Neutral citation [2020] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1337/1/12/19

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

22 December 2020

Before:

THE HONOURABLE MR JUSTICE MORGAN
(Chairman)
EAMONN DORAN
SIR IAIN McMILLAN CBE FRSE DL

Sitting as a Tribunal in England and Wales

BETWEEN:

FP McCANN LIMITED

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

(1) EOIN McCANN
(2) FRANCIS McCANN

Interveners

Heard remotely on 5-6 October 2020 and at Salisbury Square House on 7-9 October 2020

JUDGMENT

APPEARANCES

Mr Robert O'Donoghue QC and Mr Richard Howell (instructed by Pinsent Masons) appeared on behalf of the Appellant.

Mr Rob Williams QC and Mr Tristan Jones (instructed by Competition and Markets Authority) appeared on behalf of the Respondent.

CONTENTS

A. INTRODUCTION

1. On 23 October 2019, the Competition and Markets Authority ("the CMA") issued a Decision that three undertakings, including FP McCann Ltd ("FPM"), had infringed the prohibition imposed by section 2(1) ("the Chapter I prohibition") of the Competition Act 1998 ("CA 1998") and Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU").

2. The infringement related to the supply of pre-cast drainage products to the construction industry. The CMA found that the infringement had occurred from at least as early as 6 July 2006 and had continued until 13 March 2013 ("the Relevant Period"). The infringement took the form of:

   (1) price fixing or price coordination between competitors;

   (2) market sharing between competitors;

   (3) the allocation of customers including by bid rigging;

   (4) an agreement to maintain specified market shares;

   (5) the regular and systematic exchange of competitively sensitive information.

3. By its Decision, the CMA required FPM to pay a penalty of £25,449,676. This figure was the maximum penalty which could be imposed having regard to section 36(8) of CA 1998 and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 ("the Turnover for Penalties Order"); those provisions had the effect that the penalty fixed by the CMA could not exceed 10% of the turnover of FPM in the business year preceding the date of the Decision.

4. FPM now appeals against the amount of the penalty imposed by the CMA. The hearing of the appeal took place over five days in October 2020. FPM was

represented by Mr Robert O'Donoghue QC and Mr Richard Howell and the CMA was represented by Mr Rob Williams QC and Mr Tristan Jones. We are grateful to them for their considerable assistance.

5. In addition to hearing submissions from counsel, we also heard oral evidence. FPM called Mr Don Mulholland on the subject of compliance by FPM with competition law. The CMA called Mr David Williams on the subject of the implementation of the cartel in this case. The CMA also called Dr Michael Grenfell, Executive Director for Enforcement at the CMA, on the subject of the length of time taken by the CMA (and its predecessor, the Office of Fair Trading ("the OFT")) in carrying out a criminal investigation and a civil investigation into the cartel in this case. FPM also relied upon a report from Dr Avantika Chowdhury, an economist and a partner in Oxera Consulting LLP; Dr Chowdhury did not give oral evidence as the CMA did not require her to attend for cross-examination.

B. THE DECISION

(1) The Decision as to infringement

6. Chapter 1 of the Decision was headed "Introduction and Summary". The CMA addressed the Decision to three undertakings. The first was Stanton Bonna Concrete Ltd ("SB") and its parent companies, together referred to as "SBC". The second was CPM Group Ltd ("CPM") and the third was FPM. The CMA concluded that SBC, CPM and FPM had infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement through an agreement or a concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of certain pre-cast concrete drainage products to customers in Great Britain.

7. The CMA identified the representatives of FPM, who were the most active on behalf of FPM in agreeing and operating the cartel, as Eoin McCann, the managing director, Francis McCann, the products director, and [Senior FPM Employee3], the general/sales manager.

8. The CMA stated that the infringement amounted to a serious infringement of competition law, involving the most serious forms of anti-competitive conduct, by the leading suppliers of pre-cast concrete drainage products in Great Britain, over a significant period of time. In particular, the CMA found:

(1) there was evidence that the arrangement was initiated in response to difficult market conditions, with the express intention of addressing the deterioration of prices in the market;

(2) statements made by individuals attending recorded meetings highlighted that the ongoing object of the arrangement was to increase prices and maintain market positions;

(3) documentary evidence showed that individuals went to cartel meetings well prepared, taking a structured and rigorous approach to the ongoing operation and monitoring of the arrangement;

(4) there was evidence that SB, CPM and FPM sought to keep the arrangement secret, with discussions about how to disguise the existence of the arrangement from customers, including by ensuring that agreed prices were not exactly the same.

9. As regards the impact on customers, the CMA noted that pre-cast concrete drainage products were high value items which were used in large infrastructure projects including drainage and water management, roads and railways, as well as in other construction projects of varying sizes. Typical customers included civil engineering companies, construction companies and suppliers to the construction industry, utilities providers, as well as (for publicly-funded projects) local and national government. End customers included house-buyers, construction companies and tax-payers (through their contribution to publicly-funded projects).

10. Chapter 2 of the Decision set out the CMA's findings as to the factual background. This Chapter contained an overview of the relevant industry involving pre-cast concrete drainage products and the routes to market. The

CMA referred, in particular, to the spot market and to term deals. The spot market involved supplies on a deal-by-deal basis. Term deals were fixed price agreements to supply a full range of products to an end customer at particular rates for a fixed period.

11. The CMA then made findings as to the position of SB, CPM and FPM. It held that throughout the period of the infringement, SB, CPM and FPM together accounted for the majority of the market in Great Britain for the manufacture of the relevant products. From June 2006, SB, CPM and FPM together accounted for over 50% of that market; and from 2010, following a series of acquisitions by CPM and FPM, they accounted for over 90% of that market.

12. The CMA stated that FPM was a limited liability company registered in Northern Ireland. In November 2005, FPM acquired the assets (and employees under TUPE) of Hepworth Concrete, which enabled FPM to acquire a manufacturing plant at Ellistown, Leicestershire, and to expand into the wider GB market. Through its quarries, surfacing, readymix and pre-cast plants, FPM supplied a wide range of heavy building materials to the construction industry throughout the UK. FPM was the UK's largest manufacturer and supplier of pre-cast concrete solutions, including in relation to drainage and water management, tunnels and shafts, power and infrastructure, railways, walling, flooring, and tanks and chambers. Within its drainage and water management solutions division, it supplied pipes, manhole chambers and soakaways, gullies and slabs, kerbs and channel range, headwalls and storm attenuation systems.

13. The CMA then gave a brief description of the criminal cartel investigation into this cartel which was opened by the OFT under section 192 of the Enterprise Act 2002 in March 2013. This was followed by a brief description of the investigation under CA 1998.

14. On 13 November 2013, SB approached the OFT with an application for Type B leniency under the OFT's leniency policy (which was adopted by the CMA and was reflected in the CMA's current guidance on penalties). The CMA signed a leniency agreement with SBC on 6 August 2018. Both SBC and CPM expressed an interest in exploring settlement with the CMA. In accordance with the

CMA's settlement policy, on 20 July 2018, the CMA provided SBC and CPM with a draft Statement of Objections together with access to the documents referred to in the draft Statement of Objections and a list of documents on the CMA's file. On 23 July 2018, the CMA provided SBC and CPM with a draft penalty calculation. SBC and CPM were provided with an opportunity to make representations on the draft Statement of Objections and draft penalty calculation, both in writing and orally at settlement meetings in October and November 2018. On 7 December 2018, both SBC and CPM:

(1) admitted that they had infringed the Chapter I prohibition and Article 101, by way of the arrangement that was described in the Decision (in the terms set out in a revised draft of the Statement of Objections dated 26 November 2018);

(2) agreed to accept a maximum penalty; and

(3) agreed to cooperate in expediting the process for concluding the investigation.

On 13 December 2018 the CMA announced that it had settled the case with SBC and CPM.

15. On 13 December 2018, the CMA issued a Statement of Objections to the three undertakings. Following the issue of the Statement of Objections, a Case Decision Group was appointed within the CMA to act as the decision-maker on whether or not the legal test for establishing an infringement had been met and the appropriate amount of any penalty. On 22 February 2019, FPM submitted written representations on the Statement of Objections, and confirmed that it did not wish to make oral representations on the matters referred to in its response. The settling parties made no representations on the Statement of Objections.

16. On 28 June 2019, the CMA issued a Draft Penalty Statement to FPM, and summary draft penalty calculations to SBC and CPM. FPM provided written representations on the matters set out in the Draft Penalty Statement on 19 July

2019 and 18 October 2019. SBC and CPM made no representations on their respective draft penalty calculations.

17. In this Chapter of the Decision (Chapter 2), the CMA made detailed findings as to the key individuals involved in the cartel and their evidence to the CMA. In particular, there were detailed findings as to Eoin McCann, Francis McCann and [Senior FPM Employee3].

18. In Chapter 3 of the Decision, the CMA considered the relevant market. The CMA directed itself that, when applying the Chapter I prohibition and Article 101, it was not obliged to define the relevant market, unless it was impossible, without such a definition, to determine whether the agreement or concerted practice under investigation had as its object or effect the appreciable prevention, restriction or distortion of competition. The CMA considered that no such obligation arose in this case. However, the CMA did form a view of the relevant market in order to calculate the 'relevant turnover' of the undertakings in the market affected by the infringement, for the purpose of establishing the level of any financial penalties that the CMA might decide to impose. When assessing the relevant market for these purposes, the CMA considered that it was not necessary to carry out a formal analysis: the relevant market could properly be assessed on a broad view of the particular trade affected by the infringement in question.

19. The CMA then discussed the relevant product market and concluded that, for the purpose of determining the level of any financial penalty in this case, the relevant product market was the supply of the Products (defined in the Decision) to the construction industry.

20. The CMA then discussed the relevant geographic market and concluded that, for the purpose of determining the level of any financial penalty in this case, the relevant market was the supply of the relevant products to the construction industry in Great Britain.

21. Chapter 4 of the Decision was a lengthy Chapter, comprising 118 pages, which was headed "Conduct of the Parties". Chapter 4 was sub-divided into Sections, lettered A to I.

22. Chapter 4A (paragraphs 4.1-4.2) contained the essential finding of the CMA of an infringement by reason of an agreement or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of the relevant products to customers in Great Britain.

23. Chapter 4B (paragraphs 4.3-4.20) summarised the evidence base relied on by the CMA. The CMA had evidence from audio visual recordings of four meetings which took place between the cartelists (in 2012 and 2013), a significant amount of documentary evidence (which clearly established a consistent pattern of conduct throughout the period of the infringement) and a large body of witness and interview evidence.

24. Chapter 4C (paragraphs 4.21-4.52) of the Decision considered the origins of the arrangements between the cartelists. Chapter 4D (paragraphs 4.53-4.100) summarised the evidence as to the existence of regular secret meetings between the cartelists and discussed the purpose, frequency and nature of these meetings.

25. Chapter 4E (paragraphs 4.101-4.102) stated that there were three key aspects, or tenets, of the cartel arrangements. These were:

    (1) an agreement to fix or coordinate prices in the spot market, including by the agreement of price lists, with the aim of increasing prices;

    (2) an agreement in relation to certain fixed price agreements (namely, term deals and stock deals), which involved the allocation of customers (including by bid rigging) and a coordinated approach to pricing; and

    (3) an agreement to maintain specified market shares.

    The three aspects of the arrangement were not dependent on each other. The CMA found that the three aspects worked together as part of a single, cohesive

arrangement which was intended to increase prices and to maintain SB, CPM and FPM's respective shares of the market. Nonetheless, later in the Decision, the CMA considered the three aspects separately.

26. Chapter 4F (paragraphs 4.103-4.151) was headed "Pricing", Chapter 4G (paragraphs 4.152-4.273) was headed "Fixed price agreements" and Chapter 4H (paragraphs 4.274-4.326) was headed "Maintaining market shares".

27. In Chapter 4I of the Decision (paragraphs 4.327-4.328), the CMA concluded that the cartel was in place by at least as early as 6 July 2006 and continued until 13 March 2013, when it was brought to an end by the OFT which carried out inspections at the business premises of SB, CPM and FPM.

28. Chapter 5 of the Decision was a legal assessment of the conduct set out in Chapter 4. The CMA assessed the evidence by reference to the civil standard of proof in order to determine whether that evidence was sufficient to establish, on the balance of probabilities, that an infringement occurred. The CMA concluded that it had.

29. Chapter 5E (paragraphs 5.14-5.57) considered the legal principles as to agreements between undertakings and concerted practices.

30. At paragraph 5.23, the CMA stated:

> "*Presumption that information will be taken into account*
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> Where an undertaking participating in a concerted practice remains active on the market, there is a presumption that it will take account of information exchanged with its competitors when determining its own conduct on the market. The burden is on the parties concerned to adduce evidence to rebut this presumption."

31. At paragraph 5.24, the CMA stated:

> "*Reduction in uncertainty*
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> The EU Courts have emphasised that, in a properly functioning competitive market, competitors should not know how their competitors are likely to behave, and that a reduction in that uncertainty is a key part of the concept of a concerted practice. In that regard in establishing the existence of a concerted practice, it is sufficient that, by its statement of intention, the competitor should

have eliminated or, at the very least, significantly reduced uncertainty as to the conduct to expect of the other on the market."

32. At paragraphs 5.28-5.32, the CMA stated:

> "*Participation and implementation*
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> 5.28 It is settled case law that it is sufficient that the party concerned participated in meetings in which anti-competitive arrangements were concluded without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. 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. In order for the party to cease its participation, and to rebut the presumption that its participation in the meeting was unlawful, it must distance itself firmly and unequivocally from the results of the meeting in such a way that the other participants are aware that it no longer supports the objectives of the agreement or concerted practice in question.
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> 5.29 The Court of Justice of the European Union has confirmed that, where participation in meetings with an anti-competitive nature is established, in order to distance itself from an unlawful agreement, it is for the undertaking concerned to advance evidence that its participation was without any anti-competitive intention, having indicated to the other participants that its intention was different from theirs and for the other participants to understand such different intention.
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> 5.30 As the General Court of the European Union confirmed in *Sumitomo*, it is the understanding which the *other* members of a cartel have of the intention of the undertaking concerned which is of critical importance when assessing whether it sought to distance itself from the unlawful agreement.
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> 5.31 Parties cannot avoid liability for an infringement by arguing that they played only a limited part in setting up an agreement or concerted practice, that they were not (or were not always) fully committed to the agreement or concerted practice, that they had no intention of abiding by an agreement, that the agreement or concerted practice was never implemented or put into effect by them, or that they in fact behaved aggressively on the market.
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> 5.32 The fact that a party comes to recognise that in practice it can '*cheat*' on the agreement or concerted practice at certain times does not preclude the finding of an infringement. As the General Court of the European Union has held in *Dole*, '*even if a participant in collusive conduct may seek to exploit it for its own ends, or even cheat, that does not however diminish its liability in respect of its participation in that conduct. According to settled case law, an undertaking which, despite a cartel with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.*' "

33. In paragraphs 5.33-5.57, the CMA applied the legal principles it had summarised to the facts which it had found. In particular, it reached the following conclusions:

(1) on the basis of the facts and evidence set out in Chapter 4 of the Decision, the CMA found that there was a concurrence of wills between SB, CPM and FPM (for the purposes of the Chapter I prohibition and Article 101) sufficient to amount to an agreement in relation to the supply of the relevant products to customers in Great Britain;

(2) as set out in Chapter 4C, the evidence showed that an arrangement was put in place by at least as early as 6 July 2006, whereby SB, CPM and FPM agreed not to compete with each other so as to increase prices, and to maintain their respective market shares;

(3) SB, CPM and FPM cooperated in accordance with the arrangement throughout the period of the infringement;

(4) specifically, the evidence showed a common understanding between SB, CPM and FPM that they would:

(i) fix or coordinate prices for the relevant products, including by the agreement of price lists for spot market work, which reduced uncertainty as regards the pricing to be adopted by SB, CPM and FPM, with the aim of increasing prices (see Chapter 4F);

(ii) divide the market by allocating customers between them, (including through bid rigging), and maintain specified market shares, (see Chapters 4G-4H); and

(iii) regularly and systematically share pricing, tonnage and market share information in order to ensure that the arrangement was being adhered to (see Chapter 4);

(5) the arrangement between SB, CPM and FPM was deliberate and organised, and took place over a significant period of time by way of regular meetings and bilateral communications concerning specific products or customers (see Chapter 4 and Annex A);

(6) in the alternative to the CMA's finding of an agreement, the CMA found that SB, CPM and FPM participated in a concerted practice in which they knowingly substituted practical cooperation for the risks of competition;

(7) the CMA considered that the contact between SB, CPM and FPM throughout the period of the infringement created conditions which did not correspond to the normal conditions of competition in the market, reducing uncertainty about future conduct;

(8) there was a presumption that information exchanged by SB, CPM and FPM was taken into account. In this respect, the evidence indicated that the discussions held, and information exchanged, by SB, CPM and FPM was, on an ongoing basis, useful and of practical value to the parties;

(9) the CMA noted in particular that:

(i) the meetings and arrangement between SB, CPM and FPM took place over a significant period of time (that is, over six years); and

(ii) SB, CPM and FPM would challenge each other as regards quotations that were perceived to have been put in too far below the agreed prices, and take action where agreed market shares did not appear to have been maintained (see, for example, paragraphs 4.281-4.283 and 4.290-4.294);

(10) the CMA considered that discussions about spot market prices, fixed price agreements and market shares provided SB, CPM and FPM with an opportunity to confirm or improve their understanding of each other's position, strategies and future conduct, reducing strategic uncertainty;

(11) this was the case notwithstanding that pricing discussions did not necessarily relate to actual prices (see, for example, paragraph 4.108); and the reporting of market shares may not always have been wholly

accurate (see, for example, paragraph 4.303); the information exchanged provided the parties with an indication (at the very least) of the development of prices and market trends, thereby reducing uncertainty as to the operation of, and the parties' future conduct on, the market, and highlighting that there would be less downward pressure on prices than might otherwise have been expected;

(12) this was also the case even where the information discussed may already have been known by customers and could, therefore, in principle already be gathered on the market; there was a value in discussing such information, and the views of competitors as regards that information are not available publicly;

(13) moreover, as noted in paragraphs 4.74(b) and 4.297-4.301, the evidence indicated that information from the relevant trade association in relation to market shares was not sufficient for the parties' purposes; detailed discussions between SB, CPM and FPM enabled the parties to find out about each other's more up to date market share figures more simply, rapidly and directly, providing additional clarity and certainty;

(14) further, although agreed minimum spot market prices had been described (for example, by Barry Cooper [SB] and [Senior FPM Employee3] [FPM]) as '*aspirational*' in nature, they nevertheless acted as a '*target*' such that the price lists and targeting of those prices were sufficient to reduce uncertainty as regards the pricing to be adopted by SB, CPM and FPM (see paragraphs 4.108-4.126), so restricting competition;

(15) the CMA considered that, notwithstanding deviation from agreed prices, the agreement of price lists was capable of significantly restricting competition; and to the extent that there was any scope for (restricted) competition on prices, this was further constrained by the agreement in relation to the maintenance of market shares;

(16) on the subject of participation and implementation, there was no evidence to suggest that SB, CPM or FPM expressed any reservations or objections to their collaboration during the Relevant Period, or sought to publicly distance themselves from the arrangement;

(17) FPM had made representations that it considered discussions at meetings to be a form of '*banter*', '*posturing*' and '*jockeying*', and neither intended to act upon, nor acted upon, the information discussed; [Senior FPM Employee3] of FPM had said that he attended meetings in order obtain information about FPM's competitors and use it against them, as well as to feed them false information;

(18) non-implementation would need to be to the point of disrupting the cartel, and to distance the participant from the cartel, for it to be a relevant defence; there was no evidence to suggest that FPM manifestly opposed discussions in such a way that the other participants were aware that it did not support their objectives; at the very least, FPM's participation in the meetings would have encouraged the cartel conduct by SB and CPM;

(19) the CMA noted that when issues arose under the arrangement, participants at cartel meetings from each of SB, CPM and FPM actively engaged with discussions in order to seek to resolve them (see, for example, paragraphs 4.55, 4.59, 4.148, 4.187, 4.269, 4.292, 4.294 and 4.317);

(20) the transcripts of the recorded meetings showed that all those attending took an active role in sharing and soliciting information, and that they were not passive recipients of such information;

(21) the evidence set out in Chapter 4 revealed instances where SB, CPM or FPM were considered not to have been acting in accordance with the arrangement (for example, by submitting quotations that were too low); however, different levels of participation or implementation from time

to time did not prevent there having been a concerted practice and common understanding;

(22) the finding of an infringement is not precluded by the fact that a party comes to recognise that it may '*cheat*' on the agreement or concerted practice; a cartel member who disregards what is agreed for its own ends is still liable for the infringement;

(23) in any event, the evidence showed that SB, CPM and FPM would take steps to ensure that the arrangement was adhered to in the event that a party was perceived to be '*cheating*' on the arrangement, for example by challenging each other when target prices were not achieved because certain quotations were considered to be too low (see, for example, paragraphs 4.56-4.69, 4.110-4.114, 4.127, 4.177, 4.193-4.196, 4.244-4.246);

(24) the importance of adhering to the agreement or concerted practice was a common theme during the recorded meetings: SB, CPM and FPM were keen to ensure that the arrangement was implemented so as to meet their dual aims of ensuring the status quo and increasing prices (see, in particular, paragraphs 4.54-4.60);

(25) the CMA concluded that the evidence demonstrated an agreement or concerted practice between SB, CPM and FPM;

(26) the CMA considered that, having attended meetings throughout the Relevant Period, each of SB, CPM and FPM must have:

(i) realised why they were providing each other with their pricing and market share information;

(ii) realised that the disclosure of any such information would have been of practical use and value; and

(iii) expected or hoped that the information discussed would be used or relied upon.

(27) throughout the period of the infringement, SB, CPM and FPM did not determine their conduct on the market independently of each other; instead, they expressed their joint intention to conduct themselves on the market in a specific way, and had a shared understanding of how they would behave in relation to particular customers; through their regular contacts, they reduced uncertainty as to their intended conduct on the market, and knowingly substituted practical cooperation as regards pricing, the allocation of customers and the ongoing maintenance of their market shares, for the risks of competition.

34. Chapter 5F (paragraphs 5.58-5.104) considered the legal principles as to agreements or concerted practices which had the object of preventing, restricting or distorting competition.

35. At paragraph 5.63, the CMA noted that for the purposes of establishing an infringement, there was no need to take account of the actual effects of an agreement once it appeared that it had as its object the prevention, restriction or distortion of competition.

36. At paragraphs 5.77-5.78, the CMA concluded the relevant infringement took the form of an agreement or concerted practice between SB, CPM and FPM that amounted to price fixing or price coordination, including by way of agreed price lists for spot market work; market sharing through the allocation of customers, including by bid rigging; and the regular and systematic exchange of competitively sensitive information. Having considered the content and objectives of the agreement or concerted practice, and when viewed in the legal and economic context of which it formed part, the CMA found that such conduct was, by its very nature, harmful to the proper functioning of normal competition and therefore had the object of preventing, restricting or distorting competition.

37. At paragraphs 5.99-5.102, the CMA considered a submission made by FPM that there was no evidence that the arrangement had any effect on the market. The CMA stated:

> "*No evidence of effect*
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> 5.99 FPM has made representations that there is no evidence that the arrangement had any effect on the market. It has stated that it competed vigorously in the market, and was subject to considerable competitive pressure, with customers frequently playing the manufacturers off one another. It has also noted that there is evidence that some term deals and stock deals were lost during the Relevant Period (see paragraphs 4.176, 4.211 and 4.260).
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> 5.100 Having regard to the principles set out in paragraphs 5.58 to 5.76 (and, in particular, paragraph 5.63), it is clear that if an agreement or concerted practice has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement or concerted practice would have had any anti-competitive effects for the purposes of establishing an infringement of the Chapter I prohibition and of Article 101.
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> 5.101 Moreover, the CMA does not consider that FPM has demonstrated that there was no effect on the market as a result of the arrangement. In particular, even if FPM's analysis of any effect on spot market prices during the Relevant Period were correct, it is not known whether prices in the market or margins may have been lower in the absence of the arrangement. Nor does the analysis consider the prices charged by SB or CPM. Further, it is not known whether the market shares of SB, CPM and FPM would have been different in the absence of the arrangement.
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> 5.102 As noted in paragraphs 5.40 to 5.45 there is evidence that the discussions held, and information exchanged, between SB, CPM and FPM were, on an ongoing basis, useful and of practical value in the context of determining their strategy in relation to price competition, providing an indication of the parties' likely future conduct, market trends and the development of prices, thereby reducing uncertainty as to the operation of, and the parties' future conduct on, the market. Furthermore, the agreement or concerted practice meant that SB, CPM and FPM were aware that there would be less downward pressure on prices than would otherwise be expected absent the coordination."

38. Chapter 5G (paragraphs 5.105-5.126) considered the legal principles as to when it was appropriate to characterise anti-competitive conduct as constituting a single and continuous infringement as distinct from a number of separate infringements. The CMA applied those principles and concluded that it was right to characterise the conduct in this case as a single and continuous infringement. The CMA explained why it considered that the three aspects of the conduct ((i) an agreement as to price lists in the spot market, (ii) an agreement in relation to fixed price agreements involving allocation of customers and a coordinated approach to pricing and (iii) an agreement to

maintain specified market shares) should be regarded as a single and continuous infringement.

39. Chapter 5H (paragraphs 5.127-5.130) considered whether the agreement or concerted practice had an appreciable impact on competition for the purposes of Article 101. The CMA held that an agreement or concerted practice which had the object of restricting competition constituted an appreciable restriction of competition.

40. In Chapter 5I (paragraphs 5.131-5.135), the CMA considered, for the purpose of the Chapter I prohibition, whether the agreement or concerted practice might affect trade within the UK. The CMA concluded that this requirement was satisfied and that the agreement or concerted practice, by its very nature, was likely to affect trade within the UK.

41. In Chapter 5J (paragraphs 5.136-5.148), the CMA considered, for the purposes of Article 101, whether the agreement or concerted practice might affect trade between EU Member States to an appreciable extent. The CMA concluded that this requirement was satisfied.

42. In Chapter 5K (paragraphs 5.149-5.152), the CMA made its findings as to the duration of the infringement which it held was from at least as early as 6 July 2006 until 13 March 2013.

43. In Chapter 5L (paragraphs 5.153-5.155), the CMA explained that there was no relevant exemption or exclusion in relation to its finding of infringement.

44. In Chapter 5M (paragraphs 5.156-5.172), the CMA considered the question of attribution to undertakings and held that FPM was directly involved in, and liable for, the relevant infringement.

(2) The Decision as to penalty

45. Chapter 6 of the Decision dealt with the actions which the CMA decided to take. Chapter 6A (paragraphs 6.1-6.2) repeated the CMA's decision as to

infringement. Chapter 6B (paragraphs 6.3-6.4) recorded that the infringement was no longer continuing.

46. Chapter 6C (paragraphs 6.5-6.17) dealt with the approach to be adopted in relation to the requirement that an infringer should pay a penalty. The CMA considered that it should impose a penalty on SBC, CPM and FPM. The CMA held that the infringement had been committed intentionally, alternatively negligently, by SBC, CPM and FPM. The CMA referred to its guidance as to the appropriate amount of a penalty (CMA73, 18 April 2018) ("the Penalty Guidance") published pursuant to section 38 of CA 1998. The CMA also referred to the Turnover for Penalties Order made pursuant to section 36(8) of CA 1998.

47. Chapter 6D (paragraphs 6.18–6.91) set out the CMA's reasoning in relation to the calculation of the penalty. It will be necessary to examine the reasoning in more detail later in this judgment when we deal with the various Grounds of Appeal. However, at this stage, we will summarise the essential steps in the reasoning of the CMA.

48. The CMA applied its Penalty Guidance, which identifies a number of steps which are to be followed when considering the amount of an appropriate penalty.

49. Step 1 of the Penalty Guidance involves the calculation of a starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking. For this purpose, the CMA took the turnover of FPM from its last business year preceding the date when the infringement ended. This was the year ending 31 January 2013 and the relevant turnover was £24,450,600. The CMA then said that, as a starting point for calculating the penalty, it would use 30% of that turnover to reflect the seriousness of the infringement and the need for deterrence. 30% of the relevant turnover of FPM was £7,335,180.

50. Step 2 of the Penalty Guidance involved an adjustment for the duration of the infringement. The CMA held that the duration in this case was just under 6 years and 9 months which was rounded up to 6.75 years. This was used as a multiplier

for the figure arrived at pursuant to Step 1 and the figure for FPM which emerged at Step 2 was therefore £49,512,465.

51. Step 3 of the Penalty Guidance involved the assessment of various possible aggravating and mitigating factors. In the case of FPM, the CMA added 15% because of director involvement in the infringement and added 10% because the infringement was intentional. It deducted 5% for cooperation by FPM but made no adjustment in relation to alleged compliance by FPM with competition law. The combination of these percentages was a net addition of 20% producing a figure of £59,414,958.

52. Step 4 of the Penalty Guidance involved a possible adjustment for specific deterrence and proportionality. In this respect, the CMA reduced the penalty by £31,414,958 to arrive at the figure of £28,000,000.

53. Step 5 of the Penalty Guidance involved a possible adjustment to comply with the Turnover for Penalties Order. The effect of that Order was that the penalty was not to exceed 10% of the worldwide turnover of FPM in the business year preceding the date of the CMA's Decision. In the case of FPM, that year was the year ending 31 December 2018. FPM's turnover in that year was £254,496,765 and 10% of that figure was £25,449,676. As this figure was lower than £28,000,000 the amount of the penalty was reduced to £25,449,676.

54. Step 6 of the Penalty Guidance referred to possible reductions for leniency, settlement or voluntary redress. These possibilities did not arise in the case of FPM.

55. The result was that the CMA required FPM to pay a penalty of £25,449,676.

C. THE GROUNDS OF APPEAL

56. In its Notice of Appeal, FPM summarised its Grounds of Appeal as follows:

> "FPM appeals to the Competition Appeal Tribunal … against the Decision pursuant to s.46(1) of CA 1998, on the following grounds:

(1) As concerns the CMA's findings on the implementation of the alleged infringement:

(a) The CMA erred in law in failing to give adequate reasons.

(b) To the extent that the CMA found FPM implemented the alleged infringement, it erred in fact.

(2) The decision to impose the maximum penalty in this case was an unlawful breach of the CMA's statutory duty properly to assess the penalty against the statutory maximum in each case. The CMA erred in law:

(a) by applying its purported statutory guidance as to the appropriate amount of a penalty dated 18 April 2018 ("Guidance"). The Guidance is *ultra vires* s.38 of CA 1998, void and of no effect in that it abrogates the CMA's statutory duty properly to consider the level of a penalty against the statutory maximum in each case; and/or

(b) because the Decision was inconsistent with the aforesaid statutory duty in this case.

(3) As concerns the implementation and/or market effects of the alleged infringement:

(a) The CMA erred in law in treating a lack of implementation and/or market effects as irrelevant to penalty. These were substantial factors that justified a lower fine, since an infringement which is in fact implemented is necessarily more serious than one which is not (or is to a lesser extent).

(b) The CMA erred in fact:

(i) to the extent that it found that the alleged infringement was implemented by FPM and/or

(ii) in failing to accept FPM's representations that the alleged infringement did not have an effect on the market for the products.

(c) In the premises, the CMA erred in law and/or in the exercise of its discretion in selecting the maximum starting point of 30% of FPM's relevant turnover at step 1 of the Guidance.

(4) The CMA erred in law and/or in the exercise of its discretion in the application of steps 1 & 2 of the Guidance by failing to give adequate weight to FPM's real commercial situation during the Relevant Period.

(5) The CMA failed to make adequate allowance for factors mitigating the penalty:

(a) As concerns the length of the CMA's investigations, the CMA

(i) erred in law in deciding that its own unreasonable delay during an investigation was incapable of constituting a mitigating factor; and

(ii) erred in fact in deciding the length of its investigations was reasonable.

(b) The CMA erred in fact and/or in law and/or in the exercise of its discretion in making an allowance of only 5% for FPM's cooperation during its investigations.

(c) The CMA erred in fact and/or in the exercise of its discretion in making no allowance for FPM's competition law compliance programme.

(6) The CMA erred in law in assessing the proportionality of the penalty:

(a) In providing inadequate reasons; and/or

(b) By failing to take into account the fact that a large part of FPM's turnover in the business year preceding the Decision was the result of acquisitions after the end of the Relevant Period. Further and/or alternatively, the CMA contravened the principle of equal treatment.

(7) The CMA erred in law in failing to reduce the amount of the penalty it had proposed despite withdrawing its provisional case as concerns (a) the duration of the second tenet; (b) the implementation of the alleged infringement; and/or (c) the need for the general deterrence in the construction industry."

D. THE LEGISLATION IN RELATION TO THE AMOUNT OF PENALTY

57. The relevant legislation consists of sections 36 and 38 of CA 1998 and the Turnover for Penalties Order.

58. Section 36 of CA 1998, so far as relevant, provides:

"**36.— Penalties.**

(1) On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 101(1), the CMA may require an undertaking which is a party to the agreement to pay the CMA a penalty in respect of the infringement.

(2) …

(3) The CMA may impose a penalty on an undertaking under subsection (1) or (2) only if the CMA is satisfied that the infringement has been committed intentionally or negligently by the undertaking.

(4) – (7) …

(7A) In fixing a penalty under this section the CMA must have regard to—

(a) the seriousness of the infringement concerned, and

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

(i) entering into agreements which infringe the Chapter 1 prohibition or the prohibition in Article 81(1), or

(ii) …

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

(9) Any sums received by the CMA under this section are to be paid into the Consolidated Fund."

59. Section 38 of CA 1998 provides:

"**38.— The appropriate level of a penalty.**

(1) The CMA must prepare and publish guidance as to the appropriate amount of any penalty under this Part in respect of an infringement of the Chapter 1 prohibition, the Chapter 2 prohibition, the prohibition in Article 81(1) or the prohibition in Article 82.

(1A) The guidance must include provision about the circumstances in which, in determining such a penalty, the CMA may take into account effects in another Member State of the agreement or conduct concerned.

(2) The CMA may at any time alter the guidance.

(3) If the guidance is altered, the CMA must publish it as altered.

(4) No guidance is to be published under this section without the approval of the Secretary of State.

(5) The CMA may, after consulting the Secretary of State, choose how it publishes its guidance.

(6) If the CMA is preparing or altering guidance under this section it must consult such persons as it considers appropriate.

(7) If the proposed guidance or alteration relates to a matter in respect of which a regulator exercises concurrent jurisdiction, those consulted must include that regulator.

(8) When setting the amount of a penalty under this Part in respect of an infringement of a kind mentioned in subsection (1), the CMA and the Tribunal must have regard to the guidance for the time being in force under this section.

(9) If a penalty or a fine has been imposed by the Commission, or by a court or other body in another Member State, in respect of an agreement or conduct, the CMA, the Tribunal or the appropriate court must take that penalty or fine into account when setting the amount of a penalty under this Part in relation to that agreement or conduct.

(10) In subsection (9) "the appropriate court" means—

(a) in relation to England and Wales, the Court of Appeal;

(b) in relation to Scotland, the Court of Session;

(c) in relation to Northern Ireland, the Court of Appeal in Northern Ireland;

(d) the Supreme Court."

60. The Turnover for Penalties Order was made pursuant to section 36(8) of CA 1998. Article 3 of the Turnover for Penalties Order provides that:

> "The turnover of an undertaking for the purposes of section 36(8) is the applicable turnover for the business year preceding the date on which the decision of the CMA is taken or, if figures are not available for that business year, the one immediately preceding it."

E. THE PENALTY GUIDANCE

61. We were shown the guidance as to the appropriate amount of a penalty (OFT423) originally issued in December 2004 and published by the OFT pursuant to section 38 of CA 1998 ("the OFT penalty guidance of 2004"), which applied prior to the publication of the Penalty Guidance by the CMA. It is not necessary to refer to the detailed terms of the OFT penalty guidance of 2004 but we note that the guidance identified a number of steps to be used for the purpose of determining the level of a penalty. The reference to a maximum of 10% of turnover was not the first step in the guidance but it was the fifth step which, where it applied, could operate as a cap on a higher penalty figure produced by the application of steps 1 to 4 of that guidance. The OFT penalty guidance of 2004 stated that it had been revised to reflect changes arising out of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("the Modernisation Regulation").

62. The Penalty Guidance was approved by the Secretary of State under section 38(4) of CA 1998 on 16 April 2018 and was published by the CMA on 18 April 2018. Paragraph 1.3 of the Penalty Guidance states that the twin objectives of the CMA's policy are to impose penalties on infringing undertakings which reflect the seriousness of the infringement and to ensure that the threat of penalties would deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them. It also states that the CMA intends, where appropriate, to impose financial

penalties which are severe, in particular in respect of agreements between undertakings which fix prices or share markets, other cartel activities and serious abuses of a dominant position. The CMA considers that these are among the most serious infringements of competition law. At paragraph 1.5, the CMA states that it is important to ensure that penalties imposed on individual undertakings are proportionate and not excessive.

F. NO APPEAL ON INFRINGEMENT

63. It is now clear that FPM does not seek to appeal the Decision that it was a party to an agreement or concerted practice which had as its object the prevention, restriction or distortion of competition. It is therefore now clear that FPM committed an infringement of the Chapter I prohibition and Article 101(1). Although Ground 1 of the Grounds of Appeal refers to "the alleged infringement" and contends that the CMA failed to give adequate reasons in relation to the implementation of such infringement and erred in its findings of fact as to implementation, it is now clear that this Ground of Appeal is not intended to be a challenge to the finding of infringement on the part of FPM. Instead, this Ground of Appeal seeks to challenge the findings of the CMA in relation to the extent to which FPM implemented the agreement or concerted practice to which it was a party. Accordingly, this appeal is an appeal in relation only to the penalty imposed by the CMA.

G. THE INTERVENERS

64. On 15 January 2020, the CMA applied to the High Court of Justice in Northern Ireland for an order under article 13A of the Company Directors Disqualification (Northern Ireland) Order 2002 ("the 2002 Order") that Eoin McCann and Francis McCann be disqualified as directors ("the CDDO Application").

65. On 29 January 2020, the High Court in Northern Ireland, pursuant to section 16 of the Enterprise Act 2002 and The Section 16 Enterprise Act Regulations 2015 (S.I. No.1643 of 2015) transferred to this Tribunal the determination, in the CDDO Application, of whether the first condition in article 13A of the 2002

Order was satisfied (namely, whether FPM (being a company of which Eoin McCann and Francis McCann were and are directors) committed a breach of competition law as defined in article 13A(4) of the 2002 Order) ("the First Condition").

66. Eoin McCann and Francis McCann have agreed that, in relation to this Tribunal's determination of whether the First Condition is satisfied, they will not raise any issue in relation to the Decision which was not already the subject of the appeal by FPM, and would adopt the evidence and submissions of FPM in the appeal.

67. FPM, the CMA and Eoin McCann and Francis McCann have agreed that, for the purposes of, and to the extent of, the determination of the issue transferred from the High Court in Northern Ireland, it would be just and convenient for the parties to the CDDO Application to be bound by the decision of this Tribunal, or any decision on appeal from the Tribunal, that is relevant to the determination of that issue, and that, for that sole purpose, it is appropriate that Eoin McCann and Francis McCann should have permission to intervene in this appeal.

68. On 15 June 2020, we made an order permitting Eoin McCann and Francis McCann to intervene in this appeal under rule 16 of the Competition Appeal Tribunal Rules 2015 (S.I. No.1648 of 2015) ("the Tribunal Rules") for the sole purpose of ensuring that the parties to the CDDO Application are bound by the decision of this Tribunal in the appeal (and any decision on appeal from the Tribunal in the Appeal that is relevant to the determination of the issue transferred by the High Court in Northern Ireland).

69. Also on 15 June 2020, we directed that we would, in the first instance, determine the appeal only and that the determination of whether the First Condition was satisfied would be stayed pending the final determination of the appeal (and any further appeal which might be relevant to the First Condition).

70. In the event, since FPM did not seek to appeal the Decision that it was a party to an agreement or concerted practice which had as its object the prevention,

restriction or distortion of competition it is now clear that FPM committed an infringement of the Chapter I prohibition and Article 101(1). It was not contended at the hearing of the appeal that the First Condition was not satisfied although, in view of the stay referred to above, we do not make a formal determination in this judgment as to whether the First Condition was satisfied.

H. THE TRIBUNAL'S JURISDICTION

71. This is an appeal pursuant to section 46 of CA 1998. Paragraph 3(1) of schedule 8 to CA 1998 provides that the Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the Notice of Appeal. Paragraph 3(2) of schedule 8 identifies the powers of the Tribunal in relation to the decision which is the subject of the appeal. In particular, the Tribunal may remit the matter to the CMA, revoke or vary the amount of the penalty or make any other decision which the CMA could itself have made. The Tribunal is required by section 38(8) of CA 1998 to have regard to the Penalty Guidance (assuming that it is valid).

72. The approach which the Tribunal should take in relation to an appeal against a penalty imposed by the CMA has been considered in a large number of decisions of the Tribunal. It is relevant to refer in this regard to *Kier Group plc and Others v Office of Fair Trading* [2011] CAT 3 ("*Kier*") at [76]-[77], *G F Tomlinson Group Limited and Others v Office of Fair Trading* [2011] CAT 7 at [72] and *Balmoral Tanks Limited and Another v Competition and Markets Authority* [2017] CAT 23 ("*Balmoral Tanks*") at [134]-[135].

73. The above authorities establish that:

(1) an appellant is entitled to an appeal on the merits, which has been described as a full appeal; the jurisdiction of the Tribunal is not restricted to the jurisdiction which would be appropriate if this process were by way of judicial review;

(2) it has been said that if the overall penalty is considered by the Tribunal to be appropriate, it will usually not be necessary to examine minutely

the way in which the CMA interpreted and applied the Penalty Guidance at each specific step;

(3) however, where an appellant makes specific complaints about particular steps taken by the CMA it will be necessary for the Tribunal to address the specific complaints which have been made;

(4) it would not be right to ignore the conclusions and evaluations of the CMA but ultimately the Tribunal must make its own assessment as to the penalty which is appropriate in all the circumstances, having regard to the Penalty Guidance.

I. THE SECOND GROUND OF APPEAL

74. It is appropriate to address the second Ground of Appeal before considering the other Grounds of Appeal.

75. We have already set out FPM's summary of the second Ground of Appeal. Elsewhere in the Notice of Appeal, this Ground of Appeal is succinctly stated as:

> "(a) The CMA erred in law in applying *ultra vires* Guidance"; and
>
> "(b) The penalty is inconsistent with the CMA's statutory duty properly to consider the level of a penalty against the statutory maximum in each case."

76. FPM submitted that because the Penalty Guidance is *ultra vires*, it is void and of no effect. FPM says that the Tribunal does not have jurisdiction to quash the Penalty Guidance. However, it is submitted that the Tribunal does have jurisdiction on this appeal to review the legality of the penalty imposed by the CMA. It is further submitted that if the Tribunal held that the Penalty Guidance was *ultra vires* and void, the Tribunal should set aside the penalty imposed by the CMA and should remit the question of penalty to the CMA. It was said that the Tribunal could not, or should not, itself determine the amount of the appropriate penalty because, under section 48(8) of CA 1998, the Tribunal is required to have regard to the penalty guidance for the time being in force and there would, on this hypothesis, be no valid guidance.

77. The first point which arises in relation to this Ground of Appeal is whether the Penalty Guidance is *ultra vires*.

78. The CMA Penalty Guidance was issued in April 2018. Its predecessor was the OFT penalty guidance issued in December 2004, which was later adopted by the CMA. If FPM is right that the April 2018 Penalty Guidance is *ultra vires*, it would seem that the same would apply to the December 2004 Penalty Guidance. In the past, the Penalty Guidance of the OFT and of the CMA has been considered on many occasions by the Tribunal and by the Court of Appeal. It has not previously been suggested that this Guidance was *ultra vires*, void and of no effect. However, FPM's submission is open to it notwithstanding the way in which the Guidance has been applied in the past and we must deal with that submission on its merits.

79. FPM submitted that section 36(8) of CA 1998, together with the Turnover for Penalties Order made to give effect to section 36(8), specifies the maximum penalty which may be awarded under section 36 of CA 1998.

80. FPM then relied on a line of authority which establishes that, where Parliament has specified a maximum penalty for an offence, that maximum is reserved for the most serious offences of that kind. This line of authority includes *Universal Salvage and Robinson v Boothby* (1983) 5 CR. App. R (S) 428 at 432, *R v Carroll* (1995) 16 Cr. App. R. (S) 488 at 490, *Attorney General's Reference No. 57 of 2009 (Ralphs)* [2009] EWCA Crim 2555, [2010] 2 Cr. App. R (S) at [29], *R v Holman* [2010] EWCA Crim 107, [2010] RTR 23 at [16] and *R (London Borough of Haringey) v Roth* [2020] EWCA Crim 967 at [32].

81. FPM said that, applying that line of authority, the starting point when determining the amount of a penalty is to identify the amount of the maximum penalty pursuant to section 36(8) of CA 1998. Then, one should ask whether the case being considered is the most serious offence of the kind to which section 36 applies. If the case is not the most serious offence of that kind, then a penalty below, perhaps well below, the maximum penalty is appropriate. In addition, all mitigating circumstances or anything which justifies a reduction from the maximum penalty must be taken into account.

82. FPM submitted that the CMA Penalty Guidance does not adopt the approach which is required by the specification of a maximum penalty pursuant to section 36(8) and the established sentencing principles referred to above. FPM points out that the CMA Penalty Guidance can result in an infringer being required to pay the maximum permissible penalty where the case is not the most serious case of the relevant kind and where there are mitigating circumstances.

83. FPM submitted that if the maximum penalty of 10% of turnover only operates as a mechanism to impose a cap on a penalty, which would otherwise be higher, it would be open to the CMA under section 38 of CA 1998 to lay down guidance which routinely provided for penalties above the level of that cap, even in non-serious cases, with the result that the penalty imposed in many non-serious cases would be at the level of the cap.

84. The CMA submitted that Parliament's purpose in specifying a maximum penalty was not to identify the maximum penalty which Parliament thought fit to impose for the most serious case of the relevant kind. If that was not Parliament's purpose, then the CMA and the Tribunal are not restricted to imposing that penalty only in the most serious cases. The purpose of section 36(8) is a different one, namely, to ensure that a penalty (which might otherwise be fully justified) does not impose an excessive burden on an undertaking relative to the size of the business and its ability to pay.

85. The CMA submitted that Parliament obviously intended that the CMA would take into account the seriousness of the infringement and the need for general and specific deterrence and said so in section 36(7A) of CA 1998. The way in which those matters were to be dealt with was to be the subject of guidance prepared by the CMA, the guidance was to be the subject of consultation and then approved by the Secretary of State. Accordingly, it was open to the CMA to prepare, and it was open to the Secretary of State to approve, guidance such as the current CMA Penalty Guidance, which gave guidance as to the approach to be adopted when considering the seriousness of the infringement and the need for general and specific deterrence and any other matters which were relevant to the appropriate penalty.

86. The CMA submitted that Parliament was right to entrust guidance as to the appropriate level of penalty to the CMA. The CMA is a specialist regulator and the imposition of penalties is required as part of its process of regulation. The issues as to the appropriate level of penalty can be complex ones and they do not lend themselves to simple statutory formulations. In any case, the obvious purpose of section 38 of CA 1998 was to leave the appropriate level of penalty to the CMA, who would prepare guidance, subject to consultation and approval by the Secretary of State.

87. The CMA submitted that, given the great variety of infringements and infringers which may be relevant, the circumstances relevant to penalty are better reflected in the way set out in the Penalty Guidance rather than by the imposition of a maximum by reference to 10% of turnover in a year, which falls after the year or years in which the infringement occurred. Nonetheless, the maximum penalty by reference to 10% of turnover must be respected but it will operate as a cap in those cases where the penalty, which is otherwise appropriate, exceeds that cap.

88. The CMA also pointed out that when considering the seriousness of the infringement, it was relevant to look at the turnover of the infringer in the relevant market. However, the maximum of 10% of turnover pursuant to section 36(8) of CA 1998 used the global turnover which might provide no indication of the seriousness of the infringement in the relevant market. That showed that the cap was not there to specify the maximum penalty to be applied only in the most serious infringement cases.

89. Even in the absence of any persuasive authority, we would accept the submissions of the CMA as set out above. It is clear to us from sections 36 and 38 of CA 1998 that Parliament intended that questions such as the seriousness of the case and deterrence and all other relevant circumstances were to be the subject of guidance prepared by the CMA and, after consultation, approved by the Secretary of State. It is also clear that when Parliament enacted section 36(8) it was not seeking to express its view of the penalty which would be appropriate for the most serious case of infringement of the Chapter 1 prohibition or the Chapter II prohibition or Article 101 or Article 102 (section 36 applies to all of these infringements).

90. Our conclusion is in accordance with the way in which sections 36 and 38 have been understood by previous Tribunals and by the Court of Appeal, although we acknowledge that the submission now put forward by FPM was not made in any previous case. Nonetheless, it is relevant to refer to what was said by Roth J in *Eden Brown Ltd v Office of Fair Trading* [2011] CAT 8 ("*Eden Brown*") at [57], as follows:

> "Step 1 [of the Penalty Guidance] is designed, as discussed above, to establish the scale of activity by the undertaking in the relevant market: that is the sense in which the turnover is "relevant". By contrast, the penalty cap imposed by section 36(8) of the Act is determined by reference to the entirety of the undertaking's business, in all product and geographic markets, and thus prevents a penalty for violation of competition law from imposing an excessive burden on the undertaking. We note that Article 23(2) of Regulation 1/2003 similarly constrains the maximum fine that may be imposed by the Commission."

91. Part of the background to CA 1998 was the similar provisions already in force in the EU. At the time of the enactment of CA 1998, the relevant provisions in the EU were Council Regulation 1962/17/EEC, Article 15(2), and the 1998 Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of that Council Regulation. The 1998 Commission Guidelines adopted a number of rules for the purpose of determining the amount of a fine for an infringement of the relevant competition rules. In order to determine the basic amount, it was necessary to assess the gravity and duration of the infringement. Then one assessed aggravating and mitigating circumstances. The Commission Guidelines then stated that the final amount calculated according to the earlier rules was not to exceed 10% of the worldwide turnover of the undertaking in an accounting year which would normally be the year preceding the year in which the infringement decision was made.

92. It is clear from Article 15(2) of Council Regulation 1962/17/EEC, as interpreted and applied in the 1998 Commission Guidelines, that the figure of 10% of worldwide turnover in the year preceding the year of the decision was not taken as specifying the maximum penalty for the most serious offence but instead operated as a cap on the amount of the penalty which, having regard to the seriousness of the infringement and aggravating and mitigating circumstances, would otherwise be appropriate. Section 36(8) of CA 1998 was obviously

modelled on Article 15(2) of Council Regulation 1962/17/EEC. That Regulation and the 1998 Commission Guidelines are admissible as an aid to the interpretation of section 36(8) of CA 1998 and assist us in reaching the conclusion expressed above as to the purpose and effect of that subsection.

93. After the enactment of CA 1998, the EC adopted the Modernisation Regulation and Article 23(2) of this Regulation repeated the provision that the fine for an infringement of Articles 81 and 82 of the European Treaty was not to exceed 10% of its total turnover in the year preceding the infringement decision. In 2006, the European Commission published Guidelines as to the implementation of Article 23(2) of the Modernisation Regulation. It is clear from Article 23(2), as interpreted and applied in the 2006 Commission Guidelines, that the figure of 10% of total turnover in the year preceding the year of the decision was not taken as specifying the maximum penalty for the most serious offence but instead operated as a cap on the amount of the penalty.

94. We were referred to four decisions which have considered the operation of Article 15(2) of Council Regulation 1962/17/EEC and Article 23(2) of the Modernisation Regulation. The cases are Joined Cases C-189/02P *Dansk Rørindustri A/S v Commission* [2005] 5 CMLR 17 at [277]-[283], Case C-76/06P *Britannia Alloys & Chemicals Ltd v Commission* [2007] 5 CMLR 3 ("*Britannia Alloys*") at [22]-[24], Case T-211/08 *Putters International NV v Commission* at [75] and Case C-101/15P *Pilkington Group Ltd v Commission* [2016] 5 CMLR 17 at [36]-[37]. Those cases make clear that the provision in Article 15(2) of Council Regulation 1962/17/EEC and in Article 23(2) of the Modernisation Regulation, which limits the fine to 10% of the total turnover of the undertaking in the year preceding the infringement decision, exists for the purpose of avoiding the imposition of an excessive burden on the undertaking and does not exist to specify the maximum penalty to be reserved for the most serious cases only.

95. At the lowest, the reasoning and the decisions in these cases amount to persuasive authority in support of our conclusion as to section 36(8) of CA 1998 and the Turnover for Penalties Order.

96. In addition, the CMA submitted that, by reason of section 60 of CA 1998, we are obliged to apply the decisions in those four cases and to reach the conclusion for which it contended.

97. Section 60 of CA 1998, so far as relevant, provides:

> "**60.— Principles to be applied in determining questions.**
>
> (1) The purposes of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union.
>
> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in EU law.
>
> (3) …
>
> (4) Subsections (2) and (3) also apply to—
>
> (a) the CMA; and
>
> (b) any person acting on behalf of the CMA, in connection with any matter arising under this Part.
>
> (5) In subsections (2) and (3), "court" means any court or tribunal.
>
> (6) In subsections (2)(b) and (3), "decision" includes a decision as to—
>
> (a) the interpretation of any provision of EU law;
>
> (b) the civil liability of an undertaking for harm caused by its infringement of EU law."

98. We consider that section 60 of CA 1998 should be applied in this case in the following way. The question as to the meaning and effect of section 36(8) of CA 1998 is a question arising under Part I of CA 1998 in relation to competition within the United Kingdom (assuming that this wording taken from section 60(1) of CA 1998 lays down a separate criterion from that which is stated in

section 60(2)). For the purposes of section 60(2), the Tribunal is being asked to determine a question arising under Part I of CA 1998. Further, the question which the Tribunal is asked to determine is a corresponding question to the question in EU law which the European Court was asked to determine in the four cases referred to above. Accordingly, section 60 requires us to act with a view to securing that there is no inconsistency between the decision we reach and the decision reached in those four cases, so far as that is compatible with the provisions of Part I of CA 1998. We consider that to avoid inconsistency we ought to reach the decision, which we would in any event independently arrive at, and that decision is compatible with the provisions of Part I of CA 1998.

99. FPM submitted that this approach involved a misapplication of section 60 of CA 1998. The parties cited to us earlier cases on section 60, namely, *Pernod Ricard SA v Office of Fair Trading* [2004] CAT 10, *Quarmby Construction Company Limited v Office of Fair Trading* [2011] CAT 11, *Gibson v Pride Mobility Products Ltd* [2017] CAT 9, [2017] 4 CMLR 33, *UKRS Training Limited v NSAR Limited* [2017] CAT 14 and *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96. We do not derive any real assistance from those cases for present purposes and, in particular, we do not see anything in them which should lead us to apply section 60 of CA 1998 in a way different from that which we have explained above.

100. We entirely accept that the United Kingdom was not obliged to approach the question of penalties for the infringement of EU and United Kingdom competition law in the same way as the EU approaches the questions of fines for the infringement of EU competition law. But where section 36(8) of CA 1998 was plainly modelled on the corresponding provisions of Council Regulation 1962/17/EEC, now re-enacted in Article 23(2) of the Modernisation Regulation, we consider that this is a case where section 60 of CA 1998 applies in the way we have earlier described.

101. We also note that our decision and our reasons are in line with the decision and the reasons in the Competition Tribunal of the Hong Kong Special Administrative Region in *Competition Commission v W. Hing Construction Company Ltd* [2020] HKCT 1 at [60]-[67].

102. FPM referred us to decisions made by courts in Germany, Austria and Spain. The decisions were, respectively, *Re Grey Cement Cartel*, 26 February 2013, Case No KRB 20/12, *Re Federal Competition Authority's Application* 8 October 2015, Case Nos. 16 Ok 2/15b and 16 Ok 8/15l and *BCN Aduanas y Transportes v Attorney General* 29 January 2015, Appeal No. 2872/2013. In these cases, the courts recognised that the reference, in Article 23(2) of the Modernisation Regulation, to 10% of total turnover operated as a cap on the fine which was otherwise appropriate. They also recognised that member states were free to determine their own laws as to fines for infringements of competition law. They held that although their national laws also referred to the fine not exceeding 10% of total turnover, the constitutional position in those countries required the courts to treat the amount of 10% of total turnover as a maximum fine which would be appropriate for the most serious cases. Whilst we note the approach taken in those cases, that approach does not require us to construe section 36(8) of CA 1998 in a way which is different from that which we have set out above.

103. Both FPM and the CMA submitted that we would derive assistance from certain Parliamentary materials. Having considered those materials, without prejudice to the question of whether they were admissible as an aid to interpretation of section 36(8) of CA 1998, we can say that we did not derive any assistance from them.

104. It follows from our interpretation of sections 36 and 38 of CA 1998 that the CMA Penalty Guidance was not *ultra vires* but, instead, was valid and effective. We therefore reject the second Ground of Appeal. It is not necessary for us to consider what the position would have been if we had upheld that Ground of Appeal.

105. Having concluded that the CMA Penalty Guidance is valid, we are required, pursuant to section 38(8) of CA 1998, to have regard to that guidance when considering this appeal. As the ultimate question for us is whether the penalty required by the CMA was appropriate and, if not, what penalty would be appropriate, we consider that we should address those questions by addressing

the steps in the Penalty Guidance. As we address each step, we will deal with whatever Grounds of Appeal are put forward which are relevant to that step.

J. STEP 1

(1) The Penalty Guidance – Step 1

106. It is necessary to set out Step 1 from the Penalty Guidance. Although we have considered the footnotes in the Penalty Guidance dealing with Step 1, it is not necessary to set them out in this decision.

107. Step 1 provides:

> "**Step 1 – starting point**
>
> 2.3 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to:
>
> • the seriousness of the infringement and the need for general deterrence; and
>
> • the relevant turnover of the undertaking.
>
> The starting point will be calculated as described below.
>
> **Assessment of seriousness – application of percentage starting point to relevant turnover**
>
> 2.4 The CMA will apply a starting point of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers). In applying the starting point, the CMA will also reflect the need to deter the infringing undertaking and other undertakings generally from engaging in that type of infringement in the future.
>
> 2.5 This is a case specific assessment of:
>
> • first, how likely it is for the type of infringement at issue to, by its nature, harm competition;
>
> • second, the extent and/or likelihood of harm to competition in the specific relevant circumstances of the individual case (as discussed in paragraph 2.8 below); and
>
> • finally, whether the starting point is sufficient for the purpose of general deterrence.
>
> 2.6 At the first stage, the CMA will consider the likelihood that the type of infringement at issue will, by its nature, cause harm to competition. There is no pre-set 'tariff' of starting points for different types of infringement given

the range of conduct that will be encountered in different cases and to which the CMA must have regard in setting an appropriate penalty for the case in question. However, in making its assessment, the CMA will have reference to the following principles:

- The CMA will generally use a starting point between 21 and 30% of relevant turnover for the most serious types of infringement, that is, those which the CMA considers are most likely by their very nature to harm competition. In relation to infringements of the Chapter I prohibition and/or Article 101, this includes cartel activities, such as price fixing and market sharing, and other, non-cartel object infringements which are inherently likely to cause significant harm to competition. In relation to infringements of the Chapter II prohibition and/or Article 102, this will typically include conduct which is inherently likely to have a particularly serious exploitative or exclusionary effect, such as excessive and predatory pricing.

- In relation to infringements of the Chapter I prohibition and/or Article 101, a starting point between 10 and 20% is more likely to be appropriate for certain, less serious object infringements, and for infringements by effect. A 10 to 20% starting point is also more likely to be appropriate in relation to infringements of the Chapter II prohibition and/or Article 102 involving conduct which is less likely to be inherently harmful.

2.7 The above principles do not prevent the CMA from applying a starting point of below 10%. However the CMA considers that this is likely to occur as a result of the CMA having made a downwards adjustment to reflect the particular circumstances of the case, as described below.

2.8 At the second stage, the CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately to consumers. When making its case specific assessment, the CMA will consider the relevant circumstances of the case. These may include, for example:

- the nature of the product including the nature and extent of demand for that product;

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

- the market coverage of the infringement;

- the actual or potential effect of the infringement on competitors and third parties; and

- the actual or potential harm caused to consumers whether directly or indirectly.

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

2.10 In the case of infringements involving more than one undertaking, the assessment outlined above will be consistent for each undertaking. The starting point is intended to reflect the seriousness of the infringement at issue, rather than the particular circumstances of each undertaking's unlawful conduct (which are taken into account at other steps). As a result, for infringements involving more than one undertaking, the CMA expects to adopt the same percentage starting point for each undertaking to the infringement.

Determination of relevant turnover

2.11 The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year. In this context, an undertaking's last business year is the financial year preceding the date when the infringement ended.

2.12 Generally, the CMA will base relevant turnover on figures from an undertaking's audited accounts. However, in exceptional circumstances it may be appropriate to use a different figure as reflecting the true scale of an undertaking's activities in the relevant market.

2.13 The CMA recognises that such an exceptional approach may be appropriate where, in particular, the remuneration for services supplied is based on commission fees. When deciding whether it is appropriate to depart from its general rule of using turnover from audited accounts in this way, the CMA will consider a number of factors, in particular: (i) whether the remuneration for the services in question is decided by the seller of the services or the client, and (ii) whether the undertaking is purchasing inputs in order to supply a fresh product incorporating those inputs to its client. Other factors such as whether a person is taking ownership of goods or services and whether the person bears risks resulting from the operation of the business in question may also be relevant. In addition, the CMA notes that specific situations for the calculation of 'turnover' may arise in the areas of credit, financial services and insurance, as is recognised in the statutory instrument which relates to the determination of the maximum penalty that the CMA may impose.

2.14 In cases concerning infringements of Article 101 and/or Article 102, the CMA may, in determining the starting point, take into account effects in another member state of the agreement or conduct concerned. Where it does so, the CMA will take into account effects in another member state through its assessment of relevant turnover. The CMA may consider turnover generated in another member state if the relevant geographic market is wider than the UK and the express consent of the relevant member state or NCA, as appropriate, is given in each particular case.

2.15 As stated at paragraph 2.4 above, the starting point may not in any event exceed 30% of the relevant turnover of the undertaking."

(2) The Grounds of Appeal in relation to Step 1

108. Grounds of Appeal 1, 3, 4 and 7 are all relevant to the matters arising in relation to Step 1. We can summarise these various Grounds of Appeal as raising the following main points:

(1) the CMA was wrong to find that FPM had implemented the cartel;

(2) the CMA was wrong to find that the implementation of the cartel had an effect on the relevant market;

(3) the CMA was wrong to regard implementation and effects as irrelevant to penalty;

(4) the CMA failed to reflect its finding that general deterrence in the construction industry was not required;

(5) the CMA was wrong to select the maximum starting point of 30% of relevant turnover;

(6) the CMA should not have used the turnover for the financial year preceding the end of the infringement but should have taken an average of the turnover for the last three financial years preceding the end of the infringement;

(3) The possible relevance of implementation and effects

109. Before turning to the Decision of the CMA as regards the implementation of the cartel and the effects of the cartel, we will make some general remarks about what is meant by the implementation of a cartel and explain how we understand the implementation of a cartel and the effects of a cartel might be relevant to the amount of the penalty which ought to be paid.

110. This is a case of an infringement taking the form of an agreement or concerted practice which has the object of restricting competition. (In the following discussion, for simplicity, we will refer to "an agreement" rather than repeating the phrase "agreement or concerted practice".) In this type of case, the infringement occurs even without the agreement being implemented by any of the cartelists. Further, the infringement occurs even if the agreement in practice does not have an adverse effect on competition.

111. The CMA is entitled to take the view, on the facts of a particular case, that an infringement by object is a serious infringement, even one of the most serious infringements, even in a case where the agreement has not been implemented or has had no adverse effect on competition.

112. It is necessary to consider the different forms that implementation of an agreement by object can take. Exchanging information can be a significant implementation of the agreement. There is a presumption that the behaviour of a cartelist is influenced by the receipt of information from the other cartelists. This presumption entitles the CMA to find that the behaviour of a cartelist is different as a result of the exchange of information and, in that sense, a cartelist is presumed to implement the agreement in some way or other.

113. In this case there were three cartelists. Even if one cartelist does not implement the agreement, that cartelist is liable for the consequences of implementation by one or both of the other cartelists.

114. When fixing a penalty for an infringement consisting of a restriction by object, the CMA is entitled to have regard to the likelihood of harm resulting from the infringement.

115. The CMA is entitled to fix a penalty for such an infringement without knowing whether the restriction did or did not have an adverse effect on competition. In particular, if the CMA does not know this, it is not under an obligation in a restriction by object case to investigate whether there was also a restriction by effects. This has been made clear in previous decisions of the Tribunal: see *Sepia Logistics Limited v Office of Fair Trading* [2007] CAT 13 at [83]-[86], *Eden* at [80] and *Barrett Estate Services Limited v Office of Fair Trading* [2011] CAT 9 at [88]. There is good reason for this being the position. A restriction by object is an infringement irrespective of the effects of the infringement. An inquiry into the effects of a restriction by object may involve very considerable investigation and evidence gathering and be very time consuming. Such an inquiry may be considered to be unnecessary where there is an infringement by object. At the stage of fixing the penalty, the CMA is entitled to take the view in an appropriate case that the infringement by means of a restriction by object

is a very serious infringement and fix the penalty accordingly. It can choose not to investigate whether the effects of the infringement were such that it can regard the infringement as even more serious than it already considers the infringement to be.

116. If the CMA makes a specific finding that the infringement did have an adverse effect on competition, then the CMA must have evidence on which it can make that finding. If the CMA does make such a finding, supported by evidence, then it can take that finding into account when fixing the penalty. The existence of an adverse effect on competition might persuade the CMA to fix a penalty which is higher than the penalty it would have fixed, absent that finding. But such a finding will not inevitably result in a higher penalty as compared with a serious case of a restriction by object where the CMA has not made any finding, one way or the other, as to the effects of the cartel. That may be because the CMA might form the view that a case of a restriction by object is one of the most serious cases, which deserves a penalty at the top of the range, even where it does not know whether the restriction by object had an adverse effect on competition.

117. If the CMA is proposing to fix a penalty without knowing whether the restriction by object had an adverse effect on competition and one or more of the cartelists gives the CMA evidence that the cartel did not have an adverse effect on competition, the CMA ought to consider the appropriate response to that evidence. If the evidence is clear, then the CMA ought to make a finding in accordance with that evidence. If the evidence is not clear and, in particular, would require considerable investigation, then the CMA may take the view that it can fix a penalty on the basis that it does not know whether the cartel did or did not have an adverse effect on competition. The CMA can take the view that in a case of an infringement by means of a restriction by object it does not need to investigate whether there was also an infringement by reason of a restriction by effects.

118. We consider that the Penalty Guidance is consistent with the above statements of principle. We draw attention in particular to those parts of the Penalty Guidance in relation to Step 1 which refer to "the extent and likelihood of actual

or potential harm to competition and consumers" (see paragraph 2.4) and the similar references to the likelihood of harm in paragraphs 2.5, 2.6 and 2.8.

(4) What did the CMA decide as to implementation?

119. For the purposes of this appeal against penalty, it is relevant to begin by considering the reasons which the CMA gave for its Decision as to the appropriate penalty and in particular the reasons which it gave for its assessment of the seriousness of the infringement in this case. It was in the course of assessing the seriousness of the infringement, for the purposes of fixing the penalty, that the CMA indicated the approach which it adopted to the question of implementation.

120. The CMA considered the seriousness of the infringement in this case at paragraphs 6.25-6.34 of the Decision as follows (we include two relevant footnotes but we have not used the original numbering of those footnotes):

> "Seriousness
>
> 6.25 The CMA will apply a starting point of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers). In applying the starting point, the CMA will also reflect the need to deter the infringing undertaking and other undertakings generally from engaging in that type of infringement in the future.
>
> 6.26 In making this case-specific assessment, the CMA will first take into account how likely it is for the type of infringement at issue to, by its nature, harm competition. As set out in the Penalty Guidance, the CMA will generally use a starting point between 21% and 30% of relevant turnover for the most serious types of infringement. In relation to infringements of the Chapter I prohibition and/or Article 101, this includes cartel activities, such as price-fixing and market sharing and other, non-cartel object infringements which are inherently likely to cause significant harm to competition. A starting point between 10% and 20% is more likely to be appropriate for certain, less serious object infringements, and for infringements by effect.
>
> 6.27 At the second stage, the CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of the specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately to consumers.
>
> 6.28 Finally, the CMA will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence.

6.29 The CMA considers that the maximum starting point of 30% should be applied in this case to reflect adequately the seriousness of the Infringement and the need for deterrence.

6.30 In terms of the likelihood that this type of infringement will cause harm to competition, the CMA notes that the Infringement includes the most serious type of conduct: price fixing and/or coordination and market sharing.[1] The three tenets of the arrangement show a careful and sophisticated series of mechanisms for supressing competition across the whole of the market for the Products, which were established and operated with the express intention of increasing prices and maintaining the parties' respective market shares (see, for example, paragraphs 4.55, 4.59, 4.74, 4.148, 4.187, 4.269, 4.292, 4.294 and 4.317). It is well-established that such conduct amounts to the most serious type of infringement, which is very likely, by its nature, to cause harm to competition. Thus, the CMA considers that it is appropriate to use a starting point at the top of the 21 to 30% range.

6.31 As regards the extent and likelihood of harm to competition in the specific circumstances of the case, the CMA considers that there is a high likelihood of harm to competition (and ultimately to consumers), which also supports a starting point at the top of the 21 to 30% range. The CMA notes the following relevant circumstances in particular:

(a) the nature of the product: the Products are used in large infrastructure projects including drainage and water management, roads and railways, as well as in other construction projects of varying sizes. Although the products may form a small proportion of the overall cost of any construction project, they are nevertheless high value items. Typical customers include civil engineering companies, construction companies and suppliers to the construction industry, utilities providers, as well as (for publicly-funded projects) local and national government. End customers include house-buyers, construction companies and tax-payers (through their contribution to publicly-funded projects);

(b) the structure of the market: throughout the Relevant Period, SB, CPM and FPM were the leading suppliers of the Products in Great Britain. From 2006 to 2010 they accounted for over half of the relevant market, and from 2010, they accounted for more than 90% of that market (see paragraphs 2.26 and 5.134(b));

(c) the Infringement was carried out across the whole of Great Britain, a significant share of the UK market (see paragraph 5.134(a)).

6.32 As the Infringement is an object infringement, the CMA is not required to make a formal assessment of the actual harm caused for the purposes of

[1] This conduct was supported by the regular exchange of information. FPM has made representations (referring also to the representations set out in its response to the CMA's Statement of Objections (URN S1363)) that the CMA's penalty rests on a flawed characterisation of the arrangement as hard core price fixing and market sharing, noting that FPM did not implement the arrangement and there was no effect on prices, such that there was no 'agreement' or 'concerted practice' in place; and that the CMA has mischaracterised FPM's role in, and view of, the meetings: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraphs 1.3, 2.1 to 2.3, URN S1446. For the reasons set out in Chapters 4 and 5 of this Decision, the CMA is not persuaded by these arguments, and considers that the Infringement amounts to price fixing and/or price coordination and market sharing, the most serious type of infringing conduct. See also footnote [2 below].

establishing an infringement. Nevertheless, the CMA considers that the potential for harm to competition is high in circumstances where competitors with significant market share discuss pricing, allocate customers to maintain market shares and exchange competitively sensitive information.[2]

6.33 The CMA is also of the view that the maximum starting point of 30% is necessary for the purposes of general deterrence. The Infringement concerns the most serious types of infringing activity. A lower starting point would risk undermining the clear message for other businesses that they should not engage in similar conduct.

6.34 Applying 30% to:

(a) SBC's relevant turnover of £13,374,030, results in a penalty of £4,012,209 for SBC;

(b) CPM's relevant turnover of £24,885,109, results in a penalty of £7,465,533 for CPM;

(c) FPM's relevant turnover of £24,450,600, results in a penalty of £7,335,180 for FPM,

at step 1."

121. In these passages, the CMA referred to the question of implementation in footnotes 1 and 2 as set out above. In footnote 1, the CMA referred to the conduct of the cartelists as involving the regular exchange of information. The CMA also referred to representations by FPM that it had not implemented the cartel and that there was no effect on prices as showing that there was no

[2] FPM has made representations (referring also to the representations made in its response to the CMA's Statement of Objections (URN S1363)) that the facts of this case make it appropriate for the starting point for any penalty to be adjusted downwards from 30%, noting in particular that: there is no evidence that prices for FPM's Products increased as a result of any arrangement; FPM did not implement the spot market minimum price list tenet or term deal tenet; and that the CMA has mischaracterised the nature of the discussions between SB, CPM and FPM, as well as FPM's role in, and view of, such meetings, which '*at worst, amounted to a form of information sharing rather than hard core price fixing or market sharing*': FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraph 2.4, URN S1446. In its supplementary representations on the Draft Penalty Statement, FPM repeated its representations as regards the non-implementation of the arrangement and the lack of any effect on the market, further noting that CPM had made similar representations during an earlier period of the investigation, and that SBC's accounts for the year ending 31 December 2017 include '*a provision of £39,000 for 'customer claims' showing that SBC also does not appear to consider that the alleged arrangement had had any effect on the market (such that customers could bring follow on damages claims)*': FPM's representations on the CMA's Draft Penalty Statement, dated 18 October 2019, paragraphs 2.4 and 2.5, URN S1628. The CMA is not persuaded by these arguments, and considers that the Infringement amounts to price fixing and/or price coordination and market sharing (the most serious type of infringing conduct which is very likely by its nature to cause harm to competition), involving a comprehensive arrangement across the whole of the market for the Products, which was intended to increase prices and maintain market shares. The CMA has also considered and responded to both FPM and CPM's representations as regards non-implementation and effects in the market in Chapters 4 and 5. Following the CMA's consideration of, and response to, CPM's representations during an earlier stage of the investigation, CPM admitted that it had infringed the Chapter I prohibition and Article 101, by way of the arrangement as described in this Decision, under the CMA's settlement process.

agreement or concerted practice in place. In footnote 1, the CMA repeated its rejection of the submission that there had not been any agreement or concerted practice in place.

122. Footnote 2 also dealt with the question of implementation. Footnote 2 refers to FPM's representations that prices had not increased as the result of any arrangement and that FPM had not implemented the spot market minimum price list tenet or the term deal tenet and that FPM's role had been at worst a form of information sharing. The CMA did not accept those representations and held that the infringement amounted to price fixing and/or price coordination and market sharing which was intended to increase prices and maintain market shares. The CMA also stated that it had responded to FPM's case on non-implementation in Chapters 4 and 5 of its Decision.

123. In footnotes 1 and 2, dealing with the possible relevance of implementation for the purpose of assessing the seriousness of the infringement, the CMA did not in terms reject FPM's submission that it had not implemented the spot market tenet or the term deal tenet. Instead, the CMA rejected the contention that such non-implementation by FPM showed that there had not been an agreement or concerted practice to restrict competition with the intention of increasing prices and maintaining market share.

124. Further, in relation to implementation, the CMA expressed its conclusions as to implementation in Chapter 5 of the Decision, in particular, at paragraphs 5.23, 5.24-5.27, 5.28-5.32, 5.39-5.40, 5.41-5.45 and 5.46-5.57. The type of implementation which the CMA found to have occurred was the participation in the meetings, the reaching of agreements, the sharing of information together with the presumption that such information was taken into account, which presumption was not rebutted by FPM.

125. Chapter 4 of the Decision also contained findings by the CMA, which may not have been central to the CMA's reasoning in Chapter 6, or even its reasoning in Chapter 5, but which do refer to implementation of the cartel by FPM. Paragraphs 4.124-126 described the evidence from FPM witnesses as to FPM's conduct of price negotiations. Paragraphs 4.179-4.202 referred to specific

examples of the operation of the no poaching agreement. Paragraphs 4.179-4.183 referred to the evidence of Mr David Williams, to which we will refer below. Paragraphs 4.184-4.202 referred to statements made in the meetings attended by representatives of FPM, which meetings were recorded and transcribed by the CMA. Paragraphs 4.213-4.239 referred to specific examples of the operation of the shared term deals. The findings in those paragraphs were based on the documents available to the CMA. At paragraphs 4.262-4.272 referred to the operation of the arrangement as to stock deals. The findings in those paragraphs were based on FPM's documents and the recordings of meetings attended by representatives of FPM. Paragraphs 4.285-4.294 referred to the operation of the arrangement as to customer allocation. The findings in those paragraphs were largely based on the documents and the recordings of the meetings. Finally, paragraphs 4.305-4.326 referred to the exchange of market share information. The findings in those paragraphs were based on the documents and the recordings of meetings.

126. As already stated, at paragraphs 4.179-4.183 of the Decision, the CMA referred to the evidence of David Williams. The CMA called David Williams to give oral evidence at the hearing of this appeal and he was cross-examined by Mr O'Donoghue. The central evidence given by David Williams was:

(1) he had been told by [Senior FPM Employee3] and Eoin McCann that there were certain customers that FPM could not deal with because FPM should not seek to do business with customers of CPM and SB; this evidence was contained in a witness statement dated 24 January 2016 which David Williams had provided to the CMA and was repeated by David Williams in his oral evidence;

(2) he had been told by two named members of the sales team at FPM that they would not touch a particular customer because it was a CPM or a SB customer; this evidence was also in the witness statement referred to above; in his oral evidence, David Williams said that he was told by the sales team that they could not approach a CPM or SB customer.

127. Mr O'Donoghue invited us to reject the evidence of David Williams. He submitted that the evidence was false. He referred to the fact that David Williams had been an employee of FPM whose employment had been terminated by FPM. He pointed out that immediately preceding the termination of his employment he had made a false statement to FPM in relation to his expenses and that FPM became aware of that. It is also clear that David Williams was hostile to some of the representatives of FPM. Further, other parts of his witness statement contained matters which were speculation or assumption on his part.

128. We are cautious about the evidence of David Williams. The points made by Mr O'Donoghue are proper comments on his evidence. If we had evidence from FPM which contradicted that of David Williams, we might have reached the conclusion that we could not prefer his evidence to reliable evidence to the contrary. However, FPM did not call any evidence to contradict David Williams and it is in those circumstances that we have to decide whether we accept his evidence or reject it.

129. We do accept the evidence of David Williams as summarised above. He gave the evidence clearly. He gave straightforward answers to the questions put to him in cross-examination. His evidence is inherently credible given the other evidence we have as to the cartel and its operation. He named four individuals at FPM who told him there was a no-poaching agreement. FPM has not called any of those individuals and has not put forward any explanation as to why they have not been called. We are not persuaded that the evidence was fabricated on account of the termination of his employment or his bad relationship with some of the representatives of FPM.

(5) The appeal in relation to implementation

130. FPM's case is that it did not implement the cartel in various respects. Before referring further to those submissions, we consider that they do not really address the way in which the CMA dealt with the subject of implementation in Chapter 5 of its Decision and, when fixing the penalty, the way in which it considered the seriousness of the infringement in paragraphs 6.25-6.34 of

Chapter 6 of its Decision (including the references to FPM's representations in relation to implementation in footnotes 1 and 2 to those paragraphs, as set out above).

131. When considering the seriousness of the infringement, the CMA regarded the infringement as a very serious case of a restriction by object. The CMA had also explained in Chapter 5, in particular, at paragraphs 5.33-5.57 what it considered was the relevant implementation of the cartel in this case. Footnotes 1 and 2 referred to above did not in terms reject FPM's evidence as to the respects in which it did not comply with the agreement it had made but instead held that that evidence did not affect the CMA's finding that the cartel consisted of a restriction by object. Further, we consider that evidence from FPM that it cheated on the cartel would not have reduced the seriousness of the infringement in the eyes of the CMA. Further, FPM was liable for the consequences of any implementation of the cartel by SB and CPM.

132. In any case, the question for the Tribunal is whether the penalty imposed by the CMA was appropriate. If we separately consider whether the CMA correctly assessed the seriousness of the infringement, we can base ourselves on the matters identified by the CMA in Chapter 6 of the Decision in relation to the seriousness of the infringement and on the CMA's explanation in Chapter 5 of the Decision (with which we agree) as to the way in which FPM can be considered to have implemented the cartel. Further, in so far as FPM cheated on the cartel, we would not regard that as a matter which would reduce our assessment of the seriousness of the infringement.

133. In the light of our conclusions as to the relevance of implementation by FPM in this case, we can deal succinctly with FPM's submissions that it did not implement the cartel in all respects.

134. FPM made detailed references in its Notice of Appeal and in its Skeleton Argument to the way in which, in the Statement of Objections, the CMA had dealt with implementation by all the cartelists. FPM carried out a detailed comparison of the Statement of Objections and the Decision in relation to the discussion which concerned FPM. It is clear that the way in which

implementation by FPM is dealt with in the Statement of Objections is in some respects different, and in some respects the same, as the way in which that subject is dealt with in the Decision. We do not regard these differences as being material to anything which we have to decide. At one time, FPM suggested that the Decision did not give adequate reasons for the CMA's assessment of the seriousness of the infringement but that was not persisted in at the hearing of the appeal. In any case, that suggestion was unfounded and, further, the suggestion was not assisted by a comparison of the Statement of Objections with the Decision.

135. FPM identified a number of paragraphs in Chapter 4 of the Decision which described the operation of the cartel. FPM says that those paragraphs, properly understood, amounted to findings by the CMA that FPM had implemented the cartel. FPM then says that, on this appeal, the CMA must establish to the satisfaction of the Tribunal that those findings are supported by evidence and if the CMA does not do so, then the Tribunal should make different findings and, in particular, make the finding that FPM did not implement the cartel in all respects. In particular, FPM refers to findings in paragraphs 4.109, 4.124-4.126, 4.143-145, 4.155, 4.167, 4.185, 4.187, 4.204 and 4.238. Generally speaking, the findings made in those paragraphs referred to the material on which the finding was based. That material consisted of documents or the statements of representatives of FPM. From time to time, the findings also referred to statements made by representatives of SB and CPM. The CMA did not call the representatives of SB and CPM to give evidence at the hearing of this appeal and it seems to have been accepted that if we were to make our own findings on these matters, we should leave out of account the statements of the representatives of SB and CPM to which the CMA had referred. Leaving out of account those statements would not necessarily undermine the finding of the CMA in a case where the finding was based on other material in addition.

136. FPM's submissions about certain paragraphs in Chapter 4 of the Decision were made in writing and were not developed orally at the hearing. With some exceptions, we were not taken to the material which would be admissible if we were to review the findings of the CMA and make our own findings. If,

following the hearing, the Tribunal was to carry out the exercise envisaged by FPM, the time required would be very substantial.

137. Having reflected on the course which the Tribunal should adopt in relation to FPM's submissions as to certain paragraphs in Chapter 4 of the Decision, we have concluded that it would not be an appropriate use of the time of the Tribunal to carry out the exercise which FPM would wish us to carry out because the outcome of that exercise would not affect our decision in this case.

138. As explained earlier, the findings in Chapter 4 were made by the CMA at the stage of the Decision where it was addressing whether a cartel involving the three undertakings existed. The CMA used the findings in Chapter 4 and concluded that such a cartel did indeed exist. There is now no challenge to that conclusion. This appeal is about the amount of the penalty and the topic which is at present being considered is the seriousness of the infringement, which was a restriction by object. We have already explained what the CMA regarded as important when assessing the seriousness of the infringement. As to implementation, the CMA made specific findings in Chapter 5 of the Decision and there is no appeal against those findings.

139. We do not overlook the fact that Chapter 6 of the Decision does refer to specific paragraphs of Chapter 4 of the Decision. Paragraph 6.16 refers to several paragraphs in Chapter 4. However, those references are for the purpose of explaining the CMA's finding that FPM committed the infringement intentionally, alternatively negligently. There is no appeal against that finding. Some of those paragraphs in Chapter 4 are also referred to in paragraph 6.30 but they are there referred to for the purpose of explaining the finding that the cartel was established and operated with the express intention of increasing prices and maintaining market shares. There is also a non-specific reference to Chapters 4 and 5 in footnote 2 referred to above. Chapter 4 dealt with whether an agreement or concerted practice existed and Chapter 5 dealt with implementation and effects in the way we have described above.

140. For all of the reasons given above, FPM's submissions as to certain paragraphs in Chapter 4 of the Decision will not be relevant to our assessment as to whether

the penalty fixed by the CMA was appropriate nor, in particular, as to the seriousness of the infringement. We will base our assessment on the facts and matters deployed in Chapter 6 of the Decision and, to the extent they are relevant to penalty, in Chapter 5 of the Decision. In view of the fact that we heard evidence from David Williams and have made findings in accordance with that evidence, it is also open to us to take account of our finding that FPM did implement the cartel in relation to the no-poaching agreement.

(6) What did the CMA find as to the effects of the cartel?

141. We have already stated that the part of the Decision, which is of central relevance in this appeal against penalty, is Chapter 6 which deals with the fixing of the penalty and, in particular, paragraphs 6.25-6.34, which we have set out above, which deal with the CMA's assessment of the seriousness of the infringement.

142. In those paragraphs, the CMA uses the phrase "the extent and likelihood of actual or potential harm" to reflect the language of the Penalty Guidance; see paragraphs 6.25 and 6.27 of the Decision. In its assessment, the CMA addressed the question of the likelihood of harm rather than the existence of actual harm: see paragraphs 6.26 and 6.30. The CMA's ultimate finding in this respect is at paragraph 6.31 where it held that there was "a high likelihood of harm to competition (and ultimately to consumers)". At paragraph 6.32, the CMA explained that it was not necessary to carry out a formal assessment of actual harm caused by the infringement. Then it concluded that the potential for harm was high in the circumstances of that case.

143. In footnote 1 to these paragraphs, the CMA noted the representations from FPM that FPM did not implement the agreement and there was no effect on prices but the CMA nonetheless held that there had been an agreement to restrict competition. In footnote 2, when considering FPM's and CPM's representations that there had been no effect on competition, the CMA stated that the infringement was by its nature "very likely" to cause harm to competition. Accordingly, in Chapter 6 of the Decision the CMA did not proceed on the basis that the cartel had had an adverse effect on competition and it fixed the penalty

on the basis of the likelihood of harm resulting from the cartel, as permitted by the Penalty Guidance.

144. The CMA also considered the question as to the effects of the cartel in this case in Chapter 5 at paragraphs 5.65 and 5.99-5.102. The CMA made a relevant finding in paragraph 5.101 which, for convenience, we set out again:

> "Moreover, the CMA does not consider that FPM has demonstrated that there was no effect on the market as a result of the arrangement. In particular, even if FPM's analysis of any effect on spot market prices during the Relevant Period were correct, it is not known whether prices in the market or margins may have been lower in the absence of the arrangement. Nor does the analysis consider the prices charged by SB or CPM. Further, it is not known whether the market shares of SB, CPM and FPM would have been different in the absence of the arrangement."

145. In this paragraph, the CMA found that it was not known whether prices in the market or margins might have been lower in the absence of the arrangement. The CMA also referred to the position in relation to the prices charged by SB or CPM. The CMA did not make a positive finding that, by reason of the arrangement, SB and/or CPM had charged higher prices than they otherwise would. Finally, the CMA found that it was not known whether the market shares of the three cartelists would have been different in the absence of the arrangement. In other words, in this paragraph, the CMA considered that the arrangement might have had an effect on prices or margins or market shares but it did not make a positive finding that the arrangement had an adverse effect on competition.

146. The reference in paragraph 5.101 of the Decision to "FPM's analysis of any effect on spot market prices" was a reference to a Technical Annex to FPM's Response to the CMA's Statement of Objections. That Annex had been prepared by Oxera Consulting LLP and had stated, in paragraph 1.3.3 of the Annex, that Oxera had not found evidence "that the alleged infringement led to an increase in prices". In paragraph 5.101, the CMA had commented that "even if FPM's analysis … were correct" it did not affect the conclusions expressed in paragraph 5.101. We agree with the CMA's conclusions in paragraph 5.101 having considered the Technical Annex relied on by FPM.

(7) The appeal in relation to effects

147. At the hearing of the appeal, FPM submitted an Expert Report prepared by Dr Chowdhury of Oxera Consulting LLP. Her report stated that it built on the work she had carried out which had been contained in the Technical Annex referred to above. The Report explained that Dr Chowdhury had carried out a regression analysis which involved comparing FPM's prices during the relevant period in 2006 – 2013 with the prices charged by FPM after the end of that period. At paragraph 1.17 of the Report she concluded that the results of her analysis indicated that there was no evidence to suggest that the alleged infringement increased the prices charged by FPM during the period covered by the cartel.

148. The CMA indicated that it did not wish to cross-examine Dr Chowdhury as to the contents of her Report. In those circumstances, we proceed on the basis that her conclusion is correct. However, we are in the same position as the CMA was when it considered the Technical Annex and reached its conclusion at paragraph 5.101 of the Decision. The position remains:

(1) it is not known whether prices in the market or margins might have been lower in the absence of the arrangement;

(2) it is still not possible to make a positive finding that, by reason of the arrangement, SB and/or CPM had charged higher prices than they otherwise would have charged;

(3) it is not known whether the market shares of the three cartelists would have been different in the absence of the arrangement;

(4) the arrangement might have had an effect on prices or margins or market shares but it is not appropriate to make a positive finding that the arrangement had an adverse effect on competition.

149. FPM's evidence only addressed the effect of the cartel on its prices. It submits that it was not in a position to give evidence as to the effect of the cartel on the prices charged by SB and CPM. It submits that if the CMA were to contend that

the cartel had an adverse effect on the prices charged by SB and CPM, then the burden lay on the CMA to adduce evidence to that effect and it has not done so. However, the CMA did not find that the cartel had led to SB and CPM charging higher prices than they otherwise would have charged. It proceeded on the basis that it did not know whether that was the case. The CMA did not invite the Tribunal to make a different finding on this point. Accordingly, the CMA was not required to lead evidence to support a case which it did not make. The Tribunal is not obliged to make a positive finding that the cartel did have an adverse effect on the prices charged by SB and CPM. It is open to the Tribunal to proceed on the basis that it does not know the position in that respect.

150. FPM then submitted that the evidence that its prices had not been affected by the cartel supported the inference, in the absence of any evidence one way or the other, that the prices of SB and CPM had also not been affected by the cartel. We accept that it is possible that the prices of SB and CPM were not affected by the cartel but we are not persuaded that we can make a finding that that was indeed the position.

151. FPM then submitted that CPM had provided material to the CMA on which CPM relied to show that it had not charged higher prices as the result of the cartel. We were referred to a letter dated 29 August 2018 from the solicitors for CPM to the CMA. This letter commented on a draft Statement of Objections which the CMA had provided to CPM. CPM's solicitors asked for certain comments in the draft Statement of Objections to be revised. They suggested that a comment be included to the effect that agreed minimum prices were "rarely" adhered to. They also stated that adherence to agreed minimum prices, in particular, in the spot market were not enforced or adhered to "at all times". The solicitors also stated that CPM had commissioned an analysis which was said to have demonstrated that typically between 80% and 96% of prices actually charged to customers were below any minimum/list prices. For reasons which were explained, the analysis was limited to certain years and not the full period of the operation of the cartel. We were not told whether the CMA obtained a copy of the analysis prepared on behalf of CPM.

152. FPM submitted that the CMA was at fault in not obtaining a copy of the analysis prepared for CPM (if they did not obtain it) and not following up that analysis and not making a decision as to whether it accepted that analysis, which it may or may not have done. We do not think that that criticism of the CMA is well founded or has any bearing on what the CMA decided when it assessed the seriousness of the infringement in this case.

153. We explained earlier that in a restriction by object case, the CMA is not obliged when fixing the appropriate penalty to investigate the effects of the infringement and that there were good reasons for this being the position. In this case, the CMA did not need to investigate the analysis prepared for CPM in order to deal with the position of CPM or FPM. Further, it was open to the CMA to decide that, in view of its approach to the effects of the infringement when forming its view as to the seriousness of the infringement it did not need to carry out further investigation into the analysis prepared for CPM. We consider that the CMA was entitled to assess the seriousness of the infringement on the basis that it was not possible to make a positive finding that, by reason of the arrangement, CPM had charged higher prices than it otherwise would have charged.

(8) General deterrence in the construction industry

154. On 28 June 2019, the CMA provided FPM with a Draft Penalty Statement. The seriousness of the infringement was considered at paragraphs 3.3-3.12 of that document. The CMA assessed the seriousness of the infringement before considering the question of general deterrence. On that basis, the statement said that it was appropriate to use a starting percentage at the top of the 21% to 30% range. The statement referred to the need for general deterrence in a number of places: see paragraphs 3.3, 3.6 and 3.7. More specifically, in paragraph 3.12, the statement stated that the maximum starting point of 30% was necessary for the purposes of general deterrence. It was stated that the infringement concerned the most serious types of infringing activity and that a starting point any lower would risk undermining the clear message for other businesses that they should not engage in similar conduct. The statement then added that such deterrence would still appear to be necessary. This comment was supported by a reference

to specific investigations which had taken place in the construction industry and continuing investigations into anti-competitive conduct in the sector.

155. FPM provided a Response to the Draft Penalty Statement on 19 July 2019. At paragraph 2.7, it referred to paragraph 3.12 of the Draft Penalty Statement. It suggested that the previous investigations conducted by the CMA and OFT were historic and that continuing investigations had not reached the point of a finding of infringement. It was also suggested that the other cases were quite different from the instant case.

156. In Chapter 6 of the Decision, the CMA referred to the relevance of general deterrence: see paragraphs 6.19, 6.25 and 6.29. At paragraph 6.29, the CMA stated that the maximum starting point should be applied in this case to reflect adequately the seriousness of the infringement and the need for deterrence. At paragraph 6.30, the CMA stated that the nature of the conduct and the likelihood of harm made it appropriate to use a starting point at the top of the 21% to 30% range. Then at paragraph 6.33, which we have quoted above, the CMA stated that it considered that the maximum starting point was necessary for the purposes of general deterrence; the infringement concerned the most serious types of infringing activity and a lower starting point would undermine the clear message for other businesses that they should not engage in similar conduct. So far, paragraph 6.33 of the Decision followed the format of paragraph 3.12 of the Draft Penalty Statement. Paragraph 6.33 did not contain any reference to previous concluded investigations or to continuing investigations.

157. FPM submitted that the CMA had in the Decision abandoned its earlier provisional view that general deterrence in the construction industry was required and therefore the CMA should have chosen a percentage lower than the 30% provisional figure in the Draft Penalty Statement.

158. We cannot agree that the CMA had abandoned the view that general deterrence in the construction industry was required. Paragraph 6.33 of the Decision is inconsistent with any such abandonment. The CMA plainly considered that general deterrence was still necessary. The fact that the CMA chose to refer to examples of investigations in the Draft Penalty Statement and omitted those

references in the Decision does not mean that the CMA had changed its view in relation to the need for general deterrence.

159. Apart from drawing attention to the difference in the wording of paragraph 3.12 of the Draft Penalty Statement and paragraph 6.33 of the Decision, FPM did not make any submissions as to whether we should hold that there was or was not a need for general deterrence in the construction industry. On that subject, we have the considered opinion of the CMA that there remains a need for general deterrence and we will assess the appropriateness of the CMA's penalty on that basis.

(9) The percentage of relevant turnover

160. We have set out the Penalty Guidance dealing with Step 1 and we have set out the CMA's reasons for using 30% of relevant turnover as a starting point. FPM submitted to us that we ought to take the view that the right percentage was 25% in view of its submissions (1) that the arrangement was not implemented, (2) that the arrangement had no effect on the market for the relevant products and (3) that the CMA had abandoned its provisional case that general deterrence in the construction industry was required. However, having examined each of these three particular submissions, we have not accepted any one of them. Accordingly, the three reasons given by FPM for reducing 30% to 25% do not apply.

161. Standing back in order to consider whether 30% of relevant turnover is the right starting point to reflect the seriousness of the infringement including the need for general deterrence, we conclude that 30% is the appropriate starting point.

(10) The relevant turnover

162. Step 1 of the Penalty Guidance describes how relevant turnover is to be determined for the purpose of that step. The Guidance states:

> "**Determination of relevant turnover**
>
> 2.11 The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in

the undertaking's last business year. [A footnote states: Relevant turnover will be calculated after the deduction of sales rebates, value added tax and other taxes directly related to turnover.] In this context, an undertaking's last business year is the financial year preceding the date when the infringement ended.

2.12 Generally, the CMA will base relevant turnover on figures from an undertaking's audited accounts. However, in exceptional circumstances it may be appropriate to use a different figure as reflecting the true scale of an undertaking's activities in the relevant market.

2.13 The CMA recognises that such an exceptional approach may be appropriate where, in particular, the remuneration for services supplied is based on commission fees. When deciding whether it is appropriate to depart from its general rule of using turnover from audited accounts in this way, the CMA will consider a number of factors, in particular: (i) whether the remuneration for the services in question is decided by the seller of the services or the client, and (ii) whether the undertaking is purchasing inputs in order to supply a fresh product incorporating those inputs to its client. Other factors such as whether a person is taking ownership of goods or services and whether the person bears risks resulting from the operation of the business in question may also be relevant. In addition, the CMA notes that specific situations for the calculation of 'turnover' may arise in the areas of credit, financial services and insurance, as is recognised in the statutory instrument which relates to the determination of the maximum penalty that the CMA may impose.

2.14 In cases concerning infringements of Article 101 and/or Article 102, the CMA may, in determining the starting point, take into account effects in another member state of the agreement or conduct concerned. Where it does so, the CMA will take into account effects in another member state through its assessment of relevant turnover. The CMA may consider turnover generated in another member state if the relevant geographic market is wider than the UK and the express consent of the relevant member state or NCA, as appropriate, is given in each particular case.

2.15 As stated at paragraph 2.4 above, the starting point may not in any event exceed 30% of the relevant turnover of the undertaking."

163. It is really only paragraph 2.11 of the Penalty Guidance which is relevant in the present case but paragraphs 2.12-2.13 were referred to in the course of argument because they refer to "exceptional circumstances" and "an exceptional approach".

164. Paragraphs 6.20-6.24 of the Decision contained the CMA's reasoning as to the relevant turnover in this case. The CMA stated:

"*Relevant turnover*

6.20 The '*relevant turnover*' is the turnover of the undertaking in the relevant product and geographic market affected by the infringement in the undertaking's '*last business year*', that is the undertaking's financial year preceding the date when the infringement ended.

> 6.21 As regards the relevant market, the CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* and *JJB Sports plc v Office of Fair Trading* that: '*… 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*'.
>
> 6.22 As set out in Chapter 3, the CMA has found that the relevant market in this case is the supply of the Products to customers in Great Britain.
>
> 6.23 The CMA has found that the Infringement came to an end on 13 March 2013.
>
> 6.24 Therefore, in the present case:
>
> (a) the '*last business year*' of SBC is the financial year ending 31 December 2012, which results in a relevant turnover of £13,374,030;
>
> (b) the '*last business year*' of CPM is the financial year ending 31 December 2012, which results in a relevant turnover of £24,885,109;
>
> (c) the '*last business year*' of FPM is the financial year ending 31 January 2013, which results in a relevant turnover of £24,450,600."

165. The CMA added a footnote to paragraph 6.24(c) which included the following:

> "FPM has made representations that FPM's turnover in relation to the Products changed substantially between 2006 and 2013 due to the growing nature of the business (largely through acquisition), and that it is therefore not representative or proportionate to use its 2013 financial figures for the purposes of calculating its relevant turnover: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraphs 2.8 to 2.12, URN S1446. However, the CMA does not consider the circumstances to be exceptional such as to warrant a departure from the approach set out in the Penalty Guidance (noting that it is not exceptional for a business to grow and for its turnover figures to fluctuate), also noting that proportionality is considered at step 4."

(11) The appeal in relation to the relevant turnover

166. FPM submitted that the CMA ought not to have taken the figure for the year ending 31 January 2013 even though that was its last business year before the ending of the infringement, as referred to in the Penalty Guidance. FPM submitted that that year was not a representative year in respect of the period of the operation of the cartel from 2006 to 2013.

167. FPM had provided the following turnover figures for the relevant market in its Response to CMA's Draft Penalty Statement on 19 July 2019:

(1) Revenue to 31/01/2008: £19,477,358.

(2) Revenue to 31/01/2009: £15,004,940.

(3) Revenue to 31/01/2010: £18,950,348.

(4) Revenue to 31/01/2011: £23,017,975.

(5) Revenue to 31/01/2012: £23,631,003.

(6) Revenue to 31/01/2013: £25,031,141.

168. In its Response, FPM had said that 2.3% of the revenue figure for the year ending 31 January 2013 corresponded to rebates. Removing the rebates for that year produced the figure of £24,450,600 used by the CMA. It seems that a similar level of rebates applied to all of the above figures. FPM submitted that the CMA ought to have used an average for the period of the operation of the cartel and it said that the average figure was £20,390,564.

169. In *Britannia Alloys*, the Court of Justice was not concerned with the equivalent of Step 1 of the Penalty Guidance but was considering the cap, by reference to 10% of turnover, imposed by Article 15(2) of Council Regulation 1962/17/EEC. In that case there was no turnover in the year preceding the decision of the Commission. The court held that it was permissible under Article 15(2) to take the turnover of an earlier year in order to be able to make a correct assessment of the financial resources of the undertaking: see at [30]. Earlier, at [25], the court had referred to "the undertaking's real economic situation during the period in which the infringement was committed".

170. In *Kier*, the Tribunal considered Step 1 of the OFT penalty guidance of 2004. Step 1 in that Guidance referred to the undertaking's "last business year". Originally, the OFT had taken the turnover in the last business year before the

end of the infringement but then it changed its approach and took the turnover in the last business year before the decision. The OFT explained that it did this to adopt the same turnover year as was required by the Turnover for Penalties Order which imposed the cap of 10% of the turnover of that year. The Tribunal held that it was preferable for the purposes of Step 1 to take the last business year before the end of the infringement as that year was nearer to the time of the infringement and was a more reliable measure of the seriousness of the infringement, rather than the turnover of a year which might be some considerable time after the infringement had ended: see at [123]-[139]. *Kier* did not consider any suggestion as to taking an average of the turnover of all of the years during which the infringer participated in the cartel. At [126], the Tribunal referred to the statement in *Britannia Alloys* at [25] (referred to above) as to the desirability of reflecting the undertaking's real economic situation during the period in which the infringement was committed.

171. In *Balmoral Tanks*, the Tribunal upheld a decision of the CMA to use a 12-month period which was not the financial year ending before the end of the infringement. The CMA had stated in its decision in that case that the Penalty Guidance was not legally binding and that it was free to depart from it in order to choose a period which gave a more accurate reflection of the infringer's economic situation at the time of the infringement: see at [137]-[141]. In its decision, the CMA had referred to *Kier* at [126] which had referred to the undertaking's real economic situation at the time the infringement was committed.

172. We were referred to the decision of the Commission dated 8 December 2010 in Comp/39.309 *LCD (Liquid Crystal Displays)*, C(2010) 8671 Final. In its decision at [384], the Commission stated that it normally took into account the sales made by an undertaking during the last full business year of its participation in the infringement, in accordance with the Commission's Fining Guidelines. However, in that case, the Commission decided to use the figures for sale throughout the duration of the infringement and take an average annual figure. The Commission stated that the data could be established with relative ease and there had been "an exponential growth of the sales over the different

years for all undertakings" (except one whose sales had anyway fluctuated enormously).

173. We were also referred to the decision of the Commission dated 8 March 2017 in Case AT. 39960 *Thermal Systems* C(2017) 1456 final ("*Thermal Systems*"). The Commission's 2006 Fining Guidelines state that at this stage in the process, the Commission will "normally" take the sales during the last full business year of its participation in the infringement but in *Thermal Systems* at [119] and [121] it used an average of the undertaking's yearly sales during the infringement period to properly reflect "the considerable volatility" of sales during that period.

174. FPM submitted that the turnover taken by the CMA for the year to 31 January 2013 was not representative of the annual turnover for the period of the infringement. FPM said that its turnover had increased due to the acquisition of other businesses and gave the example of the acquisition of Ennstone plc in December 2008. FPM submitted by reference to the above authorities that the CMA should take a figure for turnover, which reflects the undertaking's real economic situation during the period in which the infringement was committed, and FPM's average did that whereas the turnover for the year to 31 January 2013 did not.

175. FPM accepted that the Penalty Guidance did not specify that the CMA was always to take an average of the turnover for the period of the infringement. However, FPM suggested that many infringements did not last for more than a year. Further, where the infringement was of particularly long duration, data permitting the calculation of an average might not be available.

176. FPM also criticised the footnote to paragraph 6.24(c) where the CMA stated that it did not "consider the circumstances to be exceptional such as to warrant a departure from the approach set out in the Penalty Guidance". FPM said that this footnote involved the wrong approach. The CMA was entitled to depart from the Penalty Guidance in this respect when such a departure was appropriate; the case did not have to be "exceptional". Further, FPM said, the

CMA had a discretion to depart from the Penalty Guidance in this respect and had failed to exercise its discretion.

177. The CMA submitted that, in *Kier*, the Tribunal endorsed the approach of taking the last business year before the end the infringement and that the facts of *Balmoral Tanks* were such that a departure from the Penalty Guidance was appropriate. The CMA said that the Penalty Guidance quite clearly referred to the last business year and did not refer to an average turnover. An infringer's turnover will usually be variable over a period of time. The variability of the turnover in this case was not unusual. In the last three years of the infringement, the turnover was stable at £23m to £25m. The acquisition to which FPM referred was early in the period, in 2008. FPM's turnover in the first year of the infringement was almost £20m. Turnover had dropped due to the financial crisis but then recovered. The CMA did not fail to consider whether to exercise its power to depart from the Penalty Guidance. It did consider whether to do so and decided not to do so. The reference to "exceptional" was not intended to define a legal test as to when it was appropriate to depart from the Penalty Guidance. The CMA was simply stating that there was not enough reason to depart from the Guidance.

178. We will now explain our approach in relation to this matter. The Penalty Guidance refers to the turnover in the last financial year preceding the end of the infringement. The Penalty Guidance does not require the CMA to calculate the average of the turnovers over the period of an infringement which lasted more than one year. Accordingly, the normal position is that one does not take an average figure. It is possible to speculate as to the reasons for that being the normal position. Some infringements do not last for more than a year. With other infringements which last for a considerable time, there might be difficulty in accessing data to permit an average to be calculated. Even if the relevant data is available, it is a simpler task to take the turnover in one year rather than to calculate an average figure. In times of high inflation, the turnover at the end of the period of infringement may be more representative than an average figure.

179. In the end, it is not necessary to determine why the Penalty Guidance refers to the turnover in the last year because it is clear that the CMA is entitled to depart

from this aspect of the Penalty Guidance when it is appropriate to do so. It is not helpful to try to define the cases in which it would be appropriate to depart from the usual approach. The decided cases provide examples of when the turnover in the last year was wholly unrepresentative of the turnover which ought to be considered to be relevant. All one can usefully say is that the Penalty Guidance is to be applied in the normal case so that there must be something out of the norm to justify departing from it and using an average of the turnovers for the whole period of the infringement (or some other approach).

180. In the present case, we are not persuaded that the case is sufficiently out of the norm to justify a departure from the Penalty Guidance. If the infringement had only continued for the last three years of the period when the turnover figures (before rebates) were between £23m and £25m, we do not think that that level of fluctuation would have been out of the norm but yet, on FPM's approach, it uses an average of those three years as part of the average for the whole period of the infringement. As regards the first three years of the infringement, the figures are £19.5m, £15m and £19m. If those figures had been £19m or £19.5m for the whole period, then again we do not think that the difference between those figures and £23m or £25m in the later three year period would have taken the case sufficiently out of the norm to justify using an average of the turnover figures. The figure which stands out is the figure of £15m which coincided with the downturn in the economy generally. Standing back, we do not think that the figures in this case show such volatility or exponential growth to take this case out of the norm.

181. As we have reached the conclusion that the Penalty Guidance should be applied in relation to the turnover in the last year of the infringement, it is not strictly necessary to consider what the CMA meant by its use of the word "exceptional" in the footnote to paragraph 6.24(c). That word might simply have been referring to a case which was out of the norm or it might have suggested that only more extreme circumstances would permit a departure from the Penalty Guidance. We consider that the use of the word "exceptional" is best avoided but its use in this case does not affect our overall conclusion on this point.

182. Accordingly, at Step 1, we would not depart from the CMA's adoption of a starting point of 30% of a turnover of £24,450,600, producing the figure of £7,335,180.

K. STEP 2

(1) The Penalty Guidance – Step 2

183. The Penalty Guidance states:

> "**Step 2 – adjustment for duration**
>
> 2.16 The starting point may be increased or, in particular circumstances, decreased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement. Where the total duration of an infringement is less than one year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the infringement. In exceptional circumstances, the starting point may be decreased where the duration of the infringement is less than one year. Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional cases decide to round up the part year to a full year."

(2) The Decision in relation to Step 2

184. The Decision dealt with Step 2 as follows:

> "**Step 2 – adjustment for duration**
>
> 6.35 The amount of the penalty resulting from Step 1 may be increased or, in particular circumstances, decreased to take into account the duration of an infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year.
>
> 6.36 The Infringement lasted from 6 July 2006 and continued until 13 March 2013. The duration of the Infringement was therefore 6 years, 8 months and 8 days. The CMA has rounded this up to the nearest quarter year: 6 years and 9 months.
>
> 6.37 The CMA has therefore applied a multiplier of 6.75 to the figure reached at the end of Step 1. Applying this multiplier results in a penalty of:
>
> (a) £27,082,441, for SBC;
>
> (b) £50,392,346, for CPM; and

(c) £49,512,465, for FPM,

at Step 2."

(3) The appeal in relation to Step 2

185. Grounds of Appeal 4 and 7 raise challenges in relation to the Decision in respect of Step 2.

186. FPM submitted that the Penalty Guidance in relation to Step 2 involves the CMA in exercising a discretion. Paragraph 2.16 of the Guidance says that the starting point (from Step 1) "may" be increased to take into account the duration of the infringement; the same paragraph also says that the penalty "may" be multiplied by the number of years of the infringement. FPM pointed out that the Decision simply calculated the period of the infringement at 6.75 years and then said that the CMA had "therefore" multiplied the starting point (from Step 1) by 6.75; no reasons were given for this part of the Decision. FPM then submitted that the CMA had failed to exercise its discretion in this respect, its Decision was unlawful and it was for the Tribunal to make its own decision as to Step 2.

187. FPM submitted that because the figure arrived at pursuant to Step 1 was not representative of the turnover of the period of the infringement, it was not right to multiply that figure by 6.75 but instead we should multiply that figure by 5.63. Although not spelt out in FPM's submissions, we infer that the intention was to arrive at the same figure as we would arrive at by multiplying the average turnover of £20,390,564 by 6.75 by in fact multiplying the final year turnover of £24,450,600 by 5.63.

188. FPM had a separate challenge to the Decision in relation to Step 2. It submitted that the duration of the infringement was not 6.75 years but was more properly assessed at 6.4 years. It said that in the Decision, the CMA concluded that the second tenet of the infringing conduct did not begin as early as 6 July 2006 and the CMA could only find that it began by 2007. FPM then submitted that because the CMA concluded that the third tenet was achieved and further supported by the second tenet, it ought to follow that the proper finding for the third tenet was that it too began by 2007, and not earlier. FPM then said that this

should lead to a 4-month adjustment to the period of 6.75 years and it contended for a multiplier of 6.4. FPM then developed an argument based on a comparison of the Statement of Objections and the Draft Penalty Statement (on the one hand) and the Decision (on the other). It said that there was a difference between the Statement of Objections and the Decision as to the duration of the second tenet but yet the multiplier of 6.75 did not change and it ought to have been changed.

189. The CMA submitted that it plainly exercised its discretion to multiply the starting point (from Step 1) by 6.75. The use of a multiplier of 5.63 was an inappropriate attempt to change the starting point (from Step 1) by reusing the arguments as to the representative amount of the turnover which have already been rejected. It further submitted that there was no good reason to reduce a multiplier of 6.75 to 6.4. It also said that there were no relevant differences of substance between its provisional findings and the Decision.

190. We consider that the decision of the CMA to use a multiplier of 6.75 was not an unlawful Decision by reason of a failure to exercise a discretion. That Decision was plainly the exercise of its judgement; we consider that the word "judgement", rather than "discretion", is more accurate as to what is involved. It is, however, correct to say that the CMA did not give any reasons for its Decision on this point. It seems to have regarded the matter as obvious and not requiring an explanation. Ultimately, it falls to the Tribunal to decide whether we think a multiplier of 6.75 was appropriate.

191. There is only limited argument as to what should be done at Step 2. FPM does not say that there should not be any multiplication at all. Instead, it makes the two specific points to which we referred above. We do not accept that 5.63 was an appropriate multiplier. That figure is not meant to be an expression of the duration of the infringement but is simply an attempt to re-argue the point on which FPM failed at Step 1 as to the representative amount of the turnover.

192. As to the suggested multiplier of 6.4, we have regard to the detailed reasons given by the CMA, at paragraphs 5.105-5.126, as to why it was appropriate to find that the infringement in this case was a single and continuous infringement.

There was no Ground of Appeal which challenged any of this reasoning. We consider that consistently with that reasoning it is appropriate to use a multiplier at Step 2 which is based on the duration of the single and continuous infringement. If FPM's contention that the right multiplier should be 6.4 was intended to be an implicit challenge to the finding that there was a single and continuous infringement then we would not accept that implicit challenge.

193. We are not assisted by comparing the CMA's provisional conclusions with its Decision. In any case, we find nothing in such a comparison to lead to a different overall conclusion in relation to Step 2.

194. Accordingly, at Step 2, we would not depart from the CMA's adoption of a multiplier of 6.75. The outcome of Steps 1 and 2 is therefore £7,335,180 multiplied by 6.75 which is £49,512,465.

195. Standing back at this point, we note that in relation to each of the three elements considered thus far (the turnover figure, the percentage of 30% and the multiplier), the CMA has taken a figure which is at the top end of the available range. It must be remembered that these individual elements are steps towards arriving at an overall figure which is appropriate. At a later stage, particularly when considering the proportionality of the penalty, it will relevant to recall that these three elements are at the top end of the available range and to consider whether an adjustment is required to achieve an overall result which is proportionate.

L. STEP 3

196. Ground of Appeal 5 raises challenges to the Decision in relation to Step 3.

197. Step 3 of the Penalty Guidance provides for adjustment of the penalty to reflect aggravating and mitigating features. In this case, the CMA found two aggravating features (director involvement and intentionality) about which there is now no dispute.

198. As to possible mitigating features, the CMA allowed only a 5% discount for cooperation and made no discount for alleged compliance. In a footnote to this part of its Decision, the CMA referred to a contention by FPM that the length of the combined criminal and civil investigations was relevant. FPM's point, made in its Response to the Draft Penalty Statement, was that the length of time during which it had cooperated with the CMA should be taken into account when considering a discount for cooperation.

(1) The appeal in relation to Step 3

199. In its Notice of Appeal, FPM puts forward three challenges to the Decision in relation to mitigating features. It submits that:

(1) the CMA erred in law in deciding unreasonable delay was incapable of constituting a mitigating feature and erred in fact in deciding that the length of the investigation was reasonable;

(2) the CMA ought to have made an allowance of 7.5%, rather than 5%, for cooperation;

(3) the CMA ought to have made an allowance of 10% for compliance.

(2) The length of the criminal and civil investigations

200. FPM contends that there was unreasonable delay in relation to the criminal and civil investigations in this case. FPM's Notice of Appeal and its skeleton argument presented this case as being relevant to Step 3. It was said that the alleged unreasonable delay was a mitigating feature of this case. In a footnote to paragraph 6.46(b)(iii), referred to below, the CMA stated that it did take into account cooperation by FPM throughout both the criminal and civil investigations. FPM's Notice of Appeal also referred to the question of delay in relation to Step 4 and, indeed, in its closing submissions, FPM presented its case in relation to delay as being relevant to Step 5. In these circumstances, we will not consider FPM's case as to unreasonable delay at this stage but will consider it in relation to Steps 4 and 5.

(3) The Penalty Guidance on cooperation

201. Paragraph 2.19 of the Penalty Guidance states that mitigating factors include:

> "cooperation which enables the enforcement process to be concluded more effectively and/or speedily.
>
> Footnote: Respecting CMA time limits specified or otherwise agreed will be a necessary but not sufficient criterion to merit a reduction at this step, that is to say, cooperation over and above this will be expected. An example of such cooperation may be the provision of staff for voluntary interviews and/or arranging for staff to provide witness statements. Note that in cases of cartel activity an undertaking which cooperates fully with the investigation may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if it satisfies the requirements for lenient treatment set out in part 3 of this guidance. Undertakings benefiting from the leniency programme will not receive an additional reduction in financial penalties under this head (since continuous and complete cooperation is a condition of leniency)."

(4) The Decision in relation to cooperation

202. In the Decision, the CMA dealt with mitigation for cooperation as follows:

> "*Mitigating factor - cooperation*
>
> 6.45 The CMA may decrease the penalty at Step 3 for cooperation which enables the enforcement process to be concluded more effectively and/or speedily. The Penalty Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion to merit a reduction).
>
> 6.46 In this case:
>
> (a) CPM provided cooperation during both the civil and criminal investigation, including by:
>
> (i) making a number of CPM employees and ex-employees available for voluntary interviews (some of whom provided witness statements), and providing them with separate legal representation; and
>
> (ii) assisting the CMA's criminal investigation in conducting a voluntary document review at CPM's premises;
>
> (b) FPM provided cooperation during both the civil and criminal investigation, including by:
>
> (i) agreeing to a streamlined access to file process;
>
> (ii) taking a constructive approach in discussions regarding the constitution of the CMA's file using material gathered during the parallel criminal investigation, which led to savings of time and resource;

(iii) making a number of employees available for interview (some of whom provided witness statements), and providing access to separate legal representation for relevant employees.

6.47 Given the cooperation provided by CPM and FPM in the context of both the civil and criminal investigations, the CMA considers that it is appropriate to apply a reduction of 5% to their penalties.

6.48 SBC will not receive a reduction for cooperation at step 3 given that continuous and complete cooperation is a condition of leniency. SBC's cooperation has therefore been reflected in the leniency discount applied at step 6."

203. The CMA added the following footnote to paragraph 6.46(b)(iii):

"FPM has made representations that the CMA should also take into account the fact that it waived its right to an oral hearing, as well as the length of the combined criminal and civil investigations: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraph 4.4.2, URN S1446. The CMA does not consider it appropriate to take into account the fact that FPM waived its right to an oral hearing as this did not lead to a (sic) significant resource savings for the CMA in the circumstances of this case. For the avoidance of doubt, the reduction in FPM's penalty at step 3 reflects the level of cooperation that the CMA considers was provided by FPM throughout both the criminal and the civil investigations. In its supplementary representations on the Draft Penalty Statement, FPM has made representations that it should receive a cooperation discount of above 5% (that is, a discount that is higher than the cooperation discount for CPM) because '*a number of matters suggest [CPM's] actions actually slowed down the CMA's investigation*': FPM's representations on the CMA's Draft Penalty Statement, dated 18 October 2019, paragraphs 2.6 to 2.8, URN S1628. The CMA has assessed the cooperation discounts granted to CPM and FPM in the same way, and by reference to the cooperation provided by each party. On the basis of its assessment, the CMA considers that a cooperation discount of 5% is appropriate for both parties. In particular, the CMA notes that all aspects of CPM's actions were taken into account in deciding CPM's cooperation discount, and that FPM's representations do not accurately reflect CPM's actions as a whole; for example, the CMA is of the view that CPM took a constructive approach during the access to file process during settlement; and CPM's representations on the draft Statement of Objections did not impact negatively on the efficiency of the process."

(5) The appeal in relation to cooperation

204. The appeal in relation to cooperation arose because the CMA did not take into account the fact that FPM had waived its right to an oral hearing. The reason given by the CMA was that the waiver did not lead to significant resource savings for the CMA in all the circumstances.

205. FPM pointed out that paragraph 2.19 of the Penalty Guidance referred to cooperation which enabled the process to be concluded more effectively and/or speedily. Cooperation could lead to the process being concluded more effectively and/or speedily even if the cooperation did not lead to a significant saving in resources for the CMA. FPM submitted that its waiver of its right to an oral hearing would have saved the time and expense of the CMA. FPM explained what would have been involved in an oral hearing and the consequences of an oral hearing. It said that, although the principal burden of an oral hearing would have fallen on FPM, an oral hearing and the steps taken in consequence of it would have involved the Procedural Officer and other CMA officers in substantial work.

206. The CMA submitted that the reference to "resource savings" in the footnote quoted above was attributable to the fact that FPM had claimed in its Response to the Draft Penalty Statement that the waiver of an oral hearing would have led to a saving of resources. Thus, the CMA was simply dealing with the point which had been raised by FPM and rejecting it. The CMA had not overlooked the wording of paragraph 2.19 of the Penalty Guidance.

207. The CMA further submitted that an oral hearing would not have been lengthy or complex. Whatever might be the position about oral hearings in other cases, FPM had explained in its Response to the Draft Penalty Statement that it did not think that an oral hearing would have been of any further assistance to the CMA in view of FPM's detailed response to the Statement of Objections. The CMA added that the principal burden of an oral hearing falls on the other party, in this case FPM. The CMA further submitted that, as a matter of policy, it would generally not be appropriate to incentivise parties to forego their procedural rights. As to this last point, FPM pointed out that a discount for cooperation was given in other respects which involved FPM agreeing to forego its procedural rights.

208. The CMA called Dr Michael Grenfell, the Executive Director for Enforcement at the CMA to deal with the allegation (which we consider later) that the OFT and the CMA had been guilty of unreasonable delay in carrying out the criminal and civil investigations in this case. In the course of his cross-examination, he

was asked by Mr O'Donoghue about the possible saving of time due to FPM's waiver of an oral hearing. Dr Grenfell described the possible time saving as "non-trivial". He did not regard the possible time saving as very significant having regard to the length of the investigations in this case. When pressed to agree, he was prepared to agree that the waiver of an oral hearing may have saved some weeks, but not 6 to 8 weeks.

209. We do not consider that there is anything in the point that paragraph 2.19 refers to the process being concluded more effectively and/or speedily whereas the footnote in the Decision refers to resource savings. There will often be considerable overlap between speed and resource savings. In any case, it is plain that the CMA referred to resource savings because FPM had suggested that the waiver of an oral hearing had led to resource savings; that was the point which the CMA felt it had to deal with. Further, there is force in the point that the reason given by FPM for not requiring an oral hearing was that FPM felt that an oral hearing would not be any further assistance to the CMA. In the light of those considerations, we do not feel that we can criticise the CMA for the way in which it dealt with FPM's request that the waiver of an oral hearing should be taken into account.

210. As against those points, we now have Dr Grenfell's evidence that an oral hearing would have taken a non-trivial time to deal with, perhaps weeks, but not as much as six weeks.

211. In the light of Dr Grenfell's evidence, we consider that we should take into account the non-trivial saving of time which resulted from the waiver of an oral hearing when assessing what discount for cooperation is appropriate in this case. The problem then is: what level of discount is appropriate to reflect all of the cooperation including the waiver of an oral hearing?

212. It must be remembered that the way in which the CMA, or the Tribunal, will go about awarding a discount for cooperation is inherently broad brush. The 5% already awarded by the CMA appears to have reflected some worthwhile cooperation on the part of FPM. We do not know, but we doubt, if the CMA would have chosen a different percentage if it had taken into account the waiver

of an oral hearing. The waiver seems to us to be comparatively unimportant when placed alongside the other cooperation. FPM says that the discount should be increased to 7.5%. That is a 50% increase in the amount of the discount and we do not think that the waiver of an oral hearing could be regarded as a 50% increase in the other cooperation. Even a discount of 6% would be a 20% increase in the discount allowed by the CMA. Overall, we are not persuaded that we should alter the existing discount of 5%.

(6) The Penalty Guidance as to compliance

213. Paragraph 2.19 of the Penalty Guidance states that mitigating factors include:

> "adequate steps having been taken with a view to ensuring compliance with Articles 101 and 102 and the Chapter I and Chapter II prohibitions.
>
> Footnote: The CMA will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount from the penalty of up to 10%. The mere existence of compliance activities will not be treated as a mitigating factor. Compliance activities are likely to be treated as a mitigating factor where an undertaking demonstrates that adequate steps, appropriate to the size of the business concerned, have been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the undertaking (from the top down). This will be expected to include appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities, including making a public statement regarding a commitment to compliance on the undertaking's relevant website(s) and conducting periodic review of its compliance activities, and reporting that to the CMA. The undertaking will also need to present evidence on the steps it took to review its compliance activities, and change them as appropriate, in light of the events that led to the investigation at hand. The CMA will expect compliance activities and the steps taken to be appropriate to the size of the undertaking. Save for exceptional cases, the CMA will not treat the existence of compliance activities as an aggravating factor justifying an increase in the financial penalty. Such exceptional circumstances could include situations where, for example, compliance activities are used to conceal or facilitate an infringement, or to mislead the CMA during its investigation. It should be noted that the CMA has published guidance to assist businesses to achieve competition law compliance."

(7) The Decision as to compliance

214. The CMA dealt with a possible discount for compliance in its Decision at paragraphs 6.49-6.59, in these terms:

> "*Mitigating factor - compliance*

6.49 The CMA may decrease the penalty at step 3 where an undertaking can show that adequate steps have been taken to ensure compliance with competition law. To qualify, an undertaking has to provide evidence of adequate steps taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation, from the top down, together with appropriate steps relating to competition compliance risk identification, risk assessment, risk mitigation and review activities. The CMA will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount to the penalty of up to 10%.

6.50 SBC, CPM and FPM have provided the CMA with details of their compliance plans and the steps taken to ensure a compliance culture within each respective undertaking.

6.51 Submissions from SBC show that it has:

(a) identified those areas where previous compliance programmes were not sufficiently robust, taking specific and tailored action to address them in a '*Reinforced Compliance Programme*', which includes:

(i) the provision of training for all staff;

(ii) ongoing training for those in positions assessed to be vulnerable to competition and bribery issues;

(iii) an internal system for reporting competition issues; and

(iv) a system for continuous review;

(b) made a clear public commitment to compliance with competition law on both the SB and Consolis websites, with the Consolis CEO making a personal and public commitment to compliance in the preface of the Consolis Code of Conduct; and

(c) introduced an externally run '*whistleblowing*' hotline;

6.52 Submissions from CPM/Marshalls CPM and Marshalls plc show that CPM/Marshalls CPM has made a full commitment to, and adopted at Board level, the compliance programme of Marshalls plc, which includes:

(a) the provision of tailored training and updated guidance to staff, supported by an online training module;

(b) a clear and unambiguous policy prohibiting anti-competitive conduct, with clear leadership from the Board and Executive Directors, all of whom regularly refresh their competition law knowledge;

(c) the Marshalls Code of Conduct (M-Way), which is published on its website and contains a clear policy commitment to competition, as well as setting out a '*whistle-blowing*' mechanism. A communication programme ensures that M-Way and Marshalls' Serious Concerns Policy is issued to all Marshalls CPM employees;

(d) a Group Risk Register in which a breach of competition law is a separately identified risk, and which is reviewed at least every six months

by the Executive Directors and their senior managers identified as having responsibility for each risk area; and

(e) a commitment to review regularly (no less than annually but more frequently if there are changes to law or best practice), and update, its compliance material as required.

6.53 The CMA considers that SBC and CPM have provided sufficient evidence of compliance activities, demonstrating a clear and unambiguous commitment to competition law compliance throughout the organisation from the top down, to warrant a reduction in penalty. The CMA considers that a 10 per cent reduction for compliance for SBC and CPM is appropriate and proportionate in the circumstances of this case. This reduction is granted on the condition that SBC and CPM provide an annual update to the CMA confirming their ongoing commitment to compliance activities, for the next three years.

6.54 Submissions from FPM show that it has undertaken some compliance activity since 2013, including the provision of tailored training sessions on competition law compliance to a targeted pool of staff (in 2013 and 2017, with further training planned for late 2019 / early 2020), and the provision of a competition law manual to all staff. A whistleblowing policy is also in place, for staff to report malpractice or wrongdoing.

6.55 However, the CMA does not consider that FPM has demonstrated that adequate steps have been taken to achieve a clear and unambiguous commitment to compliance throughout the undertaking, from the top down, such as to merit a reduction in its penalty.

6.56 The CMA considers that the representations made by FPM in response to the CMA's Statement of Objections (including, in particular, representations as regards FPM's failure to implement the arrangement and the lack of any effects in the market) indicate a failure to understand and accept the underlying competition law principles which calls into question both the adequacy of the compliance training and the commitment to competition law compliance by FPM.

6.57 FPM's representations in this respect were echoed by Eoin McCann, Francis McCann and [Senior FPM Employee3] in interview. This similarly calls into question whether there is a clear and unambiguous commitment to competition law compliance throughout the organisation from the top down, particularly given that FPM has stated that '*the company's directors monitor business and compliance risks through direct active involvement in the management of the company which it considers to be appropriate to the size of FPM*'.

6.58 In such circumstances, the CMA does not consider that FPM has shown a genuine commitment to compliance beyond a paper-based activity, and in particular has not provided convincing evidence of a genuine cultural shift which is at the heart of compliance.

6.59 FPM will not, therefore, receive a reduction in its penalty for compliance."

215. The Decision included the following footnote to paragraph 6.54:

> "In its supplementary representations on the Draft Penalty Statement, FPM has made representations that it should receive a compliance discount of 10% on the basis that the measures set out in its compliance material are consistent with that of SBC and CPM and appropriate for a company of FPM's size; noting that '*numerous prompts and explanations*' were given to SBC and CPM as regards their compliance submissions, which appear to '*have ensured that those parties gave sufficient representations in order to benefit from a discount for compliance*', but that '*FPM has not benefited from these types of prompts and explanations*': FPM's representations on the CMA's Draft Penalty Statement, dated 18 October 2019, paragraphs 2.9 to 2.14, URN S1628. The CMA acknowledges that FPM has undertaken some compliance activity since 2013, but for the reasons set out in the paragraphs below, does not consider that FPM has demonstrated the genuine cultural shift, from the top down, that is at the heart of compliance. The CMA further notes that, following FPM's initial submission on compliance (contained within URN S1446), the CMA wrote to FPM to obtain further detail in relation to its compliance activities; the CMA considers that this approach was sufficient and appropriate given that FPM is represented by experienced competition lawyers."

216. Finally, we refer to the following footnote to paragraph 6.57 of the Decision:

> "FPM has further stated that it does not hold a risk register, and has not undertaken a formal classification or rating of the risk of breaching competition law: URN 1541, paragraph 6.1."

(8) The evidence as to compliance

217. In the Draft Penalty Statement dated 28 June 2019, the CMA did not include compliance by FPM as a mitigating factor. In its Response dated 19 July 2019 to the Draft Penalty Statement, FPM sought a 10% discount for compliance. FPM referred to certain features of its compliance programme and staff training in compliance. On 19 August 2019, the CMA wrote to FPM's solicitors raising seven questions as to FPM's compliance. On 28 August 2019, FPM answered those questions. On 18 October 2019, FPM made further representations to the CMA on the subject of compliance; FPM's representations principally related to what was said to be the similarity of its position with that of SBC and CPM where the CMA had indicated an intention to allow SBC and CPM a discount of 10% for compliance.

218. Mr Mulholland is a director of FPM. He is the Finance Director and the designated Compliance Officer. He gave evidence at the hearing of this appeal and was cross-examined by Mr Williams. Mr Mulholland gave evidence about the FPM compliance manual and its training materials. It is not necessary to

refer to the detail of the manual and the materials as the CMA did not submit that the manual and the materials were inadequate. It was clear from Mr Mulholland's answers in cross-examination that he had a good understanding of the basic points in the manual. Mr Mulholland gave evidence of occasions when Eoin McCann and [Senior FPM Employee3] filed reports with him as to contacts, of an innocent character, with competitors.

(9) The appeal in relation to compliance

219. FPM submitted that it was appropriate to allow a discount of 10%, or at least of 5%, for the steps which it had taken to ensure compliance with competition law. Mr O'Donoghue referred to FPM's compliance programme and the fact that the compliance manual had been signed by Eoin McCann. The manual had been published by FPM on its website. FPM had appointed Mr Mulholland as Compliance Officer. FPM had a Whistleblowing Policy. Regular competition law training has been provided to staff and to the directors and senior management. The compliance programme went beyond "paper-based activity".

220. FPM further submitted that the CMA was wrong to hold that FPM's Response to the Statement of Objections called into question FPM's commitment to compliance. FPM was fully entitled to defend itself in the way in which it did. FPM took issue with a number of comments in the Statement of Objections and those comments were not repeated in the Decision.

221. FPM referred to the decisions of the Tribunal in *Kier* and *Eden Brown*. In *Kier* at [217], it was said that a discount for compliance served as an inducement to infringers to avoid infringement in the future and an intention not to infringe in the future was a mitigating circumstance. The OFT (now the CMA) should take compliance into account when considering the need for specific deterrence. At [218], the Tribunal commented that expressing the discount as a percentage of the penalty was appropriate and a discount of about 5% was unobjectionable as a general proposition. In *Eden Brown* where the OFT allowed a discount of 5% for compliance, the Tribunal stated at [127] that the OFT (now the CMA) was not obliged to carry out a detailed evaluation of an undertaking's compliance measures as that would be disproportionate. At [128], the Tribunal treated the

question of acceptance of responsibility for the infringement as different from the question of compliance.

222. FPM also submitted that the CMA's decision not to allow FPM a discount for compliance was at variance from its decision to allow both SBC and CPM a 10% discount for compliance; this was said to breach the principle of equal treatment. CPM initially challenged the case against it but that was not held against CPM on the question of the discount for compliance. Further, the CMA gave both SBC and CPM greater opportunities than it gave FPM to put forward a justification for a discount for compliance.

223. The CMA submitted that it was entitled to take the view that FPM's Response to the Statement of Objections and the answers of Eoin McCann, Francis McCann and [Senior FPM Employee3] when interviewed showed a failure of those at the top of FPM to understand and accept the underlying competition law principles and this called into question the adequacy of the compliance training and the commitment to compliance. In this regard, the CMA was critical of submissions made by FPM that failure to implement the cartel and the lack of any effects on the market showed that there had been no cartel in the first place. The CMA also criticised the answers given in interviews which suggested that the exchange of information between the competitors was posturing or banter which was designed to impress and mislead and did not involve anything wrong. Eoin McCann also suggested that the discussions between the competitors were legitimate industry discussions about the survival of the concrete sector in the face of competition from plastic products. The CMA criticised FPM's Response to the Statement of Objections that the exchange of information did not reduce uncertainty as regards behaviour.

224. The CMA further submitted that its reference in the Decision to "paper-based activity" was to distinguish between compliance policies and training on the one hand and, on the other hand, a genuine cultural change within the undertaking.

225. Mr Williams, for the CMA, made the specific submission that when FPM served its response to the Statement of Objections and when the senior personnel at FPM were interviewed by the CMA, those persons either did not understand the

compliance training which they had already received prior to their interviews alternatively they did understand the compliance training but did not intend to comply with competition law.

226. The CMA submitted that the position of FPM was quite different from that of SBC and CPM. The CMA referred to the different facts relating to the three undertakings. As to the suggestion that FPM did not have the same opportunities as the others to put its case for a discount for compliance, FPM had not shown that there was anything which it failed to say to the CMA in support of its case.

227. We will now explain our approach in relation to this matter. The Penalty Guidance makes clear, for the purpose of considering whether to allow a discount for compliance, that:

(1) the evidence of compliance activities is to be considered "carefully";

(2) the question is whether the compliance activities "merit" a discount;

(3) a discount if awarded may be "up to 10%";

(4) the "mere existence" of compliance activities will not be treated as a mitigating factor;

(5) the undertaking must "demonstrate" that adequate steps have been taken;

(6) to qualify as adequate steps, they must achieve a "clear and unambiguous" commitment to compliance;

(7) the compliance must be throughout the undertaking "from the top down".

228. It is not in dispute that FPM had a compliance programme involving an appropriate compliance manual and training. The issue before us is whether the CMA was right to conclude that FPM had failed to demonstrate a clear and unambiguous commitment to compliance from the top down. The CMA relies

on FPM's Response to the Statement of Objections and the answers given by Eoin McCann, Francis McCann and [Senior FPM Employee3] when interviewed.

229. In the Response to the Statement of Objections and in the interviews, FPM denied that it had made an agreement to restrict competition. This was an unrealistic position for FPM to take in view of the fact that the CMA had recordings of a number of meetings when the competitors discussed prices and market shares. However, we take the view that a denial of an infringement, even an unrealistic denial, does not of itself show that the senior personnel at FPM either did not understand the compliance training which they had or were not prepared to comply with it in the future.

230. In addition to FPM's basic denial of an agreement to restrict competition, the CMA points to the contentions put forward by FPM that it did not implement any such agreement and any such agreement did not have an effect on the market and that proved that no agreement had existed. The contentions as to non-implementation and no effects appear to have been put forward to support the case that no agreement to restrict competition had ever been made. That again was an unrealistic stance on the part of FPM but it is a different thing from saying that an admitted agreement to restrict competition did not involve any wrongdoing because the agreement was not implemented and/or had no effect.

231. The CMA also criticized the contentions put forward by FPM that the discussions about prices and market shares were just banter. Again, those contentions were unrealistic. However, as we understand them, they were put forward to support the unrealistic case that the competitors had not made an agreement to restrict competition. It is now clear that these discussions were an infringement of competition law because, at least, they involved sharing information as to prices and markets. However, as we read the Response to the Statement of Objections and the answers at interview to which our attention was drawn, there was really only one occasion when the question of whether the sharing of information was wrongful was specifically confronted by FPM. In the interview of Francis McCann on 9 May 2019, it was put to him that FPM should not be sharing information in the way it did. His answer was that he had

not been aware of that at the time of the meetings. He said that he had not had any training at the time of the meetings. That answer is not an assertion that sharing information is in accordance with the law. Whether Francis McCann's actual evidence about his understanding at the time of the meetings is right or wrong, we do not consider that his answer shows that which Mr Williams specifically submitted to us, namely, that senior personnel had not understood their training or did not intend to comply with it in the future.

232. We consider that FPM should not be disqualified from obtaining a discount for compliance, if otherwise justified, because it persisted in an unrealistic denial of an infringement. Its denial meant that it did not admit its infringement but the discount being considered here is not a discount for an admission but, instead, a discount for compliance. Instead, we will address the submission made to us by Mr Williams and ask whether we conclude that the senior personnel at FPM did not understand the compliance training or did not intend to comply with competition law in the future.

233. We have no reason to think that the senior personnel at FPM did not understand the compliance training. As to whether the senior personnel intend to comply with competition law in the future, it is not possible to know with complete certainty what will happen in that respect. We suspect that future compliance will be heavily influenced by the outcome of this appeal. The penalty imposed in this case can take account of the need for specific deterrence. If the penalty is the appropriate penalty having regard to the need for specific deterrence, that ought to influence FPM in relation to future compliance.

234. Applying the above reasoning, we consider that a discount for compliance is appropriate in relation to FPM. We consider that a discount of 5% is the right starting point. We therefore need to consider whether we should increase that discount in view of the fact that SBC and CPM were allowed a discount of 10% for compliance.

235. FPM submitted that we should apply the principle of equal treatment. The CMA did not submit otherwise. The Penalty Guidance says in footnote 17 to paragraph 2.1 that the CMA will observe the principle of equal treatment. The

relevant principle is that like cases will be treated alike and that unlike cases will not be treated in the same way.

236. FPM said that the CMA gave opportunities to SBC and CPM, which it did not give to FPM, to put forward a case in support of a discount for compliance. We are not persuaded that there was any failure to treat the parties equally. The communications between the CMA and the different undertakings took different forms because the undertakings took up different positions in response to the case being made against them. In any event, FPM was given an entirely appropriate opportunity to put forward its case in relation to a discount for compliance and it did so.

237. Then it was said that the discount for FPM should be the same as the discount for SBC and CPM because the relevant circumstances were the same in all three cases. On this appeal, we know most about the circumstances relating to FPM. Our view is that the discount for FPM ought to be 5%. We are not minded to change that percentage in view of the fact that the CMA, which knew the detailed circumstances of SBC and CPM, considered that they deserved a discount of 10%. However, we have examined what the CMA said about its reasons for allowing a 10% discount for SBC and CPM to see if we are persuaded that we should find that the circumstances of the three undertakings are materially the same. Having done so, we are not persuaded that we can reach that conclusion. The CMA was able to make positive findings as to SBC's and CPM's commitment to their compliance programmes. Our assessment in relation to FPM is different. We have been prepared to allow FPM a 5% discount for compliance principally because we have not accepted Mr Williams' submission that we could find that either FPM did not understand the compliance training or did not intend to comply with competition law rather than because we have been able to made confident findings as to FPM's commitment to compliance. Further, the discount of 10% for SBC and CPM was on the condition that those undertakings provided annual updates, for three years, confirming their ongoing commitment to compliance activities. Finally, although it is a minor consideration, footnote 1105 points out some shortcomings in FPM's compliance.

238. Accordingly, we consider, at Step 3 of the Penalty Guidance, that FPM should be allowed a discount of 5%.

239. The result of the above is that the adjustment to be made at Step 3 is to increase the penalty by 15% rather than by 20%. On that basis, the figure at Step 3 is £56,939,334 rather than the £59,414,958 arrived at by the CMA

M. STEP 4

240. Grounds of Appeal 5 and 6 challenge the Decision in relation to Step 4, in particular, in relation to the CMA's decision as to the proportionality of the penalty.

(1) The Penalty Guidance in relation to Step 4

241. The Penalty Guidance provides as follows in relation to Step 4:

> "**Step 4 – adjustment for specific deterrence and proportionality**
>
> 2.20 In considering whether any adjustments should be made at this step for specific deterrence or proportionality, the CMA will consider appropriate indicators of the undertaking's size and financial position at the time the penalty is being imposed. The CMA may have regard to indicators – including, where they are available, total turnover, profitability (including profits after tax), net assets and dividends, liquidity and industry margins – as well as any other relevant circumstances of the case. The CMA will generally consider three year averages for profits and turnover. The CMA may also consider indicators of size and financial position from the time of the infringement.
>
> 2.21 The penalty figure reached after steps 1 to 3 may be increased to ensure that the penalty to be imposed on the undertaking will deter it from breaching competition law in the future, given its specific size and financial position and any other relevant circumstances of the case. Such an increase will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of penalty reached at the end of step 3. Where relevant, the CMA's estimate would account for any gain which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration. The assessment of the need to adjust the penalty will be made on a case-by-case basis for each individual infringing undertaking.
>
> 2.22 In addition, there might be exceptional cases where an undertaking's relevant turnover is very low or zero with the result that the figure at the end of step 3 would be very low or zero. In such cases, the CMA would expect to make more significant adjustments, both for general and specific deterrence, at

this step. Such an approach may also be appropriate where the relevant turnover did not accurately reflect the scale of an undertaking's involvement in the infringement or the likely harm to competition. This might be the case, for example, in relation to bid-rigging cases or where an undertaking's turnover in the last business year before the infringement ended was unusually low.

2.23 In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or excessive having regard to the undertaking's size and financial position and the nature of the infringement.

2.24 At this step, the CMA will assess whether, in its view, the overall penalty proposed is appropriate in the round. Where necessary, the penalty reached at the end of steps 1 to 3 may be decreased to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition."

(2) The Decision in relation to Step 4

242. The CMA dealt with Step 4 as follows (some of the footnotes in the Decision are included but are renumbered on being transposed into this decision):

"**Step 4 – adjustment for specific deterrence and proportionality**

6.61 The penalty may be adjusted at this step for specific deterrence (ensuring that the penalty imposed on the undertaking in question will deter it from breaching competition law in the future) or to ensure that it is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case. At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round.

6.62 Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty. The assessment of the need to adjust the penalty will be made on a case-by-case basis for each individual infringing undertaking.

6.63 Where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the infringing activity on competition.[3]

[3] Penalty Guidance, paragraph 2.20. Unless stated otherwise, the CMA has based its assessment on:
(i) financial information taken from accounts consolidated at the level of Consolis Group SAS (previously named Consolis Holdings SAS): Consolis Holdings SAS Historical Financial Information for the financial years ended 31 December 2015, 2016 and 2017: URN S1360. Figures have been converted from euros into sterling using the Bank of England's annual average and year end spot

6.64 The penalty may be increased at step 4 for specific deterrence. Increases to the penalty at step 4 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of the penalty reached at the end of step 3. In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or excessive having regard to the infringing undertaking's size and financial position and the nature of the infringement.

SBC

6.65 Taking into account the serious nature of the Infringement, SB's direct and active participation in the Infringement (including through the regular attendance of a senior director at cartel meetings) and the impact of SB's infringing activity on competition, the CMA considers that a penalty of £31,144,772 is appropriate in the round.

6.66 In particular, CMA does not consider that a penalty of £31,144,772 after Step 3 is excessive or disproportionate given the size and financial position of SBC. This figure represents approximately:

(a) 2% of SBC's annual worldwide turnover for the financial year ending 31 December 2017;[4] and 3% of SBC's average annual worldwide turnover;[5]

(b) 40% of SBC's net assets and 39% of adjusted net assets;[6]

(c) -129% of SB's profit after tax for the financial year ending 31 December 2017;[7] and -178% of SBC's average annual profit after tax;[8] and

(d) 42% of SBC's operating profit for the financial year ending 31 December 2017;[9] and 61% of SBC's average operating profit.[10]

6.67 The CMA does not consider that an increase in penalty is necessary to deter SBC from further breaches of competition law given that SBC has admitted its involvement in the Infringement (coming forward for leniency and

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exchange rates over that period. Averages have been calculated over the three year period ending 31 December 2017;

(ii) CPM Group Limited's annual accounts for the financial year ending 31 December 2017: URN S1391. Averages have been calculated over the three year period ending 31 December 2017: URN S1393; URN S1392; URN S1391; and

(iii) FPM's annual report and accounts for the financial year ending 31 December 2018: URN S1388. Averages have been calculated over the three year period ending 31 December 2018: URN S1390; URN S1389; URN S1388.

[4] Based on annual worldwide turnover of £1,265,574,345.

[5] Based on average annual worldwide turnover of £1,121,311,030.

[6] Based on net assets for the year ended 31 December 2017 of £77,551,020, adjusted to £79,262,808 to reflect dividends paid out in the three year period ending 31 December 2017.

[7] SBC was loss making in the financial year ending 31 December 2017, with a loss after tax of £24,095,330.

[8] SBC was loss-making over the three year period ending 31 December 2017, with an average annual loss after tax of -£17,538,267.

[9] Based on operating profit of £73,863,139.

[10] Based on average annual operating profit of £51,008,689.

settlement), and has put in place an extensive compliance programme both within SB and across the broader Consolis Group.

6.68 Therefore, the CMA does not consider it necessary to adjust SBC's penalty at step 4 for proportionality or specific deterrence.

CPM

6.69 The CMA considers that a penalty of £55,431,580 after step 3 is large given the size and financial position of CPM.[11] This figure represents approximately:[12]

(a) 100% of CPM's annual worldwide turnover for the financial year ending 31 December 2017;[13] and 110% of CPM's average annual worldwide turnover;[14]

(b) 400% of CPM's net assets and 377% of adjusted net assets;[15]

(c) -22,173% CPM's profit after tax for the financial year ending 31 December 2017;[16] and 2,613% of CPM's average annual profit after tax;[17]

(d) 4,442% of CPM's operating profit for the financial year ending 31 December 2017;[18] and 1,638% of CPM's average operating profit.[19]

6.70 The CMA has therefore applied a reduction at step 4 to ensure that the penalty is not disproportionate or excessive.

6.71 Taking into account the serious nature of the Infringement, CPM's direct and active participation in the Infringement (including through the regular attendance of senior directors and management at cartel meetings) and the impact of CPM's infringing activity on competition, the CMA considers that a penalty of £5,000,000 is appropriate in the round.

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[11] In the particular circumstances of this case, the CMA has carried out its assessment and calculation of CPM's penalty at step 4 on the basis of CPM's annual accounts for the three years ending 31 December 2017. CPM's accounts for the financial year ending 31 December 2017 reflect the most recent full year of normal economic activities over the 12 month period preceding the date of the CMA's decision. CPM's annual accounts for the financial year ending 31 December 2018 reflect a period of only 6 months' economic activities, as the trade and net assets of CPM were transferred to its parent company during this accounting period, at which point CPM ceased trading. Nonetheless, the CMA notes that CPM's performance for the 6 month period of economic activities during the financial year ending 31 December 2018 appears to have been broadly similar to its performance during the previous accounting year, such that there is nothing to indicate that CPM's annual accounts for the financial year ending 31 December 2017 do not provide the most accurate available information about the size and financial position of CPM at the time the penalty is being imposed.

[12] Using figures from CPM Group Limited's annual accounts for the years ended 31 December 2015 (URN S1393), 31 December 2016 (URN S1392) and 31 December 2017 (URN S1391). Averages have been calculated over the three year period ending 31 December 2017.

[13] Based on annual worldwide turnover of £55,338,000.

[14] Based on average annual worldwide turnover of £50,436,791.

[15] Based on net assets for the year ended 31 December 2017 of £13,852,000, adjusted to £14,703,860 to reflect dividends paid out over the 3 year period ending 31 December 2017.

[16] CPM was loss making in the financial year ending 31 December 2017, with a loss after tax of £250,000.

[17] Based on average profit after tax of £2,121,511.

[18] Based on operating profit of £1,248,000.

[19] Based on average operating profit of £3,383,254.

6.72 The CMA considers that this figure achieves the specific deterrence required at a level that is fair, reasonable and proportionate given the size and financial position of CPM. This figure represents approximately:

(a) 9% of CPM's worldwide turnover for the financial year ending 31 December 2017; and 10% of CPM's average worldwide turnover;

(b) 36% of CPM's net assets and 34% of adjusted net assets;

(c) -2,000% of CPM's profit after tax for the financial year ending 31 December 2017; and 236% of CPM's average annual profit after tax;

(d) 401% of CPM's operating profit for the financial year ending 31 December 2017; and 148% of CPM's average operating profit.

FPM

6.73 The CMA considers that a penalty of £59,414,958 after step 3 is large given the size and financial position of FPM. This figure represents approximately:

(a) 23% of FPM's annual worldwide turnover for the financial year ending 31 December 2018;[20] and 26% of FPM's average annual worldwide turnover;[21]

(b) 45% of FPM's net assets and 40% of adjusted net assets;[22]

(c) 362% of FPM's profit after tax for the financial year ending 31 December 2018;[23] and 372% of FPM's average annual profit after tax;[24] and

(d) 319% of FPM's operating profit for the financial year ending 31 December 2018;[25] and 305% of FPM's average operating profit.[26]

6.74 The CMA has therefore applied a reduction at step 4 to ensure that the penalty is not disproportionate or excessive.

6.75 Taking into account the serious nature of the Infringement, FPM's direct and active participation in the Infringement (including through the regular attendance of senior directors and management at cartel meetings) and the impact of FPM's infringing activity on competition, the CMA considers that a penalty of £28,000,000 is appropriate in the round.

6.76 The CMA considers that this figure achieves the specific deterrence required at a level which is fair, reasonable and proportionate given the size and financial position of FPM. This figure represents approximately:

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[20] Based on annual worldwide turnover of £254,496,765.
[21] Based on average annual worldwide turnover of £229,856,359.
[22] Based on net assets for the year ended 31 December 2018 of £131,596,680, adjusted to £148,026,680 to reflect dividends paid out during the financial years ending 31 December 2016, 2017 and 2018, as well as an amount of £58.3 million to reflect a transfer of assets made to FPM Group Limited as part of a corporate restructuring in 2016.
[23] Based on a profit after tax of £16,398,109.
[24] Based on an average profit after tax of £15,988,706.
[25] Based on operating profit of £18,647,355.
[26] Based on an average operating profit of £19,459,703.

(a) 11% of FPM's worldwide turnover for the financial year ending 31 December 2018; and 12% of FPM's average annual worldwide turnover;

(b) 21% of FPM's net assets and 19% of adjusted net assets;

(c) 171% of FPM's profit after tax for the financial year ending 31 December 2018; and 175% of FPM's average annual profit after tax; and

(d) 150% of FPM's operating profit for the financial year ending 31 December 2018; and 144% of FPM's average operating profit.

6.77 FPM has made representations that the CMA's assessment of proportionality by reference to its 2018 accounts means that FPM has been '*disproportionately penalised by the length of the CMA's investigation*', given that FPM's turnover has grown significantly in the period since 2013.[27]

6.78 As regards the length of the CMA's investigation, the CMA has proceeded as expeditiously as possible, in circumstances where both the criminal and civil investigations were large and complex.[28]

6.79 In line with the Penalty Guidance, the penalty should ensure that the undertaking is deterred from breaching competition law in the future. The CMA considers that it is appropriate to assess proportionality and deterrence by reference to FPM's most recently available audited accounts because these

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[27] FPM has also stated that: CPM's figure of £5,000,000 after step 4 is significantly different to FPM's figure of £28,000,000; the CMA has mischaracterised FPM's role in the arrangement; and a penalty of £28,000,000 will have a real and immediate impact on FPM's ability to carry out its business: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraphs 5.1 to 5.9, URN S1446. In its supplementary representations on the Draft Penalty Statement, FPM provided further information on the scale of the impact that the penalty would have on FPM's business, potentially putting it in breach of its banking covenants: FPM's representations on the CMA's Draft Penalty Statement, dated 18 October 2019, paragraphs 3. 1 to 3.2, URN S1628. Taking these representations in turn: the CMA notes that the Competition Appeal Tribunal has stated that comparisons of the levels of fine imposed on different parties, '*must be approached with caution. The final figure for the fine imposed on each addressee is the result of many different choices made by the OFT as to what factors should or should not be taken into account when setting the penalty in accordance with the framework set out in the Guidelines. The fact that the application of these choices results in two different companies being subject to widely varying fines is not a matter for complaint or criticism by itself*': *G F Tomlinson Group Ltd and Others v Office of Fair Trading* [2011] CAT 7, paragraph 150. For the reasons set out in Chapters 4 and 5, the CMA is not persuaded by FPM's representations as regards its role in the arrangement. As regards the impact of the fine on FPM, the CMA notes that FPM has not demonstrated that a breach of its banking covenants would necessarily ensue as a result of the CMA's penalty, nor has it set out or quantified the specific financial implications of any such breach. For example, in its representations, FPM has not taken account of the situation after 30 June 2019 (noting that half yearly accounts suggest an annualised EBITDA of £13 million, which should reduce net borrowing and increase the company's net asset position); and (although it is a matter for parties to determine how they manage their business) the CMA notes that a transfer of assets of £58.3 million was made to FPM Group Limited as part of a corporate restructuring in 2016, which reduced FPM's stated net asset position. The CMA further notes that FPM will have the opportunity to make a reasoned application for additional time to pay should it consider this necessary.

[28] The CMA notes that it has been established by the European Courts that, although there is a principle that administrative procedures should be conducted within a reasonable time, a decision can only be challenged on the '*reasonable time*' principle if the parties' rights of defence have been infringed and in any event cannot lead to a reduction of the fine imposed (see: Judgment of 26 January 2017, *Villeroy & Boch SAS v Commission*, Case C-644/13 P, EU:C:2017:59, paragraph 79 and Judgment of 12 July 2018, *The Goldman Sachs Group v Commission*, T-419/14, EU:T:2018:445, paragraph 261).

accounts provide the most accurate reflection of FPM's size and financial position at the time the penalty is being imposed.[29]

6.80 In carrying out this assessment, the CMA has also considered FPM's penalty:

(a) against average financial indicators over the three year period ending 31 December 2018, noting that these figures are broadly similar across the relevant financial indicators to those for the financial year ending 31 December 2018 (see paragraph 6.76);

(b) against the financial indicators of SBC and CPM in order to ensure that all Parties are treated in a proportionate and consistent manner, taking account of the various differences in their individual financial circumstances.

6.81 The various financial indicators after the step 4 adjustment, as referred to in paragraphs 6.66, 6.72 and 6.76, are summarised in the table below:

Financial indicators	**SBC**		**CPM**		**FPM**	
	£	**After step 4**	**£**	**After step 4**	**£**	**After step 4**
Worldwide turnover (last financial year)	£1,265,574,345	2%	£55,338,000	9%	£254,496,765	11%
Average worldwide turnover	£1,121,311,030	3%	£50,436,791	10%	£229,856,359	12%
Net assets	£77,551,020	40%	£13,852,000	36%	£131,596,680	21%
Adjusted net assets	£79,262,808	39%	£14,703,860	34%	£148,026,680	19%

[29] FPM has noted that the CMA has accepted CPM's representations that CPM's accounts, and not those of its ultimate parent (Marshalls plc), are relevant for the purposes of the step 4 (and step 5) penalty calculation, on the basis that Marshalls plc was not involved in any infringing conduct and was unconnected with CPM at the time of the Infringement. FPM states that CPM's representations in this respect are similar to FPM's representations that the use of FPM's 2018 accounts is disproportionate, given that FPM's turnover has grown significantly since 2013 for reasons which are '*wholly unconnected with, and occurred after, the period of the alleged infringement*'. FPM further notes that there was a large degree of overlap between the CPM and Marshalls' business in the 2017 / 2018 period, which would suggest that they could be seen as the same undertaking for the purposes of the proportionality assessment: FPM's representations on the CMA's Draft Penalty Statement, dated 18 October 2019, paragraphs 2.15 to 2.18, URN S1628. However, in the circumstances of this case, the CMA considers that the step 4 (and step 5) penalty calculation should be assessed by reference to the accounts of the undertaking to whom the decision is addressed. The CMA has addressed this Decision to CPM (on the basis that it was directly involved in the Infringement, and wholly unconnected with the Marshalls group at the time of the infringing conduct), and has therefore used CPM's accounts for the purposes of the step 4 (and step 5) penalty calculation. Consistently with this, the CMA has assessed FPM's penalty at step 4 (and step 5) by reference to the accounts of FPM (the undertaking to whom this Decision is addressed), and not the accounts of its parent company. The CMA does not consider that the fact that an undertaking may have been successful or unsuccessful during the period of any investigation, should affect the approach taken in this respect.

Profit after tax (last financial year)	-£24,095,330	-129%	-£250,000	-2000%	£16,398,109	171%
Average profit after tax	-£17,538,267	-178%	£2,121,511	236%	£15,988,706	175%
Operating profit (last financial year)	£73,863,139	42%	£1,248,000	401%	£18,647,355	150%
Average operating profit	£51,008,689	61%	£3,383,254	148%	£19,459,703	144%

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(3) The appeal in relation to Step 4

243. Step 4 is the subject of Grounds of Appeal 5(a), 5(b), 6(a) and 6(b). Grounds 5(a) and 5(b) assert that the CMA (and the OFT) were guilty of unreasonable delay in relation to the criminal and civil investigations in this case and that the penalty at Step 4 ought to be adjusted, in particular reduced, as a result. As expressed, these Grounds of Appeal clearly relate to the CMA's reasoning in relation to Step 4; in particular, Ground 5(a) challenges what was said by the CMA in footnote 28 as set out above and Ground 5(b) challenges what was said in paragraph 6.78 of the Decision. However, at the end of the hearing of the appeal, Mr O'Donoghue summarised his case in relation to the various Steps in the Penalty Guidance and he put forward his contention as to the relevance of unreasonable delay in relation to Step 5, rather than Step 4. However, as the CMA dealt with the topic of alleged delay in relation to Step 4 and as the CMA's reasoning in that respect is specifically challenged, we consider that we need to deal with the topic of alleged delay when considering Step 4 although our conclusions in relation to that topic will also be relevant when we consider Step 5.

244. Ground of Appeal 6(a) asserts that the CMA did not give adequate reasons for its Decision in relation to Step 4. This Ground was developed in the Notice of Appeal by reference to the different treatment of SBC, CPM and FPM. It was said that the three undertakings were treated differently without any adequate

explanation being provided. The contention was that the penalty figure of £28 million for FPM was plucked out of the air and that the calculations which the CMA did to relate that figure to turnover, assets and profits were done to lend a false appearance of objectivity. Ground of Appeal 6(a) also made a specific criticism in relation to the non-application of paragraph 2.24 of the Penalty Guidance which referred to the impact of the infringement on competition. It was said that the CMA had failed to deal with FPM's case as to the absence of impact and had failed to differentiate between the undertakings in this respect.

245. Ground of Appeal 6(b) made a further point in relation to the CMA's (and OFT's) alleged delay in conducting the investigations in this case. It was said that FPM's turnover had increased significantly between 2013 and 2018, but yet the CMA at Step 4 had used the figures for 2018 and had made no allowance for the fact that the turnover figures had increased during the period of the alleged delay. It was further said that the treatment of FPM was unjustifiably different from the CMA's treatment of CPM. This point was explained by reference to the fact that the CMA took FPM's 2018 turnover, which had been increased by acquisitions made by FPM before 2018, whereas, in the case of CPM, the CMA had ignored the turnover of Marshalls plc which had acquired CPM during the period between the infringement and the Decision.

246. Grounds of Appeal 5(a), 5(b), 6(a) and 6(b) were developed in FPM's skeleton argument in support of the appeal in much the way they had been set out in the Notice of Appeal.

247. However, in its closing submissions on the appeal, FPM made seven specific submissions as to what a proportionate penalty would be. In summary, it was submitted that:

(1) the CMA had erred in law by asking itself what an affordable penalty would be rather than asking itself "what was the lowest penalty that could reasonably be justified"; it was said that an affordable penalty might be disproportionate;

(2) when assessing "the impact" of the infringement on competition, the CMA did not have regard to the fact that FPM did not implement the cartel and the cartel did not have an effect on competition;

(3) in assessing the size and financial position of FPM at paragraph 6.76 of the Decision, the CMA treated as part of FPM's assets £58.3 million transferred by FPM to its parent company; it should be borne in mind that the CMA did not reject FPM's submission that a penalty of £28 million would have a real and immediate impact on FPM's ability to carry on its business;

(4) there was no justification given by the CMA for the different treatment of SBC, CPM and FPM;

(5) the CMA failed to strike a proportionate balance between the three undertakings' size and financial position at the time of the Decision (see Penalty Guidance paragraph 2.24) and their size and financial position at the time of the infringement (see Penalty Guidance at paragraph 2.20);

(6) the CMA gave excessive weight to the need to ensure specific deterrence in circumstances where FPM had an extensive compliance programme;

(7) the CMA ought to have had regard to the fact that the penalty at Step 4 exceeded the statutory maximum under section 36(6) of CA 1998.

248. In its closing submissions, FPM submitted that the appropriate penalty at Step 4 ought to have been in the range from £5.090 million to £12.725 million which figures were some 2% to 5% of FPM's worldwide turnover. It was said that we should arrive at a figure in this range by reflecting the approach which the CMA adopted in relation to SBC and CPM and by recognising that most of the penalty of £28 million was explained by turnover in products other than those which were the subject of the infringement.

249. In our view, some of the specific matters relied upon by FPM in its closing submissions go beyond the Grounds of Appeal. In those circumstances, we

consider that we should consider the Grounds of Appeal which relate to Step 4 and decide whether to uphold some or all of those grounds. If we do not uphold any of the grounds which relate to Step 4, the only matter which we then need to take into account in relation to Step 4 is the fact that we have reduced the figure arrived at by the CMA at Step 3 and we ought to consider whether that circumstance would lead us to reduce the figure arrived at by the CMA at Step 4. Conversely, if we do uphold any Ground of Appeal in relation to Step 4, we will need to form our own view as to what figure would be appropriate at Step 4 and we would then take into account all of the submissions made on behalf of FPM whether or not they form an identified Ground of Appeal. As we will explain later in this Decision, we will in any case deal with all of the seven specific matters raised by FPM for the sake of completeness.

(4) Grounds of Appeal 5(a) and 5(b)

250. These Grounds of Appeal challenge two statements made by the CMA in the Decision. The first statement was in paragraph 6.78 where the CMA stated that it had proceeded with the investigations "as expeditiously as possible". The second statement was in a footnote to that paragraph which stated that the requirement that administrative procedures should be conducted within a reasonable time could not lead to a reduction of the fine imposed although a breach of that requirement would be relevant if the breach had infringed a party's rights of defence. In the present case, FPM has not submitted that the time taken by the CMA (and the OFT) has infringed FPM's rights of defence.

251. To deal with these Grounds of Appeal, we obviously need to consider whether "delay" in conducting the criminal and/or civil investigations could be relevant to the assessment of the appropriate penalty either at Step 4 or Step 5 of the Penalty Guidance. If "delay" could not be relevant in that way, then it would not be necessary to consider further whether there had been "unreasonable delay". Conversely, if "delay" could be relevant to penalty, we would then have to consider whether there was in this case "unreasonable delay". To do so, we would plainly need to know what standard of "reasonableness" to apply to determine that question. It would seem likely that the answer to the first question

as to how "delay" could be relevant to penalty would inform our decision as to the standard to be applied when considering "reasonableness".

252. FPM submitted that unreasonable delay could lead to a reduction in the penalty otherwise due. It said that the determination as to whether an undertaking was responsible for an infringement of UK or EU competition law involved the determination of a criminal charge for the purposes of Article 6 of the European Convention on Human Rights and Fundamental Freedoms: see *Competition and Markets Authority v Flynn Pharma Ltd* [2020] EWCA Civ 339, [2020] Bus LR 803 at [136] per Green LJ. FPM submitted that the amount of delay which gave rise to a contravention of Article 6 was discussed by the Privy Council in *Dyer v Watson* [2002] UKPC D1, [2004] 1 AC 379 ("*Dyer v Watson*").

253. FPM then submitted that even where there had not been a contravention of Article 6, the question of delay could still be relevant to the broader question of what is a just penalty. An otherwise appropriate penalty may be reduced to do justice where there has been excessive delay: see *R v Kerrigan* [2014] EWCA Crim 2348, [2015] 1 Cr App R (S) 29 at [38]-[40] per Hallett LJ. FPM referred to the decision of the Tribunal in *Argos Limited v The Office of Fair Trading* [2005] CAT 13 ("*Argos*") where the Tribunal considered whether there had been excessive delay by the OFT which might be relevant to the amount of the penalty although the allegation of excessive delay was rejected on the facts.

254. FPM accepted that EU case law rejected the notion that unreasonable delay could justify a reduction in the amount of the penalty but FPM nevertheless drew attention to the decision of the General Court in Case T-240/07 *Heineken Nederland BV v Commission (Re Dutch Beer Cartel)* [2013] 4 CMLR 38. In any case, the Tribunal is not obliged by section 60 of CA 1998 to apply the EU case law on this point. Further, the EU case law was not persuasive as to domestic law because the EU case law was influenced by two considerations which do not apply in this jurisdiction. The first consideration was that there is a limitation period for EU enforcement proceedings but no relevant limitation period under UK law. Further, the EU case law holds that excessive delay is not relevant to penalty because an undertaking can bring proceedings for compensation arising from the delay and (it was said) that does not apply in this jurisdiction.

255. FPM submitted that there were good reasons in this case why unreasonable delay, if established, should lead to a reduction in the penalty. The reasons were that the delay had meant that the Decision was taken and published later than it ought to have been. The date of the Decision affects the figures for turnover and assets and profits which are used for the calculation of the penalty at Step 4. A similar point arises in relation to Step 5. Thus, the excessive delay has had a direct effect on the amount of the fine. It is not relevant that delay could operate both ways. If the relevant figures were lower at a later date as compared with an earlier date, it could be suggested that the undertaking would benefit from the delay. But that is not this case.

256. The CMA's submissions in relation to the alleged relevance of alleged unreasonable delay started in a different place. The CMA referred to the reasons why some parts of the Penalty Guidance and the Turnover for Penalties Order refer to the time of the Decision. That was because the policy of the relevant provisions is to identify the penalty which is appropriate at the time when the penalty is being imposed and not at some earlier time when the undertaking was not required to pay a penalty. In particular, at Step 4, the relevant considerations relate to specific deterrence and proportionality. These considerations require one to examine the financial position of the undertaking at or near to the time of the Decision and not at some date remote from the date of the imposition of the penalty. The fact is that the undertaking is required to pay the penalty at a time when it has the financial position which is taken into account when determining the penalty. The undertaking may have had a weaker financial position at an earlier point in time but it was not required to pay a penalty at that earlier point in time.

257. The CMA submitted, as FPM appeared to acknowledge, that EU case law made it clear that excessive delay by the Commission or by the court did not justify a reduction in the appropriate penalty. As to the possible relevance of excessive delay at Step 5, it was said that Parliament had made a deliberate choice to express the cap on the penalty by reference to a date near to the date of the Decision and not some earlier date.

258. As to *Dyer v Watson*, relied on by FPM, the CMA submitted that that case showed what is meant by unreasonable delay. It must be inordinate and inexcusable delay, which is a high threshold. Further, while inordinate and inexcusable delay might lead to a reduction of penalty in a criminal case of the type considered in *Dyer v Watson* and cases which have followed it, these proceedings involve a very different type of case. This is not to be seen as a case where the delay has caused anxiety to a defendant or where a defendant's circumstances in life have radically changed during the period of delay. So far as relevant, all that has happened has been that the financial position of FPM has changed but the policy of Step 4 and the Turnover for Penalties Order requires the CMA and the Tribunal to use the figures as to its financial position at or near to the date of the Decision.

259. Finally, the CMA submitted that in so far as FPM's case is based on an alleged contravention of Article 6, then Article 6 only applies from the date when a person is "charged". In this case, FPM was not the subject of the criminal investigation at all as that investigation concerned individuals and not FPM. Thus, any allegation of unreasonable delay for the purposes of Article 6 can only apply to the period from the opening of the civil investigation.

260. In response to CMA's submission as to when FPM was charged, FPM submitted that FPM should be considered to have been charged for the purposes of Article 6 when measures were taken which carry the implication of an allegation that an offence has been committed and which substantially affect the position of the suspect: see *Foti v Italy* (1982) 5 EHRR 313 at [52]. FPM submitted that it had been "charged" no later than March 2013 when directors of FPM were arrested and FPM's premises were inspected under the powers conferred by the Enterprise Act 2002. It was said that those measures carried the implication of an allegation of infringement of the relevant provisions of CA 1998 and FPM's interests were substantially affected at that point. The CMA replied to this submission by pointing out that a civil investigation may or may not automatically follow a criminal investigation and the civil investigation in this case was only opened following a subsequent consideration of whether it was appropriate to do so. We doubt if FPM is right about when it was "charged" for

the purposes of Article 6 but, in the event, it is not necessary to rule on this point.

261. We note that the CMA specifically said that it did not go so far as to argue that the Tribunal had no jurisdiction to make a reduction in the penalty in a case of delay.

(5) Discussion

262. It is not in dispute that the CMA was obliged to comply with Article 6 from, at the latest, the opening of the civil investigation. We have left open whether it was liable to comply with Article 6 from an earlier date.

263. Article 6 states that in the determination of a person's civil rights and obligations or of any criminal charge, a person is entitle to a fair and public hearing "within a reasonable time". The meaning and application of this phrase was explained by the Privy Council in *Dyer v Watson*. In particular, Lord Bingham said at [52]-[55]:

> "52. In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.
>
> 53. The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.
>
> 54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious

> applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.
>
> 55. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise, or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit under section 22(3)(b) of the Prosecution of Offences Act 1985, to show that he has acted "with all due diligence and expedition." But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter."

264. In *Dyer v Watson*, at [78]-[79], Lord Hope discussed the question of possible prejudice caused by delay. He said that where significant prejudice due to delay could be demonstrated, then that could be taken into account when considering whether the delay was unreasonable. He added that the mere fact of inordinate or excessive delay would be sufficient to raise a presumption that prejudice had been suffered. At [80], Lord Hope referred to the concept of reasonableness requiring a high threshold to be crossed and at [81] to the purpose of Article 6 being to protect against "excessive" procedural delay. We have also taken into account what was said by Lord Rodger in that case at [152] and his comment:

> "Periods of inactivity do not per se show that the proceedings have taken an unreasonable time. But where the length of the proceedings appears to be excessive, periods of inactivity may lead to the conclusion that the reasonable time requirement has indeed been infringed."

265. *Dyer v Watson* establishes that "unreasonable delay" for the purposes of Article 6 involves inordinate and inexcusable delay.

266. Where there is a contravention of a person's Article 6 rights in the context of a proceeding where a penalty is imposed, the remedy for the contravention may be a reduction in the penalty: see *Mills v HM Advocate* [2002] UKPC D2, [2004] 1 AC 441 at [16] per Lord Steyn.

267. There is extensive EU case law as to whether it is open to the Commission, or the courts when reviewing the amount of a penalty, to reduce the amount of the penalty in a case where there has been unreasonable delay either on the part of the Commission or the court. Initially, the court was prepared to reduce the amount of the fine to reflect the fact of unreasonable delay. This was for reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity. Later, the court held that a failure by the General Court to adjudicate within a reasonable time could give rise to a claim for damages resulting from the delay. This led to the decision that the court should not reduce the fine by reason of the delay but the undertaking should be left to its claim for damages and guidance was given as to how such a claim should be dealt with. The position is explained in Case C-40/12P *Gascogne Sack Deutschland GmbH v Commission (Re Industrial Bags Cartel)* [2014] 4 CMLR 12 at [80]-[103]. The position therefore is that the fine is not reduced to reflect any unreasonable delay by the Commission or by the court: see Case C-414/12P *Bolloré v Commission* ("*Bolloré*") 8 May 2014 at [109], of which we were provided with an English translation. This case has been repeatedly followed: see Case C-608/13 *Compañía Española de Petroleós (CEPSA) SA v Commission ("Re Spanish Bitumen Cartel)* [2016] 5 CMLR 4 at [61] and Case C-616/13 *Poductos Asfálticos (PROAS) SA v Commission ("Re Spanish Bitumen Cartel)* [2016] 5 CMLR 5 at [74]-[79] where the delay was by the Commission rather than by the court. Many of the cases, which considered allegations of delay, concerned delay by the court and those cases referred to the possibility of claims for damages for unreasonable delay by a court but it was not submitted that any different principles as to the reduction of the fine applied where the delay was by the Commission rather than by the court. It was suggested that these cases were influenced by the fact that such proceedings in the EU are subject to a 10-year limitation period. While that was part of the

reasoning of the Court of First Instance in *Bolloré* it was not central to the reasoning of the Court of Justice in *Bolloré*.

268. It was not suggested that the EU case law was binding on the Tribunal by reason of section 60 of CA 1998. Insofar as it was suggested that the EU case law was persuasive, we can see differences between the relevant rules in EU competition law and domestic competition law. The real reason for the decisions in the EU cases is that the undertaking should be left to a claim for damages for prejudice suffered as a result of unreasonable delay but the amount of the fine should not be altered on that account. We did not receive any submissions as to the possible liability of the CMA for damages pursuant to section 8 of the Human Rights Act 1998 and the parties appeared to assume that no such claim could be made. In any case, we are not persuaded that an undertaking should be restricted to claiming damages for a contravention of Article 6 if it could show that the penalty imposed by the CMA was increased as the direct result of delay contrary to Article 6. We are not persuaded that the reasoning in the EU case law in this respect should be adopted in this jurisdiction.

269. The result of the above reasoning is that if FPM were able to establish a contravention of Article 6, then it would be open to the Tribunal to consider whether it would be appropriate to reflect that fact in a reduction of the penalty. As earlier explained, for this purpose FPM would have to show two things. The first is that the CMA had been guilty of inordinate and inexcusable delay and the second is that the right response to that finding is that it is appropriate to reduce the penalty on that account. It would be open to the Tribunal to find that there had been inordinate and inexcusable delay but that the penalty should not be reduced on that account. In some cases, the Tribunal may well consider that there is no real connection between the delay and the amount of the appropriate penalty. In other cases, where the delay has directly caused the penalty to be higher than it would otherwise have been, the case for a reduction in the penalty might be stronger. But even there, the Tribunal would have to take full account of the submission made by the CMA to the effect that the policy behind the Penalty Guidance in relation to Step 4 and the policy behind the Turnover for Penalties Order is that questions of deterrence and proportionality ought to be

addressed at the time when the penalty will be imposed and not at an earlier time when the penalty had not been imposed and will not be paid.

270. We also need to address FPM's alternative submission that if there had been delay which has caused the penalty to be higher than it would otherwise have been, then even where the delay did not involve a contravention of Article 6, the Tribunal could still reduce the penalty on account of the delay. As to that possibility, we can comment that in every case, the Tribunal is seeking to determine the penalty which is appropriate in all the circumstances. We therefore would not wish to rule out altogether the possibility that in some combination of circumstances, including delay on the part of the CMA, the Tribunal might think it appropriate to select a lower penalty rather than a higher penalty to reflect all the circumstances including any adverse effect attributable to delay. However, without purporting to lay down any immutable principle, we do not expect that the Tribunal would readily consider taking the course of reducing the penalty where the relevant passage of time did not amount to inordinate or inexcusable delay. In such a case, the policy considerations behind the choice of date at Step 4 and the Turnover for Penalties Order would be a powerful reason for not reducing the penalty by way of a departure from Step 4 and that Order.

(6) The facts in relation to alleged unreasonable delay

271. We will now consider whether there has been inordinate and inexcusable delay in this case.

272. FPM's challenge to the length of the investigation was set out in its Notice of Appeal as referred to above and developed in its skeleton argument. In summary, FPM's case was as follows.

273. First, the total length of the criminal and civil investigation, amounting to seventy-nine months, between the arrests in March 2013 and the Decision in October 2019, was unduly long.

274. Second, the criminal investigation, of almost five years, was excessively long. Specifically, it was said that the second interviews of those arrested and interviewed in March 2013 could and should have occurred significantly before February and June 2015.

275. Third, as to civil investigation delays:

(1) The CMA's decision to open the civil case three years after the March 2013 cartel meeting and arrests was unjustifiably slow.

(2) The CMA's decision (the so-called *volte face*) to further delay the civil investigation was also unjustifiable.

(3) Finally, the overall 42-months of the civil investigation was unjustifiably lengthy. Specific criticisms of CMA's conduct of the civil case were also made, including delays in information requests, document production and missing the estimated date for issuance of the infringement decision by seven months.

276. In its Defence, the CMA denied that the length of the investigation was excessive. It submitted that the conduct of the investigation was a matter of public law in respect of which any attempt by a court or Tribunal to appraise the time taken must afford the CMA a wide margin of appreciation.

(7) Dr Grenfell's evidence on delay

277. Dr Grenfell, The CMA's Executive Director, was the CMA's witness on this issue at the main hearing and was cross examined by Mr O'Donoghue, for FPM. Dr Grenfell was the Senior Responsible Officer ('SRO') for the overall investigation, responsible for taking the major decisions but without involvement in the day-to-day management of the case.

278. His evidence can be summarised as follows.

279. He told the Tribunal that the CMA had been clear about the typical difficulties of running parallel criminal and civil cases (in the letter from Ms Jessica Radke, the CMA's Director of Litigation), but it was reasonable for FPM to ask whether those difficulties explained the delay in this case. He told us that his detailed answers necessarily relied upon discussions with the case teams since he did not have those day-to-day case responsibilities. The CMA had reservations about revealing unduly 'granular' operational detail of case-handling. It risked deterring proper internal management discussions. He sought to be as helpful as possible within that operational constraint and wished to avoid the implication that the CMA was being evasive.

280. This was the largest and most complex criminal investigation which the CMA had conducted. There was a period of necessary intelligence-gathering prior to the commencement of the criminal investigation in March 2013. At one point, nine individuals were under investigation. The OFT received significant evidence of the cartel's existence from four recorded meetings and a series of dawn raids in 2013, at which substantial documentary evidence was seized. Shortly thereafter, it also received a leniency application on behalf of SBC. However, none of this established the length of the cartel, some six and three-quarter years, nor obviate the need for significant further investigation. The initial evidence suggested a cartel of about nine months' existence. As extra work was undertaken, it became clearer that the cartel was even more serious and long-lasting. The leniency agreement with SBC was, in any event, not signed until much later.

281. An unfavourable comparison had been made between this case and the length of the criminal investigation into CMA Case CE/9691/12 "Galvanised steel tanks for water storage main cartel infringement" ("Galvanised Steel Tanks"), which lasted two years and two months from opening the criminal case until the last charge, in respect of a cartel lasting seven years. CMA criminal investigators regarded the investigation into concrete drainage pipes as particularly large and complex. It had up to nine criminal suspects compared to three in Galvanised Steel Tanks. Even in that case, the CMA was delayed in making real progress on a civil investigation until after the criminal case was disposed of.

282. As to the delay between first and second interviews, the evidential and investigatory standards for criminal cases were higher than for civil cases, as was the burden of proof. To bring charges it had to be demonstrated that: all reasonable lines of inquiry had been exhausted; there was a reasonable prospect of conviction; and that prosecution was in the public interest. Moreover, after the arrests, between one hundred and one hundred and thirty potential witnesses were interviewed. Given video recordings, interviews, documentary and electronic evidence and the dozens of witness statements, evidence had to be stress tested to ensure meaningful questioning took place in second interviews, and the time taken between the rounds of interviews was not unduly long. By the time of the second interviews in 2015, the CMA had a great deal of evidence, but it was still expanding as the case developed, all of which needed to be checked and corroborated to meet the standards for Crown prosecutors and to be put before a jury.

283. After Barry Cooper was charged in March 2016, input from external counsel was required on whether others should also be charged. Whilst it was hoped this could be dealt with by the Autumn of 2016, external counsel had a mass of documents to review and advise on. An issue also arose during that Autumn and Winter on the extent of waiver of legal professional privilege by a suspect. This concerned access to key pieces of evidence and took a number of months to resolve

284. There had been no consideration of whether to start a civil investigation sooner than the Pipeline Steering Group ('PSG') paper of March 2016, but the CMA did not accept that there ought to have been. Dr Grenfell had seen no evidence of such a consideration by the OFT, the CMA's predecessor and did not know whether the issue had been considered prior to the CMA's coming into existence. There were good reasons for trying to run parallel investigations but good reasons, also, for not doing so. That was why the issue went to the PSG in March 2016. Following the PSG's recommendation, he formally opened the civil case the following month. It was quickly realised, however, that the decision to run the civil and criminal cases in parallel was ambitious and over-optimistic and, at an operational level, the civil work was soon suspended.

Nevertheless, the civil enforcement action was concluded as expeditiously as possible in October 2019.

285. The problem for the civil case team in April 2016 was a large and growing criminal evidence base (some 21,000 documents) that needed a full review and assessment as to the extent they also addressed the issues necessary for a Competition Act Statement of Objections. Moreover, criminal interviews were still taking place, as was checking and corroboration. It was soon realised that little could meaningfully be done to draft the Statement of Objections whilst the evidence remained in flux, and attempting to do so risked wasting CMA time and resources. There were also other civil cases which could be progressed more productively.

286. As to this being a *volte face*, the recommendation of the PSG meeting was to open a civil investigation, which occurred in April 2016. There was no *volte face*. The civil investigation remained open and was brought to a conclusion. There was a secondary operational question, about what initially could be achieved in the civil investigation before disposal of the criminal case. It had been hoped to make some progress on the Statement of Objections but soon recognised that no worthwhile progress was possible. Pausing the civil case was an operational judgement. As SRO, he had been consulted and agreed with the decision. As a result, the civil case and especially the Statement of Objections was not substantially progressed between June 2016 and June 2017.

287. When the civil case team resumed work, the criminal file was very significant and was still growing. It necessarily focussed on individuals, dishonesty (as the law then stood) and the cartel offence. It needed to be shaped for a civil investigation as to the extent of a (cartel) agreement between undertakings, as well as identifying which, of their many, products were covered by the cartelisation. For production of a Statement of Objections the substantial evidential base had to be reduced to a few hundreds of documents, as the parties would in due course require access to that file. Thus, confidentiality issues also had to be identified and resolved. This was a long and difficult process. The CMA was also approached about settlement by two of the three parties and had to develop a hybrid process.

288. By November 2017, after a full assessment of the evidence base (referred to above) the CMA were in a position to take a provisional decision (expressed to the parties following the CMA's internal 'Stop/Go meeting' that month) that there had been a Competition Act infringement by the undertakings under investigation, and thus the CMA would be proceeding to issue a Statement of Objections. This stage was reached only five months after resumption of the civil case and reflected the benefit of work from the criminal investigation, as well as new civil case work. Even after that point, in November 2017, new witnesses came forward, and new information / evidence was required to complete a Statement of Objections, including questions of market dynamics. Some of this information could only be requested once the CMA's civil investigation team had got fully to grips with all the existing evidence.

289. More routine information, such as financial data and corporate structure, was also required, though this was not a roadblock to the CMA investigation and analysis at the time. Since some of the requests were for historic information, it could have been requested at an earlier stage, but the timing of these requests made little difference to the progress of the case overall.

290. Sending a draft Statement of Objections to CPM and SBC in July 2018 reflected the decision of the CMA to embark on a hybrid settlement process, following approaches from both companies. Further witnesses from CPM also emerged after the company approached the CMA; these needed to be interviewed and their evidence factored into the existing file. Settlement offers from all parties to a cartel were typically attractive for the CMA. After negotiation, they could result in admissions of liability from all concerned (for which they received a penalty reduction) and significantly reduce CMA time and resources. Settlement negotiations would take time but admissions of liability and, therefore, the near certainty that there would be no challenge to a final decision outweighed that delay. However, a hybrid case, some settling but others not, presented a more finely balanced decision of delay versus advantage, and the CMA spent time in Spring 2018 considering its response. Ultimately, the CMA proceeded with a hybrid settlement with two of the three parties. It was also thought that FPM might decide to settle during the remainder of the process. The extra cooperation of CPM, because of the settlement process, also resulted

in two further witnesses who brought valuable evidence for the Statement of Objections.

291. Taking the forty-two months, from April 2016 to October 2019, as the length of the civil case and comparing it to the eighteen months average case length, was misleading. It was common ground that the civil case did not really commence until after disposal of the criminal case in June 2017, and so the civil case lasted about twenty-eight months. Furthermore, those averages include cases that were fully settled, neither hybrid nor contested, which lowers the average.

292. By the current standards of the European Commission and by OFT standards, prior to 2014, this was a quick case. By current CMA standards, it was not particularly quick, and slower than average, but not unreasonably long. The hybrid process took time, but resulted in a well-reasoned decision that gave the parties a fair hearing. Overall, agreeing a hybrid settlement could well have shortened the case compared to a fully contested investigation with three parties.

293. It was accepted that the draft Statement of Objections, sent to the settling parties as part of the process for comment, may not have significantly changed before being finally issued in December 2018. It was also accepted that some interviews which took place in 2019, after issuance of the Statement of Objections, might have had only marginal benefit, though noted that this would not have been known in advance.

(8) Decision on inordinate and inexcusable delay

294. We found Dr Grenfell to be a credible and straightforward witness and accept the thrust of his evidence. He explained his reliance on discussions with the case teams, and we are grateful for his willingness to explain details, within the limitations he described, despite the CMA's understandable reluctance to disclose information which could impede future work. We also note that it was common ground in these proceedings that the Tribunal should not undertake a detailed audit of OFT or CMA decision-making and timelines.

295. We now turn to the specific criticisms concerning delay from the Notice of Appeal set out above.

296. The first was about the total length of the combined (criminal and civil) investigation period (from March 2013 to the Decision in October 2019). An assessment of the validity of this criticism follows from a consideration of the time taken in the criminal and civil cases separately. We deal with these below.

297. Next, it was alleged that the criminal investigation was, itself, excessively long. We note and accept Dr Grenfell's evidence that it was the largest and most complex criminal case that the CMA and OFT had dealt with. Whilst four years and three months is a substantial period of time for any investigation, we are not persuaded that such a period was excessive in relation to investigating, to overall criminal case standards, a secret seven-year cartel arrangement involving nine potential suspects, which involved more than a hundred possible witnesses and a very substantial volume of documents, video recordings and electronic evidence. It was a serious and long-running cartel which merited a thorough investigation and resulted in a guilty plea. In the circumstances described to us by Dr Grenfell, we were not persuaded, in particular, that a comparison with the length of the OFT/CMA investigation into Galvanised Steel Tanks, which had far fewer suspects, is indicative of this investigation being unduly long.

298. When asked to explain why the second interviews of those arrested in March 2013 were delayed until February and June 2015, he told us that the delay was because the second interviews were an important opportunity to put important relevant questions to suspects, once sufficient criminal evidence had been gathered and stress tested for those purposes. He told us that this was not an undue delay in the circumstances of the case. He was persuasive under cross-examination and we accept his assessment.

299. As regards the civil case, we take the first two criticisms together. FPM complained that the CMA decision to open a civil case three years after the criminal case commenced was unjustifiably slow. It also complained that the civil case was then suspended soon afterwards, the so-called *volte face*.

300. FPM pointed to CMA policy statements that there were good reasons to undertake criminal and civil cases in parallel, and CMA past practice demonstrated it was possible. In his evidence Dr Grenfell admitted that there was no consideration within the CMA, at least, about whether to open a civil case sooner but did not accept that there ought to have been. However, we accept his explanation that, whilst there are good reasons for running such cases in parallel, there are also good reasons not to do so, including the risk of contaminating evidence in the criminal case and the potential for important evidence for the civil case to emerge during a criminal trial.

301. During cross-examination, he explained the significant problems the civil case team faced once the civil investigation had been opened, in trying to form a Competition Act case from a criminal evidence base that was, at that stage, still developing significantly. He also told us that the CMA team had, at the time, other cases which it could progress more efficiently and effectively. We consider that the CMA was fully entitled to prioritise its work in this way. In our view, the past experience of the CMA of the risks in seeking to run parallel criminal and civil cases, as partly demonstrated in this case, also justified the CMA in not considering whether to open a civil case at an earlier stage. As a result, we do not consider that the CMA was unjustifiably slow in opening its civil case in April 2016, nor that it was wrong to suspend it soon thereafter.

302. In making a decision to open the civil case in April 2016, the CMA attempted to shorten the overall length of the investigation. The suspension until June 2017, in the face of the operational problems then encountered, was the correct decision. We do not, however, believe that the CMA deserves to be criticised for its attempt to obtain any case management efficiencies which might have been available.

303. FPM's third complaint was that the length of the civil case, some forty-two months, was unduly long. Firstly, it is clear to us that, despite being opened in April 2016, work on the civil case, in reality, only commenced in June 2017, after closure of the criminal investigation. Thus, the civil case took twenty-eight months to complete. We have considered average case lengths of the OFT, European Commission and the CMA, which were drawn to our attention.

304. Two of the three parties approached the CMA for settlement. Dr Grenfell explained that hybrid cases are not so clearly advantageous for the CMA, requiring more thought, which imposes a delay in itself, in addition to a potentially lengthier process. We note that the CMA has not been criticised for its choice of a hybrid settlement in this case. We make no criticism and we have already accepted Dr Grenfell's evidence about the challenges and delays imposed by developing the criminal evidence into a Competition Act case, including time taken to resolve the waiver of privilege issue.

305. Finally, specific criticisms were made about delays in information requests, document production and missing estimated dates for production of the final Decision. We were satisfied by the explanations given by Dr Grenfell and, in any event, are of the opinion that none of these had a material impact. Overall, we accept Dr Grenfell's assessment that, by current CMA standards, the investigation was not particularly quick, slower than average, but not unreasonably long.

306. It follows that neither the criminal, civil or combined investigations were subject to inordinate or inexcusable delay even though portions of the work may not have proceeded as swiftly as the authorities had hoped or intended. Accordingly, we do not accept FPM's case for a reduction in the penalty based on its contention that there was inordinate and inexcusable delay.

307. As to FPM's secondary case, that even without inordinate and inexcusable delay it is appropriate to reduce the penalty because if the Decision had been earlier, the penalty would have been lower, we do not accept that case either. First of all, the time taken in this case was not inordinate and inexcusable. The CMA did not contravene Article 6 or any obligation owed to FPM. The CMA took time to deal with a complex case involving a considerable amount of material. The policy behind the choice of date for Step 4 in the Penalty Guidance is the right policy which addresses issues as to deterrence and proportionality by reference to the financial position of the undertaking at the time when the penalty is imposed. Prima facie, that date is the right date and an earlier date is the wrong date. In this case, it is appropriate to fix the penalty by reference to

the date identified at Step 4. In due course, the same reasoning will apply to the Turnover for Penalties Order at Step 5.

(9) Ground of Appeal 6(a)

308. The first thing we need to do is to determine the scope of Ground 6(a). In the Notice of Appeal, Ground 6(a) is headed "inadequate reasons" but paragraph 137 of the Notice of Appeal refers to the CMA erring in law "in giving inadequate reasons and/or acting irrationally". The Ground of Appeal is developed in the Notice of Appeal by putting forward contentions that the Decision did not contain clear, adequate and intelligible reasons for the conclusions. There are various references to the CMA's reasoning being unexplained and to the figures being plucked out of the air. FPM alleges that the CMA was intent on maximising the penalty on FPM, a non-settling party, and ensure that the settling parties only had modest fines. It is in that context that FPM contend that the CMA acted unlawfully or irrationally. FPM then asks the Tribunal to assess afresh the proportionality of the penalty. Then, added at the end of this Ground of Appeal, there is a specific point that the CMA should have taken into account the fact that the infringement by FPM had no impact on competition. The overall thrust of this Ground of Appeal is to challenge the reasons given by the CMA in respect of its assessment of the penalty for FPM as compared with the way it assessed the penalty for SBC and CPM.

309. We will therefore, in the first instance, approach Ground 6(a) on the basis that FPM contends that the reasons given are not clear, adequate and intelligible. There is clear guidance in *South Bucks District Council v Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953 ("*Porter (No 2)*") as to what is required in this respect. At [35]-[36], Lord Brown summarised the law as follows (we omit specific points which related to the planning context of that case):

> "35. It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.

> 36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. … Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. …"

310. In *Porter (No 2)*, the House of Lords reversed the decision of the Court of Appeal which had required the decision-maker to provide "a much fuller analysis" or a "clear and cogent analysis" of a central issue. The House of Lords held that the central issue involved a value judgment and that a requirement for a much fuller analysis overstated the requirement to give reasons: see at [38].

311. We add that there is a basic difference between a contention that reasons are not clear, adequate and intelligible and a contention that a reason is wrong. The latter contention needs to be identified in a ground of appeal: see the Tribunal Rules 2015, rule 9(4)(d). It is not good enough to make a general contention that the reasons are not adequate and then to try to argue on appeal that a reason given, which was clearly stated, was wrong.

312. When considering FPM's contention that the reasons given by the CMA were not clear, adequate and intelligible, it is important to remember that Step 4 is dealing with the question whether the penalty figure arrived at pursuant to Steps 1 to 3 ought to be adjusted on the grounds of deterrence or proportionality. The Penalty Guidance refers to various matters which will be considered but ultimately the assessment of the figure at Step 4 is an assessment "in the round": see paragraph 2.24 of the Penalty Guidance. As to the question of proportionality, paragraph 2.24 states that the issue is whether the penalty is "disproportionate or excessive". The questions arising at Step 4 involve matters of evaluation or judgment. By their very nature, they do not lend themselves to elaborate explanations.

313. In its Decision, in relation to FPM, the CMA had to give clear, adequate and intelligible reasons as to why it arrived at a figure of £28 million at Step 4. In that respect, the CMA set out all the considerations which it regarded as potentially relevant. Those considerations were in accordance with the Penalty Guidance and that Guidance gave further explanation as to the potential relevance of those considerations. Between paragraphs 6.73 and 6.81 of the Decision, the CMA made its findings as to the relevant considerations. It addressed the question of deterrence and the question of proportionality. At paragraph 6.76 (the calculations being repeated in the table at paragraph 6.81), the CMA expressed the figure of £28 million as a percentage of various other figures as to turnover, assets and profits. The CMA then dealt with specific points which had been raised by FPM.

314. We consider that the reasons given by the CMA for its Decision in relation to Step 4 were clear, adequate and intelligible. We do not think that more was required by way of reasoning. Ultimately, the figure at Step 4 has to be arrived at "in the round" as the Penalty Guidance specifically states. At Step 4, there is no single right figure in a case like the present. What is involved is evaluation and judgement on the question of proportionality. What matters is what figure feels appropriate taking account of all relevant considerations.

315. The criticisms made by FPM in its Notice of Appeal are really directed to a comparison of the figure which was determined for FPM and the figures arrived at for SBC and CPM. If the Decision provided clear, adequate and intelligible reasons for the figure arrived at for FPM, we do not think that those reasons would cease to be clear, adequate and intelligible because the figures arrived at for SBC and CPM were different. The CMA went through the same process for SBC and CPM as it did for FPM. Looked at individually, the CMA gave proper reasons for its decisions in relation to SBC and CPM. If FPM had wished to contend on this appeal that the reasons given for the CMA's treatment of FPM were wrong and should be reversed by the Tribunal then FPM ought to have said so in its Notice of Appeal. If FPM had wished to contend on this appeal that the CMA had infringed the principle of equal treatment in its treatment of the three undertakings, then again it ought to have said so in its Notice of Appeal. FPM did not raise either of those points in its Notice of Appeal.

316. At the hearing, we asked Mr O'Donoghue to explain what he would say would be adequate reasons in relation to the question whether a penalty was disproportionate or excessive. In his closing submissions, Mr O'Donoghue did produce a paper setting out his criticisms of the CMA's approach to proportionality. We have summarised the seven reasons which Mr O'Donoghue then put forward. However, these seven matters amounted to contentions that the CMA had been wrong to decide various matters. If FPM had wished to make those contentions on this appeal, they ought to have been in its Notice of Appeal. Some of those matters were plainly not raised by the Notice of Appeal; we refer to the first, third, sixth and seventh matters. With some of the other matters there is room for argument if one were to read Ground 6(a) as a loose way of complaining about the different treatment of the three undertakings. Interestingly, in relation to the question we asked Mr O'Donoghue as to how he suggested one ought to give proper reasons for a value judgment as to proportionality, Mr O'Donoghue's approach is certainly no better than the reasons given by the CMA and effectively consists of a submission that certain percentages should have been used for CPM and the same percentages ought to have been used also for FPM.

317. Under Ground 6(a), FPM raised a specific criticism of the CMA's reasoning. Paragraph 2.24 of the Penalty Guidance lists as a material consideration "the impact of the undertaking's infringing activity on competition". In the Decision, at paragraph 6.75, the CMA listed a number of matters which it took into account including "the impact of FPM's infringing activity on competition". Paragraph 6.75 did not set out what the impact was but paragraph 6.75 must be understood as cross-referring to the CMA's earlier findings as to the impact on FPM's infringing activity on competition.

318. FPM submitted that it did not implement the cartel and the cartel did not have an adverse effect on competition. Earlier in this decision, we have dealt with the specific points made by FPM in relation to implementation and the effect on competition. We held that we would not disturb the CMA's findings in those respects. Accordingly, there was no error at paragraph 6.75 of the Decision in the CMA cross-referring to its earlier findings in those respects and taking its earlier findings into account amongst the material considerations.

319. It follows that we reject Ground of Appeal 6(a).

(10) Ground of Appeal 6(b)

320. Ground of Appeal 6(b) raised two overlapping challenges to the Decision in relation to Step 4. The first challenge was that the CMA used turnover, asset and profit figures for FPM for the financial year ending 31 December 2018 (as well as average turnover and average profit figures for the three years ending 31 December 2018). The year to 31 December 2018 was the last financial year before the Decision. FPM said that the figures for that year, and the three-year average, in particular the figures for turnover, were much higher than in earlier years in the period from the date on which the infringement ended up to 31 December 2018. FPM said that one reason why the turnover figures increased substantially during that period was that FPM acquired the assets of other undertakings and in some cases those undertakings operated in sectors which involved products other than the products which were the subject of the cartel in this case. FPM submitted that the CMA was wrong to take the turnover figures for the year to 31 December 2018 (or the three-year average) without making an allowance for that consideration.

321. The second challenge raised under Ground of Appeal 6(b) was that the CMA infringed the principle of equal treatment in that it treated CPM in a way which was different from FPM. In the case of CPM, in the period from the end of the infringement to the Decision, CPM had not acquired any other undertakings but it had been acquired by another undertaking, Marshalls plc. FPM submitted that it was open to the CMA at Step 4, when assessing a penalty to be paid by CPM, to take into account the turnover, assets and profits of Marshalls plc. If the CMA had done so and, in particular, had treated Marshalls plc/CPM in the same way as it had treated FPM then the penalty for CPM would have been much higher. FPM submitted that the penalty imposed on it ought to be considerably reduced to comply with the principle of equal treatment.

322. We will now address the first challenge in greater detail. FPM introduced this point by complaining of the CMA's alleged unreasonable delay in carrying out the investigations in this case. We have already held that the CMA was not

guilty of unreasonable delay. Nonetheless, FPM's submission is still relevant because it contended that relevant events occurred between the end of the infringement and 31 December 2018.

323. FPM said that its turnover for the year to 31 January 2013 was some £85 million whereas its turnover for the year to 31 December 2018 was some £254 million; FPM changed its year of account in the intervening period. We add here that FPM's turnover in the year to 31 December 2016 was some £227 million and its turnover in the year to 31 December 2017 was some £208 million. FPM said that the increase in turnover of £169 million between 2013 and 2018 was attributable to its acquisition of pre-cast plants which produced products other than the products involved in the cartel.

324. FPM relied on the approach of the Tribunal in *Kier* at [169]. That case considered the OFT penalty guidance of 2004 and the way in which it was applied by the OFT. At one stage in the penalty assessment, the OFT considered what penalty was appropriate taking account of the need for deterrence. The OFT used a Minimum Deterrence Threshold, or MDT. The MDT involved considering the total worldwide turnover of the undertaking. At [169], the Tribunal considered that the MDT was liable to result in disproportionate figures. The Tribunal took the example of a multi-national oil company which had a UK subsidiary operating in the construction industry where the subsidiary had infringed competition law in a limited way. The Tribunal commented that to take the group turnover of the multinational oil company as the basis for the assessment of a penalty, which reflected the need for deterrence, would be disproportionate.

325. Paragraph 2.20 of the Penalty Guidance specifically states that, at Step 4, the CMA will consider appropriate indicators of the undertaking's size and financial position "at the time the penalty is being imposed". Paragraph 2.20 then lists some financial indicators which include total turnover, profitability and assets. It is stated that the CMA will generally consider three-year averages for profits and turnover. Finally, paragraph 2.20 states that the CMA "may" also consider indicators of size and financial position "from the time of the infringement".

326. Paragraph 2.21 of the Penalty Guidance, dealing with specific deterrence, refers to a case where an undertaking has a significant proportion of its turnover "outside the relevant market". The point made in paragraph 2.21 is that the penalty figure which emerges from Steps 1 to 3, where Step 1 uses the turnover of the undertaking in the relevant product and the relevant geographic market in the last business year before the end of the infringement, may not give rise to sufficient specific deterrence where a significant proportion of the turnover of the undertaking is from outside the relevant market. In other words, the penalty figure which emerges from Steps 1 to 3 will be considered to be too small to deter an undertaking which has a size and financial position derived from a wider market. The assessment of the need to adjust the penalty on this ground is to be made on a case-by-case basis.

327. Paragraph 2.24 of the Penalty Guidance, dealing with proportionality, specifically refers to assessing that question by reference to the size and financial position of the undertaking.

328. The Penalty Guidance specifically addresses the time at which the financial position of the undertaking is to be judged and the width of the market which is to be considered as relevant. Step 4 concentrates on the time at which the penalty is imposed rather than the earlier time which was the end of the infringement. Step 4 also allows the CMA to take into account the extent to which the turnover of the undertaking is derived from a market which is wider than the market in the products the subject of the infringement. Both of these matters are considered to be relevant in order that the penalty imposed will achieve the right level of specific deterrence and will be proportionate.

329. We do not consider that the example given in *Kier* at [169] should lead to the Tribunal not following the Penalty Guidance in relation to Step 4 and, in particular, as regards the width of the market which might be relevant for Step 4. The Penalty Guidance was obviously drafted in the light of, and with the benefit of, the observations at [169] in *Kier*. The Penalty Guidance explains in greater detail than in *Kier* how the CMA and the Tribunal should approach these questions. The Penalty Guidance was the subject of consultation and has been approved by the Secretary of State.

330. The CMA applied the Penalty Guidance at Step 4 in this case. In particular, it directed itself by reference to paragraphs 2.20 and 2.24 of that Guidance. As regards the time at which the size and financial position should be assessed, the CMA referred to the financial position for the year ending 31 December 2018 and, in relation to turnover and profits, the average of the last three years. As regards the width of the market, the CMA had regard to the worldwide turnover of FPM and this was not restricted to the product market which was relevant at Step 1.

331. The CMA specifically addressed the point made by FPM that its turnover had grown significantly in the period since 2013. FPM had provided to the CMA its turnover figures for that period in its response to the Draft Penalty Statement and it is clear that the CMA was aware of them. The CMA specifically addressed the question of the time at which the financial position of FPM should be assessed in the light of the turnover figures over that period. At paragraph 6.79, the CMA specifically said that proportionality and deterrence should be assessed in this case at the time at which the penalty was imposed but added, at paragraph 6.80, that it had also used indicators over a three year period ending 31 December 2018 and noted that the figures in that three year period were broadly similar.

332. The CMA stated that the penalty figure of £59,414,958, produced at the end of Step 3, would be disproportionate. It held that a proportionate figure which reflected the need for specific deterrence was £28 million. FPM accepts, of course, that the CMA was right to make a substantial reduction in the figure of some £59 million. The degree by which the figure of £59 million should be reduced on the grounds of proportionality was plainly a matter of evaluation and judgement. The CMA explained its choice of the figure by reference to the financial indicators recommended in the Penalty Guidance. The CMA thought that the resulting figure of £28 million achieved the specific deterrence required at a level which was fair, reasonable and proportionate.

333. The question for the Tribunal is whether we consider that a reduction from a figure of some £59 million to £28 million was appropriate. Having examined the Penalty Guidance and the reasons given by the CMA for its conclusion, we

do not find any flaw in the reasoning. Of course, the CMA may have used appropriate reasoning but arrived at a position which we did not consider to be the appropriate penalty. However, we consider that, applying the Penalty Guidance as to the time at which the financial position of FPM is to be assessed and as to the use of worldwide turnover, we agree with the CMA that a penalty of £28 million is appropriate to reflect the need for specific deterrence and proportionality.

334. Our evaluation in the last paragraph was on the basis that the penalty figure produced by Steps 1 to 3 was some £59 million whereas we have earlier reached the conclusion that the penalty figure we would have arrived at, at the end of Step 3, would have been some £56 million. We will therefore have to review the assessment of £28 million at Step 4 in the light of that difference. Before we do so, we will consider the second challenge raised by Ground of Appeal 6(b) and we will then discuss the seven specific points raised by FPM in its closing submissions even though not all of those points were the subject of a Ground of Appeal.

335. The second challenge raised under Ground of Appeal 6(b) was that the CMA infringed the principle of equal treatment in that it treated CPM in a way which was different from the way it treated FPM. The particular point which arose in relation to CPM was that the trade and net assets of CPM were transferred to Marshalls Mono Ltd (which was a wholly owned indirect subsidiary of Marshalls plc) mid-way through the financial year ending 31 December 2018.

336. At footnote 11 quoted above, the CMA noted the transfer of CPM's trade and assets to the subsidiary of Marshalls plc in 2018. That meant that the accounts of CPM for the year to 31 December 2018 only related to trading for about six months. The CMA explained why, in those circumstances, it considered that it ought to use CPM's accounts for the year ending 31 December 2017 for the purposes of Step 4.

337. In a footnote to paragraph 6.85, dealing with Step 5 rather than Step 4, the CMA made a different point in relation to CPM. It explained that for the purpose of section 36(8) of CA 1998 and the Turnover for Penalties Order, it was directed

to use CPM's accounts for the year ending 31 December 2018. However, as CPM had transferred its trade to the subsidiary of Marshalls plc mid-way through that year, the CMA decided to use CPM's accounts for the year ending 31 December 2017. The CMA held that it was entitled to use the earlier accounts for the purposes of Step 5 in reliance on the decisions of the Court of Justice in *Britannia Alloys* and Case T-392/09 *Garantovana SA v Commission (Re Calcium Carbide Cartel)* [2014] 5 CMLR 6 ("*Garantovana*"); both of these cases considered Article 23(2) of the Modernisation Regulation.

338. At footnote 29 quoted above, the CMA referred to the argument then put forward by FPM which has now led to this challenge to the Decision. The CMA explained that it used the accounts of CPM for the year ending 31 December 2017 and that it did not use the accounts of Marshalls plc because Marshalls plc was not involved in the infringing conduct and, indeed, was not connected with CPM at the time of the infringement. The CMA considered that the undertaking which ought to bear the penalty was CPM and not Marshalls plc. Therefore, the CMA ought to use the accounts of CPM. In the case of FPM, it was the undertaking that had committed the infringement and the undertaking to which the Decision would be addressed and the undertaking which ought to bear the penalty. The fact that the turnover of FPM had expanded between 2013 and 2018 and that FPM's acquisition of subsidiaries in that period had contributed to the expansion did not lead the CMA to alter its approach when using FPM's accounts.

339. In support of this challenge to the Decision, FPM submitted that the CMA had made errors in its treatment of CPM. It first said that because CPM ceased to exist as a matter of economic reality before the Decision, the CMA was entitled to hold that Marshalls plc had become liable for CPM's infringement in this case. It was then said that if the CMA had held that Marshalls plc was the undertaking which ought to bear the penalty, then the CMA ought to have had regard to the accounts of Marshalls plc and not the accounts of CPM. If the CMA had done that then, it was argued, it ought not to have taken account of all of the turnover of Marshalls plc but only the turnover which was unconnected to CPM and assessed the penalty accordingly. Having taken those steps in relation to Marshalls plc, then the CMA ought to have adopted a similar

approach to FPM and only had regard to the turnover of FPM which related to its activities not including those connected with subsidiaries who did not deal in the products which were the subject of the infringement. FPM submitted that the CMA had made a further error in that it was not entitled at Step 5 to use a financial year for CPM which was different from the year ending 31 December 2018 which was the year mandated by section 36(8) of CA 1998 and the Turnover for Penalties Order.

340. FPM's submissions as to how CPM ought to have been treated are not obviously right. In addition, FPM's argument that it was treated in breach of the principle of equal treatment is extremely convoluted. That argument is that one should assume that CPM had been treated in a way different from the way they had actually been treated. Then, on that hypothesis, it was argued that the actual treatment of FPM could be seen to infringe the principle of equal treatment.

341. We consider that the starting point is to consider whether there was any error in the CMA's approach to the treatment of FPM in view of the fact that it had acquired subsidiaries between 2013 and 2018. We have already addressed that argument and found that the CMA did not err in its approach.

342. The next point is to consider whether the actual treatment of FPM and the actual treatment of CPM resulted in a breach of the principle of equal treatment for FPM. We do not consider that there was any breach of that principle. CPM had not acquired a subsidiary in the period 2013 to 2018 and so the cases of the two undertakings are not the same or similar.

343. The third point is to consider whether we should construct the hypothesis that CPM and Marshalls plc were treated in a different way. As we have said, it is not obviously right that the CMA should have regarded Marshalls plc as the relevant undertaking that ought to be penalised. Further, it is not obviously right that, if Marshalls plc had been the relevant undertaking, one would look only at the turnover of Marshalls plc which was attributable to CPM. But even if the CMA went wrong in law in these respects, the fact remains that it did not adopt that approach. We do not consider that we can hold that the CMA treated FPM

and CPM unequally when the CMA did not in fact treat CPM/Marshalls plc in the way in which FPM contends they should have been treated.

344. Similarly, whether the CMA was right or wrong as to the way in which it applied Step 5 to CPM seems to us to be irrelevant to the question whether CPM and FPM were impermissibly treated in an unequal way at Step 4.

345. Accordingly, we reject Ground of Appeal 6(b).

(11) FPM's further submissions in relation to Step 4

346. We referred earlier to the fact that in the course of its closing submissions, FPM made seven submissions in relation to Step 4, not all of which had been raised by a Ground of Appeal. However, for completeness, we will now comment on those submissions.

347. First, FPM submitted that the CMA had erred in law by asking itself what an affordable penalty would be rather than asking itself "what was the lowest penalty that could reasonably be justified". This submission also referred to *Kier* at [169] for the proposition that an affordable penalty might be disproportionate; we have already dealt with that contention. We do not consider that there is a legal principle that the CMA is restricted to imposing the lowest penalty that could reasonably be justified. The Penalty Guidance exists for the purpose of guiding the CMA in its assessment of the appropriate penalty, not the minimum penalty. In relation to Step 4, the CMA and the Tribunal must consider specific deterrence and proportionality. In most cases, both of those matters will indicate a figure in a band of figures rather than a single precise figure. The figure in the band of figures which should be chosen as the final penalty figure will depend on evaluation and judgement and the reasoning process will not lend itself to elaborate exposition. Ultimately, the CMA has to select the figure which seems to it to be appropriate in all the circumstances. The CMA is not constrained to selecting the lowest figure in the band. FPM cited a sentence from the decision of the Tribunal in *Argos* at [248] which referred to "the lowest penalty that could reasonably be justified". We do not read that sentence as laying down a legal constraint on the CMA's assessment of the appropriate penalty. That sentence

was only a comment on the result arrived at in that case following a detailed assessment of the question as to the appropriate penalty in all the circumstances of that case.

348. We have already dealt with the second specific submission which related to "the impact" of the infringement on competition as that submission had been raised in Ground of Appeal 6(a).

349. FPM's third submission was that, in assessing the size and financial position of FPM at paragraph 6.76 of the Decision, the CMA treated as part of FPM's assets £58.3 million transferred by FPM to its parent company. The CMA referred to the transfer of these assets in a footnote to paragraph 6.73 which we have quoted above. In paragraph 6.76, the CMA referred to both the amount of the net assets before adjustment and the net assets after adjustment. The CMA explained that the adjustment to net assets was made for two reasons. One reason related to an adjustment to reflect dividends which had been paid out and FPM does not criticise that adjustment. The second adjustment was to reflect the transfer of £58.3 million of assets. The CMA also explained that net asset figure before adjustment was some £131.6 million and after adjustment was £148.0 million, a difference of about £16.5 million. As this point was not raised in any Ground of Appeal, we were not taken to any of the underlying calculations and we were not shown what difference this point on its own made to the adjustment of the net assets. In any case, at paragraph 6.76(b), the CMA did not base itself on the adjusted figure for net assets alone but it also referred to the unadjusted figure. In the absence of a Ground of Appeal raising this point and without it being explained to us what difference this point on its own would make to the figure for net assets, we are not persuaded that the CMA did anything inappropriate in this respect or, more relevantly, that its assessment of the penalty at £28 million becomes inappropriate as a result. As part of this submission, FPM reminded us that the CMA did not reject FPM's submission that a penalty of £28 million would have a real and immediate impact on FPM's ability to carry on its business. We have reminded ourselves of what the CMA said on that subject but we do not see that that changes our assessment of FPM's submission as to the adjustment of net assets.

350. In Ground of Appeal 6(a), it had been submitted that the CMA had not given adequate reasons for its different treatment of SBC, CPM and FPM at Step 4. We have already held that the reasoning of the CMA in this respect was clear, adequate and intelligible. However, in its fourth and fifth submissions in closing, FPM wished to contend that the reasoning of the CMA was wrong in these respects and that it had infringed the principle of equal treatment. It was said that there was no justification given by the CMA for the different treatment of SBC, CPM and FPM and that the CMA had failed to strike a proportionate balance between the three undertakings' size and financial position at the time of the Decision (see Penalty Guidance paragraph 2.24) and their size and financial position at the time of the infringement (see Penalty Guidance at paragraph 2.20). We have already discussed Ground of Appeal 6(b) which related to the way in which the CMA had dealt with the position of CPM and Marshalls plc.

351. In relation to the comparison between FPM and SBC, we note that FPM benefitted from a reduction in the penalty from some £59 million at Step 3 to £28 million at Step 4 whereas SBC's penalty at Step 3 was not reduced at Step 4. The CMA considered whether to increase SBC's penalty at Step 4 in order to provide specific deterrence. It held that it would not be appropriate to increase the penalty at Step 4 on that account because SBC had admitted its involvement in the infringement, coming forward for leniency and settlement, and had put in place an extensive compliance programme. The penalty assessed for SBC was different from the penalty assessed for FPM because the two sets of circumstances were different. There was no breach of the principle of equal treatment.

352. In relation to the comparison between CPM and FPM, the figures for the two undertakings after Step 3 were £55,431,580 (CPM) and £59,414,958 (FPM). However as can be seen from a comparison of paragraph 6.69 of the Decision (CPM) with paragraph 6.73 (FPM), the figures at that stage were more excessive for CPM than they were for FPM. It was for that reason that the reduction at Step 4 for CPM was greater than the reduction at Step 4 for FPM. The resulting figures at Step 4 were £5 million (CPM) and £28 million (FPM). These two figures were expressed as percentages of the turnover, assets and profits of the

two undertakings. The comparison is at paragraph 6.72 (CPM) and paragraph 6.76 (FPM). Some of the percentages are comparable and some of the percentages are greater for CPM than FPM. The circumstances of these two undertakings were not the same. In particular, the turnover, assets and profits of the two undertakings were different. The comparison of paragraph 6.72 with paragraph 6.76 suggests to us that the CMA produced a result which fully respected the principle of equal treatment.

353. FPM's sixth submission was that the CMA gave excessive weight to the need to ensure specific deterrence in circumstances where FPM had an extensive compliance programme and the treatment of FPM was compared with the treatment of SBC at paragraph 6.67 of the Decision. We do not consider that the CMA gave excessive weight to the need for specific deterrence. When we considered FPM's compliance programme and decided to allow FPM a reduction of 5% on that account, we expressed the view that the likelihood of FPM complying with competition law in the future would be more influenced by specific deterrence in the form of the penalty imposed rather than its compliance programme. The different approach by the CMA in the case of SBC (see at paragraph 6.67 of the Decision) was because the facts were different in relation to the two undertakings. Overall, we are not persuaded by FPM's sixth submission.

354. FPM's seventh submission was that the CMA ought to have had regard to the fact that the penalty at Step 4 exceeded the statutory maximum under section 36(8) of CA 1998. FPM's point was that, at paragraph 6.76(a), the CMA had explained that a penalty of £28 million represented 11% of FPM's worldwide turnover whereas the statutory maximum under section 36(8), read together with the Turnover for Penalties Order was 10% of that turnover. We do not see this as a valid criticism of the CMA's approach. The Penalty Guidance at Step 4 requires the CMA to form its own view as to what is required by way of deterrence and proportionality. As a matter of principle, it is open to the CMA to form an assessment that the appropriate figure, when expressed as a percentage of the turnover of the last year before the Decision, should be greater than 10% of the relevant turnover. The CMA is entitled to take the view that the statutory maximum falls to be applied at a later stage, at Step 5, and should not

be used as part of the assessment for Step 4. That is how the matter is dealt with in the Penalty Guidance and in the EU case law to which we earlier referred when we considered FPM's submission that the penalty ceiling pursuant to section 36(8) of CA 1998 was reserved for the most serious cases of the relevant kind.

355. We have now considered the seven matters raised by FPM in the course of its closing submissions in relation to Step 4. Having done so, we have not found that any of these submissions has persuaded to take a different view from the CMA on the relevant matter.

356. The last matter which the Tribunal needs to consider in relation to Step 4 is the possible relevance of the fact that the figure arrived at by the CMA at Step 3 was some £59 million whereas we have arrived at a figure at Step 3 of £56 million. When the CMA arrived at its figure of £28 million at Step 4, it concluded that £28 million was the fair, reasonable and proportionate figure to achieve the specific deterrence that was needed. The CMA did not approach the matter by asking what percentage of £59 million was the appropriate penalty. Nor did the CMA ask itself how much of a reduction from £59 million should be made. The CMA did not use the figure of £59 million as a step in the calculation of the figure of £28 million. Accordingly, it does not follow that because our figure of £56 million at Step 3 is lower than the CMA's figure of £59 million at Step 3 that an adjustment needs to be made to the figure of £28 million at Step 4. We have already expressed the view that we regard a penalty figure of £28 million at Step 4 as appropriate having regard to the need for deterrence and proportionality. We remain of that view having considered this further point.

N. STEP 5

357. At Step 5, the CMA applied section 36(8) of CA 1998 and the Turnover for Penalties Order. These provisions imposed a ceiling on the permissible penalty by reference to a figure which was 10% of the turnover of FPM for the business year preceding the date of the Decision. For FPM, the relevant business year was the year ending 31 December 2018 when its turnover was £254,496,765.

10% of that figure was therefore £25,449,676. The CMA therefore held that the penalty figure of £28 million assessed at Step 4 was subject to this cap so that the penalty to be imposed was £25,449,676. It imposed that penalty accordingly.

358. Step 5 is the subject of the challenges raised by Grounds of Appeal 5(a) and 5(b). It will be remembered that, by those Grounds of Appeal, FPM contended that the CMA (and the OFT) had been guilty of unreasonable delay in the conduct of their investigations. FPM submitted that the result of the unreasonable delay was that the financial year which was relevant for the purposes of section 36(8) of CA 1998 and the Turnover for Penalties Order was the year ending 31 December 2018 whereas, if the CMA and the OFT had not been guilty of unreasonable delay, then the relevant year would have been an earlier year when the turnover was lower and the ceiling imposed by section 36(8) of CA 1998 would have been lower.

359. There was discussion as to whether it was open to the CMA, when applying section 36(8) of CA 1998 and the Turnover for Penalties Order, to use a different financial year from that provided by the Order. We were referred to the decisions of the Court of Justice in *Britannia Alloys* and *Garantovana* (cited earlier) on that point. We do not need to determine that question in this case. Assuming that that course was not open the CMA but it nonetheless felt that it was appropriate to reduce the penalty assessed at Step 5 to reflect the consequences of unreasonable delay on the part of the CMA, we consider that it would be open to it to make an end allowance following Step 5 for that purpose. The CMA would have power to make an end allowance pursuant to sections 36 and 38 of CA 1998. The fact that an end allowance of that kind was not referred to in the Penalty Guidance would not preclude the CMA from doing so.

360. However, we have already held that FPM cannot establish what is required for Grounds of Appeal 5(a) and 5(b). This means that the CMA was right not to make any end allowance to the penalty figure produced at Step 5.

O. THE OVERALL RESULT

361. The overall result is that we unanimously uphold the Decision of the CMA to impose a penalty on FPM of £25,449,676.

The Honourable Mr Justice Morgan Chairman Eamonn Doran Sir Iain McMillan CBE FRSE DL

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

Date: 22 December 2020