthly consumption.[88]

5.53. The sales agent will then perform the comparison, showing the customer how much they can save compared to their current tariff, if they switch to the supplier for whom the agent works.[89] The customer can then switch to that supplier via the tablet device.[90]

5.54. EGEL considers that PPM customers were under-served by the market because they are less likely to change energy supplier without direct marketing.

5.55. Until July 2016, EGEL only targeted customers with non-smart PPM meters because its systems did not support smart meters. Since July 2016, it also supports customers with smart meters.

5.56. From November 2016, Economy extended its sales strategy to target customers who pay by direct debit, including through price comparison sites and Economy's own website.

5.57. From February 2017, Economy stopped door-to-door field sales in response to concerns expressed by the Authority about mis-selling.

Context from 2015

[84] See paragraph 8.163 of the CMA's EMI final report.
[85] For a detailed description of how face-to-face sales, using sales apps, were done during the Relevant Period by a sales agency working for EGEL, see document references EW0004, EW0005 and EW0006.
[86] See, for example, document reference EW0004, pages 6 to 8.
[87] See paragraph 13.316 of the CMA's EMI final report
[88] Document reference EW0004, page 4.
[89] Document reference EW0004, page 9.
[90] Document reference EW0004, page 10 to 13.

5.58. An e-mail exchange from March 2015[91] provides a helpful explanation of one of the key means by which the Infringement was implemented because, in it, Dyball and a third company explain how Dyball's CRM software could be used to block sales to certain customers. In 2015, the discussion concerned how to prevent Economy's sales agencies from trying to sell to Economy's existing customers.

5.59. The e-mail exchange in question took place between Dyball and a company called *[✂]*, a software developer.[92] On 16 March 2015, [Dyball Employee 1] (of Dyball) sent an e-mail to *[✂]* (*[✂]*), asking for an explanation as to why customers recruited by Economy's sales agents weren't being processed from a sales app into Dyball's CRM:

> "*I would like to find the problem with transfer customers into CRM. I cannot find the problem in my API…and errors on the server. Could you please tell me, how you are checking customers. I think you are using my API?*"

5.60. *[✂]* responded by writing: "*you'd need to ask* [Economy] *how they are getting customers into your CRM. We are not using your API on the live environment at present to do this*".

5.61. At that point, Andrew Dyball stepped in, to seek clarity on the means by which sales to Economy's existing customers could be prevented from being processed, in an e-mail in response to *[✂]*, as follows:

> "*My understanding is that we supply a list of EE* [i.e., Economy] *customers to you that are filtered out of your app to stop them being re-registered. Please correct if I'm wrong*",

5.62. *[✂]* replied by explaining the sales blocking mechanism by writing:

> "*When a sales agent uses the iPad application to attempt to sign up a customer, if that customer has both gas and electricity with* [Economy] *already, the customer cannot proceed, no registration can take place.*"

5.63. Whilst Economy is entitled to prevent its sales agents from signing up its existing customers, the Authority has concluded that the evidence shows that this sales blocking mechanism was later used, during the Relevant Period, by Economy and EGEL to prevent sales to each other's customers from being processed.

Chronology of events

5.64. In the following section, we describe the behaviour that the Authority has decided constitutes an infringement of the Chapter I prohibition. The following, indicative chronology is intended to provide a summary of the infringing conduct:

Date	Action
January 2016	Economy, EGEL and Dyball agreed that Economy and EGEL would not acquire each other's customers from 1 March 2016. Dyball agreed to assist in implementing the Infringement.[93]

[91] Document reference DL0085.
[92] On its website, this company holds itself out as providing "*Expert WordPress & Laravel Development*" (see *[✂]*, accessed on 14 January 2018). Both of those software programmes concern website development.
[93] For example, see paragraphs 5.66 to 5.68, below.

Date	Action
February 2016	Dyball developed CRM systems for each of Economy and EGEL. Those systems contain functions allowing the rejection of customers seeking to switch between the two businesses from being registered on the CRM system.[94]
March 2016	The Parties postponed implementation of the Infringement, at least in part, due to technical issues with the necessary software. [95]
April 2016	• Dyball procured Economy's and EGEL's customer lists and shared both sets with both companies. Economy and EGEL used each other's customer lists to prevent sales to those customers. [96] • Economy and EGEL instructed their respective sales agents not to sell to the other's customers. [97]
Late April 2016	• Dyball suggested that Economy and EGEL move to accessing customer lists using an API rather than using monthly, manual updates from a CD.[98] • Each of Economy and EGEL identified those of its respective customers who were in the process of switching between the two companies. Each company terminated the processing of such sales.[99] • Dyball developed an automatic means of blocking such sales from being processed in Economy's CRM system.[100]
May 2016	Dyball developed an automatic override to customer registration blocking in order to allow customers of Economy or EGEL who approached the other company asking to switch to do so (as opposed to customers who had been approached by either Party's sales agents).[101]
June 2016	• Economy and EGEL tracked customers switching between the two companies, sought reassurance that Dyball's CRM software was continuing to block such switches from being processed and exchanged lists of the individual sales agents responsible for those switches.[102]

[94] For example, see paragraphs 5.70 to 5.71, below.
[95] For example, see paragraphs 5.72 to 5.76, below.
[96] For example, see paragraphs 5.77 to 5.87, below.
[97] For example, see paragraphs 5.93 to 5.97, below.
[98] For example, see paragraphs 5.82 to 5.83, below.
[99] For example, see paragraphs 5.98 to 5.110, below.
[100] For example, see paragraphs 5.111 to 5.112, below.
[101] For example, see paragraphs 5.113 to 5.125, below.
[102] For example, see paragraphs 5.132 to 5.134, below.

Date	Action
	• Dyball proposed automatic CRM blocking to EGEL.[103] • Economy asked for EGEL's customers to be hidden from Economy's sales agents.[104]
July 2016	Confirmation of the EGEL CRM "gate" and sales app restriction.[105]
August 2016	• Confirmation that EGEL's sales agents would not target Economy's customers.[106] • EGEL continued to share Economy's customer lists internally.[107]
Summer 2016	Dyball commissioned to develop an enhanced "CSM" system, as an update to the CRM systems.[108]
September 2016	First investigatory steps taken by the Authority.[109]

5.65. In the excerpts given below, we have interpreted references to "EE", "EETL" and "Economy" and variants to refer to one or more companies forming part of the undertaking we have identified in paragraph 1.2.1 as Economy. Similarly, we have interpreted references to "E", "E Power", "E-Power" and "Epower" and variants to refer to one or more companies forming part of the undertaking we have identified in paragraph 1.2.3 as EGEL.

January 2016: Reaching the agreement

5.66. On 1 February 2016, [Dyball Senior Manager 1] (Dyball) sent an e-mail to the EGEL Senior Manager, [EGEL Senior Manager 2], [EGEL Employee 1] and Paul Cooke (all of EGEL) and to Andrew Dyball and [Dyball Senior Manager 2] (both of Dyball)[110] entitled "*Notes and Actions from Meeting 29012016*". In that e-mail, [Dyball Senior Manager 1] stated the following:

> "*E and Economy will no longer be acquiring one another's customers where contracts signed date is greater than the 1st March 2016 — AD/PC and LK to meet on Monday to discuss, agree and advise of further action.*"[111]

5.67. Internal EGEL correspondence from [EGEL Senior Manager 2] to the [EGEL Senior Manager 1], sent in response to [Dyball Senior Manager 1]'s note of the 29 January

[103] For example, see paragraph 5.135, below.
[104] For example, see paragraphs 5.136 to 5.144 and 5.149 to 5.151, below.
[105] For example, see paragraphs 5.152 to 5.154, below.
[106] For example, see paragraph 5.155, below.
[107] For example, see paragraph 5.157, below.
[108] For example, see paragraphs 5.158 to 5.163, below.
[109] For example, see paragraph 4.4, above.
[110] [Dyball Employee 2], [Dyball Employee 3] and [Dyball Employee 4] (all of Dyball) were also copied to the e-mail exchange but no-one from Economy was copied to the e-mail.
[111] Document reference DL0027. That document contains a further version of the meeting note, amended but not materially to the current analysis. During an interview, Andrew Dyball confirmed that, in this e-mail, AD referred to himself, PC referred to Mr Cooke and LK referred to Ms Khilji.

2016 meeting, contained the following observation: "[Dyball Senior Manager 1] *has minuted our anti-competitive behaviour…*".[112]

5.68. In a later submission to the Authority, EGEL sought to explain this statement as an expression of "*irritation and surprise*" at the comment quoted in paragraph 5.66, above, having been included in the note of the meeting. EGEL's explanation is as follows: "*An off-hand comment was made by* [Dyball Senior Manager 1] *at the end of this meeting where he queried whether any resolution of the issue of customer churn between E and Economy could be anti-competitive. In response to this comment, it was made clear to* [Dyball Senior Manager 1] *that no decision had been taken and a meeting would take place the following week between Paul Cooke, Lubna Khilji and Andrew Dyball to review this further*". This explanation was not supported with evidence.[113] At interview, when asked about his statement "[Dyball Senior Manager 1] *has minuted our anti-competitive behaviour…*", [EGEL Senior Manager 2] refused to provide an explanation.[114] In a later witness statement, [EGEL Senior Manager 2] stated that his e-mail to [EGEL Senior Manager 1] was an expression of "*irritation and surprise*" in response to [Dyball Senior Manager 1] recording his concerns in writing about anti-competitive behaviour. In that witness statement, [EGEL Senior Manager 2] said that he didn't think that the "*work request*" was anti-competitive and that, in any case, it had not been agreed at the meeting.[115]

5.69. EGEL stated that it held no documents in relation to a meeting scheduled for either Monday, 1 or 8 February 2016 and was unable to confirm whether any such subsequent meeting took place.[116] Economy stated that it had no record of any such meeting having taken place.[117]

February 2016: Preparing to implement the agreement

5.70. On 14 February 2016, Andrew Dyball (Dyball) sent an e-mail to both Paul Cooke (EGEL) and Lubna Khilji (Economy) attaching a draft for the requirements of a new CRM and billing system. That document shows that this new system included functions allowing the rejection of customers from registration on the CRM system.[118]

5.71. On 23 February 2016, internal Economy correspondence, with the subject "*Loss and Gain From Epower*",[119] contains a table showing the numbers of customers gained from and lost to EGEL during the previous four months.[120]

March 2016: An attempt to implement

5.72. On 1 March 2016, Andrew Dyball e-mailed [EGEL Senior Manager 2] (EGEL) and Paul Cooke (EGEL), saying that he "*had been working hard to get the mutual Customer registration halted. We have encountered a problem understanding and amending*

[112] Document reference EP0233. As is clear from the document, the "[Dyball Senior Manager 1]" referred to here is [Dyball Senior Manager 1] (Dyball).
[113] His legal adviser referred us to EGEL's earlier corporate explanation (see the transcript of that interview, document reference AP0005, paragraph 280).
[114] Document reference EP0232.
[115] Document reference JR0007.
[116] Document reference EP0232, paragraph 2.7, in relation to the 1 February 2016. EGEL subsequently confirmed that neither did they hold any evidence of a relevant meeting having taken place on 8 February 2016 (document reference EP0235).
[117] Document reference EE0215.
[118] Document reference EE0020.
[119] Document reference EE0113.
[120] This showed gains of 1338, 476, 651 and 538 in November, December, January and February, respectively, and corresponding losses of 2007, 2134, 1421 and 1662, giving net figures of -669, -1658, -770 and -1124.

some of [Dyball Employee 1]*'s code but if we cannot resolve tomorrow I will add a supplementary workaround in CRM at EE*".[121]

5.73. On 3 March 2016, [EGEL Employee 1] (EGEL) sent an e-mail to Andrew Dyball (copying [EGEL Senior Manager 2] (EGEL) and [Dyball Senior Manager 1] (Dyball)), stating: "*I understand we are holding off stopping Economy Energy customers switching to us until 4th April. We are currently getting an error message in our [✂] app saying "EE electricity customer". It appears to be for all deals signed after 25th Feb. Could we get this filter removed until April 4 please?*".[122]

5.74. On 8 March 2016, [Economy Employee 1] (Economy) sent an e-mail to Andrew Dyball saying "*I gave [✂] [123] an updated xoserve and ecoes disc a couple of weeks ago. I was wondering if this has been uploaded yet for the sales data. I know it takes some time to run. If you could let me know when this is done, I can let [✂] know to update the sales app*".[124]

5.75. Internal Economy correspondence on 15 March 2016, referred to a phone call with an employee of one of Economy's sales agents as follows: "*I've spoken to [✂]*, of *[✂]*, [a sales agent acting for Economy] *he's lost a few people to EPower, I think they were a bit hacked off that for some reason some of their deals didn't make it from their ipads to us??? He was breaking up on the phone but I'm speaking to him again later to understand what's happened and make sure it doesn't in the future*".[125]

5.76. On 5 April 2016, internal *[✂]* correspondence with a reference line "*Missing deal is on app?*" gave a consumer's details and said "*Deal appeared as duplicate but with economy - signed 31/3*".[126]

April 2016: Information exchange

5.77. On 8 April 2016, Andrew Dyball wrote to [EGEL Senior Manager 2] (EGEL) and [Economy Employee 2] (Economy), copying [Dyball Employee 5] (Dyball), as follows:

> "[Economy Employee 2] – *would you forward to the relevant Economy personnel please?*
>
> [EGEL Senior Manager 2] – *would you forward to the relevant E personnel please?*
>
> *The attached api scripts allow the download of EE* [Economy] *and EP* [EGEL] *live MPANs and MPRNs.*
>
> *I understand that you pull down the MPANS/MPRNs on a periodic basis to exclude from your apps.*
>
> *We refresh the back end tables on a daily basis.*"[127]

[121] Document reference DL0029. The Authority understands "*EE*" to refer to Economy.
[122] Document reference DL0005.
[123] We assume this to be [Dyball Senior Manager 2] (Dyball).
[124] Document reference DL0130.
[125] Document reference EE0112.
[126] Document reference EW0029.
[127] Document reference DL0064. In a note to the Authority (document reference DL0074, page 3), Dyball stated that these APIs were developed in June 2016. The e-mail quoted here demonstrates that they were developed in April 2016.

5.78. On 11 April 2016, that e-mail was forwarded internally at Economy by [Economy Employee 2], with a covering e-mail saying "*I received this from Dyball with regards to removing E* [i.e., EGEL] *sites from our Sales portfolio*".[128]

5.79. A document entitled "*EE_MPANs*" and described as "*List of EE* [i.e., Economy] *MPANs generated from Dyball API call*" was attached to internal correspondence within EGEL on the following day.[129]

5.80. On 18 April 2016, [Economy Employee 3] (Economy) emailed Andrew Dyball, copying [Economy Senior Manager 3] (Economy) and [Dyball Employee 5] (Dyball) and asking the following:

> "*Would it* [be] *possible to adjust the EE API call so that it also returns the EP MPANs/MPRNs? This would allow all the MPANs and MPRNs to be excluded without the need for any recoding on the app.*
>
> *We would be happy to then share this with EP so they don't have to recode their own as much, but instead just call a single API instead of 2.*"[130]

5.81. [Dyball Employee 5] (Dyball) responded to the same group, saying that Dyball would be happy to do so.

5.82. On 30 April 2016, Andrew Dyball wrote to Paul Cooke (EGEL) and Lubna Khilji (Economy), copying [Dyball Employee 5] and [Dyball Senior Manager 3] (both, of Dyball), [EGEL Senior Manager 2] (EGEL), [Economy Employee 2] (Economy), as follows:

> "*Dear Paul & Lubs,*
>
> *We plan to develop apis to interact with ECOES data in real time rather than loading the historic CDs.* […]
>
> *At the moment we have 3 suppliers (including you two) interested and I suggest splitting the cost equally. I'll make investigations how we can implement this across different Suppliers from a single web server.*
>
> *Let me know if this appeals.*"[131]

5.83. On 30 April 2016, Paul Cooke (EGEL) replied, copying Lubna Khilji (Economy) and other Dyball, Economy and EGEL employees, saying "*Works with me Andrew* [Dyball]", followed by a grinning emoji.[132]

5.84. On 3 May 2016, Ms Khilji also replied, saying "*I'm happy too*".[133]

5.85. In an interview with the Authority, Andrew Dyball explained that Dyball had developed an API for Economy and EGEL to allow them to download their own and each other's customer lists. Mr Dyball suggested that his colleague had assumed that this sharing of customer lists was to allow Economy and EGEL to remove those customers from their respective sales apps.[134]

5.86. Mr Dyball also explained the following:

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[128] See the same document reference.
[129] Document reference EP0084.
[130] Document reference DL0064.
[131] Document reference DL0133.
[132] Document reference EP0066.
[133] Document reference EP0388.
[134] Document reference DL0276, pages 52 to 53.

> "[W]*e would update a list of economy energy customers on a monthly basis, so the job to, these Economy Energy customers. That's done monthly.* […] *it's the case for both* [Economy and EGEL]*. It's a database job that runs on a monthly basis to update the customers* […] *This database is specific to Economy and E. So, it's effectively a look up of E customers from Economy, which is - that would not happen anywhere else only with the agreement of these two companies.*
>
> *So, we've got E customers here and here are the Economy customers and E looks at the Economy customers and it's that view that's only updated on a monthly basis. So, it's not industry wide, it's just within this.*"[135]

5.87. In a separate interview with the Authority, [Dyball Senior Manager 1] (of Dyball) had the following exchange with an officer of the Authority:

> "[Authority]*: Are you able to tell what the API...*
>
> [Dyball Senior Manager 1]*: There seems to be four* [APIs]*, returning a list of E MPANs and MPRNs and then the same, Economy's MPANs and MPRNs.* […] *But yes, it is pulling back the MPANs and MPRNs for Economy and for E.*
>
> [Authority]*: What would that mean? Who would then get to see that information that was drawn back?*
>
> [Dyball Senior Manager 1]*: For these particular ones both E and Economy could access those lists of MPANs and MPRNs.*
>
> [Authority]*: Would they be able to access all four?*
>
> [Dyball Senior Manager 1]*: Yes.*
>
> [Authority]*: Or would they be able to access their own?*
>
> [Dyball Senior Manager 1]*: All four.*
>
> [Authority]*: Did you understand why that was; why they could see each other's?*
>
> [Dyball Senior Manager 1]*: Only in the sense that we were asked to do so.*
>
> [Authority]*: When you say asked to do so, asked to do what?*
>
> [Dyball Senior Manager 1]*: To provide the list of MPANs and MPRNs supplied by the other party.*
>
> [Authority]*: Do you know - would that request have come to you or would it have come to someone else within Dyball.*
>
> [Dyball Senior Manager 1]*: It came to Andy. Andy Dyball.*
>
> [Authority]*: Did he tell you who it came from?*
>
> [Dyball Senior Manager 1]*: From Paul and Lubna. Yes.*"[136]

5.88. In that interview, there was a further exchange, in which an e-mail conversation that took place between [Dyball Senior Manager 1], other Dyball employees and a third party developer was discussed.[137] In that exchange, [Dyball Senior Manager 1] recognised that the e-mail conversation concerned Economy seeking to remove EGEL's customers from its own "*sales table*". He also confirmed that he understood that the reason why Dyball was helping Economy and EGEL to obtain lists of each other's customer MPANs and MPRNs was in order to allow Economy and EGEL to

[135] Document reference DL0276, pages 52 to 53.
[136] Document reference DL0277, pages 14 and 15.
[137] Document reference DL0013.

remove those customers from their respective sales apps, preventing them from selling to each other's customers.[138]

5.89. Other evidence shows that [Dyball Senior Manager 1]'s knowledge at the relevant time was clearer than at the time of interview and that he understood the purpose of the product being developed by Dyball. For example, in the e-mail conversation cited in the previous paragraph,[139] the first e-mail in the conversation is short, from Economy, addressed to [Dyball Senior Manager 1] and explains that Economy was experiencing a problem with "*actively removing E-Power customers*" from its sales table. [Dyball Senior Manager 1] forwarded the Economy e-mail within Dyball (copying Economy) with the following statement: "*I believe we have developed an API for Economy and E whereby they can call a list of each others* [sic] *MPANs and MPRNs so they remove them from their sales app so they do not sell to each other's customer*". The rest of the e-mail conversation concerns the means by which Economy can obtain lists of Economy's and EGEL's MPANs and MPRNs.[140]

5.90. Further, on 16 May 2016, [Dyball Senior Manager 1] was copied to an exchange in which restrictions on switching customers are discussed in connection with MPANs and MPRNs, and "'*non-compete' Customers*".[141] He was also copied to another e-mail exchange in which Andrew Dyball discussed withdrawing registration of Economy's customers from EGEL's CRM, with reference to MPANs and MPRNs.[142]

5.91. In addition, the evidence we have gathered demonstrates that Dyball, more generally, was aware that the MPANs and MPRNs that it was supplying to Economy and to EGEL were being used to prevent the acquisition of each other's customers. For example, in an e-mail dated 8 April 2016, Andrew Dyball wrote to both [EGEL Senior Manager 2] (EGEL) and [Economy Employee 2] (Economy) saying: "*I understand that you pull down the MPANS/MPRNs on a periodic basis to exclude from your apps*".[143] A very similar statement is included in an e-mail from Andrew Dyball to [EGEL Senior Manager 1](EGEL) and [EGEL Senior Manager 2] (EGEL) in relation to excluding Economy customers.[144] In an e-mail dated 27 April 2016, Andrew Dyball wrote to [EGEL Senior Manager 1](EGEL) and Paul Cooke (EGEL) saying that "[w]*e put in a new version of CRM in at Economy last night. This stopped 39 E Customers being sent to the Economy CRM and will continue to work going forward. I will liaise with their developers to remove E customers from their sales app*".[145]

5.92. On 19 April 2016, a spreadsheet with the subject "*EETL MPANs*" was circulated within EGEL.[146]

April 2016: Economy and EGEL instruct their sales agents not to target each other's customers

[138] Document reference DL0277, page 22. [Dyball Senior Manager 1] then asked to pause the interview in order to consult his lawyer in private and, when he returned, he revised his interpretation of the document, saying that while Dyball provided a list of MPANs and MPRNs to Economy and EGEL, he did not know how Economy and EGEL would use those lists.
[139] Document reference DL0013.
[140] Also document reference EP0060 in which [EGEL Senior Manager 1](EGEL) explains to Messrs. Dyball and [Dyball Senior Manager 1] how EGEL used "*EE MPANs*" to exclude Economy's customers from EGEL's sales apps in order to prevent EGEL's sales agents from having contact with Economy's customers.
[141] Document reference DL0007.
[142] Document reference EP0038.
[143] Document reference DL0064.
[144] Document reference DL0025.
[145] Document reference DL0024.
[146] Document reference EP0081.

5.93. On 12 April 2016, *[✂]* (*[✂]*) wrote to Paul Cooke (EGEL), as follows: "*All advisors are aware that we're no longer taking Economy*".[147] Later, *[✂]* again wrote to Mr Cooke, with sales data and saying "[t]*he advisors are no longer taking Economy Energy…*". Mr Cooke acknowledged receipt of that e-mail.[148]

5.94. On 22 April 2016, an internal e-mail at Economy asked for views on a draft e-mail that read as follows:

> "*Over the last few months we have noticed an extremely high number of E Power customers alternating between E Power and Economy Energy.*
>
> *We will not stand in the way of any customer who genuinely wants to join or leave us, however, no commission will be paid on these sales.*"[149]

5.95. Later on the same day, a senior manager at Economy sent an e-mail containing the same wording to five sales agents.[150] Subsequent correspondence suggests that those sales agents responded to Economy.[151] For example, one e-mailed response contained the following statement: "*I was under the impression that we couldn't quote against them?*"[152] Another said: "*We are in no way targeting these customers but if we come across E power customers going forward, we will not switch them?*"[153]

5.96. On the same day, a further sales agency responded to Economy by saying "*Can you remove them from the sales app please. this way we can stop all sales. As you would expect if we are not getting paid for it then i don't want any sales going through, even the ones that want to change to economy*".[154]

5.97. On 24 April 2016, *[✂]* (*[✂]*) sent an e-mail to [EGEL Senior Manager 1](EGEL) with the reference line "*Economy Energy Customers*",[155] attached to which was a spreadsheet entitled "*Economy Energy Customers.xlsx*"[156] containing the names and addresses of 15 customers. Against each name was a "*Signed Up*" date of between 16 March 2016 and 16 April 2016, an MPAN and an MPRN.

Late April 2016: Manual withdrawal of switches

5.98. On 20 April 2016, [EGEL Employee 2] (EGEL) sent an e-mail to Dyball entitled "*EETL Losses*" and stating "*It looks like we're still receiving losses from Economy, please see at the attached*".[157]

5.99. On 20 April 2016, Lubna Khilji (Economy) sent an e-mail to Paul Cooke (EGEL) entitled "*Fw:Pending Losses to Epower*", attaching a spreadsheet containing details of Economy customers seeking to switch to EGEL. In that e-mail, Ms Khilji wrote: "*For withdrawing please. Please also make sure you keep N* [sic] *eye on future registrations. We are doing the same*". Paul Cooke forwarded that e-mail to [EGEL Senior Manager 1] (EGEL).[158] [EGEL Senior Manager 1] replied as follows: "*We had*

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[147] Document reference EW0012.
[148] Document reference EW0014.
[149] Document reference EE0108.
[150] These sales agencies were "*[✂]*" (document reference EE0132), "*[✂]*" (document reference EE0131), the "*[✂]*" (document reference EE0109), "*[✂]*" (document reference EE0134), *[✂]* (document reference EE0133) and an unidentified agency (document reference EE0135).
[151] Document references EE0109, EE0130, EE0131, EE0132 and EE0139.
[152] Document reference EE0130.
[153] Document reference EE0109.
[154] Document reference EE0131.
[155] Document reference EP0021.
[156] Document reference EP0022.
[157] Document reference EP0037.
[158] Document reference EP0062.

more losses received from them yesterday; so we'll check they have been withdrawn today. We have loaded 1 customer that called up, so the only 1 that we will allow to be taken from them."[159]

5.100. On 21 April 2016, [EGEL Employee 2] (EGEL) sent an e-mail to Andrew Dyball and [Dyball Senior Manager 1] (Dyball), copying [EGEL Senior Manager 2] (EGEL) and attaching a list of MPANs and MPRNs and asking "*Please withdraw registration for the attached Economy supplies. I'll send another spreadsheet with losses from Economy that will need to be withdrawn later today.*" Andrew Dyball replied with: "*I have stopped further EE MPANs and MPRNs going into Economy CRM*".[160]

5.101. Later that day, Andrew Dyball forwarded [EGEL Employee 2]'s e-mail to [Economy Employee 2] (Economy), copying [EGEL Employee 2] and writing: "*As discussed-here are the MPAN/MPRNs to be withdrawn*". [Economy Employee 2] replied all as follows: "*Thanks for the list, we had ran* [sic] *our own reports and it sounds like we may have worked some of these already, but we are just matching them to confirm to see how many still need working*".[161]

5.102. [Economy Employee 2] forwarded the list within Economy with a covering e-mail asking "*Can you see how many of these have been worked and how many are left to do*". One of the internal recipients replied, saying: "*these are properties we supply and are for E to withdraw their registration*".[162]

5.103. On 22 April 2016, [EGEL Employee 2] (EGEL) sent an e-mail to Andrew Dyball stating "*Here's a list of current losses we have from Economy with the corresponding MPRNs*".[163] Each MPAN and MPRN listed in the attached was marked "*Loss Received*".[164] Mr Dyball then forwarded [EGEL Employee 2]'s e-mail and attachment to [Economy Employee 2] (Economy), with [EGEL Employee 2] in copy. Mr Dyball's covering e-mail was blank.[165]

5.104. On 24 April 2016, [EGEL Senior Manager 1](EGEL) wrote to [EGEL Senior Manager 2] (EGEL) and [Dyball Senior Manager 1] (Dyball), copying [EGEL Employee 2] (EGEL), to say the following:

> "*As agreed with Paul (and I assume Lubna) we are to accept registrations from customers who have called in to request a transfer of supply.*
>
> *Please ensure these contracts are registered.*"[166]

5.105. On 25 April 2016, [Dyball Senior Manager 1] confirmed with [EGEL Senior Manager 1] (copying [EGEL Employee 2] and [EGEL Senior Manager 2]) "*that all MPANs and MPRNs are currently going through (some have completed) the* [change of supplier] *process to E*".[167]

5.106. On 29 April 2016, Andrew Dyball sent [Economy Employee 2] (Economy) a further e-mail saying "*Below is a list of recent registrations submitted by EETL for LORM*

[159] Document reference EP0107.
[160] Document reference EP0038.
[161] Document reference DL0262.
[162] Document reference EE0161.
[163] Document reference EP0190.
[164] Document reference EP0191.
[165] Document references EP0205 and EP0206.
[166] Document reference EP0020. In a note to the Authority, Dyball described this mechanism as a "workaround" intended to allow the parties "to bypass" the CRM restrictions "if needed for an individual Customer" (document reference DL0074, page 4).
[167] Document reference EP0020.

(Epower) MPANS. I have been asked by Epower if it is possible to withdraw these registrations (and the associated Gas). Let me know if we can assist".[168]

5.107. On the same day, Andrew Dyball e-mailed [EGEL Senior Manager 1] (EGEL), copying Paul Cooke and [EGEL Employee 2] (both, of EGEL) to say the following:

> *"I have supplied a list of MPANs to be withdrawn to Economy Energy.*
>
> *Going forward we have a 'safety net' in place to stop registrations going to Economy CRM. In the last two days it appears that there have been 3 losses received both today & yesterday that have 'slipped through'. Is this acceptable?"*[169]

5.108. During an interview with the Authority, Andrew Dyball said the following:

> "*If* [EGEL Senior Manager 1] *or* [EGEL Senior Manager 2] *provided me with a list of MPANs that they would want to cancel at E in their company, we would do it on their behalf, yeah."*[170]

5.109. In late April 2016, there are several examples of direct communication between Economy and EGEL to facilitate the withdrawal of registration of each other's customers. For example, on 25 April 2016, Andrew Dyball (Dyball) had sent an e-mail containing a list of MPANs/MPRNs to Economy asking for them to be withdrawn from Economy's customer registration system. [Economy Employee 2] queried this with [EGEL Employee 2], who confirmed that EGEL was seeking the addresses corresponding to the listed MPANs/MPRNs to be withdrawn from Economy's systems because they were "*live with E*" and that EGEL had "*a loss received with Economy against the energy supply*".[171]

5.110. Further, during this period, Dyball also initiated telephone calls with Economy and EGEL staff in relation to the withdrawal of customer registration; it did not merely receive such calls.[172]

April to May 2016: Dyball implements CRM customer registration blocking for Economy

5.111. Internal Economy correspondence from 27 April 2016 reads as follows: "[t]*he customer quote finished and it appears to have thrown out 41 exceptions so it looks like the fix is working. Do you know whether the patch was off industry level supplier or app existing supplier? It's just there seem to be a few E.ON customers that have been stripped from the data*."[173]

5.112. On the same day, Andrew Dyball wrote to [EGEL Senior Manager 1] (EGEL), copying Paul Cooke (EGEL) and saying "*We put a new version of CRM in at Economy last night. This stopped 39 E Customers being sent to Economy CRM and will continue to work going forward. I will liaise with their developers to remove E customers from their sales app."*[174]

May 2016: Developing an automatic override to customer registration blocking (allowing pro-active switchers to switch)

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[168] Document reference DL0267.
[169] Document reference DL0135.
[170] Document reference DL0276, page 62.
[171] Document reference EP0039 (duplicated at EP0199, with an attachment at EP0200), EP0067, and EP0106.
[172] Document references DL0017 and DL0120.
[173] Document reference EE0186.
[174] Document reference DL0024.

5.113. On 6 May 2016, *[✂]* wrote to EGEL's "sales complaints" e-mail address asking:

> "*Can this customer be contacted to move to E? They are very keen but not in the app but adviser has been to property and they have Prepay meter and with supplier bellow?*
>
> *[✂] FOR ELECTRIC*
>
> *ECONOMY ENERGY FOR GAS*"[175]

5.114. The following day, EGEL replied as follows: "*added to manually upload*".[176]

5.115. Internal Economy correspondence from 11 May 2016, reads as follows: "*for this customer it states on the app that the account has been exported to CRM but I can't see anything for this customer on CRM can you help cheers*". A reply reads: "*This one was an E Power exception that never made it to CRM*".[177] The Authority understands the "*E Power exception*" to refer to the automatic blocking of a customer's registration with Economy if that customer was seeking to transfer to Economy from EGEL.

5.116. On 13 May 2016, [Economy Employee 2] (Economy) sent an e-mail to Andrew Dyball and [Dyball Senior Manager 1] (Dyball), copying [Economy Senior Manager 1], [Economy Employee 4] and [Economy Employee 5] (all of Economy) and stating:

> "*Where we have a genuine customers* [sic] *who want to transfer from E to ourselves how can we do this with our current system restrictions, we have 2 customers who have called us to move over. In these circumstances we have to register the customer.*
>
> *Would you be able to suggest any solutions to the problem, whether it be an individual login that could process the customers, or a manual process to get them past the customer export. We are expecting the volumes to be very low as we are not contacting them.*"[178]

5.117. On 16 May 2016, Andrew Dyball replied "*I have added an extra screen to CRM that solves the problem*". Further adding that he would "*release this evening* […] *If you have a few to send immediately happy to process these in advance*".[179] On the following day, Andrew Dyball tested the updated system using details of a number of customers provided by Economy. From further e-mails in the same e-mail chain, the test appears to have been a success. He also offered to provide "release notes", explaining how "*to register the 'non-compete' Customers*".[180]

5.118. On 18 May 2016, [Economy Employee 5] (Economy) contacted Andrew Dyball to say that he had come across "*a strange exception this morning*" and it asked for Dyball's help because "[t]*his account was removed as an E-Power exception, however the customer said that they had recently left their supply and were now with [✂]*".[181] [Economy Employee 5] went on to explain that he had "*checked Ecoes and Xoserve and can see this is the case*", asking "*why the exception still stood?*"

[175] Document reference EP0099.
[176] Also document reference EP0099.
[177] Document reference EE0187.
[178] Document reference DL0006.
[179] Document reference DL0006.
[180] Document reference DL0007.
[181] Document reference DL0008.

5.119. Andrew Dyball replied by saying that "*the list of MPANs and MPRNs is currently only updated on a monthly basis. Do you think this should be daily?*"[182] We understand this to mean that the lag in updating the EGEL customer lists held by Economy meant that a customer could be automatically blocked in Economy's CRM as a customer of EGEL even though that customer had (recently) switched away from EGEL (as in the above case, in which the customer had switched to *[✂]*).

5.120. On 20 May 2016, [Economy Employee 5] wrote to Mr Dyball (copying [Dyball Senior Manager 1] (Dyball)) in an e-mail entitled "*E-Power*", saying "*I hear the testing is coming along well so you'll soon be able to get us/me off your back. In the mean-time we do have a few customers that have requested to come over to us and I was wondering would you mind popping them through for us please?*" Later that day, Mr Dyball confirmed that those customers had been registered.[183]

5.121. On 23 May 2016, Dyball sent "*Release Notes*" to Economy, with the following explanation:

> "*When we attempt to register a 'non compete' MPAN or MPRN the transfer to CRM will fail with an appropriate error message in the CRM.Customer_Quote table.*
>
> *We check whether the MPAN or MPRN is in the EXTERNAL_MPxN table that is populated with non compete MPxNs.*
>
> *If we wish to bypass this process the menu item 'Register Failed Non Competes' will allow us to send these MPxNs to CRM and the acquisitions inbox*."[184]

5.122. On 27 May 2016, [Economy Employee 6] (Economy) contacted Andrew Dyball (Dyball) with a query about "*How to register E customers*" and how to "*Register Non-Competes*". Mr Dyball's response to the first query was to refer [Economy Employee 6] to "*release notes attached 2.1.15*".[185] In an e-mail dated 31 May 2016, [Economy Employee 6] sent [Economy Employee 5] (Economy) an attachment entitled "*Economy Energy CRM V2 1 15 Release Notes .docx*".[186] This document was forwarded from Mr Dyball and in the body of [Economy Employee 6]'s e-mail, he wrote "*Attached doc explains the registration process for E customers*". In the attached release notes, screenshots show a window entitled "*Customer Relation Manager*" and a drop-down menu on which the only two options were entitled "*Manage Registrations*" and "*Register Failed Non Competes*".[187] Under that screenshot was the following wording:

> "*When we attempt to register a 'non-compete' MPAN or MPRN the transfer to CRM will fail with an appropriate error message in the CRM. Customer_Quote table.*
> *We check whether the MPAN or MPRN is in the EXTERNAL_MPxN table that is populated with non compete MPxNS.*
> *If we wish to bypass this process the menu item 'Register Failed Non Competes' will allow us to send these MPxNS to CRM and the acquisitions inbox*".

[182] Document reference DL0008.
[183] Document reference EE0192.
[184] Document references EE0168 and EE0169.
[185] Document references DL0100. A copy of those release notes are available under document reference EE0169.
[186] Document reference EE0170.
[187] Document reference EE0171.

5.123. The document then displays a further screenshot showing a window from a computer programme entitled "*Register Non Competes*", with an entry field headed "*MPxN*" and buttons marked "*Add*" and "*Cancel*" below the entry field.

5.124. On 27 May 2016, [Economy Employee 5] (Economy) had also contacted Mr Dyball to ask whether the latter had "*had any luck with the E-Power re-application patch*". Mr Dyball replied with the two screenshots mentioned above.[188] The entry field in the second screenshot was populated with a number that featured in [Economy Employee 5]'s e-mail asking about the "*E-Power re-application patch*" under the heading "*MPAN*".

5.125. Throughout June 2016, Economy's employees made use of the ability to override the "*E-power exception status*" shown in the Dyball release notes,[189] letting EGEL customers register in Economy's CRM and, thereby, switch from EGEL to Economy.

May 2016: Further evidence of implementation

5.126. Internal EGEL correspondence from 19 May 2016 reads as follows:

> "*FROM [✂]:*
>
> *I have just spoken and validated a* [customer name, address and reference number] -
>
> *He switched from [✂] to Economy Energy only days ago, so he is still within his cooling off period with Economy Energy.*
>
> *He said he is going to ring Economy Energy today to cancel with them, so that for the time being he can remain with [✂], which will give time for the switch to E to take place; can someone from E please call him to ensure he cancels, or this will result in an industry rejection?*"[190]

5.127. On 19 May 2016*[✂]* sent an e-mail to [Economy Employee 7] (Economy), copying [Economy Employee 8] and [Economy Employee 9] (both, Economy), entitled "*missing sales*" and asking: "*I've had a look and cant* [sic] *seem to find the following deals in Opendoor.*[191] *Are you able to have a look at these?*" Economy explained that a number of the customers did not appear in Open Door because they were EGEL's customers.

5.128. On 20 May 2016, [Dyball Employee 5] (Dyball) wrote to various Dyball employees,[192] as well as to [Economy Senior Manager 1] (Economy) and [EGEL Senior Manager 2] and the [EGEL Senior Manager 1] (both of EGEL) to propose a three-day workshop for "*the new combined CRM and billing system*".[193] On 24 May 2016, Dyball wrote to the same group, thanking them for confirming their attendance at the workshop. [Dyball Employee 5] also said that he was attaching "*a generic set of requirements*

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[188] Document reference EE0194.
[189] Document references EE0195 and EE0196.
[190] Document reference EP0018.
[191] Document reference EE0122. In its response to a statutory request for information from the Authority (see document reference EE0293), Economy explained this term as follows: "*"Open Door" is the name of a workforce management application used by Economy Energy and its field agents. (…) On the agent version of the application, the agents will only see the number and location of the properties that have been allocated to them at any given time."*
[192] These were Andrew Dyball, *[✂]* (an IT contractor working for Dyball), [Dyball Senior Manager 2], [Dyball Senior Manager 1] and [Dyball Senior Manager 3].
[193] We understand this to be a reference to nnnnnmm,./ the CSM system.

based on those pr nm,. ovided by Economy Energy".[194] The set of requirements attached to that e-mail contained the following reference:

> "*The system will integrate with the existing Sales API to receive customer contracts and tariff data, and provide ECOES and GSP data. Also provides non-compete sales exclusion lists.*"[195]

5.129. On 24 May 2016, a document entitled "*EE_MPANs.xlsx*" was attached to internal correspondence at EGEL.[196] We understand the "*EE*" in the file name to refer to Economy.

5.130. On 31 May 2016, *[✂]* (who appears to have been working with *[✂]*) wrote *[✂]* (*[✂]*) asking why sales were "*missing*" despite the fact that "*none are with E*".[197] *[✂]* then wrote to [Economy Employee 7] (Economy) reporting the "*missing*" sales. *[✂]* was aware, therefore, that Economy was not processing sales to EGEL's customers.

5.131. On the same day, *[✂]* sent another e-mail to [Economy Employee 7], copying [Economy Employee 8] (Economy) asking "*Can I have a report of the deals that have been rejected by the CRM last week for being E-power*". [Economy Employee 5] (Economy) replied instead of [Economy Employee 7] with an e-mail saying "*Please find attached the sales that were not accepted into CRM because they were E-Power customers*".[198] A document entitled "*E-Power WC 23.05.16.xlsx*" was attached to that e-mail. That document contained a list of customers, each marked with "*Ex*", which the Authority takes to stand for "*exclusion*".

June 2016: The "Gate"

5.132. On 1 June 2016, internal correspondence showed that EGEL was tracking the number of customers they had gained from and lost to Economy during the previous month. [EGEL Senior Manager 1](EGEL) sent to *[✂]* (*[✂]*) a list of Economy's customers who had switched to EGEL in April and May 2016[199] and, in response, it received a list of the individual sales agents who had signed up those Economy customers.[200]

5.133. On the same day, Paul Cooke (EGEL) sent an e-mail to Lubna Khilji (Economy) entitled "*Economy Losses/Gains*", informing Ms Khilji that "[w]*e have taken 61 customers from you in May. You have taken 89 from us (contract signed date in May) Awaiting confirmation from Andrew Dyball that his 'gate' is still in place*".[201]

5.134. Internal correspondence at Economy[202] from the following day, forwarding the e-mail mentioned in the previous paragraph reads as follows: "*I think the gate is still working, we do have genuine cases where the customers want to come over to us from E and can not stop these customers from transferring so there will be a handful but not the volumes that did churn between us*".[203] The Authority understands the

[194] Document reference DL0048.
[195] Document reference DL0048.
[196] Document reference EP0040.
[197] Document reference EE0118.
[198] Document reference EE0119.
[199] Document reference EW0025.
[200] Document reference EW0023.
[201] Document reference EP0067.
[202] That correspondence was between [Economy Senior Manager 1], Lubna Khilji and [Economy Senior Manager 2].
[203] Document reference EE0089.

"*gate*" to refer to the CRM system restrictions preventing Economy and EGEL from processing sales to each other's customers.

June 2016: Dyball proposes a "gate" in EGEL's CRM, to add to EGEL's existing "gate" of restricting its sales agents from approaching Economy's customers

5.135. On 2 June 2016, Andrew Dyball wrote to [EGEL Senior Manager 1], copying [EGEL Senior Manager 2] (both, EGEL), as follows:

> "*I understand that we provide a list of Economy Energy MPANs and MPRNs so that they can be removed from your app prior to the point of sale. I can provide details when in the office later today.*
>
> *I can put in place a catch-all that will inhibit the transfer of Economy Customers to CRM (there is a similar mechanism at EE) - obviously the disadvantage of this being the Customer is kept out of the loop as to why the registration has not gone live and if they ring E there will be no record in CRM. Please advise (urgently) if this is required as it is a fair bit of work to get in place today.*
>
> *We can also provide an override to ensure the Customer does go through on request from CRM if the Customer is adamant they wish to transfer to E. Again this is in place at EE.*
>
> *There will no doubt be some Customers in CRM awaiting the cooling off period - let us know if these require cancelling.*
>
> *Finally withdrawals are obviously an option - let us know if you would like us to process these for you.*
>
> *Let me know your thought* [sic] *and we will ensure any modifications are done as soon as practicable.*"[204]

June and July 2016: Further evidence of sales to EGEL's customers being blocked at Economy

5.136. Internal correspondence within Economy on 17 June 2016 contained the following request "*This customer is with Epower* […] *Can you please put through a sale*". A response read: "*I will be able to override the E-power exception status on Monday and on the same day her account should go into CRM*".[205]

5.137. Further internal Economy correspondence on 23 June 2016 queried the fact that "*the app says this customer is on CRM but she is not, and I've checked echoes* [sic] *and it says she's still with npower*", to which the reply reads as follows: "*this was an exception because they are a former E-Power customer. I can push the sale through for you and it will be in CRM in about 20 minutes*".[206]

5.138. On 22 June 2016, [Economy Employee 5] (Economy) told [Dyball Senior Manager 1] (Dyball), copying [Economy Employee 7] (Economy), that he was working on "*actively removing E-power customers before they reach the sales tables*". Economy checked whether a particular customer was supplied by EGEL using ECOES data.[207]

5.139. On 30 June 2016, [Economy Employee 5] (Economy) sent an email to [Economy Employee 8] (Economy). This included a draft response to *[✂]* (*[✂]*). It contained

[204] Document reference DL0025.
[205] Document reference EE0195.
[206] Document reference EE0196.
[207] Document reference DL0013.

the following comments: "*I've had a look into the figures for you and they seem to add up* […] *86 of the missing sales were from former E-Power customers and are not invoice able*".[208] The actual response did not include this quote. However, it did refer to: "*86- E-Power customers*".[209]

5.140. Internal correspondence within Economy from the same day shows a complaint from a sales agency[210] being forwarded with a covering e-mail stating "*Are they aware we are not able to sell to E-Power?*"[211]

5.141. On 7 July 2016, a different sales agency e-mailed Economy with a customer query, to which [Economy Employee 5] replied by saying that the "*app saying this supply is already with us may be a safety mechanism built in to prevent us from taking over supplies we can't support, much like the E-Power customers showing as already with EE*".[212]

5.142. On the same day, Economy's Indian call centre operator contacted Economy to report a customer "*as lost in CRM*" such that they were "*unable to sign the customer up in the sales app*". Internal Economy correspondence contained the following explanation for this:

> "*Just done a bit of digging and have noticed that we have lost the customer to Epower.*
>
> *Advisors are not allowed to signed* [sic] *Epower customers, however, there is a way around this if the customer still wants to join. The sales would have to be done manually by someone that has the authority to do so.*"[213]

5.143. Internal Economy correspondence from 26 July 2016 included the following question, sent to an internal "*Salessupport*" e-mail account:

> "*Can you please tell me why customers account has* [not] *yet been uploaded onto CRM?*
>
> *The customer has received an email explaining that her start date with EE should be around 23/07/16 but since then hasn't received any correspondence via email or post.*"

5.144. The response was as follows: "*It appears they have gone through as an exception, Reason is that their MPRN was already registered at E. Therefore they are an E-Power customer*".[214] We understand the use of the word "*exception*" in this context to mean that the customer's switch would not be processed.[215]

June and July 2016: Evidence of sales to Economy customers being blocked at EGEL

5.145. Internal correspondence within Dyball on 23 June 2016 reads as follows: "*I believe we have developed an API for Economy and E whereby they can call a list of each*

[208] Document reference EE0117. We understand that a query had been raised about whether the correct number of sales had been credited *[✂]*'s agency for commission purposes (see also document reference EE0115).
[209] Document reference EE0115.
[210] Document reference EE0116.
[211] Document references EE0116 and EE0199.
[212] Document reference EE0200.
[213] Document reference EE0173, which also shows that there was an internal request to override the automatic block on processing the customer.
[214] Document reference EE0205.
[215] See, for other examples, paragraph 5.115, 5.118, 5.125 and 5.137, above.

other's MPANs and MPRNs so they remove them from their sales app so they do not sell to each other's customer [sic]".[216]

5.146. On 28 June 2016, *[✂]* (*[✂]*) sent [EGEL Senior Manager 1](EGEL) details of three customers of a third party supplier, with the subject title "[Third party supplier's] *customers signed up last week. All have been cancelled. Advisors put down as Economy!*".[217]

5.147. Two hours later, [EGEL Employee 3] (EGEL) sent an e-mail to *[✂]* reporting an "*Unsuccessful import*", to which *[✂]* replied "*It was because they were Economy Energy Customers. No panic*".[218]

5.148. On 1 July 2016, internal correspondence at EGEL contained instructions not "*to cancel Economy Energy customers*", saying "*although we are avoiding engaging with these customers on the doorstep, we should process them as normal if they have slipped through the net*".[219] This was passed on within EGEL as follows: "*we are no longer cancelling accounts down where their current supplier is EETL. Although we are attempting to not to* [sic] *engage on the doorstep if some accounts pass through the net we will process them in the normal fashion moving forward*".[220]

June 2016: Economy asks for EGEL's customers to be hidden from Economy's sales agents

5.149. On 27 June 2016, [Economy Employee 10] (Economy) asked [Economy Employee 9] (then, of *[✂]*) to "*hide the properties belonging to E Power so the agents can't sell to them please*".[221] [Economy Employee 9] responded to [Economy Employee 7] (Economy) with a proposal as to how this could be achieved. [Economy Employee 7] agreed with that proposal.[222]

5.150. Further to the internal sharing of lists of Economy's customers by EGEL on 12 and 19 April 2016 and 24 May 2016, such lists were further shared internally within EGEL on 27 June 2016[223] and 15 July 2016.[224]

5.151. EGEL also continued to monitor instances of customers won from Economy and lost to them.[225]

July 2016: Confirmation of the EGEL CRM "gate" and sales app restriction

5.152. On 13 July 2016, *[✂]* internal correspondence read as follows:

> "*We are still getting EE customers signing up. IT IS NOT THE ADVISOR FAULT.*
>
> *For some reason the following advisors ipads are not downloading the latest exceptions file automatically. As a matter of urgency can you ask the following*

[216] Document reference DL0013, which contains a discussion amongst Dyball employees of how MPAN and MPRN customer lists were downloaded. This e-mail was sent by [Dyball Senior Manager 1], to [Dyball Employee 6], copying [Dyball Employee 5], Andrew Dyball and [Economy Employee 5] (Economy).
[217] Document reference EW0026.
[218] Document reference EP0026.
[219] Document reference EP0028.
[220] Document reference EP0029, see also EP0030.
[221] This means that Economy's sales agents would not be shown properties supplied by EGEL on tablet devices loaded with Economy's sales app.
[222] Document reference EE0102.
[223] Document reference EP0043.
[224] Document references EP0045 and EP0046.
[225] Document reference EP0044.

> *advisors to turn ipad completely off, turn on, connect to WIFI, and then open the App. I believe this should fix the problem*".[226]

5.153. On the same day, [EGEL Senior Manager 1](EGEL) wrote to Andrew Dyball and [Dyball Senior Manager 1] (Dyball), copying [EGEL Employee 1] (EGEL), as follows:

> "*My understanding was that our only filter of Economy Energy customers was via the Sales App, which excludes live EE MPANS from displaying and thus preventing Sales Advisors having contact with these customers.*
>
> *I have now been advised that EE contracts are now bouncing at your end, returning a message to the Sales App server to notify [✂] that it has been rejected.*
>
> *Please can you confirm if you have a filter in place to prevent any EE applications being loaded yourselves?*"[227]

5.154. On 14 July 2016, Dyball replied to EGEL, confirming that customers were being rejected within EGEL's CRM system with the reason "*EE Gas Customer*".[228] (Again, the Authority understands the letters "EE" to refer to Economy.)

August 2016: EGEL's "exclusion lists"

5.155. On 8 August 2016, EGEL received two queries[229] from *[✂]* as to whether *[✂]*, on behalf of EGEL, could target Economy's smart meter customers or whether Economy was to be added to the "*prohibited companies*" on *[✂]*'s "*scripts*". [EGEL Employee 3] (EGEL), in response to one e-mail, confirmed that *[✂]* was not to switch Economy's customers[230] and, in the response to the other e-mail, said that if the existing supplier was other than Economy, the switch could go ahead, but if it was Economy, the switch should be placed on hold.[231]

5.156. Internal EGEL correspondence from 1 August 2016 reports that a sales representative had complained that an Economy customer's details were not accessible on the sales representative's iPad. EGEL concluded that the sale would be processed as "*a manual upload*".[232]

5.157. During August and early-September, EGEL continued to share Economy's customer lists internally,[233] including one entitled "*Excluded_MPANs*".[234]

Development of an enhanced "CSM" system

5.158. Having been instructed in May to do so, Dyball continued to develop a "CSM" system for Economy and EGEL during the summer of 2016. In an interview with the Authority, Andrew Dyball described this as "*a new CRM*" that was "*jointly financed*" by the two suppliers.[235]

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[226] Document reference EW0010.
[227] Document reference EP0060.
[228] The same document reference.
[229] Document references EP0034 and EP0035.
[230] Document reference EP0034
[231] Document reference EP0035.
[232] Document reference EP0217.
[233] For example, document references EP0048 and EP0050.
[234] Document reference EP0050.
[235] Document reference DL0276, the transcript of that interview, at pages 13 and 14. Also document references DL0033 and DL0034.

5.159. [EGEL Employee 1] (EGEL) sent a document entitled "*Dyball CSM Dev Road Map*" to *[✂]*, [Dyball Employee 5] and Andrew Dyball (all, Dyball) on 30 August 2016.[236] That document contained reference to a "*Sales API Interface*" which is described as follows:

> "*The system will integrate with the existing Sales API to receive customer contracts and tariff data, and provide ECOES and GSP data. Also provides non-compete sales exclusion lists.*"[237]

5.160. A system diagram entitled "*Customer Service Manager - System Scope*" contains the following explanation of the CSM system: "*The new combined CRM & Billing Application will be referred to as CSM or Customer Service Manager.* [The contents of the chart displayed in the body of the document] *is what is defined as being in scope for the delivery of the project. This will form the basis for our specification meetings to be held 31st May to 2nd June*".[238] The diagram includes reference to "*Exclusion Lists*" on an arrow feeding into a box marked "*Sales App/The App*".

5.161. That CSM diagram shows customer information being fed into the sales API from the sales app. The sales API then feeds "*ECOES/GSP Data*" to the sales app, which returns "*Contracts*", "*Customer info*" and "*Tariffs*", presumably from sales, to the sales API. The CSM and Sales API are shown in a rectangle marked "*Dyball Systems*", implying that the sales app (which sits outside that rectangle) was not developed by Dyball.[239]

5.162. In a note to the Authority, received on 31 October 2016, Dyball explained that "*No common systems or databases were set up by Dyball Associates – each of its clients has its own operational system, CRM, etc. These are not shared between the companies; each has separate installations of systems on separate servers.*"[240]

5.163. That note also contained the following explanation:

> "*under instruction from Economy Energy and Epower, further checks were put in place to validate the upload of sales data to restrict the cross registration of each other's MPANs and MPRNs. This was implemented in two different ways:*
>
> - *At Economy Energy the check was put in place on the CRM import process. This restriction was in place from 27th April 2016 and removed 18th September 2016. A workaround was added to bypass this check if needed for an individual Customer.*
> - *At Epower the check is in place on the upload of Customers from the Sales Application via the API. This restriction was in place for the following dates:*
>   - *4th November 2014 thru 30th January 2015.*
>   - *2nd March 2016 (one day only)*

[236] Document references EP0141 and EP0142.
[237] The same description was used in document reference DL0033. EGEL and Dyball have told the Authority that the "*non-compete sales exclusion lists*" referred to in these documents were intended for a situation in which a company has a portfolio of brands. EGEL and Dyball also explained that this was a functionality that was not, in fact, used. The Authority notes that neither Economy nor EGEL have more than one brand in operation and that this explanation is not consistent with the evidence described in this Decision.
[238] Document reference DL0070.
[239] This understanding was confirmed at interview with Andrew Dyball (see document reference 276, page 55).
[240] This statement is taken from a document entitled "*Note to Ofcom* [sic] *Background to relationship between Dyball Associates, Economy and E*", document reference DL0074.

- *23rd June 2016 thru 31th October 2016 and still on-going.*

This instruction to create the necessary code was carried out. Individual customer applications could now be checked, within the Dyball customer acquisition protocols for each party, against the other party's customer database. If a customer was flagged as belonging to the other, it would no longer transfer across. At no point, though, was the whole customer database itself made available to the other company.

Dyball Associates does not provide the sales handsets and systems used by either Economy or E."

Andrew Dyball's summary of Dyball's involvement

5.164. During an interview with the Authority,[241] Andrew Dyball agreed with the following summary of his evidence:

5.164.1. In 2014, at around the time that Paul Cooke established EGEL, there was an exchange of emails agreeing to block switches from Economy to EGEL.[242] In that exchange, Mr Cooke sent an e-mail to Andrew Dyball, in response to an e-mail from Ms Khilji, in which he wrote that "*Against the rules or not – all economy energy transfers to epower need to be pulled now*".[243]

5.164.2. In January 2016, there was a meeting to discuss Economy and EGEL agreeing not to take each other's customers, effectively saying that no switches will be allowed between the two companies. This appears to be a reference to the meeting described in paragraphs 5.66 to 5.69, above, at which Dyball and EGEL representatives discussed an agreement that had already been reached between Economy and EGEL, or it may refer to an earlier meeting at which the agreement had been concluded between Economy and EGEL.

5.164.3. Technical problems on the proposed implementation date of 1 March 2016 meant that the mechanism for preventing registration of sales to each other's customers was not in place. In any event, Mr Dyball received a later communication to tell him that Economy and EGEL had agreed to delay blocking customers from switching between them until early April 2016. This supports the evidence cited at paragraphs 5.72 to 5.76, above.

5.164.4. Dyball's role in implementing the Infringement – preventing customers from switching between Economy and EGEL – was two-fold. Firstly, Dyball provided for Economy and EGEL to be able to pull down each other's client lists in the form of MPANs and MPRNs (see also paragraphs 5.77 to 5.92 and 5.158 to 5.163, above). Secondly, Dyball introduced an impediment in the sales verification process in each company's CRM. This stopped sales from being processed after the sale had been concluded (see also paragraphs 5.111 to 5.112, 5.135 and 5.152 to 5.154, above).

5.165. These points were discussed during the interview and summarised to Mr Dyball at the end. Mr Dyball confirmed that they are "*a reasonable reflection*" of his evidence

[241] Document reference 276 - a transcript of that interview
[242] Document reference DL0011. We note that this e-mail was sent before the Demerger Agreement was signed.
[243] For reasons of administrative priority, the Authority has chosen not to investigate this potential earlier agreement and whether it represents a breach of the Chapter I prohibition.

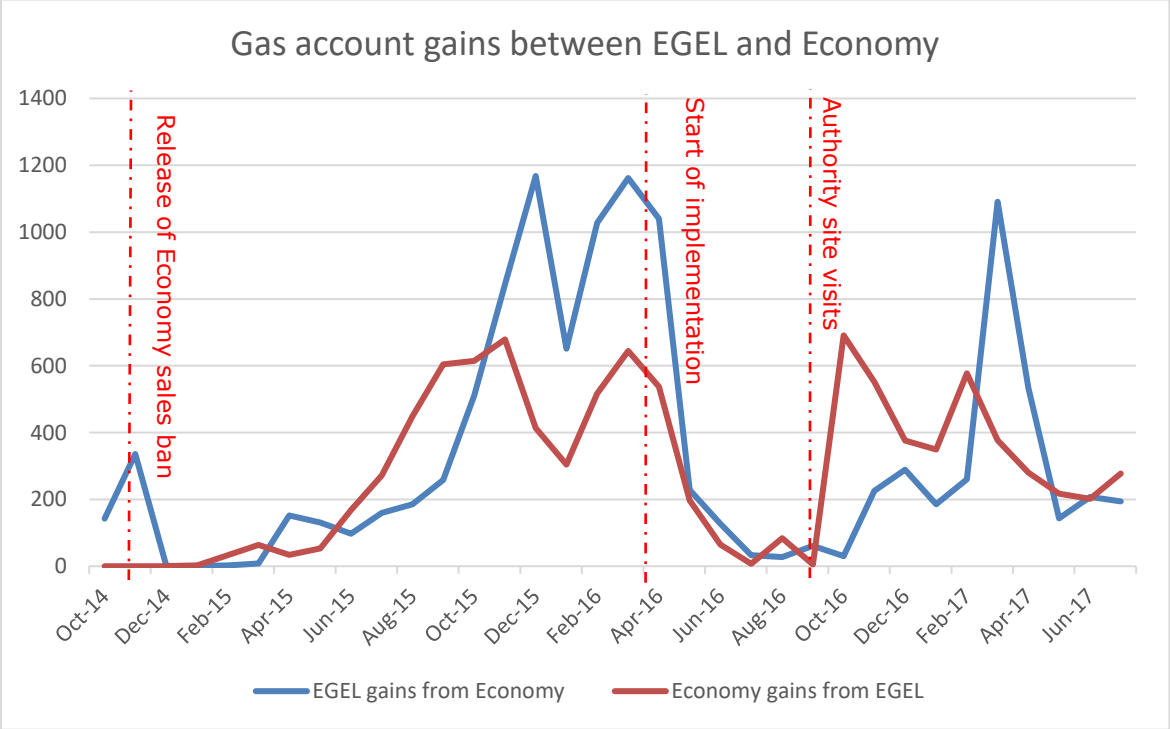
and that he thought "*the agreement being made there was obviously minuted by* [Dyball Senior Manager 1] *at a meeting of staff at E*".[244]

Reduction in the rate of customers switching between Economy and EGEL

5.166. The following graphs show that, during the Relevant Period, there was a significant reduction of the rate of customers switching between Economy and EGEL that was not replicated in changes to switching rates from and to other suppliers.

5.167. There is no credible explanation for the substantial drop in switching rates between Economy and EGEL in April/May 2016, shown in Figure 1, other than the existence of an agreement and/or concerted practice of the sort described in this Decision. As Figures 2 and 3 demonstrate, there was no similar, sustained fall in switching rates involving Economy and/or EGEL and other suppliers over the same period. The level of switching between Economy and EGEL increased only after the Authority visited Economy's and EGEL's business premises in September 2016. Again, this increase is not reflected in Economy's and/or EGEL's switching rates with other suppliers.

Figure 1 – Economy and EGEL switching data from October 2014 to June 2017[245]



5.168. These switching figures were reported to the Authority on a monthly basis by Xoserve, which receives the data from gas shippers.[246] This graph shows a gradual

[244] Document reference DL0276, pages 65 to 66.
[245] The Authority refers only to gas account figures in this graph because it holds reporting data for gas accounts throughout the period, broken down by supplier on a monthly basis whilst corresponding information for electricity accounts until June 2016 was not available to the Authority. However, we would expect electricity switching figures to show a similar pattern, particularly because there is a strong tendency for domestic customers to source their gas and electricity from the same energy supplier (see, for example, the summary to the CMA's EMI report, paragraph 10).
[246] Xoserve's data relates only to supply points connected to the National Transmission System. Pre-June 2017, this data does not include around 1.5 million sites that are currently connected to independent gas transporters networks. From June 2017 onwards, the independent gas transporters networks are included. The omitted meter

increase in switching through most of 2015, following EGEL's entry into the market in late-2014 and Economy having been released, in December 2014, from a sales ban imposed by the Authority for violations of its gas and electricity supply licences (marked by the first vertical red line on the graph). The final quarter of 2015 and the first quarter of 2016 show substantially higher and sustained switching of customers between Economy and EGEL, with a seasonal dip over Christmas. The graph then shows an abrupt reduction in customers switching between Economy and EGEL, almost to zero. The second vertical red line shows the data for the final month before the Infringement was implemented (i.e., March-April 2016). The third vertical red line marks the first set of switching data for a full month following the Authority's inspections at Economy's and EGEL's premises[247] (i.e., data for October 2016).[248] After that date, the graph shows that Economy and EGEL resumed competition for each other's customers.[249]

points should not, however, disrupt the trend shown in Figure 1.

[247] See paragraph 4.4.

[248] Industry arrangements involve a time-lag of several weeks from the date on which a customer requests to be switched before the switch is complete. This may cause a delay in any reported switching figures.

[249] The delayed resumption for switches to EGEL is likely to have been the result of EGEL's later removal of its CRM restrictions.

Figure 2 – [✂]

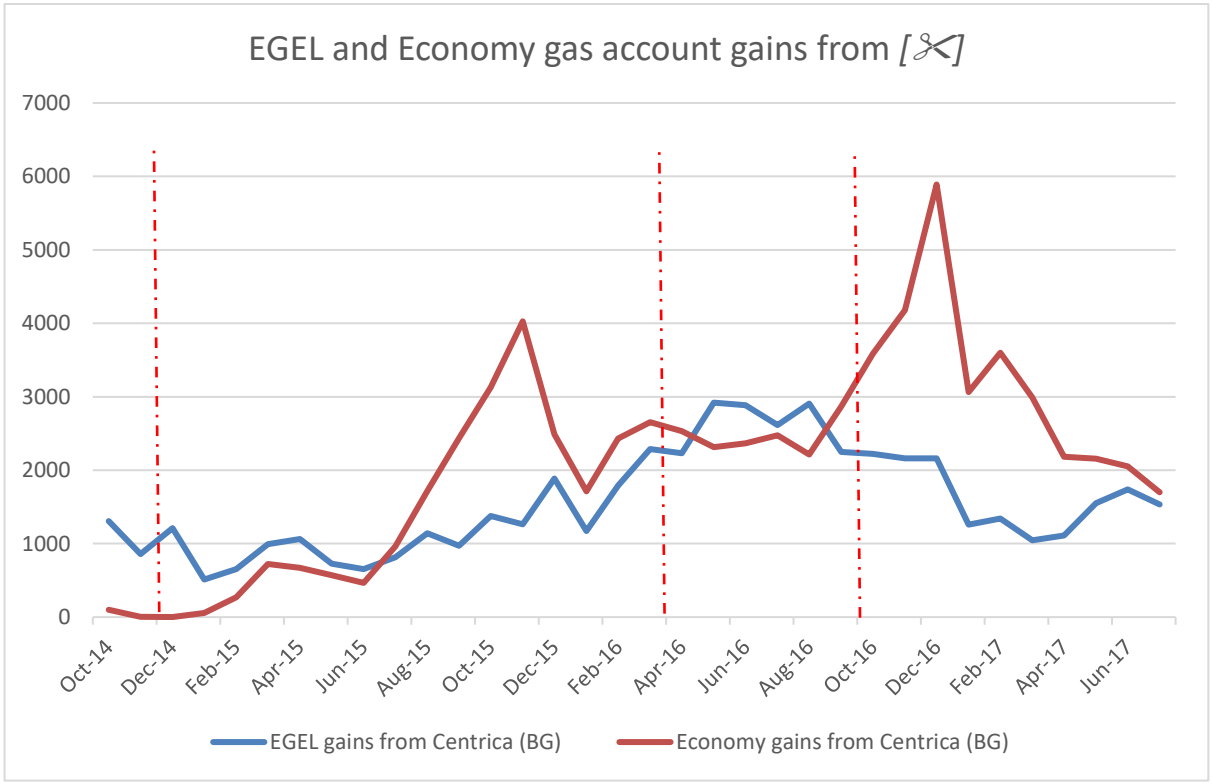
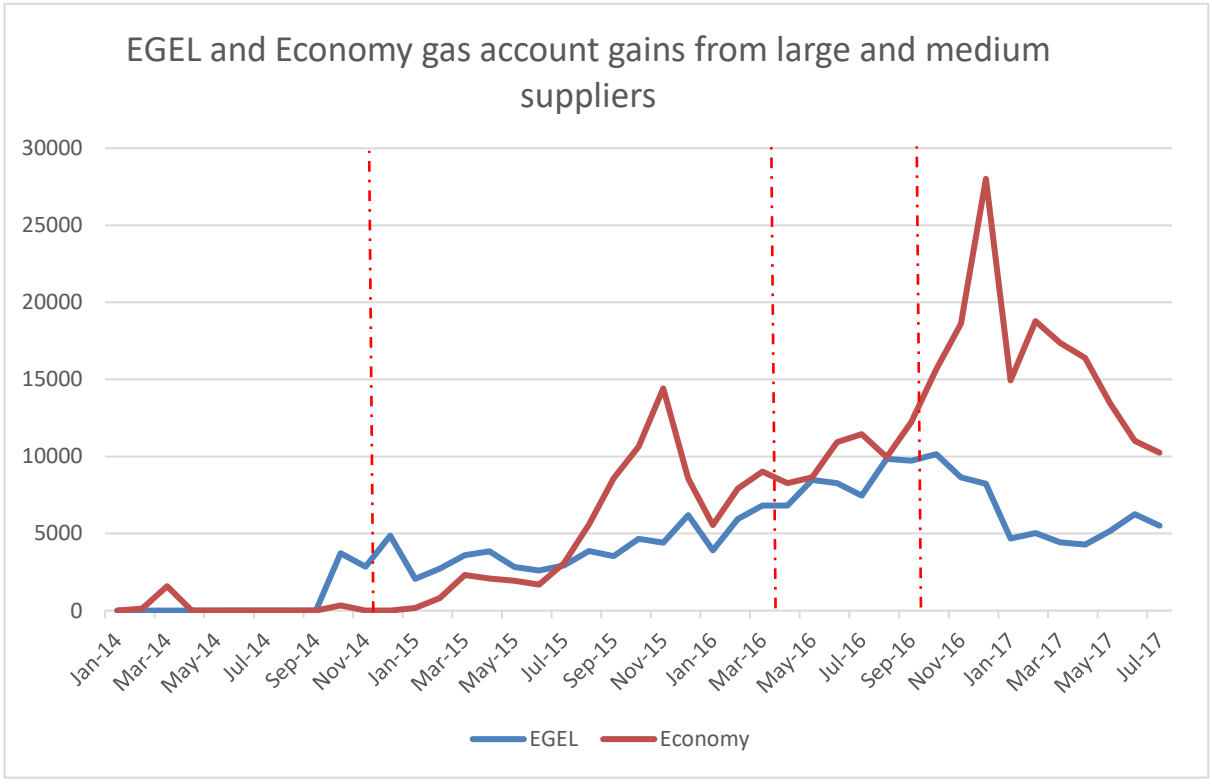
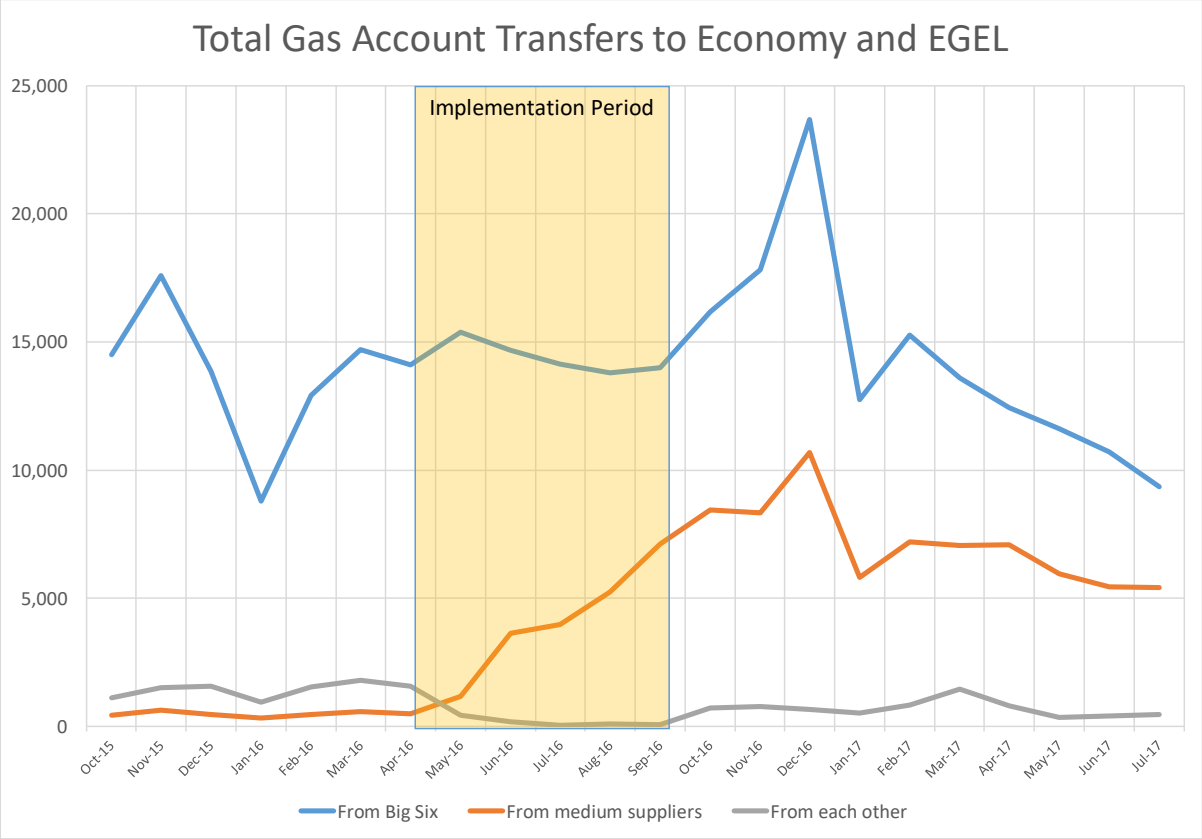


Figure 3 – Economy and EGEL gains from large and medium suppliers[250]



[250] These suppliers are the Six Large Energy Firms, plus Co-operative Energy, First Utility, Ovo, Spark Energy and Utilita.

Figure 4 – Total gains of customer gas accounts to Economy and EGEL



5.169. Figure 4 shows total transfers jointly to EGEL and Economy from (i) the Six Large Energy Firms; (ii) five medium suppliers and (iii) each other.

5.170. On this aggregate basis, it is very clear that the agreement did not coincide with, still less cause, an increase in transfers to Economy and EGEL from the Six Large Energy Firms and succeeded in reducing transfers from each other. There was an increase during the Relevant Period in transfers from the medium suppliers. This trend continues after the reported removal of the CRM restrictions on switching between Economy and EGEL.[251]

Duration

5.171. The duration of the Infringement is a relevant factor for determining any financial penalties that the Authority may decide to impose following a finding of infringement.

5.172. The Infringement began when the arrangements described above were first agreed, i.e., in January 2016, at the latest. As at September 2016, the Infringement was ongoing. On the basis of the switching figures illustrated in Figure 1 and the statements made by Dyball, cited at paragraph 5.163, above, the Authority considers that implementation of the Infringement was brought to end by Economy in September 2016 and, by EGEL, in October 2016.

[251] This continuation suggests that, while an increase in switching from the medium suppliers coincided with the beginning of the Infringement's implementation, the increase was not caused by the Infringement, contrary to a statement contained in paragraph 4.4 of the Letter of Facts.

Summary of findings of fact

5.173. No later than in January 2016, Economy, EGEL and Dyball agreed that Economy and EGEL would not target, nor accept switches from, each other's existing domestic customers from 1 March 2016.

5.174. Between March and at least September 2016, Economy and EGEL implemented that agreement and/or concerted practice in a number of ways which included the following steps, assisted and facilitated by Dyball:

5.174.1. Measures to prevent EGEL's existing customers from appearing on software sales applications used by agents selling on behalf of Economy, and *vice versa*;[252]

5.174.2. Measures to restrict the registration of EGEL's existing customers in Economy's CRM system, and *vice versa*; and

5.174.3. Instructions given to sales agents not to approach the customers of the other undertaking and that no commission would be paid for switching such customers.

5.174.4. Sharing customer lists, via Dyball, to enable the withdrawal of customers from the switching process.

5.175. Aspects of the Infringement varied over time. In particular:

5.175.1. Its implementation was postponed from March 2016 until April 2016, seemingly due to technical issues.

5.175.2. The arrangements were varied to allow EGEL's customers who actively approached Economy (and *vice versa*) via other channels to complete the switching process.

5.176. Dyball was aware of the Infringement and both intended to and did contribute proactively, by its own conduct, to Economy's and EGEL's common objectives of sharing markets and allocating customers between them.

6. Market analysis and definition

6.1. For the purpose of determining whether there has been a breach of the Chapter I prohibition, the Authority is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement and/or concerted practice in question had as its object or effect an appreciable prevention, restriction or distortion of competition.[253]

6.2. In the present case, it is not necessary to reach a view on market definition in order to determine whether there has been an infringement of the Chapter I prohibition. However, as the Authority is requiring the Parties to pay a penalty under section 36 of the CA98, to do so, it is required to form a view on the relevant market for the purpose of establishing the level of that financial penalty.[254] Nevertheless, the

[252] This was achieved by the sales app either not showing the customer to the sales agent at all or by the app showing the customer as already being a customer of the supplier whom the sales agent was working for (i.e., Economy's sales agents saw both Economy's and EGEL's customers as Economy's customers whilst EGEL's sales agents saw both Economy's and EGEL's customers as EGEL's customers).
[253] See case T-62/98 *Volkswagen AG v Commission* [1995] ECR II-289, paragraph 230, and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, paragraph 74.
[254] See OFT423 and see *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318 ("**Argos and Littlewoods (CoA)**"), at paragraphs 169 and 170 to 173.

Authority notes that, for the purpose of determining the level of a penalty, a formal analysis of the relevant product market is not necessary. It is sufficient for the Authority to be satisfied, on a reasonable and properly reasoned basis, of the relevant product market affected by the Infringement.

6.3. To these ends, the Authority has taken into account the context of the Infringement in ascertaining whether the content of that agreement and/or concerted practice reveals the existence of a restriction of competition 'by object' within the meaning of section 2(1) of the CA98. The following section is intended to explain that market context and to explain the basis on which the Authority has reached a view on the relevant market for the purposes of imposing a fine.

6.4. Further, while it is also necessary for the Authority to define the relevant product and geographic markets in order to determine whether the Infringement is capable of affecting trade within the UK or between EU Member States, this does not require the same degree of precision as for assessing anti-competitive effects. It suffices for the Authority to provide a sufficiently detailed description of the relevant sector, including supply, demand and geographic scope, to allow the Authority to determine whether the relevant thresholds are exceeded.[255]

The relevant product market analysis

6.5. The Infringement relates to Economy's and EGEL's retail supply of gas and/or electricity to domestic consumers. This activity involves competing to sell gas and electricity to end users, procuring that energy, setting the prices they pay and managing customer service.

6.6. In its EMI report, the CMA found that energy retail supply activity could be sub-divided into separate markets based on fuel type (gas or electricity)[256] and customer type (domestic or non-domestic SME).[257]

6.7. In its EMI report, the CMA concluded that PPM customers could form a separate segment of the energy retail supply market. This was because of important restrictions in the choice of tariffs available to customers on PPMs compared with standard credit meters during the Relevant Period, including:

[255] See the judgment in case C-439/11 P *Ziegler v Commission* EU:C:2013:513 (CJEU), paragraphs 67 to 69 and 71-73; and the opinion of Advocate General Kokott (EU:C:2012:800 (AG)) paragraphs 52 to 54 and 58 (citing the EU Market Definition Notice, paragraphs 10 and 12). Kokott AG observed, at paragraph 59, "*in a comparatively simple case…, it would fundamentally run counter to the requirements of efficient and resource-saving administrative activity if the Commission were required to spend more time than absolutely necessary on the definition of the market in connection with the application of the 5% criterion*".

[256] On the demand-side, there are very few substitutes for gas and electricity in the short term for end users. Although there is likely to be some substitutability between the two (e.g. for heating and cooking), this substitutability is limited and would tend to have an effect over the long-term, rather than customers making short-run decisions to switch between electricity and gas (see paragraphs 3.8, 3.21 and 3.22 of the findings section of the EMI report). Moreover, a retail energy supplier has very limited, if any, ability to influence the purchasing choices of end users in response to short-run price signals.

[257] There are a number of differences between domestic and non-domestic SME customers (see paragraph 3.24 and 3.25 of the findings section of the EMI report). These include that SMEs have: different characteristics (such as fewer use gas); different sales channels (such as using brokers); different tariff structures available to them; different costs associated with supplying them; and different regulatory rules applicable to them. From a demand-side point of view, customers cannot substitute between domestic retail supply and non-domestic SME retail supply. Similarly, it is difficult for non-domestic SME customers to switch to tariffs that are aimed at larger non-domestic customers (often referred to as "*industrial and commercial*" or "*I&C*" customers) because such tariffs are generally only available for very large users of energy.

6.7.1. A PPM was not generally a choice on the part of the customer. Generally, PPMs were installed where a customer has a poor payment history or in certain types of rented accommodation.[258]

6.7.2. Customers on legacy PPM meters (as opposed to "smart" PPM meters), which remains the large majority of PPM customers, can only access PPM tariffs with their current meter, and would need to change to a credit meter to access direct debit or standard credit tariffs.[259]

6.7.3. PPM customers faced higher actual and perceived barriers to switching to alternative tariffs than other customers in the retail domestic energy markets due, in particular, to the need to change meters to access these tariffs and restrictions on the ability of indebted PPM customers to change supplier.[260]

6.8. As explained in paragraphs 5.3 and 5.13, above, the overwhelming majority of Economy's and EGEL's customers had a PPM during the Relevant Period.

6.9. The characteristics of PPM customers mean that they are less engaged in the market than direct debit customers and are less likely to switch energy supplier.[261] This is because PPM customers included higher proportions of people with a range of demographic characteristics that are associated with low levels of engagement in the domestic retail energy markets, notably: low levels of income; low levels of education; living in social rented housing; and having a disability. These characteristics correspond with those used by the Authority to identify vulnerable customers who are in special need of support and protection when engaging in the competitive energy market.[262] In a 2015 review into how PPM customers were served by the energy retail market, Ofgem found that although not all PPM customers are financially vulnerable, they are disproportionately on low incomes, with more than 60% of PPM meters installed due to debt. The report also noted that one estimate suggests that more than a third of households with PPM meters have one or more individuals with a long-term physical or mental health condition or disability.[263] Moreover, the CMA found that PPM customers faced higher barriers to accessing and assessing information and additional actual and perceived barriers to switching. The CMA considered that low levels of engagement by PPM customers may have, in part, been influenced by the lower gains from switching available to this group.[264]

6.10. In addition to these demand-side characteristics that make PPM customers particularly vulnerable to distortions of competition, in its EMI final report, the CMA identified supply-side barriers, which limited the potential for competition in the PPM segment of the retail energy market.[265] Those barriers included technical restrictions, which limited the number of energy tariffs that suppliers could offer to customers,

[258] See paragraph 105 of the summary of the CMA's EMI final report and paragraph 3.37 of its findings section.
[259] See paragraph 9.213 of the CMA's EMI final report
[260] See paragraph 9.476 of the CMA's EMI final report.
[261] See paragraphs 5.42 to 5.44, above.
[262] For further information on this work, see the Authority's work on updating its consumer vulnerability strategy, available here: https://www.ofgem.gov.uk/about-us/how-we-work/working-consumers/protecting-and-empowering-consumers-vulnerable-situations/consumer-vulnerability-strategy.
[263] That report was entitled "*Prepayment review: understanding supplier charging practices and barriers to switching*" and was published on 23 June 2015. The review arose from Ofgem's Consumer Vulnerability Strategy, which seeks to reduce the likelihood and impact of vulnerability and ensure all customers can access market benefits. It followed research by the Children's Society, Citizens Advice, Church Action on Poverty and the All-Party Parliamentary Inquiry into Hunger that raised concerns about costs falling unfairly on those who can least afford them.
[264] For more information on the adverse effect on competition identified by the CMA in its energy market investigation in respect of PPM customers, see footnote 73, above.
[265] See section 9 of the findings section of the EMI report (specifically, pages 544 to 569).

especially in gas.[266] These barriers limited the ability of energy suppliers[267] to compete for PPM customers by offering them new tariffs.[268] While the constraint on the number of tariffs available appeared to be more acute in gas than electricity, a constraint on the ability of a supplier to offer tariffs for one fuel type was found likely to affect its willingness to offer tariffs on the other as there was a tendency for suppliers to offer new gas and electricity tariffs together.[269]

6.11. As a result of these demand-side and supply-side characteristics, the CMA found that what it described as the PPM retail market segments were subject to two, distinct adverse effects on competition ("**AEC**"s),[270] as follows:

6.11.1. "Domestic Weak Customer Response" AEC: the PPM segments, like the rest of the energy retail supply markets, were subject to a "Domestic Weak Customer Response" AEC.[271] The CMA found that there are additional characteristics of the PPM market segments that contribute to the Domestic Weak Customer Response AEC. Those PPM-specific characteristics were, in particular, higher actual and perceived barriers to accessing and assessing information about switching arising, in particular, from relatively low access to the internet and confidence in using PCWs, and higher actual and perceived barriers to switching arising from the need to change meter and from debt assignment issues.[272]

6.11.2. "Prepayment" AEC: the CMA labelled the second AEC that it found to affect the PPM segments as the "Prepayment" AEC. This AEC relates to supply-side restrictions and the additional difficulties involved in engaging with and switching PPM customers.[273] The result is that the features specific to PPM customers reduce retail suppliers' ability and/or incentives to compete to acquire such customers. Those features are as follows:

6.11.2.1. Technical constraints that limit the ability of all suppliers, and in particular new entrants, to compete to acquire PPM customers, and to innovate by offering tariff structures that meet demand from PPM customers who do not have a smart meter.

6.11.2.2. Softened incentives for all suppliers, and in particular new entrants, to compete to acquire PPM customers due to:

6.11.2.2.1. actual and perceived higher costs to engage with, and acquire, PPM customers compared with other customers; and

[266] See paragraph 9.476 of the CMA's EMI final report.
[267] This barrier affected suppliers who already supplied energy to PPM customers, existing suppliers who did not supply existing PPM customers but who may have started to do so and potential new entrants.
[268] See paragraph 9.476 of the CMA's EMI final report.
[269] See paragraph 4.414 of the CMA's EMI final report. Appendix 9.6 to the EMI sets out more detail, analysis and evidence supporting findings of supply-side barriers to entry and expansion in what the CMA referred to as the PPM segments. See also paragraphs 162 to 167 of the summary section of the EMI report.
[270] See paragraphs 147 and 167 of the summary of the CMA's EMI final report.
[271] The features of this AEC were that customers: (a) have limited awareness of, and interest in, their ability to switch energy supplier; (b) face actual and perceived barriers to accessing and assessing information due to the complexity of billing and tariff structures and a lack of confidence and access to PCWs; and (c) face actual and perceived barriers to switching, such as where they experience erroneous transfers.
[272] See the CMA's "*The Energy Market Investigation (Prepayment Charge Restriction) Order 2016*". See also the accompanying "*Notice of making an order*", dated 7 December 2016. These barriers have led to a reduction in competition for PPM customers (see paragraphs 3.38 to 3.40 of the CMA's EMI final report findings). This, in turn, means that proactive targeting of PPM customers, such as by doorstep sales, is often necessary to cause such customers to switch supplier.
[273] See paragraph 20.12 of the findings section of the CMA's final EMI report.

6.11.2.2.2. a low prospect of successfully completing the switch of indebted customers, who represent about 7 to 10% of PPM customers.[274]

6.12. The severity of these AECs in the PPM segments meant that the CMA proposed a series of remedies, including a price cap for PPM customers.[275]

6.13. Overall, due to the PPM-specific demand-side and supply-side constraints, the CMA concluded that the nature of competition was less intense in the PPM segments of the market compared with competition in the market segments for customers who pay by direct debit or standard credit.[276] Evidence in the EMI report that supported this conclusion included the following:

6.13.1. PPM customers had materially fewer PPM tariffs to choose from in comparison with the market segments consisting of domestic customers who paid their energy bills by direct debit.[277]

6.13.2. The cheapest dual fuel tariff for PPM customers was around £200 more expensive per year than the cheapest dual fuel tariff for customers paying by direct debit.[278] This difference was not explained by the cost difference of serving each of these groups of customers, which was estimated to be far smaller, at £63.[279] This availability of lower tariffs for customers who pay by direct debit when compared to the tariffs available to PPM customers may be a result of more intense competition to acquire direct debit customers.

6.13.3. The estimated gains from switching available to PPM customers were much lower than those available to direct debit customers. In the second quarter of 2015, for example, the switching gains for PPM customers averaged £70 (or 8% of the annual bill) whereas for direct debit customers of the Six Large Energy Firms they averaged £219 (or 19% of the annual bill).[280] Again, this may be indicative of more intense competition to acquire new customers in the direct debit segment through offering lower tariffs, when compared with competition for acquiring PPM customers.

6.14. The Authority's view is that the findings in the CMA's EMI report remain applicable in the context of the present investigation because that report was published during the Relevant Period. As such, the Authority considers the relevant product market to be that for the retail supply of energy to domestic customers.[281]

6.15. It is clear from the CMA's analysis in that report that the characteristics of competition for PPM customers meant that the dynamics of retail energy market competition differed for PPM customers and direct debit customers during the Relevant Period.

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[274] See also section 9 (particularly, paragraph 9.476) of the EMI report.
[275] See the CMA's "*The Energy Market Investigation (Prepayment Charge Restriction) Order 2016*". See also paragraph 20.25 of the findings section of the CMA's final EMI report and paragraphs 207, 219 to 222 and 243 to 252 of the summary section of the EMI report.
[276] See paragraphs 3.38 of the findings section of the EMI report.
[277] See paragraphs 3.39, 8.273, 8.276, 8.278, 8.280, 8.297, 8.301 and 9.213 of the CMA's EMI final report. See also paragraph 110 of the CMA's summary of its EMI report, in which it explained that standard variable tariffs are acquisition tariffs for PPM customers, whereas suppliers seek to attract non-PPM customers used (cheaper) fixed tariffs.
[278] See figure 8.37 and paragraphs 8.286, 8.297 and 8.301 of the CMA's EMI final report.
[279] See paragraph 8.286 of the CMA's EMI final report.
[280] See table 8.13 of the CMA's EMI final report. See also paragraphs 129 and 130 of the CMA's summary of its EMI report.
[281] See paragraph 28(c) and (d) of the summary of the CMA's EMI final report, and paragraph 3.41 of its findings section, in which the CMA concludes that it considered customers paying by direct debit, standard credit and prepayment to fall into different market segments of the domestic retail markets, in the light of the different intensity of competition to which they are subject, rather than falling into separate product markets.

Competition for PPM customers was particularly susceptible to distortion and, as such, PPM customers and direct debit customers may have fallen into different market segments of the domestic retail market.

6.16. Economy and EGEL point to the CMA's conclusion that the Six Large Energy Firms enjoy a position of unilateral market power over their inactive customer base and have the ability to exploit such a position through pricing their standard variable tariffs materially above a level that can be justified by cost differences from their non-standard tariffs.[282] However, any such market power must be understood in the context of competition in relation to the acquisition of PPM customers being driven by small and mid-tier suppliers, such as Economy and EGEL.[283]

The relevant geographical market analysis

6.17. Consistent with the CMA's EMI report, the Authority's view on the relevant geographic market context is that, at its broadest, it covers Great Britain. This view has been formed on the basis of the following information:

6.17.1. the regulatory regime, which determines to a large extent the basic parameters of retail energy competition, applies equally across Great Britain;

6.17.2. a number of retail gas and electricity suppliers have a presence in all regions in Great Britain;

6.17.3. retail gas and electricity is increasingly marketed through PCWs, or using national media campaigns; and

6.17.4. in most regions in Great Britain, similar tariffs are available to gas and electricity customers. Those tariffs include, notably, a supplier's standard variable tariff.

6.18. However, the Authority recognises that, during the Relevant Period, the principal sales channels used by Economy and EGEL were face-to-face (doorstep) sales and telesales, rather than PCWs. The former may tend to be focussed in certain geographic regions. The use of these marketing channels is reflected in the findings of the EMI report.[284]

6.19. Having considered these factors, the Authority concludes that the relevant geographical market is Great Britain, as found by the CMA in its EMI report.

Conclusion on market analysis

6.20. For the reasons set out above, the Authority concludes that the relevant market is that for the retail supply of gas and electricity to domestic customers in Great Britain. However, the Authority notes that PPM customers tend to be particularly vulnerable when engaging with the competitive retail energy market and, as a result of their demographic characteristics, the nature of competition in the market for PPM customers is not the same as, and is less intense than, competition for customers who pay by direct debit.[285] As a result, competition for PPM customers is particularly susceptible to distortion.

[282] See paragraphs 158 and 160 of the summary section of the EMI Report, and paragraphs 2.63 to 2.69 of the Joint Response.
[283] See, for example, the Joint Response, paragraph 2.67.
[284] See paragraph 5.42, above.
[285] This reflects the CMA's conclusion, as expressed in paragraph 8.303 of the findings section of the EMI report.

7. Legal Assessment

Introduction

7.1. The Chapter I prohibition prohibits agreements between undertakings and concerted practices which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless an applicable exclusion is satisfied or the agreements in question are exempt in accordance with the provisions of Part I of the CA98.

7.2. This section sets out the Authority's legal assessment of the Parties' conduct, taking into account the relevant facts set out in section 5 and in light of the factual background set out in sections 1 and 2. For the reasons set out below, the Authority finds that the Parties participated in an agreement and/or a concerted practice, which infringed the Chapter I prohibition. That agreement and/or concerted practice had the object of preventing, restricting or distorting competition in the UK by sharing markets and/or allocating customers, and may have affected trade within the UK. The key legal principles, including references to the relevant case law and primary and secondary legislation, are also included in this section.

7.3. As a preliminary matter, the Authority notes that section 60 of the CA98 requires it, when determining a question arising under Part I of the CA98, to act, so far as is compatible with the provisions of Part I, to secure that there is no inconsistency with the principles laid down by the TFEU and the CJEU, and any relevant, applicable decision of the CJEU. The Authority must, in addition, have regard to any relevant decision or statement of the European Commission.[286]

7.4. References to specific paragraphs of sections 5 and 6 are included for ease of reference to the relevant key facts and market context, but the Authority's conclusions are reached in light of the totality of the relevant facts presented in sections 1, 2 and 5 and the market analysis in section 6.

Burden of proof

7.5. The burden of proving an infringement of the Chapter I prohibition lies with the Authority.[287] However, this burden does not preclude the Authority from relying, where appropriate, on inferences or evidential presumptions.[288]

Standard of proof

7.6. The Authority has assessed the evidence in this case by reference to the civil standard of proof, namely whether it is sufficient to establish on the balance of probabilities that an infringement occurred, bearing in mind that infringements of the CA98 are

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[286] See section 60(3) of the CA98. In addition, the CJEU has held that national competition authorities "*may take into account*" guidance contained in non-legally binding Commission Notices (specifically the Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU, (OJ [2001] C368/13, Vol II) but such authorities are not obliged to do so. See case C-226/11 *Expedia v Autorité de la concurrence and Others*, ECLI:EU:C:2012:795 ("**Expedia**"), paragraphs 29 and 31. However, as a matter of domestic law, the obligation under section 60(3) of the CA98 requires UK courts to have regard (though not necessarily to follow) relevant statements of the European Commission. See, for example, *Dŵr Cymru Cyfyngedig v Albion Water Ltd* [2008] EWCA Civ 536, paragraph 32, in which the Court of Appeal held the relevant Commission notice constituted a "*statement of the Commission*" to which it must have regard pursuant to section 60(3).

[287] See *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, [2002] CAT 1 ("**Napp**"), paragraphs 95 and 100. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17 ("**JJB Sports**"), paragraph 164 and *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 31, paragraph 88.

[288] See, for example, the judgment of the CJEU in joined cases C-204/00 , C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission* EU:C:2004:6 ("**Aalborg Portland**"), paragraph 57. See also *JJB Sports*, paragraph 206, citing the judgment in *Aalborg Portland*.

serious matters attracting severe financial penalties.[289] In light of this, the Authority has reached its conclusions on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, the Parties being entitled to the presumption of innocence, and to any reasonable doubt there may be.[290]

The Authority's approach to assessing liability

7.7. As set out in paragraphs 7.28 and 7.29 of the current section of this Decision, in order to determine which legal persons represent the undertakings who were involved in the Infringement, the Authority first examines which legal persons were directly involved in the infringing conduct. Then it considers whether any other legal persons represent the same undertaking, and whether it is necessary to address this Decision to these legal persons in addition to, or instead of, the legal person(s) who were involved in the infringing conduct.

7.8. The Parties to whom this Decision is addressed are set out in paragraph 1.1 above. They consist of:

- the legal entities that were directly involved in the Infringement; and
- the legal entities which the Authority presumes exercised decisive influence over those legal entities during the Relevant Period.

7.9. Where more than one legal entity is named in respect of a particular Party, the Authority considers that they form part of the same undertaking and should be held jointly and severally liable for the Infringement and any financial penalty imposed by the Authority.

Issues under contention

7.10. The first legal issue for the Authority is whether the agreement falls outside of the scope of the Chapter I prohibition, as the Parties have contended, on the grounds that it was made between parties forming part of the same economic undertaking. The Authority has concluded that Economy and EGEL did not form part of the same undertaking for the purposes of the Chapter I prohibition.

7.11. The second major issue is whether – if Economy and EGEL are considered to form separate undertakings for the purposes of the Chapter I prohibition – the agreement is properly categorised as a restriction of competition "by object". On this question, the Authority has concluded that the agreement had the "object" of restricting competition, such that there is no need to examine the effects of the agreement to determine whether it infringed the Chapter I prohibition.

Undertakings
Legal framework

7.12. The first legal issue for the Authority is whether the agreement falls outside of the Chapter I prohibition, as the Parties have contended, on the grounds that it was made between parties forming part of the same economic undertaking.

7.13. As explained above in paragraph 5.25, Economy and EGEL have suggested that the Authority take "*a holistic approach*" when considering whether they formed part of a single undertaking for the purposes of competition law during the Relevant Period.

[289] *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 31, paragraph 88.
[290] See *Napp*, paragraph 109.

As a result, Economy and EGEL conclude that the two companies formed part of a single economic unit at all material times.

7.14. In the following paragraph, the Authority explains the relevant legal principles and the reasons why it has concluded that Economy and EGEL did not form part of the same undertaking for the purposes of the Chapter I prohibition.

The concept of an undertaking

7.15. The Chapter I prohibition concerns "undertakings", a term which is not defined in the CA98, nor in the TFEU but which has been the subject of much case law in the CJEU. The concept has an economic scope: it encompasses any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.[291] "*Economic activity*" has been defined as any activity "*consisting in offering goods and services on a given market*".[292]

7.16. The concept of an "undertaking" is not the same as corporate legal personality for the purposes of commercial and company law. The undertaking that participated in an infringement is not necessarily identical with the precise legal entity within a group of companies whose representatives actually took part in meetings where the conduct under investigation took place.

7.17. The concept of an "undertaking" is used in a number of contexts in EU competition law, across which the CJEU has established a uniform interpretation.[293]

7.18. An undertaking should be understood as an economic unit even if in law that unit consists of several natural or legal persons.[294] More broadly, undertakings are economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind envisaged in the Chapter I prohibition.[295]

7.19. The Chapter I prohibition will not apply to agreements formed between natural or legal persons that form part of a single economic unit and, thus, the same undertakings for the purposes of competition law. The criterion applied by the CJEU in determining whether a parent company and its subsidiaries form a single economic

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[291] See the judgments in cases C-41/90 *Hofner and Elser v Macroton* [1991] ECR I-1979, paragraph 21, joined cases C-628/10 P etc. *Alliance One International Inc (and others) v Commission*, [2012] ECR I-479 ("**Alliance One**"), paragraph 42 and case C-97/08 P *Akzo Nobel NV v Commission* [2009] ECR I-8237 ("**Akzo Nobel**"), paragraph 54.
[292] See the CJEU's judgment in cases C-180/98 etc. *Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, paragraph 75.
[293] See the opinion of Advocate General Kokott in case C-440/11 *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV* ("**Portielje**") EU:C:2012:763, paragraph 50. To this effect, see also the CJEU's judgment in case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107, and Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 28. See also such judgments as that in case T-132/07 *Fuji Electric System Co. Ltd. v. Commission* [2011] ECR II-4091, ECLI:EU:T:2011:344 ("**Fuji Electric**"), in which the General Court discusses the case law on the concept of an undertaking in relation to both the question of the applicability of Article 101 of the TFEU and whether liability for an infringement of competition law by a subsidiary could be attributed to its parent company (paragraph 180). Equally, see the judgment in case C-172/12 P *EI du Pont de Nemours v Commission*, ECLI:EU:C:2013:601 ("**Pont de Nemours**"), paragraph 46, in which the concept of an undertaking is explained, for the purposes of attributing liability for the conduct of a subsidiary to a parent company by reference to case law relating to whether Article 101 TFEU could apply to an agreement between different entities.
[294] See the CJEU's judgment in case 170/83 *Hydrotherm v Compact* [1984] ECR 2999, paragraph 11, and the judgment of the General Court in case T-102/92 *VIHO Europe BV v Commission* ECLI:EU:T:1995:3, paragraph 50 ("**Viho (GC)**") (confirmed on appeal to the CJEU).
[295] See *Viho (GC)*, paragraph 50, and the judgments in cases C-407/08 P, *Knauf Gips KG v European Commission* ("**Knauf Gips**"), EU:C:2010:389, paragraph 84 and *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2016] CAT 11 ("**Sainsbury's (CAT)**"), Paragraph 355.

unit is whether the subsidiaries enjoy real autonomy in determining their course of action in the market.[296] The criterion has also been applied in cases involving relationships other than those of a parent and its subsidiary.[297]

7.20. More recently, the CJEU has consistently framed the test of whether separate natural or legal persons form part of the same undertaking as one of whether one entity actually exercises decisive influence or control over one or more other entities.[298] It should be noted that, for the purposes of this test, it is not sufficient to find, for example, that a parent company is in a position to exercise decisive influence over the conduct of its subsidiary, but it must also be established that such influence was actually exercised.[299] Similarly, in cases such as the present, in order for distinct corporate bodies to be considered as a single economic unit, decisive influence has to be established by one over the other such as to eliminate the other's independent action, or autonomy, in the market.

7.21. There is extensive and consistent case law on this issue, in which most of the decisions of the CJEU, and the opinions of the Advocates General, and the decisions of the General Court have been concerned with the attribution of liability to a parent for the conduct of a subsidiary. In the following paragraphs, the Authority sets out the main principles to be derived from the case law on this issue. That case law provides the appropriate legal context for an analysis of the facts in this case.

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[296] See the CJEU's judgment in case 48/69 *ICI v Commission of the European Communities* [1972] ECR 619 ("**ICI**"), paragraphs 133 and 134, which concerned the attribution of liability to a parent company for the participation by a subsidiary in a cartel. In that case, the CJEU stated that the enjoyment of real autonomy was the correct test to apply in order to determine whether the Article 101(1) prohibition can apply to relations between a parent company and its subsidiary.

[297] The CJEU employed the same form of words in its judgment in case C-73/95 P *Viho Europe BV v. Commission* [1996] ECR I-5457 ("**Viho**"), paragraphs 15 to 18. That case concerned the applicability of the Article 101(1) prohibition between companies within the same group. In that case, the CJEU established that the different entities within a group of companies formed part of the same undertaking by virtue of the fact that the subsidiaries did "*not enjoy real autonomy in determining their course of action in the market, but* [carried] *out the instructions issued to them by the parent company controlling them*". The CJEU's conclusion was based upon the subsidiaries' sales and marketing activities being directed by an area team appointed by the parent company and which controlled, in particular, sales targets, gross margins, sales costs, cash flow, stocks and staffing policy. The area team also dictated the range of products to be sold, monitored advertising and issued directives concerning prices and discounts. See also *Fuji Electric*, paragraph 180 ("*Where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Article* [101(1) TFEU] *may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit*"), and in case 66/86 *Ahmed Saeed Flugreisen and Others v Zentrale zur Bekaempfung Unlauteren Wettbewerbs* [1989] ECR 803, paragraphs 35 and 36, and case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* ECLI:EU:C:1988:225.

[298] See, for example, the opinion of Mengozzi AG in joined Cases C-231/11 P, C-232/11 P and C-233/11 P *Siemens Österreich and others v Commission* [2009] ECR I-08237, ECLI:EU:C:2013:578 ("**Siemens Österreich**"), paragraph 80 (which was explicitly endorsed by the CJEU and by the CAT, in its judgment in *Sainsbury's (CAT),* paragraph 363(8)), and the opinion of Kokott AG in *Akzo Nobel* paragraph 97. See also the CJEU's judgments in cases C-90/09 P *General Química and Others v Commission* [2011] ECR I-1 ("**General Química**"), paragraph 37, and C-172/12 P *EI du Pont de Nemours v Commission*, ECLI:EU:C:2013:601 ("**Pont de Nemours**"), paragraph 41. See also, the General Court's judgments in *Fuji Electric*, paragraph 181, and T-104/13 *Toshiba Corp. v. Commission* ECLI:EU:T:2015:610 ("**Toshiba (Cathode Ray Tubes)**"), paragraph 94.

[299] See, for example, the General Court's judgments in *Toshiba (Cathode Ray Tubes)*, paragraph 95, case T-541/08 *Sasol and Others v Commission* [2014] ECR, paragraph 43, and case T-543/08 *RWE and RWE Dea v Commission* [2014] ECR, paragraph 101. See also *Pont de Nemours*, paragraph 44, the opinion of Advocate General Kokott in *Akzo Nobel*, paragraph 47, citing the judgment in *ICI*, paragraph 137 and C-107/82 *AEG Telefunken AG v Commission of the European Communities* [1983] ECR 3151, paragraph 50. See also the General Court's judgment in the General Court's judgment in case T-77/08 *The Dow Chemical Company v European Commission* [2012] ECR II-47 ("**Dow Chemical**"), paragraph 75 and the CJEU's judgment in the same case (C-179/12 P, ECLI:EU:C:2013:605), paragraphs 58, 65, 67 and 69 in which the CJEU said that, where two entities each own 50% of the shares in a joint venture and the latter infringes competition law, the three entities will only form a single undertaking if it can be shown that the two parent companies had, in fact, exercised decisive influence over the joint venture.

7.22. In deciding this question, the CJEU has emphasised that competition law, in general, and this issue, in particular, are concerned with substance over form, and do not depend on technicalities of company law.[300] For example, a parent company's influence over its subsidiaries need not act directly upon pricing, production and sales activities or similar aspects essential to market conduct because influence over corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters may have indirect effects on the market conduct of the subsidiaries and of the whole group. In the end, the decisive factor is whether one entity, by reason of the intensity of its influence, can direct the conduct of another entity to such an extent that the two must be regarded as one economic unit for the purposes of competition law.[301]

7.23. Further, specific instructions, guidelines or the exercise of rights of co-determination, while not necessary for a finding of decisive influence, are a particularly clear indication of the existence of an entity's decisive influence over another entity's commercial policy.[302]

7.24. In order to establish whether an entity determines its conduct on the market independently, it is necessary, as a general rule, to take into consideration the economic, organisational and legal links which tie that entity to, say, a parent company. The nature of those links may vary from case to case and cannot therefore be set out in an exhaustive list.[303] So, there is no 'checklist' to complete in making that assessment: the case law "*does not impose any formal requirement for the exercise of decisive influence*".[304] The existence of an economic unit may be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such a unit.[305] Circumstances in which the CJEU has found such a body of consistent evidence to demonstrate different natural or legal persons as forming part of a single economic unit have included the following:

7.24.1. "[T]*he presence, in leading positions of the subsidiary, of many individuals who occupy managerial posts within the parent company*", combined with "*an agreement between the parent companies* […] *in relation to the management of their common subsidiary*" and a situation in which "*a parent company is also the supplier or customer of its subsidiary,* [meaning that] *it has a very specific interest in managing the production or distribution activities of the subsidiary, in*

[300] See the opinion of Advocate General Kokott in *Portielje*, paragraphs 71 to 76: "*The question whether a subsidiary can determine its conduct on the market autonomously or is exposed to the decisive influence of its parent company cannot be assessed solely on the basis of the relevant company law. Otherwise, it would be easy for the parent companies concerned to evade responsibility for infringements of the cartel rules committed by their wholly owned subsidiaries by relying on events falling entirely under company law* […] *the decisive factor is ultimately economic reality, since competition law is guided not by technicalities, but by the actual conduct of undertakings* […] *it would be excessively formalistic and in no way conform to economic reality if questions about influence as between a parent company and a subsidiary were to be appraised solely on the basis of actions governed by company law* […It is] *of decisive importance, leaving aside all the formal deliberations on company law, to examine the actual effects of the personal links between* [parent and subsidiary] *on everyday business activities and to assess purely on the basis of the facts whether* [the subsidiary…] *really determined its commercial policy independently*".

[301] See the opinion of Kokott AG in *Akzo Nobel*, paragraphs 91 to 93, cited *Dow Chemical*, paragraph 77, as referred to by Economy and EGEL in the Joint Response (see, for example, paragraph 7.46 of this Decision).

[302] *Ibid.*

[303] See *Alliance One*, paragraph 45.

[304] See *Portielje*, paragraph 50. The phrase is the Commission's, but was borne out in the CJEU's approach to the judgment.

[305] See, for example, the CJEU's judgments in *Knauf Gips*, paragraph 65 and in *Toshiba (Cathode Ray Tubes)* (case C-623/15 P ECLI:EU:C:2017:21), paragraph 47.

order to take full advantage of the added value created by the vertical integration thus achieved". [306]

7.24.2. An agreement specifying that two parent companies of a joint venture would appoint (a) representatives who would exercise jointly the powers of the subsidiary "*for the partner concerned, without prejudice to the right of each partner to exercise those powers itself*" and, (b) two managers, who were entrusted with the day-to-day management of the subsidiary and would report regularly to their respective parent company's representative on the policy followed and provide them with all relevant information.[307]

7.24.3. An agreement between joint parent companies providing for veto rights with respect to matters of strategic importance which were essential for the pursuit of the subsidiary's activities, including in relation to material investments,[308] combined with the joint adoption of a prospectus "*regarding sales, production, development, personnel, investment, financial plans and capital recovery*" that formed the basis of the subsidiary's business plan that contained the subsidiary's "*main operational and financial objectives and its essential strategic planning*".[309]

7.24.4. A majority shareholder managed a number of companies and represented those companies in commercial negotiations (individually and as a group), including at cartel meetings, at which the companies were allocated a single cartel quota. The group of companies was owned by that shareholder, along with his wife. This was combined with the group of companies referring in internal documents to the companies in question as a "group" and aggregating all the companies' turnover for the group's own records and the companies being jointly represented in administrative proceedings before the European Commission.[310]

7.24.5. A number of companies with the same shareholders, all from the same family, all with the same managing shareholders and an agreement "*to ensure the single management and direction of the companies*". This was combined with evidence that the companies were collectively represented at cartel meetings and the fact that one of the companies sent turnover figures for all the companies to the European Commission without being presented with a request for information.[311]

7.25. Similarly, the CAT has found that a shareholder of the parent company which was owned by his family, was chair of that parent company and the subsidiary that participated in the cartel under investigation caused those companies to form part of a single undertaking. The parent company's accounts stated that the shareholder had "ultimate control" of it, and the parent company and subsidiary filed joint accounts. The shareholder, personally, and the parent company guaranteed the

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[306] See the judgment in *Fuji Electric*, paragraph 184. See also the General Court's judgment in *Toshiba (Cathode Ray Tubes)*, paragraph 100 (confirmed on appeal to the Court of Justice, in paragraph 52 of its judgment).
[307] See the judgment in case T-314/01 *Avebe v. Commission* [2006] ECR II-3085) ECLI:EU:T:2006:266, paragraph 90, read in conjunction with paragraphs 135 to 142.
[308] See the General Court's judgment in *Toshiba (Cathode Ray Tubes)*, paragraph 106 and 108.
[309] *Ibid*., paragraph 109 and 110.
[310] See the judgment in case T-9/99 *HFB v. Commission*, ("**HFB**") ECR, EU:T:2002:70, paragraphs 54 to 68. This position was confirmed on appeal in case C-189/02 P *Dansk Rørindustri v Commission* [2005] ECR I-5425 ("**Dansk Rørindustri**"). See, in particular, the CJEU's description, in paragraph 120 of the judgement, of the General Court's assessment that the companies formed a single economic unit on the basis of almost 100% shareholdings and "*the fact that* [a joint shareholder] *held key functions within the management boards of those companies and also* […] *he represented the various undertakings at meetings of the* [cartel…] *and that the undertakings were allocated a single quota by the cartel*". The CJEU confirmed the General Court's approach in paragraph 130 of its judgment.
[311] See *Knauf Gips*, paragraphs 61 to 72.

subsidiary's debts and the shareholder attended the meeting at which the cartel under investigation was agreed by the subsidiary.[312]

7.26. An entity would necessarily be in a position to exercise decisive influence over a second entity where the second entity is wholly owned, directly or indirectly, by the first entity. In these case, the courts have established a rebuttable presumption that a parent company does in fact exercise such influence when its holds 100% of the shares in the subsidiary (such that the subsidiary does not act independently on the market).[313]

7.27. The mere fact that the share capital of two separate commercial companies is held by the same person or family unit is insufficient to establish those companies as a single economic unit.[314] Ultimately, however, the separateness of the businesses will depend upon whether they determine their conduct on the market independently of each other.[315]

Attribution of liability to parent companies for the activities of subsidiaries

7.28. It follows from this that the conduct of a subsidiary may be imputed to its parent company (at the time an infringement was committed) in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities.[316] That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore a single undertaking.[317] In such a case, the Authority may choose to penalise either the subsidiary that participated in an infringement, or the parent company that controlled it during the Relevant Period, or both of them jointly and severally.[318]

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[312] See the CAT's judgment in *Double Quick Supplyline Limited* [2007] CAT 13, see paragraphs 67 and 70 to 80.
[313] See, for example, *Alliance One*, paragraph 46. The CJEU has also found that this presumption arises when a parent company owned "*virtually all the shares*" in its subsidiary (see the judgment in case T-299/08 *Elf Aquitaine v Commission* [2011] ECR II-2149, paragraphs 53 to 56 (97.55% shareholding) and the judgment in case C-58/11 P *ENI v Commission* ECLI:EU:C:2013:289, paragraphs 6 and 47 (99.97% shareholding)). The CJEU declined to apply the presumption where the shareholding was only 60% (see the judgement in case T-64/06 *FLS Plast / Commission* ECLI:EU:T:2012:102, paragraph 36).
[314] See *Dansk Rørindustri*, paragraph 118, and the judgment in case C-196/99 P *Aristrain v Commission* [2003] ECR I-11005 ("**Aristrain**"), paragraph 99.
[315] See footnote 297, above, and *Viho*, paragraph 16. For examples of this test being applied, see also the European Commission's decision in case IV/32.732 *IJsselcentrale* OJ [1991] L 28/32, paragraphs 22 to 24, and the judgment in *Portieljie*, paragraphs 80 to 87.
[316] See for example, *Akzo Nobel*, paragraph 58, and *Alliance One*, paragraph 43. The CAT has followed the approach taken in *Akzo Nobel*: see, for example, Case 1121/1/1/09 *Durkan Holdings and others v Office of Fair Trading* ("**Durkan Holdings**") [2011] CAT 6 at paragraph 22. The Authority notes the reference, in *Sainsbury's (CAT)*, paragraph 363(20), to the fact that "*the question as to the existence of an "undertaking" and the question as to the attribution of liability between different companies within an "undertaking" are distinct*". In light of the authorities cited in the preceding paragraphs, particularly the opinion of Mengozzi AG in *Siemens Österreich* (explicitly endorsed by the CAT in paragraph 363(21) of *Sainsbury's (CAT)*), the Authority understands this distinction to concern only the purpose for which the "decisive influence" test is put, rather than whether it is applicable to the identification of entities that form part of the same undertaking. The Authority understands that the CAT was seeking to make the point that not every constituent person forming part of an "undertaking" should be liable for an infringement for which that undertaking is responsible (see paragraph 363(21) of the judgment). Only the entity participating directly in the infringing behaviour or any entity exercising decisive influence over the participating entity may be liable for the breach and may be penalised (see paragraph 363(22)). In that case, the CAT had not been asked to decide whether two companies were sister companies within an undertaking for the purpose of determining whether the Chapter I prohibition could apply to relations between those companies.
[317] See, to this effect, the judgment in *General Química*, paragraphs 34 to 38.
[318] See the recent judgments of the CJEU in case C-516/15 P *Akzo Nobel NV v European Commission (Re. Heat*

7.29. As with the question of whether several natural or legal persons form part of the same undertaking, this assessment turns not only on the parent's degree of influence on commercial policy in the narrow sense of the subsidiary's commercial conduct – this is only one factor that enables the liability of the parent to be established.[319] Again, in order to establish whether a subsidiary determines its conduct on the market independently, the Authority would consider the economic, organisational and legal links which tie that subsidiary to its parent company.[320] As explained above, the CJEU has established a rebuttable presumption to the effect that a parent company does in fact exercise such influence when its holds 100% of the shares in the subsidiary.[321]

Application in this case

7.30. In this section, we consider the following points:

7.30.1. the evidence suggesting that the Parties are each undertakings for the purposes of competition law;

7.30.2. attribution of intra-group liability;

7.30.3. the evidence demonstrating that Economy and EGEL are separate undertakings for the purposes of the Chapter I prohibition;

7.30.4. assessment of arguments put to the Authority for considering that Economy and EGEL belong to a single undertaking; and

7.30.5. conclusion on Economy and EGEL as separate undertakings.

The Parties as undertakings

7.31. During the Relevant Period, Economy Energy Trading Limited and E (Gas and Electricity) Limited were each engaged in offering gas and electricity to domestic premises in the UK[322] under separate energy supply licences, issued by the Authority, and each is, as a result, an entity engaged in economic activities. Therefore, both Economy Energy Trading Limited and E (Gas and Electricity) Limited were capable of constituting undertakings for the purposes of the Chapter I prohibition.

Stabilisers Cartel) EU:C:2017:314, paragraphs 50-51 and 56-57, and case C-444/11 P *Team Relocations NV v European Commission* EU:C:2013:464, paragraph 159. Applying this legal framework "*does not in any way constitute an exception to the principle of personal responsibility, but is the expression of that very principle. That is because the parent company and the subsidiaries under its decisive influence are collectively a single undertaking for the purposes of competition law and responsible for that undertaking … that gives rise to the collective personal responsibility of all the principals in the group structure, regardless of whether they are the parent company or a subsidiary … As the parent company exercising decisive influence over its subsidiaries, it pulls the strings within the group of companies*" (see *Sainsbury's (CAT)*, paragraph 363(3), citing the opinion of Advocate General Kokott in *Akzo Nobel*, paragraphs 97 to 99.

[319] See *Akzo Nobel*, paragraphs 73 to 74, in which the CJEU approved the opinion of Advocate General Kokott, paragraph 87: "*the absence of autonomy of the subsidiary in terms of its market conduct is only one possible connecting factor on which to base an attribution of responsibility to the parent company. It is not the only connecting factor, for, according to the Court's case-law, attribution of conduct to the parent company is possible 'in particular' where the subsidiary … does not decide independently upon its own conduct*". The CAT has confirmed that the relevant factors "*are not limited to* [a subsidiary's] *commercial conduct*" (see *Durkan*, paragraph 22(d)). See also *Alliance One*, paragraph 170: "*It is also necessary to reject the applicants' argument that the decisive influence that a parent company must exercise in order to have liability attributed to it for the infringement committed by its subsidiary must relate to activities which form part of the subsidiary's commercial policy stricto sensu and which, furthermore, are directly linked to that infringement*".

[320] See for example, *Akzo Nobel*, paragraph 74, and *Alliance One*, paragraph 45.

[321] See paragraph 7.26, above.

[322] See paragraphs 5.1 (Economy) and 5.11 (EGEL) of this Decision.

7.32. Dyball Associates Limited provides software and consultancy services to participants in the UK gas and electricity supply markets. As such, Dyball Associates Limited is also an undertaking for the purposes of the Chapter I prohibition.

Attribution of intra-group liability

7.33. As explained above, for each Party which the Authority proposes to find has infringed the Chapter I prohibition, the Authority has first identified the legal entity directly involved in the Infringement. It has then determined whether liability for the Infringement should be shared with another legal entity, in which case each legal entity's liability will be joint and several.

7.34. **Economy**:

7.34.1. The Authority finds that Economy Energy Trading Limited was directly involved in, and is therefore liable for, the Infringement.

7.34.2. The Authority further finds that Economy Energy Holdings Limited is jointly and severally liable with Economy Energy Trading Limited for the Infringement. Economy Energy Holdings Limited holds a 100 per cent shareholding in Economy Energy Trading Limited and did so throughout the Relevant Period;[323] it can therefore be presumed to have exercised decisive influence over Economy Energy Trading Limited during the Relevant Period, and to form part of the same undertaking.

7.35. **EGEL**:

7.35.1. The Authority finds that E (Gas and Electricity) Limited was directly involved in, and is therefore liable for, the Infringement.

7.35.2. The Authority further finds that E Holdings Ltd is jointly and severally liable with E (Gas and Electricity) Limited for the Infringement. Since 31 August 2016, E Holdings Ltd has held a 100 per cent shareholding in E (Gas and Electricity) Limited.[324] Since that date, E Holdings Ltd can therefore be presumed to have exercised decisive influence over E (Gas and Electricity) Limited and to form part of the same undertaking.

7.35.3. Further, as explained in paragraph 5.14, above, Mr Cooke was registered as the owner of all of the shares in E (Gas and Electricity) Limited before that date and, since that date, has been the registered owner of all of the shares in E Holdings Ltd. In addition, the restructured corporate group continued to operate on the market in the same way as E (Gas and Electricity) Limited. As such, there was functional and economic continuity within EGEL throughout the Relevant Period, between the E (Gas and Electricity) Limited and the corporate group into which it was merged.[325]

7.36. **Dyball**:

7.36.1. The Authority finds that Dyball Associates Limited was directly involved in, and is therefore liable for, the Infringement.

[323] See paragraph 5.4, above.
[324] See paragraph 5.14, above.
[325] See the European Commission's decision of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 - PVC), paragraph 41.

7.36.2. The Authority further finds that Dyball Holdings Limited is jointly and severally liable with Dyball Associates Limited for the Infringement. Since 24 April 2016, Dyball Holdings Limited has held a 100 per cent shareholding in Dyball Associates Limited;[326] it can therefore be presumed to have exercised decisive influence over Dyball Associates Limited during that period, and to form part of the same undertaking.

7.36.3. In addition, the restructured corporate group continued to operate on the market in the same way as Dyball Associates Limited, with Andrew Dyball remaining as that company's sole director. As such, there was functional and economic continuity within Dyball throughout the Relevant Period, between the Dyball Associates Limited and the corporate group into which it was merged.

7.37. This Decision is therefore addressed to Economy Energy Trading Limited, Economy Energy Holdings Limited, E (Gas and Electricity) Limited, E Holdings Ltd, Dyball Associates Limited and Dyball Holdings Limited.

Economy and EGEL as separate undertakings

7.38. EGEL and Economy have submitted that, when EGEL was acquired by Mr Cooke – which was while he was a director of Economy – its initial development as a business owed much to Ms Khilji's support. Regardless of that submission, the evidence available to the Authority shows that Ms Khilji and Mr Cooke separated their respective business interests through a process that started in mid-2014 and continued for several months after the signature of the Demerger Agreement in August 2014. That process was formalised in the terms of the Demerger Agreement.

7.39. Since that separation, the actual conduct of Economy and EGEL demonstrates that they have operated as distinct businesses, competing against each other.[327] In addition to market data, the Authority has requested, gathered and considered a substantial and consistent body of evidence of the manner in which each of Economy and EGEL functions and has concluded that, having taken into account the economic, organisational, legal and personal links between Economy and EGEL, the evidence does not bear out the Parties' submissions that the two businesses should be regarded as one economic unit.

7.40. The documentary evidence and industry data gathered by the Authority concerning Economy's and EGEL's corporate functioning and commercial policy during the Relevant Period is consistent with the provisions of the Demerger Agreement and show Economy and EGEL, in fact, operating as separate undertakings. That evidence and data consist of the following factors, listed in paragraphs 5.23 and following, above:

7.40.1. Unambiguous statements made in October 2014 by Economy in a letter and a follow-up e-mail to the Authority to the effect that EGEL was a competitor.

7.40.1.1. In October 2014, Economy made a number of submissions to the Authority in response to a formal request for information. The information had been sought by the Authority in order to inform a decision as to whether to lift a sales ban that the Authority had imposed on Economy because of its failure to comply with certain conditions of its licence.[328]

[326] See paragraph 5.31, above.
[327] See Figure 1, above, at paragraph 5.167.
[328] More information about the context of this sales ban and the provisional order, issued under section 25(2) of the

7.40.1.2. The first of those statements was a suggested response to any inquiry from the Authority given by Ms Khilji in an internal e-mail to [Economy Senior Manager 1] that reads as follows: "*Paul Cooke and E Power have no association with economy Energy, its staff, premises, customers etc. It is a rival business competing against us*".[329]

7.40.1.3. That suggested response was reflected in the final response sent to the Authority:

"*Paul Cooke was a Director and shareholder of Economy Energy but resigned 30th May 2014 and his shareholding was subsequently bought by Lubna Khilji. EPower have no association with Economy Energy, its staff, premises, customers, etc. Some former Economy Energy staff are now employed by EPower* [EGEL]*. It is a rival business competing against us.*"[330]

7.40.1.4. Later in October 2014, the Authority sought clarification of this statement by asking for the names and the former job titles of the Economy staff whom Economy understood were, at that time employed by EGEL. The Authority stated that it was asking for this information in order to establish whether those employees kept any association with Economy. Economy replied as follows:

"*Epower has no association with Economy Energy whatsoever. Epower is not run by Lubna Khilji or in the interests of Lubna Khilji or Economy Energy. Neither EPower nor any director or employee or EPower has any interest in the business or share capital of Economy Energy. Neither Lubna Khilji nor Economy Energy will receive any potential success of E Power in the same way that they will not receive any benefit from any potential success of other rivals such as [✂] or [✂]. As previously stated EPower is a competitor in the industry.*"[331]

7.40.1.5. Although these statements were made in respect of a separate investigation, the Authority considers them to be relevant to the matters under consideration in this Decision.

7.40.1.6. In particular, those statements were consistent with terms of the Demerger Agreement of 28 August 2014, which, again, were unequivocal in demerging the operations of Economy and EGEL. Through the mechanism of that agreement the two businesses were separated and Mr Cooke no

Electricity Act 1989 and section 28(2) of the Gas Act 1986, can be found here: https://www.ofgem.gov.uk/publications-and-updates/economy-energy-provisional-order.

[329] The e-mail was dated 8 October 2014 and was also addressed to [Economy Senior Manager 2] (see document reference EE0357).

[330] See document reference EE0414, which was sent by [Economy Senior Manager 1] (Economy) to officers of the Authority under cover of an e-mail dated 17 October 2014, that was copied to Ms Khilji and [Economy Senior Manager 2] (Economy). At interview, Ms Khilji questioned the accuracy of the additional parts of this statement, compared with her suggested response, saying that it had been sent by an inexperienced member of staff, claiming not to have seen the response before it was sent and claiming that her digital signature had been taken from another document and attached to this letter (see document reference LK0002, paragraphs 674 to 711).

[331] See document reference EE0415. This statement was included in an e-mail to the Authority sent by [Economy Senior Manager 1] (Economy), copying Ms Khilji and [Economy Senior Manager 2] (Economy) on 28 October 2014.

longer had an interest in, or involvement with the management of, Economy.

7.40.2. The terms of Demerger Agreement itself:

7.40.2.1. state that its intention is to separate the business assets of Ms Khilji and Mr Cooke; [332]

7.40.2.2. are clearly intended to be legally binding on its parties;

7.40.2.3. provide that payments that had already been made by Ms Khilji on behalf of Mr Cooke constitute full consideration for any interest Mr Cooke held in Economy;[333]

7.40.2.4. in consideration of those payments, extinguish a declaration of trust dated 22 May 2014, by which Ms Khilji had declared that she held half of her shares in Economy for the benefit of Mr Cooke;[334]

7.40.2.5. specify that Ms Khilji would cease to have any title or interest in EGEL;[335]

7.40.2.6. prevent Mr Cooke from (a) using Economy's name or (b) holding himself out as having any connection with Economy, in the course of business;[336]

7.40.2.7. prevent Mr Cooke or any company associated with Mr Cooke from targeting Economy's existing customers or its employees. Such non-compete agreements are often used by employers for a period that is limited in time to protect their relationships with customers, clients and other trade connections by preventing a departing employee from, in a subsequent role, taking advantage of the employer's trade connections;[337]

7.40.2.8. require Mr Cooke to indemnify Economy for half of any fine imposed by the Authority on Economy for a licence breach, insofar as the fine exceeds £350,000,[338] further indicating a commercially negotiated separation of business interests; and

7.40.2.9. require each of the parties to that agreement do all such things as may be reasonably necessary in order to give effect to the agreement's terms.[339] This provision supports the Authority's view that the Demerger Agreement was intended to create binding legal effects between the parties. It also demonstrates that the parties to the agreement continued to be under a

[332] Document reference EP0356, page 3, recital C.
[333] These payments are described as the "*Completion Payment*" and the "*Deferred Payment*", defined together as the "*Purchase Price*". See clauses 3.4 and 4.2 of the Demerger Agreement for the obligation for Ms Khilji to make those payments and see schedule 3 for a list of payments already made.
[334] See clauses 2.1 and 3.5(a) of the Demerger Agreement. Clause 3.5(b) provides that Mr Cooke would, similarly, cease to have any title to, interest in or claim over any shares in any company associated with Economy. The declaration of trust is further described in paragraph 5.26.2.1, above.
[335] See clauses 3.5(c).
[336] See clause 4.4(c) of the Demerger Agreement. For completeness, the Authority notes that clause 8 of the Demerger Agreement stipulates that that contract constitutes the entire and only legally binding agreement between the parties relating to its subject matter and that any variation must be in writing, signed by each party and expressed to be such a variation. At interview, Mr Cooke confirmed that there had been no supervening variation (see document reference EP0354, page 34).
[337] See clause 4.4(a) and (b), and clause 4.4(d) prohibits Mr Cooke from interfering with Economy's suppliers. See, also, paragraphs 7.77 to 7.83, below, on the significance of the non-compete clause contained in the Demerger Agreement.
[338] See clause 5.1.
[339] See clause 7.

duty to cooperate for a period following its signature to give effect to the separation of business interests.

7.40.2.10. The Authority considers that, where it follows from contractual stipulations governing the relationship between companies that those companies and their respective shareholders constitute distinct businesses on the market, it may reasonably be concluded that that those companies, indeed, constitute separate businesses.[340] As a result, the Authority considers that through the Demerger Agreement, Ms Khilji and Mr Cooke definitively confirmed the separation of their respective business interests and that their respective businesses were (at least from that point onwards) owned and run entirely separately. This was the clear intention of the parties to the Demerger Agreement.

7.40.3. Senior managers at each company did not regard the businesses as forming part of the same group:

7.40.3.1. The executives of Economy and EGEL acted on the clear assumption that each was in competition with the other.

7.40.3.2. For example, in an e-mail dated 27 May 2015 sent by [Economy Senior Manager 1] (Economy) to [EGEL Senior Manager 1](EGEL), [Economy Senior Manager 1] threatened to report EGEL to Ofgem for misleading Economy's customers when encouraging Economy's customers to switch to EGEL.[341] In that e-mail, [Economy Senior Manager 1] also questioned [EGEL Senior Manager 1]as to how EGEL had obtained Economy's tariff data, saying that Economy had not provided it. One part of a group of companies would not need to resolve a dispute about the acquisition of customers by another part of the group by threatening to report that other part to the sectoral regulator for potential enforcement action.[342]

7.40.3.3. In the same vein, the following month (June 2015), in an e-mail from Ms Khilji to Mr Cooke,[343] Ms Khilji alleged that EGEL had been in breach of its licence by giving misleading information to Economy's customers about Economy's tariffs, provoking those customers to switch to EGEL. In order to encourage Mr Cooke to correct this alleged failing, Ms Khilji threatened to refer EGEL to Ofgem. The Authority is not persuaded by the explanation provided by Ms Khilji that this exchange was intended in jest because there is nothing in the e-mail or any communications surrounding this e-mail to support this explanation.[344]

7.40.3.4. Further, in February 2015, when asked by Economy's accountants whether Ms Khilji held any shares on trust for Mr Cooke, [Economy Senior Manager 2], a senior manager at Economy responded by writing that he did not know of any ongoing interest held by Mr Cooke in Economy.[345]

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[340] See, to this effect, the opinion of Wathelet AG in case C-373/14 P *Toshiba v Commission* ("**Toshiba (Transformers)**").
[341] Document reference EE0086.
[342] At interview, Ms Khilji explained this document to show "*two egotistical ops people having a spat over nothing*" (see document reference LK0002, pages 80 to 81). In contrast, [EGEL Senior Manager 1] claimed that only [Economy Senior Manager 1] was unaware of the operational connection between Economy and EGEL.
[343] Document reference EE0087.
[344] For Ms Khilji's explanation, document reference LK0002, pages 81 to 82.
[345] Document reference EE0360. The exchange described here arose from a declaration sent by Economy's accountants to Her Majesty's Revenue and Customs, on Economy's behalf, which contains the following statement:

7.40.3.5. Similarly, in July 2016, when asked by a major contracting partner for a list of companies owned by Mr Cooke, a senior manager at EGEL ([EGEL Senior Manager 2]) made no reference to Mr Cooke's alleged interest in Economy.[346]

7.40.3.6. If the two companies operated as a single undertaking with Ms Khilji exercising decisive influence over EGEL's decision-making and Mr Cooke exercising such influence over Economy, the Authority would expect to have received contemporaneous evidence in the Parties' submissions of senior managers being aware of Economy and EGEL acting as a group of companies.[347] Instead, the Authority's assessment of the evidence is that the Parties acted as competitors and that the evidence does not support any finding that senior management and those responsible for the day-to-day operation of each of Economy and EGEL considered that they were acting as part of the same group.

7.40.3.7. The Authority notes statements made in the Joint Response submitted by Economy and EGEL, at interview and in witness statements to the effect that senior managers considered that Ms Khilji and Mr Cooke managed EGEL together.[348]

7.40.3.8. But the available contemporaneous evidence supports the Authority's view that the senior management of each company considered that Economy and EGEL were in competition with each other. As well as the evidence contained in this paragraph 7.39.3, the statement quoted in paragraph 5.67, above, demonstrates that the senior management at EGEL regarded Economy and EGEL as separate businesses that should be competing against each other.[349]

7.40.4. Statements made by Mr Cooke at interview in which he explained that EGEL is his and Economy is Ms Khilji's:

7.40.4.1. In oral evidence to the Authority, Mr Cooke submitted that he was responsible for the management of EGEL, a company of which he was the sole shareholder. Mr Cooke made no submission to the effect that *de facto* ownership and control was shared by with Ms Khilji.

7.40.4.2. To the contrary, Mr Cooke told the Authority that although he may discuss EGEL's business decisions with Ms Khilji, he retains ultimate control over EGEL's business decisions.[350]

"*Ms Lubna Khilji (LK) owns 100% of the shares in each of the above-mentioned companies*". The companies mentioned included Economy Energy Trading Limited.

[346] Document reference EP0387. These statements reflect the position according to Mr Cooke, at interview, in which he told the Authority that, following the date of the Demerger Agreement, he held no claim over any of the shares in Economy (document reference EP0354, page 36, middle of page).

[347] During an interview, Ms Khilji stated the she had not informed [Economy Senior Manager 1] of Mr Cooke's interest in Economy, that she could not remember the reason for this and that she only told senior managers and officers of Economy of Mr Cooke's interest as a result of the present investigation (document reference LK0002, pages 100 to 105).

[348] See, for example, paragraph 7.47.10 and the documents referred to in that paragraph.

[349] The Authority is not persuaded by EGEL's explanation of this statement, which reads as follows: "*An off-hand comment was made by* [Dyball Senior Manager 1] [Dyball] *at the end of this meeting where he queried whether any resolution of the issue of customer churn between E and Economy could be anticompetitive. In response to this comment, it was made clear to* [Dyball Senior Manager 1] *that no decision had been taken and a meeting would take place the following week between Paul Cooke, Lubna Khilji and Andrew Dyball to review this further*" (document reference EP0232, paragraph 2.5).

[350] The transcript to a voluntary interview conducted with Mr Cooke on 21 June 2017 (document reference EP0354),

7.40.4.3. Mr Cooke explained explicitly that, if he were to oppose a decision that Ms Khilji proposed to take at Economy, Ms Khilji would not consider herself to be bound by his opinion and that business decisions at Economy are dictated by Ms Khilji.[351]

7.40.4.4. Later in the same interview, Mr Cooke confirmed that neither he nor Ms Khilji perform any role in each other's business and that each run their respective businesses as they see fit.[352]

7.40.4.5. Mr Cooke stated that he understood the intention behind the Demerger Agreement to have been as follows: "*so she takes Economy, I go forward with E. We run our businesses as we want to run them*" and "*we both have wills and we both leave each other - but no, day-to-day, I have nothing to do with - as far as this is concerned, no, she's doing Economy, I'm doing E. Yeah, it's easy*".[353]

7.40.4.6. Mr Cooke went on to explain the effect of certain clauses of the Demerger Agreement, as follows: "*I am sole owner of E, she's sole owner of Economy. She runs Economy how she wants, I run E how I want*."[354]

7.40.5. Economy and EGEL compete against each other:

7.40.5.1. The switching data set out in paragraphs 5.166 to 5.170 demonstrate that Economy and EGEL were, increasingly, competing against each other and taking customers from each other throughout 2015 and early 2016. This competition is unsurprising because, during the Relevant Period, the principal means by which Economy and EGEL won business was by targeting PPM customers through proactive outreach to potential customers.[355] This inevitably brought the two companies into competition for PPM customers.

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pages 26 to 27.

[351] The transcript of Mr Cooke's interview of 21 June 2017 (document reference EP0354), page 42.

[352] Pages 28 and 33 of the transcript.

[353] Page 31 of the transcript. We assume this reference to wills to reflect an earlier claim made by EGEL that Mr Cooke has left his shareholding in EGEL to Ms Khilji in the event of his death and that Ms Khilji has reciprocated by leaving her shareholding in Economy to Mr Cooke in her will (document reference EP00337, paragraph 4.19). Whilst these legacies may give rise to the possibility of exercising control over both companies in the event that either Ms Khilji or Mr Cooke dies, such bequests, even assuming that they had been put in place before or during the Relevant Period, would demonstrate neither the possibility of exercising control over both Economy and EGEL before either Ms Khilji's or Mr Cooke's death nor, crucially, would the bequests demonstrate the actual exercise of such control by Ms Khliji over EGEL or by Mr Cooke over Economy. For completeness, the Authority notes that it has neither requested copies of Ms Khilji's and/or Mr Cooke's wills nor have such copies been produced to the Authority, in light of the analysis given in the previous sentence.

[354] Page 31 of the transcript. In subsequent correspondence, EGEL claimed that "*Mr Cooke's response was based on what has actually occurred in the operation of E and EETL on a day-to-day basis. Their working relationship is collaborative and they work together to reach a decision whereby they moderate each other's behaviour through discussion. There has never been a practical circumstance where either Mr Cooke or Ms Khilji has felt the need to use a veto against the other*" (document reference EP0364, paragraph 3.1). This contradicts Mr Cooke's clear statements to the effect that no such veto right existed. Also in document reference EP0364, EGEL claimed that the reciprocal trust documents dated April 2016 demonstrate a power of veto by Ms Khilji and Mr Cooke over each other's business such as to give rise to the ability to exercise of decisive influence and control. However, the rights provided for in those trust documents are described as rights vested in the person declaring the trust as the registered holder of the shares, meaning that they are ownership rights that provide no evidence of the actual exercise decisive influence or control. In document reference EP0364, EGEL further claims that such decisive influence and control was, in fact, exercised, as exemplified by a number of instances in which Mr Cooke and Ms Khilji consulted each other about business decisions. The Authority notes that such purported consultation would not amount to the actual exercise of decisive influence or control for the purposes of the Chapter I prohibition. Further, several of the instances relied upon by EGEL pre-date the April 2016 trusts.

[355] Paragraphs 5.46 onwards, above.

7.40.5.2. The trend of increasing competition between the two companies stopped abruptly when the Infringement was implemented and resumed following the Authority's on-site inspections, conducted for the purposes of the present investigation, in September 2016.

7.40.5.3. In these circumstances, the Authority considers that, far from acting together on the market as a single economic entity, Economy and EGEL were in direct competition with each other.

7.40.6. Companies House filings:

7.40.6.1. During the Relevant Period, Economy and EGEL were separately incorporated, neither owned shares in the other and they had no common legal shareholders. This remains the case.

7.40.6.2. Until July 2018, the formal records of each company filed with Companies House showed no links between Ms Khilji and EGEL nor between Mr Cooke and Economy, except in respect of Mr Cooke's directorship of Economy Energy Trading Limited between November 2013 and May 2014. Further, the Authority has found no other public documents suggesting such links during the Relevant Period.

7.40.6.3. In addition, the Authority notes that, since 6 April 2016, each company has been required to take reasonable steps to find out if there is anyone who has significant control over that company and, if so, identify them and report their identity to Companies House.[356] In that regard:

7.40.6.3.1. Economy Energy Holdings Limited has reported that its "*ultimate controlling party*" is Ms Khilji[357] and Economy reports that Ms Khilji has "*significant control*" over it. The contemporaneous PSC filings with Companies House make no reference to Mr Cooke having any form of control over Economy.[358]

7.40.6.3.2. Similarly, in its contemporaneous PSC filings, EGEL reported that Mr Cooke had "*significant control*" over it, while making no reference to Ms Khilji having any form of control over EGEL.[359]

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[356] See sections 790D and 790VA of the Companies Act 2006 (the "**Companies Act**") (read with part 35 of that statute). Failure to comply with these requirements may constitute a criminal offence, committed by the company and every officer of the company who is in default, pursuant to section 790F of that Act. The Authority notes that the test for identifying a "*person with significant control*" over a company does not require the actual exercise of control (see Schedule 1A of the Companies Act). Indeed, relatively low levels of share ownership may suffice (see paragraph 2 of Schedule 1A of the Companies Act). Further, the concept of "*significant influence or control*" under the Persons with Significant Control regime (the "**PSC regime**") implies a lesser degree of influence than the concept of "*decisive influence*", which is under discussion here (for a definition of the former, see the Department for Business, Energy and Industrial Strategy's "*Statutory guidance on the meaning of "significant influence or control" over companies in the context of the register of people with significant control*" dated June 2017, paragraph 1.23). In these circumstances, if – as Economy and EGEL contend – Ms Khilji exercises "*decisive influence or control*" over EGEL, she would also meet the "*significant influence or control*" criterion under the PSC regime, meaning EGEL would be bound to notify Companies House of this fact. Similarly, if Mr Cooke, in fact, exercises "*decisive influence or control*" over Economy, Economy would be required to notify Companies House of this fact. The fact that neither Economy nor EGEL made such a contemporaneous notification suggests that neither have considered Mr Cooke and Ms Khilji, respectively, to meet the "*significant influence or control*" criterion for the PSC regime, which is a lower threshold than the concept of "*decisive influence or control*".

[357] See Economy Energy Holdings Limited's annual report and financial statements for the year ended 31 March 2017, filed with Companies House, page 35.

[358] See paragraph 5.8, above.

[359] See paragraphs 5.16 and 5.17, above. The Authority notes that, in July 2018, the Parties made filings with Companies House which purported to amend their earlier contemporary filings so as to assert that Ms Khilji had been a PSC in respect of EGEL and Mr Cooke a PSC in respect of Economy during the Relevant Period. This was not

7.40.7. Economy and EGEL have distinct brands on the market:

7.40.7.1. Economy's and EGEL's consumer-facing public profiles are unconnected and they have distinct brands. They do not act or present themselves together on the market as a single economic entity.

7.40.7.2. They operate from separate premises, each with their own employees and management boards, the members of which do not overlap.[360]

7.40.8. An e-mail sent on 14 May 2014 by Ms Khilji to Mr Cooke saying "*LP is now entirely yours*".[361] It is clear that "*LP*" refers to Lorimer Power Limited, the name of E (Gas and Electricity) Limited at that time. In the remainder of that e-mail, Ms Khilji advises Mr Cooke on steps to take in establishing EGEL, using the terms "*you*" and "*your*" when advising Mr Cooke on managing EGEL, not "*we*" and "*our*".

7.40.9. In an internal e-mail sent in early 2016, EGEL's senior managers referred to "*our anti-competitive behaviour*": this statement was made in an e-mail sent by [EGEL Senior Manager 2](EGEL) to [EGEL Senior Manager 1](EGEL) in response to minutes of a meeting held in late January 2016 between EGEL and Dyball personnel. Those minutes include the following statement: "*E and Economy will no longer be acquiring one another's customers*".[362] [EGEL Senior Manager 2]'s reference to anti-competitive behaviour suggests that he and [EGEL Senior Manager 1] did not regard Economy and EGEL as forming part of the same business. The statement also presumes a separate customer base being competed for until that point.

Assessment of arguments for considering that Economy and EGEL belong to a single undertaking

7.41. As explained above,[363] Economy and EGEL have made a number of submissions in which they have argued that the Authority should not regard them as forming separate undertakings for the purposes of the Chapter I prohibition.

7.42. The Authority has carefully considered Economy's and EGEL's submissions and all the evidence that is relevant to this question and it has concluded that those Parties are separate undertakings for the purposes of the Chapter I prohibition.

7.43. In summary, Economy's and EGEL's case is that, from at least 2012, when Ms Khilji and Mr Cooke were assisted financially by members of their family, they established Economy as a new entrant in the retail supply of energy. It is said that the operation was as a family unit in a continuum of business of which Economy and EGEL were part of the same unit. Thus, they maintained a single undertaking for the purposes of competition law, as a family, and included incorporated bodies owned by each of them within that single undertaking. They further contend that whether Ms Khilji was the sole shareholder of Economy and Mr Cooke was the sole shareholder of EGEL was

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a matter relied on by Counsel at the oral hearing (see document references JR0021 to JR0026). The Authority relies on the contemporary filings as evidence consistent with the representations made to it by Economy and EGEL before the Authority issued its Statement of Objections (see paragraph 5.21, above). The Authority places little weight on the later entries which were retrospectively adjusted after the Statement of Objections had been issued, rendering the PSC register consistent with the case now being advanced by the Parties.

[360] The Authority notes, however, that it has on its file reference in whistle-blower material to Economy and EGEL's management working in collaboration (the whistle-blower material is described in paragraph 5.29, above).

[361] Document reference EE0363.

[362] See paragraph 5.67, above.

[363] See paragraphs 5.19 to 5.27, above.

the result of an internal decision by the family and the legal forms adopted should not be allowed to conceal the fact that there remained a single family business.

7.44. It is further submitted that the family enterprises that began with Economy, expanded with the acquisition of EGEL (then, called Lorimer Power Ltd) from Dyball. Economy and EGEL claim that the creation of a second brand, incorporated through a separate company, did not have the effect of rendering EGEL a separate undertaking for the purposes of competition law. Rather, the Parties submit that a family decision that Mr Cooke should ensure the day-to-day running of EGEL and Ms Khilji the day-to-day running of Economy was consistent with both companies being part of a single undertaking, whose strategic management was carried out by the family unit.

7.45. In further support of their argument, the Parties rely upon the existence of a trust deed entered into in May 2014 and reciprocal trust deeds entered into in April 2016.

7.46. As to the relevant legal principles, the Parties argued that the most relevant authority in the extensive case law relevant to this question was the opinion of Advocate General Kokott in *Akzo Nobel* and the judgment in *Dow Chemical*, in which it was stated that when evaluating whether separate persons or incorporated bodies form part of the same undertaking, all personal, legal and economic factors should be taken into account.[364] According to the Parties in this case, the context was one in which the family unit had remained in ownership and control since 2014 and throughout the Relevant Period and that neither Economy or EGEL could be said to be independent of each other before or after that.

7.47. In the following paragraphs, we explain why the Authority rejects the arguments advanced by the Parties and has concluded that the Economy and EGEL were separate undertakings for the purposes of the Chapter I prohibition.

7.47.1. A holistic approach: Economy and EGEL have asked that the Authority take "*a holistic approach*" to determining whether they form part of the same undertaking.[365] Economy and EGEL have explained that such an approach concerns their co-ownership by two individuals, who have been a couple for many years and have children together. Further, those individuals are said by Economy and EGEL to have set up, financed and run Economy and EGEL together with a common plan. The Authority is also asked to consider "*numerous links*" existing between Economy and EGEL when taking this "*holistic approach*".

7.47.1.1. The Authority accepts that, as a matter of principle, there may be situations in which several persons who have legal ownership of separate companies, may qualify as a single economic undertaking for the purposes of competition law.[366] However, the Authority has concluded that, based on the evidence on its file, this is not the case in this instance.

7.47.1.2. The fault line in the Parties' submission is their conflation of the separate concepts of ownership and control. The EU case law is clear on that issue.[367] Beneficial ownership, in the form of reciprocal declarations of trust by Ms Khilji and Mr Cooke is not considered sufficient, of itself, to establish that separate entities form part of the same undertaking for the purposes of the

[364] This case law is discussed in detail in paragraphs 7.15 to 7.29, above.
[365] This term does not feature in the relevant case law.
[366] See the examples given in paragraph 7.24, above.
[367] See, in particular, *Aristrain*, paragraph 99.

Chapter I prohibition. As explained above, the relevant legal test is whether, during the Relevant Period, Mr Cooke exercised decisive influence over Economy and whether Ms Khilji exercised decisive influence over EGEL.

7.47.1.3. As required by the well-established case law on this point, the Authority has assessed, in the round, a wide range of evidence on the links between Economy and EGEL. On the basis of that careful assessment, the consistent body of evidence relating to the personal, legal and organisational links between Economy and EGEL has led the Authority to conclude that, during the Relevant Period, Economy and EGEL were separate undertakings for the purposes of the Chapter I prohibition. The context and the facts are critical to this question.

7.47.1.4. The present situation is far removed from the simple proposition for which the Parties' legal representatives contended that there was a continuum of beneficial ownership and shared control from 2012 and through the relevant periods.

7.47.1.5. In fact, the body of evidence before the Authority is inconsistent with the Parties' submissions to the effect that Mr Cooke and Ms Khilji ran Economy and EGEL together with a common plan, in a manner that was uninterrupted by the Demerger Agreement. In support of that contention, Economy and EGEL claim that Ms Khilji and Mr Cooke considered that they jointly owned and managed Economy and EGEL throughout the Relevant Period.[368] Economy and EGEL also refer to Mr Cooke having approached accountants in January 2015 to inquire about establishing trusts over the shares in Economy and EGEL. No trusts were established at that time.

7.47.1.6. When investigating the issue of whether Economy and EGEL were separate undertakings during the Relevant Period, the Authority sent formal information requests to those Parties.[369] The Authority sought contemporaneous documents from Economy and EGEL, and their directors, relating to the involvement of Ms Khilji in EGEL's management and or Mr Cooke in Economy's management during the Relevant Period. [370] The Authority considered that, if what Economy and EGEL stated in their later submissions and evidence (including that produced during the course of the investigation) was true, it would be reflected in contemporaneous documents. The number of contemporaneous documents provided to the Authority was limited and is not supportive of the later submissions put to it.[371] The Authority therefore does not accept the Parties' arguments to the effect that Mr Cooke's involvement in managing Economy before the date of the Demerger Agreement's signature continued after that date, nor that Ms Khilji acquired an interest in and control over EGEL in 2014 and that such interest and control continued up to and throughout the Relevant Period.

[368] This was expressed as being an understanding that existed "*in their heads*" (see pages 13 (at points B and C) and 16 (at points C, D and H) of the transcript of the oral hearing that took place on 9 November 2018 (see document reference JR0026)).
[369] Document references EE0289 and EP0321.
[370] For example, document references EE0342, EE0343, EE0344, EE0345, EE0346, EE0381, EE0409, EE0417, EP0341, EP0367 and EP0368.
[371] For example, the documents referred to in document references EE0382, EE0408, EE0413, EE0418, EE0419, EP0342, EP0343, EP0344 and EP0454.

7.47.1.7. Nor does the Authority consider that the April 2016 reciprocal trusts provide support for Economy's and EGEL's claim of continuous decisive control by Ms Khilji and Mr Cooke over both undertakings, particularly because the Authority has been shown no credible evidence of significant managerial involvement by Ms Khilji in EGEL or Mr Cooke in Economy (as explained further below).

7.47.1.8. For the reasons set out in paragraph 7.27 and the analysis contained in the following paragraphs on the significance of the April 2016 trust documents, the Authority does not consider that any ownership rights held by Ms Khilji in EGEL or by Mr Cooke in Economy during the Relevant Period are material to the question of whether Economy and EGEL belonged to the same undertaking for the purposes of the Chapter I prohibition.

7.47.1.9. Neither does the Authority consider that the relationship between Ms Khilji and Mr Cooke is relevant to the question of whether Economy and EGEL formed separate undertakings for the purposes of the Chapter I prohibition. Economy's and EGEL's contention that the entities may form part of the same undertaking by virtue of one being owned and controlled by a partner in a relationship and the other being owned and controlled by the other partner would be a significant departure from the existing case law set out in paragraphs 7.19 to 7.27, above.

7.47.1.10. In the following paragraphs, the Authority goes on to discuss the evidence of whether, during the Relevant Period, Ms Khilji exercised decisive influence over EGEL or Mr Cooke exercised such influence over Economy.

7.47.2. Actual exercise of decisive influence or control: EGEL[372] and, later, Economy[373] have both made representations to the Authority to the effect that the alleged involvement of Ms Khilji in certain decisions taken by EGEL and the alleged involvement of Mr Cooke in certain decisions taken by Economy demonstrate that Economy and EGEL should be regarded as forming part of a single undertaking. The Authority notes that a large number of the decisions relied upon in this regard pre-date the signature of the Demerger Agreement.

7.47.2.1. As a preliminary matter, the Authority notes that no convincing argument or evidence has been advanced as to how Ms Khiji exercises decisive influence over Mr Cooke, or *vice versa*, even if it were possible for natural persons to exercise decisive influence over each other such that that influence would constitute control for the purposes of the Chapter I prohibition. Neither Economy nor EGEL has provided any authority in support of their proposition that a couple in a stable, long-term relationship will constitute a single undertaking for the purposes of competition law. Indeed, the case law cited at paragraph 7.27, above, suggests otherwise. The mere fact that the share capital of two separate commercial companies is held by the same person or family unit is insufficient to establish those companies as a single economic unit.[374] Ultimately, however, the separateness of the businesses will depend upon whether they determine their conduct on the market independently of each other.[375]

[372] Document references EP0337, EP0364 (particularly, section 3) and EP0454 (particularly, section 3).
[373] Document references EE0382, EE0419 (pages 4 to 5) and EE0422.
[374] See *Dansk Rørindustri*, paragraph 118, and *Aristrain*, paragraph 99.
[375] See footnote 297, above, and *Viho*, paragraph 16. For examples of this test being applied, see also the European

7.47.2.2. The Authority has gone on to consider whether, on the one hand, Ms Khilji should be regarded as forming part of the same undertaking as EGEL and, on the other hand, Mr Cooke should be regarded as forming part of the same undertaking as Economy.

7.47.2.3. As a preliminary point, the Authority notes that the majority of the decisions to which Economy and EGEL refer as providing evidence of the actual exercise of decisive influence or control occurred during 2014. Even assuming that those decisions provided evidence of the actual exercise of decisive influence or control, they occurred more than a year before the beginning of the Relevant Period.

7.47.2.4. Further, if the trust documents dated April 2016 are taken at face value, the authorities referenced in paragraph 7.27 confirm that mere common shareholdings in separate commercial companies held by the same person or family unit are insufficient to establish that the companies form part of a single economic unit. It must be shown that the relevant shareholder actually exercised decisive influence over the decisions of the company such that the company does not enjoy real autonomy in its conduct on the market.[376]

7.47.2.5. In arriving at its conclusion on this issue, the Authority has considered carefully whether there are economic, organisational and legal links between, on the one hand, Ms Khilji and EGEL and, on the other hand, Mr Cooke and Economy. As part of this assessment, the Authority has considered the effects of the personal links described by the Parties as existing between Mr Cooke and Ms Khilji.

7.47.2.6. Importantly, during the Relevant Period, Ms Khilji was not the registered owner of any shares in EGEL and did not represent EGEL externally,[377] and Mr Cooke was not the registered owner of any shares in Economy and had not represented Economy externally since early 2015. Whilst the April 2016 trust documents appear to confer beneficial ownership rights upon their beneficiaries, they provide no evidence of the actual exercise of control, or any managerial involvement. Further, they were signed several months after the agreement and/or concerted practice under investigation was concluded and, as explained above, the claim that they give rise to the exercise of control conflicts with Economy's and EGEL's contemporaneous statutory filings with Companies House concerning "*persons with significant control*" over each business.[378]

7.47.2.7. Following EGEL's submissions, the Authority took the investigatory steps described in paragraph 4.13 to 4.16 above. The documents that the Authority gathered from those steps provide no evidence of Ms Khilji or Mr Cooke exerting decisive influence or control over each other's business. Indeed, the Authority uncovered only a small number of e-mails between Ms Khilji and Mr Cooke relating to the business decisions mentioned in the Parties' submissions. None of those e-mails demonstrated that Ms Khilji

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Commission's decision in case IV/32.732 *IJsselcentrale* OJ [1991] L 28/32, paragraphs 22 to 24, and the judgment in *Portielje*, paragraphs 80 to 87.

[376] See the principles set out in paragraphs 7.19 to 7.27, above.

[377] Mr Cooke provided confirmation of this at interview (see document reference EP0354, page 28).

[378] Document 5.8, 5.16 and 5.17, above, and Annex 2 to this Decision.

was bound to follow Mr Cooke's stated views in relation to Economy's business decisions, or *vice versa*.[379]

7.47.2.8. It is notable that the majority of the evidence on which the parties rely dates from 2014, some years before the beginning of the Relevant Period. In any event, the evidence provided in Economy's and EGEL's submissions (particularly references to "consultation", "guidance", "discussion", "requests", "support", "updates" and "advice") is insufficient to establish that either Ms Khilji or Mr Cooke exercises "decisive" influence over the other's business within the meaning of the case law.[380]

7.47.2.9. The Authority notes that Economy and EGEL are large, professional businesses organised into separate groups of companies, with each business reporting an annual turnover of roughly £100 million in the 2016-2017 financial year and employing hundreds of staff directly or indirectly.[381] The Authority would expect some form of record to exist showing the process followed to make strategic decisions in such businesses.

7.47.2.10. While the Authority has gathered and reviewed substantial quantities of documents from each business concerning their respective decision-making, as noted above,[382] there is very limited evidence of the decisions of one undertaking having been influenced by the other undertaking. This is true both in relation to the decisions advanced by Economy and EGEL as instances in which decisive influence or control has purportedly been exercised, and more generally.

7.47.2.11. The evidence provided to the Authority of purported influence by Ms Khilji over EGEL's decision-making and by Mr Cooke over Economy's decision-making is not such as to constitute the actual exercise of decisive influence or control when compared with the circumstances in which the courts have found such decisive influence or control to have been exercised.[383]

7.47.2.12. Economy and EGEL have submitted that Mr Cooke ensured the "day-to-day" operation of EGEL and Ms Khilji managed the "day-to-day" operation of Economy, although they took important decisions together. The Parties have, however, been unable to provide contemporaneous documentary evidence of such joint strategic decision-making. The witness evidence

[379] Indeed, in respect of a debenture that was removed from early drafts of a trading contract with a firm called Axpo, the Authority has evidence of the internal reasoning and decision-making process within EGEL, without countervailing evidence of input into that decision – let alone the decision being dictated – by Ms Khilji (document references EP0431 and EP0438). For further examples of strategic business decisions being debated within EGEL without Ms Khilji being copied to correspondence or otherwise mentioned, document references EP0381, EP0382, EP0384, EP0385, EP0386, EP0387, EP0404, EP0405, EP0408, EP0409, EP0410, EP0411, EP0418, EP0419, EP0420, EP0421, EP0422, EP0423, EP0424, EP0426, EP0427, EP0431 and EP0450.

[380] In this regard, Economy's submission to the Authority dated 5 March 2018 is particularly striking in that, when asked to provide evidence of examples given by Economy of Ms Khilji's ongoing involvement in EGEL's management and Mr Cooke's ongoing involvement in Economy's management, Economy referred the Authority to Ms Khilji providing support to EGEL in 2014 and early 2015, Mr Cooke having requested support from Ms Khilji at that time, "*an advisory relationship*" existing between Ms Khilji and Mr Cooke, discussions between Ms Khilji and Mr Cooke about staffing matters at Economy that took place almost entirely in 2014 and various other examples of "advice" and "discussion", also predominantly in 2014 or early 2015 (see document reference EE0422).

[381] For direct employees in 2016-2017, see paragraphs 5.2 and 5.11, above. The Authority notes that Economy's and EGEL's sales functions are largely outsourced to sales agencies and certain of their back office functions are undertaken by external firms, such as Dyball.

[382] See paragraph 7.40.3, for example.

[383] See paragraph 7.24, above, for examples of those circumstances.

provided in support of this claim appears inconsistent with the consistent body of evidence, described in this section, of Economy and EGEL appearing to determine their conduct on the market independently and, indeed, competing against each other.

7.47.2.13. The history of events since 2014 and throughout the Relevant Period (as explained in paragraph 7.40, above) is consistent with the control of Economy being vested in Ms Khilji and the control of EGEL being with Mr Cooke. Indeed, the statements made to the Authority in October 2014, which were made by or with the approval of Ms Khilji, and Economy's and EGEL's contemporary PSC filings are all consistent with Economy and EGEL not only being seen to be, but also being separate undertakings.

7.47.2.14. As a result, the Authority concludes that the evidence on its file does not show that Mr Cooke actually exercised decisive influence over Economy's decision-making or that Ms Khilji actually exercised decisive influence over EGEL's decision-making during the Relevant Period. The Authority considers that, during the Relevant Period, the evidence on its file clearly demonstrates that Economy and EGEL enjoyed real autonomy in determining their respective conduct on the market.

7.47.2.15. For completeness, the Authority notes Economy's and EGEL's reference to passages from the CJEU's judgment in the case of *HaTeFo GmbH v Finanzamt Haldensleben*.[384] The Authority considers that, because that case concerned entities whose economic and financial relations were very significantly more intertwined than those of Economy and EGEL, it provides little assistance in this matter.[385]

7.47.3. Diversification of risk as a rationale for separate incorporation and operation: As explained above, in December 2017,[386] Economy and EGEL allege that EGEL was established by Ms Khilji and Mr Cooke as a means of mitigating market risk of their purportedly joint financial assets.

7.47.4. At interview, Ms Khilji explained that EGEL was established to mitigate the risk of volatile wholesale energy prices and of the effect of a provisional order that contained a prohibition on Economy acquiring new customers.[387] The Authority had imposed that provisional order on Economy in order to bring Economy into compliance with a number of licence conditions and other relevant requirements which it appeared to the Authority Economy was contravening, or likely to

[384] Case C-110/13 ECLI:EU:C:2014:114.
[385] The relationship between the two companies in question is explained in paragraph 36 of the judgment, as follows: "*Concerning the economic and financial relations between HaTeFo and X, it is apparent from the order for reference that X sells all of HaTeFo's production, while HaTeFo is not visible on the market. A representative of X is responsible for the technical aspects of HaTeFo's production. Furthermore, HaTeFo transferred to X its computer and procurement management, and its research activity. Finally, HaTeFo uses one of X's bank accounts for the purposes of its business activity*". However, Economy and EGEL have entirely separate brands on the market and they administer their sales and marking activity separately (with the exception of the agreement and/or concerted practice concerned by this Decision). For example, the Authority is unaware of any computer systems, procurement management or research activities shared by Economy and EGEL. Economy and EGEL have distinct management teams, with no overlap of employees or directors, with the exception of a small number of secondments and transfers of staff in 2014. While there was cooperation between the two undertakings in respect of Dyball's commission to develop a new "CSM" system (see paragraphs 5.158 to 5.163, above), Economy and EGEL were otherwise operationally independent of each other and did not share a bank account during the Relevant Period.
[386] See paragraphs 5.26.2.5 to 5.26.2.8, above.
[387] Document reference LK0002, paragraphs 136 to 138, 152, 169 to 173 and 182 to 233.

contravene as a result of failing to comply with certain conditions of its supply licences and complaints handling regulations.[388]

7.47.4.1. The Authority notes that neither Economy nor EGEL has been able to provide contemporaneous documentation to support this account of the reasons for establishing EGEL. In light of this, the Authority is reliant upon the accounts that have been provided by various persons involved in the relevant events. Those accounts are inconsistent in this regard.

7.47.4.2. At interview, Ms Khilji elaborated by explaining that she established EGEL, with Mr Cooke, to mitigate the effects of (a) volatile wholesale energy prices, and (b) a provisional order imposed by the Authority in February 2014 preventing Economy from acquiring new customers in response to Economy contravening or being likely to contravene certain conditions of its supply licences and complaints handling regulations.

7.47.4.3. At interview, whilst Mr Cooke had also claimed that EGEL was established as a means of diversifying risk. Mr Cooke said that this diversification only concerned energy procurement.[389] Mr Cooke explained that the difference in EGEL's and Economy's approaches to purchasing energy developed organically, and was not the result of a common strategy. Mr Cooke told the Authority that: "*we've gone for more longer forecasting with less fixed in whereas she's gone to completely fixed in for a shorter period of time. So, they're the two models. We didn't discuss that by the way. That's just the route she wanted to take with her side of things and that's the route I wanted to take with mine*".[390]

7.47.4.4. When asked to elaborate on how EGEL and Economy decided on their respective strategies for purchasing energy, Mr Cooke went on to explain that "*I knew what she was doing, but that didn't influence what we were doing at E and didn't influence what she was doing at Economy*".[391] Mr Cooke went on to state that, when EGEL was established, Economy and EGEL procured energy in the same way – rather than using deliberately contrasting approaches – and it was only over time that Economy's approach diverged from EGEL's approach. Mr Cooke also stated that that divergence was the result of decisions taken by Economy's managers rather than by Ms Khilji and Mr Cooke implied that he does not decide upon EGEL's energy procurement strategy because he leaves this to his "*team*".[392]

7.47.4.5. Mr Cooke also stated that EGEL's purchasing strategy was determined by managers at EGEL rather than being a strategic decision taken by Mr Cooke himself.[393] This description of the companies' evolving energy purchasing strategies is inconsistent with the account given to the Authority of a joint,

[388] Document reference LK0002, pages 22 to 23. The sales restriction was imposed for the purpose of securing compliance with certain complaints handling regulations and provisions of Economy's energy supply licences. The provisional order was intended to remain in force until Economy had satisfied the Authority that it had implemented remedial measures specified in the Authority's provisional order dated 14 February 2014. On 13 May 2014, the Authority confirmed its provisional order, subject to modifications. On 12 December 2014, the Authority revoked the majority of the provisions of its confirmed provisional order, including the sales prohibition. On 3 June 2015, the Authority revoked the remaining provisions of the confirmed provisional order.
[389] Transcript of Mr Cooke's interview (document reference EP0354), page 23.
[390] Transcript of Mr Cooke's interview (document reference EP0354), page 15.
[391] Transcript of Mr Cooke's interview (document reference EP0354), page 23.
[392] Transcript of Mr Cooke's interview (document reference EP0354), page 25.
[393] Transcript of Mr Cooke's interview (document reference EP0354), page 25.

pre-determined policy of adopting different purchasing strategies in order to mitigate the risk of one strategy failing.

7.47.4.6. Apart from wholesale energy procurement strategy, another area of difference between the two businesses' business models that has been claimed to demonstrate deliberate, strategic divergence concerns Economy's development of a telesales marketing channel.[394] The Authority notes, however, that while Economy did develop telesales as a route to market, the preponderance of Economy's new customers were acquired through face-to-face sales until early 2017.[395] Face-to-face sales were also EGEL's principal sales channel.[396] Both businesses also both developed further sales channels, particularly PCWs, throughout 2016.[397] So, rather than there having been a marked differentiation of sales channels as part of a strategy of diversifying the risk of one business model failing, Economy's and EGEL's sales channels mostly mirrored each other throughout the Relevant Period.

7.47.4.7. More broadly, the Authority notes that, rather than adopting divergent sales and marketing strategies from the outset in order to mitigate the risk of choosing an unsuccessful business model, Economy and EGEL appear to have adopted very similar business models, focussing almost exclusively upon selling to customers with PPMs, using face-to-face selling. This similarity of business plan undermines the contention that EGEL was established with an approach that was consciously different to Economy's.

7.47.4.8. EGEL also claims that its decision to change smart meter provider in light of concerns about its (then) provider's ability to supply both Economy and EGEL provides evidence of Economy and EGEL acting as a single undertaking and diversifying risk.[398] This change of provider appears to have been a rational response to a supplier's lack of capacity rather than providing evidence of Economy and EGEL diversifying supply chains to mitigate risk. Further, EGEL points to Economy and EGEL sharing a number of service providers in support of its contention that they should be regarded as forming part of a single undertaking in respect of the Chapter I prohibition.[399] The Authority considers that neither the fact that Economy and EGEL have different smart meter providers nor the fact that they shared IT providers, financial advisers and accountants provide evidence of Economy and EGEL forming part of a single undertaking to the standard required by the applicable case law.

7.47.4.9. Economy and EGEL have also claimed that a "*risk of regulatory intervention*" was a reason for setting up EGEL.[400] The regulation of the energy sector is designed to protect energy consumers and is based on statute. Any attempt to circumvent it is inappropriate and may be unlawful, particularly in light of the criminal offences of making false statements to

[394] See, in particular, *[✂]* letter dated 17 November 2017 (document reference EP0454), paragraph 3.32.
[395] Document references EE0212 and EE0213.
[396] Document reference EP0344.
[397] Document references EE0212, EE0213 and EP0334.
[398] Document reference EP0364, paragraph 4.3. More information on that choice of provider was given by EGEL in document reference EP0454, paragraphs 3.19 to 3.23.
[399] Document reference EP0337, paragraph 4.14.
[400] In particular, pages 43 to 44 of the transcript of Economy's and EGEL's oral hearing that took place on 9 November 2018 (document reference JR0026).

the Authority.[401] The most effective manner of avoiding regulatory enforcement action is to comply with the relevant legal and regulatory rules.

7.47.4.10. In any case, the Authority does not consider that, even if Ms Khilji and Mr Cooke were seeking to avoid enforcement action by establishing EGEL, such a motivation provides evidence of continued joint control by them over Economy and EGEL. Further, the Authority notes an absence of contemporary evidence in support of the Parties' argument.

7.47.5. Ms Khilji assisted EGEL in establishing itself on the market:

7.47.5.1. Economy and EGEL submit that Ms Khilji's involvement in setting up EGEL and support provided by Ms Khilji to EGEL as it was establishing itself as an energy supplier support their claim that Economy and EGEL should be regarded as forming part of a single undertaking during the Relevant Period.

7.47.5.2. The Authority considers that such assistance formed part of Ms Khilji's and Mr Cooke's separation of their respective business interests, which was definitively confirmed in the Demerger Agreement.

7.47.5.3. The Authority notes that a number of events that took place during and in the months following the establishment of EGEL, on which the Parties rely in claiming that Ms Khilji controlled EGEL, are provided for in the Demerger Agreement. The Authority considers that any suggestion that these events demonstrate a common purpose shared by or sharing of resources between Economy and EGEL is a mischaracterisation of those events. Rather, they should be considered with reference to the stated purpose and detailed provisions of the Demerger Agreement. The events in question are the following:

7.47.5.4. **Financing EGEL's entry into the market**:[402] clause 1 of the Demerger Agreement contains a definition of "*Completion Payment*". Clause 3.4 provides that the Completion Payment is to be paid by Ms Khilji to Mr Cooke at the completion date and appears to be consideration for extinguishing Mr Cooke's interest in Economy, which had been formalised by a trust declared by Ms Khilji in Mr Cooke's favour on 22 May 2014. The Completion Payment is expressed as being *[✂]*, minus a "*Goods and Services Payment*" and minus a "*Transferred Assets Payment*". The payments making up the Goods and Services Payment are accounted for in schedule 2 to the Demerger Agreement and total *[✂]*, including payments for five salaries.[403] Economy also seeks to claim that use of those five Economy employees in setting up EGEL demonstrates that EGEL was and is under common control by Mr Cooke and Ms Khilji.[404]

7.47.5.5. **Provision of computer and office furniture**:[405] similarly, the "*Transferred Assets Payment*" mentioned above as forming part of the

[401] See section 59 of the Electricity Act 1989 and section 43 of the Gas Act 1986.
[402] See paragraph 2.16 of Economy's response of 17 November 2017 to a Section 26 Notice (document reference EE0382), and paragraphs 3.2(a), 3.14(e), 3.22(a) and 4.3(b) of *[✂]* note dated 4 December 2017 (document reference EE0408).
[403] This accounting is very detailed and includes an entry a payment for 37 pence.
[404] See paragraphs 2.14(h) and 2.17(a) of Economy's response of 17 November 2017 to a Section 26 Notice (document reference EE0382), and paragraph 3.15(c) of *[✂]* note dated 4 December 2017 (document reference EE0408).
[405] Paragraph 2.17(e) of document reference EE0382, and paragraph 3.15(b) and 3.22(c) of document reference EE0408.

"*Completion Payment*" concerns a number of laptops and an item entitled "desktop" and comes to £1,848.49 in value.[406]

7.47.5.6. **Use of Economy's telephone platform until November 2014**:[407] clause 6 of the Demerger Agreement provides that EGEL may use Economy's telephone call centre platform until 30 November 2014. A fee for use of that platform was provided for.[408]

7.47.5.7. As such, these transfers appear to be part of a commercial transaction intended to effect the separation of Mr Cooke's and Ms Khilji's business interests, as explained in the Demerger Agreement. Ms Khilji has claimed that it would be "*absurd*" for her to have "*simply given away half a million pounds*" from a business that she owned to fund a business solely owned by another person.[409] However, and as explained in the preceding paragraphs, Ms Khilji's financial assistance for EGEL's establishment in the market was provided for in the Demerger Agreement as part of a commercial transaction in which the parties stipulated the contractual obligations of each party and the benefit to be derived by each.

7.47.6. The Demerger Agreement should be ignored:

7.47.6.1. When asked about the clauses of the Demerger Agreement cited above, Ms Khilji suggested that the separation purporting to have been effected by the Demerger Agreement should be ignored by the Authority because it was a legal fiction and merely part of a mechanism to formalise the withdrawal of money from Economy in order to set up EGEL.[410] Mr Cooke had given us a similar account.[411]

7.47.6.2. The Authority considers that it is appropriate to rely upon the terms of the Demerger Agreement and that significant weight can fairly be given to the intentions of the parties to the Demerger Agreement, as expressed in that document. The Authority also considers that, along with the behaviour of the Parties, the Demerger Agreement created a legal reality of separate businesses and there are competition law implications that flow from that reality.

7.47.6.3. As such, the Authority considers that the contemporary correspondence with the Parties, as subsequently confirmed, suggest that Mr Cooke should not be seen as exercising control over the operation of Economy. There is no other credible explanation for the decision to employ the rather elaborate device of a Demerger Agreement to finance the establishment of EGEL than to separate Mr Cooke's and Ms Khilji's business interests. Other, simpler arrangements could and would have been adopted if EGEL and Economy were to be run together under the same ownership and control. Thus the Demerger Agreement was essential for the purpose of separating the two businesses.

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[406] See schedule 3 to the Demerger Agreement.
[407] See paragraph 2.17(b) of document reference EE0382, and paragraph 3.15(b) of document reference EE0408.
[408] See recital C of the Demerger Agreement, which explains the purpose of that agreement.
[409] See paragraph 55 in Annex 1 to the Joint Response. See also page 22 of the transcript of the hearing that took place on 9 November 2018 (document reference JR0026).
[410] Document reference LK0002, page 39.
[411] Document reference EP0354, pages 28 to 29. This account has also been presented to us in submissions, including in a letter from *[✂]* dated 13 September 2017 (document reference EP0364), paragraph 1.3 and a further letter from *[✂]* dated 17 November 2017, paragraph 2.4 (document reference EP0454).

7.47.6.4. Moreover, the Authority does not accept as credible arguments that the Parties were unaware of the implications of those terms, or (colloquially) that they did not know what they were doing. They knew or they should have known that the consequences of entering into the Demerger Agreement, was that any joint control over both entities, if it had existed before, had been abandoned.

7.47.6.5. Developing their line of argument in which they sought to explain away the Demerger Agreement, Economy and EGEL have claimed that that it would be artificial to distinguish between periods before and after the Demerger Agreement in deciding whether Economy and EGEL form separate undertakings for the present analysis.[412] Economy, further, claims that the Demerger Agreement "*irrefutably confirms Ms Khilji's and Mr Cooke's common understanding that they jointly owned E*".[413] The basis of these claims is not clear to the Authority and both are directly contradicted by the terms of the Demerger Agreement (for example, see paragraph 7.40.2, above).

7.47.6.6. Further, the Authority notes a dearth of contemporary evidence to support the claim made by Economy and EGEL that the Demerger Agreement (and an accompanying agreement settling Mr Cooke's dismissal from his employment with Economy) "*were all about creating funds to set up* [EGEL] *in the most efficient manner*" for a family unit consisting of Ms Khilji, Mr Cooke and their children.[414] In support of that claim, Economy and EGEL refer to two heavily-redacted documents dated May 2014,[415] which they claim show an intention to set up reciprocal trust arrangements in Economy and EGEL, for the benefit of Mr Cooke and Ms Khilji, respectively. However, the Authority understands that no trust was established over shares in EGEL for the benefit of Ms Khilji. A trust created over half of the shares in Economy for the benefit of Mr Cooke was created on 22 May 2014,[416] which was extinguished by the Demerger Agreement.[417] This arrangement is consistent with the stated purpose of the Demerger Agreement (i.e., the separation of Ms Khilji's and Mr Cooke's business interests), by formalising Mr Cooke's interest in Economy, before formally removing that interest through the commercial transaction, namely the Demerger Agreement.

7.47.6.7. Ms Khilji also claimed that the terms of the Demerger Agreement did not reflect the reality of the situation and that they were standard, "*off-the-shelf*" contractual terms, drafted by the lawyers who drew up the document.[418] However, the Demerger Agreement was specific to the parties to that agreement, setting out its purpose of separating Ms Khilji's and Mr Cooke's business interests, permitting EGEL's use of Economy's telephone call centre platform for three months after the date of the Demerger Agreement,[419] accounting for sums paid by Economy for setting up EGEL,

[412] For example, document reference EE0422, paragraphs 1.2 and 1.3 and the submissions of the parties at the oral hearing held on 9 November 2018 (document references JR0021 to JR0026).
[413] Document reference EE0419, page 2.
[414] Transcript of the oral hearing with Economy and EGEL that took place on 9 November 2018 (document reference JR0026).
[415] Document references EE0503 and EE0504.
[416] See paragraph 5.26.9, above.
[417] See clause 3.5(a) of the Demerger Agreement.
[418] Document reference LK0002, pages 43 to 50.
[419] See clause 6 of the Demerger Agreement.

extinguishing Mr Cooke's interest in Economy, creating liability for Mr Cooke for half of any penalty imposed by the Authority above £350,000,[420] specifying internet domain names to be retained by each party,[421] and even accounting for the transfer of laptops and office equipment worth less than £2,000.[422]

7.47.6.8. Far from being a template legal document, it is clear from the wording of the Demerger Agreement that it was drafted to take into account the specific circumstances of Ms Khilji's and Mr Cooke's situation in order to sever their business interests.

7.47.7. Economy's decision to sell mobile phones: Economy[423] and EGEL[424] have also claimed that Economy's decision to start selling mobile phones provides evidence of Economy and EGEL being managed jointly. However, the decision for Economy to start selling mobile phones, the registration of an appropriate domain name and the incorporation of a company for this business pre-dated the decision to establish EGEL and all occurred during Mr Cooke's employment with Economy, which ended more than eighteen months before the beginning of the Relevant Period.[425] In those circumstances, the Authority considers Economy's decision to sell mobile phones to be irrelevant to the question of whether Economy and EGEL form separate undertakings.

7.47.8. Co-operation in respect of smart meters: The purchasing of surplus smart meters by EGEL from Economy is also held up by EGEL as evidence of a lack of competition between Economy and EGEL.[426] Similarly, both Economy[427] and EGEL[428] point to the secondment of two members of staff from Economy to help EGEL set up its roll-out of smart meters. While these appear to be examples of cooperation between the two businesses, they do not demonstrate the exercise of control or that Economy and EGEL belong to a single undertaking for the purposes of competition law.[429]

7.47.9. Transfer and secondment of staff:

7.47.9.1. Economy[430] and EGEL[431] point to the movement of a small number of employees from Economy to EGEL, when the latter was being set up in mid-2014. However, Economy had previously told the Authority that those members of staff transferred their employment to EGEL, severing their association with Economy.[432] The Authority does not consider that the transfer of employees from Economy to EGEL constitutes evidence of

[420] This was done by clause 5.1 of the Demerger Agreement, which appears to have been intended to ensure that Mr Cooke remained liable for any fine imposed by the Authority arising from the period during which Mr Cooke was a director of Economy. It is notable that clause 5.1 envisages a penalty of up to £350,000 and, in December 2017, after having admitted breaches of numerous conditions of its supply licences, Economy was fined £1 and agreed to make a redress payment of £250,000 to Citizens Advice.
[421] Schedule 1 to the Demerger Agreement.
[422] Schedule 3 to the Demerger Agreement.
[423] Document reference EE0382, paragraph 3(f).
[424] Document reference EP0364, paragraph 3.6(b).
[425] Document reference EP0454, paragraph 3.34 to 3.36.
[426] Document reference EP0454, paragraph 3.26.
[427] Document reference EE0419, pages 3 and 5.
[428] Document reference EP0454, paragraphs 3.24 to 3.25.
[429] For the test for control, see paragraphs 7.28 to 7.27, above.
[430] Document reference EE0382, paragraph 2.17, which refers to four employees.
[431] Document reference EP0337, paragraph 4.13, which refers to five employees (including Mr Cooke). See, too, document reference EP0344, paragraphs 1.12 to 1.15 and annexes.
[432] See paragraph 7.40.1.1, above.

common control and notes that it is consistent with Ms Khilji and Mr Cooke separating their business interests through the Demerger Agreement.

7.47.9.2. Economy points to Ms Khilji's role in recruiting a software developer called *[✂]* for EGEL in June 2014.[433] The Authority notes that this predates the Demerger Agreement and *[✂]*'s salary costs, paid by Economy, were reimbursed by Mr Cooke to Ms Khilji pursuant to the terms of the Demerger Agreement,[434] suggesting that *[✂]*'s recruitment by Ms Khilji for EGEL represented a commercial transaction between separate businesses for which accounts were settled, rather than support within a group of companies.

7.47.9.3. Economy also submits that there may have been further contact between Economy personnel and *[✂]* in the months following the date of the Demerger Agreement but it has provided only one contemporaneous document in support for this assertion.[435] That document is an e-mail exchange consisting of two, one-line e-mails dated October 2014 in which an Economy employee asked *[✂]* for a spreadsheet showing how to calculate credit cover rules for the electricity balancing mechanism.[436] *[✂]* responded by attaching a copy of a spreadsheet containing "example calculations" relating to balancing mechanism credit cover.

7.47.9.4. In any case, the Authority does not consider that Ms Khilji's role in recruiting *[✂]* for EGEL or any further interaction between Economy and *[✂]* in the months following the transfer of his employment to EGEL to demonstrate that Ms Khilji exercised control over EGEL during the Relevant Period. The Authority reaches this conclusion because it does not consider that such a transfer demonstrates the actual exercise of control or decisive influence and because of the significant period of time that elapsed between these events, which took place in 2014, and the beginning of the Relevant Period (which began, at the latest, in January 2016). In addition, the Authority considers the circumstances surrounding *[✂]*'s recruitment and his purported interaction with Economy employees in the months following the Demerger Agreement to be consistent with the process of separation of Ms Khilji's and Mr Cooke's business interests, as provided for in and effected by the Demerger Agreement.

7.47.9.5. Equally, Economy cites the secondment of one of EGEL's employees (namely, [EGEL Employee 4]) to Economy for four weeks in October-November 2014 as evidence of Mr Cooke being involved in the management

[433] Document references EE0382, paragraph 2.14(h), and EE0422, pages 2 to 3.
[434] The end of schedule 2 to the Demerger Agreement (on page 18 of that document).
[435] Document references EE0457 and EE0458.
[436] The balancing mechanism is one of the tools used by National Grid to balance electricity supply and demand close to real time. It is needed because electricity cannot be stored and must be manufactured at the time of demand. Where there is a discrepancy between the amount of electricity produced and that which suppliers have contracted to take off the electricity transportation network during a certain time period, National Grid may accept a 'bid' or 'offer' to either increase or decrease generation (or consumption). The balancing mechanism is used to balance supply and demand in each half hour trading period of every day. If a supplier has failed to contract on the wholesale electricity market for the correct quantity of electricity that its customers consume during a half hour period and National Grid has to step in to balance the network, the supplier will be required to make payments to cover the cost of National Grid's intervention. In order to minimise the risk of suppliers defaulting on their balancing market liability, they must maintain a certain level of credit. It appears that the calculation of that credit cover was the subject of the very brief e-mail exchange.

of Economy after the date of the Demerger Agreement.[437] Economy claims that [EGEL Employee 4]had been employed by Economy until 30 June 2014 and was then seconded back to assist Economy in developing a sales strategy and sales capability following the lifting of the Authority's first sales ban on Economy, which had been imposed for Economy's failure to comply with certain conditions of its licence. The Authority does not consider this secondment in 2014 to indicate that Mr Cooke exercised control over Economy during the Relevant Period, applying the same reasoning set out in the immediately preceding paragraph in relation to *[✂]*'s employment to [EGEL Employee 4]'s secondment.

7.47.10. EGEL's "*24-hour/48-hour*" informal management pause

7.47.10.1. Economy and EGEL submit that the senior management of EGEL operated an informal practice according to which they would wait twenty-four or forty-eight hours before executing a management decision taken by Mr Cooke on the basis that he might discuss the decision with Ms Khilji and change his mind.[438]

7.47.10.2. In light of the case law cited in paragraphs 7.28 to 7.27, above, the Authority considers that such a practice would be materially different to the circumstances in which the courts have found decisive influence to have been actually exercised. As such and noting the limited evidence of any such management pause, the Authority does not consider that any management pause would constitute evidence of the exercise of decisive influence by Ms Khilji over EGEL (and would provide no supporting evidence of Mr Cooke's influence over Economy). On the contrary, it would only show that Mr Cooke discusses commercially confidential matters relating to EGEL's business with his common law partner who has knowledge and experience of the industry through running a competing business in the same sector.

7.47.11. Negative joint control: Economy has claimed that ownership rights may suffice to establish that different entities form part of a single undertaking, without the need to demonstrate that control has actually been exercised by one entity over another.

7.47.11.1. These claims have taken the following forms:

7.47.11.1.1. Common ownership of two companies is sufficient to establish that those companies form part of the same undertaking.[439]

7.47.11.1.2. A split 50/50 shareholding has the effect of conferring "*negative joint control*" on each shareholder.[440]

7.47.11.1.3. Veto rights as would permit one person, legal or natural, to block key decisions by the entity concerned.[441]

7.47.11.2. Economy has provided no legal authority in support of these claims.[442] In any case, the Authority's substantive assessment and the relevant

[437] Document reference EE0419, page 2 (penultimate paragraph), and EE0422, paragraphs 2.10 and 2.11.
[438] For a fuller description of this practice, see paragraph 5.26.8, above. Also, for example, document references AP0003, paragraphs 10 to 19, and CP0003, paragraphs 23 to 27.
[439] For example, document reference EE0419, page 2.
[440] Document reference EE0408, paragraph 2.17.
[441] Document reference EE0408, paragraph 2.18.
[442] The Authority notes that a different conception of "*control*" is used as a jurisdictional test in the field of merger

evidence, both described above, point clearly to Economy and EGEL competing against each other as separate undertakings.

Conclusion on Economy and EGEL as separate undertakings

7.48. It is well established that, in order to establish that two or more legal or natural persons form part of the same undertaking for the purposes of the Chapter I prohibition, the Authority has to be satisfied that the relationship between those persons and their conduct on the market is such that they do not act independently of each other. In carrying out that assessment, the Authority has considered whether, over the Relevant Period, Economy (or Ms Khilji) exercised a decisive influence over EGEL and whether EGEL (or Mr Cooke) exercised a decisive influence over Economy.

7.49. Having regard to the economic, organisational, legal and personal links between Economy and EGEL, the extensive evidence of the manner in which Economy and EGEL function does not bear out the Parties' contention that the two must be regarded as one economic unit.

7.50. On the basis of the legal principles that have been applied consistently by the courts in the settled case law described above, the Authority has therefore concluded that, during the Relevant Period, Economy and EGEL did not act together on the market as a single economic entity and formed separate undertakings for the purposes of the Chapter I prohibition.

Agreements between undertakings

Legal framework

Agreements

7.51. For the purposes of Chapter I of the CA98, "agreements" include oral agreements and "gentlemen's agreements".[443] There is no requirement for the agreement to be formal or legally binding, nor for it to contain any enforcement mechanisms.[444] It may be inferred from the conduct of the parties, including conduct that appears to be unilateral.[445] Tacit acquiescence may also be sufficient to give rise to an agreement for the purpose of the Chapter I prohibition.[446] An agreement may also consist of either an isolated act or a series of acts or continuous conduct.[447]

7.52. The key question in establishing an agreement for the purposes of the Chapter I prohibition is whether there has been "*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes*

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control. In that context, the acquisition of certain ownership rights or veto rights over strategic business decisions, even if those rights are not exercised, may give rise to a notifiable transaction under merger control rules.

[443] Case 41/69 *ACF Chemiefarma NV v European Commission* [1970] ECR 661 (in particular, at paragraphs 106 to 114).

[444] See *JJB Sports,* at paragraph 156; *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 ("**Argos and Littlewoods (CAT)**"), at paragraphs 153 and 658; affirmed by the Court of Appeal in *Argos and Littlewoods (CoA)*, paragraphs 126 and 136-141.

[445] Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711 ("**Hercules Chemicals**") at paragraph 256 to 258. See also Case T-168/01 *GlaxoSmithKline v Commission* [2006] ECR II-2969 (upheld on appeal in Joined cases C-501/06 P etc *GlaxoSmithKline Unlimited v Commission*, [2009] ECR I-9291) ("**GlaxoSmithKline**"), at paragraphs 84 to 90; and Case C-74/04 P *Commission v Volkswagen AG* [2006] ECR I-6585 ("**Volkswagen**") at paragraph 37. Domestically, see *Argos and Littlewoods (CAT)*, paragraph 658.

[446] See *Volkswagen*, paragraph 39, and the European Commission's Notice: Guidelines on Vertical Restraints, OJ C 130, 19 May 2010, paragraph 25.

[447] See the judgment in case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, EU:C:1999:356 ("**Anic**"), paragraph 81.

the faithful expression of the parties' intention".[448] It has been held that: "*…it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way…*".[449]

7.53. Although it is necessary to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, the Authority is not required to establish a joint intention to pursue an anti-competitive aim.[450] The fact that a party may have played only a limited part in setting up an agreement, or may not be fully committed to its implementation, does not mean that it is not party to the agreement.[451]

7.54. The fact that a party does not act on, or subsequently implement, the agreement at all times and in respect of all customers does not preclude the finding that an agreement existed.[452]

Concerted practices

7.55. The Chapter I prohibition also applies to "concerted practices". The Court of Appeal has noted that "*concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for* [the] *purpose*" of determining whether there is consensus between the undertakings said to be party to a concerted practice.[453]

7.56. The following key points arise from the case law on the concept of a concerted practice:

7.56.1. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market, including the prices and commercial terms it offers to customers.[454] 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 future 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

[448] See the judgment in case T-41/96 *Bayer AG v Commission*, [1996] ECR II-381, paragraph 69 (upheld on appeal in joined cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, [2004] ECR I-23. The point is discussed at paragraphs 96–97 of the higher court's judgment).
[449] See *Hercules Chemicals*, paragraph 256, citing C-41/69 *ACF Chemiefarma NV v European Commission* [1970] ECR 661, paragraph 112; and joined cases C-209/215 and C-217/78 *Heintz van Landewyck Sarl v Commission* [1980] ECR 3125, paragraph 86. For application of this principle in domestic law, see *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2012] EWCA Civ 1190, paragraphs 15 and 22.
[450] See the General Court's judgment in *GlaxoSmithKline*, paragraph 77.
[451] See the OFT's "*Guidance on Agreements and Concerted Practices*" (December 2004), adopted by the CMA Board ("**OFT401**"), paragraph 2.8. See also T-25/95 *Cimenteries CBR and Others v Commission*, [2000] ECR II-491 ("**Cimenteries**"), paragraphs 1389 and 2557 (this judgment was upheld on liability by the Court of Justice in *Aalborg Portland*, although the fine was reduced); and, more generally, *Anic*, paragraphs 79–80, ("*the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its responsibility for the entire infringement*").
[452] Case 86/82 *Hasselblad v Commission* [1984] ECR 883, paragraph 46. See also *Toshiba (Transformers)*, paragraphs 61 to 63 ("*it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel*").
[453] See *Argos and Littlewoods (CoA)*, paragraph 22.
[454] See the judgment in case 40/73 etc *Suiker Unie v Commission* ECR, EU:C:1975:174 ("**Suiker Unie**"), paragraph 173, followed in *Anic*, paragraph 116. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4 ("**Apex Asphalt**"), at paragraph 206(iv).

competition which do not correspond to the normal conditions of 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.[455]

7.56.2. A concerted practice is a form of coordination between undertakings which falls short of "*having reached the stage where an agreement properly so-called has been concluded*", and where competitors knowingly substitute practical cooperation between them for the risks of competition.[456] The CJEU has added that "*by its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants*".[457]

7.56.3. The coordination (which is prohibited by the requirement of independence) comprises "*any direct or indirect contact*" between undertakings, which has the object or effect of influencing the conduct on the market of an undertaking thereby creating conditions of competition which do not correspond to the normal conditions of the market in question.[458]

7.56.4. It follows that a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.[459] However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.[460] In addition, the CJEU in *Hüls v Commission* stated that "*subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period*".[461]

7.57. In any event, the Chapter I prohibition 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. 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.[462]

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[455] See the judgment in case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184 ("**Dole Food**"), paragraph 120, and the judgment in case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343 ("**T-Mobile Netherlands**"), paragraph 33. See also the judgment of the General Court of 10 November 2017 in case T-180/15 *ICAP*, ECLI:EU:T:2017:795 ("**ICAP**"). This judgment has been appealed by the European Commission on the basis that the General Court incorrectly applied the case law of the Court of Justice on the statement of reasons required when imposing fines, imposing a stricter obligation on the Commission to motivate in more detail its methodology in calculating the fine imposed on an intermediary/facilitator.

[456] See *ICI*, paragraph 64. See also *T-Mobile Netherlands*, paragraph 26 and *JJB Sports*, at paragraphs 151 to 153.

[457] *ICI*, paragraph 65, applied by the CAT in *JJB Sports* at paragraph 151.

[458] See *Suiker Unie*, paragraph 174. See also *T-Mobile Netherlands*, paragraph 33, *Apex Asphalt*, paragraph 206(v), case 172/*80 Gerhard Züchner v Bayerische Vereinsbank*, ECR, EU:C:1981:178 ("**Gerhard Züchner**"), paragraph 14; and *Anic*, paragraph 117.

[459] See the judgment in case C-199/92 *Hüls v Commission*, ECR, EU:C:1999:358 ("**Hüls**"), paragraph 161.

[460] See *Apex Asphalt*, paragraph 206(xi) , citing *Hüls*, paragraph 1962; *Anic*, paragraph 124; *Cimenteries*, paragraphs 1865 and 1910.

[461] See *Hüls*, paragraph 162.

[462] See *T-Mobile Netherlands*, paragraphs 38 and 39, *Dole Food*, paragraph 125 and *ICAP*, paragraph 55.

Agreement and/or concerted practice

7.58. It is not necessary, for the purpose of finding an infringement, to distinguish between agreements and concerted practices, or to characterise conduct as exclusively an agreement, a concerted practice or a decision by an association of undertakings.[463] Nothing turns on the precise form taken by each of the elements comprising the overall agreement and/or concerted practice. As explained by the CJEU, "*it is settled case-law that, although Article* [101 TFEU] *distinguishes between 'concerted practice', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibition of that article catch different forms of coordination between undertakings of their conduct on the market* […] *and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct*".[464]

7.59. It is also established law that a series of agreements, concerted practices or decisions by associations of undertakings can be characterised as constituting a single and continuous infringement where they are interlinked in terms of pursuing a common objective.

Information exchange

7.60. Information exchange giving rise to competition law issues can take various forms. Firstly, data can be directly shared between competitors. Secondly, data can be shared indirectly through a common agency (for example, a trade association) or a third party.[465]

7.61. Information exchanges will normally be unlawful if they relate to information that has an appreciable adverse effect on important aspects of competition such as price, output, quality or range of services provided but can also involve the exchange of customer lists. That impact has to be assessed by reference to the characteristics of the information exchanged as well as the economic conditions of the market.[466]

7.62. There are agreements or concerted practices under which information is exchanged where the main economic function lies in the exchange of information itself. Moreover, information exchange can be part of another type of horizontal co-operation agreement (for example, the parties to a customer allocation agreement share certain information on their respective customers). The assessment of the latter type of information exchange should be carried out in the context of the assessment of the horizontal co-operation agreement itself.[467]

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[463] See *Argos and Littlewoods (CoA)*, paragraph 21. See also *Hercules Chemicals*, paragraph 264 and the judgments in cases T-1/89 *Rhône-Poulenc v Commission*, ECR, EU:T:1991:56 ("**Rhône-Poulenc**"), paragraph 127, *Anic*, paragraphs 131 and 132; and also Commission Decision of 10 July 1986, *Roofing Felt*, Case IV/31.371 ("**Roofing Felt**"), in which the conduct of the undertakings was found to be an agreement as well as a decision of an association.
[464] See the judgment in case C-382/12 *MasterCard and Others v Commission*, EU:C:2014:2201 ("**MasterCard**"), paragraph 63 and the case law cited in that paragraph. See further the judgments in *HFB*, paragraphs 186 to 188, and cases C-238/05 *Asnef-Equifax*, ECR, EU:C:2006:734, paragraph 32, T-305/94, 306/94 etc. *LVM v Commission*, ECR, EU:T:1999:80, paragraph 696: "*In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article* [101] *of the Treaty.*"
[465] See the European Commission's communication "*Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*" (the "**Horizontal Guidelines**") OJEU C 11, 14.1.2011, paragraph 55.
[466] Horizontal Guidelines, paragraph 58.
[467] Horizontal Guidelines, paragraphs 56.

7.63. Whilst, in general, exchanges of genuinely public information[468] are unlikely to constitute an infringement of the Chapter I prohibition, even if the data is publicly available (for example, information published by regulators), an additional information exchange by competitors may give rise to restrictive effects on competition if doing so further reduces strategic uncertainty in the market. This is especially the case if the exchange itself is non-public, in that it is not equally accessible to all competitors and customers.[469]

Liability as a facilitator

7.64. The CJEU has held that a person facilitating an infringement of Article 101 of the TFEU may, itself, be considered to have participated in that infringement in circumstances in which "*the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk*".[470]

7.65. There is nothing in the wording of the Chapter I prohibition that indicates that the prohibition is directed only at the parties to such agreements or concerted practices who are active on the markets affected by those agreements or practices.[471] Indeed, the case law clearly states that the terms "agreement" and "concerted practice" do not presuppose a mutual restriction of freedom of action on one and the same market on which all the parties are present.[472] The Chapter I prohibition refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition in the UK, irrespective of the market on which the parties operate, and that only the commercial conduct of one of the parties need be affected by the terms of the arrangements in question.[473]

Participation and implementation

7.66. It is settled case law that it is sufficient that the party concerned participated in meetings in which anti-competitive arrangements were concluded to prove to the requisite standard that the undertaking participated in the cartel, unless there is evidence that the party had publicly distanced itself from those anti-competitive arrangements. This is because a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery.[474]

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[468] That is to say, information that is generally equally accessible (in terms of costs of access) to all competitors and customers.
[469] Horizontal Guidelines, paragraphs 92 to 94. See also case T-587/08 *Fresh Del Monte v. Commission* EU:T:2013:129, paragraph 323 (this case was partially overturned on appeal to the CJEU, though not on this point).
[470] See the judgment in case C-194/14 P *AC-Treuhand v. Commission* ECLI:EU:C:2015:717 ("**AC-Treuhand**"), paragraph 30 and the case law cited in that judgment.
[471] See *AC-Treuhand*, paragraph 27 and *ICAP*, paragraph 97.
[472] See *AC-Treuhand*, paragraph 33 and *ICAP*, paragraph 103.
[473] See *AC-Treuhand*, paragraph 35.
[474] See *Dansk Rørindustri*, paragraphs 142 and 143, cited in *AC-Treuhand*, at paragraph 31, and *ICAP*, at paragraph 101 and the judgment in case C-70/12P *Quinn Barlo v Commission*, EU:C:2013:351, paragraph 29("*They* [the appellants] *thus seek to challenge the settled case law of the Court of Justice according to which it is sufficient for the Commission to establish that the undertaking concerned participated in meetings having an anti-competitive purpose, without manifestly opposing it, in order to prove to the requisite legal standard that the undertaking participated in the cartel*").

7.67. The fact that a party may have played only a limited part in setting up an agreement and/or concerted practice, or may not be fully committed to its implementation, or may have participated only under pressure from other parties, does not mean that it is not party to the agreement or concerted practice.[475]

Application in this case

7.68. For the reasons set out below, the Authority finds that the Infringement constitutes an agreement and/or concerted practice for the purpose of the Chapter I prohibition.

7.69. The most direct evidence of the agreement and/or concerted practice having been concluded is in the e-mail described in paragraph 5.66 and the internal correspondence at EGEL that it provoked.[476] The Authority recognises that the absence of a representative from Economy means that the agreement cannot have been reached at the meeting reported in [Dyball Senior Manager 1]'s e-mail of 1 February 2016. Rather, this is the first reference to the agreement and/or concerted practice in the evidence gathered during the course of the investigation. The agreement may have been reached in secret or incrementally.

7.70. EGEL's account of [Dyball Senior Manager 1]'s 1 February 2016 e-mail[477] is unconvincing in that it fails to explain why [Dyball Senior Manager 1] believed that an agreement had been reached between the Parties for Economy and EGEL not to acquire each other's customers and, specifically, that the agreement and/or concerted practice was to be implemented from 1 March 2016. Other evidence confirms that the Parties intended to implement the agreement and/or concerted practice on or around 1 March 2016 (see paragraphs 5.72 and 5.163). Nor does EGEL's account explain why [Dyball Senior Manager 1] believed that such an agreement was discussed during the meeting of 29 January 2016, a meeting at which he was present and taking notes. If [Dyball Senior Manager 1]'s note of the meeting is incorrect in reporting that such an agreement had been reached and discussed, EGEL's explanation of [EGEL Senior Manager 2]'s response seems plausible only if his reference to "*our anti-competitive behaviour*" is understood as sardonic. The more plausible explanation is that [Dyball Senior Manager 1]'s note is accurate and that [EGEL Senior Manager 2] was surprised that [Dyball Senior Manager 1] had created a written record of conduct that [EGEL Senior Manager 2] understood to breach competition law.

7.71. Whilst the e-mail described at paragraph 5.66 gives an indication of when Economy, EGEL and Dyball reached the agreement and/or concerted practice that constitutes the Infringement, it is not the only direct reference to its existence. There are numerous other express references amongst the evidence the Authority has gathered to the fact that the agreement and/or concerted practice existed.[478]

7.72. Nevertheless, the Authority does not rely entirely upon express references to the agreement and/or concerted practice in order to substantiate the Infringement's existence. The Authority holds and has considered very considerable evidence that the agreement and/or concerted practice was implemented by the Parties from which the Infringement's existence can be inferred. This is because communication

[475] See OFT401, paragraph 2.8. See also, for example, *Cimenteries*, paragraphs 1389 and 2557 (this judgment was upheld on liability (although the fine was reduced) by the CJEU in *Aalborg Portland*) and *Anic*, paragraphs 79 and 80.
[476] See paragraph 5.67, above.
[477] See paragraph 5.68, above.
[478] See paragraphs 5.73, 5.74, 5.79, 5.91, 5.133, 5.138, 5.145 and 5.163.

between the Parties, and certainly by employees at a working level, would have been necessary for the agreement's and/or concerted practice's implementation.

7.73. As a preliminary matter, the Authority notes the ample evidence of a meeting of minds and a concurrence of wills between the Parties in respect of the Infringement, an example of which is the statement cited in paragraph 5.66, above. The evidence cited in paragraph 7.74 demonstrates a concurrence of wills in relation to each method of implementing the Infringement.

7.74. **As explained in paragraph 5.174, Economy, EGEL and Dyball used a number of methods to prevent Economy and EGEL from acquiring each other's existing customers. Those means of implementation were as follows:**

7.74.1. **Measures to prevent EGEL's existing customers from appearing on software sales applications used by agents selling on behalf of Economy, and *vice versa*:**[479]

7.74.1.1. Economy and EGEL used customer lists in the form of MPANs (from the ECOES system) and MPRNs (from Xoserve's database), with Dyball's knowledge and assistance, to exclude each other's customers from the sales software – or "apps" – used by their respective salesforces (see paragraphs 5.74, 5.135, 5.138, 5.145, 5.152, 5.153 to 5.154 and 5.164).

7.74.1.2. The specific means by which this was achieved was by Economy's and EGEL's sales apps displaying each other's customers as already with them, so sales to those customers would be shown as duplicates (see paragraphs 5.76 and 5.141). Alternatively, properties supplied by the other Party would just not be shown to sales agents using the app (see paragraphs 5.149 and 5.153).

7.74.1.3. Paragraph 5.77 shows Dyball helping Economy and EGEL to access each other's customer lists, with the express intent of excluding customers from their sales apps. The e-mails quoted in paragraphs 5.78 and 5.80 show that, at Economy, it was understood that these lists were meant to be used to prevent EGEL's existing customers from appearing on Economy's sales apps. The internal circulation of Economy's customer lists, accompanied by a reference to a "*Dyball API call*", indicates that EGEL was using the customer lists provided by Dyball to exclude Economy's existing customers from EGEL's sales apps.

7.74.1.4. The Dyball correspondence quoted or referred to in paragraphs 5.81, 5.82 and 5.145 demonstrates that Dyball knew the purpose to which Economy would put the MPANs and MPRNs (i.e., the lists of EGEL's customers) and that Dyball intended to contribute by its own conduct to the common objectives pursued by Economy and EGEL.

[479] This was achieved by the sales app either not showing the customer to the sales agent at all or by the app showing the customer as already being a customer of the supplier whom the sales agent was working for (i.e., Economy's sales agents saw both Economy's and EGEL's customers as Economy's customers whilst EGEL's sales agents saw both Economy's and EGEL's customers as EGEL's customers).

7.74.2. **Measures to restrict the registration of EGEL's existing customers in the CRM system provided to Economy by Dyball, and a reciprocal restriction in the CRM system provided to EGEL by Dyball**:

7.74.2.1. Andrew Dyball, Lubna Khilji (Economy) and Paul Cooke (EGEL) agreed a system by which the CRM systems developed by Dyball for Economy and EGEL would not process sales to each other's existing customers (see paragraph 5.70). Economy and EGEL monitored whether they lost customers to each other and corresponded to ask each other to prevent the processing of such customers in their respective CRM systems (see paragraphs 5.99, 5.109 and 5.133). Internal correspondence at Economy and EGEL shows that Economy and EGEL were withdrawing each other's customers from their respective CRM systems (see paragraphs 5.99 to 5.102).

7.74.2.2. These CRM restrictions were not implemented in March 2016, as originally planned, because of technical issues. Their planned implementation was postponed until April 2016 (see paragraphs 5.72 and 5.73). Sales between Economy and EGEL were, however, being blocked even before the postponed implementation date of April 2016 (see paragraphs 5.75 and 5.76). This is consistent with the evolving approach to implementing the agreement and/or concerted practice that formed the Infringement.

7.74.2.3. The mechanism that prevented sales to each other's customers from being processed by Economy's and EGEL's respective CRM systems was often referred to as creating "exceptions" for those customers (see paragraphs 5.115, 5.118, 5.125, 5.136, 5.137, 5.144 and 5.152) or relating to "*non-compete*" customers (see paragraph 5.121). In correspondence between Economy and Dyball and between EGEL and Dyball, the fact that a customer was already supplied by either Economy or EGEL was understood to be a valid reason for that customer's switch not to be processed in the other's CRM system (see paragraphs 5.127, 5.130, 5.131, 5.137, 5.139, 5.143 to 5.144, 5.146 to 5.147, 5.154). In contrast, the fact that the customer was supplied by a third party supplier was not a valid reason for their switch to be rejected and the rejection of such customers within the CRM systems was a cause for inquiry when it occurred (see paragraphs 5.118 and 5.126, 5.137 and 5.146 to 5.147).

7.74.2.4. Towards the end of April 2016, Economy, EGEL and Dyball agreed that customers who pro-actively sought to switch between Economy and EGEL would be allowed to do so, without their registration in the relevant CRM being blocked (see paragraphs 5.104, 5.113 to 5.114,[480] 5.120, 5.121, 5.136, 5.148 and 5.156). The need for a means of forcing Economy's CRM system to process sales to EGEL's customers is further evidence of Economy's CRM system containing a mechanism to automatically block the processing of such customers, which Economy and EGEL sought to by-pass/override (see paragraphs 5.116 to 5.122).

7.74.2.5. Dyball knew the purpose of exchanging the lists of the customer "losses" (i.e., customers switching between Economy and EGEL, processing of which breached the terms of the agreement and/or concerted practice that

[480] These two paragraphs demonstrate that switches between Economy and EGEL were being blocked and that the block could be overridden.

constitutes the Infringement). In that knowledge, Dyball played a central and proactive role as intermediary in sharing both those lists of "losses" and instructions to withdraw the registration of those customers (for example, see paragraphs 5.103, 5.106 to 5.108, 5.111, 5.112, 5.117, 5.119, 5.120, 5.121 and 5.128).

7.74.2.6. When the Parties decided to allow customers who proactively sought to switch between Economy and EGEL to do so, Dyball developed an override option in Economy's CRM system to register "non-compete" customers and spontaneously offered this to EGEL (see paragraph 5.135). Whilst developing that override, it assisted Economy and EGEL by manually processing the customers concerned. Once Dyball had introduced that override option into Economy's CRM, Dyball worked with Economy to resolve issues with its implementation (see paragraph 5.122).

7.74.2.7. During the summer of 2016, Dyball developed a new CRM system for Economy and EGEL, referred to as a "CSM" system. The CSM system contained the same functionality that allowed Economy and EGEL to prevent sales to each other's customers from being processed (see paragraphs 5.158 to 5.163).

7.74.3. Instructions given to Economy's sales agents not to approach EGEL's customers and to EGEL's sales agents not to approach Economy's customers or that no commission would be paid for switching such customers:

7.74.3.1. In April 2016, EGEL's sales agents had been instructed not to target Economy's existing customers (see paragraph 5.93). Shortly afterwards, Economy instructed its own sales agents that it would not pay commission on EGEL's existing customers switching to Economy (see paragraphs 5.94 and 5.95). The responses to Economy's e-mails to its sales agencies suggest that Economy had already instructed those agencies not to target EGEL's existing customers and that they accepted that instruction even before being told that they would not receive commission for such sales (see paragraphs 5.95 and 5.96, as well as paragraph 5.140).

7.74.3.2. Both Economy and EGEL monitored sales agencies' adherence to their instructions, even requiring lists of individual sales agents who signed up customers in breach of their agreement and/or concerted practice (see paragraph 5.132).

7.74.3.3. Another software provider used by Economy was aware that Economy was not targeting EGEL's existing customers (see paragraph 5.130).

7.74.3.4. Economy was seeking not to contact EGEL's customers at all, whether through sales agents or through its own sales staff (see the final sentence of paragraph 5.116 and paragraph 5.142).

7.74.3.5. In response to a query from a sales agency, EGEL confirmed that the agency was not to target any Economy customers (see paragraph 5.155).

7.75. **Sharing customer lists, via Dyball, to enable the withdrawal of customers from the switching process. This sharing of information supported or was**

ancillary to the Infringement and, therefore, constituted part of the Infringement's restriction of competition by object:

7.75.1. Before the period under investigation, Dyball had regularly received customer data by disc from Economy for the purposes of updating sales data for the Economy sales app, seemingly to prevent Economy's sales agents from signing up its own customers.[481] Economy, EGEL and Dyball adapted this system to give effect to the Infringement.

7.75.2. Throughout the Relevant Period, Economy and EGEL regularly downloaded or otherwise received four files, each containing customer lists. The file containing a list of consumers whom Economy supplied with electricity would be labelled with "*EE*" and "*MPAN*", whilst the file containing a list of Economy's gas customers would be labelled "*EE*" and "*MPRN*". Equally, the file containing a list of EGEL's electricity customers would be labelled "*E*" and "*MPAN*" and its gas customer lists would be in a file labelled "*E*" and "*MPRN*" (see paragraphs 5.77 to 5.92). Both Economy and EGEL received all four files and knew that the other company also received all four files.

7.75.3. EGEL downloaded Economy's customer lists and shared them internally (see paragraphs 5.79, 5.92, 5.129, 5.150 and 5.157). This internal sharing of lists indicates that EGEL was making use of them. The Parties shared the MPAN and MPRN data with the express purpose of excluding customers from each company's sales apps (see paragraphs 5.85, 5.108, 5.138, 5.145 and 5.164), to support the restrictions described in paragraph 7.74.1 (see paragraphs 5.89 to 5.91).

7.75.4. Dyball confirmed to the Authority, in a note dated 31 October 2016, that it understood that the MPANs and MPRNs were used to "*restrict the cross-registration*" of customers.[482]

7.75.5. In light of this, the Authority considers that the Parties' exchanging of customer information was ancillary to and supported the sales restrictions described in paragraphs 7.74.1 and 7.74.2.

7.75.6. In relation to Dyball's role, the Authority notes that its role went beyond facilitating the sharing of customer lists between Economy and EGEL. It was responsible for putting in place the restrictions described in paragraph 7.74.1 and updating the underlying customer lists. Further, it took a proactive role in improving the way in which customer lists were shared, suggesting that an API be used to interact with live ECOES data (i.e., to obtain MPAN customer lists, although the evidence cited in paragraphs 5.80, 5.87, 5.89, 5.128, 5.145, 5.159 and 5.161 shows that the APIs were used to obtain MPRN as well as MPAN data), rather than the customer lists being shared on CD (see paragraph 5.82). Later, Dyball offered to increase the frequency with which customer lists were exchanged to improve implementation of the Infringement[483] (see paragraph 5.119). At interview, Andrew Dyball confirmed that the customer lists were not being exchanged publicly and were not equally accessible to all competitors and customers.

[481] For more context, see paragraphs 5.58 to 5.62.
[482] Document reference DL0074.
[483] This was to prevent customers who had recently switched away from Economy or EGEL to a third party supplier from being caught by Economy's and EGEL's CRM processing restrictions.

7.75.7. As such, these mechanisms for information-sharing show that there was a meeting of minds and a concurrence of wills between Economy, EGEL and Dyball. The Parties had agreed that Dyball would make Economy's and EGEL's information, in the form of lists of each company's customers, available to both companies for use in support of the sales restrictions described in paragraphs 7.74.1 and 7.74.2.

7.75.8. Throughout the Relevant Period, Economy and EGEL remained active in the market and were able to download each other's customer lists using the API provided by Dyball. Considering all the available evidence, the Authority infers that Economy and EGEL took account of the information received using the API for the purposes of determining their conduct in the market. In particular, the Authority notes the abundant evidence of both Economy and EGEL using the customer lists to support the practices described in paragraphs 7.74.1 and 7.74.2, above. The Authority has seen no evidence to the contrary.

7.75.9. The Authority notes that lists of MPANs and MPRNs are not publicly available, but are available to certain energy market participants through the relevant industry bodies.[484] Whilst the lists of each other's customers' MPANs and MPRNs would have been available to Economy and EGEL in this way, by Dyball compiling and processing the lists,[485] circulating the lists to Economy and EGEL, using the information to block customers or allow them to be registered in its CRM system,[486] and refining that process[487] the Parties reduced barriers to accessing those customer lists for Economy and EGEL, facilitating collusion between them. The Authority also notes that the Parties did not make the customer lists equally accessible to all competitors and customers but sought to use them to coordinate their own behaviour on the market.[488]

7.75.10. By regularly and systematically sharing strategic information in the form of Economy's and EGEL's customer lists, as described in this paragraph 7.75, in support of the measures described in paragraph 7.74, Economy, EGEL and Dyball knowingly substituted practical cooperation between them for the risks of competition throughout the Relevant Period.

7.76. **Economy and EGEL actively monitored adherence to their agreement and/or concerted practice** (see paragraphs 5.71, 5.97,[489] 5.98, 5.99, 5.103, 5.111, 5.132 to 5.134, and 5.151).

The significance of a non-compete clause in the Demerger Agreement:

7.77. Economy has claimed that the existence of the non-compete clause contained in paragraph 4.4 of the Demerger Agreement means that no infringement of the Chapter I prohibition "*could arise in any event*" between Economy and EGEL on the purported basis that the non-compete clause had the effect of preventing all competition between Economy and EGEL for a period of two years.

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[484] See the definition of ECOES in section 2, above, for more information on the categories of market participants who may access the ECOES database.
[485] See paragraph 7.74.2.5.
[486] See paragraph 7.74.2.6 and 7.74.2.7.
[487] See paragraph 7.75.6.
[488] See paragraph 7.67.
[489] The *[✂]* customer and sales details were clearly being shared to allow EGEL to monitor the success of the Agreement's implementation and/or for EGEL to withdraw registration of Economy's customers from EGEL's CRM system.

7.78. The Authority notes that the non-compete clause contained in the Demerger Agreement only prevents EGEL from approaching Economy's customers, whereas the Infringement restricts both EGEL from targeting Economy's customers and Economy from targeting EGEL's customers.

7.79. Further, the only Economy customers concerned by the non-compete clause in the Demerger Agreement are those who were Economy's customers at the date of the Demerger Agreement (or during the period of twelve months preceding that date). Such customers would have represented less than half of Economy's customers at the beginning of the Relevant Period.[490]

7.80. Accordingly, the non-compete clause contained in the Demerger Agreement – even if it does not in and of itself infringe the Chapter I prohibition – is not capable of providing a legal defence to the Infringement.

7.81. In any case, whilst being interviewed by the Authority, Mr Cooke expressed surprise at discovering that the non-compete clause restricted EGEL from approaching Economy's customers. Mr Cooke said that he had understood the relevant clause only to restrict EGEL from approaching Economy's staff but accepted, on reading the clause, that it also restricted EGEL from approaching Economy's customers.[491] Therefore, Mr Cooke was unaware that the non-compete clause in the Demerger Agreement sought to restrict EGEL from targeting Economy's customers. In those circumstances, the non-compete clause, if enforceable, was not implemented by EGEL and could not have justified the Infringement.

7.82. Further, it is clear from the switching data cited above that Economy and EGEL did, in fact, compete with each other from late-2014.[492]

7.83. The Authority also notes that such time-limited and otherwise circumscribed non-compete clauses are a means of a business seeking to prevent a departing business partner or senior manager from using their knowledge of the business, obtained in that role, to poach the business' customers and employees. The non-compete clause in the Demerger Agreement therefore provides further evidence of the separation of Ms Khilji's and Mr Cooke's business interests.

7.84. For the purposes of this Decision, the Authority has been required to consider whether the non-compete clause contained in the Demerger Agreement may fall within the scope of the ancillary restraints doctrine, which is described below, in paragraphs 7.137 to 7.145, as a permissible means of facilitating a commercial operation. However, for the reasons set out in paragraphs 7.146 to 7.150, the Authority has concluded that the Infringement cannot fall within the scope of that doctrine.

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[490] Documents filed by Economy with Companies House suggest that, at the end of the 2014-2015 financial year (i.e., more than eight months after the signature of the Demerger Agreement, when Economy's customer base is likely to have been significantly smaller), Economy had around 46,000 customers. At interview, Mr Cooke estimated that in July/August 2014, Economy had roughly 50,000 customers (see document reference EP0354, pages 32 to 33). Many of those customers would have switched away from Economy between the date of the Demerger Agreement and the beginning of the Relevant Period. So, the remaining customers concerned by the non-compete clause because they had remained with Economy until the Relevant Period are likely to have been fewer than 46,000/50,000. While these customers may have been able to switch to EGEL once the agreement was modified to allow customers who proactively sought to switch between Economy and EGEL to do so, they would still have been affected by the agreement's sales restriction. Economy's customer numbers during the Relevant Period are discussed in paragraph 5.3, above, and show that, at the start of that period, Economy had around 100,000 customers.

[491] Document reference EP0354, page 32.

[492] See paragraphs 5.166 to 5.171, above.

Dyball as facilitator

7.85. By January 2016, at the latest, Dyball was a party to the Infringement by facilitating the sharing of markets and allocation of customers between Economy and EGEL. It was fully aware that it had been concluded because, in January 2016, its representatives had been present at a meeting at which the Infringement and its implementation were discussed.[493]

7.86. As shown in paragraphs 7.74.2.1, 7.74.2.3, 7.74.2.5 and 7.74.2.7, above, the CRM and CSM systems that Dyball developed for Economy and EGEL included functionality designed to permit Economy and EGEL to filter out sales to each other's customers. Dyball had full knowledge that the functionality would be used and was being used by Economy and EGEL to block registration of each other's customers and, by doing so, to reduce competition between Economy and EGEL. The fact that Dyball had this knowledge is demonstrated by communications to which Dyball was a party in which non-compete restrictions were discussed with either Economy or EGEL (for example, see paragraphs 5.72, 5.73, 5.80, 5.98, 5.103, 5.107, 5.108, 5.112, 5.116 to 5.118, 5.135 and 5.153 to 5.154) or with both Economy and EGEL (see paragraphs 5.77, 5.100 to 5.101, 5.105 to 5.106 and 5.128). The evidence set out in those paragraphs demonstrates that Dyball had specific and detailed knowledge of Economy's and EGEL's intention of restricting competition between themselves. The Authority does not rely merely upon the references to "non competes"[494] or "exclusion lists".[495]

7.87. Further, Dyball actively facilitated use of its CRM and CSM systems for that purpose and, throughout the Relevant Period, Dyball resolved IT issues with the intention of allowing the Infringement to be implemented more effectively, thus contributing to the anti-competitive objectives of Economy and EGEL.

7.88. As described in paragraphs 7.75.1, 7.75.3 and 7.75.6, Dyball knew the purpose for which Economy and EGEL were procuring each other's customer lists and actively contributed to the sharing of those lists. Dyball contributed by its own conduct to the sharing of information by, initially, sending each party a CD containing those customer lists and, later, suggesting ways in which the information could be shared more efficiently to improve the allocation of customers between Economy and EGEL.

7.89. Dyball was aware of the collusive behaviour and even sought to contribute to that behaviour through its own pro-active conduct. A prominent example of this is described in paragraph 5.135, above, in which Dyball approached EGEL, to offer it enhanced software solutions for blocking sales to Economy's customers from being processed (and for overriding that blockage, when considered appropriate). It had created those solutions to allow Economy to block sales to EGEL's customers.

7.90. A second example of Dyball not only contributing to the effectiveness of the market sharing agreement and/or concerted practice but being pro-active in doing so was its suggestion that the customer lists be refreshed daily, rather than monthly (see paragraphs 5.82 and 5.119).

7.91. The evidence shows that the Parties had a close working relationship and that Dyball treated Economy and EGEL as separate businesses, such as when it informed EGEL about software that it had developed for Economy and also offered it to EGEL (see

[493] Document reference DL0027.
[494] See, for example, paragraphs 5.121 to 5.123, above.
[495] See, for example, paragraphs 5.155 to 5.160, above.

paragraph 5.135). Following the Demerger Agreement, the evidence provided by Andrew Dyball was that Dyball did not deal with Ms Khilji in relation to EGEL and did not deal with Mr Cooke in relation to Economy.[496] Further, Dyball knew that Paul Cooke owned all of the shares in EGEL and that, at least in 2014, Ms Khilji had no shareholding in EGEL. It knew this because it had sold EGEL to Mr Cooke.[497]

7.92. Dyball provided software to implement the Infringement, and it actively procured Economy's and EGEL's customer lists (in the form of MPANs and MPRNs). It shared both companies' lists with both companies, in the knowledge that those lists would be used to prevent sales by Economy to EGEL's customers and by EGEL to Economy's customers. By coordinating implementation of the Infringement and proactively suggesting means of implementing it in this way, Dyball intended to contribute by its own conduct to the common objectives pursued by EGEL and Economy and was aware of the actual conduct planned or put into effect by EGEL and Economy in pursuit of the agreement and/or concerted practice's anti-competitive objective.

7.93. On this basis, the Authority concludes that the evidence on its file demonstrates that Dyball was a party to the agreement and/or concerted practice that constitutes the Infringement and is liable for that conduct.

Object of preventing, restricting or distorting competition

7.94. The Authority has found that the Parties' agreement and/or concerted practice had the object of preventing, restricting or distorting competition in the retail markets for the supply of gas and electricity to domestic customers in the UK. As explained below, this conclusion has been reached on the basis of legal principles that have been applied consistently by the courts in settled case law.

Legal framework

7.95. The Chapter I prohibition concerns agreements between undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition.

7.96. In that regard, the CJEU has established that certain types of coordination between undertakings, including market sharing and customer allocation, reveal a sufficient degree of harm to competition for the examination of their effects to be considered unnecessary.[498] The actual effects of such an agreement or concerted practice therefore do not need to be taken into account because it is apparent that the object of the agreement is to prevent, restrict or distort competition.[499] Such agreements are regarded as having an anti-competitive object. In other words, "*where the anticompetitive object of the agreement is established, it is not necessary to examine its effects on competition*".[500]

7.97. The relevant case law arises from the fact that certain forms of coordination between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.[501] Experience shows that such behaviour leads to

[496] Document reference DL0276, pages 18 to 19.
[497] Document reference DL0074, page 3, and the relevant documents available on the Companies House website.
[498] See the CJEU's judgment in case C-67/13 P *Groupments des cartes bancaires v. Commission*, ECLI:EU:C:2014:2204 ("**Cartes Bancaires**"), paragraph 49 and *Toshiba (Transformers)*, paragraph 26. See also *Cityhook Limited v OFT* [2007] CAT 18, paragraph 269.
[499] See the CJEU's judgments in cases 56/64 and 58/64 *Consten and Grundig v Commission* EU:C:1966:41, and *T-Mobile Netherlands*, paragraph 29.
[500] See and *Toshiba (Transformers)*, paragraph 25.
[501] See *Cartes Bancaires*, paragraph 50, and *Toshiba (Transformers)*, paragraph 25. See also the opinion of Advocate

falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.[502] So, if an agreement is found to have an anti-competitive object, it is not necessary to demonstrate that final consumers be deprived of the advantages of effective competition in terms of, for example, supply, quality or price.

7.98. The starting point for this assessment must be the nature of the restriction in question,[503] considered in the context of the examples of anti-competitive conduct set out in the relevant statutory wording or already recognised in case law.[504]

7.99. Section 2(2)(c) of the CA98 expressly prohibits "*agreements… which… share markets*". Further, the CJEU has already held that market-sharing agreements (e.g., where undertakings agree to apportion particular markets, by means of allocating customers,[505] between themselves) constitute particularly serious breaches of the competition rules.[506] "*Non-aggression*" or "*status quo*" agreements have been recognised as a type of customer-allocation agreement, and a restriction "by object", in prior EU and UK decisions.[507] The CJEU has also held that agreements which aim to share markets have, in themselves, an object restrictive of competition and fall within a category of agreements expressly prohibited by the EU law equivalent of the Chapter I prohibition.[508] Such an object cannot be justified by an analysis of the economic context of the anti-competitive conduct concerned.[509]

7.100. The concept of restriction of competition "by object" must, however, be interpreted restrictively and can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. Otherwise, competition authorities would be exempted from the obligation to prove the actual effects on the

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General Wahl in *Cartes Bancaires*, in which he referred to "*an inherent risk of a particularly serious harmful effect*", in paragraph 55 of his opinion, as echoed in Wathelet AG's opinion in *Toshiba (Transformers)*, paragraph 70.

[502] See *Cartes Bancaires*, paragraph 51 and *Toshiba (Transformers)*, paragraphs 26.

[503] See the Court of Appeal's judgment of 24 January 2019 in *Gascoigne Halman Limited v. Agents' Mutual Limited*, [2019] EWCA Civ 24 ("**Gascoigne Halman**") paragraphs 48 and 59. See also *GlaxoSmithKline*, paragraph 55.

[504] See, for example, *T-Mobile Netherlands,* paragraph 37, and the opinion of Wathelet AG in *Toshiba (Transformers)*, paragraphs 72 to 74 and 89.

[505] See the Commission's decision dated 27 November 2002 in case 37978 *Methylglucamine,* paragraphs 98 and 227 and the judgment in *Portielje*, paragraphs 95 and 111.

[506] See, to that effect, the judgments in: case C-408/12 P *YKK and Others v Commission*, EU:C:2014:2153, paragraph 26; case C-449/11 P *Solvay Solexis v Commission*, EU:C:2013:802, paragraph 82; and case C-239/11 P, C-489/11 P and C-498/11 P Siemens and Others v Commission, EU:C:2013:866 ("**Siemens**"), paragraph 218. See also the CJEU's judgment in *Toshiba (Transformers)*, paragraph 28.

[507] As to EU decisions, see, for example, COMP/38638 *Butadiene Rubber* 29 November 2006 (see recitals 98 ("*agreements not to try to win the major customers of the competitors, thereby preserving the status quo in the market*"), 130(3rd indent), 249, 271 and, especially, 301); COMP/39181 *Candle Waxes* 1 October 2008 ("**Candle Waxes**") (see, for example, recital 108 ("*main customers of each producer were to be respected*")). As to UK decisions, see OFT's decision in relation to *Stock check pads* (case CA98/03/2006), paragraphs 102 ("*agreed not to target each other's existing customers; this was evidenced by, inter alia, the exchange of customer and price lists*"), 219 (market sharing "*in that they agreed not to target each other's exclusively allocated customers*"); the OFT's decision in relation to the *Supply of prescription medicines to care homes in England* (case CE/9627/12) ("**Prescription medicines to care homes in England**"), paragraphs 5.43-5.45; 6.136-6.140, (especially paragraph 6.137 (agreement that each undertaking "*would not actively target care homes already supplied with prescription medicines by*" the other)).

[508] See Commission decisions COMP/37533 *Choline Chloride* 9 December 2004 (cf. recitals 64 to 65, 99(b), 103, 142(2nd indent)), *Candle Waxes* (see recitals 95, 243, especially, 302 and 644) (fines reduced but appeals otherwise rejected by the EU's General Court in various appeals, some of which are on further appeal to the CJEU). See also *Toshiba (Transformers)*, paragraph 28, the judgment of the CJEU in case C-403/04 and 405/04 P *Sumitomo v. Commission* [2007] ECR I-729 ("**Sumitomo**"), paragraph 43, the decision of the Commission in case AT.40098 *Blocktrains*, paragraph 43 and the OFT's decision in *Prescription medicines to care homes in England*, paragraph 6.138. See also the Horizontal Guidelines, paragraph 160.

[509] See the judgments in *Siemens*, paragraph 218, and in *Toshiba (Transformers)*, paragraph 28.

market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.[510]

7.101. According to the case-law of the CJEU, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition "by object", "*regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part*".[511]

7.102. However, in respect of types of agreements forming part of an established category of restrictions of competition "by object", such as market-sharing agreements, the CJEU has held that analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object.[512]

7.103. A finding that an agreement and/or concerted practice has an anti-competitive object is not rebuttable by an analysis of the actual effects of the agreement and/or concerted practice.[513]

7.104. In addition, the term "object", as used in the Chapter I prohibition, means the objective meaning and purpose of the agreement considered in the economic context in which it is applied.[514] The parties' subjective intention is not a necessary factor in determining whether an agreement and/or concerted practice between undertakings is restrictive, although there is nothing prohibiting the competition authorities or the courts from taking that factor into account.[515]

7.105. An agreement and/or concerted practice may be regarded as having an anti-competitive object even if it does not have a restriction of competition as its sole aim but also pursues other legitimate objectives.[516]

7.106. Moreover, information exchange can be part of another type of horizontal co-operation agreement and/or concerted practice (for example, the parties to a production agreement share certain information on costs). Information exchange may be part of or facilitate the implementation of a cartel (for example, by enabling companies to monitor whether the participants comply with the agreed terms or the parties to a production agreement may share certain information on costs). Those types of exchanges of information will be assessed as part of the cartel.[517]

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[510] See *Cartes Bancaires*, paragraph 58. See also the interpretation to this restrictive approach given by the Court of Appeal in *Gascoigne Halman*, paragraph 55, in which its purpose is said to ensure caution in extending the scope of "by object" restrictions beyond those already recognised in the statute or otherwise by the courts.
[511] See *Cartes Bancaires*, paragraph 53, and *Toshiba (Transformers)*, paragraph 27.
[512] See *Toshiba (Transformers)*, paragraph 29. Regard should also be had to the guidance offered by Wathelet AG in *Toshiba (Transformers)*, paragraph 68 (echoing the words of Kokott AG in *T-Mobile Netherlands*, paragraph 46) on the extent of the analysis of the economic and legal context required: "*taking into account the economic and legal context therefore means that the agreement at issue must be capable in an individual instance of resulting in the prevention, restriction or distortion of competition*". Whether and to what extent, in fact, any anti-competitive effects result from conduct that constitutes a restriction of competition "by object" can only be of relevance for determining the amount of any fine and assessing any claim for damages.
[513] See the judgment in cases T-68/00 etc. *JFE Engineering v Commission* [2004] ECR II-2501, paragraphs 181-184 and *Sumitomo*, paragraph 42 to 45.
[514] See the judgment in cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v Commission* EU:C:1984:130, paragraphs 25-26, and Whish and Bailey, *Competition Law*, ninth edition ("**Whish and Bailey**"), page 123.
[515] See *Cartes Bancaires*, paragraph 54.
[516] See the judgments in case C-551/03 P *General Motors BV v Commission* EU:C:2006:229, paragraph 64, and the judgment in C-209/07 *Beef Industry Development Society and Barry Brothers*, EU:C:2008:643 ("**BIDS**"), paragraph 21. See also the CAT's judgment in *Ping Europe* [2018] CAT 13 ("**Ping**"), paragraphs 101 and 130.
[517] See the Horizontal Guidelines, paragraphs 56 and 59. See, for example, the judgment in *Aalborg Portland* 1510-

Application in this case

7.107. Having examined as a whole the evidence on the Authority's file against the objectives of the agreement and/or concerted practice, the content of its provisions and the legal and economic context, the agreement and/or concerted practice can be regarded, by its very nature, as being injurious to the proper functioning of normal competition. By agreeing not to target each other's customers and by sharing customer lists in support of that agreement and/or concerted practice, Economy and EGEL restricted competition between themselves.

7.108. The principal argument advanced by Economy and EGEL is that the Authority has not had proper regard to the economic and legal context of the agreement and/or concerted practice by failing to consider either the behaviour of their sales agents or the market power of the Six Large Energy Firms. Economy and EGEL claim that the agreement and/or concerted practice was, in fact, pro-competitive in that it facilitated the EGEL's entry into the market, which offered customers additional, lower-cost choice compared to the Six Large Energy Firms.

7.109. However, it is not necessary to conduct an assessment of the actual effects of the agreement and/or concerted practice on competition in the context of the Chapter I prohibition. This is because a customer allocation/non-compete agreement between competitors that restricts competition by object does not cease to be an infringement by object because it may be capable of increasing competition on the market. Any pro-competitive effect produced by the agreement and/or concerted practice is to be considered in the context of section 9 of the CA98.[518]

7.110. The recent judgment of the CAT in *Ping* makes it clear that the reason for imposing a restriction of competition (in that case, so as to promote inter-brand competition in the supply of golf clubs) is no defence to the categorisation of the agreement as a restriction of competition by object when it is clearly anti-competitive. The object of the agreement in that case was to restrict the sales of golf clubs on-line. In the present case, the object of the agreement was to remove competition between Economy and EGEL in selling energy to each other's customers: this was plainly anti-competitive and inimical to the way in which competition is intended to work in the retail energy market. The fact that the movement of customers between the two energy suppliers may have been perceived as being unprofitable to either or both, or that the agreement and/or concerted practice might have improved their profitability or allowed them to better compete against other energy suppliers does not mean that the conduct ceases to constitute a restriction of competition by object, for the purposes of the Chapter I prohibition. Nor does such a motive, even allowing for its existence, mean that the Authority must establish that the agreement and/or concerted practice is anti-competitive in effect.

1511, 1634: "*Those exchanges are thus considered unlawful not in themselves but in that they were the linchpin or, at the very least, one of the linchpins of the Cembureau agreement…. Accordingly, the Court need only ascertain whether or not they were carried out with the anticompetitive object found by the Commission in the contested decision. There is no need to examine whether the intrinsic nature of the information exchanged might or might not by itself make them unlawful.*"

[518] This approach is consistent with the relevant case law, particularly the CAT's judgment in *Ping Europe Limited v Competition and Markets Authority* [2018] CAT 13, paragraph 135, and the CJEU's judgment in *BIDS*, paragraph 21.

Market sharing: an established category of restriction by object

7.111. Economy and EGEL claim that the agreement and/or concerted practice does not obviously fit within any established category of restriction of competition "by object".

7.112. The Authority considers that, through the conduct described in section 5, the Parties allocated and reserved Economy's and EGEL's existing customers to their then-current supplier (i.e., Economy or EGEL, as appropriate). As a market sharing or customer allocation agreement and/or concerted practice – a type of agreement explicitly listed in section 2 of the CA98 as an example of an anti-competitive agreement and consistently found to be, in itself, restrictive of competition "by object" – the Authority's analysis of the economic and legal context of such an agreement and/or concerted practice may therefore be limited to what is strictly necessary to establish the existence of a restriction of competition by object.

The content and objectives of the provisions

7.113. The object of the agreement was to secure that Economy did not supply energy to the customers of EGEL and that EGEL did not supply energy to the customers of Economy, albeit there was a proviso that neither would block transfers actively sought by customers. As such, the agreement in question was a particularly offensive form of anti-competitive agreement, denying customers the benefit of choice and motivated by an objective of increasing profit for the Parties by eliminating competition between Economy and EGEL.

7.114. Competition was eliminated in relation to potential customers who were not approached by either Economy or EGEL as a result of the Infringement when they would have been approached had the Infringement not been in place. The content of the provisions of the agreement and/or concerted practice also removed competition between Economy and EGEL in respect of certain customers who sought to switch between the two suppliers during the Relevant Period and were prevented from doing so, albeit a subsequent modification to the way in which the Infringement was implemented meant that customers who pro-actively sought to switch between Economy and EGEL were permitted to do so.

7.115. Further, the information exchange described in paragraph 7.75 concerned lists of individual customers and sufficient information to allow the CRM (supplied and maintained by Dyball) and sales software systems used by Economy and EGEL to prevent customers from switching between Economy and EGEL.

The Parties' intention

7.116. Although the Parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive of competition by object, the Authority notes that the purpose of the agreement and/or concerted practice was to reduce the competitive pressure that Economy and EGEL exerted upon each other in relation to their existing customers.

7.117. In fact, the Parties understood their agreement and/or concerted practice to be anti-competitive. That understanding was demonstrated by the reaction of EGEL employees to the minutes of the meeting that took place on 29 January 2016.[519]

[519] Document reference EP0233 and paragraph 7.70, above.

7.118. Economy and EGEL claim that the agreement and/or concerted practice was necessary to prevent malpractice by their own sales agents. The Authority notes that the existence of any purportedly pro-competitive motive does not *per se* preclude a finding of infringement by object and a finding that an agreement and/or concerted practice has an anti-competitive object is not rebuttable by an analysis of the actual effects of the agreement and/or concerted practice. It follows that, regardless of whether Economy and EGEL had subjective aims of reducing malpractice amongst their sales agents and better competing against the Six Large Energy Firms, in agreeing not to target each other's customers and sharing information, via Dyball, in support of that agreement, it may be characterised as an object infringement if it reveals a sufficient degree of harm to competition.

7.119. Further, the Authority notes that the contemporaneous evidence of malpractice provided to the Authority is very limited in nature and predates the beginning of the Relevant Period by several months. Further, while Economy and EGEL claim that they took unilateral steps to address the alleged malpractice, the documents they have provided to support that claim appear only to show that they sought to avoid employing sales advisers who had been suspected of poor sales practices, more generally and not "double-badging", in particular.

7.120. The Authority further notes a paucity of evidence in support of Economy's and EGEL's claim that their motive when concluding and implementing the Infringement was to better compete against the Six Large Energy Firms. In fact, the Authority's own analysis, reflected in figure 4, above, suggests that during the Relevant Period, Economy and EGEL failed to increase the number of customers switching to them from the Six Large Energy Firms. While the number of customers switching to Economy and EGEL during the Relevant Period increased during the Relevant Period, that increase was part of a trend that began beforehand and continued afterwards.[520]

7.121. The Authority has considered these points further, below, in relation to the ancillary restraints doctrine and the application of section 9 of the CA98.

The economic and legal context of the Infringement

7.122. The economic and legal context of which the Infringement forms part is described in sections 5 and 6, above. Agreements to share markets or allocate customers are likely to reduce competition to the detriment of consumers. In this case, by agreeing not to compete for each other's customers, Economy and EGEL are likely to have been able to reduce the competitive constraints they faced, potentially worsening outcomes for PPM consumers through higher prices or a lower quality of service.

7.123. Based on data provided by Economy and EGEL to the Authority, almost all of both undertakings' customer accounts were for customers with PPM tariffs during the Relevant Period. Given the market dynamics and significantly higher incidence of vulnerability amongst PPM customers explained in section 6, above, the conduct in this case reveals, on the facts, a sufficient degree of harm to competition to mean that it is capable of constituting a restriction of competition by object. This conclusion is reinforced by the particular characteristics of PPM consumers, who constituted the overwhelming majority of Economy's and EGEL's customers during the Relevant Period (see paragraphs 5.41 to 5.44 and 6.7 to 6.15).

[520] See Figure 4, above, at paragraph 5.167.

7.124. On the demand-side, the Authority notes that, in its EMI report, the CMA found that a combination of features of the markets for domestic retail supply of gas and electricity in Great Britain give rise to an adverse effect on competition through an overarching feature of weak customer response which, in turn, gives suppliers a position of unilateral market power concerning their inactive customer base which they are able to exploit through their pricing policies or otherwise. The CMA termed this a "**Domestic Weak Customers Response AEC**".[521] The CMA went on to find that there are additional characteristics of the PPM segments that contribute to the features of the Domestic Weak Customer Response AEC for PPM customers (see paragraphs 5.43, 5.44 and 6.9, above).[522] The result is that PPM customers are particularly vulnerable and disengaged from the market when compared to customers paying by direct debit or standard credit.

7.125. Given that Economy and EGEL operate in the supply of gas and electricity, predominantly to PPM customers, the Infringement is likely to have given rise to greater consumer detriment than would have been the case if the Infringement only concerned customers who paid by standard credit or direct debit.

7.126. Although Economy and EGEL did not hold large market shares in the relevant market during the Relevant Period, competition, particularly in the PPM sector, is driven by smaller suppliers such as Economy and EGEL. As such, any attempt to reduce competition in this sector, even by competitors with relatively smaller market shares, is likely to have had a material effect on competition in this sector.

7.127. On the supply side, the CMA found that a "**Prepayment AEC**" means that technical constraints and softened incentives mean that competition for PPM customers is weakened (see paragraphs 5.45, 6.11 and 6.13, above).[523] In this context, Economy and EGEL are amongst a small number of suppliers who actively target PPM customers.

7.128. This is in the context, during the Relevant Period, of the Six Large Energy Firms having considerably more customers on PPMs but not actively marketing to, or receiving large numbers of switches from, PPM customers.[524] This is likely to be a result of the factors identified by the CMA as giving rise to the Prepayment AEC but, certainly, the Six Large Energy Firms did not compete against Economy and EGEL through the primary means of marketing employed by the latter during the Relevant Period, namely, door-to-door sales. Such sale methods are particularly important in reaching PPM customers who are less likely to consider switching than other customers. In those circumstances, during the Relevant Period, competition in relation to the acquisition of PPM customers was driven by small and medium-sized suppliers, such as Economy and EGEL, competing on price.[525]

7.129. The Infringement had the potential to cause direct financial harm to the customer base of Economy and EGEL by depriving their respective customers of access to opportunities to switch their supply from one business to the other. This effect is likely to have been particularly acute given the relatively small number of suppliers

[521] "AEC" standing for "*adverse effect on competition*".
[522] See paragraph 6.11.1, above.
[523] See also paragraph 20.12 in the findings section of the CMA's final EMI report.
[524] See, for example, paragraph 98(b) and 106 of the summary of the CMA's EMI final report. See also paragraphs 8.70 and 8.72 of the EMI final report findings. Those findings relate to the withdrawal from doorstep selling by the Six Large Energy Firms.
[525] This is also the conclusion reached by Economy and EGEL in their Joint Response (see paragraph 2.67, which makes reference to paragraph 8.286 of the EMI final report findings).

actively marketing to PPM customers and the lower propensity of PPM customers to switch energy supplier without such active sales and marketing.

7.130. These demand-side and supply-side constraints mean that, in the market segments for PPM customers, competition is already especially weak, so any conduct that restricts competition would seem likely to be particularly harmful to the already-weakened competition that remains on the market.[526]

7.131. The Authority notes that Economy and EGEL submitted a report from an economic consultancy that concluded that "*there are good economic reasons to believe that* [Economy and EGEL, as separate undertakings] *would have had unilateral incentives not to target each other's gas and electricity customers actively*".[527] Economy and EGEL rely upon that conclusion to seek to establish that the agreement and/or concerted practice cannot have had the effect of appreciably restricting competition, because Economy and EGEL would not have been incentivised to compete against each other,[528] even in the absence of the Infringement. This submission fails, however, to take into account the evidence of customers switching between Economy and EGEL both before the implementation of the Infringement and following the end of the Relevant Period (see Figure 1, above),[529] and a very significant drop in switching covering the period during which the Infringement was implemented.

7.132. The same economic report also concludes that the Infringement would be expected to encourage greater marketing efforts by Economy and EGEL to target customers of both the Six Large Energy Firms and other suppliers in the market more generally. In respect of competition with the Six Large Energy Firms, the evidence on the Authority's file shows no significant increase in customers switching from the Six Large Energy Firms to Economy and EGEL during the Relevant Period (see Figure 4, above).[530] The evidence on the Authority's file suggests a gradual increase in customers switching from medium suppliers to Economy and EGEL, in line with trends established before the beginning of the Relevant Period and continuing after the end of the Relevant Period (see Figures 3 and 4).[531]

7.133. Further, the information exchange described in paragraph 7.75 concerned lists of individual customers and was sufficiently frequent, detailed and accessible to allow the CRM (supplied and maintained by Dyball) and sales software systems used by Economy and EGEL to prevent customers from switching between Economy and EGEL. The customer lists were accessed to support the measures described in paragraphs 7.74.1, 7.74.2 and 7.74.3, above, by allowing those measures to operate and by allowing the Parties' adherence to the agreement and/or concerted practice,

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[526] The simple proposition that the more narrowly-framed the market, the greater the harm to competition resulting from a restriction of competition would seem to apply here (see, for example, the CAT's judgment in *North Midland Construction PLC v. Office of Fair Trading* [2011] CAT 14, paragraph 59).
[527] See Annex 8 to the Joint Response, a report by RBB Economics, dated 24 July 2018 (document reference JR0009).
[528] See the Joint Response, paragraph 6.12.
[529] At paragraph 5.166, above.
[530] At paragraph 5.168, above.
[531] At paragraph 5.167, above. While Figure 4 shows an increase in customers switching from medium suppliers, contrary to a statement contained in paragraph 4.4 of the Letter of Facts, that increase in switching from the medium suppliers, whilst coinciding with the beginning of the Infringement's implementation, was part of a prior trend, which extended beyond the end of the Relevant Period, meaning that no relationship of causation exists. If a causal connection exists, as Economy and EGEL have claimed (see Economy's and EGEL's response to the Letter of Facts, dated 27 February 2019, paragraphs 4.6 to 4.9), in light of the principal effect of the Infringement of reducing competition between Economy and EGEL, any concomitant increase in switching from medium suppliers is not capable of undermining a finding that the Infringement constitutes a restriction of competition "by object" but may be considered as a possible exemption, under section 9 of the CA98.

to be monitored. As such, the Parties' agreement and/or concerted practice of sharing customer lists was ancillary to the Infringement and, therefore, shared its object of restricting competition.

Conclusion

7.134. Based on the evidence obtained in this case, the Infringement and its implementation, as described in sections 5 and 7, concerns the allocation of PPM customers between Economy and EGEL with the purpose of reducing the existing competition between those companies for PPM customers. Customer allocation agreements form an established category of restriction of competition "by object".

7.135. Consideration of the content of its provisions, its objectives and the economic and legal context of which it forms part reveals a sufficient degree of harm to competition, in the PPM market segments in which competition is already weakened, that it may be considered a restriction of competition "by object" within the meaning of the Chapter I prohibition.

7.136. The Authority has therefore reached the conclusion, based on a careful assessment of the evidence on its file, that the object of the conduct of the Parties was the prevention, restriction and/or distortion of competition in the retail supply of gas and electricity to PPM customers in the UK within the meaning of section 2(1) of the CA98.

The ancillary restraints doctrine

7.137. Economy and EGEL have suggested that the agreement and/or concerted practice "*would have been a conventional and legitimate (objectively necessary) means*" for Mr Cooke and/or Ms Khilji and/or Economy to establish EGEL in the retail energy market and, as a result, it falls outside of the scope of the Chapter I prohibition.

Legal framework

7.138. If a given operation or activity is not covered by the Chapter I prohibition, owing to its neutrality or positive effect in terms of competition, neither will a restriction of the commercial autonomy of one or more of the participants in that operation or activity, if that restriction is objectively necessary to the implementation of that operation or activity and is proportionate to its objectives.[532]

7.139. The CJEU has explained this "ancillary restraints" doctrine as follows: "*Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with Article* [101 TFEU] *in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article* [101(1) TFEU]".[533]

7.140. In order to determine whether an anti-competitive restriction can escape the Chapter I prohibition because it is ancillary to a main operation that is not anti-competitive in nature, the Authority must inquire as to whether that operation would be impossible to carry out in the absence of the restriction in question. The fact that the main operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the "objective

[532] See *MasterCard*, paragraph 89. See also the Article 101(3) Guidelines, paragraphs 28 to 30.
[533] See *Mastercard*, paragraph 90.

necessity" required in order for it to be classified as ancillary and thus fall outside of the scope of the Chapter I prohibition.[534]

7.141. That approach is justified not merely in order to preserve the effectiveness of the Chapter I prohibition, but also on grounds of consistency. As the Chapter I prohibition does not require an analysis of the positive and negative effects on competition of a principal restriction, the same finding is necessary with regard to the analysis of accompanying restrictions.[535] Such an analysis can take place only in the specific framework of section 9 of the CA98.[536]

7.142. In this way, the CJEU has sought to ensure that the ancillary restraints doctrine is strictly limited in terms of the circumstances in which it may apply.

7.143. Similarly, examination of the objective necessity of a restriction in relation to the main operation is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation. Rather, the Authority must determine whether, in the specific context of the main operation, the restriction is necessary to implement that operation.[537]

7.144. Put another way, the objective necessity test, as set out in the CJEU's case law, concerns the question of whether, in the absence of a given restriction of commercial autonomy, a main operation or activity which is not caught by the Chapter I prohibition and to which that restriction is secondary, is likely not to be implemented or not to proceed.[538]

7.145. As part of its assessment of the objective necessity and proportionality of such a restriction, the Authority will consider whether the relevant restriction is directly related to the main operation.[539] The burden of proof for establishing that the ancillary restraints doctrine applies lies with the parties.[540]

Application in this case

7.146. The Authority has concluded that the Infringement was not directly related to the Demerger Agreement or EGEL's entry into the retail energy market because of the context in which it was agreed, particularly because it was concluded seventeen months after the conclusion of the Demerger Agreement.

7.147. Notwithstanding that point, the Authority has concluded that the agreement and/or concerted practice was not objectively necessary for the implementation of the Demerger Agreement and EGEL's entry into the retail energy market. Even if EGEL's commercial success were a relevant consideration to the test to be applied in the context of the ancillary restraints doctrine, by the beginning of the Relevant Period, EGEL had already established itself as a brand in the market without the restriction of competition created by the agreement and/or concerted practice. So, the

[534] See *Mastercard*, paragraph 91.
[535] See the CJEU's judgment in case T-112/99 *Métropole télévision (M6) v Commission* [2001] ECR II-2459 ("**Métropole**"), paragraph 108, and the Article 101(3) Guidelines, paragraph 30.
[536] See *Métropole*, paragraph 107, as quoted by the Court of Appeal in *Sainsbury's Supermarkets Limited v Mastercard* [2018] EWCA 1536 (Civ) ("**Sainsbury's (CoA)**"), paragraph 60. See also the Article 101(3) Guidelines, paragraph 30.
[537] See *Métropole*, paragraph 109.
[538] See *Mastercard*, paragraph 93.
[539] See *Métropole*, paragraphs 104, 105, 115 and 116, and the Article 101(3) Guidelines, paragraph 29.
[540] See *Métropole*, paragraph 131.

agreement and/or concerted practice cannot have been objectively necessary for EGEL's market entry.

7.148. In addition, Economy and EGEL have provided little evidence to support their claims that action by their sales agencies in 2015 would have been likely to cause EGEL to cease supplying energy to PPM customers. Those claims are also unsupported by persuasive evidence that other, less restrictive and/or unilateral behaviour to address the purported problem had been exhausted.[541] Further, the parties' claims are contradicted by EGEL's growth both before and after the Relevant Period, when the agreement and/or concerted practice was not in place.

7.149. The parties have sought to rely upon the judgment of the Court of Appeal in *Bookmakers' Afternoon Greyhound Services v Amalgamated Racing.*[542] However, the facts of that case are so different to those surrounding the agreement and/or concerted practice in the present case that the Authority has found no assistance in that case.

7.150. Further, Economy's and EGEL's claim that an obligation on Economy not actively to solicit EGEL's customers for a two-year period would have been "*beyond reproach*" if it had been contained in the Demerger Agreement because, without it, EGEL could not have been set up is supported neither by authority nor by the facts. The Demerger Agreement contained no such restriction and EGEL became well-established in the market and, before, during and after the Relevant Period, it engaged in active competition with other parties using its own resources. In that context, the Authority sees no basis for the application of the ancillary restraints doctrine.

Appreciable restriction of competition

Legal framework

7.151. Agreements and concerted practices will only infringe the Chapter I prohibition if they have as their object or effect an appreciable prevention, restriction or distortion of competition within the UK or a part of it.[543]

7.152. An agreement or concerted practice that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.[544]

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[541] That evidence consists of e-mail correspondence from October and early November 2015 (cited in the Joint Response, paragraph 2.59) and statements made in witness statements, the latter being summarised in a submission made to the Authority on behalf of Economy and EGEL, dated 23 November 2018 (document reference JR0027), paragraphs 4.1 to 4.3. For example, annexes 16 and 17 to the Joint Response concern mis-selling the reduction of complaints rather than demonstrating concerns about repeated switching between Economy and EGEL (document reference JR0017 and JR0018).

[542] [2009] EWCA Civ 750.

[543] It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see *Expedia*, paragraph 16 citing, among other cases, Case 5/69 *Völk v Vervaecke*, EU:C:1969:35, paragraph 7. See also OFT401, paragraph 2.15.

[544] See *Expedia*, paragraph 37; and the European Commission's "*Notice on agreements of minor importance*" [2014] OJ C291/01, paragraphs 2 and 13. These cases apply *mutatis mutandis* in respect of the Chapter I prohibition - see Section 60(2) of the CA98 which provides that, when determining a question in relation to the application of Part I of the CA98 (which includes the Chapter I prohibition), the court (and the Authority) must act with a view to securing that there is no inconsistency with any relevant decision of the European Court in respect of any corresponding question arising in EU law. See also *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch) paragraphs 148ff.

Application in this case

7.153. The Authority has found that the Infringement had the object of preventing, restricting or distorting competition. Given that the effect on trade test is satisfied (see the section immediately below), the Authority therefore also finds that the Infringement produces, by its very nature, an appreciable restriction of competition in the market segments for the retail supply of gas and electricity to PPM customers in Great Britain for the purposes of the Chapter I prohibition.

7.154. In any event, the Authority notes that the Infringement is likely to have had an appreciable effect on competition for the retail supply of gas and electricity to PPM customers in Great Britain because:

7.154.1. The geographic scope of the Infringement was not limited in any way – effectively, it covered the whole of Great Britain;

7.154.2. Economy and EGEL had a combined turnover of almost £100 million in the year ended 31 March 2016 and, together, they had approximately 270,000 customers. In the following year, each Party's growth to a combined turnover of £229 million and an aggregate of 555,000 customers. This figures show that they are substantial operators; and

7.154.3. The Parties operate in areas of the market in which competition is already constrained by supply-side and demand-side deficiencies, meaning that the further restriction of competition produced by the Infringement is likely to be more pronounced in the context of already-weakened competition.

7.155. The Parties argue that the Infringement had neither the object nor the effect of producing an appreciable restriction of competition. In brief, the Parties contended that what they did was entirely sensible, eliminating wasteful competition between them, which had turned out to be expensive and unprofitable, for the greater benefit of the competitive process. As stated above, this argument is wholly misconceived and in direct conflict with the established case law.

7.156. Moreover, the evidence is that immediately prior to the Infringement being implemented, Economy and EGEL were engaged in active competition with each other of direct benefit to their customers across Great Britain. Further, the Infringement would have had the effect of restricting appreciable, actual and potential competition between Economy and EGEL.

Effect on trade within the UK

Legal Framework

7.157. By virtue of section 2(1)(a) of the CA98, the Chapter I prohibition applies only to agreements and/or concerted practices which "*may affect trade within the United Kingdom*".

7.158. For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.[545]

7.159. As regards the question of whether the effect on trade within the UK should be appreciable, the CAT has held in one case that there is no need to import into the CA98 the rule of "appreciability" under EU law, the essential purpose of which is to

[545] Section 2(7) of the Act provides that "the United Kingdom" means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

demarcate the fields of EU law and UK domestic law respectively. [546] In a subsequent case, the CAT held that it was not necessary to reach a conclusion on that question.[547]

7.160. EU and domestic guidance states that market sharing agreements are, by their very nature, capable of affecting trade.[548] Further, the Authority notes that the CMA has said that, in practice, it is very unlikely that an agreement and/or concerted practice which appreciably restricts competition within the UK does not also affect trade within the UK.[549]

Application in this case

7.161. The Infringement was capable of affecting trade within the UK because it is a market sharing and/or customer allocation agreement and/or concerted practice.

7.162. Further, the Infringement was implemented within the UK and had an appreciable effect on competition in the UK.

7.163. In addition and in the alternative, the size of the Parties and the nature of the agreement and/or concerted practice are such to suggest an effect on trade in the UK.

7.164. Accordingly, the Authority proposes to find that it affected or may have affected trade within the UK.

Effect on trade between Member States of the European Union

Legal Framework

7.165. Article 3(1) of Regulation 1/2003 obliges the Authority, when applying national competition law, to also apply Article 101 of the TFEU.

7.166. For the purposes of assessing whether an agreement and/or concerted practice may affect trade between EU Member States, the Authority follows the approach set out in the Commission's published guidance.[550]

7.167. In its Effect on Trade Notice, the European Commission states that "[t]*he effect on trade criterion is an autonomous* [Union] *law criterion, which must be assessed separately in each case*".[551] It is also immaterial whether the participation of a particular undertaking in the agreement and/or concerted practice has an appreciable effect on trade between Member States.[552] The question is whether the agreement and/or concerted practice in question (and not just the restriction of competition) is capable of affecting trade between Member States.[553]

7.168. Agreements and/or concerted practices which cover only part of an EU Member State are not likely to appreciably affect trade between EU Member States, unless they have the effect of hindering competitors from other EU Member States from gaining

[546] See the CAT's judgment in *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11 ("**Aberdeen Journals**"), at paragraphs 459 to 461.
[547] See *North Midland Construction plc v Office Of Fair Trading* [2011] CAT 14 (paragraphs 48 to 51 and 62) but considered that it was *'not necessary* […] *to reach a conclusion'*.
[548] Commission Notice "*Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*" (2004/C101/07) (the "**Effect on Trade Notice**"), paragraph 64.
[549] See OFT401, paragraph 2.25.
[550] See the *Effect on Trade Notice*.
[551] *Effect on Trade Notice*, paragraph 12.
[552] *Effect on Trade Notice*, paragraph 15.
[553] *Effect on Trade Notice*, paragraph 16.

access to part of the EU Member State, which constitutes a substantial part of the internal market.[554] Agreements and/or concerted practices which are local in nature are in themselves not capable of this effect.[555]

7.169. The agreement and/or concerted practice must affect trade between EU Member States to an appreciable extent.[556] This is a jurisdictional requirement demarcating the boundary between EU competition law and national competition law.[557] Appreciability may be assessed by reference to the market position and importance of the undertakings concerned, and it will be absent where the effect on the market is insignificant because of the undertakings' weak position on the market.[558]

7.170. The Authority further notes that the Commission considers that agreements between small and medium-sized undertakings (or "**SME**"s)[559] are normally not capable of affecting trade between EU Member States.

Application in this case

7.171. The nature of the agreement and/or concerted practice under investigation, the nature of the products concerned by the agreement and/or concerted practice, the geographical focus of EGEL's sales and Economy's and EGEL's market shares and sales volumes mean that it is unlikely that the Infringement was capable of appreciably affecting trade between EU Member States.

7.172. Further, Economy and EGEL are likely to have fallen within the definition of a SME during the Relevant Period.

7.173. As a result, Article 101 of the TFEU is not applicable.

Exclusion or exemption

Exclusion

7.174. The Chapter I prohibition does not apply in any of the cases in which it is excluded by or as a result of Schedules 1 to 3 of the CA98. Section 3 of the CA98 provides that certain cases are excluded from the Chapter I prohibition. It is for a Party wishing to rely on such an exclusion to adduce evidence that the exclusion applies. The Authority has found that none of the relevant exclusions applies to the Agreement.

Exemption

7.175. Agreements and/or concerted practices which satisfy the criteria set out in section 9 of the CA98 benefit from exemption from the Chapter I prohibition.

7.176. There are four cumulative criteria to be satisfied:

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[554] *Effect on Trade Notice*, paragraphs 89 and 92.
[555] *Effect on Trade Notice*, paragraph 91.
[556] Case 5/69, *Völk v Vervaecke* [1969] ECR 295 ("**Völk**"), paragraph 3 and Case 22-71 *Béguelin Import v SAGL Import Export* [1971] ECR 949, paragraph 16. See also the *Effect on Trade Notice*, paragraphs 12 and 44.
[557] *Case 22/78 Hugin Kassaregister and Hugin Cash Registers v Commission* [1979] ECR 1869, paragraph 17. See also *Aberdeen Journals*, paragraph 459.
[558] See *Völk*, paragraph 3; Case T-77/92 *Parker Pen v Commission* [1994] ECR II-549, paragraph 40 and the *Effect on Trade Notice*, paragraph 44.
[559] As originally defined in the Annex to Commission Recommendation 96/280/EC, Annex, Article 1, now in the Commission's Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises 2003/361/EC, Annex, Art. 2(1).

7.176.1. the agreement contributes to improving production or distribution, or promoting technical or economic progress;

7.176.2. while allowing consumers a fair share of the resulting benefit;

7.176.3. it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives;

7.176.4. it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

7.177. In considering whether an agreement satisfies the criteria set out in section 9 of the Act, the Authority will have regard to the European Commission's Article 101(3) Guidelines.[560]

7.178. The burden of proof to demonstrate that an agreement or concerted practice which infringes the Chapter I prohibition satisfies the exemption conditions is on the undertaking or undertakings claiming the benefit of the exemption. Severe restrictions of competition, such as market sharing and other hardcore restrictions, are unlikely to fulfil (at least) the first two conditions to qualify for an exemption. Moreover, such agreements generally also fail the third condition (indispensability).[561] However, each case ultimately falls to be assessed on its merits.

7.179. Given that, for section 9 to apply, the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects, it is necessary to verify what is the link between the agreement and the claimed efficiencies and what is the value of these efficiencies.[562]

7.180. In general, efficiencies stem from an integration of economic activities whereby undertakings combine their assets to achieve what they could not achieve as efficiently on their own or whereby they entrust another undertaking with tasks that can be performed more efficiently by that other undertaking.[563] No such integration has been claimed in this case.

7.181. Economy and EGEL have claimed that the Infringement was pro-competitive in that it allowed them to: (a) establish a separate supplier in the market to compete against the Six Large Energy Firms;[564] (b) focus their sales efforts on winning PPM customers from the Six Large Energy Firms;[565] and (c) reduce the risk of EGEL failing due to the cost of commission paid to sales agents for customers being switched repeatedly between Economy and EGEL.[566] The Authority has considered these claimed efficiencies set against the competitive harm inherent in a market sharing agreement, such as the Infringement, which is one of the most serious restrictions of competition.

7.182. In respect of argument (a), for the reasons set out in paragraphs 7.146 and 7.147, above, the Authority has concluded that the Infringement cannot have facilitated the establishment of EGEL on the market. Economy and EGEL have produced no evidence to support the argument that introducing EGEL into the market was

[560] This reflects the approach taken by the CMA, as explained in *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 5.5.
[561] See, to this effect, the Article 101(3) Guidelines, paragraph 46.
[562] See the Article 101(3) Guidelines, paragraph 50.
[563] See the Article 101(3) Guidelines, paragraph 60.
[564] See, for example, paragraphs 1.6, 2.71, 5.13 7.10(b) and (c), and 7.15 to 7.18 of the Joint Response.
[565] See, for example, paragraph 6.15, as well as paragraphs 1.6, 2.53, 2.54 to 2.57, 5.13, and 9.30 of the Joint Response.
[566] See, for example, paragraph 5.13, 7.10(c), 7.19 to 7.26 and 9.30 of the Joint Response.

intended to allow Economy and EGEL to better compete against the Six Large Energy Firms or that it had that effect.[567] While Economy and EGEL have submitted an economic report alluding to competitive benefits that would arise from the introduction of EGEL as an additional brand to compete against the Six Large Energy Firms,[568] that statement is unsupported by empirical evidence and relies upon an assumption that EGEL's competitive strategy is (and was) differentiated from that of Economy. For the reasons set out in paragraphs 7.47.4.6 and 7.47.4.7, the Authority concludes that assumption to be ill-founded.[569] More broadly, any causal link between the Infringement and this claimed efficiency,[570] and the magnitude of the claimed efficiency are too uncertain to discharge the burden of proof falling to the Parties.

7.183. In respect of argument (b), the switching data shown in Figures 2, 3 and 4, above, demonstrate that there was no significant increase in switching from the Six Large Energy Firms to Economy and EGEL during the Relevant Period.[571] Latterly, the Parties have emphasised an increase in switches, during the Relevant Period, from smaller and medium-sized suppliers.[572] However, as shown in Figure 4, above, any increase in switching from medium suppliers was part of a trend that started before the implementation of the Infringement and continued afterwards, so cannot be said to have been caused by the Infringement.[573] Further, the economic report submitted by Economy and EGEL[574] suggests that each of those Parties had reduced unilateral incentives to compete against each other because of Mr Cooke's beneficial interest in Economy and Ms Khilji's beneficial interest in EGEL. However, those beneficial interests were created several months after the beginning of the Relevant Period. Moreover, the report provides no justification for the agreement as opposed to unilateral conduct, it relies upon economic theory without accompanying empirical data, and it posits a diversion of marketing effort without showing an increase in the overall marketing effort, greater efficiencies (given that Economy and EGEL retained separate sales and marketing forces) or objective competitive benefits for consumers. As such, the likelihood, magnitude and causation of the claimed efficiencies are too uncertain to establish that the first condition for the application of section 9 is met.

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[567] The Authority notes that Ms Khilji, in a witness statement provided by Ms Khilji with Economy's and EGEL's Joint Response (document reference JR0002), refers to the intention of her and Mr Cooke's intention, when establishing EGEL, to compete with the "big energy providers" (paragraph 116 of Ms Khilji's witness statement) and a reference in Mr Cooke's corresponding witness statement (document reference JR0003) to the effect that Ms Khilji and Mr Cooke assumed that the numbers of customers switching to Economy and EGEL from other suppliers would be commensurate with the size of those suppliers. However, neither statement concerns the purpose of the Infringement and only the former concerns the purpose for which EGEL was established in the market.
[568] Annex 8 to the Joint Response (document reference JR0009), paragraph 39.
[569] For a description of Economy's sales channels during the Relevant Period, see paragraphs 5.9 and 5.10, above, and for a description of EGEL's sales channels, see 5.18. See also paragraphs 5.46 to 5.57. For the reasons for the similarity of sales channels connected with actual and perceived barriers to PPM customers switching, see paragraphs 6.9 to 6.11, above.
[570] The importance of parties establishing this causal link is explained in the Article 101(3) Guidelines, paragraph 55.
[571] More recently, Economy and EGEL have argued that, because the Relevant Period coincided with the spring and summer months when, they say, switching is expected to be lower, the fact that switching from the Six Large Energy Firms increased slightly (in relation to EGEL) or remained flat (in relation to Economy) indicates that the arrangement was successful in increasing switching from the Six Large Energy Firms (Economy's and EGEL's response to the Letter of Facts, dated 27 February 2019, paragraph 4.15). Although, they have provided no evidence to support this counterfactual.
[572] See Economy's and EGEL's response to the Letter of Facts, paragraphs 4.9
[573] This continuation suggests that, while an increase in switching from the small suppliers coincided with the beginning of the Infringement's implementation, the increase was not caused by the Infringement, contrary to a statement contained in paragraph 4.4 of the Letter of Facts.
[574] Annex 8 to the Joint Response (document reference JR0009), paragraphs 40 to 43.

7.184. In respect of argument (c), for the reasons set out in paragraph 7.148, the Parties have not demonstrated that the movement of customers between Economy and EGEL as a result of malpractice by their respective external sales agents threatened the continued existence of EGEL or that the Infringement was the least restrictive means of bringing that movement to an end. Consequently, the causal link between the Infringement and this claimed efficiency is unclear.

7.185. For these reasons, the Authority concludes that the Parties have failed to substantiate the nature of the claimed efficiencies, the causal link between the Infringement and those efficiencies or the likelihood and magnitude of each claimed efficiency.[575] So, the Infringement does not meet the first condition for the application of section 9 of the CA98 because it has not been shown to contribute to improving production or distribution, or promoting technical or economic progress by improving the conditions of competition on the market.

7.186. Economy and EGEL have claimed that they allowed consumers a fair share of the resulting benefit by offering lower prices to the Six Large Energy Firms' inactive customers and by increasing choice in the market by facilitating EGEL's entry into and survival in the market. They also claim that customers who sought to switch between Economy and EGEL were not prevented from doing so. The Authority does not consider that the Parties have demonstrated that the degree of harm to competition for Economy's and EGEL's installed customer base inherent in the Infringement is likely to have been compensated by the potential consumer benefits described by the Parties, particularly because there does not appear to have been an increase in switching to Economy and EGEL from the Six Large Energy Firms.

7.187. On the third condition for the application of section 9:

7.187.1. For the reasons set out in paragraphs 7.146 and 7.147, above, the Authority has concluded that the Infringement was not indispensable to the establishment of EGEL on the market.

7.187.2. The Parties could have chosen to focus their separate sales forces on targeting customers of the Six Large Energy Suppliers (or any other suppliers) without agreeing to refrain from targeting each other's existing customers. The Parties have not suggested that there was any integration of Economy's and EGEL's sales and marketing teams, such as may have produced cost efficiencies. In light of this, compared with the Infringement, unilateral decisions by Economy and EGEL to target the Six Large Energy Firms (or other suppliers) would have been less competitively restrictive means of increasing the intensity of Economy's and EGEL's competition with other suppliers.

7.187.3. For the reasons set out in paragraph 7.148, the Parties have failed to substantiate either the extent of the purported problem of external sales agents repeatedly switching customers between Economy and EGEL or that the Infringement was indispensable to and the least restrictive means of bringing that purported practice to an end. Neither have the Parties shown that preventing that practice would have been indispensable to achieving the claimed efficiencies of increasing competition with either the Six Large Energy Firms or with small and medium-sized suppliers.

[575] The requirement for this substantiation is explained in the Article 101(3) Guidelines, paragraph 50.

7.188. Economy and EGEL point to their low market shares in claiming that the Infringement does not afford them the possibility of eliminating competition in respect of a substantial part of the products in question. In light of the Authority's findings to the other section 9 criteria, it does not consider that it is necessary for it to reach a view on the application of the fourth criterion to the Infringement.

7.189. The Parties have not, therefore, shown that the Infringement produces competitive benefits to outweigh the Infringement's restriction of competition for Economy's and EGEL's installed customer base.

Parallel exemption

7.190. Pursuant to section 10 of the CA98, an agreement is exempt from the Chapter I prohibition if it does not affect trade between EU Member States but otherwise falls within a category of agreement which is exempt from Article 101(1) of the TFEU by virtue of a block exemption regulation. It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.[576] To date, the Authority has received no such evidence.

Duration

7.191. The duration of the Infringement is a relevant factor for determining any financial penalties that the Authority decides to impose following a finding of infringement.

7.192. In light of the evidence gathered by the Authority whilst investigating the Infringement, the Authority proposes to find that the Infringement lasted for at least 8 months, as described in paragraph 5.172.

Procedural issues

7.193. During the Authority's investigation, Economy and EGEL raised a number of issues that they submit prevent the Authority from reaching a decision in this case. The Authority has explained its reasons for disagreeing with that submission in Appendix 3 to this Decision.

8. The Authority's action

The Authority's decision

8.1. Based on the evidence set out in this decision, the Authority finds that Economy, EGEL and Dyball entered into an agreement and/or concerted practice to share markets and/or allocate customers between Economy and EGEL in relation to the supply of gas and electricity to domestic customers in Great Britain that infringed the Chapter I prohibition.

8.2. Under that agreement and/or concerted practice, Economy, EGEL and Dyball agreed that Economy and EGEL would not actively target customers already supplied with energy by the other Party. The agreement and/or concerted practice was supported by the Parties sharing commercially sensitive information, in the form of details of their current customers. The agreement and/or concerted practice existed from January 2016, at the latest, until, at the earliest, the date of the Authority's first investigatory steps in this investigation in September 2016. This agreement and/or

[576] See by analogy section 9(2) of the CA98.

concerted practice had, as its object, the prevention, restriction or distortion of competition.

8.3. Dyball was party to the agreement and/or concerted practice and intended to contribute, and did contribute, to the common objectives pursued by Economy and EGEL. Dyball did this through its own conduct in designing, implementing and maintaining software systems that allowed the acquisition of certain customers to be blocked and customer lists to be shared, and by, itself, sharing customer lists and instructions to block particular customers from switching between Economy and EGEL. Dyball was aware of the actual conduct planned or put into effect by Economy and EGEL in pursuit of the objective of sharing markets and/or allocating customers. Therefore, Dyball participated as a facilitator in the Infringement.

8.4. Based on the evidence available to the Authority, the conduct referred to in the preceding paragraphs does not benefit from a relevant exemption or exclusion.

8.5. The Authority considers it appropriate and proportionate to issue financial penalties against the undertakings to which this Decision is addressed. The undertakings consist of the legal entities that participated in the conduct that is the subject of the Infringement and parent companies that are jointly and severally liable for the Infringement.

Directions

8.6. Section 32(1) of the CA98 provides that, if the Authority has made a decision that conduct infringes the Chapter I prohibition, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the Infringement to an end.

8.7. In light of the above, the Authority directs the Parties, so far as is relevant, not to enter into the same or similar arrangements in the future.

Financial penalties

8.8. Section 36(1) of the CA98 provides that, on making a decision that an undertaking has infringed the Chapter I prohibition, the Authority may require an undertaking which is party to the agreement to pay a financial penalty in respect of the infringement.

8.9. As stated at paragraphs 7.7 to 7.9 above, a parent company may be held jointly and severally liable for an infringement committed by a subsidiary company.

8.10. When setting a financial penalty, the Authority must have regard to the guidance on penalties in force at the time.[577]

The Authority's margin of appreciation in determining the appropriate penalty

8.11. Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the CA98 and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the "**2000 Order**"),[578] and (ii) the Authority has had regard to the CMA's guidance on the appropriate amount of a penalty ("**Penalties Guidance**") in accordance with section 38(8) of the CA98, the

[577] See section 38(8) of the CA98. The appropriate guidance is the Penalties Guidance.
[578] SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

Authority has a margin of appreciation when determining the appropriate amount of a penalty under the CA98.[579] The Authority is not bound by its decisions or those of other regulators in relation to the calculation of financial penalties in previous cases.[580] Rather, the Authority makes its assessment on a case-by-case basis,[581] having regard to all relevant circumstances and the objectives of the CMA's and its own policy on financial penalties.[582] In line with statutory requirements and the twin objectives of the relevant policies on financial penalties, the Authority will also have regard to the seriousness of the infringement and the desirability of deterring both the undertaking on which the penalty is imposed and other undertakings from engaging in behaviour that breaches the prohibition in Chapter I of the CA98 (as well as other prohibitions under the CA98 and the TFEU, as the case may be).[583]

Small agreements

8.12. Section 39(3) of the CA98 provides that a party to a "*small agreement*" is immune from financial penalties for infringements of the Chapter I prohibition, provided that the agreement is not a "*price fixing agreement*" as defined in section 39(9) of the CA98.

8.13. A small agreement is an agreement between undertakings whose combined turnover does not exceed £20 million in the business year ending in the calendar year preceding one during which the infringement occurred.

Application in this case

8.14. The Infringement does not amount to a small agreement for the purposes of section 39 of the CA98 because the combined applicable turnover of the Parties is very significantly greater than £20 million, in the business year ending in the calendar year preceding one during which the Infringement occurred.

8.15. The small agreements immunity therefore does not apply in this case.

Intention/negligence

8.16. The Authority may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently. However, the Authority is not obliged to specify whether it considers the infringement to have been intentional or negligent.[584]

8.17. The CAT has defined the terms "*intentionally*" and "*negligently*" as follows:

> "*…an infringement is committed intentionally for the purposes of section 36(3) of the CA98 if the undertaking must have been aware, or could not have been unaware, that its conduct has the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the*

[579] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 168 and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, paragraph 102.
[580] See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 ("**Eden Brown**"), paragraph 78.
[581] See, for example, *Kier Group and Others v OFT* [2011] CAT 3 ("**Kier**"), paragraph 116, where the CAT noted that "*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*". See also *Eden Brown*, paragraph 97, where the CAT observed that "[d]*ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case*".
[582] See the Enforcement Guidelines, particularly, paragraphs 6.53 to 6.56.
[583] Section 36(7A) of the CA98 and Penalties Guidance, paragraph 1.4.
[584] *Napp Pharmaceutical Holdings v OFT* [2002] CAT 1, at 453 to 457. See also the CAT's judgment on penalty in *Argos and Littlewoods (CAT)*, paragraph 221.

undertaking ought to have known that its conduct would result in a restriction or distortion of competition".[585]

Application in this case

8.18. As stated at paragraphs 7.107 to 7.136 above, the Authority has found that the Infringement had as its object the prevention, restriction or distortion of competition and that the Parties must therefore have been aware (or could not have been unaware) and, at the very least, ought to have known that their conduct was capable of harming competition.

8.19. By restricting customers' ability to switch between Economy and EGEL, the Parties must have been aware, or could not have been unaware, and, at the very least, ought to have known that the agreement and/or concerted practice had the object or effect of restricting competition. Figure 1, above, demonstrates the restriction of competition between Economy and EGEL, which would or, at least, should have been apparent to the Parties' managers. Indeed, as noted at paragraph 5.67 above, senior managers of EGEL even recognised that the Infringement constituted a breach of competition law and allowed the behaviour to be implemented:

"[Dyball Senior Manager 1] *has minuted our anti-competitive behaviour…*".[586]

8.20. The Authority therefore considers that the Parties committed the Infringement intentionally or, at the very least, negligently.

Calculation of penalties

8.21. As noted at paragraph 8.10, when setting the amount of a penalty, the Authority must have regard to the guidance on penalties in force at that time. The Penalties Guidance sets out a six-step approach to calculating penalties.

Step 1 – Starting point

8.22. The starting point for a financial penalty is calculated having regard to the seriousness of the infringement and the undertaking's relevant turnover.

8.23. To adequately reflect the seriousness of an infringement, the Authority will apply a percentage rate of up to 30% to the undertaking's relevant turnover. The starting point will depend in particular upon the nature of the infringement. The more serious and widespread the infringement, the higher the starting point is likely to be. When making its assessment of seriousness, the Authority will consider a number of factors.

8.24. The relevant turnover is the turnover of the undertaking in the relevant product market and geographic market affected by the infringement in the undertaking's last business year preceding the date when the infringement ended. Generally, relevant turnover will be based on figures from an undertaking's audited accounts, but in exceptional circumstances it may be appropriate to use a different figure.

8.25. When assessing relevant markets for these purposes, the CAT and the Court of Appeal have stated that it is not necessary for the Authority to carry out a formal analysis: it is sufficient for the Authority to be satisfied, on a reasonable and properly

[585] See the penalty judgment in *Argos and Littlewoods*, paragraph 221.
[586] Document reference EP0233. The "[Dyball Senior Manager 1]" referred to here is [Dyball Senior Manager 1] (Dyball).

reasoned basis, of what is the relevant product market affected by the infringement.[587]

Seriousness of infringement

8.26. The Authority has taken the starting point as 18% of the relevant turnover.

8.27. In determining the starting point, the following factors have been taken into account in assessing the seriousness of the Infringement:

8.27.1. As explained above, the Authority considers that the Infringement constituted a restriction of competition "*by object*" – that is, the agreement and or concerted practice had as its "*object*" the prevention, restriction or distortion of competition. This is because the Infringement constituted a market-sharing arrangement. Market-sharing agreements are amongst the most serious of competition law infringements.[588]

8.27.2. The Authority does not consider that the Infringement had an impact on other competitors in the relevant market.

8.27.3. The Authority also considers that any potential harm to consumers was limited to the customers of Economy and EGEL and – for most of the duration of the Infringement – only to those customers who would not have pro-actively sought to switch suppliers.

8.28. The Authority's assessment of the above factors in the round is that, whilst the nature of the "by object" restriction is sufficiently serious to incur a penalty towards the high end of the range set out in the Penalties Guidance, it is appropriate in the particular circumstances of this case for the Authority to exercise its discretion to apply a lower penalty. The Authority, therefore, considers it appropriate to take a starting point of 18% of the Parties' relevant turnover, despite the fact that the Infringement constitutes a restriction of competition by object.

8.29. Economy and EGEL have submitted that the Authority should impose no financial penalty because, they argue, the nature of the Infringement, as articulated in this Decision, is novel. The Authority rejects that submission because it has reached this Decision on the basis of conventional legal principles that have been applied consistently by the courts in settled case law.[589] As such, there is no basis for refraining from imposing a financial penalty in this case.

Relevant turnover

8.30. The relevant turnover is the turnover of an undertaking in the relevant product and geographic market affected by the infringement in that undertaking's last business year.

8.31. The Authority considers the relevant market to be the retail supply of gas and electricity to domestic consumers in Great Britain, particularly in light of the findings

[587] The Court of Appeal held in *Argos and Littlewoods (CoA)*, paragraph 169: "*…neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty*." The Court of Appeal considered that it was sufficient for the OFT to "*be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement*" (paragraphs 170 to 173, and paragraph 189). See *Argos and Littlewoods v OFT* [2005] CAT 13, paragraphs 176–178, and *JJB Sports v OFT* [2005] CAT 22, paragraphs 112, 115 and 119.
[588] See the Penalties Guidance, paragraph 2.6.
[589] As explained, in particular, in paragraphs 7.48 to 7.50, 7.94 and 7.112.

of the CMA in its EMI report.[590] However, even if the market were to be regional in scope, the relevant turnover would be the same.

8.32. In the case of Dyball, as a facilitator, the Authority recognises that Dyball does not operate in the relevant market. Instead, the Authority considers it appropriate to use the market in which Dyball operates (the provision of software and consultancy services to energy suppliers in Great Britain) as that is the market in which Dyball's conduct, in relation to the Infringement, occurred.

8.33. The Authority has based Dyball's relevant turnover on its turnover in its financial year ended 30 April 2015.[591]

8.34. The Authority's view is that the duration of the Infringement continued until at least September 2016 (see Step 2 below). Accordingly, the Authority has taken Economy's and EGEL's turnover during the financial year ended 31 March 2016 as those Parties' relevant turnover for the purpose of calculating penalties.

8.35. Based on the financial data available to the Authority in this case, the Authority considers that:

8.35.1. Economy's relevant turnover is £56,933,000;

8.35.2. EGEL's relevant turnover is £39,166,606; and

8.35.3. Dyball's relevant turnover is £574,067.

Step 2 – Adjustment for duration

8.36. The starting point under Step 1 may be increased, or in particular circumstances, decreased, to take into account the duration of an infringement. Where the total duration of an infringement is less than one year, the Authority will treat that duration as a full year for the purpose of calculating the number of years of the infringement.[592] The Authority received submissions that it should use a multiplier of 0.5 to reflect the fact that the Infringement was implemented for less than six months.[593] The Authority sees no reason to depart from the Penalties Guidance by acceding to that request.

8.37. The Authority considers the duration of the Infringement to have been from, at the latest, January 2016, when the agreement and/or concerted practice was reached,[594] to at the earliest September 2016 (approximately eight months). The Authority considers that it is appropriate to round the length of infringement to one year and therefore no change in penalty is applied at this step.

[590] See section 6 of this Decision.
[591] See the Penalties Guidance, paragraph 2.11, which specifies that the undertaking's turnover in the last business year preceding the date when the infringement ended should be taken as the relevant turnover. As Dyball changed its accounting period during 2015, the financial year ended 31 March 2015 is the last complete year of financial records preceding the end of the Infringement available to the Authority.
[592] This reflects the Penalties Guidance, paragraph 2.16.
[593] Document references EP0730, section 5 and EE0519, section 6.
[594] The date of agreement rather than of its implementation is the relevant starting point in calculating the duration of the Infringement.

Step 3 – Adjustment for aggravating and mitigating factors

8.38. The amount of the financial penalty at the end of Step 2 may be increased where there are aggravating factors, and/or decreased where there are mitigating factors.

Adjustments made at this step

Aggravating factors – involvement of directors or senior management

8.39. The Authority expects directors to be aware of competition law issues and considers that the involvement of the directors and senior management, of all three Parties, in the design and implementation of the Infringement should be taken into account.

8.40. In this case, the conduct that contributed to the Infringement was agreed and/or contributed to by the directors of each Party, namely Lubna Khilji (Economy), Paul Cooke (EGEL), *[✂]* (EGEL), Andrew Dyball (Dyball) and *[✂]* (Dyball).

8.41. Given the above, in the circumstances of this case, the Authority considers that an uplift should be applied to reflect the involvement of directors or senior managers.

Mitigating factors – Prompt termination of the Infringement

8.42. The Authority further considers that it should take into account the prompt termination of the Infringement as a mitigating factor at Step 3.

8.43. It is clear from the evidence that the Parties terminated the Infringement in September 2016, shortly after the Authority opened its investigation.[595]

8.44. The Authority considers that a reduction of 5% would be appropriate to reflect the timing of termination of the Infringement.[596]

Mitigating factors – Genuine uncertainty

8.45. As explained at paragraph 8.29, Economy and EGEL have submitted that the Authority should impose no financial penalty because, they argue, the nature of the Infringement, as articulated in this Decision, is novel. For similar reasons, they submit that a reduction for genuine uncertainty would also be appropriate. The basis of those Parties' argument on this matter was their submission that the two corporate groups operated as a single family undertaking, a submission which the Authority has rejected. The case law on what is required to establish that two undertakings are to be considered as a single undertaking is clear and established, leaving no room for an argument by Economy and EGEL of genuine uncertainty as to the legal consequences of their actions. The Authority, therefore, rejects Economy's and EGEL's submission and concludes that no reduction for genuine uncertainty is warranted.

8.46. The Authority considers, however, that it should take into account the apparently genuine uncertainty of Dyball's directors in its participation in the Infringement as a mitigating factor at Step 3. In its response to the Statement of Objections,[597] Dyball submitted that the Authority relies upon complex legal arguments to establish the existence of the Infringement and that Dyball could not reasonably be expected to have considered and undertaken such an assessment during the Relevant Period.

[595] See figure 1, above.
[596] In its draft penalty statement, the Authority proposed a reduction of 10% at this point. However, such a reduction would not have been consistent with the decisional practice of other domestic competition authorities. Ultimately, for the reasons explained below, the level of this reduction makes no difference to the final penalty, which has been significantly reduced on grounds of proportionality.
[597] Document reference DL0340.

The Authority does not consider such submissions compelling in relation to Dyball's liability, as explained at paragraphs 7.85 to 7.93. The Authority also notes the duty of directors to inform themselves generally of the requirements of competition law. It recognises however that there are a relatively limited number of instances in which the European Commission or a UK competition authority has found an undertaking to have breached competition law through facilitating an anti-competitive agreement between other parties.

8.47. As such, the Authority considers that a reduction of 5% to Dyball's penalty is appropriate in these circumstances.

Mitigating factors – Co-operation

8.48. Dyball's co-operation during the course of the investigation has also been taken into account. Two of Dyball's directors, Andrew Dyball and *[✂]*, agreed to voluntary interviews with the Authority at a relatively early stage of the investigation. This contributed to the progression of the investigation. Dyball also waived its opportunity to make confidentiality submissions on the case file, which led to time and resource savings for the Authority.

8.49. To reflect this cooperation, the Authority has reduced Dyball's penalty by 5%.

Step 4 – Adjustment for specific deterrence and proportionality

8.50. In considering whether any adjustments should be made at this step, for specific deterrence or for proportionality, the Authority has had regard to appropriate indicators of the size and financial position of the relevant undertakings, the nature of the Infringement, the role of each undertaking in the Infringement and the impact of each undertaking's infringing activity on competition, as well as any other relevant circumstances of the case. The Authority has also will assessed whether the overall penalty is appropriate in the round.[598]

8.51. Where necessary, the penalty may be decreased at Step 4 to ensure that the level of penalty is not disproportionate or excessive. In assessing the penalty for all three Parties, the Authority took into account matters including:

8.51.1. The turnover of each undertaking in the most recent financial year, and a three-year average of turnover;

8.51.2. The profits of each undertaking in their most recent financial year; and

8.51.3. The net assets of each undertaking.

8.52. The Authority's consideration of step 4 in calculating each Party's financial penalty is set out below.

Economy

8.53. Consistent with the approach set out in the Penalties Guidance, the Authority took into account at the stage of issuing its draft penalty statement to Economy on 15 March 2019[599] that the level of any penalty should not be disproportionate or excessive having regard to the undertaking's size and financial position. As part of this assessment, the Authority had regard to EETL's entry into administration on 14

[598] See the Penalties Guidance, paragraph 2.20 and following.
[599] Document reference EE0516.

January 2019. The entry of the company into administration had followed the revocation of Economy Energy Trading Limited ("**EETL**")'s energy supply licences on 12 January 2019 and the appointment by the Authority of a supplier of last resort to ensure the continuity of energy supplies to EETL's former customers.

8.54. The Authority had provisionally concluded that, while a reduction from the figures set out at Step 3 of the draft penalty statement should be made, a penalty of £1.65 million was appropriate. EETL made a series of representations in response to that draft penalty statement. The nature of EETL's representations, which the Authority considers are relevant to this stage of the process, may be briefly summarised as follows:

8.54.1. There is no legal basis for the Authority to impose a penalty on EETL because it is in administration and companies in administration benefit from a moratorium on legal proceedings under the Insolvency Act 1986[600] (the **Administration Moratorium**) which would apply to action under the CA98 – accordingly, it submits that no penalty should be imposed; and

8.54.2. The current financial status of EETL, of which the Authority should take account at Step 4, is not reflected accurately in the audited accounts which are historical. It was submitted that the Authority should take account of the factors summarised below, which are said to justify a reduction in the financial penalty to zero or a nominal amount:

8.54.2.1. The information contained in EETL's administrators' "*Notice of statement of affairs in administration*", which shows that the current expectation is that the company's liabilities exceed the realisable value of its assets by more than £32 million.[601]

8.54.2.2. The fact that EETL has no ongoing trading activities to be taken into account in determining the scale of its activities. Further, given the manner in which it ceased trading and entered administration, there is no prospect of EETL resuming trading. This was confirmed at an oral hearing on Economy's draft penalty statement by one of EETL's joint administrators (Eddie Williams) who stated that it is highly likely that EETL will go into liquidation.[602]

8.54.2.3. The fact that there was no realistic prospect of a return to EETL's shareholder (i.e., Economy Energy Holdings Limited), from the liquidation. This was also stated by Mr Williams during the oral representations on penalty.[603]

8.54.3. Further, although it made no representations in response to the draft penalty statement, Economy Energy Holdings Limited ("**EEHL**") has provided information to the Authority[604] on its financial position. It explained that it has no assets except, as at the date of its response, £10,000 in cash in the bank and shareholdings in a number of non-trading companies, as well as shares in EETL, and does not anticipate receiving any income from these. The last annual report

[600] See paragraphs 43(6) of Schedule B1 of the Insolvency Act 1986.
[601] That statement of affairs is dated 14 January 2019, was signed by Mr Williams on 13 March 2019 and filed with Companies House on 22 March 2019.
[602] Transcript of EETL's oral hearing, which took place on 8 April 2019, page 4, at F.
[603] Transcript of a hearing on the proposed penalty held with Economy Energy Trading Limited on 8 April 2019, page 4, at G.
[604] Document references EE0520.

and financial statements filed by the company with Companies House was for the year ended 31 March 2017 and showed that the income for the Economy group of companies derived entirely from EETL.[605]

8.55. Having considered these representations, the Authority notes that they highlight further relevant information which was not fully apparent at the time of issuing the draft penalty statement. While the Authority rejects the submission that no penalty should be imposed, it does however consider that such factors justify, in the specific circumstances of this case, a further reduction to the level of financial penalty to £200,000. The Authority's principal reasons for reaching this conclusion, together with other relevant observations, are set out below.

8.56. First, the Authority considers that the entry of a company into administration is not a bar to the imposition of a financial penalty. In this regard, the Authority notes that financial penalties under the CA98 have previously been imposed on companies in administration.[606] The Authority considers that the judgment of the Court of Appeal in *Re Railtrack*[607] confirms that the question of whether regulatory action will engage the Administration Moratorium is a case-by-case assessment. The Authority considers that the decision of the High Court in *Frankice*,[608] on which EETL's submission on the Administration Moratorium rests, is limited to its own facts which do not relate to the CA98.

8.57. Second, the Authority places significant weight on the information emphasised in Mr Williams' submissions as to the cessation of EETL's business and very low likelihood of a return to shareholders. In these circumstances, there is no prospect of EETL continuing to trade nor of any funds from Economy being used to fund another business. Further, the Authority has taken account of the "*Notice of statement of affairs in administration*" alongside the financial information considered at the stage of issuing the draft penalty statement to assess the current financial position of EETL.

8.58. The Authority considers that its understanding of EETL's current financial position in light of this information suggests that a penalty of £1.65 million as proposed in the draft penalty statement would be disproportionate. The Authority does not however consider that no penalty is an appropriate exercise of its discretion in the circumstances of this case.

8.59. This is because it considers that the imposition of a penalty on Economy, even of a lower amount than proposed previously, continues to serve an important purpose in deterrence.[609] Issuing no penalty or a nominal penalty only (as EETL invites the Authority to do) is less likely to deter future wrongdoing of the type addressed in this Decision than if a penalty were imposed. Further, the Authority is concerned about the potential moral hazard concerns which could arise from issuing no penalty or a nominal penalty only. There is a risk that imposing such a penalty could encourage abuse of the administration and other insolvency processes in order to avoid liability under the CA98. Even if such abuse were not ultimately successful, attempts to do so may cause disruption to investigations, leading to wasted resources on the part of competition authorities. Such outcomes are not in the interests of consumers.

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[605] Document references EE0517 and EE0518.
[606] See the decision of the Competition and Markets Authority in *Online Posters*, Case 50223.
[607] *Winsor v Special Railway Administrators of Railtrack plc* [2002] EWCA Civ 955.
[608] See [2010] EWHC 1229 (Ch).
[609] The Authority notes that under section 36(7A) of the CA98 it is required when setting a penalty to have regard to the desirability of deterring both the undertaking on whom the penalty is imposed and others from entering into agreements which infringe the Chapter 1 prohibition.

8.60. These factors need to be balanced against each other. In the Authority's judgment, a reduction in the level of penalty at Step 4 is necessary to take account appropriately of the current financial position of EETL as it is now understood while also facilitating the achievement of these important objectives and ensuring the penalty is not disproportionate in the circumstances. The Authority has considered whether a specific adjustment should be made to take account of the financial position of EEHL, which is not currently in administration. It has concluded that none is appropriate given the links between the two companies, which form part of the same undertaking, and the matters referred to in the submissions at 8.54.3. Accordingly, the Authority has decided that Economy's penalty after Step 4 should be decreased to £200,000 to ensure that the level of penalty is not disproportionate, having regard to its financial position.

8.61. The Authority emphasises that, had it not been for this highly fact sensitive and specific set of circumstances, it would have remained of the opinion that a much larger financial penalty would have been appropriate, having regard to factors such as the nature of the Infringement.[610] The Authority notes that the amount of penalty imposed that will eventually be paid by a company in administration is governed by other provisions of the Insolvency Act 1986.

8.62. The Authority considers that this adjusted penalty is appropriate in all the circumstances.

EGEL

8.63. In considering whether any adjustments should be made at this step for specific deterrence or proportionality, the Authority has considered appropriate indicators of the EGEL's current size and financial position. The Authority has had regard to indicators, including turnover, profitability (including profits after tax), net assets, liquidity and industry margins, in the context of all the relevant circumstances of the case. In particular, the Authority has considered three year averages for profits and turnover, taking into account a significant loss shown in EGEL's unaudited management accounts for the 2018 to 2019 financial year.

8.64. The Authority, in taking into account the typical margins on turnover earned by retail energy suppliers in order to ensure that the ultimate penalty represents a proportionate and sufficient punishment and deterrent,[611] has had regard to the introduction of a price cap for energy supplied to customers with a PPM. That price cap came into force on 1 April 2017 and EGEL has submitted that it has meant that any profits generated before that date no longer reflect typical industry margins for suppliers with large proportions of PPM customers, such as EGEL. The Authority notes that the CMA has announced that it will review the PPM price cap and consider whether a change of circumstances has occurred such that a removal or variation of the price cap would be appropriate.[612]

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[610] As explained above, the Authority's decision in relation to the calculation of financial penalties does not bind itself or other regulators in future cases. The Authority makes its assessment on a case-by-case basis, having regard to all relevant circumstances and the objectives of the CMA's and its own policy on financial penalties.
[611] See *Kier*, paragraphs 117 and 172.
[612] A copy of the Authority's response to the CMA's consultation, in which the Authority proposed that the CMA adopt the methodology used by Ofgem to set its own default tariff price cap, is available here: https://assets.publishing.service.gov.uk/media/5c6adf7840f0b61a196aa83f/Ofgem_s_response_to_ITC_Redacted.pdf.

8.65. EGEL has also provided financial forecasts for the next three years, which include projected profits. Those projections suggest that it anticipates returning to profit in each of the following three years. This must be considered alongside the loss in the financial year ended 31 March 2019 mentioned above.

8.66. In light of these factors and the financial data produced by EGEL, the Authority considers that EGEL's penalty after Step 4 should be decreased to £650,000 to ensure that the level of penalty is not disproportionate or excessive. The Authority's view is that such a reduction is appropriate having regard to EGEL's current size and financial position and, in particular, because EGEL would be unable to pay a higher penalty due to its financial position.

8.67. The Authority considers that this adjusted penalty is appropriate for deterrence purposes without being disproportionate or excessive.

Dyball

8.68. The Authority considers that Dyball's penalty after Step 4 should be decreased to £20,000 to ensure that the level of penalty is not disproportionate or excessive. The Authority's view is that such a reduction is appropriate having regard to Dyball's financial position.

8.69. The Authority considers that this adjusted penalty is appropriate for deterrence purposes without being disproportionate or excessive.

Step 5 – Adjustment to prevent maximum penalty from being exceeded and to avoid double jeopardy

8.70. The final amount of the penalty calculated according to the method set out above may not, in any event, exceed 10% of the worldwide turnover of any of the undertakings in their last business year.[613]

8.71. If a penalty or fine has been imposed by the European Commission, or by a court or other body in another Member State in respect of an agreement or conduct, the Authority must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct.

8.72. The Authority has assessed the relevant factors at this stage and no reduction of penalty is necessary for any of the Parties at this stage.

Step 6 – Application of reductions for leniency and settlement

8.73. None of the Parties have entered into a leniency or settlement agreement with the Authority.

Financial hardship

8.74. In exceptional circumstances, the Authority may reduce a penalty where the undertaking is unable to pay the penalty proposed due to its financial position. Such

[613] See section 36(8) of the CA98, as read in light of the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (as amended), paragraph 3.

financial hardship adjustments will be exceptional and there can be no expectation that a penalty will be adjusted on this basis

8.75. As explained under Step 4, above, the penalties for Economy and EGEL have been reduced to reflect those Parties' current size and financial position, as well as EGEL's likely ability to pay a penalty without jeopardising its ability to continue trading. Having considered the financial information provided by EGEL, the Authority does not consider that the level of its penalty jeopardises EGEL's viability. The Authority has had regard, however, to EGEL's submissions regarding its cash flow and, as such, it would accept receipt of payment of the penalty on a deferred basis.

8.76. Given the significant adjustments made at Step 4, and as described in paragraphs 8.53 to 8.62 to ensure that Economy's penalty reflects its current financial position and is not disproportionate, no further discount for financial hardship is appropriate.

8.77. The Authority therefore makes no further adjustment at Step 6 for Economy's or EGEL's penalties and no adjustment to Dyball's penalty figure.

Penalties imposed by the Authority

8.78. The total penalty imposed on each Party for its involvement in the Infringement is therefore:

8.78.1. Economy - £200,000.

8.78.2. EGEL - £650,000.

8.78.3. Dyball - £20,000.

Payment of penalties

8.79. The Authority requires the Economy, EGEL and Dyball to pay the respective penalty set out at paragraph 8.78. Payment should be made to the Authority by close of banking business on 1 August 2019[614] or on such date or dates agreed in writing with the Authority, particularly in respect of EGEL.

SIGNED:
Elizabeth France CBE

SIGNED:
Amelia Fletcher OBE

SIGNED:
John Swift QC

Enforcement Decision Panel, for and on behalf of the Gas and Electricity Markets Authority

29 May 2019

[614] The next working day two calendar months from the expected date of receipt of the Decision.

Appendix 1 – People referred to in this Decision

Name	Role	Time period
Economy		
[Economy Senior Manager 1]	[✂],[✂],[615] [✂]	[✂]
[Economy Employee 8]	[✂], telesales	-
[Economy Employee 3]	Various, including [✂] [✂]	[✂]
[Economy Employee 10]	[✂]	[✂]
[Economy Employee 7]	[✂]	-
[Economy Senior Manager 3]	[✂]	[✂]
[Economy Employee 2]	[✂]	-
Khilji, Lubna	CEO, director 100% shareholder	February 2011 to date
[Economy Senior Manager 2]	[✂],[✂]	[✂]
[Economy Employee 5]	[✂]	-
[Economy Employee 9]	[✂]	-
EGEL		
Cooke, Paul	Managing director, director, 100% shareholder[616]	July 2014 to date
[EGEL Employee 1]	[✂]	-
[EGEL Senior Manager 1]	[✂]	[✂]

[615] The job titles and roles in this table of people connected with Economy were taken from the organogram furnished to the Authority by Economy (document reference EE0090). Information on directorships and shareholdings were taken from documents filed with Companies House.
[616] The job titles and roles in this table of people connected with EGEL were taken from the organogram furnished to the Authority by EGEL (document reference EP0122). Information on directorships and shareholdings were taken from documents filed with Companies House.

Name	Role	Time period
[EGEL Senior Manager 2]	*[✂]*	-
[EGEL Employee 2]	-	-
Dyball		
Dyball, Andrew	CEO, director[617] (and director and shareholder of Dyball Holdings Limited)	-
[Dyball Senior Manager 3]	*[✂]*	*[✂]*
[✂]	*[✂]*	*[✂]*
[Dyball Senior Manager 1]	*[✂][✂]*	*[✂]*
[Dyball Senior Manager 2]	*[✂][✂]*	*[✂]*
[Dyball Employee 5]	*[✂]*	-
Other		
[✂]	*[✂]*: *[✂]*,*[✂]*,*[✂]*[618]	*[✂]*
[✂]	*[✂]* – a sales agency acting for Economy	-
[✂]	*[✂]*: Sales manager	-

[617] The job titles and roles in this table of people connected with Dyball were taken from the organogram furnished to the Authority by Dyball (document reference DL0014). Information on directorships, shareholdings and the identity of the company secretary are taken from documents filed with Companies House.
[618] *[✂]*

Appendix 2 – The Parties' recent PSC filings

1. Summary

1.1. Since the date on which the Authority issued its Statement of Objections (i.e., 29 May 2018), Economy and EGEL have filed a number of documents with Companies House, updating previous filings concerning the PSC regime. A full table of the relevant PSC filings is included below.

1.2. Predominantly, the parties' recent filings concern the two holding companies (i.e., Economy Energy Holdings Limited ("**EEHL**") and E (Holdings) Ltd ("**EHL**")) and are "*second filings*", dated 27 July 2018, amending the previous filings cited in the Statement of Objections, as follows:

1.2.1. EEHL reported Lubna Khilji ("**LK**") and Paul Cooke ("**PC**") as each having been a PSC in respect of that company since 6 April 2016[619] and as each holding 50% of the shares and voting rights in EEHL since the same date; and

1.2.2. EHL reported LK and PC as each having been a PSC in respect of that company since 3 August 2016[620] and as each holding 50% of the shares and voting rights in EHL since the same date.

1.3. We also note that it was only on 31 August 2016 that the shares in E (Gas and Electricity) Limited (EGEL) were transferred from PC to EHL.[621] Further, on 13 February 2017, EHL reported that, on 31 August 2016, it had allotted a further 5 shares to PC. The trust that PC purported to create on 6 April 2016 in favour of LK was over 3 shares in EHL.

2. Relevant PSC filings

Document type	Date of filing	PSC	Effective date	Shares held
Economy Energy Holdings Limited				
Confirmation Statement (with updates - PSC notification)	17 March 2017[622]	LK: 75% or more shares in the company.	Became registrable: 6 April 2016	3,521,770 ordinary shares
Confirmation Statement (no updates)	17 March 2018[623]	As above	-	-

[619] This is the date on which LK and PC purport to have entered into reciprocal trusts for 50% of the shares and voting rights in their respective holding companies (i.e., EEHL and EHL).
[620] The significance of this date is not clear to the Authority.
[621] We know this from a confirmation statement filed by EGEL on 8 May 2017 and from EGEL's annual report and financial statements for the year ended 31 March 2017, which reports that it became a wholly-owned subsidiary of EHL on 31 August 2016. That document was filed with Companies House on 27 December 2017.
[622] Dated 27 March 2017 on the Companies House website.
[623] Dated 29 March 2018 on the Companies House website.

Document type	Date of filing	PSC	Effective date	Shares held
Second filing for confirmation statement dated 17 March 2017	27 July 2018[624]	1. PC: more than 25% of the shares and voting rights but not more than 50% 2. LK: more than 25% of the shares and voting rights but not more than 50%	6 April 2016	PC: 1,760,885 ordinary shares LK: 1,760,885 ordinary shares
Second filing for confirmation statement dated 17 March 2018	27 July 2018[625]	-		As above
Economy Energy Trading Limited				
Confirmation Statement (with updates)	7 September 2016[626]	LK: right to exercise or actually exercises significant influence or control over the company	6 April 2016	40,100 ordinary shares
Confirmation Statement (no updates)	7 September 2017[627]	As above	-	As above
Confirmation Statement (no updates)	7 September 2018[628]	As above	-	As above
PSC01 Notice of PSC	7 December 2018[629]	EEHL has: • 75% or more shares in the company • the right directly or indirectly to		

[624] Dated 22 August 2018 on the Companies House website.
[625] Dated 22 August 2018 on the Companies House website.
[626] Dated 21 September 2016 on the Companies House website.
[627] Dated 10 October 2017 on the Companies House website.
[628] Dated 11 October 2018 on the Companies House website.
[629] Dated 11 December 2018 on the Companies House website.

Document type	Date of filing	PSC	Effective date	Shares held
		appoint or remove the majority of the board of directors • 75% or more voting rights in the company		
PSC07 Notice of cessation of PSC	7 December 2018[630]	EEHL (as above) LK removed as a PSC		
E Holdings Ltd				
Confirmation Statement (with updates)	23 July 2016[631]	PC has: • 75% or more shares in the company • the right directly or indirectly to appoint or remove the majority of the board of directors • 75% or more voting rights in the company	Became registrable: 6 April 2016	PC: 1
Statement of Capital following an allotment of shares	13 February 2017[632]	-	5 shares allotted on 31 August 2016	PC: 6 shares
Confirmation statement (with updates)	23 July 2017[633]	-		PC: 6 shares
PSC01 Notice	27 July 2018[634]	PC: • 25% but not more than	3 August 2016	-

[630] Dated 11 December 2018 on the Companies House website.
[631] Dated 25 July 2016 on the Companies House website.
[632] Dated 22 August 2018 on the Companies House website.
[633] Dated 25 July 2017 on the Companies House website.
[634] Dated 1 August 2018 on the Companies House website.

Document type	Date of filing	PSC	Effective date	Shares held
		50% shares in the company • 25% but not more than 50% voting rights in the company		
PSC01 Notice	27 July 2018[635]	LK: • 25% but not more than 50% shares in the company • 25% but not more than 50% voting rights in the company	3 August 2016	-
Confirmation Statement (no updates)	23 July 2018[636]	-	23 July 2018	-
Second Filing for Confirmation Statement dated 23 July 2017 (statement of capital change/ shareholder change)	27 July 2018[637]	LK: • 25% but not more than 50% shares in the company • 25% but not more than 50% voting rights in the company	23 July 2017	LK: 3 shares PC: 3 shares
Second Filing for a Confirmation Statement dated 23 July 2017 (statement of capital change/ shareholder change)	5 October 2018[638]	-	23 July 2017	PC: 6 shares
Notice of a person ceasing to be a PSC	7 December 2018[639]	LK removed as a PSC	3 August 2016	-

[635] Dated 1 August 2018 on the Companies House website.
[636] Dated 14 August 2018 on the Companies House website.
[637] Dated 22 August 2018 on the Companies House website.
[638] Dated 23 October 2018 on the Companies House website.
[639] Dated 12 December 2018 on the Companies House website.

Document type	Date of filing	PSC	Effective date	Shares held
Notice of a person ceasing to be a PSC	7 December 2018[640]	PC removed as a PSC	3 August 2016	-
Notice of a person ceasing to be a PSC	7 December 2018[641]	PC removed as a PSC	6 April 2016	-
PSC01 Notice	7 December 2018[642]	LK has the right to exercise, or actually exercises, significant influence or control over the company	6 April 2016	-
Notice of a person ceasing to be a PSC	14 December 2018[643]	LK removed as a PSC	31 August 2016	-
PSC01 Notice	14 December 2018[644]	LK: • 25% but not more than 50% shares in the company • 25% but not more than 50% voting rights in the company	31 August 2016	-
PSC01 Notice	5 January 2019[645]	PC holds, directly or indirectly: • 75% or more of the shares in the company • 75% or more of the voting rights in the company PC has the right, directly or indirectly, to	6 April 2016	-

[640] Dated 12 December 2018 on the Companies House website.
[641] Dated 12 December 2018 on the Companies House website.
[642] Dated 12 December 2018 on the Companies House website.
[643] Dated 20 December 2018 on the Companies House website.
[644] Dated 20 December 2018 on the Companies House website.
[645] Dated 9 January 2019 on the Companies House website.

Document type	Date of filing	PSC	Effective date	Shares held
		appoint or remove a majority of the board of the directors of the company.		
E (Gas and Electricity) Limited				
Annual Return	8 May 2015[646]			Andrew Dyball: 2 shares until 25 July 2014 Alison Hughes: 2 shares until 25 July 2014 PC: 4 shares from 25 July 2014
Confirmation Statement with updates (with a PSC notification)	8 May 2017[647]	EHL: the relevant legal entity holds directly or indirectly 75% or more shares in the company	PSC became registrable: 31 August 2016	PC: 4 shares until 31 August 2018 EHL: 4 shares from 31 August 2018
Confirmation Statement (no updates)	8 May 2018[648]	As above	-	As above
PSC01 Notice	7 December 2018[649]	EHL: as above PC holds, directly or indirectly: • 75% or more of the shares in the company • 75% or more of the voting rights in the company PC has the right, directly or indirectly, to	6 April 2016	As above

[646] Dated 6 June 2015 on the Companies House website.
[647] Dated 9 May 2017 on the Companies House website.
[648] Dated 9 May 2018 on the Companies House website.
[649] Dated 13 December 2018 on the Companies House website.

Document type	Date of filing	PSC	Effective date	Shares held
		appoint or remove a majority of the board of the directors of the company.		
PSC01 Notice	7 December 2018[650]	EHL: as above PC: as above LK has the right to exercise, or actually exercises, significant influence or control over the company	6 April 2016	As above
PSC07 Notice of cessation of PSC	7 December 2018[651]	EHL as above. Removal of PC as a PSC	31 August 2016	As above
PSC07 Notice of cessation of PSC	7 December 2018[652]	EHL as above Removal of LK as a PSC	31 August 2016	As above

[650] Dated 13 December 2018 on the Companies House website.
[651] Dated 13 December 2018 on the Companies House website.
[652] Dated 13 December 2018 on the Companies House website.

Appendix 3 – Procedural issues raised by Economy and EGEL

1. Introduction

1.1. Economy and EGEL in their joint written and oral representations submitted that procedural irregularities had vitiated the Authority's investigation. A number of the matters raised repeat those made in a complaint to the Authority's procedural officer (the "**Procedural Officer**") by Economy on 27 March 2018 and which was the subject of his decision on 23 May 2018 (the "**Procedural Officer's Decision**").[653] Insofar as the Authority refers to the Procedural Officer's Decision in this appendix, it endorses the conclusions reached in that decision.

1.2. In the following section, the following specific matters are addressed for the purposes of explaining why the Authority has concluded that none of them prevent it from reaching this infringement decision:

- Privilege against self-incrimination;
- The disclosure of potentially exculpatory material;
- Observation of procedural safeguards set out in Chapter 9 of the CMA's guidance on investigation procedures in CA98 cases;
- Access to the Authority's case file in relation to certain documents arising from Ofgem's engagement with a former employee of Economy.
- Public comment by a former case official;
- Interrogation of certain documents prepared for the purpose of a closed, unrelated regulatory procedure;
- Concurrent competition law and regulatory investigations against Economy and EGEL; and
- The duration of the Authority's investigation.

2. Economy's privilege against self-incrimination

2.1. Economy has argued that the Authority breached Economy's privilege against self-incrimination by using its power to compel Ms Khilji and *[✂]* to answer questions pursuant section 26A of the CA98.[654] At the time, both Ms Khilji and *[✂]* were directors of Economy Energy Trading Limited.[655]

2.2. The Authority's position is that there has been no such breach as a consequence of its use of powers under section 26A of the CA98. It is clear from the statutory scheme in which section 26A sits that individuals who are required to answer questions under section 26A do so in their capacity as individuals, not as representatives of the undertaking concerned (in this case, Economy).

2.3. Even if the privilege against self-incrimination were engaged, none of the questions asked and answered pursuant to section 26A of the CA98 fall within the

[653] See https://www.ofgem.gov.uk/publications-and-updates/ofgem-s-procedural-officer-decision-20181-matter-application-economy-energy. The matters had also been raised in correspondence although the nature and extent of them had varied over time (document references PC0001, PC0003, JR0001, JR0021 and JR0026).
[654] We note, for completeness, that one of Economy's grounds of complaint to the Procedural Officers had been in similar terms (document reference PC0003, pages 1 and 2). The Procedural Officer concluded in his decision that the application of the privilege against self-incrimination in relation to section 26A of the CA98 was a matter outside of his jurisdiction. This was because he considered it was an issue of substance rather than a procedural issue in the terms set out in the guidance on the scope of the Procedural Officer's jurisdiction (see the Procedural Officer's Decision, paragraphs 20 to 23.).
[655] Document references LK0002 and *[✂]* 0003 for transcripts of those interviews.

categories of questions which have been found to be unlawful by the courts in the context of competition law investigations,[656] as appears to have been accepted at the time of the interviews, when only one question was objected to and the question was not pursued.[657]

2.4. In any event, the Authority has not relied upon the statements made during the interviews carried out using the powers provided for in section 26A for the purposes of this Decision, although it considered whether any of the answers given by the interviewees were potentially exculpatory. In these circumstances, it cannot be said that Economy has been treated unfairly.

3. The disclosure of potentially exculpatory material

3.1. This allegation relates to material containing details of discussions with whistle-blowers who had approached the Authority with information about Economy and EGEL's alleged wrongdoing. There were five such contacts and five documents relating to these.[658]

3.2. It should be emphasised that none of the documents were relied upon for the purposes of the Statement of Objections or for this Decision. The only reliance which was placed on any of the documents was in respect of the initial whistle-blowing allegation which was used as intelligence which led the Authority to conclude it had sufficient grounds to open an investigation under the CA98. In this Decision, the Authority has not relied upon information contained in the documents in question and does not consider that they contain exculpatory material (the only relevant statements are speculation about Ms Khilji's and Mr Cooke's personal relationship, which was already known to the Authority).

3.3. The material was not initially made available at the time of issuing the Statement of Objections but was made available to the Parties in a timely fashion, such that they were able to refer to those documents in their submissions to the Authority.

3.4. Insofar as the documents in question contained information that is relevant to the present investigation, they have been made available to the Parties' lawyers (but not directly to the Parties), in a redacted form because of the significant public interest in preventing undertakings from learning the identity of whistle-blowers who approach public authorities to report suspected wrongdoing.

3.5. There has been no apparent difficulty in making representations on the material disclosed to the Parties' lawyers in a confidentiality ring. Economy and EGEL made representations about the substance contained in document references WB4 and WB5 during the oral hearings[659] and it would have been open to the Parties to make further submissions to the Authority in reliance upon those documents. Accordingly, there has been no prejudice to the Parties' ability to exercise their rights of defence.

[656] The case law on this question is contained, principally, in the CJEU's judgment in case C-374/87 *Orkem v Commission* [1989] ECR 3283.
[657] That refusal is recorded in the transcript of an interview with Ms Khilji that took place on 18 January 2018 (document reference LK0002, paragraph 667 to 669).
[658] Document references WB1, WB2, WB3, WB4 and WB5.
[659] Transcript of the oral hearing (document reference JR0026), pages 20 to 22 and 32 to 33.

4. Failure to observe the procedural safeguards set out in Chapter 9 of the Guidance on CMA's investigation procedures in Competition Act 1998 cases

4.1. Economy and EGEL complain that there has been a failure to follow the CMA's guidance in relation to appropriate oversight and review of the relevant facts and key underlying evidence by specialist lawyers and economists from outside the case team: see paragraph 9.5 of the CMA's guidance.[660]

4.2. This point has already been addressed in the Procedural Officer's Decision, which concluded that that Authority had applied the appropriate procedural safeguards in this investigation and made the following points:

4.2.1. The CMA's guidance states that it is only intended to explain the CMA's approach, and it expressly provides that it "*does not cover the procedures used by sectoral regulators in their competition law investigations*".[661] Equally, there is nothing set out in the Authority's own Enforcement Guidelines that would give rise to an expectation that the Authority will follow the approach set out in chapter 9 of the CMA's guidance.

4.2.2. The Authority's internal processes and the general desire to act consistently with the CMA and other UK competition authorities mean that internal review arrangements that would normally be followed by the Authority are similar to those outlined in Chapter 9 of the CMA's guidance.

4.2.3. There is no legal right for parties subject to a CA98 investigation to require a competition authority to conduct an internal review before reaching a decision to issue a Statement of Objections.

5. Access to the Authority's case file in relation to certain documents arising from Ofgem's engagement with a former director of Economy

5.1. In their Joint Response,[662] Economy and EGEL submitted that the case team:

5.1.1. failed to provide a complete case file when the Statement of Objections was issued; and

5.1.2. failed to provide records of communication between the case team and a former director of Economy upon request.

5.2. Economy requested the disclosure of records of communication between the case team and former director.[663] On 11 July 2018, the Authority provided records of contact between the case team and former director to Economy, EGEL and Dyball.

5.3. As provided for in the CMA Rules and the CMA's guidance, when issuing a Statement of Objections, it is general practice to exclude from the issued case file documents that are considered routine administrative documents.[664] The Authority did not disclose the documents referred to by Economy and EGEL when

[660] See the CMA's guidance on the CMA's investigation procedures in Competition Act 1998 cases ("CMA8", published on 12 March 2014) and available here: https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases (this version contains amendments that were made in early 2019).
[661] See paragraph 1.6 of CMA8.
[662] Document reference JR0001, paragraphs 11.18 to 11.19.
[663] See a letter from Economy to the Authority dated 26 June 2018.
[664] See CMA8, paras 11.19 to 11.29.

the Statement of Objections was issued because it considered them to be administrative documents.

5.4. On the second point, Economy and EGEL point to four further contacts between the case team and the former director, referred to in other correspondence, that the case team did not disclose to Economy and EGEL: a meeting between members of the case team and the former director on 25 November 2016 and three telephone calls.

5.5. The Authority disclosed a note of the meeting of 25 November 2016 to Economy on 27 July 2018. The Authority confirmed to Economy in its letter of 27 July 2018 that it does not hold records of any further communication with the former director, including the telephone calls referred to in Economy's letter of 26 June 2018.

5.6. The case team did not record notes of these calls due to the fact that they were of an administrative nature, although it accepts that it should have done so as a matter of good practice.

6. Public comment by a former case official

6.1. The concerns raised relate to statements made on the LinkedIn social media platform by a former employee of the Authority following the Authority's announcement of the issue of the Statement of Objections.[665]

6.2. The nature of these concerns have varied over time. First it was argued that this demonstrated the case team is biased.[666] Later, it was argued that this statement "*irremediably compromised the impartiality of some members of the case team that had worked on the* [Statement of Objections]."[667]

6.3. The Authority notes the following matters of relevance to the legal assessment:

6.3.1. The focus of any assessment as to bias should be on the position of the decision-maker at the relevant time. The decision to issue the Statement of Objections was taken by the Senior Responsible Officer with input from the Authority's Enforcement Oversight Board (the "**EOB**"), among others.[668] The decision to issue the Statement of Objections was not taken by the case team.

6.3.2. The Parties have identified no missing lines of enquiry / failures to consider relevant matters as a consequence of the alleged bias of the case team despite invitations to do so and the Parties' exercise of their rights of defence, following the Statement of Objections being issued.[669]

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[665] Document reference JR0021, slide 18 and the transcript of the oral hearing (document reference JR0026), page 34.
[666] The Joint Response, paragraph 11.17.
[667] A submission to the Authority dated 23 November 2018 on behalf of Economy and EGEL (document reference JR0027), paragraph 5.12.
[668] The EOB provides strategic oversight and governance to Ofgem's enforcement work and oversees the portfolio of cases, including monitoring their progress. After a discussion with the other members of the EOB, the senior civil servant who chairs the EOB takes the decision on whether to open (or not) an investigation into a potential regulatory breach, taking account of the relevant prioritisation criteria. More information on the role of the EOB can be found in section 6 of Ofgem's Enforcement Guidelines, which are available here: https://www.ofgem.gov.uk/system/files/docs/2017/10/enforcement_guidelines_october_2017.pdf.
[669] A letter sent by the Authority's Senior Responsible Officer to Economy on 20 February 2018 (document reference PC0002).

6.3.3. The actual observations made by the former employee do not add materially to what was said in the press release announcing the issue of the Statement of Objections, and the press release specifically cautioned that the reader should not presume there has been an infringement.

6.4. Further, following the issuing of the Statement of Objections, the Senior Responsible Officer was replaced as the decision-maker by a panel drawn from the Authority's Enforcement Decision Panel (the "**EDP**"), as required by the CMA Rules.[670] The EDP has exercised its own judgment in deciding whether the Parties have infringed the Chapter I prohibition.[671]

7. Interrogation of certain documents prepared for the purpose of a closed, unrelated regulatory procedure

7.1. Economy and EGEL complain about an "*unjustified interrogation of certain documents prepared for the purpose of a closed, unrelated regulatory procedure*".

7.2. The Authority understands this to refer to: (i) a draft communication which Economy had prepared in order to send it to the Authority concerning the role played by Paul Cooke and EGEL in Economy's sales function;[672] and (ii) an e-mail to the Authority which contained the final text of that communication.[673]

7.3. Both of these documents were created in the context of the 2014 regulatory investigation by the Authority and are relevant to understanding the separation between Economy and EGEL, as explained in paragraph 7.40.1, above.

7.4. The first, draft document was made available to the Authority in response to a request made during an inspection carried out under section 27 of the CA98.

7.5. Having returned from the inspection, enquiries were made to establish whether a final response was sent to the Authority and in what terms. A response was identified. The Authority decided that the most appropriate approach was to require Economy to provide a final copy of this document using a Section 26 Notice. Economy provided the second, final document in responding to that Section 26 Notice.

7.6. This point has already been addressed in the Procedural Officer's Decision. In that decision, the Procedural Officer noted that the legal framework that applies to the Authority envisages that information collected for one purpose may be used for different purposes by both the Authority and other relevant public bodies. The Procedural Officer also noted that the case team ultimately used information collected during a sectoral investigation to confirm the existence of a particular version of a document, which was then re-requested from Economy using powers under section 26 of the CA98. This meant that Economy was able to make representations about the interpretation of that document and its use in the investigation.[674] Any procedural issues around access to documents that would be relevant to the Parties' defence was also addressed by the access to file process

[670] The requirement for a different decision-maker is contained in Rule 3.
[671] See *Gillies v SSWP* [2006] UKHL 2 at paragraph 18 per Lord Hope.
[672] Document reference EE357.
[673] Document references EE414 and EE415.
[674] As such, the document was only used by the case team in a manner which respects the judgments of the CJEU in case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others* [1992] ECR I-4785 and case 85/87 *Dow Benelux v Commission* [1989] ECR 3137 – *i.e.*, it was not used in evidence but rather as intelligence as to the existence of a document.

that applied upon the Statement of Objections being issued, which provided all the Parties with an opportunity to make representations on the document.

8. Concurrent competition law and regulatory investigations against Economy and EGEL

8.1. Economy and EGEL raise concerns about the Authority opening regulatory investigations into both companies at the same time as opening this investigation. Concerns were raised about the proportionality and motivations for this, as well as either too much or too little coordination between the case teams. In the Joint Response,[675] Economy and EGEL also complain about an alleged failure by the Authority to explain why it opened such investigations.

8.2. By way of background, it should be noted that the initial information which gave rise to the CA98 complaint in the present case also referred to matters giving rise to concerns of mis-selling. In accordance with the Authority's Enforcement Guidelines, a senior civil servant determined that, on each of the CA98 and mis-selling concerns, the relevant legal test to investigate had been met and the matters were sufficiently serious to warrant investigation by the Authority. Accordingly, parallel investigations were opened by the Authority's Enforcement Oversight Board.

8.3. The Authority does not accept that it has an obligation to companies in such situations to refrain from opening investigations into multiple infringements under different statutory frameworks where multiple infringements are suspected to have occurred. In any event, each investigation has been undertaken with a degree of coordination at a senior level to consider the proportionality of any requests made of the Parties across the two investigations (for example, through overlapping information requests).[676]

8.4. As to the parallel mis-selling investigation, in January 2018, EGEL admitted breach of relevant sales and marketing licence conditions,[677] and the investigation into Economy has only ceased because its licences were revoked following its insolvency. The outcome of each investigation has confirmed the public interest in pursuing both investigations in parallel.

9. The duration of the Authority's investigation

9.1. Economy and EGEL have complained about the duration of the proceedings.[678] They refer to the case having taken more than 18 months before a Statement of Objections was issued and consider this breaches the principle taken from the CJEU's judgment in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*.[679]

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[675] The Joint Response, paragraph 11.16.
[676] This was explained in Ofgem's response (dated 5 October 2017) to Ms Khilji's Freedom of Information Act 2000 request. A further explanation for the reasons why two investigations were opened is also provided in a letter sent by the Authority's Senior Responsible Officer to Economy on 20 February 2018 (document reference PC0002).
[677] https://www.ofgem.gov.uk/publications-and-updates/investigation-e-gas-and-electricity-limited-s-compliance-under-gas-and-electricity-supply-licences-standard-licence-condition-25-and-13
[678] See section 11 of the Joint Response (paragraphs 11.22 to 11.26).
[679] Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* ECLI:EU:C:2006:592.

9.2. It should be noted that the length of the proceedings in the case cited was 102 months in total.[680] Further, in that case, the parties claimed that certain managers, who may have had relevant information, had left the parties' employment during the course of the investigation, which had made it difficult for the parties to respond to the Commission's requests for information.[681] The CJEU found that even these facts were insufficient to demonstrate a breach of the parties' rights of defence.[682]

9.3. In any event, the time taken to reach a Statement of Objections in this case was largely the result of the Authority taking necessary and appropriate steps to investigate fully matters relevant to the investigation which had been raised belatedly and piecemeal by the Parties: see the procedural history to this investigation and the careful scrutiny given to each of the various submissions advanced by the Parties with respect to their contention that Economy and EGEL formed part of the same undertakings, as set out in sections 4, 5 and 7, above.[683]

9.4. The Statement of Objections was issued shortly afterwards, on 29 May 2018. Since that time, the Authority has received written and oral representations from the Parties on the Statement of Objections, sought additional information from the Parties, issued a Letter of Facts, issued draft penalty statements and considered written and oral representations made on those representations.[684] It has carefully considered the correct level of the penalties imposed on the Parties, particularly in light of Economy's and EGEL's particular financial situations. To do this, it has requested further, detailed financial information from the Parties. Further, the Authority acceded to a request, in January 2019, from Economy Energy Trading Limited's administrator for a delay in responding to the Letter of Facts because the administrators had only recently been appointed.

9.5. The Authority is therefore of the view that the timescales for this investigation have not been excessive. Further, there has been no identified impact on the rights of the defence from this time period.

[680] See paragraph 9 of the judgment.
[681] See paragraphs 55 to 60.
[682] See paragraph 61.
[683] See paragraphs 4.3 to 4.17, 5.19 to 5.28, and 7.12 to 7.49, above.
[684] See paragraphs 4.18 and 4.19, above.