

Decision of the Competition and Markets Authority

Restrictive arrangements preventing
estate and lettings agents from advertising
their fees in a local newspaper

Case CE/9827/13

8 May 2015

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

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 Names have been replaced by a general descriptor of the individual's role.

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1. INTRODUCTION

A. General

1.1 By this decision, of which Annexes A to G form an integral part (the Decision) the Competition and Markets Authority (CMA) has concluded that the undertakings and association of undertakings listed at paragraph 1.2 below (each a Party, together the Parties) have infringed the prohibition imposed by section 2(1) (the Chapter I prohibition) of the Competition Act 1998 (the Act). Consequently, the CMA has imposed a penalty on each Party (as set out at paragraph 6.64).

1.2 The Decision is addressed to each Party to which the CMA has attributed liability in respect of one or more of the agreements, concerted practices and the decision by an association of undertakings, which the CMA has concluded constitute an infringement of the Chapter I prohibition (the Infringement), and for the resulting penalty in each case, namely:

- Three Counties Estate Agents Limited,¹ trading as Three Counties Estate Agents Association (Three Counties)
- Waterfords (Estate Agents) Limited² (Waterfords)
- Castles Property Services Limited³ (Castles)
- Hamptons Estates Limited,⁴ trading as Hamptons International (Hamptons International), and its ultimate parent companies Countrywide Group plc⁵ and Countrywide plc⁶ (together referred to as Countrywide), and
- Trinity Mirror Southern Limited⁷ (TMS), as publisher of the *Surrey & Hants Star Courier* (the *Star Courier*), and its ultimate parent company Trinity Mirror plc⁸ (Trinity Mirror).

¹ Company number 5496726.

² Company number 3089973.

³ Company number 5148441.

⁴ Company number 2036215.

⁵ Company number 4947152.

⁶ Company number 8340090.

⁷ Company number 1985909.

⁸ Company number 82548.

B. Summary of the relevant facts

- 1.3 The factual scenario to which this case relates is summarised as follows. A number of estate and lettings agents⁹ operating in and around Fleet in Hampshire (the Three Counties Area, as defined in Annex C, paragraph C.28) agreed with one another that they would bargain collectively with the area's local newspaper, the *Star Courier*,¹⁰ in relation to buying advertising space in that publication's dedicated property supplement, *Homes and Property*. In addition, the agents also agreed with one another not to include, in their respective advertisements in the *Star Courier*, details of their fees or commission rates, or make any direct or indirect references to their fees, commission rates, promotions, discounts or special offers, or any other value proposition.¹¹ In other words, they agreed that they would not use their advertising in the *Star Courier* to compete with one another on price.
- 1.4 Three Counties was an association of agents established as a vehicle for the negotiation of advertising rates with the *Star Courier* on behalf of its members. The officers of Three Counties were drawn from the members, and Three Counties did not have any significant physical, financial or staff resources of its own.¹² Employees of certain member agencies carried out the tasks of developing and enforcing Three Counties' Terms and Conditions of Membership (T&CM). Three Counties' T&CM expressly included a prohibition on members from advertising their fees, in line with the agents' agreement not to advertise their fees outlined above. Three Counties was effectively a vehicle utilised by the member agencies for carrying out that agreement.
- 1.5 In addition, certain of Three Counties' members¹³ used the *Star Courier* as a mechanism to enforce the members' agreement not to advertise fees. Initially, this included putting pressure on the *Star Courier* to deter member agents from advertising their fees by charging them a higher, 'non-association' rate, or to prevent Three Counties' members from advertising their fees. Subsequently, this was extended to prevent all agents (whether or not members of Three Counties) from advertising their fees in the *Star Courier*. Despite initial resistance, the *Star Courier* ultimately acceded to this pressure, and agreed to prevent agents (whether or not members of Three Counties) from advertising their fees.

⁹ For ease of presentation, 'estate and lettings agents' are collectively referred to simply as agents for the remainder of this Decision, unless the context requires otherwise.

¹⁰ See www.gethampshire.co.uk/.

¹¹ For ease of presentation, these matters are referred to simply as 'advertising their fees' for the remainder of this Decision, unless the context requires otherwise.

¹² See Chapter 3, section A below.

¹³ See Chapter 1, section D below.

C. Summary of the Infringement

- 1.6 In light of the facts set out at Chapter 4 below, the CMA has concluded that each of the Parties has infringed the Chapter I prohibition. Specifically, the CMA has concluded that, between 20 July 2005 (at the latest) and 31 January 2014 (the Relevant Period), certain of Three Counties' members, including Waterfords, Castles and Hamptons International,¹⁴ entered into one or more agreements or concerted practices that:
- 1.6.1 they would not advertise their fees in the *Star Courier*, and
 - 1.6.2 they would deter or prevent members of Three Counties from advertising their fees in the *Star Courier*.
- 1.7 The CMA has concluded that certain of Three Counties' members, including Waterfords, Castles and Hamptons International,¹⁵ monitored compliance with and enforced the agreement(s) or concerted practice(s) not to advertise fees, in order to deter or prevent members of Three Counties from advertising their fees in the *Star Courier*.
- 1.8 The CMA has also concluded that from 14 September 2012 (at the latest) TMS, as the publisher of the *Star Courier*, became a party to the agreement(s) or concerted practice(s) with certain of Three Counties' members, including Waterfords and Hamptons International,¹⁶ to prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.
- 1.9 Further, the CMA has concluded that the subject matter of the agreement or concerted practice not to advertise fees in the *Star Courier* (as set out at paragraph 1.6.1 above) was reflected by Rule 21 of Three Counties' T&CM; and accordingly, Rule 21 of the T&CM constituted a decision by an association of undertakings to prevent its members from advertising their fees in the *Star Courier*.
- 1.10 The CMA has also concluded that compliance with Rule 21 was facilitated by Rule 6(d) of Three Counties' Committee Rules¹⁷ and Rule 27(xi) and (xii) of

¹⁴ As set out in more detail in Chapter 5, Section C, the CMA has concluded that at least Waterfords, Castles and Hamptons International were each a party to the Infringement. The CMA also has reasonable grounds for suspecting that other undertakings, including the agents stated to be a member of Three Counties as at 20 December 2013 (see CMA Document Reference 3C 15.5) (the Current Members, as set out at Annex D), would have participated in the arrangement in question. However, for reasons of administrative prioritisation, the CMA has not made any finding that such other undertakings thereby committed an infringement of the Chapter I prohibition.

¹⁵ See footnote 14 above.

¹⁶ See footnote 14 above.

¹⁷ See paragraphs 4.14 and 4.19 below.

Three Counties' T&CM,¹⁸ which empowered Three Counties (via Three Counties' Management Committee (the Committee)) to monitor compliance with and enforce Rule 21 of the T&CM.

- 1.11 The duration of participation in the Infringement differs for each Party, but each Party's participation in the Infringement covers some or all of the Relevant Period.¹⁹

D. Summary of the relevant market, economic context and the CMA's competition concerns

Summary of the relevant market²⁰

- 1.12 The members of Three Counties are all agencies active in the supply of residential sales and/or lettings services. Since its formation, the vast majority of Three Counties' members have been 'traditional' estate or lettings agents; that is, agents operating with a high street presence.²¹
- 1.13 The CMA considers that residential sales and lettings services may comprise two separate relevant product markets of residential sales services and residential lettings services.²² However, given that the CMA has found that the Infringement covered both residential sales and lettings services it is not necessary to reach a final conclusion on this.²³
- 1.14 The CMA also considers that the relevant product market may consist of the residential sales and lettings services offered by traditional estate or lettings agents, as opposed to including services offered by online estate or lettings agents. However, the CMA has determined that it is not necessary to reach a final conclusion on this as, in any event, the potential effects of the Infringement are likely to be appreciable even if the market comprised online agents as well as traditional agents.²⁴
- 1.15 The CMA has concluded that the geographic scope of the residential sales and lettings services market is local, ie within an approximately five mile radius from Fleet. This broadly equates to the readership of the *Star Courier* which includes the towns of Aldershot, Camberley, Farnborough, Fleet,

¹⁸ See paragraph 4.74 below.

¹⁹ See Annex B.

²⁰ See Annex C, section A for further detail.

²¹ See Annex C, paragraph C.9.

²² See Annex C, paragraphs C.8 to C.25.

²³ See Annex C, paragraphs C.8 to C.25.

²⁴ See Annex C, paragraphs C.8 to C.25.

Frimley, Sandhurst and Yateley, located in the three counties of Hampshire, Surrey and Berkshire in South-East England.²⁵

Summary of the economic context²⁶

- 1.16 Estate and lettings agents active in the supply of residential sales and lettings services offer similar services.²⁷ Barriers to entry to the market(s) for residential sales and lettings services are relatively low, with marketing and advertising being the only significant sunk costs.²⁸ However, marketing and advertising are particularly important elements of competition,²⁹ and the local nature of residential sales and lettings services³⁰ means that establishing a brand in the local area is very important. In particular, local newspapers are a key medium for advertising agents' services to potential vendors and lessors, as well as to prospective purchasers and tenants.³¹
- 1.17 Whilst previous research has shown that price competition is weak in the market(s) for residential sales and lettings services,³² fees are identified as one of the most important factors in deciding which agent to instruct to sell or let a property (along with other factors such as reputation and professionalism).³³ The CMA considers that advertising of fees is likely to be a driver of competition because it provides information to customers that is not otherwise easily available.³⁴ It is also likely to prompt consumers to seek out better deals and negotiate on price. Further, advertising of fees provides a reference price for potential vendors or lessors when selecting an agent. The CMA considers this is significant in a market where many customers will be first time or infrequent purchasers of residential sales or lettings services,³⁵ who may lack a good understanding of the price and quality offerings of different agents.
- 1.18 Membership of Three Counties ranged from around 20 to 40 agents during the Relevant Period.³⁶ The aggregate market share in the relevant market³⁷ of the members ranged from 50%-95%,³⁸ or almost all agents that advertised in

²⁵ See Annex C, paragraphs C.26 to C.28.

²⁶ See Annex C, section B for further detail.

²⁷ See Annex C, paragraphs C.14 and C.33.

²⁸ See Annex C, paragraph C.33.

²⁹ See Annex C, paragraph C.34.

³⁰ See paragraph 1.15 above and Annex C, paragraphs C.26 to C.28 and C.35.

³¹ See Annex C, paragraphs C.35 to C.38.

³² See Annex C, paragraph C.42.

³³ See Annex C, paragraph C.43, in particular footnote 951.

³⁴ See Annex C, paragraph C.43.

³⁵ See Annex C, paragraph C.43, in particular footnote 952.

³⁶ See paragraph 3.3.

³⁷ See Annex C, Section A

³⁸ Particularly at formation, the CMA understands that up to 95% of local agents were listed as members – see paragraph 3.3 and Annex C, paragraph C.41.

the *Star Courier*.³⁹ In light of this, the CMA considers that deterring or preventing agents from advertising their fees significantly reduced vendors' and lessors' ability to compare prices across a large number of agents, or to be sure that they included a 'low cost' agent in their search, if they wished to do so.⁴⁰

Summary of the CMA's competition concerns⁴¹

- 1.19 In a well-functioning market for residential sales and lettings services, the CMA would expect agents to compete on price (ie their fees), as well as on other aspects of their offering, such as reputation or local presence, thus creating better choice for consumers who are thereby able to weigh cost against service.⁴² The CMA would also expect agents, in competing with one another, to use advertising to attract customers, and to use price as a key feature on which to differentiate their service offering.
- 1.20 The CMA considers that transparent and readily accessible pricing information or references to value propositions such as discounts or promotions can:
 - 1.20.1 make it easier and less time consuming for vendors and lessors of property to understand what offerings are available in the market, compare those offerings, and determine which agent offers the best price in relation to the service offered, and potentially increase their motivation for 'shopping around' (ie reduces their 'search costs')
 - 1.20.2 make it easier for prospective vendors and lessors to benchmark and compare quotations, and therefore to negotiate on price
 - 1.20.3 facilitate entry or expansion by new businesses, by allowing them to use price to attract new customers and thereby to establish a brand and good reputation in the local area, and
 - 1.20.4 facilitate innovative pricing structures and services, by allowing businesses to advertise different pricing structures to attract new customers away from established models.
- 1.21 The CMA considers that the clear, upfront advertising of prices within the market(s) for residential sales and lettings services is therefore beneficial to competition and consumers.⁴³

³⁹ See Annex C, paragraph C.41.

⁴⁰ See Annex C, paragraph C.43.

⁴¹ See Annex C, section C.

⁴² See Annex C, paragraphs C.45 to C.49.

⁴³ See Annex C, paragraphs C.45 to C.49.

- 1.22 In light of this, the CMA is concerned that deterring or preventing agents from advertising their prices in the *Star Courier* would have the following consequences on competition within such market(s):
 - 1.22.1 it would reduce price competition between agents, and thus reduce downward pressure on the prevailing level of agents' fees or commission rates in relation to properties to sell or let in the Three Counties Area (as defined in Annex C, paragraph C.28) (the Market Price), and/or
 - 1.22.2 it would reduce price competition from potential competitors, or innovative pricing structures or business models.
- 1.23 As a result, agents would have fewer incentives to engage in price competition with other agents, ultimately leading to vendors or lessors paying higher prices, and/or facing less choice.

2. GLOSSARY

Glossary of terms

Term	Definition
2008 Contract	An agreement to offer advertising rates between Three Counties and [the previous owner of the <i>Star Courier</i>] dated 1 November 2007
2008 Complaint	A complaint received by the OFT in March 2008 about potentially restrictive practices by Three Counties and other estate agents associations in the area
2013 Complaint	A complaint received by the OFT in January 2013 from a lettings agent, [Complainant], about potentially restrictive practices by Three Counties
Act	Competition Act 1998
Advertising Waiver	An amendment to the original T&CM to permit estate or lettings agents operating without a high street premises to advertise their sales commission (at the discretion of the Committee)
Article 101	Article 101 Treaty on the Functioning of the European Union
Article 102	Article 102 Treaty on the Functioning of the European Union
Arrangements	The agreements, concerted practices and decision as described in Chapter 5, section C
CAT	Competition Appeal Tribunal
Castles	Castles Property Services Limited
Chapter I prohibition	The prohibition imposed by section 2(1) of the Act
CJ	The Court of Justice of the European Union (formerly the European Court of Justice)
CMA	Competition and Markets Authority
Committee	Three Counties' Management Committee
Committee Rules	Three Counties Property Association: Selection of Members and Advertisement Committee Constitution and Rules
Countrywide	Countrywide plc and Countrywide Group plc, the ultimate parent companies of Hamptons International
Current Members	The members of Three Counties as at 18 December 2013, as set out at Annex D
Decision	This Decision, dated 8 May 2015
EU	European Union
European Courts	Includes the CJ and the GC

GC	The General Court of the European Union (formerly the Court of First Instance).
[X]	[X]
Hamptons International	Hamptons Estates Limited
Infringement	The infringement of the Chapter I prohibition particularised at Chapter 5 of the Decision
Market Price	The prevailing level of agents' fees or commission rates in the Three Counties Area, as defined in paragraph 1.22.1
OFT	Office of Fair Trading
Parties	The addressees of the Decision, as listed at paragraph 1.2 (each a Party)
Penalties Guidance	<i>Guidance as to the appropriate amount of a penalty</i> (OFT423, September 2012), adopted by the CMA Board.
Prohibition on Advertising Fees	The agreement or concerted practice that certain of Three Counties' members would not advertise their fees in the <i>Star Courier</i>
Relevant Period	The duration of the Infringement as defined at paragraph 1.6
Rule 21	A prohibition on the members of Three Counties from directly or indirectly advertising their fees or commission rates within the property paper included as Rule 21 of each version of the T&CM, as amended from time to time.
Rule 21 Prohibition	The decision by an association of undertakings, as set out in Rule 21 of the T&CM
[X]	[X]
<i>Star Courier</i>	The <i>Surrey & Hants Star Courier</i> , a free weekly publication distributed in Fleet and the surrounding areas and owned by TMS since 28 March 2010 (and [the previous ultimate owner of the <i>Star Courier</i>] prior to this date)
Statement of Objections	The Statement of Objections dated 10 December 2014
TFEU	Treaty on the Functioning of the European Union
The 2000 Order	Competition Act 1998 (Determination of Turnover for Penalties) Order 2000
Three Counties	Three Counties Estate Agents Limited, trading as Three Counties Estate Agents Association
Three Counties Area	The geographic scope of the relevant market, as defined in Annex C, section A
TMS	Trinity Mirror Southern Limited

Trinity Mirror	Trinity Mirror plc, the ultimate owner of TMS
T&CM	Three Counties' Terms and Conditions of Membership as amended over time
Waterfords	Waterfords (Estate Agents) Limited

Key individuals

[X]	Managing Director, Waterfords Committee member, Three Counties (2 November 2004 to 4 August 2014) Chairman, Three Counties (2 November 2004 to 1 April 2008)
[X]	[Senior Manager], Hamptons International – [X] Committee member, Three Counties (13 May 2009 to 4 August 2014) Chairman, Three Counties (1 April 2010 to 4 August 2014)
[X]	Managing Director, Castles Committee member, Three Counties (2 November 2004 to 5 November 2008)
[X]	Head of Group Property and Regional Sales Manager, TMS

[For ease of reference, the following additional abbreviations have been used in this Decision following redactions for confidentiality:

[Current Member]	An estate or lettings agent active within the Three Counties Area or advertising within the <i>Star Courier</i> , which was a member of Three Counties as at 18 December 2013
[Former Member]	An estate or lettings agent active within the Three Counties Area or advertising within the <i>Star Courier</i> , which has been a member of Three Counties but was not a Current Member as at 18 December 2013
[Non Member]	An estate or lettings agent active within the Three Counties Area or advertising within the <i>Star Courier</i> , which has not been a member of Three Counties
[The previous owner of the <i>Star Courier</i>]	The previous owner of the <i>Star Courier</i> and a company ultimately owned by the previous ultimate owner of the <i>Star Courier</i>
[The previous ultimate owner of the <i>Star Courier</i>]	The previous ultimate owner of the <i>Star Courier</i>

[Trade Association]	An association of estate and lettings agents, unrelated to Three Counties
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3. BACKGROUND

A. Three Counties

- 3.1 Three Counties is an association of estate and letting agents in Hampshire, Surrey and Berkshire, principally based in and around Fleet in Hampshire.⁴⁴ Three Counties was formed as an unincorporated association by 2 November 2004 (at the latest).⁴⁵ Three Counties was registered as a limited liability company at Companies House on 1 July 2005 under the name Three Counties Estate Agents Limited.⁴⁶ The original subscribers to the limited company were [the Managing Director] of Waterfords, [the Managing Director] of [Former Member 1], [the Managing Director] of Castles and [an Employee] of [Former Member 22].⁴⁷ As at the date of the Decision, the shareholders of the company are [the Managing Director of Waterfords] (50%) and [the Managing Director]⁴⁸ of [Current Member K] (50%).
- 3.2 As at the date of the Decision, the company's directors are [the Managing Director] of Waterfords and [a Director] of [Current Member O].⁴⁹ [A Director] of [Current Member O] is also the company secretary. Three Counties' current Chairman is [a Senior Manager] of Hamptons International.⁵⁰
- 3.3 Three Counties' members include local independent agents and local branches of national and international chains. Nineteen agents, together referred to as the Current Members and listed in full at Annex D, were stated to be members of Three Counties as at 18 December 2013.⁵¹ Since its establishment in 2004, the CMA understands that between 20 and 40 local agents (at least) have been members of Three Counties.⁵²

⁴⁴ See Annex D.

⁴⁵ See paragraph 4.2.

⁴⁶ Company number 5496726.

⁴⁷ Memorandum and Articles of Association dated 20 May 2005 (CMA Document Reference 3C 15.1).

⁴⁸ Referred to throughout this Decision as [the Managing Director].

⁴⁹ Previous directors through the Relevant Period include [X].

⁵⁰ 'Chairman' in this context is chairing the voluntary committee not the board of directors of the limited company.

⁵¹ In other words, as at the date the OFT opened a formal investigation into Three Counties, its members and TMS. See letter dated 17 January 2014 from [law firm 1] to OFT (CMA Document Reference r_3C 15) and enclosed membership list (CMA Document Reference 3C 15.5).

⁵² See, for example, (i) membership list dated 20 July 2005 (40 members) ([CMA Document Reference Current Member B] 14.6), and (ii) membership list dated 1 March 2007 (49 members) (CMA Document Reference r_CAS 3.159, page 4).

B. Waterfords

- 3.4 Waterfords is a residential estate agency offering residential property services within a five mile radius of each of its five offices in Fleet, Yateley, Camberley, Chobham and Sunningdale.⁵³
- 3.5 Waterfords is a limited liability company, registered at Companies House on 10 August 1995.⁵⁴ Waterfords' principal activity during the period of the Infringement⁵⁵ was, and continues to be estate agency services, including sales and lettings.
- 3.6 As at the date of the Decision, Waterfords' directors are [the Managing Director], [Director] and [Director]. All current directors were company directors during the period of the Infringement.⁵⁶

C. Castles

- 3.7 Castles is a residential estate agency offering residential property sales services within Hampshire from offices in Farnham and Aldershot.⁵⁷
- 3.8 Castles is a limited liability company, registered at Companies House on 8 June 2004.⁵⁸ Castles' principal activity during the period of the Infringement⁵⁹ was, and continues to be, residential sales services.
- 3.9 As at the date of the Decision, Castles' directors are [the Managing Director], [Director] and [Director]. [Director] is also Castles' company secretary. All current directors were also directors during the period of the Infringement.

D. Hamptons International and Countrywide

- 3.10 Hamptons International is an international chain of estate and lettings agents providing property services in the form of residential estate agency, residential lettings and land and new homes.⁶⁰ Hamptons International has around 86 offices operating throughout the UK, including a branch in Fleet, Hampshire.⁶¹

⁵³ See letter dated 6 January 2014 from [the Managing Director] of Waterfords to OFT (CMA Document Reference r_WAT 2).

⁵⁴ Company number 3089973; registered address: 90 Park Street, Camberley, Surrey, GU15 3NY.

⁵⁵ As set out in relation to Waterfords at Annex B, paragraph B.10.

⁵⁶ Other directors appointed during the Relevant Period include: [X]

⁵⁷ Statement dated 24 January 2014 by [the Managing Director] of Castles (CMA Document Reference r_CAS 3).

⁵⁸ Company number 5148441; registered address: Turnpike House, 1208-1210 London Road, Leigh-on-sea, Essex, SS9 2UA.

⁵⁹ As set out in relation to Castles at Annex B, paragraph B.12.

⁶⁰ Letter dated 21 January 2014 from Countrywide Legal to OFT (CMA Document Reference r_HAMP 6.2).

⁶¹ Letter dated 21 January 2014 from Countrywide Legal to OFT (CMA Document Reference r_HAMP 6.2).

- 3.11 Hamptons International is a limited liability company registered at Companies House on 11 July 1986.⁶² Hamptons International's principal activity during the period of the Infringement⁶³ was, and continues to be the provision of estate agency services, including lettings and management.
- 3.12 As at the date of the Decision, the company's current directors are [Director], [Director], [Director] and [Director].⁶⁴
- 3.13 From 2 August 2006 to 17 June 2010, Hamptons International was ultimately owned and controlled by [X].
- 3.14 Since 18 June 2010, Hamptons International has formed part of the Countrywide group of companies, the UK's largest estate agency and property services group, ultimately owned and controlled by Countrywide plc.
- 3.15 Countrywide plc is a public limited company registered at Companies House on 21 December 2012. Countrywide's principal activity during the period of the Infringement⁶⁵ was, and continues to be property management and property solutions.
- 3.16 Prior to the incorporation of Countrywide plc, Hamptons International was ultimately owned and controlled by Countrywide Group plc, a public limited company registered at Companies House on 29 October 2003.⁶⁶ Countrywide's principal activity during the period of the Infringement⁶⁷ was, and continues to be property management and property solutions. For the avoidance of doubt, the CMA has concluded that Hamptons International, Countrywide Group plc and Countrywide plc form an indivisible part of a single economic undertaking for the purposes of the Chapter I prohibition.⁶⁸

E. The Trinity Mirror group and the *Star Courier*

- 3.17 TMS is a limited liability company registered at Companies House on 5 February 1986.⁶⁹ TMS' principal activity during the period of the Infringement⁷⁰ was, and continues to be the publishing of newspapers.
- 3.18 As at the date of the Decision, the company's current directors are [Director], [Director], [Limited company] and [Limited company].

⁶² Company number 2036215; registered address: 32 Grosvenor Square, Mayfair, London, W1K 2HJ.

⁶³ As set out at Annex B, paragraph B.14.

⁶⁴ Other directors appointed during the Relevant Period are: [X].

⁶⁵ As set out in relation to Hamptons International/Countrywide at Annex B, section B.14.

⁶⁶ Company number 4947152; registered address: 17 Duke Street, Chelmsford, Essex, CM1 1HP.

⁶⁷ As set out at Annex B, paragraph B.14.

⁶⁸ See Annex B, paragraphs B.10 to B.20.

⁶⁹ Company number 1985909; registered address: One Canada Square, Canary Wharf, London, E14 5AP.

⁷⁰ As set out at Annex B, paragraph B.21.

- 3.19 TMS is part of the Trinity Mirror group of companies, one of the UK's largest multimedia companies. Trinity Mirror publishes around 130 physical newspaper titles and over 260 titles overall, including national, regional and sports papers, websites and digital products.
- 3.20 Trinity Mirror is a public limited company registered at Companies House on 11 November 1904.⁷¹ Trinity Mirror was the ultimate holding company for the Trinity Mirror group's multimedia activities throughout the period of the Infringement.⁷²
- 3.21 The *Star Courier* is a free weekly publication distributed in Fleet and the surrounding areas.⁷³ According to public sources, it was founded in 1977 as the *Surrey & Hants Star*, but merged in 2008 with three other local weekly publications – the *Aldershot and Farnborough Courier*, *Camberley and Yateley Courier* and *Fleet and Hart Courier* – to form the *Star Courier*.⁷⁴
- 3.22 There are three newspaper titles distributed in Fleet, all published by Trinity Mirror/TMS (the *Star Courier*, the *Aldershot News and Mail Series* and the *Surrey Advertiser*).⁷⁵ The *Star Courier* has, by a significant margin, the highest circulation figures and penetration levels in the local area,⁷⁶ with a total circulation of 56,615 and a readership of 89,504.⁷⁷ Moreover, it is the only free title in the area.⁷⁸
- 3.23 The *Star Courier* has a significant property advertising supplement called *Homes and Property*. Since 2008 the *Homes and Property* supplement has also appeared in the weekly *Aldershot News and Mail*.⁷⁹

⁷¹ Company number 82548; registered address: One Canada Square, Canary Wharf, London, E14 5AP

⁷² As set out at Annex B, paragraph B.21.

⁷³ Distributed in Aldershot, Camberley, Farnborough, Fleet, Frimley, Sandhurst and Yateley. Source: JICREG data for the *Surrey & Hants Star Courier* (as at 1 April 2014) (CMA Document Reference CMA 2).

⁷⁴ See www.britishpapers.co.uk/england-se/surrey-hants-star-courier/ (for ease of presentation information extracted and copied into CMA Document Reference CMA 62). See also letter dated 4 September 2008 from [the Head of Advertising] of [the previous owner of the *Star Courier*], which notes that 'From week commencing Monday 15th September, issue dated Thursday 18th September, the group is merging the titles *The Surrey & Hants Star* and *The Courier*...The new publication will be known as *The Star Courier*...The *Star Courier* is anticipated to be printed in virtually identical quantities and geographical sectors' (letter attached to email dated 4 September 2008 from [an Employee] of the [previous owner of the *Star Courier*] to [the Managing Director] of Castles (CMA Document Reference CAS 3.257)).

⁷⁵ See CMA Document Reference TM 18.1. The *Aldershot News and Mail* and the *Surrey Advertiser* are both paid-for daily titles.

⁷⁶ Source: JICREG data for Fleet (CMA Document Reference CMA 2.1) (as at 1 April 2014): the *Star Courier*'s average readership in the area represented 47.56% of the total adult population, with the *Aldershot News and Mail* reaching 12.12% and the *Surrey Advertiser* reaching 0.07%.

⁷⁷ Source: JICREG data for the *Surrey & Hants Star Courier* (as at 1 April 2014) (CMA Document Reference CMA 2).

⁷⁸ Source: JICREG data for Fleet (as at 1 April 2014) (CMA Document Reference CMA 2.1).

⁷⁹ See letter dated 4 September 2008 from [the Head of Advertising] of [the previous owner of the *Star Courier*] (attached to email dated 4 September 2008 from [an Employee] of [the previous owner of the *Star Courier*] to [the Managing Director] of Castles (CMA Document Reference CAS 3.257)), which notes that 'The property section will remain, as it is at present, within the paid for title, *The Aldershot News*, as a tabloid stitched and trimmed product'.

3.24 Since 28 March 2010, the *Star Courier* has been owned by TMS,⁸⁰ which is in turn a wholly owned subsidiary of Trinity Mirror.⁸¹ Prior to 28 March 2010, the *Star Courier* was owned and published by [the previous owner of the *Star Courier*].⁸² [The previous owner of the *Star Courier*] was and remains 100% indirectly owned by [the previous ultimate owner of the *Star Courier*] and [X].⁸³

3.25 References to actions or decisions taken by the *Star Courier* in the Decision should be read as actions or decisions taken by its relevant owner at the time ([the previous owner of the *Star Courier*] or TMS).

F. Summary of the OFT/CMA's formal investigation

3.26 As set out in more detail at Annex E, in January 2013, the Office of Fair Trading (OFT) received a complaint from a lettings agent based in Fleet, [the Complainant] (the 2013 Complaint). The 2013 Complaint raised a number of concerns about Three Counties' T&CM and its relationship with the *Star Courier*. Following internal investigation and consideration, on 18 December 2013 the OFT launched a formal investigation under section 25 of the Act, having established reasonable grounds for suspecting a breach of the Chapter I prohibition in relation to the Infringement.

3.27 On 1 April 2014, the CMA assumed responsibility for the investigation on the transfer of the OFT's relevant functions to the CMA.

3.28 For reasons of administrative prioritisation, the CMA carried out a scoping process to determine which of the Current Members should be prioritised or de-prioritised from the scope of the investigation (see Annex E for further details). As a result of that scoping process, the CMA decided to exclude from the investigation each of the Current Members, with the exception of the Parties, namely Waterfords, Castles and Hamptons International, along with TMS and Three Counties.

3.29 On 10 December 2014, the CMA issued a Statement of Objections to the Parties, in which it proposed to make a decision that the Parties had infringed the Chapter I prohibition of the Act. The purpose of the Statement of

⁸⁰ Company number 1985909. See section 26 response dated 20 January 2014 from Trinity Mirror (CMA Document Reference TM 18.1) and Trinity Mirror structure chart, received 20 January 2014 (CMA Document Reference TM 18.2).

⁸¹ See Annex B (Parties' Liability).

⁸² Company number [X]. On 29 March 2010 its name was changed to [X] but for clarity this Decision refers throughout to [the previous owner of the *Star Courier*], as its name prior to the sale of the *Star Courier* to TMS during the Relevant Period. Previous names include [X] and references in the documents to [X]] are understood to be references to this company.

⁸³ Section 26 response dated 25 April 2014 from [the previous ultimate owner of the *Star Courier*] ([CMA Document Reference [the previous ultimate owner of the *Star Courier*] 4.1).

Objections was to give each Party an opportunity to make representations on the CMA's proposed decision.

- 3.30 Following receipt of the Statement of Objections, each of the Parties indicated its willingness to enter into settlement discussions with the CMA in relation to the case.
- 3.31 Following such discussions, over the course of 5 and 6 March 2015 each Party offered to settle the case.⁸⁴ Each Party voluntarily, clearly and unequivocally admitted the facts and allegations of infringement as set out in the Statement of Objections (subject to limited representations on manifest factual inaccuracies contained therein), which are now reflected in the Decision. As part of settlement, each Party agreed to co-operate in expediting the process for concluding the case. On 11 March 2015, the CMA confirmed that it would settle the case with each of the Parties and that it intended to proceed to issue an infringement decision.⁸⁵

⁸⁴ In April 2015, the CMA became aware that relevant turnover information provided by one of the Parties to the case had been provided in relation to an incorrect reference year. The CMA was satisfied that that this error was genuine, and the figure originally submitted was provided in good faith. Following provision of the correct information, the relevant Party re-submitted its offer to settle the case on 6 May 2015, which was accepted by the CMA on 7 May 2015.

⁸⁵ This was publicly announced by the CMA on 19 March 2015.

4. Relevant facts

A. The formation of Three Counties and its relationship with the *Star Courier*

- 4.1 The CMA understands that the *Star Courier*⁸⁶ has historically published the only dedicated local property paper in the Fleet area.⁸⁷ Prior to the formation of Three Counties, local agents considered prices for advertising properties for sale or to let in the *Star Courier* to be '*prohibitively expensive*',⁸⁸ particularly when compared to the perceived rates charged by publications in other local areas.⁸⁹ In addition, agents were frustrated at a lack of transparency in the rates being charged and perceived preferential treatment of a particular advertiser.⁹⁰
- 4.2 In late 2004, certain of the agents in the Fleet area decided to try to address these concerns and held a meeting on 9 September 2004 to discuss a proposal to create an estate agents' association.⁹¹ A further meeting was held on 2 November 2004 with representatives from 16 agents, 14 of which agreed to form an association, with a further 11 agents reported to have offered their full support.⁹² The first Committee (referred to as the Steering Committee at that time) was elected at that meeting, consisting of [the Managing Director] of Waterfords, [the Managing Director] of Castles, [an Employee] of [Current

⁸⁶ Known then as *The Courier* but for consistency referred to as the *Star Courier* throughout this Decision. See footnote 82 above for details.

⁸⁷ Witness interview with [the Managing Director] of Waterfords dated 5 March 2014, page 11, lines 5-6 (CMA Document Reference r_3C 47.1).

⁸⁸ Witness interview with [the Managing Director] of Waterfords dated 5 March 2014, page 10, line 15 (CMA Document Reference r_3C 47.1).

⁸⁹ See draft letter dated 15 September 2004 from [the Managing Director] of Waterfords (CMA Document Reference 3C 24.5). The CMA does not have a full version of this letter but the reference on page 1 '[X]' suggests that it was prepared on behalf of [the Managing Director of Waterfords] by [his Personal Assistant].

⁹⁰ See draft letter dated 15 September 2004 from [the Managing Director] of Waterfords (CMA Document Reference 3C 24.5). The CMA does not have a full version of this letter but the reference on page 1 '[X]' suggests that it was prepared on behalf of [the Managing Director] of Waterfords by [his Personal Assistant]; presentation from meeting on 2 March 2005 held at the [X] Hotel, slide 5 (CMA Document Reference r_CAS 3.105); and letter dated 6 May 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [a Partner] of [accountant firm 1] which notes: '*the Association was formed primarily to bring down the rates of newspaper advertising which had been historically one of the biggest overheads Estate Agents were burdened with each year.*' (letter attached to email dated 6 May 2005 from [the Personal Assistant to the Managing Director of Waterfords] (CMA Document Reference r_CAS 3.70)).

⁹¹ See draft letter dated 15 September 2004 from [the Managing Director] of Waterfords (CMA Document Reference 3C 24.5). This letter details the following agents as present at this initial meeting: [Non Member Agent 1]; [Current Member C]; [Former Member 13]; [Former Member 26]; Waterfords; [Current Member J]; [Former Member 5]. The following companies were stated to have expressed an interest in joining the association: [Former Member 10]; [Former Member 33]; [Former Member 37]; [Current Member M]; [Former Member 15]; and [Current Member R].

⁹² Letter dated 3 November 2004 from [the Managing Director] of Waterfords (CMA Document Reference 3C 24.4). The CMA does not have a full version of this letter but the reference on page 1 '[X]' suggests that it was prepared on behalf of [the Managing Director] of Waterfords by [his Personal Assistant].

Member C],⁹³ [an Employee] of [Former Member 22], [the Managing Director] of [Former Member 26] and [the Managing Director] of [Former Member 1].⁹⁴

- 4.3 In late 2004 and early 2005, the Committee of the newly formed association, Three Counties, held discussions with a number of publishing companies in relation to setting up a new property paper for the purpose of advertising member agents' properties.⁹⁵ The CMA understands that the principal motivation for these discussions was to ensure Three Counties' members had a credible threat of moving all of its member agents to a new publication, thereby strengthening its negotiating position against the *Star Courier*.⁹⁶
- 4.4 On 14 February 2005,⁹⁷ [the Managing Director] of Waterfords informed [the Managing Director of the previous owner of the *Star Courier*],⁹⁸ that a number of local agents had '*formed "The Three Counties Estate Agents Association" to help control the interests of all the members in various aspects of our businesses, including the future of local paper advertising*'.⁹⁹ The letter invited the *Star Courier* to tender for Three Counties' members' future property advertising business at a meeting on 8 March 2005.
- 4.5 Following correspondence between Three Counties and [the previous owner of the *Star Courier*] in relation to Three Counties' compatibility with competition law,¹⁰⁰ [the Managing Director] and [an Employee] of [the

⁹³ [Current Member C], company number '[REDACTED]'. [An Employee] of [Current Member C] was replaced on the Committee by [an Employee] of [Current Member C] on 8 February 2005 (minutes of meeting dated 8 February 2005, attached to email dated 13 February 2005 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.123)).

⁹⁴ Letter dated 3 November 2004 from [the Managing Director] of Waterfords (CMA Document Reference 3C 24.4). The CMA does not have a full version of this letter but the reference on page 1 '[REDACTED]' suggests that it was prepared on behalf of [the Managing Director] of Waterfords by [his Personal Assistant].

⁹⁵ See, for example, minutes of meeting on 12 January 2005 discussing presentations by [magazine 1], [the magazine representative] and Trinity Mirror (attached to email dated 21 January 2005 from [the Personal Assistant to the Managing Director of Waterfords] to Committee members (CMA Document Reference r_CAS 3.132)) and minutes of meeting on 25 January 2005 discussing a further presentation by Trinity Mirror (attached to email dated 26 January 2005 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference r_CAS 3.130)). See also email dated 25 January 2005 from [the Director of Business Development] of [magazine 1] to Committee members (CMA Document Reference r_CAS 3.131); email dated 26 January 2005 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference r_CAS 3.130); and email dated 27 January 2005 from [the Managing Director] of [Former Member 1] to [the Personal Assistant to the Managing Director of Waterfords] and Committee members (CMA Document Reference r_CAS 3.128).

⁹⁶ Witness interview with [the Managing Director] of Waterfords dated 5 March 2014, page 14, line 16 and following: '*I always wanted to stay with The Courier...I really wanted to get to the point where another paper was ready to go before we started having those quite meaningful discussions with The Courier*' (CMA Document Reference r_3C 47.1).

⁹⁷ Draft letter dated 9 February 2005 (attached to email dated 10 February 2005 from [the Personal Assistant to the Managing Director of Waterfords] to Committee members (CMA Document Reference CAS 3.125)) but the letter dated 17 February 2005 from [the Managing Director] of [the previous owner of the *Star Courier*] (CMA Document Reference 3C 24.93) refers to a letter dated 14 February 2005.

⁹⁸ See footnote 82 above.

⁹⁹ Draft letter dated 9 February 2005 (attached to email dated 10 February 2005 from [the Personal Assistant to the Managing Director of Waterfords] to Committee members (CMA Document Reference CAS 3.125)). See footnote 97 above.

¹⁰⁰ See letter dated 17 February 2005 from [the Managing Director] of [the previous owner of the *Star Courier*] to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.93), which asked for confirmation that

previous owner of the *Star Courier*] attended a meeting with the Committee on 8 March 2005.¹⁰¹ The minutes of the meeting stated that a number of points were confirmed with *Star Courier*, including that there would be one agreed advertising rate for Three Counties' members.¹⁰²

- 4.6 A further meeting was held with [the previous owner of the *Star Courier*] on 16 March 2005.¹⁰³ The Committee confirmed the terms of the proposed agreement by letter on 17 March 2005. The letter set out advertising rates to be applied to Three Counties' members up to the end of 2006. It also set out the rates applicable to non-members, specifying that non-members should pay '*...a rate above that of members...*'.¹⁰⁴ [the Managing Director] of [the previous owner of the *Star Courier*] reportedly confirmed '*all points in the letter*' in a telephone call with [the Managing Director] of [Former Member 1] on 29 March 2005.¹⁰⁵

B. The development of the T&CM and the inclusion of the Prohibition on Advertising Fees

- 4.7 At the same time as Three Counties was negotiating an agreement with [the previous owner of the *Star Courier*] in relation to advertising in the *Star Courier*, it was formulating the internal rules and procedures that would apply to its members.

the formation of Three Counties had received approval from the OFT. [The Managing Director of Waterfords] circulated this letter by facsimile to Committee members on 18 February 2005) (see email from [the Managing Director] of [Former Member 1] dated 18 February 2005 to Committee members (CMA Document Reference r_CAS 3.117)). [The Managing Director of Waterfords] responded to [the Managing Director] of [the previous owner of the *Star Courier*] on 22 February 2005, noting that '*We are however aware that our Constitution and Rules of the Association must allow an open invitation for all agents to join and cannot be too restrictive in certain areas and with the advice of both our Solicitors and the Office of Fair Trading we have taken this into consideration. We will of course, be more than happy to let you have a copy of this assuming the Association can agree our advertising requirements with your paper*' (email dated 22 February 2005 from [the Personal Assistant to the Managing Director of Waterfords] to Committee members attaching a draft letter from [the Managing Director] of Waterfords to [the Managing Director] of [the previous owner of the *Star Courier*] (CMA Document Reference CAS 3.114)). By e-mail dated 22 February 2005, [the Managing Director] of Castles responded to the email from [the Personal Assistant to the Managing Director of Waterfords] to state that the letter was '*spot on*' (CMA Document Reference CAS 3.113). By e-mail dated 22 February 2005, [an Employee] of [Former Member 22] added '*my sentiments exactly*' (CMA Document Reference CAS 3.113). By e-mail dated 22 February 2005, [the Managing Director] of [Former Member 1] said '*looks good and hits the spot*' (CMA Document Reference CAS 3.112).

¹⁰¹ Minutes of meeting on 8 March 2005 with [the Managing Director and an Employee of the previous owner of the *Star Courier*] (CMA Document Reference CAS 3.98).

¹⁰² Minutes of meeting on 8 March 2005 with [the Managing Director and an Employee of the previous owner of the *Star Courier*] (CMA Document Reference CAS 3.98).

¹⁰³ Minutes of meeting on 16 March 2005 (attached to email dated 10 March 2005 from [the Personal Assistant to the Managing Director of Waterfords] (CMA Document Reference CAS 3.96)).

¹⁰⁴ Letter dated 17 March 2005 from [the Managing Director] of [Former Member 1] to [the Managing Director of the previous owner of the *Star Courier*] (CMA Document Reference CAS 3.94).

¹⁰⁵ Email dated 29 March 2005 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.84).

4.8 Three Counties' constitution, rules of membership and internal regulations are contained within various documents, consisting of:

- *Three Counties Property Association: Terms and Conditions of Membership* (T&CM)¹⁰⁶
- *Three Counties Property Association: Selection of Members and Advertisement Committee Constitution and Rules*¹⁰⁷ (Committee Rules)
- *Three Counties Estate Agents Association: Appeals Tribunal*¹⁰⁸
- Memorandum and Articles of Association of Three Counties Estate Agents Limited pursuant to the Companies Act 1985 and 1989.¹⁰⁹

4.9 The CMA understands that Three Counties' original T&CM were largely based on the rules of another association of local estate and letting agents.¹¹⁰ According to Three Counties, it engaged the services of [law firm 2] to review the proposed T&CM and confirm their legality.¹¹¹

4.10 Each version of the T&CM contains at Rule 21, as amended from time to time, a prohibition on the members of Three Counties from directly or indirectly advertising their fees or commission rates within the property paper (Rule 21).¹¹² In addition, Rule 6(d) of the Committee Rules, as amended from time to time, obliged the Committee to monitor advertisements placed within the property paper and to ensure that members did not advertise their

¹⁰⁶ Undated, (CMA Document Reference 3C 24.151) Three Counties has informed the CMA that three versions of the T&CM were prepared in 2005, 2006 and 2008 – see letter dated 17 January 2014 from [law firm 1] (CMA Document Reference 3C 15).

¹⁰⁷ Undated, CMA Document Reference [Current Member K] 11.12.

¹⁰⁸ Undated, CMA Document Reference 3C 24.149.

¹⁰⁹ Undated, CMA Document Reference 3C 15.1.

¹¹⁰ It is not clear which association's rules were used as a base. An email dated 11 November 2004 from [the Managing Director] of [Former Member 1] to [the Personal Assistant to the Managing Director of Waterfords] – intended for [the Managing Director] of Waterfords, [an Employee] of [Current Member C], [an Employee] of [Former Member 22] (although addressed to '[X]'), so this may not have been received by [an Employee of Former Member 22]), [the Managing Director] of [Former Member 26] and [the Managing Director] of Castles (CMA Document Reference CAS 3.143) attaches the rules of [Trade Association 2] (registered as a private company limited by guarantee with no share capital under the name [Trade Association 2] (company number [X])). However, a later email dated 15 December 2004 from [the Managing Director] of Waterfords (CMA Document Reference CAS 3.141) states that the initial version of the '*Constitution, Rules and Agreement*' were 'a copy of the [X] agreement, understood to be the [Trade Association 3] (registered as a private limited company under the name [Trade Association 3] (company number [X]), dissolved on 31 May 2011). This was confirmed during interview by [the Managing Director] of Waterfords (witness interview on 5 March 2014, page 17, line 11 and following (CMA Document Reference r_3C 47.1)) and [the Managing Director] of Castles (witness interview on 4 June 2014, page 16 (CMA Document Reference r_CAS 23.3)) See also CMA Document Reference r_3C 77.1.

¹¹¹ Letter dated 25 August 2014 from [law firm 1] on behalf of Three Counties to CMA (CMA Document Reference r_3C 77.1)

¹¹² The term property paper is undefined in any of the constitutional or governance documents (as set out at paragraph 4.8 above), but is understood to refer to the *Homes and Property* section of the *Star Courier* given the various communications with that publication and the terms of the agreement reached between Three Counties and [the previous owner of the *Star Courier*] as described at Chapter 4, section A above.

commission rates, whether directly or indirectly (Rule 6(d)).¹¹³ The table included at Annex F summarises the CMA's understanding of the development of Rule 21 and Rule 6(d).

- 4.11 As demonstrated below, the Committee¹¹⁴ was principally responsible both for agreeing to include Rule 21 in the T&CM, and the subsequent amendments to its wording to expand the operation and scope of the prohibition.¹¹⁵
- 4.12 For ease of presentation, the evidence in the CMA's possession around the development of Rule 21 is addressed in the sections below, reflecting the various iterations of the T&CM and the discussions that led to each amendment of Rule 21.

November 2004 to July 2005: The original T&CM

- 4.13 The original version¹¹⁶ of the T&CM (undated) included the following prohibition at Rule 21:

'Members shall not advertise sales commission rates whether directly or indirectly in the property paper'.¹¹⁷

- 4.14 In addition, what the CMA understands to be the original version of the Committee Rules (which appears to date back at least to 2005) stated at Rule 6(d):

'The Secretary shall monitor and ensure that Members do not advertise any sales commission rates whether directly or indirectly in the Members Property Paper¹¹⁸ and shall make decisions on whether or not an advert should be permitted which in any way contains or refers to a promotion, reduction, fee, special offer or discount'.¹¹⁹

- 4.15 Shortly after Three Counties had been established, the Committee discussed whether or not to include Rule 21 of the T&CM and 6(d) of the Committee Rules, as set out above, as part of the conditions for membership of Three

¹¹³ The Committee Rules (CMA Document Reference [Current Member K] 11.12).

¹¹⁴ Consisting of [the Managing Director] of Waterfords, [an Employee] of [Current Member C] (until 8 February 2005, at which point he was replaced by [an Employee] of [Current Member C]), [the Managing Director] of Castles, [the Managing Director] of [Former Member 26] and [the Managing Director] of [Former Member 1].

¹¹⁵ See paragraphs 4.13 to 4.42 below.

¹¹⁶ Provided by Castles on 24 January 2014 as part of the section 26 response. It is not clear whether this version was in fact the original version or merely a draft. For ease of reference in this Decision, it is referred to as the original version.

¹¹⁷ The term 'property paper' is not defined in the T&CM (CMA Document Reference r_CAS 3.16) – see footnote 112 above.

¹¹⁸ The term 'Members' Property Paper' is not defined in the Committee Rules (CMA Document Reference [Current Member K] 11.12) – see footnote 112 above.

¹¹⁹ Rule 6(d) of the Committee Rules. The CMA does not have a copy of the original Committee Rules but an email dated 15 July 2005 from [the Managing Director] of [Former Member 1] (CMA Document Reference CAS 3.66) set out the rule as cited above and stated 'I believe that these were the original rules as issued'.

Counties.¹²⁰ On 4 January 2005, [an Employee] of [Former Member 22], an estate agent operating without a high street presence, emailed the original Committee members¹²¹ in relation to Rule 21 of the 'Association committee constitution and rules'. He stated:

'I know I have already raised the subject of advertising fees at a previous meeting but having read part way through the above I stopped at the point it mentioned about the restriction of advertising fees and wanted to clarify what your thoughts were on the subject. I am keen to support the association but as you know, can only do so without such restrictions and would been [sic] keen to establish as soon as possible if this is likely to cause a problem'.¹²²

- 4.16 [The Managing Director] of Castles responded on 5 January 2005 to say that *'My personal view is that the role of the association is not to interfere with how individual companies run their businesses – providing it's ethical and within the law'.¹²³* However, [the Managing Director] of [Former Member 26] strongly supported the inclusion of a prohibition on advertising fees in the T&CM when he replied on 6 January 2005:

'...I will not support any one advertising cheap fees...If the majority of the other advertisers wish to do this, that is up to them and I will abide with a democratic majority decision, however, I must say that I do not like it and will not support it. If [Trade Association 3] do not allow it, why should we?'.¹²⁴

- 4.17 This email exchange was followed by a Committee meeting¹²⁵ on 12 January 2005. The minutes of that meeting record as follows:

'In his absence, [the Managing Director of Former Member 26] had submitted a note covering his concerns in quoting fees in advertising.¹²⁶ The members present felt that whilst they are in general agreement with [the Managing Director of Former Member 26]'s views on agents offering special offers reducing their standard fees, organisations such as [Former Member 22] who operate a somewhat different business to the rest of us and are therefore not

¹²⁰ It should be noted that Three Counties was not formally registered as a limited company at Companies House until 1 July 2005 (CMA Document Reference CMA 12).

¹²¹ Email dated 4 January 2005 from [an Employee] of [Former Member 22] to Committee members (CMA Document Reference CAS 3.137).

¹²² Email dated 4 January 2005 from [an Employee] of [Former Member 22] to Committee members (CMA Document Reference CAS 3.137).

¹²³ Email dated 5 January 2005 from [the Managing Director] of Castles to Committee members (CMA Document Reference 3C 24.91).

¹²⁴ Email dated 6 January 2005 from [the Managing Director] of [Former Member 26] to Committee members (CMA Document Reference 3C 24.92).

¹²⁵ Attended by [the Managing Director] of Waterfords, [the Managing Director] of Castles, [an Employee] of [Former Member 22] and [the Managing Director] of [Former Member 1] – minutes of meeting on 12 January 2005 attached to email dated 21 January 2005 from [the Personal Assistant to the Managing Director of Waterfords] to Committee members (CMA Document Reference r_CAS 3.132)).

¹²⁶ Understood to be CMA Document Reference 3C 24.92. See paragraph 4.16 above.

*seen as direct competition to the general marketplace, could advertise their standard rate’.*¹²⁷

- 4.18 By 20 July 2005 (at the latest), Three Counties had amended Rule 21 of the original T&CM to grant a waiver to companies such as [Former Member 22] (the Advertising Waiver):

*‘Members shall not, unless granted a waiver by the Committee in writing, advertise any sales commission rates whether directly or indirectly in the Property Paper and shall obtain the express approval of the Committee for any proposed advert (or alteration or amendment to an existing approved advert) which in any way contains reference to a promotion, reduction, fee, special offer or discount. A copy of the proof of any such advert shall be forwarded to the Committee no less than 21 days prior to the date that the member wishes the advert to appear. Any waiver by the Committee permitting the advertising of sales commission shall be at the discretion of the Committee and will only be granted in exceptional circumstances and only where the advertiser has no shop fronted premises at all in the area covered by the paper’.*¹²⁸

- 4.19 Three Counties also amended Rule 6(d) of the Committee Rules to reflect the new wording of Rule 21:

*‘The Secretary shall monitor and ensure that Members do not advertise any sales commission rates whether directly or indirectly in the Members Property Paper and shall make decisions on whether or not an advert should be permitted which in any way contains or refers to a promotion, reduction, fee, special offer or discount. The Committee shall consider an application in writing from a Member whether they should grant a waiver to enable the member to advertise their fees. This discretion shall only be used in exceptional circumstances and is predominately intended to deal with advertisers who have no shop fronted premises at all in the area where the paper is distributed’.*¹²⁹

- 4.20 On 20 July 2005, [the Managing Director] of Waterfords circulated the T&CM to all members, noting that ‘as a member you are respectfully asked to adhere to [the T&CM]’.¹³⁰

¹²⁷ Minutes of meeting dated 12 January 2005 (attached to email dated 21 January 2005 from [the Personal Assistant to the Managing Director of Waterfords] to Committee members (CMA Document Reference r_CAS 3.132).

¹²⁸ Clause 21, T&CM (CMA Document Reference 3C 24.151).

¹²⁹ Rule 6(d), Committee Rules (CMA Document Reference [Current Member K] 11.12).

¹³⁰ Letter dated 20 July 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [a Director] of [Current Member K] (CMA Document Reference 3C 24.99). This letter also notes: ‘Although it is likely

August 2005 to November 2005: The extension of Rule 21 to all members

- 4.21 Between August 2005 and November 2005, the Committee¹³¹ decided to amend further the wording of Rule 21, following (a) confusion by certain members as to whether Rule 21 prohibited only the advertisement of sales commission rates, or also lettings rates and (b) discussions about the Advertising Waiver.

Lettings commission rates

- 4.22 On 12 August 2005, [the Managing Director] of Waterfords wrote to two members of Three Counties, [Current Member M] and [Former Member 30] in relation to an advertisement by each agent that breached Rule 21.¹³² On 16 August 2005, [a Director] of [Former Member 30] replied to [the Managing Director of Waterfords] to query whether Rule 21 extended to rental charges.¹³³ [The Managing Director of Waterfords] replied to [a Director] of [Former Member 30] on 22 August 2005, accepting that Rule 21 was a little ‘ambiguous’ but confirming that *‘advertising any rates, whether it be sales commission or rental, is prohibited as a member of the Association, I must ask you to stop advertising your fees with immediate effect’*.¹³⁴ [A Director] of [Former Member 30] replied on 24 August 2005, accepting that *‘if the rules are amended to cover lettings and rental charges then I will of course comply’*.¹³⁵
- 4.23 In light of this issue, on 22 August 2005 [the Managing Director] of Waterfords wrote to [the Managing Director] of Castles and suggested amending Rule 21 of the T&CM:

that you would have seen an initial draft of this, it is very important that you read through carefully the entire document to make sure that you are happy to work within the bounds of the agreement...’

¹³¹ Consisting from 8 February 2005 of [the Managing Director] of Waterfords, [the Managing Director] of [Former Member 1], [an Employee] of [Current Member C], [the Managing Director] of Castles and [an Employee] of [Former Member 22]. [An Employee] of [Current Member C] took over from [an Employee] of [Current Member C] on 8 February 2005 (minutes of meeting dated 08 February 2005, attached to email dated 13 February 2005 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.123).

¹³² Letter dated 12 August 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [an Employee] of [Current Member M] (CMA Document Reference 3C 24.101) and letter dated 12 August 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [a Director] of [Former Member 30] (CMA Document Reference 3C 24.102). Each letter stated: *‘I have been asked to draw to your attention the fact that your current advertising is in breach of Rule Number 21 which does not allow advertising of fees. I have enclosed a copy of these Rules and would ask that you change the style of your advert in order to comply and to continue benefiting from the reduced advertising rates’*.

¹³³ Letter dated 16 August 2005 from [a Director] of [Former Member 30] to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.104): *‘I have no problem in changing our advert but as this is a rentals advert, these are not sales commissions. Please advise where the rental charges are mentioned in the rules.’*

¹³⁴ Letter dated 22 August 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [Director] of [Former Member 30] (CMA Document Reference 3C 24.108).

¹³⁵ Letter dated 24 August 2005 from [a Director] of [Former Member 30] to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.109).

'...there will be a need to alter the paragraph as it relates to advertising sales commissions but does not deal with rental rates. As you know, I was asked by the Committee to write to [Former Member 30] and [Current Member M], asking them not to advertise their lettings rates and [Former Member 30] have challenged the fact that it says "sales commission" only. I therefore propose that the following amendment is made and look for the Committee's approval so that this can be circulated to all the Association members.

"Members shall not, unless granted a waiver by the Committee in writing, advertise any sales commission or rental rates whether directly or indirectly..."

This amendment would go with a covering letter from ourselves drawing the Members' attention to the change'.¹³⁶

The Advertising Waiver

- 4.24 On 2 August 2005, [the Managing Director] of Waterfords contacted the Committee to complain about [Former Member 22]'s advertisements.¹³⁷ At a subsequent meeting held on 11 August 2005,¹³⁸ the minutes record that *'The Committee reviewed the recent advert as used by [Former Member 22] and the owners have agreed to amend the format and submit revised copy to the Committee w/c 22.8 for approval.'* In addition, the minutes record that the Committee agreed to alter the rules in light of the issues with [Former Member 22]: *'In the light of the above, the Committee will establish firm rules for advertising copy of all Association Members [sic] adverts in The Courier at the next committee meeting...'*¹³⁹
- 4.25 In light of the meeting on 11 August 2005, on 22 August 2005 [an Employee] of [Former Member 22] requested the Committee to approve an amended advertisement, apparently removing an explicit reference to its fee rates:

¹³⁶ Letter dated 22 August 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [the Managing Director] of Castles (CMA Document Reference r_CAS 3.233).

¹³⁷ Email dated 2 August 2005 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference r_CAS 3.64): *'Most of you are aware that I have taken issue with [Former Member 22] regarding their new advert as I felt it was in breach of our new rules...[I] think we should try & resolve this ASAP to avoid further problems, not just on this specific matter but other agents misunderstanding what they can and cant [sic] do because the rules aren't clear!'*. The complaint is not expressly stated to be around the inclusion of fees, but when viewed in conjunction with later documents (for example, CMA Document Reference CAS 3.58 where [an Employee] of [Former Member 22] states on 22 August 2005 *'What I'll do is send you through the text which we propose to use as this is obviously what is being questioned'*), the CMA has concluded that it is reasonable to infer that this is the issue under discussion.

¹³⁸ Attended by [the Managing Director] of Waterfords, [an Employee] of [Former Member 22], [the Managing Director] of Castles and [the Managing Director] of [Former Member 1] – minutes of meeting dated 11 August 2005 attached to email from [the Managing Director] of [Former Member 1] to Committee members dated 12 August 2005 (CMA Document Reference r_CAS 3.62).

¹³⁹ Minutes of meeting held on 11 August 2005 (attached to email dated 12 August 2005 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference r_CAS 3.62).

'The plan is to remove the first paragraph of text on the left hand page ('tired and uninspired') remove the savings table and 'how is 0.8% possible' text. We plan to put some client testimonials in place of these...

I trust that this will not cause any further problems'.¹⁴⁰

- 4.26 On 22 August 2005, [the Managing Director] of Waterfords requested a copy of the full advertisement,¹⁴¹ and on the same day [an Employee] of [Former Member 22] sent through a list of client quotations that they planned to include in the advertisement.¹⁴² This included quotations such as *'The fact you only charge 0.8% is an added bonus'* and *'you have given such good value in terms of the low commission rates charged'*. On 25 August 2005 [an Employee] of [Current Member C] commented:

'I am against fees altogether being mentioned, it seems as though by getting clients to mention fees in a comment it is squeezing the issue in through the backdoor. I would find it quite acceptable for them to say that as they don't have prominent igh [sic] street offices that they discount their fees'.¹⁴³

- 4.27 Following an offer on 6 September 2005 to further amend the advertisement,¹⁴⁴ on 7 September 2005 [the Managing Director] of Waterfords sent another email to [Former Member 22] on the subject:

'Myself, [the Managing Director of Former Member 1] & [the Managing Director of Castles] feel that in light of the fact you have tried hard to modify your advert from its current format we are willing to accept your changes... However I should point out that we all feel we originally accepted you could advertise your fees based upon your original advert & had we known of the changes you were looking to make we wouldn't have agreed to any special dispensation.

You should also be aware that I am getting grief from other agents about the fact your [sic] allowed to advertise your fees & 'why can't we' comments are coming through.

¹⁴⁰ Email dated 22 August 2005 from [an Employee] of [Former Member 22] to Committee members (CMA Document Reference CAS 3.60).

¹⁴¹ Email dated 22 August 2005 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference CAS 3.59).

¹⁴² Email dated 22 August 2005 from [an Employee] of [Former Member 22] to Committee members (CMA Document Reference CAS 3.56).

¹⁴³ Email dated 25 August 2005 from [an Employee] of [Current Member C] to Committee members (CMA Document Reference CAS 3.54).

¹⁴⁴ Email dated 6 September 2005 from [an Employee] of [Former Member 22] to Committee members (CMA Document Reference CAS 3.50).

*I therefore feel this matter needs to be properly addressed & a firm decision reached that is in the interest of the majority of our members at the next committee meeting on 13th October. Depending upon the decision reached this could of course mean that you may be asked again to change your advert.*¹⁴⁵

- 4.28 [An Employee] of [Former Member 22] responded to this email on 7 September 2005 with the following comments:

'Firstly, my understanding of the dispensation was that it was based upon the manner in which we traded ie from first floor premises and this was the way in which we (as the committee) felt that [Former Member 22] could continue advertising our fee. The fact that we have chosen to make the fee a more prominent part of our advertising should not make any difference...Also where do you draw the line on what you can and can't say...at the end of the day we are all wanting to promote our business some use promotional offers such as golfing incentives, some use general adatorial [sic] which ever way we look at it it's all the same.

*I'd be interested to know just how many estate agents want to print their fees? If there are that many maybe we should go with the majority and allow fees to be printed, after all the association is working for its members!'*¹⁴⁶

- 4.29 Despite these comments and other independent complaints by certain members,¹⁴⁷ minutes of the next Committee meeting on 13 October 2005 record the following:

*'Given all recent issues over member advertising of commission fees in the Courier, the committee unanimously agreed that from the near future, no member would be allowed to advertise fees. There would be no exception to this rule.'*¹⁴⁸

¹⁴⁵ Email dated 7 September 2005 from [the Managing Director] of Waterfords to [an Employee] of [Former Member 22] (CMA Document Reference r_3C 24.111).

¹⁴⁶ Email dated 7 September 2005 from [an Employee] of [Former Member 22] to Committee members (CMA Document Reference r_CAS 3.47).

¹⁴⁷ See, for example, email dated 7 September 2005 from [an Employee] of [Former Member 36] to [the Personal Assistant to the Managing Director of Waterfords] which states: *'...I did not...expect that as a consequence [of joining Three Counties] I would have conditions and restrictions imposed on how I run my business. As a small firm if I wish to advertise a special fee or perhaps open a new branch with special offers then I can see no reason why I should not be aloud [sic] to do so'* (CMA Document Reference CAS 3.46). This was forwarded from [the Managing Director] of Waterfords to the Committee, noting that it *'represents similar sentiments to those expressed to me by 3 other agents in last few days'* (email dated 8 September 2005 from [the Managing Director] of Waterfords (CMA Document Reference CAS 3.46).

¹⁴⁸ Minutes of meeting dated 13 October 2005, attended by [the Managing Director] of Waterfords, [the Managing Director] of Castles, [an Employee] of [Current Member C] and [the Managing Director] of [Former Member 1] (CMA Document Reference r_CAS 3.219).

- 4.30 Following the meeting on 13 October 2005, the Committee discussed whether it would be possible to prevent all members advertising fees as proposed, following legal advice from [law firm 2].¹⁴⁹ [The Managing Director] of Waterfords confirmed on 26 October 2005 that he felt the rule should be amended regardless of concerns apparently raised by the advising solicitor:

'I still firmly believe we should go ahead with changing the rules to exclude all mention of fees...[the solicitor] is rightly covering himself by pointing out there is always a possibility that [Former Member 22] could seek independent advice & fight their corner...My view is lets [sic] go ahead with the proposals & see what reaction we get, if we find [an Employee of Former Member 22] &/or others threaten legal action or the likes of [sic] then we can decide at that point upon the best course of action'.¹⁵⁰

- 4.31 [The Managing Director] of Castles and [the Managing Director] of [Former Member 1] both responded on the same day that they agreed with [the Managing Director of Waterfords] position.¹⁵¹ [The Managing Director] of [Former Member 1] noted:

'My view still remains that we are not restricting [Former Member 22] or indeed any other agent in advertising fees in the Courier but if they wish to be a member of the association then this will no longer be permitted.

Thus, in the absence of any reply from [the solicitor] on my points below, I agree we go ahead and issue the edict stating that members will no longer be allowed to advertise fees'.¹⁵²

- 4.32 On 1 November 2005, [the Managing Director] of [Former Member 1] circulated a letter to all members:

'...there has been much confusion as to some members advertising fees in the Courier and to resolve this matter the committee agreed that as from 29th November no member will be allowed to quote fees in their Courier

¹⁴⁹ The legal advice itself does not form part of the CMA's file. See email dated 21 October 2005 from [the Managing Director] of [Former Member 1] to Committee members and [the Personal Assistant to the Managing Director of Waterfords] (CMA Document Reference r_CAS 3.32) where he asks 'Does he [the solicitor] understand that we are not preventing [Former Member 22] in [sic] advertising fees in the Courier but only if they are an association member?' and email dated 26 October 2005 from [the Managing Director] of Castles (CMA Document Reference r_CAS 3.32).

¹⁵⁰ Email dated 26 October 2005 from [the Managing Director] of Waterfords to Committee members and [law firm 2] (CMA Document Reference r_CAS 3.32).

¹⁵¹ Emails dated 26 October 2005 from [the Managing Director] of Castles to Committee members and [law firm 2] and from [the Managing Director] of [Former Member 1] to Committee members and [law firm 2] (CMA Document Reference r_CAS 3.31).

¹⁵² Email dated 26 October 2005 from [the Managing Director] to Committee members and [law firm 2] (CMA Document Reference r_CAS 3.31).

*advertisement. A revised schedule of terms and conditions of the association will be issued’.*¹⁵³

2006: The further extension of Rule 21 to cover both direct and indirect references to fees

- 4.33 In light of this decision, at the end of 2005 and in early 2006 the Committee discussed the revised wording for Rule 21. Following a query from [Former Member 22] on 4 November 2005 whether the revised rules would allow them to advertise “*We won’t be beaten*” or some such similar phrase when talking about fees’,¹⁵⁴ the Committee members suggested during email correspondence on 7 November 2005 that the rule should be extended to prohibit any direct or indirect reference to fees, as well as the fees themselves:

[An Employee of Current Member C]:

*‘Wouldn’t it be easier to make the rule no reference to fees or charges? I think these guys will just take the route- “we are cheaper than the rest” which will encourage undercutting even more than putting their low fees in!’*¹⁵⁵

[The Managing Director of Waterfords]:

*‘As I see it there can be no reference to fees...[the Employee of Former Member 22] has to accept the fact “we won’t be beaten” published is as damaging to the other members/industry as quoting a ridiculously low %. If we allow any flexibility we leave ourselves wide open again to other agents trying to bend the rules’.*¹⁵⁶

[The Managing Director of Former Member 1]:

*‘We should close down all opportunities for any advert copy relating to fees etc. “Won’t be beaten on price” relates to fees and therefore should not be allowed. By having a blanket ban on quoting fees or any [sic] indeed any reference to fees we ensure we do not get caught out in future’.*¹⁵⁷

¹⁵³ Letter dated 1 November 2005 from [the Managing Director] of [Former Member 1] (on Three Counties letterhead) to Three Counties members (CMA Document Reference CAS 3.220).

¹⁵⁴ Email dated 4 November 2005 from [an Employee] of [Former Member 22] to [the Managing Director] of Castles (CMA Document Reference CAS 3.29).

¹⁵⁵ Email dated 7 November 2005 from [an Employee] of [Current Member C] to [the Managing Director] of Castles (CMA Document Reference CAS 3.27).

¹⁵⁶ Email dated 7 November 2005 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference CAS 3.25).

¹⁵⁷ Email dated 7 November 2005 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.24).

[An Employee of Current Member C]:

'I agree, this encourages agents to undercut each other'.¹⁵⁸

4.34 On 9 January 2006, [the Managing Director] of [Former Member 1] suggested:

'... maybe the terms should read: '21. Members shall not advertise sales or lettings commission rates whether directly or indirectly in the property paper nor refer to their commission rates or other agents [sic] rates in any way'.¹⁵⁹

4.35 This position was confirmed in a Committee meeting on 11 January 2006:

'New rules regarding the advertising of fees in the Courier agreed as per [the Managing Director of Former Member 1's] email. [The Managing Director of Waterfords] to write to all members and confirm new rule 21'¹⁶⁰

4.36 However, before the amended rule was adopted, it was further extended on 28 January 2006. The amended rule purported to allow the Committee to instruct the *Star Courier* to charge the higher 'non-association' rate for advertising where a member attempted to submit an advertisement in breach of Rule 21.¹⁶¹

4.37 The following changes to the T&CM were communicated to members on 3 February 2006 (emphasis as in the original):¹⁶²

*'Members **shall not advertise sales or lettings commission rates** whether directly or indirectly in the property paper nor refer to their commission rates or any other agents [sic] rates in any way.*

*Should any member attempt to advertise fees in any way whatsoever the committee will immediately inform the Property Paper to charge the non association rate for that advert and the member will be immediately contacted to discuss further action under clause 27.'*¹⁶³

¹⁵⁸ Email dated 7 November 2005 from [an Employee] of [Current Member C] to Committee members (CMA Document Reference CAS 3.24).

¹⁵⁹ Email dated 9 January 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference r_CAS 3.13).

¹⁶⁰ Minutes of Three Counties Committee Meeting dated 11 January 2006 (CMA Document Reference r_CAS 3.10).

¹⁶¹ Email dated 28 January 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.148). This enforcement mechanism was first suggested by [the Managing Director] of Castles on 21 November 2005 (CMA Document Reference r_CAS 3.18).

¹⁶² Letter dated 3 February 2006 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [the Managing Director] of Castles (as a member) (CMA Document Reference CAS 3.217).

¹⁶³ See CMA Document Reference 3C 24.150 and version attached to email dated 3 February 2006 from [the Managing Director] of [Former Member 1] to Committee members and [the Personal Assistant to the Managing Director of Waterfords] (CMA Document Reference CAS 3.146).

March 2006 to February 2008: Attempts to strengthen the application of Rule 21

- 4.38 Following a number of advertisements appearing in the *Star Courier* in breach of Rule 21 (see paragraphs 4.105 to 4.107 below), on 31 March 2006, [the Managing Director] of Waterfords wrote to [an Employee] and [the Group Advertisement Manager] of the *Star Courier* in relation to, along with other issues, agents advertising their fees:

*'The second issue relates to Agents continuing in some cases to advertise fees. The first we get to know about it is when the paper appears and you then tell us you cannot retrospectively charge the higher amount. As an Association, we find this unacceptable and feel that there must be a way that you can either prevent the advert from going in, or if this is not possible make sure that the offending agent is charged the higher amount.'*¹⁶⁴

- 4.39 Shortly afterwards, on 4 April 2006 a further letter from [the Managing Director] of Waterfords to the Committee stated:

'I have spoken to [the previous owner of the Star Courier]¹⁶⁵ regarding this issue of informing us when they are about to place an advert that mentions fees and invoicing the offending Company at the card rate.

They insist that because the paper is printed at Reading, they have no control on what goes in the paper and also the invoice is generated at the same time.

I have suggested that they charge a higher rate for the their [sic] next advert inserted by way of a penalty for advertising the fees. They however, are not happy about this as they feel it is our responsibility to collect the difference, as it is the Association rules that dictates what Agents can and can't advertise...

My suggestion to the Committee is that the Association charges the Agent direct the difference in the advertising in such a situation but in order to do this, we would need to amend the rules'.¹⁶⁶

- 4.40 [The Managing Director] of Castles responded by email on 4 April 2006 to agree with the proposal: *'I don't think we've got an option. We'll have to make the terms watertight and would suggest that if the payment is not forthcoming*

¹⁶⁴ Letter dated 31 March 2006 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [an Employee] and [the Group Advertisement Manager] of the *Star Courier* (CMA Document Reference 3C 24.125).

¹⁶⁵ Understood to refer to [the previous owner of the *Star Courier*], the owner of the *Star Courier* at that time (CMA Document Reference CAS 3.257) (see footnote 82 above).

¹⁶⁶ Letter dated 4 April 2006 from [the Managing Director] of Waterfords (on Three Counties letterhead) to Committee members (CMA Document Reference 3C 24.126).

*it is added to the agents [sic] subscription the on [sic] renewal!'*¹⁶⁷ On 5 April 2006, [the Managing Director] of [Former Member 1] circulated suggested wording¹⁶⁸ for the amended rule, noting that *'My view is that if the payment is not forthcoming then the disciplinary action kicks in and if the member fails to pay after disciplinary then they should be expelled. Big stick seems to be the only thing which works'*.¹⁶⁹

4.41 [The Managing Director] of Waterfords confirmed his agreement to [the Managing Director] of [Former Member 1]'s suggestions on the same day, adding *'Perhaps going onto say if the invoice is not settled within a given period, say 28 days, their membership will be suspended & the courier instructed to charge them the higher rate until the invoice is settled'*.¹⁷⁰ Finally, on 6 April 2006 [the Managing Director] of Castles made some small amendments to the suggested draft.¹⁷¹

4.42 Following these discussions, on 8 April 2006 the second paragraph of Rule 21 was amended to read as follows:

'Should any member attempt to advertise fees in any way whatsoever the committee will immediately raise an invoice for the difference between the 'association rate for page advertising' and the non association rate for agents [sic] pages in that weeks [sic] advertising and this amount will be payable to the association within 28 days. The member will be immediately contacted to discuss further action under clause 27 and membership suspension if fee not paid'.¹⁷²

¹⁶⁷ Email dated 4 April 2006 from [the Managing Director] of Castles to committee members and [the Personal Assistant to the Managing Director of Waterfords] (CMA Document Reference CAS 3.302).

¹⁶⁸ [The Managing Director] of [Former Member 1's] suggested wording was: **'21. Members shall not advertise sales or lettings commission rates whether directly or indirectly in the property paper nor refer to their commission rates or any other agents [sic] rates in any way. Should any member attempt to advertise fees in any way whatsoever the committee will immediately raise an invoice for the difference between the 'association rate for page advertising' and the non association rate and this amount will be payable to the association. The member will be immediately contacted to discuss further action under clause 27'** (emphasis as in the original).

¹⁶⁹ Email dated 5 April 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.302).

¹⁷⁰ Email dated 5 April 2006 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference CAS 3.302).

¹⁷¹ Email dated 6 April 2006 from [the Managing Director] of Castles to Committee members (CMA Document Reference CAS 3.183).

¹⁷² Email dated 8 April 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.302). It should be noted that it is not entirely clear when this paragraph was actually altered or came into force, and between 2006 and 2008 there appears to be internal confusion by the Committee members as to the correct version. For example, on 8 April 2006, [the Managing Director] of [Former Member 1] emailed Committee members with this amended wording (CMA Document Reference CAS 3.302), and this version of the rule also appears in the T&CM forwarded from [the Managing Director] of [Former Member 1] to Committee members on 10 October 2006 *'for your records and issue to any prospective new members'* (CMA Document Reference CAS 3.164). However, later emails suggest that this amendment was not formally made in 2006. For example, an email dated 11 October 2007 from [the Managing Director] of Castles to Committee members discusses possible changes to the T&CM, including *'the right for the association to levy the difference between 3 Counties rate and rate card rate where a breach of the rules has occurred (should the committee see fit!)*' (CMA Document Reference CAS 3.288), confirmed by letter dated 16 October 2007 from [the Managing

March 2008 to October 2008: The OFT's warning letter and the apparent removal of Rule 21

- 4.43 In March 2008, the OFT informally investigated complaints received against Three Counties and [Trade Association 2],¹⁷³ in relation to rules in each association's terms and conditions of membership that prohibited the publication of members' fees and commission rates in the relevant local property paper (the 2008 Complaint).
- 4.44 On 11 March 2008 the OFT contacted Three Counties to set out its concerns in relation to potential restrictions on advertising (including commission rates) and constraints on general competition between members.¹⁷⁴ The OFT requested Three Counties, together with its members, to consider the concerns raised in the letter ***'together with the rest of its agreements and activities, to identify areas where they are not currently complying with competition law and make changes where necessary'*** (emphasis as in the original).
- 4.45 According to the evidence, the OFT's concerns were communicated to all members of Three Counties at the 2008 AGM on 3 April 2008:
- 'OFT LETTER: [The Managing Director of Waterfords] explained letter received from the OFT & that the rules had been put together by Lawyers who had written rules for similar associations. OFT concern mainly relates to advertising of fees and the association restricting this, which goes against anti competitiveness [sic] so if members want to do that the rules are being changed to reflect this and we are responding to the OFT to that effect'.¹⁷⁵*
- 4.46 The evidence demonstrates that Three Counties at least intended to remove Rule 21 from the T&CM in light of the OFT's concerns. [The Managing Director] of [Current Member K] (joint chairman of Three Counties from April 2008 to February 2010) sent an email to [the Managing Director] of [Former Member 26] on 9 April 2008, commenting:
- '[The Managing Director] [of Waterfords] advised me that he had been dealing with the OFT in our area and had been advised that the association in this*

Director] of Waterfords (on Three Counties letterhead) to Committee members (CMA Document Reference CAS 3.284); and agreed in Committee meeting of 22 January 2008 (CMA Document Reference r_CAS 3.274). However, a further email dated 5 February 2008 from [the Managing Director] of Castles to Committee members notes that *'We will have to ask the paper to charge them the extra. It's not gone through the rules for us to be [sic] able to do so'* (CMA Document Reference CAS 3.270). However, this later version was the one submitted to the OFT by [the Complainant] in January 2013 (CMA Document Reference [Complainant] 1 and CMA Document Reference [Complainant] 1.1).

¹⁷³ [X].

¹⁷⁴ Letter dated 11 March 2008 from the OFT to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.140).

¹⁷⁵ Minutes of AGM on 3 April 2008 (CMA Document Reference r_CAS 3.245).

*area was not able to prevent firms advertising their commission rates in the local papers. At our AGM last Wednesday 2nd April [sic – 3 April] we advised all members of this’.*¹⁷⁶

4.47 On 9 July 2008, the issue was again discussed at a Committee meeting. The minutes state: *‘OFT Response & Update – [the Managing Director] [of Waterfords] waiting on the Associations [sic] Solicitors and will then respond and put it to bed’.*¹⁷⁷

4.48 On 30 September 2008, [a Director] of [Former Member 27] emailed [the Managing Director] of Waterfords to ask if he had *‘had any time to consider the clause re rates in adds [sic]...[as] I would reluctantly have to resign from the association of [sic] it is decided we must remove the clause’.*¹⁷⁸

4.49 In response, [the Managing Director] of Waterfords noted on the same day:

*‘As it happens I agree & support your views that members should not promote their fees. What I can’t remember is whether the newly drafted rules have this clause in, or if it was removed because of the concerns expressed by the OFT. Someone needs to check this with the solicitors, [law firm 1] ...’.*¹⁷⁹

4.50 On 17 October 2008, the OFT contacted [the Managing Director] of Waterfords, forwarding him a copy of [Trade Association 2]’s terms and conditions of membership, which had been revised in light of separate discussions with the OFT.¹⁸⁰ [Trade Association 2]’s amended rules still contained a prohibition on advertising fees in the relevant property paper, on the grounds (the CMA understands) that the local publication in that area, [X], unilaterally prohibited the advertising of fees. [The Managing Director of Waterfords] replied to query this:

‘I thought when we spoke you had concerns that we were not allowing agents to advertise fees in the paper, as such we have spent the last 4 months with our solicitors re drafting the rules to accommodate this. If you are saying that

¹⁷⁶ Email dated 9 April 2008 from [the Managing Director] of [Current Member K] to [the Managing Director] of [Former Member 26], [a Director] of [Current Member K] and [a Director] of [Current Member K] (CMA Document Reference [Current Member I] 4.5). This was supported by witness evidence from [the Managing Director of Current Member K]: *‘I do recall [the Managing Director of Waterfords] standing up and saying “We cannot prevent you from advertising fees. If you want to advertise your fees in the newspapers, go ahead”* (witness interview with [the Managing Director] of [Current Member K] dated 6 June 2014, page 16 (r_CMA Document Reference [Current Member K] 40).

¹⁷⁷ Minutes of meeting on 9 July 2008 (no list of attendees) (CMA Document Reference r_CAS 3.246).

¹⁷⁸ Email dated 30 September 2008 from [a Director] of [Former Member 27] to [the Managing Director] of Waterfords (CMA Document Reference CAS 3.256).

¹⁷⁹ Email dated 30 September 2008 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference CAS 3.256).

¹⁸⁰ Email dated 17 October 2008 from the OFT to [the Managing Director] of Waterfords (CMA Document Reference r_CAS 3.251).

[Trade Association 2]'s association new rules are okay then, from what I can remember of our original rules, there wasn't anything wrong with them'.¹⁸¹

4.51 The OFT responded on 22 October 2008:

'I passed [Trade Association 2]'s changes for your consideration – I am not necessarily saying they are 'right' but they do follow discussion and correspondence I had with [a Director of Former Member 27]

As I said to [a Director of Former Member 27] it is for you and your members to judge what is appropriate given the requirements of competition law. For example, if following legal advice you think it is better not to have a rule banning advertising fees in the local paper, then you should take that decision'.¹⁸²

4.52 [The Managing Director] of Waterfords forwarded the OFT's email and [Trade Association 2]'s amended rules to the Committee for consideration on 22 October 2008.¹⁸³

4.53 The CMA infers from the evidence that changes to the T&CM were further discussed following the OFT's communication in October 2008. An email from [an Employee] of [Former Member 34] (joint Chairman of Three Counties in 2008) on 24 October 2008 stated:

'I've chased the new rules 6 times in the last month & am still waiting for them & probably will be on the 6th [the next Committee meeting].

Once they're in I'll forward them on to all parties for fine tuning & bat it back into the Solicitors [sic] court, they will then take another 4/5 months to respond by which time the Association will have gone pair [sic] shaped...'.¹⁸⁴

4.54 The above evidence suggests that the T&CM were amended to reflect the OFT's concerns. This is supported by witness evidence from [the Managing Director] of Waterfords, who stated that the changes had been made: *'we went to our solicitors and we made the changes that were necessary after that discussion that we had with [the OFT]'.¹⁸⁵* [The Senior Manager] of Hamptons International also understood that Rule 21 had been removed and noted that

¹⁸¹ Email dated 17 October 2008 from [the Managing Director] of Waterfords to the OFT (CMA Document Reference r_CAS 3.251).

¹⁸² Email dated 22 October 2008 from the OFT to [the Managing Director] of Waterfords (CMA Document Reference r_CAS 3.251).

¹⁸³ Email dated 22 October 2008 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference r_CAS 3.251).

¹⁸⁴ Email dated 24 October 2008 from [an Employee] of [Former Member 34] to [the Managing Director] of Castles (CMA Document Reference r_CAS 3.250).

¹⁸⁵ Witness interview with [the Managing Director] of Waterfords on 5 March 2014, page 22, line 14 and following (CMA Document Reference r_3C 47.1).

he understood that *'this had been looked at and a change had been made and all was ok. I believed that the change had been included in the terms'*.¹⁸⁶ In addition, the CMA notes that there are only sporadic examples of active enforcement of Rule 21 directly against the members of Three Counties between 2008 and 2010.

- 4.55 However, this is contradicted by witness¹⁸⁷ and documentary¹⁸⁸ evidence, and submissions made by Three Counties during the course of the CMA's investigation, in which it claims that the OFT's communications in October 2008 led it to understand that there was, in fact, no need to amend the T&CM: *'The Directors of 3C entered into correspondence with the then OFT and as a result of this correspondence (with [a Director of Former Member 27] [sic – incorrect name] believed in good faith that its Rules were in compliance with [the Act] and TFEU 101 and 102...'*¹⁸⁹
- 4.56 The CMA does not dispute that the directors of Three Counties may have believed that the T&CM, including Rule 21, were in compliance with the Act. It also accepts that the OFT's correspondence in October 2008¹⁹⁰ did not explicitly state that the legal position of [Trade Association 2] should not be viewed as applicable to Three Counties. It should be noted that [Trade Association 2]'s analysis of the legitimacy of retaining the equivalent of Rule 21 in its terms and conditions was based on the fact the relevant local paper, [X], unilaterally prohibited advertisements from containing references to fees. The OFT was unable to share the detail of [Trade Association 2]'s analysis with Three Counties at the time, due to reasons of confidentiality.
- 4.57 Notwithstanding the above, the CMA notes that ignorance or a mistake of the law is no bar to a finding of infringement of the Act.¹⁹¹ In addition, the CMA does not accept Three Counties' submissions that the OFT's correspondence in October 2008 constituted express or tacit approval of the T&CM, and in particular of Rule 21, or any kind of assurance that it would not be subject to further investigation. In particular, the CMA notes that the OFT's email of 22 October 2008 expressly stated that it was not *'necessarily saying that [Trade*

¹⁸⁶ First voluntary statement by [the Senior Manager] of Hamptons International dated 13 March 2014 (CMA Document Reference r_HAMP18.3) page 5.

¹⁸⁷ See witness interview with [the Managing Director] of Castles: *'I never saw...a copy of revised rules that reflected any...changes that should have been made'* (witness interview dated 4 June 2014, page 25 (CMA Document Reference r_CAS 23.3)).

¹⁸⁸ See paragraphs 4.60 to 4.69 below.

¹⁸⁹ Letter dated 25 August 2014 from [law firm 1] to CMA (CMA Document Reference r_3C 77.1). See also witness interview with [the Senior Manager] of Hamptons International where [law firm 1] made similar comments (witness interview dated 14 March 2014 page 23, lines 16-21 (CMA Document Reference r_3C 84.2)).

¹⁹⁰ As set out at paragraphs 4.50 to 4.52 above.

¹⁹¹ See paragraph 6.12 below.

Association 2]’s rules are “right”. In addition, the OFT clearly qualified its position to state:

*‘...it is for you and your members to judge what is appropriate given the requirements of competition law. For example, if following legal advice you think it is better not to have a rule banning advertising fees in the local paper, then you should take that decision’.*¹⁹²

- 4.58 The CMA has concluded that the above correspondence demonstrates that, in line with standard practice and published guidance at that time,¹⁹³ the OFT expressly advised Three Counties to conduct a self-assessment of the T&CM’s compatibility with competition law and made no assurance either that [Trade Association 2]’s position was compliant with the Act, or that Three Counties was in the same legal position. The CMA has further concluded that this correspondence notified Three Counties and its members that they should consider amending the T&CM in order to ensure its compliance with the Act. Finally, the CMA notes that Three Counties had, in fact, sought legal advice in order to help it conduct that self-assessment.¹⁹⁴
- 4.59 In any case, the CMA notes that the OFT’s correspondence cannot affect the assessment of whether the conduct of the Parties or the content of the T&CM are compliant with the Act¹⁹⁵ and may only properly be taken into account when considering mitigating factors in relation to the calculation of financial penalties, if applicable.¹⁹⁶

July 2010 to December 2013: The continued application of Rule 21

- 4.60 Despite the above statements that Rule 21 had been removed from the T&CM, the evidence demonstrates that Rule 21 was still contained within the T&CM and at least generally adhered to by the members of Three Counties until the start of the OFT’s investigation in December 2013.
- 4.61 For example, following an apparent enquiry into membership by [Former Member 25], on 30 July 2010 [the Managing Director] of Waterfords asked [the Senior Manager] of Hamptons International to inform them that they would be unable to advertise fees or special offers as members of Three Counties:

¹⁹² Email dated 22 October 2008 from OFT to [the Managing Director] of Waterfords (CMA Document Reference r_CAS 3.251).

¹⁹³ See, for example, *Competing Fairly* (OFT447, March 2005), page 10: ‘It is for businesses themselves to determine whether or not their agreements and/or conduct comply with competition law.’

¹⁹⁴ See paragraphs 4.47 to 4.54 above.

¹⁹⁵ *National Grid plc v Gas and Electricity Markets Authority and ors* [2010] UKCLR 386, paragraph 109.

¹⁹⁶ *National Grid plc v Gas and Electricity Markets Authority and ors* [2010] UKCLR 386, paragraph 109.

*'I think you should tell them they cannot advertise fees/special offers in their adverts. I say this because they are about to open in Camberley offering 0% for 3 months!'*¹⁹⁷

- 4.62 A letter sent from [the Senior Manager] of Hamptons International to [Former Member 25] on 31 August 2010 then noted:

'Further to our conversations and previous correspondence enclosing the application for the 3 Counties, I have noticed with interest your advertising week commencing the 23 August, 2010 promoting the opening of the new Camberley Branch...

*I would bring to your attention, within the rules of membership of the 3 Counties Association, Section 21 [Rule 21], making reference to advertising sales or lettings commission rates and trust that if you decide to join the 3 Counties Association to benefit from the reduced advertising rates, this section of our rules is adhered to'.*¹⁹⁸

- 4.63 In addition, on 14 September 2012, [the Senior Manager] of Hamptons International wrote to [the Head of Group Property and Regional Sales Manager] of the *Star Courier* to ask them to ensure that there would be no reference to fees in any advertising by a member opening a new office:

*'I am aware that [Current Member C] are soon to launch new/rebranded offices in Fleet and Yately and they are offering 0% fees to entice new clients to them, please can we ensure that the likely promotional advertising in the Courier over forthcoming weeks has no reference fees [sic]'*¹⁹⁹

- 4.64 On 31 October 2013, [a Director] of [Current Member J]²⁰⁰ wrote to [the Managing Director] of Waterfords to complain about a [Current Member K] advertisement that publicised its fees for tenants:

'I have just looked in the paper on the lettings pages and noticed that [Current Member K] [sic] are advertising fees on the rental side I thought this was a big

¹⁹⁷ Email dated 30 July 2010 from [the Managing Director] of Waterfords to [the Senior Manager] of Hamptons International (CMA Document Reference r_HAMP 9.316).

¹⁹⁸ Letter dated 31 August 2010 from [the Senior Manager] of Hamptons International to [an Employee] and [an Employee] of [Former Member 25] (CMA Document Reference 3C 24.146).

¹⁹⁹ Email dated 14 September 2012 from [the Senior Manager] of Hamptons International to [a Sales Representative] of the *Star Courier*, [the Head of Group Property and the Regional Sales Manager], TMS of TMS and others (CMA Document Reference r_3C 24.41).

²⁰⁰ [Current Member J] is a Current Member of Three Counties and [a Director] of [Current Member J] has been a committee member from at least 19 May 2010 to 4 August 2014 (CMA Document Reference r_3C 24.70). [The Director] of [Current Member J] was listed as a current member of the Committee in Three Counties' response to the section 26 notice dated 17 January 2014 (CMA Document Reference r_3C 15).

NO NO what is going on everybody seems to be doing their own thing anyway let me know if this is now allowed so we can all do it'.²⁰¹

- 4.65 [The Managing Director] of Waterfords forwarded this complaint to the *Star Courier* on 31 October 2013.²⁰² In response, [the Head of Group Property and Regional Sales Manager] of the *Star Courier* explained on 1 November 2013 that, following a ruling by the Advertising Standards Authority (ASA) in March 2013, from 1 November 2013 all lettings agents would be obliged to advertise non-optional fees for tenants.²⁰³ She then asked [the Managing Director of Waterfords] for '*guidance*' on the position.²⁰⁴ In light of this explanation, [the Managing Director of Waterfords] confirmed to the paper on the same day that Three Counties' members would be permitted to advertise fees in respect of tenants but that the advertising of fees for vendors or letting rates for landlords would remain prohibited:

'...given that it is now the law I think it's perfectly reasonable to allow agents to advertise tenant ONLY fees'.²⁰⁵

- 4.66 In response to [the Managing Director] of Waterfords on the same day, [a Director] of [Current Member J] stated:

'Yes I know about the legislation however I thought due to the association that we belong to including [the Managing Director] [of [Current Member K]] I thought it was agreed that no fees had to be advertised my mistake obviously. I have noticed that you do not advertise your fees so obviously you thought like I did that it was not the done thing. So I guess if all letting agents advertise Tenants [sic] fees, another war begins on who will be the cheapest'.²⁰⁶

- 4.67 [The Managing Director] of Waterfords' response to [a Director] of [Current Member J] on 3 November 2013 confirmed that Rule 21 was still an active part of the T&CM:

'Hi [Director of Current Member J], you are right our rules say no fees. However all lettings agents have to make reference to tenant fees to comply

²⁰¹ Email dated 31 October 2013 from [a Director] of [Current Member J] to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.74).

²⁰² Email dated 31 October 2013 from [the Managing Director] of Waterfords to [the Head of Group Property and Regional Sales Manager], TMS (CMA Document Reference 3C 24.75), noting '*[Director] of [Current Member J] is of course absolutely right & the paper know the agreement the association has with regard to fees*'.

²⁰³ Email dated 1 November 2013 from [the Head of Group Property and Regional Sales Manager], TMS to [the Managing Director] of Waterfords (CMA Document Reference r_HAMP 9.294).

²⁰⁴ Email dated 1 November 2013 from [the Head of Group Property and Regional Sales Manager], TMS to [the Managing Director] of Waterfords (CMA Document Reference r_HAMP 9.294).

²⁰⁵ Email dated 1 November 2013 from [the Managing Director] of Waterfords to [the Head of Group Property and Regional Sales Manager], TMS of TMS (CMA Document Reference r_HAMP 9.295).

²⁰⁶ Email dated 1 November 2013 from [a Director] of [Current Member J] to [the Managing Director] of Waterfords (CMA Document Reference [Current Member J] 14).

*with new regs, so the association will obviously have to change its policy to allow this to happen.*²⁰⁷

- 4.68 In line with this, Three Counties' current Chairman, [the Senior Manager] of Hamptons International, sent an email to [the Head of Group Property and Regional Sales Manager] of the *Star Courier* on 6 November 2013 to confirm the position:

'I am in the process of writing to all members and in light of the change in guidelines from 1st November and the recommendations from CAP for all Lettings to disclose non-optional charges to tenants, the [Current Member K] advertisement or similar is now acceptable.

*The 3 Counties view remains in respect to Sales and Lettings agents making reference to selling and lettings fees or incentives'*²⁰⁸

- 4.69 This decision was communicated to all members of Three Counties in December 2013:

*'Following an ASA ruling in March 2013... [t]he 3 Counties Estate Agents recognise this change in practice and accept that any letting agent can and should make reference to tenant fees. However, the view of the Committee for the good of its members still prohibit the advertising of financial incentives including selling and letting fees within the Property Courier'*²⁰⁹

C. Members' agreement or acquiescence to Rule 21

- 4.70 The evidence below demonstrates that members were obliged to sign up to the T&CM in order to join Three Counties. The evidence also demonstrates that compliance with the T&CM in general, and Rule 21 in particular, was a mandatory condition for membership of Three Counties, and that both new

²⁰⁷ Email dated 3 November 2013 from [the Managing Director] of Waterfords to [a Director] of [Current Member J] (CMA Document Reference r_HAMP 9.297).

²⁰⁸ Email dated 6 November 2013 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_HAMP 9.319).

²⁰⁹ Letter (undated but understood to be from 12 December 2013 – see CMA Document Reference HAMP 9.327) from [the Senior Manager] of Hamptons International to: [Current Member A] (CMA Document Reference 3C 24.67.11); [Current Member B] (CMA Document Reference 3C 24.67.1); Castles (CMA Document Reference 3C 24.67.12); [Current Member F] (CMA Document Reference 3C 24.67.3); [Current Member G] (CMA Document Reference 3C 24.67.7); Hamptons International (CMA Document Reference 3C 24.68.3 and CMA Document Reference HAMP 9.3); [Current Member I] (CMA Document Reference 3C 24.67, CMA Document Reference 3C 24.67.10 and CMA Document Reference [Current Member I] 11.3); [Current Member J] (CMA Document Reference 3C 24.67.9 and CMA Document Reference [Current Member J] 10); [Current Member K] (CMA Document Reference 3C 24.68.5); [Current Member L] (CMA Document Reference 3C 24.67.8); [Current Member M] (CMA Document Reference 3C 24.67.4); [Current Member N] (CMA Document Reference 3C 24.67.6); [Current Member O] (CMA Document Reference 3C 24.68.2); [Current Member E] (CMA Document Reference 3C 24.67.2); [Current Member P] (CMA Document Reference 3C 24.68); [Current Member Q] (CMA Document Reference 3C 24.68.1); [Current Member R] (CMA Document Reference 3C 24.67.5 and CMA Document Reference [Current Member R] 2.4); Waterfords (CMA Document Reference 3C 24.68.4).

and existing members were reminded of their obligations to comply with Rule 21 (as amended from time to time).

Compliance with the T&CM, including Rule 21: a condition for membership

- 4.71 The evidence demonstrates that prospective Three Counties' members were obliged to accept and agree to abide by the T&CM (which included Rule 21) as a pre-condition for joining Three Counties.
- 4.72 For example, following the formation of Three Counties by the original members,²¹⁰ [the Managing Director] of Waterfords sent a letter to the members on 20 July 2005 enclosing a copy of the T&CM. This letter noted that '*as a member you are respectfully asked to adhere to [the T&CM]*'. The letter also emphasises the importance of reading the entire T&CM '*to make sure that you are happy to work within the bounds of the agreement*'.²¹¹
- 4.73 In addition, in order to join Three Counties, a prospective new member had to complete the '*Three Counties Estate Agents Association Application for Membership*'.²¹² The application form confirms that prospective members agreed to abide by the terms of the T&CM as a condition of membership:

'I hereby apply for membership, declare and certify that:

I agree to be bound by the Association's Rules of Membership a copy of which I have read and understood and will attend before the Association Committee in pursuit of my application if requested to do so.

I understand that Three Counties Estate Agents Association is a trading name of a Limited Liability Company and that the rules of the Association are not a binding contract as between members but between each member individually and the Limited Liability Company (Three Counties Estate Agents Association Limited)'.²¹³

²¹⁰ Understood to be: [Former Member 1]; [Former Member 4]; [Current Member B] [Current Member C]; Castles; [Former Member 5]; [Former Member 6]; [Former Member 7]; [Former Member 8]; [Current Member E]; [Current Member F]; [Former Member 9]; [Former Member 10]; [Former Member 13]; [Former Member 14]; [Former Member 15]; [Former Member 16]; [Former Member 17]; [Current Member J]; [Current Member K]; [Former Member 19]; [Current Member L]; [Current Member M]; [Former Member 21]; [Current Member N]; [Former Member 22]; [Former Member 23]; [Former Member 25]; [Former Member 26]; [Former Member 27]; [Former Member 28]; [Former Member 30]; [Former Member 33]; [Former Member 34]; [Current Member R]; Waterfords; [Former Member 35]; [Former Member 36]; [Former Member 37]; and [Former Member 38] (Membership list dated 20 July 2005; CMA Document Reference 3C 15.2).

²¹¹ See, for example, letter dated 20 July 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [a Director] of [Current Member K] (CMA Document Reference 3C 24.99). The CMA infers that similar letters were sent to all founding members.

²¹² CMA Document Reference 3C 24.23.

²¹³ See CMA Document Reference 3C 24.23. For an example of a completed application form, see CMA Document Reference r_[Current Member P] 2.5.

- 4.74 It is also clear from the T&CM that compliance with the T&CM in general, and Rule 21 in particular, was a mandatory condition for continued membership of Three Counties.²¹⁴ Rule 27 of the T&CM, as amended in April 2006,²¹⁵ expressly provides that a member may be suspended or expelled from Three Counties for failure to abide by the T&CM or Rule 21:

'The Committee shall in their absolute discretion (in accordance with the rules) have the right at any time to cancel withdraw expel or suspend the Members [sic] Membership of the Association in the following circumstances...

(xi) Where any Member fails in any respect whatsoever to abide by the terms and conditions of membership as set out from time to time;

(xii) Where a member fails to abide by rule 21'.²¹⁶

- 4.75 The evidence also demonstrates that at least certain prospective members of Three Counties were expressly advised that compliance with Rule 21 was a condition of membership. For example, on 29 November 2007 [the Managing Director] of Castles wrote to the [Lettings Director] of [Former Member 33] in response to a membership enquiry, and noted that:

'At an early stage we decided that we would restrict the advertising of fees and this seems to be widely welcomed although as with any association not all members are always happy with all the rules!'.²¹⁷

- 4.76 Similarly, on 31 August 2010 [the Senior Manager] of Hamptons International wrote to [an Employee and an Employee] of [Former Member 25], again in response to a membership enquiry, stating:

'I would bring to your attention, within the rules of membership of the 3 Counties Association, Section 21 [Rule 21], making reference to advertising sales or lettings commission rates and trust that if you decide to join the 3

²¹⁴ See, for example, letter (undated) from [the Managing Director] of Castles (on Three Counties letterhead) to [the Regional Manager] of [Former Member 18] (CMA Document Reference CAS 3.215) which notes: 'I, as compliance officer, of the 3 Counties Association have been asked to write to you with regard to a recent [Former Member 18] advert appearing in the Courier newspaper on 15th March... You can advertise fees but not as a member of the association. If you wish to continue to benefit from the association rate you will need to comply with the rules as set out. I hope you appreciate all members are bound by the rules and it is not within the spirit of the association that members seek to gain some 'advantage' when others are fully complying with the rules.'

²¹⁵ CMA Document Reference CAS 3.302. However, see footnote 172 above regarding the date Rule 27(xii) came into force.

²¹⁶ Version of T&CM attached to email dated 6 April 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.302). It should be noted that Rule 27(xi) has been present in each version of the T&CM. See footnote 172 above regarding the date Rule 27(xii) came into force.

²¹⁷ Letter dated 29 November 2007 from [the Managing Director] of Castles (on Three Counties letterhead in his capacity as Compliance Officer) to [the Lettings Director] of [Former Member 33] (CMA Document Reference CAS 3.191). An undated letter records sending the T&CM to [Former Member 33] (letter from [the Managing Director] of Castles (on Three Counties letterhead) to [the Lettings Director] of [Former Member 33] (CMA Document Reference CAS 3.195).

*Counties Association to benefit from the reduced advertising rates, this section of our rules is adhered to’.*²¹⁸

Reminders in relation to Rule 21

- 4.77 The evidence demonstrates that the members of Three Counties were specifically reminded of the existence of Rule 21 and their obligation to comply with it.
- 4.78 For example, from time to time, certain members of the Committee circulated reminders to members that Rule 21 prohibited members from advertising their fees in the *Star Courier*, or updates to the wording of Rule 21:

1 November 2005 (from [the Managing Director of Former Member 1])

*‘There has been much confusion as to some members advertising fees in the Courier and to resolve this matter the committee agreed that as from 29th November no member will be allowed to quote fees in their Courier advertisement. A revised schedule of terms and conditions of the association will be issued.’*²¹⁹

3 February 2006 (from [the Managing Director of Waterfords])

*‘Please find enclosed a new insert to replace the same page in your existing Rules of the Association which covers the subject of fees. These new terms take immediate effect...’*²²⁰

26 April 2007 (from [the Managing Director of Castles])

*‘I have, as compliance officer, been asked by the committee to remind all members that it is STRICTLY AGAINST the rules of membership to advertise or refer to fees in any way’.*²²¹

²¹⁸ Letter dated 31 August 2010 from [the Senior Manager] of Hamptons International (on Three Counties letterhead, in his capacity as Chairman) to [an Employee and an Employee] of [Former Member 25] (CMA Document Reference 3C 24.146).

²¹⁹ Letter dated 1 November 2005 from [the Managing Director] of [Former Member 1] (on Three Counties letterhead) to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.117) and [the Managing Director] of Castles (CMA Document Reference CAS 3.220). The CMA infers that identical letters were sent to all members.

²²⁰ Letter dated 3 February 2006 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [the Managing Director] of Castles (CMA Document Reference CAS 3.217). See also CMA Document Reference [Current Member O] 22. The CMA infers that identical letters were sent to all members. The excerpt sets out Rule 21 in the following terms: *‘Members **shall not advertise sales or lettings commission rates** whether directly or indirectly in the property paper nor refer to their commission rates or any other agents [sic] rates in any way. Should any member attempt to advertise fees in any way whatsoever the committee will immediately inform the Property Paper to charge the non association rate for that advert and the member will be immediately contacted to discuss further action under clause 27’* (emphasis as in the original).

²²¹ Email dated 26 April 2007 from [the Managing Director] of Castles to all members (addressed to: Waterfords; [Former Member 1]; [Former Member 2]; [Former Member 3] [Current Member A]; [Current Member B]; [Current

22 May 2007 (from [the Managing Director of Waterfords])

'A number of you have been in contact with me asking for clarity on the Associaton's [sic] rules regarding the advertising of sales and commission rates.

I quote below the paragraphs that cover these points, as stated in the Terms and Conditions of Membership:

"20. Members may not advertise legal fees whether directly or indirectly in the Property Paper.

21. Members shall not advertise sales or lettings commission rates whether directly or indirectly in the property paper nor refer to their commission rates or other agents [sic] in any way.

Should any member attempt to advertise fees in any way whatsoever the committee will immediately raise an invoice for the difference between the 'association rate for page advertising' and the non association rate for agents [sic] pages in that weeks [sic] advertising and this amount will be payable to the association within 28 days. The member will be immediately contacted to discuss further action under clause 27 and membership suspension if fee not paid."

As mentioned previously, in [the Managing Director of Castles'] most recent memo, these Rules cover any 'offers' you promote including matters relating to HIPs²²² and therefore you must think very carefully about the wording of any advert prior to submission to the paper...'.²²³

6 July 2007 (from [the Managing Director of Waterfords])

'...the Association wishes to clarify that members will be able to advertise any special offers on their provision of HIPs; in other words, if it is your intention to

Member C]; Castles; [Former Member 5]; [Former Member 6]; [Former Member 7]; [Former Member 8]; [Current Member E]; [Current Member F]; [Current Member G]; [Former Member 10]; [Former Member 12]; [Former Member 13]; [Former Member 14]; [Former Member 15]; [Former Member 16]; [Former Member 17]; [Current Member J]; [Current Member K]; [Former Member 18]; [Former Member 19]; [Current Member L]; [Former Member 20]; [Current Member M]; [Former Member 21]; [Current Member N]; [Former Member 22]; [Current Member O]; [Former Member 23]; [Former Member 25]; [Former Member 26]; [Former Member 27]; [Former Member 28]; [Former Member 29]; [Former Member 30]; [Former Member 32]; [Former Member 24]; [Former Member 33]; [Former Member 34]; [Current Member R]; [Former Member 35]; [Former Member 36]; [Former Member 37]; [Former Member 38]) (CMA Document Reference CAS 3.157).

²²² Home Information Packs.

²²³ Letter dated 22 May 2007 from [the Managing Director] of Waterfords (on Three Counties letterhead) to all members (CMA Document Reference CAS 3.301).

*offer free packs inclusive within a fee and as long as the fee is not mentioned, you are free to advertise this message’.*²²⁴

12 December 2013 (from [the Senior Manager of Hamptons International])

*‘... the view of the Committee for the good of its members still prohibit [sic] the advertising of financial incentives including selling and letting fees within the Property Courier’.*²²⁵

- 4.79 The CMA has seen very little evidence of members complaining about Rule 21 in response to such reminders or updates. The notable exception is a complaint made by [Former Member 36],²²⁶ which contacted [the Managing Director] of Waterfords on 7 September 2005 with the following comments:

*Whilst advertising reduced fees is not something that is currently on my agenda I do not see how being a member of this association should in any way restrict any future marketing I may wish to use...I did not ... expect that as a consequence [of joining the association] I would have conditions and restrictions imposed on how I run my business. As a small firm if I wish to advertise a special fee or perhaps open a new branch with special offers then I can see no reason why I should not be aloud [sic] to do so’.*²²⁷

- 4.80 In response to this comment, [an Employee] of [Former Member 22] noted on 8 September 2005 that: *‘I couldn’t agree more...the association was introduced to reduce advertising costs not to dictate how people should run their business’.*²²⁸ It is notable that [Former Member 22] terminated their membership in May 2006 and the evidence suggests that this is because they wished to advertise their fees.²²⁹

- 4.81 Apart from the above, any complaints about Rule 21 seem to have principally arisen in connection with the original waiver contained within Rule 21 which

²²⁴ Letter dated 6 July 2007 from [the Managing Director] of Waterfords (on Three Counties letterhead) to all members (CMA Document Reference [Current Member O] 12).

²²⁵ Letter from [the Senior Manager] of Hamptons International (on Three Counties letterhead) to [Current Member J] (undated but understood to be from 12 December 2013 – see CMA Document Reference HAMP 9.327). Copies were sent to all members – see footnote 209 above.

²²⁶ Understood to be a member of Three Counties from at least 20 July 2005 (see CMA Document Reference [Current Member B]14.6) to 26 October 2011 (see letter dated 26 October 2011 from [the Senior Manager] of Hamptons International to [an Employee] of [Former Member 36] (CMA Document Reference HAMP 9.90).

²²⁷ Email dated 7 September 2005 from [an Employee] of [Former Member 36] to [the Managing Director] of Waterfords (CMA Document Reference CAS 3.46). However, see also footnote 230 below.

²²⁸ Email dated 8 September 2005 from [an Employee] of [Former Member 22] to Committee members (CMA Document Reference CAS 3.45).

²²⁹ Email dated 3 May 2006 from [an Employee] of [Former Member 22] to Committee members (CMA Document Reference CAS 3.182): *‘I just wanted to let you know out of courtesy that we will not be renewing our membership to the association’*, which [the Managing Director] of [Former Member 1] forwarded to Committee members commenting: *‘Surprise surprise. Expect 0.8% in paper next week’* (email dated 3 May 2006 from [the Managing Director] of [Former Member 1] (CMA Document Reference CAS 3.182). This is followed by an email dated 10 May 2006 from [the Managing Director] of [Former Member 1] to Committee members with the subject

allowed certain companies such as [Former Member 22] to advertise their fees, on the grounds they would be gaining an unfair competitive advantage.²³⁰

D. Enforcement of Rule 21

- 4.82 The evidence demonstrates that Rule 21 was actively enforced by the Committee, principally through a combination of complaints by members, warning letters from the Committee²³¹ and, in one instance, formal disciplinary action under Rule 27 of the T&CM (see paragraphs 4.92 to 4.94 below). Indeed, the Committee's stated intention was to act upon clear breaches of the T&CM.²³²
- 4.83 The most frequent spur to enforcement action was where one of the Committee members would identify an infraction of Rule 21, and ask one of their fellow Committee members to send a warning letter to the offending agent.²³³ Non-Committee members of Three Counties also complained from time to time, asking the Committee (principally [the Managing Director] of Waterfords or [the Managing Director] of Castles) to take action on their behalf.²³⁴

line '[Former Member 22]' that states: 'As expected in this weeks [sic] courier with ad showing fees from 1%' (CMA Document Reference CAS 3.181).

²³⁰ See, for example, the letter dated 24 August 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [an Employee] of [Current Member M] (CMA Document Reference CAS 3.55) that refers to [an Employee] of [Current Member M] 'concerns in allowing special dispensation for Agents such as [Former Member 22] [sic] to advertise their fees where they do not have ground floor/shop front premises' and the letter dated 18 October 2005 from [an Employee] of [Former Member 36] to [the Managing Director] of Castles (CMA Document Reference CAS 3.222) that argues '[t]o allow one agent to blatantly get away with offering what I am sure we would all agree is a ridiculous commission rate of 0.8% just because they do not have a town office is in my view ludicrous'.

²³¹ See email dated 5 February 2008 from [the Managing Director] of Castles to Committee members (CMA Document Reference CAS 3.270): 'We have in the past had to write to [Former Member 22], [Former Member 39], [Former Member 26], [Former Member 36], [Current Member L], [Former Member 40], [Former Member 33], [Current Member B] and [Former Member 27] and they all had a warning.'

²³² Email dated 19 January 2006 from [the Managing Director] of Castles to [an Employee] of [Former Member 22] (CMA Document Reference CAS 3.149) 'It is the association's policy to act upon any clear breaches and respond to complaints...but hopefully members will respect the rules!'

²³³ See, for example, email dated 18 January 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.6): 'I see in today's Courier that [Former Member 18] have a large advert stating '...£1000 off our standard fees etc. Of course this contravenes all our regulations. [the Managing Director], Waterfords – will you be sending out a letter? I'm next door to them today so I can drop in and inform them if required'; and email dated 25 July 2006 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference CAS 3.170): 'Could you tell me if [Former Member 39] are still in the association? I assume they are. This weeks [sic] advert is offering 50% off their normal fees! Let me know & I will wander across and have 'words'. In meantime [Managing Director of Castles] would you mind sending our usual warning letter.' Other examples include email dated 25 January 2006 from [the Managing Director] of [Former Member 1] to Committee members regarding [Current Member M] and [Former Member 40] (CMA Document Reference CAS 3.156); email dated 22 August 2006 from [the Managing Director] of [Former Member 1] to Committee members regarding [Current Member L] (CMA Document Reference CAS 3.168); email dated 9 November 2006 from [the Managing Director] of [Former Member 1] to Committee members regarding [Former Member 32] (CMA Document Reference CAS 3.163).

²³⁴ See, for example, (1) Letter dated 3 November 2005 from [the Managing Director] of Waterfords to all association members (CMA Document Reference 3C 24.118): 'A number of you have contacted me over the last 24 hours expressing your concern that [Former Member 27] were advertising 0% fees, which was a clear breach

- 4.84 Responses to such complaints varied from a verbal warning²³⁵ to a formal warning letter, which was usually sent in the following (or substantively similar) format:

'It has been brought to my attention that you are advertising your fees in your Courier advert. I need to remind you that the advertising of any fees is strictly against the rules of the membership of the association and request your advert is amended immediately.

*Any continued breach of the rules can result in a disciplinary hearing with possible expulsion from the association'.*²³⁶

- 4.85 Although the CMA understands that Three Counties has not suspended or expelled any member for breaching Rule 21,²³⁷ the Committee's frequent use of warning letters (particularly during 2005 and 2006) shows that the Committee used the threat of disciplinary action and/or expulsion to deter or prevent members from advertising their fees in breach of Rule 21. In addition, it is clear from the evidence that the Committee communicated such breaches to the *Star Courier*, to try and obtain their support in enforcing Rule 21²³⁸.
- 4.86 The evidence also demonstrates that, on a number of occasions, the enforcement action resulted in the 'offending' agent promising to alter its behaviour and comply with Rule 21 in the future by removing the reference to fees or discounts in response to that enforcement action.²³⁹ From time to time,

of the Association Rules'; (2) email dated 19 January 2006 from [an Employee] of [Former Member 22] to [the Managing Director] of Castles (CMA Document Reference CAS 3.202): *'I am writing to seek an explanation and clarity on the current rules regarding advertising, as far as I can see there is no consistency or policing of what is being said...[Former Member 18] – Quote a £1000 reduction off of their standard fees. Nobody is allowed to quote a fee or special offer as far as I am aware...'*; (3) email dated 10 May 2006 from [a Director] of [Current Member O] to [the Personal Assistant to the Managing Director of Waterfords] (CMA Document Reference r_CAS 3.178): *'Just a question regarding advertising in this weeks [sic] courier [Former Member 22] are advertising fees. Have the rules changed or are they not a member of three counties? The same for [Non Member Agent 7] and [Non Member Agent 8] and [Former Member 21]';* and (4) email dated 16 October 2007 from [the Managing Director] of [Former Member 16] (CMA Document Reference r_CAS 3.287): *'[Current Member B] have just opened a Lettings Department and in this weeks [sic] Courier are advertising "no set ups [sic] fees". This appears to contravene the Associations [sic] rules and gives an unfair advantage. I would respectfully request that the Association contact [Current Member B] to bring them back into line'.*

²³⁵ See, for example, email dated 18 January 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference r_CAS 3.5), noting that he had *'Nipped next door and had a chat saying the ad was against association rules. The manager said he wouldn't run it again'.*

²³⁶ Letter dated 15 November 2005 from [the Managing Director] of Castles (on Three Counties letterhead) to [a Director] of [Former Member 27] (CMA Document Reference CAS 3.221).

²³⁷ See section 26 response dated 17 January 2014 from Three Counties (CMA Document Reference r_3C 15).

²³⁸ See paragraphs 4.88 *et seq* below.

²³⁹ See for example, (1) Letter dated 17 November 2005 from [a Director] of [Former Member 27] to [the Managing Director] of Castles (CMA Document Reference CAS 3.224) *'I can assure you it was an oversight on my behalf and can confirm that no future advertising will contain our rates, in order to make sure that we do not fall foul of the association's rules'.* (2) Letter dated 16 August 2005 from [a Director] of [Former Member 30] to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.104) *'I have no problem in changing our advert...'* (3) Email dated 9 November 2006 from [the Managing Director] of Castles to [an Employee] of [Former Member 32] (CMA Document Reference CAS 3.162): *'I have spoken to [an Employee] of [Former Member 32] and he assures me the advert will be amended forthwith'.* See also: letter dated 24 August 2005 from [a Director] of [Former Member 30] to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.109); minutes

such enforcement action also prompted changes to the T&CM and/or general reminders to the members that compliance with Rule 21 was a compulsory condition for membership (see Chapter 4, section C above).

- 4.87 In addition, the evidence below demonstrates that the Committee exerted pressure on the *Star Courier* to support its enforcement activity by asking it to monitor advertisements for content that breached Rule 21 and either to refuse to publish the advertisement or charge the higher, 'non-association' rate for that advertisement. The evidence demonstrates that by 14 September 2012 (at the latest), the *Star Courier* acceded to such pressure and actively supported the Committee's enforcement activities by monitoring advertisements for 'prohibited' references to fees, in respect of both members and non-members of Three Counties, and ultimately rejecting advertisements containing such references.

2005: Enforcement by the Committee and initial requests for support from the *Star Courier*

*August 2005: [Former Member 30] and [Current Member M]*²⁴⁰

- 4.88 As set out at paragraph 4.22 above, on 12 August 2005, [the Managing Director] of Waterfords wrote identical letters to two members of Three Counties, [Current Member M] and [Former Member 30], in relation to an advertisement by each agent that breached Rule 21.²⁴¹ Whilst [Former Member 30] queried whether the prohibition in Rule 21 extended to lettings

of meeting held on 11 August 2005 (attached to email dated 12 August 2005 from [the Managing Director] of [Former Member 1] (CMA Document Reference r_CAS 3.62)); email dated 22 August 2005 from [an Employee] of [Former Member 22] to Committee members (CMA Document Reference CAS 3.60); email dated 4 November 2005 from [an Employee] of [Former Member 22] to [the Managing Director] of Castles (CMA Document Reference CAS 3.29); letter dated 18 October 2005 from [an Employee] of [Former Member 36] to [the Managing Director] of Castles (CMA Document Reference CAS 3.222); letter dated 3 November 2005 from [the Managing Director] of Waterfords to Three Counties members (CMA Document Reference 3C 24.118); email dated 16 November 2005 from [the Managing Director] of [Former Member 1] to [the Managing Director] of Waterfords (sent to [the Personal Assistant to the Managing Director of Waterfords]) (CMA Document Reference CAS 3.20); letter dated 18 January 2005 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference r_CAS 3.5); letter dated 30 March 2006 from [the Regional Director] of [Former Member 18] to [the Managing Director] of Castles (CMA Document Reference CAS 3.305); email dated 27 July 2006 from [the Managing Director] of Castles to Committee members (CMA Document Reference r_CAS 3.169); email dated 9 November 2006 from [the Managing Director] of Castles to Committee members (CMA Document Reference CAS 3.162); letter dated 24 October 2007 from [the Manager] of [Current Member B] to [the Managing Director] of Castles (CMA Document Reference CAS 3.193).

²⁴⁰ Letter dated 12 August 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [a Director] of [Former Member 30] (CMA Document Reference 3C 24.102) and letter dated 22 August 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [a Director] of [Former Member 30] (CMA Document Reference 3C 24.108).

²⁴¹ Letter dated 12 August 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [an Employee] of [Current Member M] (CMA Document Reference 3C 24.101) and letter dated 12 August 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [a Director] of [Former Member 30] (CMA Document Reference 3C 24.102).

advertisements,²⁴² it accepted that it would need to change its advertisement following clarification of the T&CM.²⁴³

- 4.89 In light of these communications, on 12 August 2005 [the Managing Director] of Waterfords wrote to [an Employee] of the *Star Courier* to advise it of the existence of Rule 21:

*'It may also be useful for you to know that within the Terms of Membership, members are forbidden to make reference to fees within their advert if they operate from ground floor premises with a shopfront. We have noted that one or two agents are in breach of this rule and we will be advising them accordingly that if they continue they will no longer enjoy the rights of being an Association member. I will obviously let you know who those agents are, if we continue to have problems.'*²⁴⁴

- 4.90 [The Group Advertisement Manager] of the *Star Courier* responded to [the Managing Director] of Waterfords on 25 August 2005, requesting him to 'keep [them] up to date' in relation to fees and membership.²⁴⁵

- 4.91 In interview, [the Managing Director] of Waterfords stated that the reason for alerting the *Star Courier* to the existence of Rule 21 was to 'make it easier for them to police it from their end... so by letting them know... we felt that they would, perhaps, say... to the offending agent that 'you can't run that because it is in breach of the rules'.²⁴⁶ [The Managing Director] of Waterfords] felt it was necessary for the *Star Courier* to support their enforcement of Rule 21 '[b]ecause if they let it go, then potentially we could end up with the paper full of agents advertising fees every week and, as I have consistently said, we wanted a quality publication, so, you know, we felt that we could have their assistance by making sure that it didn't get to that point'.²⁴⁷

²⁴² Letter dated 16 August 2005 from [a Director] of [Former Member 30] to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.104).

²⁴³ Letter dated 16 August 2005 from [a Director] of [Former Member 30] to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.104): 'I have no problem in changing our advert...' and letter dated 24 August 2005 from [a Director] of [Former Member 30] to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.109) 'I accept that if the rules are amended to cover lettings and rental charges then I will of course comply'.

²⁴⁴ Letter dated 12 August 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [an Employee] of the *Star Courier* (CMA Document Reference CAS 3.61).

²⁴⁵ Letter dated 25 August 2005 from [the Group Advertisement Manager] of the *Star Courier* (to [the Managing Director] of Waterfords (CMA Document Reference 3C 24.110).

²⁴⁶ Witness interview with [the Managing Director] of Waterfords dated 5 March 2014 (CMA Document Reference r_3C 47.1) page 103, line 23 to page 104, line 8.

²⁴⁷ Witness interview with [the Managing Director] of Waterfords dated 5 March 2014 (CMA Document Reference r_3C 47.1), page 104, lines 19 to 24.

September/October 2005: [Former Member 22]

- 4.92 In September 2005, following the discussions with [Former Member 22] around changing the content of its advertisement (described at Chapter 4, section B above), the Committee decided to hold a formal disciplinary hearing to consider expelling [an Employee] of [Former Member 22] from the Committee and/or [Former Member 22] from Three Counties.²⁴⁸
- 4.93 The evidence demonstrates that the Committee members were generally in favour of expelling [Former Member 22] both from the Committee and potentially Three Counties:

[The Managing Director of Waterfords] - 29 September 2005):

'I am firmly of the opinion that [an Employee of Former Member 22] should be asked to step down from his position on the Committee and asked to leave the Association if no immediate changes are made to his advert'.²⁴⁹

[The Managing Director of Former Member 1] - 1 October 2005):

'As a committee member there is a need to be seen to be responding, this has not been the case and if we are to set standards then we must act accordingly. I agree with [the Managing Director of Waterfords] on the action required'.²⁵⁰

[An Employee of Current Member C] - 3 October 2005):

'I agree. This is the only option...'.²⁵¹

- 4.94 A disciplinary meeting was duly held on 13 October 2005. The minutes record that [Former Member 22] was ultimately not expelled from the Committee or Three Counties:

'It was agreed that whilst [Former Member 22] had overrun the agreed timeline for correction of their recent advert, it was also agreed that the

²⁴⁸ See email dated 22 September 2005 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.42); email dated 22 September 2005 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference CAS 3.42) and email dated 21 September 2005 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.42). See also letter dated 23 September 2005 from [the Managing Director] of Castles to [an Employee] of [Former Member 22] (CMA Document Reference CAS 3.229): *'...I am therefore writing to give you the required 14 days [sic] notice to inform you of the Committees [sic] decision to discuss your expulsion from the committee'.*

²⁴⁹ Letter (29 September 2005 – the letter is undated but copied into a later email from [the Managing Director] of [Former Member 1] – see CMA Document Reference r_CAS 3.37) from [the Managing Director] of Waterfords to Committee members (CMA Document Reference r_CAS 3.230).

²⁵⁰ Email dated 1 October 2005 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference r_CAS 3.37).

²⁵¹ Email dated 3 October 2005 from [an Employee] of [Current Member C] to Committee members (CMA Document Reference r_CAS 3.36).

committee had not given full clear guidelines. Thus the matter will be dropped'.²⁵²

- 4.95 In May 2006, [Former Member 22] voluntarily resigned its membership of Three Counties, and the evidence suggests that this was because it wished to advertise its fees:

[An Employee of Former Member 22] – 3 May 2006):

'I just wanted to let you know out of courtesy that we will not be renewing our membership to the association'.²⁵³

[The Managing Director of Former Member 1] - 3 May 2006):

'Surprise surprise. Expect 0.8% in paper next week'.²⁵⁴

- 4.96 This is followed by an email from [the Managing Director] of [Former Member 1] on 10 May 2006 with the subject line '[Former Member 22]': *'As expected in this weeks [sic] courier with ad showing fees from 1%'.²⁵⁵*

November 2005: [Former Member 27]

- 4.97 On 3 November 2005, [the Managing Director] of Waterfords wrote to Three Counties' members in relation to an advertisement by [Former Member 27]:²⁵⁶

'A number of you have contacted me over the last 24 hours expressing your concern that [Former Member 27] were advertising 0% fees, which was a clear breach of the Association Rules.

I have spoken to [a Director] of [Former Member 27] who has confirmed that he was not aware of these rules and therefore had not intended to be in breach or cause inconvenience to any of the Association Members. He has therefore assured us that he will not submit any further advertising of this

²⁵² Minutes of meeting on 13 October 2005 (attended by [the Managing Director] of Waterfords, [the Managing Director] of Castles, [an Employee] of [Current Member C] and [the Managing Director] of [Former Member 1]) (CMA Document Reference r_CAS 3.219) and see letter dated 23 September 2005 from [the Managing Director] of Castles (on Three Counties letterhead) in his capacity as Compliance Officer) (CMA Document Reference CAS 3.229).

²⁵³ Email dated 3 May 2006 from [an Employee] of [Former Member 22] to Committee members (CMA Document Reference CAS 3.182).

²⁵⁴ Email dated 3 May 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.182).

²⁵⁵ Email dated 10 May 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.181).

²⁵⁶ A member of Three Counties from at least 20 July 2005 ([CMA Document Reference Current Member B]14.6) to 30 September 2008 (CMA Document Reference CAS 3.256).

nature with the exception of one promotional advert which is already with the printers and too late to retract'.²⁵⁷

- 4.98 On the same date, 3 November 2005, [the Managing Director] of Waterfords wrote to [an Employee] of the *Star Courier* to inform them of the breach and to request the paper to charge the non-member advertising rate as a penalty:

'Following our conversation today, I confirm that I have spoken to [a Director] of [Former Member 27] explaining that if he is to repeat any further advertising featuring fees, he will have to pay the 'card rate' for such adverts. He has assured me that he will not submit any more copies in breach of the Association Regulations, although he feels it is too late to stop next week's advert, but equally accepts he will have to pay the higher rate if this advert is to appear.

I have assured all the other members that this action has been taken and that the paper will take the necessary steps to invoice and collect the higher rate from Romans for these types of adverts'.²⁵⁸

- 4.99 In response to the above letter, on 4 November 2005, [an Employee] of [Former Member 22] asked the Committee to clarify the extent of the prohibition in Rule 21:

'Perhaps someone could clarify something for me...are we saying that it is acceptable for agents to advertise fees under the rules of the association providing they pay the higher rate on the weeks such adverts appear?

I was also under the impression that we had agreed if the [previous owner of the Star Courier is] contacted with new advert templates from member agents that they would be referred back to the committee for approval before they go to print?'.²⁵⁹

- 4.100 The response from [the Managing Director] of [Former Member 1] on the same day stated:

'1. Ref fees – as per the minutes of the committee meeting and my letter to all members, the rule is that no member can advertise fees...If any agent wants

²⁵⁷ Letter dated 3 November 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to all Three Counties' members (CMA Document Reference 3C 24.118).

²⁵⁸ Letter dated 3 November 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [Employee] of the *Star Courier* (CMA Document Reference 3C 24.119).

²⁵⁹ Email dated 4 November 2005 from [an Employee] of [Former Member 22] to Committee members (CMA Document Reference CAS 3.26).

to advertise fees in the Courier they can do so but not as a member of the association.

2. The Courier said it was difficult for them to monitor all adverts as most are now done on line'.²⁶⁰

- 4.101 Following an apparent failure by [Former Member 27] to withdraw the offending advertisement, [the Managing Director] of Waterfords again contacted [an Employee] of the *Star Courier* on 14 November 2005:

'I notice that [Former Member 27] have repeated their 0% advertising campaign, despite the assurances given by [a Director of Former Member 27] that this would stop and I therefore must ask that once again you continue charging [Former Member 27] the full rate for advertising until this has stopped.

[The Managing Director] has today written to [Former Member 27] informing them that if this continues they will be asked to leave the Association. We will of course keep you informed on how this matter develops'.²⁶¹

As indicated, the following day, [the Managing Director] of Castles sent a formal warning letter to [Former Member 27].²⁶²

- 4.102 Later evidence suggests both that [Former Member 27] did amend their advertisement as requested and that the *Star Courier* had supported Three Counties in resolving the issue. On 16 November 2005, [the Managing Director] of [Former Member 1] emailed [the Managing Director] of Waterfords to note *'I see that [Former Member 27] did amend their advert this week and for the first time there is nobody advertising fees',²⁶³* and in his reply on 17 November 2005, [the Managing Director] noted that [the Group Advertisement Manager] and [an Employee] of the *Star Courier* had been *'very supportive on this whole fee issue in particular re-enforcing our standpoint with [Former Member 27]'.²⁶⁴*

- 4.103 On 21 November 2005, [the Managing Director] of Castles suggested amending the rules to reflect the proposition that the *Star Courier* would be

²⁶⁰ Email dated 4 November 2005 from [the Managing Director] of [Former Member 1] to [the Personal Assistant to the Managing Director of Waterfords] and Committee members (CMA Document Reference CAS 3.26).

²⁶¹ Letter dated 14 November 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [Employee] of the *Star Courier* (CMA Document Reference 3C 24.120).

²⁶² Letter dated 15 November 2005 from [the Managing Director] of Castles (on Three Counties letterhead) to [a Director] of [Former Member 27] (CMA Document Reference CAS 3.221).

²⁶³ Email dated 16 November 2005 from [the Managing Director] of [Former Member 1] to [the Managing Director] of Waterfords (CMA Document Reference CAS 3.20).

²⁶⁴ Emails dated 17 November 2005 between [the Managing Director] of [Former Member 1] and [the Managing Director] of Waterfords (CMA Document Reference CAS 3.20).

instructed to charge a higher rate for advertisements in breach of Rule 21 (see Chapter 4, section B above):

*'it may be worth adding into the rules that if a breach of this specific rule occurs then instructions will be issued to the newspaper to automatically charge the rack rate and not the association's discounted rate. The usual disciplinary hearing will then take place. We will have to speak to the paper to ensure that this can be done'.*²⁶⁵

- 4.104 In light of the Committee's discussions about the proposed new process, on 22 November 2005 [the Managing Director] of Waterfords suggested that they *'talk to courier about subject of charging 'offenders' the higher rate when we meet [an Employee] and [the Group Advertisement Manager] of the Star Courier'*²⁶⁶ for lunch on 13th december [sic].²⁶⁷

January 2006 to November 2006: Enforcement by the Committee and requests for the Star Courier to support the prohibition on advertising fees

- 4.105 On 18 January 2006, [the Managing Director] of [Former Member 1] alerted the Committee members²⁶⁸ to an advertisement by [Former Member 18] stating *'£1000 off our standard fees etc. Of course this contravenes all our regulations'.*²⁶⁹ In addition, on 25 January 2006, [the Managing Director of Former Member 1] also informed the Committee that both [Current Member M] and [Former Member 40] were advertising their fees.²⁷⁰ In response to the latter email, [the Managing Director] of Waterfords replied to [the Managing Director of Former Member 1] on the same date that *'They have both been told not to advertise fees, I vote we tell the courier to charge higher rate until they stop'.*²⁷¹

- 4.106 In addition to contacting each of the relevant agents to tell them that advertising fees was prohibited under Rule 21,²⁷² [the Managing Director] of

²⁶⁵ Email dated 21 November 2005 from [the Managing Director] of Castles to Committee members (CMA Document Reference r_CAS 3.18).

²⁶⁶ See email dated 22 November 2005 from [the Personal Assistant to the Managing Director of Waterfords] and Committee members (CMA Document Reference CAS 3.19).

²⁶⁷ Email dated 22 November 2005 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference r_CAS 3.18).

²⁶⁸ Consisting at that time of [the Managing Director] of Waterfords, [the Managing Director] of Castles, [an Employee] of [Current Member C] and [a Director] of [Current Member N]).

²⁶⁹ Email dated 18 January 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.6).

²⁷⁰ Email dated 25 January 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference r_CAS 3.155).

²⁷¹ Email dated 25 January 2006 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference CAS 3.153).

²⁷² See (1) [Former Member 18]: email dated 18 January 2006 from [the Managing Director] of [Former Member 1] to Committee members (*'Nipped next door and had a chat saying the ad was against association rules. The manager said he wouldn't run it again'*) (CMA Document Reference r_CAS 3.5); email dated 19 January 2006 from [the Managing Director] of Castles to [an Employee] of [Former Member 22] (CMA Document Reference

[Former Member 1] proposed amending the wording of Rule 21 *'to have clarity on the advertising of fees front and to issue immediate penalty for those who do so'*.²⁷³

4.107 On 31 March 2006, following further enforcement action against various members' advertisements that included references to fees,²⁷⁴ [the Managing Director] of Waterfords sent a letter to [an Employee] and [the Group Advertisement Manager] of the *Star Courier* to complain about (amongst other issues) agents continuing to advertise fees. [The Managing Director] directly asked the *Star Courier* to either block the publication of such advertisements or to charge the higher rate for the advertisement:

'The second issue relates to Agents continuing to advertise fees. The first we get to know about it is when the paper appears and you then tell us you cannot retrospectively charge the higher amount. As an Association, we find this unacceptable and feel that there must be a way that you can either

CAS 3.149): '[Former Member 18] have been written to alerting them to the consequences of continuing to breach the rules and [Current Member M], who claim not to be part of the association and the Courier have been requested to charge their non member rate'; email dated 15 March 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.145) and letter from [the Managing Director] of Castles (on Three Counties letterhead) to [the Regional Manager] at [Former Member 18] (undated) (CMA Document Reference CAS 3.215). (2) [Former member 40]: email dated 25 January 2006 from [an Employee] of [Current Member C] to Committee members: 'I've called the [Area manager] for Lettings for [Former member 40] ...Told her she will be charged full rate for non compliant adverts' (CMA Document Reference r_CAS 3.152); letter dated 27 January 2006 from [the Managing Director] of Castles (on Three Counties letterhead) to [an Employee] of [Former member 40] (CMA Document Reference CAS 3.218): 'It has been brought to my attention that you are advertising your management fees in your Courier advert. I need to remind you that the advertising of any fees is strictly against the rules of membership of the association and request your advert is amended immediately'; (3) [Current Member M]: email dated 25 January 2006 from [the Managing Director] of Waterfords to [the Managing Director] of [Former Member 1] (CMA Document Reference CAS 3.153): 'They have both been told not to advertise fees, I vote we tell the courier to charge higher rate until they stop'.

²⁷³ Email dated 28 January 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.148). See paragraph 4.36 above for further detail.

²⁷⁴ See email dated 15 March 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.145): '[Former Member 18] again p86 make reference to fees – we need to sort these people out'; email dated 15 March 2006 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference CAS 3.144): 'We have a procedure in the rules which needs to be followed, clause 21 & 27. My interpretation is they now have to pay the higher rate for the offending advert & if it happens again they will be expelled from association. As compliance officer would [the Managing Director] of Castles mind speaking to [Former Member 18] & I will inform paper to charge higher rate'; letter (undated) from [the Managing Director] of Castles to [the Regional Manager] of [Former Member 18] (CMA Document Reference CAS 3.215): 'I, as compliance officer, of the 3 Counties Association have been asked to write to you with regard to a recent [Former Member 18] advert appearing in the Courier newspaper on 15th March. The advert was in clear breach of the association rules as a clear reference to fees was made. This is the second time that this breach has occurred. A request has been made to the newspaper that the published and not the association rate be applied to this advert. You can advertise fees but not as a member of the association. If you wish to continue to benefit from the association rate you will need to comply with the rules as set out. I hope you appreciate all members are bound by the rules and it is not within the spirit of the association that members seek to gain some 'advantage' when others are fully complying with the rules...I would appreciate an assurance from you that this breach will not reoccur'; letter dated 30 March 2006 from [the Regional Director] of [Former Member 18] to [the Managing Director] of Castles (attached to email dated 3 April 2006 from [the Client Manager] of Castles to [the Managing Director] of Castles (CMA Document Reference CAS 3.305)) 'I apologise for this breach of the rules, and hope you are happy that we now have in place a structure that will ensure this breach does not reoccur'.

prevent the advert from going in, or if this is not possible make sure that the offending agent is charged the higher amount'.²⁷⁵

- 4.108 However, shortly afterwards a letter from [the Managing Director] of Waterfords to the Committee dated 4 April 2006 suggests that the *Star Courier* was not able or prepared to accept this request:

*'...They insist that because the paper is printed at Reading, they have no control on what goes in the paper and also the invoice is generated at the same time.'*²⁷⁶

- 4.109 [The Commercial Director], the Commercial Director and later Managing Director of [the previous owner of the *Star Courier*] from March 2007 to December 2010,²⁷⁷ corroborated this evidence in interview, stating that the *Star Courier* could not monitor advertisements placed by agents because the advertisements were sent electronically by the agents directly to the newspaper for publication. There was no further intervention by the production or the advertising team in checking the advertisements.²⁷⁸ However, [the Commercial Director of the previous owner of the *Star Courier*] did accept that this related only to standard advertisements for houses for sale or rental; the advertising team would have had full sight of so-called 'promotional' advertisements that did not fit standard templates.²⁷⁹

- 4.110 In light of the *Star Courier's* apparent reluctance to support the Committee to enforce Rule 21, on 8 April 2006²⁸⁰ the Committee amended Rule 21 of the T&CM to allow the Committee to invoice the difference between the 'association' and the 'non-association' advertising rate, in the event of a member attempting to advertise fees '*in any way whatsoever*'²⁸¹ (see Chapter 4, section B above).

- 4.111 Notwithstanding the change in the wording of Rule 21 (see paragraph 4.42 above), there is evidence that the Committee continued to identify and

²⁷⁵ Letter dated 31 March 2006 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [an Employee] and [the Group Advertisement Manager] of the *Star Courier* (CMA Document Reference CAS 3.306).

²⁷⁶ Letter dated 4 April 2006 from [the Managing Director] of Waterfords (on Three Counties letterhead) to Committee (CMA Document Reference 3C 24.126). See paragraph 4.39 above for the full wording of the letter.

²⁷⁷ Currently Commercial Director of a Trinity Mirror group company. Witness interview with [the Commercial Director of a Trinity Mirror group company] dated 10 June 2014, page 17 (CMA Document Reference r_TM 67.3).

²⁷⁸ Witness interview with [the Commercial Director of a Trinity Mirror group company] on 10 June 2014, page 17 (CMA Document Reference r_TM 67.3).

²⁷⁹ Witness interview with [the Commercial Director of a Trinity Mirror group company] on 10 June 2014, page 22 (CMA Document Reference r_TM 67.3).

²⁸⁰ It should be noted that it is not entirely clear when this paragraph was actually altered or came into force – see footnote 172 above.

²⁸¹ As stated in the version submitted to the OFT by [the Complainant] on 14 January 2013. (CMA Document Reference [Complainant] 1] and CMA Document Reference [Complainant] 1.1).

reprimand breaches of Rule 21 by Three Counties' members that continued to advertise their fees in breach of Rule 21 during the remainder of 2006.²⁸²

April 2007 to January 2008: The Committee continues to enforce Rule 21 and increases pressure on the Star Courier to reject all advertisements containing references to fees

4.112 During 2007, the Committee continued to identify and reprimand breaches of Rule 21 by Three Counties' members.²⁸³ However, in light of the apparent

²⁸² See, for example, (1) [Former Member 21]: email dated 16 May 2006 from [the Managing Director] of Castles to [the Personal Assistant to the Managing Director of Waterfords] and Committee members (CMA Document Reference r_CAS 3.178): *'I have spoken to [a Director] of [Former Member 21] who refers to the fact that the advert makes no mention or reference to fees. The advert refers to a 'special offer'...from what I understand if there is no mention of fees/rates etc it'll be hard for us to consider it in breach'*.

(2) [Former Member 39]: email dated 25 July 2006 from [the Managing Director] of Waterfords to Committee members regarding an advertisement that offered '50% off their normal fees' (CMA Document Reference CAS 3.170) noting that *'they have been [X] by yours truly, usual story new manager, reckoned he didn't know the rules!'*

(3) [Current Member L]: email dated 22 August 2006 from [the Managing Director] of [Former Member 1] to Committee members (CMA Document Reference CAS 3.168): *'I see [Current Member L] have advertised 50% discount on their letting fees this week. You need to sort them out – what is it with these letting boys?'* [the Managing Director] of Waterfords responded on 23 August 2006, noting *'rest assured zero tolerance will be exercised on my part'* (email dated 23 August 2006 from [the Managing Director] of Waterfords (CMA Document Reference r_CAS 3.167)). [The Managing Director] of Castles accordingly sent them a formal warning letter on 22 August 2006 (letter dated 22 August 2005 from [the Managing Director] of Castles (on Three Counties letterhead) to [an Employee] of [Current Member L] (CMA Document Reference CAS 3.209); and

(4) [Former Member 32]: email dated 9 November 2006 from [the Managing Director] of [Former Member 1] to [the Managing Director] of Castles (CMA Document Reference CAS 3.163): *'I see in this weeks [sic] Courier that the above have a large box stating 'Unbeatable Fees'. Given that they have just joined the association and are on trial they are breaking the rules Over to you'*. [The Managing Director] of Castles responded to [the Managing Director] of [Former Member 1] 'email on 9 November 2006: *'I have spoken to [an Employee of Former Member 32] and he assures me the advert will be amended forthwith. I will drop him a line and remind him of the rules...Regards [the Managing Director] of Castles [X]'* (email dated 9 November 2006 from [the Managing Director] of Castles (CMA Document Reference CAS 3.162)). See also letter dated 9 November 2006 from [the Managing Director] of Castles (on Three Counties letterhead) to [an Employee] of [Former Member 32] (CMA Document Reference CAS 3.208).

²⁸³ See, for example, (1) [Current Member C] (part of Countrywide plc) letter dated 20 April 2007 from [the Managing Director] of Castles (on Three Counties letterhead) to [an Employee] of [Current Member C] (CMA Document Reference CAS 3.204): *'It has been brought to my attention that you are advertising a discount off your fees in your Courier advert. I need to remind you that the advertising of or referring to fees is strictly against the rules of membership of the association and request your advert is amended immediately'*;

(2) [Current Member L]: email dated 9 August 2007 from [the Managing Director] of [Current Member K] to [the Personal Assistant to the Managing Director of Waterfords] (CMA Document Reference CAS 3.295) *'[Personal Assistant to the Managing Director of Waterfords], would you mind contacting [Current Member L] and advise them that they are currently breaching rules by advertising in the Courier reduced property management fees...'*. In her response on the same day, [the Personal Assistant to the Managing Director of Waterfords] noted *'I have spoken to [an Employee] in charge of Lettings...She told me that she spoke to the Courier who advised her that the advert will be fine as long as she does not mentioned [sic] exact fee amounts! I informed her that this was certainly not the case and that she is in breach of the terms and conditions of the association...I have asked her not to repeat this advert and she told me she will not. I am awaiting a call back from the Courier regarding this matter...'* (email dated 9 August 2007 from [the Personal Assistant to the Managing Director of Waterfords] to Committee members (CMA Document Reference CAS 3.295)). See also letter dated 28 August 2007 from [the Managing Director] of Castles (on Three Counties letterhead) to [a Director] of [Current Member L] (CMA Document Reference CAS 3.196)

(3) [Current Member B]: email dated 16 October 2007 from [the Managing Director] of [Former Member 16] to [the Personal Assistant to the Managing Director of Waterfords] (CMA Document Reference r_CAS 3.287): *'[Current Member B] have just opened a Lettings Department and in this weeks [sic] Courier are advertising "no set ups fees". This appears to contravene the Associations [sic] rules and gives an unfair advantage. I would respectfully request that the Association contact [Current Member B] to bring them back into line'* and letter dated 18 October 2007 from [the Managing Director] of Castles (on Three Counties letterhead) to [the Manager] of [Current Member B] (CMA Document Reference 3C 24.135): *'I have had a complaint from a 3 Counties Member*

difficulties encountered by the Committee in preventing member agents from advertising their fees, the Committee renewed its attempts to persuade the *Star Courier* to support it to enforce Rule 21, and to prevent agents from advertising their fees, whether or not they were a member of Three Counties.

4.113 In a letter dated 3 July 2007, [the Managing Director] of Waterfords invited [an Employee] of the *Star Courier* to attend a meeting with the Committee on 19 July 2007. One point in the agenda was *'Prevention of Agents advertising fees'*.²⁸⁴ On the same day, [the Managing Director] sent a copy of the letter to the Committee, noting that *'the purpose of the meeting is to try to persuade the paper to prevent any agents to advertise fees, members of the Association or not'*.²⁸⁵

4.114 As arranged, on 19 July 2007, [an Employee] of the *Star Courier* and [the Commercial Director] of [the previous owner of the *Star Courier*] attended a Committee meeting. The minutes of the meeting record discussion on various issues in the relationship between Three Counties and the newspaper, and also noted:

'Additional points discussed with [the Commercial Director and an Employee of the previous owner of the Star Courier] were:

1. *It's [sic] policy in not allowing advertising of fees and clarification as to whether it can be done legally – [Commercial Director] checking on this and reporting back'*.²⁸⁶

4.115 This discussion was followed by a letter from [the Managing Director] of Waterfords to [the Commercial Director] of [the previous owner of the *Star Courier*] on 23 July 2007, which stated that any further relationship with the *Star Courier* must be based on written agreement from the newspaper that,

*bringing to my attention that you have advertised "no setup fees" in your recent Courier advert. I have been asked to reconfirm the rules to remind you that the advertising of **or referring to fees** is strictly against the rules of membership of the Association and request your advert is not repeated'* and letter dated 24 October 2007 from [the Manager] of [Current Member B] to [the Managing Director] of Castles (CMA Document Reference CAS 3.193): *'Please pass on my apologies to the Association members and confirm to them that I have now familiarised myself with the rules laid down by the Three Counties Association'* (emphasis as in the original), and (4) [Former Member 33] : email dated 19 November 2007 from [the Managing Director] of Waterfords to [the Managing Director] of Castles: *'[Former Member 33] advertised fees in lettings advert. Could you send them your "smack on wrists" letter?'* (CMA Document Reference CAS 3.280) and letter dated 20 November 2007 from [the Managing Director] of Castles (on Three Counties letterhead) to [an Employee] of [Former Member 33] (CMA Document Reference CAS 3.192): *It has been brought to my attention that you have advertised a discount off your fees in your Courier advert of the 14th November. I have been asked to reconfirm the rules to remind you that the advertising of **or referring to fees** is strictly against the rules of membership of the Association and request your advert is not repeated'* (emphasis as in the original).

²⁸⁴ Letter dated 3 July 2007 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [an Employee] of the *Star Courier* (CMA Document Reference CAS 3.199).

²⁸⁵ Letter dated 3 July 2007 from [the Managing Director] of Waterfords (on Three Counties letterhead) to Committee members (CMA Document Reference 3C 24.129)

²⁸⁶ Minutes of meeting on 19 July 2007 ([CMA Document Reference Current Member K] 11.9).

amongst other points, *'you will not allow advertising of fees or references to fees, from any advertiser, whether an Association Member or not'*.²⁸⁷

- 4.116 However, [the Commercial Director] of [the previous owner of the *Star Courier*]'s response on 18 September 2007 stated that the *Star Courier* would not agree to these terms, on the grounds that such an agreement could breach competition law:

'As I explained, we were concerned that some parts of our agreement may not comply with competition law and, having taken advice, this has been confirmed. This means that both of our organisations would be liable to prosecution and, therefore, we find ourselves in a position where we cannot agree with you on the advertising rates we offer to third parties, or enforce a "no fees in advertising" policy'.²⁸⁸

- 4.117 In his interview, [the Commercial Director] of [the previous owner of the *Star Courier*] confirmed that he had taken advice from [the previous owner of the *Star Courier*]'s legal team following the meeting with Three Counties on 19 July 2007. [The Commercial Director of the previous owner of the *Star Courier*] stated that *'They were asking me...to police the situation...we told them that we weren't prepared to do that upon legal advice'*.²⁸⁹

- 4.118 The *Star Courier*'s position appears to have been discussed at the subsequent Committee meeting on 26 September 2007,²⁹⁰ with the minutes recording the topic of *"Consider Courier's response"*. However, there is no content recorded under this topic. The heading entitled *"Discuss our own newspaper"* is followed by a record of discussion:

'[The Director of Former Member 27] suggested resign/lapse our Agreement with the Courier and tell them they have the opportunity to re-tender for the business, but will have competition - possible proposal to avoid anti competitiveness, could be own the paper, they print and distribute'.²⁹¹

²⁸⁷ Letter dated 23 July 2007 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [the General Manager & Director] of [the previous owner of the *Star Courier*] ([CMA Document Reference Current Member K] 11.8). This letter was also circulated in draft form to Committee members for comments (CMA Document Reference CAS 3.297).

²⁸⁸ Letter dated 18 September 2007 from [the Commercial Director] of [the previous owner of the *Star Courier*] to [the Managing Director] of Waterfords (CMA Document Reference CAS 3.240).

²⁸⁹ Witness interview with [the Commercial Director of a Trinity Mirror group company] dated 10 June 2014, page 24 (CMA Document Reference r_TM 67.3).

²⁹⁰ [The Commercial Director] of [the previous owner of the *Star Courier*]'s letter of 19 September 2007 was circulated by email dated 18 September 2007 by [the Managing Director] of Waterfords to Committee members (CMA Document Reference r_CAS 3.294). The Committee meeting was attended by [the Managing Director] of Waterfords, [the Managing Director] of Castles, [an Employee] of [Former Member 34], [the Managing Director] of [Current Member K], [a Director] of [Current Member N], [a Director] of [Former Member 27] and [a Director] of [Current Member R].

²⁹¹ Three Counties minutes of meeting dated 26 September 2007 (CMA Document Reference r_CAS 3.241).

4.119 Following this meeting, [the Managing Director] of Waterfords wrote to [the Commercial Director] of [the previous owner of the *Star Courier*] on 1 October 2007. This letter acknowledged the *Star Courier*'s concerns, but asked them to find a way of 'overcoming' the problem.²⁹² The CMA has not been provided with evidence of any written response to this letter. However, it appears that the newspaper attended a further meeting with the Committee on 10 October 2007.²⁹³ This was followed by a letter on 12 October 2007 from [the Managing Director of Waterfords] to the Three Counties members, which stated that an agreement had been reached between the *Star Courier* and Three Counties:

'We have negotiated a fantastic deal with the Courier, which includes substantial savings on current advertising exclusive to the Three Counties Members. (...)

Although the rules of the Association do not allow agents to advertise their fees, up until now non members have been free to do this. I am pleased to say that the paper have now agreed not to accept advertising from any agent who advertises rates (...)

The Courier have agreed the above terms provided we sign a 3 year agreement with them starting on 1st November 2007'.²⁹⁴

4.120 During interview, [the Managing Director] of Waterfords stated that the Committee was 'keen just to completely tidy up the publication, because we realised that, not that it happened very often, but that, you know, there was the opportunity for agents to advertise their fees, if they were non-members, and we asked them whether or not they would consider not allowing non-members to advertise their fees to which they agreed. So this is me reporting back to the members that very conversation...I do seem to remember them saying that they would need to check out that it wasn't in breach of any rules and regulations and I do recall them actually then coming back and saying that they had checked it with the hierarchy at Trinity Mirror [sic]²⁹⁵ and that it was all perfectly acceptable'.

4.121 In contrast, [the Commercial Director] of [the previous owner of the *Star Courier*] denied that the *Star Courier* had agreed not to accept advertising from agents who advertised rates, as claimed in [the Managing Director] of

²⁹² Letter [(incorrectly)] dated 2 January 2014 from [the Managing Director] of Waterfords to [the Commercial Director] of [the previous owner of the *Star Courier*] (CMA Document Reference [Current Member K] 11.6).

²⁹³ No meeting notes for this meeting have been provided to the CMA; however, a letter from [the Commercial Director of the previous owner of the *Star Courier*] to [the Managing Director] of Waterfords dated 3 December 2007 refers to that meeting (CMA Document Reference CAS 3.188).

²⁹⁴ Letter dated 12 October 2007 from [the Managing Director] of Waterfords (on Three Counties letterhead) to Three Counties' members ([CMA Document Reference Current Member K] 11.5).

²⁹⁵ [The previous ultimate owner of the *Star Courier*] were in fact the ultimate owners at this time.

Waterfords' letter, asserting that it was an '*absolute fabrication*'.²⁹⁶ However, the following email correspondence took place between [the Managing Director of Waterfords] and [the Commercial Director of the previous owner of the *Star Courier*] shortly afterwards, on 19 November 2007:

[The Managing Director of Waterfords]:

'[Former Member 33] are also advertising rates in their lettings adverts!?'²⁹⁷

[The Commercial Director of the previous owner of the *Star Courier*]:

'Finally with reference to [Former Member 33], we believe this is an "interpretation of the rules" issue.

In our opinion the text does not indicate what [Former Member 33] lettings rates are, so therefore they are not advertising rates.

They state they will halve their rates if they fail to let the property within one month.

Is this a loophole that requires amendment of the Association rules and regulations?

Is this an issue for the Association to resolve?

If we received a page from an agent claiming to reduce their rates by half if they failed to sell a property within a month, do we accept the ad, as no actual rates have been advertised?

Will the Association contact [Former Member 33] to point out the rules?

We need your advice on this moving forward'.²⁹⁸

4.122 A letter then sent by [the Commercial Director] of [the previous owner of the *Star Courier*] to [the Managing Director] of Waterfords on 3 December 2007 enclosed a draft contract for advertising rates (the 2008 Contract).²⁹⁹ In the cover letter [the Commercial Director of the previous owner of the *Star*

²⁹⁶ Witness interview with [the Commercial Director of a Trinity Mirror group company] dated 10 June 2014, page 27 (CMA Document Reference r_TM 67.3).

²⁹⁷ Email dated 19 November 2007 from [the Managing Director] of Waterfords to [the Commercial Director] of [the previous owner of the *Star Courier*] (CMA Document Reference CAS 3.279).

²⁹⁸ Email dated 19 November 2007 from [the Commercial Director of the previous owner of the *Star Courier*] to [the Managing Director] of Waterfords (CMA Document Reference CAS 3.279).

²⁹⁹ Although Three Counties is a party to the 2008 Contract, the CMA notes that the agreement is clearly entered into for the benefit of Three Counties' members. For example, the 2008 Contract states at Recital C that '*The Parties have agreed that [the previous owner of the *Star Courier*] will offer Association members advertising in The Courier during the Term of this agreement on the following terms and conditions*' (CMA Document Reference 3C 24.136).

Courier] summarised the key terms of the agreement reached between the newspaper and Three Counties which would govern the relationship between each of Three Counties' members and TMS. Neither the cover letter of 3 December 2007 nor the draft 2008 Contract made any reference to restricting advertisements containing rates and/or fees in the *Star Courier*.³⁰⁰

4.123 However, in a further letter dated 8 January 2008 to Three Counties' members and copied to [the Commercial Director] of [previous owner of the *Star Courier*], [the Managing Director] of Waterfords noted the following:

'I am pleased to inform you that we have finally reached an agreement with [the previous owner of the Star Courier] on advertising costs for the next 3 years. (...)

In order for us to take advantage of these rates, the paper have asked that the Association sign a 3 year agreement expiring on 31st October 2010 which the Committee are happy to do. There is nothing particularly onerous in this agreement, but I highlight below some of the main points: (...)

- *Members (and now non-members) cannot make reference to fees or commissions in any way whatsoever.*

*Assuming everybody is happy with the Committee's proposals (and it is for you to let us know if you are not), we will be signing the agreement within the next 7 days (...).'*³⁰¹

February 2008 to December 2011: The ongoing relationship between the Committee and the *Star Courier*

4.124 There is little documentary evidence pertaining to the relationship between the Committee and the *Star Courier* from 2008 to March 2010.³⁰² However, the available evidence suggests that the Committee³⁰³ continued to contact the *Star Courier* in relation to advertisements containing fees. For example, email correspondence in February 2008 between [the Managing Director] of Waterfords, [the Managing Director] of Castles and [a Director] of [Former Member 27] discussed an email from [Current Member O] (a member of

³⁰⁰ Draft Agreement to offer Advertising Rates between Three Counties and [the previous owner of the *Star Courier*] dated 1 November 2007 (unsigned) (CMA Document Reference 3C 24.136 or CMA Document Reference CAS 3.188). [The Managing Director] of Waterfords indicates on 17 January 2008 that the agreement was signed and returned to the *Star Courier* (CMA Document Reference r_CAS 3.277).

³⁰¹ Letter dated 8 January 2008 from [the Managing Director] of Waterfords (on Three Counties letterhead) to the Members (CMA Document Reference CAS 3.278 or CMA Document Reference [Current Member O] 17).

³⁰² This appears to coincide with the resignation of [the Managing Director] of Castles as Compliance Officer.

³⁰³ Consisting at that time of [the Managing Director] of Waterfords, [a Director] of [Current Member R], [the Managing Director] of Castles, [a Director] of [Former Member 27], [a Director] of [Current Member N], [the Managing Director] of [Current Member K] and [an Employee] of [Former Member 34] (see minutes of Committee meeting dated 22 January 2008 (CMA Document Reference r_3C 24.8)).

Three Counties) that referred to '*Discounted fees for the month of February*'.³⁰⁴ Given the apparent difficulties in enforcing the breach internally,³⁰⁵ [the Managing Director of Waterfords] noted in an email to the Committee on 6 February 2008 that:

*'...I've told the paper to charge extra, they seem okay with this. Perhaps your letter could tell them that we have told the paper to charge full rate. If for any reason this is not done we could collect the difference with their annual subscription...'*³⁰⁶

4.125 On 28 March 2010, Trinity Mirror purchased the *Star Courier* and a number of other regional newspaper titles from [previous ultimate owner of the *Star Courier*]. On 23 March 2010, [the Head of Group Property and Regional Sales Manager], TMS, then TMS' Head of Group Property and Regional Sales Manager, Berkshire,³⁰⁷ contacted [the Managing Director] of Waterfords to arrange for the transfer of the 2008 Contract from [the previous ultimate owner of the *Star Courier*] to TMS.³⁰⁸ That agreement was due to expire in November 2010. [The Head of Group Property and Regional Sales Manager], TMS then assumed responsibility for the Three Counties relationship.³⁰⁹ During interview, [the Head of Group Property and Regional Sales Manager], TMS stated that her understanding of the arrangements between the *Star Courier* and Three Counties at that time was '*the Three Counties rates were in place, and members didn't advertise fees*'.³¹⁰

4.126 From November 2010, when the 2008 Contract expired, until 2012, there is evidence of discussions between Three Counties and TMS regarding the

³⁰⁴ Included in *Star Courier* 6 February 2008 (attached to letter dated 6 February 2008 from [the Managing Director] of Castles (on Three Counties letterhead) to [a Director] of [Current Member O] (CMA Document Reference CAS 3.187). See email dated 5 February 2008 from [the Managing Director] of Castles to [the Managing Director] of Waterfords (CMA Document Reference CAS 3.270), email dated 5 February 2008 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference CAS 3.270). See also email dated 5 February 2008 from [the Managing Director] of Castles to Committee members (CMA Document Reference CAS 3.270) which noted: '*I will write to them. We will have to ask the paper to charge them the extra. It's not gone through the rules for us to be [sic] able to do so. When asked previously the paper wouldn't and said they couldn't...*' See also email from [a Director] of [Current Member R] which commented '*Based on the rule you emailed through I think they should definitely be charged the page rate. Let's show some teeth!*' (email dated 6 February 2008 from [a Director] of [Current Member R] to [the Managing Director] of Castles and [the Managing Director] of Waterfords (CMA Document Reference CAS 3.271).

³⁰⁵ See email dated 6 February 2008 from [the Managing Director] of Castles to Committee members (CMA Document Reference CAS 3.270) '*...we haven't the authority – until the rule change comes through to levy the difference in page rate*'.

³⁰⁶ Email dated 6 February 2008 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference CAS 3.270).

³⁰⁷ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 20, lines 16-20 (CMA Document Reference r_TM 67.2).

³⁰⁸ Email dated 23 March 2010 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Managing Director] of Waterfords (CMA Document Reference r_HAMP 9.188).

³⁰⁹ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 27, lines 16-20 (CMA Document Reference r_TM 67.2).

³¹⁰ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 30, lines 1-3 (CMA Document Reference r_TM 67.2).

renewal of the 2008 Contract and the fees charged by the *Star Courier*. However, the evidence suggests that the 2008 Contract was never actually renewed.³¹¹

- 4.127 During March 2010 to April 2012, there is little evidence that the *Star Courier* was actively preventing the advertising of fees. However, one email from [a Sales Representative] of TMS (a Sales Representative at the *Star Courier*) to [the Managing Director] of Waterfords on 10 August 2011 suggests that the newspaper was monitoring advertisements for references to fees or discounts:

'Following on from our conversation this morning, please could you take a look at the attached artwork from [Former Member 2] to see if the wording breaches the 3 Counties agreement on rates?

*As you can see there is no mention of rates or fees but just saying there is a discount, so just wanted to get your opinion'.*³¹²

- 4.128 [Former Member 2] is not a current member of Three Counties, and it is not clear from the evidence submitted to the CMA whether it may have been at the time of the advertisement.³¹³ It is also unclear whether this advertisement was published in the *Star Courier*, in this or an amended form.

January 2012 to November 2012: The *Star Courier* agrees to enforce Rule 21

- 4.129 There is evidence that, at the beginning of 2012, certain agents (both members and non-members of Three Counties) advertised their fees, or made references to their fees or discounts, within the *Star Courier's* property paper.³¹⁴ For example, an advertisement from [the Complainant] (a non-member) in the [X] issue of the *Star Courier* stated '*our fees are up to 40% cheaper than some of our competitors in Fleet*'.³¹⁵

³¹¹ Witness interview with [the Senior Manager] of Hamptons International dated 14 March 2014, page 31, lines 18 to 26 (CMA Document Reference r_3C 84.2).

³¹² Email dated 10 August 2011 from [a Sales Representative] of TMS to [the Managing Director] of Waterfords (CMA Document Reference r_3C 24.33).

³¹³ See, for example, minutes of a Committee meeting held on 29 June 2006 (CMA Document Reference r_3C 24.2), which notes under '*New Applications*' that [Former Member 2] application was '*deferred subject to Association Terms review*'. However, [Former Member 2] are listed as a member on a membership list dated 22 February 2012 (attached to CMA Document Reference r_HAMP 9.242).

³¹⁴ See [Former Member 5] advertisement in *Star Courier* dated 26 January 2012] (CMA Document Reference CMA 19); [the Complainant] advertisement in *Star Courier* dated [X] (CMA Document Reference CMA 20); [Non Member Agent 2] advertisement in *Star Courier* dated 26 April 2012 (CMA Document Reference CMA 9); Waterfords advertisements in *Star Courier* dated 12 June 2012 (CMA Document Reference CMA 11), 6 September 2012 (CMA Document Reference CMA 25) and 4 October 2012 (CMA Document Reference CMA 26); [Non Member Agent 11] in *Star Courier* dated 5 July 2012 (CMA Document Reference CMA 22); and [Non Member Agent 3] advertisements in *Star Courier* dated 16 August 2012 (CMA Document Reference CMA 24) and 1 November 2012 (CMA Document Reference CMA 27).

³¹⁵ [Complainant] advertisement in *Star Courier* dated [X] (CMA Document Reference CMA 20).

- 4.130 However, during 2012, following renewed pressure from the Committee, the evidence demonstrates that the *Star Courier* agreed to support the Committee in enforcing the application of Rule 21, specifically by agreeing to monitor and reject advertisements that contained references to fees, both in relation to Three Counties' members and other, non-member agents. The evidence also demonstrates that [the Head of Group Property and Regional Sales Manager] of TMS instructed the *Star Courier* advertising team to reject advertisements containing references to fees³¹⁶ and, on at least one occasion, did in fact reject such an advertisement.³¹⁷
- 4.131 In early 2012, the evidence demonstrates that the issue of agents' advertising fees in the *Star Courier* was again under discussion. For example, in the context of discussions around renewing the 2008 Contract,³¹⁸ on 13 April 2012, [the Senior Manager] of Hamptons International wrote to the Committee indicating that he had met [the Head of Group Property and Regional Sales Manager] of TMS the previous day to discuss the proposed contract to fix advertising rates.³¹⁹ Whilst this email makes no mention of agents advertising their fees, an internal Trinity Mirror email from [the Head of Group Property and Regional Sales Manager] to [an Accounts Property Manager], a Key Accounts Property Manager for TMS,³²⁰ sent a few days later on 26 April 2012, suggests that [the Head of Group Property and Regional Sales Manager] asked for internal guidance on TMS' position on this issue.³²¹

³¹⁶ See paragraphs 4.157 and 4.158 below.

³¹⁷ See paragraphs 4.157, 4.160 and 4.161 below.

³¹⁸ See, for example, emails dated 4 January 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International (CMA Document Reference r_TM 27.40]) and email dated 8 February 2012 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Commercial Director] of TMS (CMA Document Reference r_TM 27.29).

³¹⁹ Email dated 13 April 2012 from [the Senior Manager] of Hamptons International to Committee members (CMA Document Reference r_HAMP 9.238).

³²⁰ See email dated 12 September 2013 from [an Accounts Property Manager] of TMS to [the Advertising Account Manager] of TMS (CMA Document Reference r_TM 27.8, page 3).

³²¹ See internal Trinity Mirror email dated 26 April 2012 from [the Head of Group Property and Regional Sales Manager] of TMS to [an Accounts Property Manager] of TMS whose subject is "*are agents advertising fees in your paper?*" (CMA Document Reference r_TM 27.27). There is further evidence that [the Head of Group Property and Regional Sales Manager] of TMS asked [an Accounts Property Manager] of TMS for advice in relation to whether agents could advertise their fees - see email dated 12 September 2013 from [an Accounts Property Manager] of TMS to [the Advertising Account Manager] of TMS cc [the Head of Group Property and Regional Sales Manager] of TMS in relation to the new ASA rules on advertising lettings fees: '*(b) it kind of throws the whole 'agents not advertising their fees in adverts' out the window a bit? Maybe it will be a good thing as things may become a little more transparent...Please keep me informed as to what you are doing in your area/with your clients – and I will too – so that we can ensure that we are all doing the same thing.*' (CMA Document Reference r_TM 27.8) and email dated 31 October 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [an Accounts Property Manager] of TMS that asks '*what is the score with the fees?*' (CMA Document Reference r_TM 27.4).

4.132 The discussions on renewing the 2008 Contract continued in May 2012,³²² and on 25 May 2012 [the Managing Director] of Waterfords sent an email to the Committee, which stated:

*'I've met a few times with [the Head of Group Property and Regional Sales Manager] ... On a separate note, she has agreed that from now on, they will not carry any adverts with fees quoted, members or otherwise, obviously a good thing'.*³²³

4.133 In interview, [the Head of Group Property and Regional Sales Manager] of TMS denied reaching any such agreement with [the Managing Director] of Waterfords, stating that *'it's just something that we wouldn't do, to be honest, because we have run fees'*.³²⁴ However, email correspondence from 14 September 2012 contradicts [the Head of Group Property and Regional Sales'] position:

[The Senior Manager of Hamptons International] to [the Head of Group Property and Regional Sales of TMS] (14 September 2012):

*'I am aware that [Current Member C]³²⁵ are soon to launch new/rebranded offices in Fleet and Yately and they are offering 0% fees to entice new clients to them, please can we ensure that the likely promotional advertising in the Courier over forthcoming weeks has no reference fees [sic]'.*³²⁶

[The Head of Group Property and Regional Sales of TMS] to [the Senior Manager of Hamptons International] (14 September 2012):

*'[Current Member C] we will check the adverts and make sure it isnt [sic] advertised'.*³²⁷

4.134 In a further email dated 11 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales] of TMS, [the Senior Manager of Hamptons International] commented:

³²² See, for example, emails dated 3 April 2012, and 3 and 4 May 2012 between [the Head of Group Property and Regional Sales Manager] of TMS and [the Regional Business Analyst] (TMS Regional Business Analyst) (CMA Document Reference r_TM 27.47).

³²³ Email dated 25 May 2012 from [the Managing Director] of Waterfords to [the Partner] of [Non Member Agent 4] and Committee members (CMA Document Reference r_HAMP 9.243).

³²⁴ Understood to mean that TMS have included direct or indirect references to agents' fees in their advertisements in the *Star Courier*. Witness interview with [the Head of Group Property and Regional Sales Manager] dated 7 March 2014, page 40, lines 24-25 (CMA Document Reference r_TM 67.2).

³²⁵ A member of Three Counties from 2011 (CMA Document Reference r_Current Member C2).

³²⁶ Email dated 14 September 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] (CMA Document Reference r_HAMP 9.248).

³²⁷ Email dated 14 September 2012 from [the Head of Group Property and Regional Sales Manager] to [the Senior Manager] of Hamptons International (CMA Document Reference r_HAMP 9.249).

'I notice with disappointment that [Non Member Agent 5] has been advertised this week and disclosing their fees, although they are not members of the association and this falls outside our own advertising rules, your policing for your majority and regular advertisers would be appreciated particularly where cheap 'bucket' agents are involved that only advertise once or twice a year'.³²⁸

4.135 The conversation continued as follows:

[The Head of Group Property and Regional Sales Manager of TMS] to [the Senior Manager of Hamptons International] (12 October 2012):

'To be honest we missed it as the line was very small. We will be letting [Non Member Agent 5] [sic] know today that we will not be running fees in the Star Courier'³²⁹

[The Senior Manager of Hamptons International] to [the Head of Group Property and Regional Sales Manager of TMS] (12 October 2012):

'If we could request that you are diligent on this matter, Estate Agents advertising cheap fees has a direct effect on our fee levels and naturally threatens our profit margins...'³³⁰

[The Head of Group Property and Regional Sales Manager of TMS] to [the Senior Manager of Hamptons International] (12 October 2012):

'[Senior Manager of Hamptons International], understand and we will be from now on.'³³¹

4.136 On 25 October 2012 [the Senior Manager] of Hamptons International emailed [the Head of Group Property and Regional Sales Manager] of TMS about the same issue:

'I had cause to raise [Non Member Agent 5] advert promoting their fees two weeks ago and their advert this week promotes half price fees. Please ensure your team are aware of the damage this form of advertising does to your other paying customers, it cheapens and compromises our industry and has a direct

³²⁸ Email dated 11 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] (CMA Document Reference r_HAMP 9.250).

³²⁹ Email dated 12 October 2012 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International (CMA Document Reference r_3C 24.46).

³³⁰ Email dated 12 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_3C 24.47).

³³¹ Email dated 12 October 2012 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International (CMA Document Reference r_HAMP 9.251).

*effect on our revenue. Please ensure no further advertisements are permitted to advertise fees’.*³³²

- 4.137 On the same day, [the Managing Director] of Waterfords replied to [the Senior Manager] of Hamptons International to suggest *‘Perhaps we should say to [the Head of Group Property and Regional Sales Manager of TMS] if it appears one more week, or the likes of, we will come out of the paper the following week, perhaps that would get their attention’.*³³³ Also on the same day, [the Managing Director] of [Current Member K] commented by email to [the Head of Group Property and Regional Sales Manager] of TMS that *‘This is irritating to say the least. We have an agreement in place with your Company and this is not being respected. If I may be so bold, I have to say that if it occurs again then I believe I will have to look at rates taking into account this issue’.*³³⁴

- 4.138 On 26 October 2012, the conversation continued as follows:

[The Head of Group Property and Regional Sales Manager of TMS] to [the Senior Manager of Hamptons International] (26 October 2012):

*‘Hi [Senior Manager of Hamptons International], as discussed. The wording that we use in other publications for any reference to fees is ‘unbeatable’ ‘most competitive’ ‘fantastic’. We will take this up again with [Non Member Agent 5]’*³³⁵

[The Senior Manager of Hamptons International] to [the Head of Group Property and Regional Sales Manager of TMS] (26 October 2012):

*‘Could I suggest that all advertisers are reminded that in the event an advert makes reference to fees or discounted rates, the advertiser may be required to withdraw or amend their advertisement.’*³³⁶

[The Head of Group Property and Regional Sales Manager of TMS] to [the Senior Manager of Hamptons International] (26 October 2012):

³³² Email dated 25 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_HAMP 9.255).

³³³ Email dated 25 October 2012 from [the Managing Director] of Waterfords to [the Senior Manager] of Hamptons International (CMA Document Reference r_3C 24.48).

³³⁴ Email dated 25 October 2012 from [the Managing Director] of [Current Member K] to [the Head of Group Property and Regional Sales Manager] and Committee members (CMA Document Reference r_HAMP 9.255).

³³⁵ Email dated 26 October 2012 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International and Committee members (CMA Document Reference r_HAMP 9.256).

³³⁶ Email dated 26 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS and Committee members (CMA Document Reference r_HAMP 9.257).

'[The Senior Manager of Hamptons International], yes we will have the conversations with all advertisers again'.³³⁷

4.139 During interview, [the Head of Group Property and Regional Sales Manager] of TMS maintained that she made these comments to 'appease' [the Senior Manager] of Hamptons International, and that she did not pass on these comments to [Non Member Agent 5].³³⁸ [The Head of Group Property and Regional Sales Manager] stated that she had not policed any adverts, and that she published advertisements containing fees, regardless of the complaints it would generate from Three Counties.³³⁹ It should be noted that [the Head of Group Property and Regional Sales Manager] position is to some extent supported by limited examples of adverts within the *Star Courier* property supplement throughout 2012, which do make at least indirect references to fees.³⁴⁰

4.140 However, on 15 November 2012, [the Senior Manager] of Hamptons International complained about another [Non Member Agent 5] advertisement (emphasis as in the original):

'Could I please suggest you look at [Non Member Agent 5]'s advert. I accepted your comment last week that the wording 'Traditional Agency Service – without the 'traditional' fees was not a direct reference to fees BUT 'Show us a written quote from another local agent and we will guarantee to beat it' IS.

"Fee Wars" and discounts directly effects [sic] all Estate Agents [sic] revenue and these reduced revenues often have a direct effect on advertising budgets. I have had cause to bring up the point of [Non Member Agent 5] ...and on 3 occasions I feel my points have been ignored, therefore I will be putting forward to the 3 Counties members that advertising is suspended or reduced until Trinity Mirror agree that NO reference to fees is allowed in their paper.

Please take this email as notice that Hamptons will not be advertising for the remainder of 2012'.³⁴¹

³³⁷ Email dated 26 October 2012 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International and Committee members (CMA Document Reference r_3C 24.49).

³³⁸ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 45, lines 11 and 16 (CMA Document Reference r_TM 67.2).

³³⁹ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 45, line 25 and page 46, lines 2-9 (CMA Document Reference r_TM 67.2).

³⁴⁰ See footnote 314 above.

³⁴¹ Email dated 15 November 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_HAMP 9.259). See also email dated 15 November 2013 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS which states '...I will be putting forward to the 3 Counties members that advertising is suspended or reduced until Trinity Mirror agree that NO reference fees is allowed in their paper.'

4.141 [The Head of Group Property and Regional Sales Manager] of TMS responded on the same day, asking [the Senior Manager] of Hamptons International to *'leave this with me please and I will come back to you today'*.³⁴² She then contacted [the Senior Manager of Hamptons International] again the following day, on 16 November 2012, asking him to call her.³⁴³

4.142 Prior to calling [the Head of Group Property and Regional Sales Manager] of TMS, [the Senior Manager] of Hamptons International asked the Committee for their comments on his complaint.³⁴⁴ [The Managing Director] of Waterfords responded that he had discussed the issue with [the Head of Group Property and Regional Sales Manager] the previous day. [The Managing Director of Waterfords] stated that:

*'I saw [the Head of Group Property and Regional Sales Manager of TMS] yesterday & told her your point was valid & one I support. The paper is concerned that they are possibly being deemed as anti-competitive and are worried about being sued. I explained that if they continue to allow [Non Member Agent 5] & the likes of [sic] to advertise/make reference to fees they will have a mass exodus of quality agents from the papers. It seems they are taking our point very seriously & I think they now take the view that's [sic] it's unlikely these small agents have either the clout or resources to take legal action & will therefore forbid any further advertising of this sort.'*³⁴⁵

4.143 When questioned on this document, [the Head of Group Property and Regional Sales Manager] of TMS acknowledged that she had concerns preventing agents from advertising their fees could breach competition law:

*'...we did talk about the fact that it was anti-competitive... I did have a conversation with him about the fees because it was then... because it was getting to the stage where...it was picking up on things like traditional agency service...so...we did talk about it.'*³⁴⁶

³⁴² Email dated 15 November 2012 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International (CMA Document Reference r_HAMP 9.261 or CMA Document Reference r_3C 24.53).

³⁴³ Email dated 16 November 2012 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International (CMA Document Reference r_HAMP 9.260).

³⁴⁴ Email dated 16 November 2012 from [the Senior Manager] of Hamptons International to Committee members (CMA Document Reference r_HAMP 9.262).

³⁴⁵ Email dated 16 November 2012 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference r_HAMP 9.264).

³⁴⁶ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 47, lines 25-26 and page 48, lines 1-2 and 10-15 (CMA Document Reference r_TM 67.2). The CMA notes that Three Counties' members combined advertising spend represented an important revenue stream for the *Star Courier* – see witness interview with [the Commercial Director of a Trinity Mirror group company]: *'it is vitally important that we...had a relationship with the ...estate agents'* (witness interview with [the Commercial Director of a Trinity Mirror group company] dated 10 June 2014, page 15, line 31 (CMA Document Reference r_TM 67.3)).

4.144 In his interview, when questioned about this email, [the Senior Manager] of Hamptons International stated:

*'I think the background – well, this is probably one of those unfortunate shooting from the hip. The email is timed 8.49 in the morning. I largely suspect that 15 November happens to be the day the newspapers land on my front doormat and I open the paper, and to be seeing an advert which I wasn't particularly pleased with (...).'*³⁴⁷

4.145 The CMA has no further evidence on these discussions, although [the Senior Manager] of Hamptons International referred to having had some '*frank conversations*' with [the Head of Group Property and Regional Sales Manager] of TMS over the following week and that he '*hope[d] to have a resolution shortly*'.³⁴⁸ [The Head of Group Property and Regional Sales Manager of TMS] was unable to recall these discussions, although accepted that the relationship was '*becoming more pressurised*' at this point.³⁴⁹

January 2013 to December 2013: The Star Courier actively enforces Rule 21 and extends the prohibition on advertising fees to non-members

4.146 The evidence from January to December 2013 demonstrates that TMS, often under pressure from certain of Three Counties' members, including Waterfords and Hamptons International, actively monitored and rejected advertisements containing direct or indirect references to fees, whether from members or non-members of Three Counties.

4.147 For instance, an internal TMS email from [the Head of Group Property and Regional Sales Manager] of TMS to TMS' [Commercial Director] (Commercial Director), dated 7 January 2013, demonstrates that she was seeking internal guidance on whether to accept an advertisement containing a reference to fees:

*'if I move [sic] want to put fees in next week am I able to say to them we wont [sic] be running fees do you think?'*³⁵⁰

4.148 Another internal TMS communication the following day between [an Account Manager of TMS] and [the Features and Property Editor of TMS]

³⁴⁷ Witness interview with the [Senior Manager] of Hamptons International dated 14 March 2014, page 29, lines 22-26 and page 30, lines 1-2 (CMA Document Reference r_3C 84.2).

³⁴⁸ Email dated 22 November 2012 from [Senior Manager] of Hamptons International to Committee members (CMA Document Reference r_HAMP 9.263).

³⁴⁹ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 52, line 15 (CMA Document Reference r_TM 67.2).

³⁵⁰ Email dated 7 January 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Commercial Director] of TMS (CMA Document Reference r_TM 27.24).

demonstrates that the newspaper had, in fact, expressly told at least certain agents not to include fees in their advertisements:

[An Account Manager of TMS] to [the Features and Property Editor of TMS] (8 January 2013):

*'[A Sales Representative] of TMS mentioned you asked about [Non Member Agent 5] regarding some editorial... They aren't booking adverts with us at the moment and we've had a fair few problems with them towards the end of last year. They kept putting rates in their adverts even when told they couldn't.'*³⁵¹

[The Features and Property Editor of TMS] to [an Account Manager of TMS] (8 January 2013):

*'Shall I just say that they need to speak with you re adverts before we can put anything in'.*³⁵²

[An Account Manager of TMS] to [the Features and Property Editor of TMS] (8 January 2013):

*'Yes I guess so although I think [the Head of Group Property and Regional Sales Manager of TMS] wants to speak to them to "sort them out" hehe. Maybe just ignore them for now as we are until we're sorted with how we're going to deal with them'.*³⁵³

- 4.149 An email from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International dated 16 January 2013 demonstrates that TMS intended to reject advertisements containing a reference to fees:

*'Hi [Senior Manager of Hamptons International], still awaiting a decision on above [referring to subject line of 'fees']. However I will be letting [Non Member Agent 5] know anyway that we will not be accepting any wording on beating quotes etc'.*³⁵⁴

- 4.150 In addition, internal TMS documents demonstrate that TMS was looking for ways to 'resolve' the concerns raised by the Committee. One proposal was for

³⁵¹ Email dated 8 January 2013 from [an Account Manager] of TMS to [the Features and Property Editor] of TMS (CMA Document Reference r_TM 27.38).

³⁵² See email dated 8 January 2013 from [the Features and Property Editor] of TMS to Account Manager of TMS (CMA Document Reference r_TM 27.23).

³⁵³ Email dated 8 January 2013 from [an Account Manager] of TMS to [the Features and Property Editor] of TMS (CMA Document Reference r_TM 27.38).

³⁵⁴ Email dated 16 January 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International (CMA Document Reference r_3C 24.57).

TMS to amend its terms and conditions for advertising to expressly prohibit agents from advertising their fees in its property papers.³⁵⁵

- 4.151 An email from [the Head of Group Property and Regional Sales Manager] of TMS dated 17 January 2013 demonstrates that the reason for this change was, at least in part, to support the Committee's requests for TMS to block advertisements containing direct or indirect references to fees:

*'We are looking to add to our terms and conditions the clause below which [online portal] have about agents [sic] fees...I need to know the outcome...am seeing the 3 Counties chairman on this next week and i [sic] need a decision? Things are kicking off with this lot – not happy on fees or any mention of beating any quotes by certain agents'.*³⁵⁶

- 4.152 This is further supported by evidence dated 27 March 2013, where an email from [the Head of Group Property and Regional Sales Manager] of TMS to [a Regional Business Analyst at a Trinity Mirror group company] asks for advice on the wording for the renewed 2008 Contract: *'Point 7.1 Still waiting on fees as this was supposed to be built in as part of TMS terms and conditions. Want to put "As part of Trinity Mirror's terms and conditions agents advertising fees in Residential and Lettings will not be accepted".'*³⁵⁷

- 4.153 A draft contract between Three Counties and TMS was circulated on 10 April 2013.³⁵⁸ The contract is very similar to the 2008 Contract, but one material change can be seen in Clause 7, which stated that TMS may reject advertisements that are not compliant with TMS' terms and conditions.³⁵⁹

- 4.154 In interview, the [the Head of Group Property and Regional Sales Manager] of TMS accepted that changing Trinity Mirror's terms and conditions in this way would have offered no direct benefit to the paper.³⁶⁰ The CMA understands

³⁵⁵ Email dated 4 January 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International (CMA Document Reference r_3C 24.56): *'Trinity are now looking at amending our terms and conditions to include that we will not be accepting adverts relating to fees in our property papers. It looks like we wont [sic] need to amend the contract. I am awaiting a time line on this.'*

³⁵⁶ Email dated 17 January 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Digital Director of TMS] (CMA Document Reference r_TM 27.21). This email enclosed the terms and conditions of membership of [online portal], which contained the following clause: *'(You...) 11. Warrant that (...) Your Data does not include details of Your commission, fees, specific comparisons with third parties who We perceive to be competitors of You or Your Client'*; Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 56, lines 10-20 (CMA Document Reference r_TM 67.2).

³⁵⁷ See email dated 27 March 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [a Regional Business Analyst at a Trinity Mirror group company] (CMA Document Reference r_TM 27.12).

³⁵⁸ See email dated 11 April 2013 from [the Senior Manager] of Hamptons International to Committee members (CMA Document Reference r_HAMP 9.275).

³⁵⁹ See draft contract attached to email dated 11 April 2013 from [the Senior Manager] of Hamptons International to Committee members (CMA Document Reference r_HAMP 9.135).

³⁶⁰ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 55, line 14 (CMA Document Reference r_TM 67.2).

that the proposed change to Trinity Mirror's terms and conditions did not, in fact, take place.³⁶¹

4.155 The evidence also demonstrates that the internal advertising team was instructed to enforce the prohibition on advertising fees. On 29 January 2013, [an Account Manager of TMS] asked [the Head of Group Property and Regional Sales Manager] of TMS for clarification on the prohibition on printing fees: *'Quick question... They cant [sic] print their fees in their adverts but what if they want them on their leaflets inside the Star Courier? I have an enquiry for this.'*³⁶² [The the Head of Group Property and Regional Sales Manager] responded on the same day: *'[Account Manager of TMS], as its [sic] in the rop part³⁶³ we do have fees on leaflets so yes at moment but will check this as well going forward'.*³⁶⁴

4.156 A further complaint about a [Non Member Agent 6]³⁶⁵ advertisement demonstrates that TMS had instructed its staff to support the enforcement of Rule 21, and extend it to non-members. On 1 February 2013, [the Senior Manager] of Hamptons International sent the following email to [the Head of Group Property and Regional Sales Manager] of TMS:

'I am frustrated that notwithstanding our numerous conversations, a half page editorial featuring [Non Member Agent 6], promoting their "Pick and Mix" service "at a fraction of the cost of a conventional agent".'

With immediate effect Hamptons will reduce their advertising this year by half and I expect you to resolve this immediately, I will in the meantime be taking steps to re-engage the 3 Counties discussions to produce our own newspaper.

³⁶¹ See witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 54, lines 19-24 and page 55, lines 3-5 (CMA Document Reference r_TM 67.2); email dated 19 March 2013 from [the Regionals & Nationals Credit Manager] of TMS to [the Head of Group Property and Regional Sales Manager] of TMS attaching the agreed terms and conditions (which does not contain a clause prohibiting the advertising of fees) (CMA Document Reference r_TM 27.15). There was further internal discussion around the adoption of this clause on 27/28 March 2013 (email dated 28 March 2013 from [the Regional Business Analyst of a Trinity Mirror group company] to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_TM 27.45)) but again there is no evidence that the proposed change was adopted.

³⁶² Email dated 29 January 2013 from [an Account Manager] of TMS to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_TM 27.18).

³⁶³ The CMA understands 'ROP' to stand for 'Run of Paper', or an advertisement that may be placed anywhere within the paper. See CMA note of section 27 inspection of Trinity Mirror documents dated 21 January 2014 (CMA Document Reference r_TM 28).

³⁶⁴ Email dated 29 January 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [an Account Manager] of TMS (CMA Document Reference r_TM 27.18).

³⁶⁵ The CMA understands that [Non Member Agent 6] is not and has not ever been a member of Three Counties.

As you will tell from the tone of this email, I am less than pleased and frankly sick of being forced to bring this to your attention'.³⁶⁶

- 4.157 [The Head of Group Property and Regional Sales Manager] of TMS responded on 4 February 2013:

'The original press release that came in had references to fees and other services. They cut the bulk of the editorial sent. This sentence was missed on this occasion.

Editorial have been vigilant for the last few years on cutting any references to below.

We apologise that it happened this time and editorial have assured that further checks will now be in place...

On the advertising front [an Account Manager of TMS] and [an Accounts Property Manager of TMS] have been checking adverts for any references to fees or quotes. Nothing has ran [sic] recently. Agents who wish to run fees or wording associated to unbeatable quotes are being told that we have made a commercial decision not to carry this type of advertising...

Please be assured that going forward the editorial and advertising pages will have our best attention'.³⁶⁷

- 4.158 Following that exchange, on 11 February 2013 [an Account Manager] of TMS asked [the Head of Group Property and Regional Sales Manager] of TMS to confirm what wording [Non Member Agent 5] were allowed to use: *'What is the wording we are allowed to use? We previously said 'unbeatable' was ok as we removed their 'half price' and replaced it with this'.³⁶⁸* [The Head of Group Property and Regional Sales Manager of TMS] instructed her not to accept any wording at all related to fees: *'No wording at all now. We can't run any wording at all related to fees. This will also [sic] carried in our terms and conditions in the future'.³⁶⁹*

³⁶⁶ Email dated 1 February 2013 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_HAMP 9.268).

³⁶⁷ Email dated 4 February 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International (CMA Document Reference r_HAMP 9.271).

³⁶⁸ Email dated 11 February 2013 from [an Account Manager] of TMS to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_TM 27.17).

³⁶⁹ Emails dated 11 February 2013 between [an Account Manager] of TMS and [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_TM 27.17).

- 4.159 On 22 April 2013, [the Managing Director] of [the Complainant] submitted an advert containing references to fees for publication in the *Star Courier*.³⁷⁰ On 23 April 2013, this was forwarded internally within TMS by [an Account Manager] of TMS to [an Employee] of TMS with the comment '*It mentions fees???*' [an Employee of TMS] responded on the same day: '*I don't think we can use it*'.³⁷¹
- 4.160 However, on reverting to [the Managing Director] of [the Complainant] on the same day, [an Account Manager of TMS]' response was '*We cannot run the advert you have supplied for this weeks [sic] Star Courier Homes & Property as we have made a commercial decision across all our property publications to not run any references to fees and rates*'.³⁷² The CMA also notes that the [the Managing Director] of [the Complainant]'s response demonstrates that he had previously altered the advertisement in line with instructions from TMS: '*It was my understanding that you would not publish rates, which we have not included in the advert*'.³⁷³
- 4.161 This incident is supported by witness evidence, where [the Head of Group Property and Regional Sales Manager] of TMS accepted that her team was instructed to reject advertisements containing references to fees,³⁷⁴ although she stated that it was only for a '*short period*'.³⁷⁵ In practice, [the Head of Group Property and Regional Sales Manager of TMS] estimated that she and her team rejected advertisements involving '*no more than two*' advertisers.³⁷⁶
- 'This is where we had told, I think, one or two agents in the end...that we wouldn't run fees at this moment in time. And I think it literally was one or two agents*'.³⁷⁷
- 4.162 Finally, the evidence demonstrates that TMS still supported the enforcement of Rule 21 later in 2013, both in relation to members and non-members. In September 2013, TMS internally discussed how to deal with the new ASA

³⁷⁰ The advert included comments such as '*We offer the best rates on both managed properties and find-only*', '*We DO NOT charge renewal fees on find-only*' and '*We have no hidden fees – know where you are from day one*' (CMA Document Reference [Complainant] 7e).

³⁷¹ Emails dated 23 April 2013 between [an Account Manager] of TMS and [an Employee] of TMS (CMA Document Reference r_TM 27.9).

³⁷² Email dated 23 April 2013 from [an Account Manager] of TMS to [the Managing Director] of [the Complainant] (r_ [CMA Document Reference [Complainant] 7d).

³⁷³ Email dated 23 April 2013 from [the Managing Director] of [the Complainant] to [an Account Manager] of TMS (CMA Document Reference r_TM 27.34).

³⁷⁴ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 71, lines 20-23 (CMA Document Reference r_TM 67.2).

³⁷⁵ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 71, line 24 (CMA Document Reference r_TM 67.2).

³⁷⁶ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 65, lines 21-26 and page 71, lines 8-9 (CMA Document Reference r_TM 67.2).

³⁷⁷ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 61, lines 13-17 (CMA Document Reference r_TM 67.2).

guidance on upfront advertising of tenants' fees (see paragraphs 4.64 to 4.69 above). [The Advertising Account Manager] of TMS forwarded the guidance to [an Accounts Property Manager] of TMS, who commented: *'it kind of throws the whole 'agents not advertising their fees in adverts' out the window a bit? Maybe it will be a good thing as things may become a little more transparent...Please keep me informed as to what you are doing in your area/with your clients – and I will too – so that we can ensure that we are all doing the same thing'*.³⁷⁸

On 31 October 2013, [the Managing Director] of Waterfords complained to [the Head of Group Property and Regional Sales Manager] of TMS about an advertisement by [Current Member K] containing such rental fees. Following [the Head of Group Property and Regional Sales Manager]'s clarification that this was due to a legislative change, [the Managing Director of], Waterfords confirmed on 1 November 2013 that Three Counties' members would be permitted to advertise tenants' fees.³⁷⁹

4.163 His instructions were internally communicated within TMS on the same day by [the Head of Group Property and Regional Sales Manager], both to TMS' [Commercial Director],³⁸⁰ and to the advertising team, noting: *'All, we are accepting all lettings fees in the paper. NO TO residential'*.³⁸¹

4.164 Following this discussion, [the Senior Manager] of Hamptons International confirmed to [the Head of Group Property and Regional Sales Manager] of TMS on 6 November 2013 that:

'in light of the change in guidelines... [advertising tenants' fees] is now acceptable. (...)

The 3 Counties view remains in respect to Sales and Lettings agents making reference to selling and lettings fees or incentives'.³⁸²

4.165 [The Senior Manager] of Hamptons International then sent a letter in December 2013 to all of Three Counties' members to communicate this change in policy, but confirming that the *Star Courier* would not accept

³⁷⁸ Email dated 12 September 2013 from [an Accounts Property Manager] of TMS to [the Advertising Account Manager] of TMS (CMA Document Reference r_TM 27.8).

³⁷⁹ See paragraph 4.65 above.

³⁸⁰ Email dated 1 November 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Commercial Director] of TMS (CMA Document Reference r_TM 27.2).

³⁸¹ Email dated 1 November 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [an Employee] of TMS, [an Employee] of TMS, [the Advertising Account Manager] of TMS and [a Sales Representative] of the *Star Courier* (CMA Document Reference r_TM 27.1).

³⁸² Email dated 6 November 2013 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_3C 24.83).

advertisements containing non-lettings commissions or fees from either members and non-members:

'the view of the Committee for the good of its members still prohibit the advertising of financial incentives including selling and letting fees within the Property Courier. It should also be stated that Trinity Mirror accepts that the advertising of fees for non-members will also not be accepted'.³⁸³

E. Developments since January 2014

4.166 After the commencement of the OFT's formal investigation in December 2013, the CMA understands that on 31 January 2014 [law firm 1] wrote to the Current Members on behalf of Three Counties to confirm that Three Counties would not be enforcing Rule 21 of its T&CM, and would be suspending its activities under that rule (and others of concern to the OFT).³⁸⁴ In addition, that letter confirmed that the arrangement with the *Star Courier* would be suspended.³⁸⁵ On 4 August 2014, [the Managing Director] of Waterfords sent a further letter to the Current Members indicating that Three Counties had ceased its activities and steps were being taken to dissolve Three Counties Estate Agents Limited.³⁸⁶

³⁸³ Letter (undated but understood to be from 12 December 2013 – see CMA Document Reference HAMP 9.327) from [the Senior Manager] of Hamptons International (on Three Counties letterhead) to members (See footnote 209).

³⁸⁴ Letter dated 31 January 2014 from [law firm 1] to Hamptons International (CMA Document Reference r_3C 29.1).

³⁸⁵ Letter dated 31 January 2014 from [law firm 1] to Hamptons International (CMA Document Reference r_3C 29.1).

³⁸⁶ Letter from Three Counties to its members dated 4 August 2014 (CMA Document Reference r_3C 77.3).

5. LEGAL ASSESSMENT

A. Introduction

- 5.1 This Chapter sets out the CMA's conclusions of its legal assessment of the Parties' conduct in light of the evidence set out at Chapter 4 above.³⁸⁷ Whilst the key legal principles are included in this Chapter for ease of reference, a detailed explanation of the legal principles on which the CMA's assessment is based and on which the CMA relies, including references to the relevant case law and primary and secondary legislation, is set out at Annex A (Legal Framework). In the first reading of the Decision, Annex A should be read before this Chapter.
- 5.2 The CMA has assessed the evidence in this case by reference to the requisite standard of proof as described in paragraphs A.94 to A.95 of Annex A. The CMA considers that the evidence set out in the Decision is sufficient to discharge the burden of proof in respect of the CMA's findings.

B. Undertakings and associations of undertakings

- 5.3 The Chapter I prohibition applies to agreements and concerted practices between 'undertakings', as well as to decisions by 'associations of undertakings'.³⁸⁸

Undertakings

- 5.4 For the purposes of the Act, an undertaking is any entity engaged in economic activity, regardless of its legal status or the way in which it is financed.³⁸⁹
- 5.5 The CMA has concluded that each of Three Counties' members, including Waterfords, Castles, Hamptons International and the remaining Current Members, and TMS is an entity engaged in economic activities, as set out below:
- 5.5.1 During the Relevant Period, each of Waterfords, Castles and Hamptons International, and the other members of Three Counties, including the Current Members, was engaged in offering estate and/or lettings agency services in the UK or a part of it.³⁹⁰

³⁸⁷ Note that references to specific paragraph numbers are included in this section for ease of reference to the primary sources of evidence, but the conclusions are reached in light of the totality of the evidence.

³⁸⁸ See Annex A, paragraph A.7.

³⁸⁹ See Annex A, paragraph A.8.

³⁹⁰ See Chapter 3, sections A to D.

5.5.2 During the Relevant Period, TMS was engaged in publishing national, regional and local newspapers, websites and digital products in the UK.³⁹¹

5.6 In light of the above, the CMA has concluded that each of Three Counties' members, including Waterfords, Castles, Hamptons International and the remaining Current Members, and TMS constitutes an undertaking for the purposes of the Chapter I prohibition. See Annex B for an assessment of the individual liability and the period for which each Party is found liable for the Infringement.

Associations of undertakings

5.7 An association of undertakings is any body formed to represent the interests of its members in commercial matters.³⁹²

5.8 As set out at paragraph 5.6 above, the CMA has concluded that each of Three Counties' members, including the Current Members, constitutes an undertaking for the purposes of the Act. In light of the evidence set out at Chapter 4, section A above, the CMA has concluded that Three Counties was formed, and operated throughout the Relevant Period, to represent the interests of its members in commercial matters, including but not limited to the negotiation of a reduction of costs for advertising in the *Star Courier*.³⁹³ The CMA has therefore concluded that Three Counties was an association of undertakings for the purposes of the Chapter I prohibition.

5.9 As set out in paragraph 3.1 and further to the facts set out in paragraph 4.2 above, the CMA has found that Three Counties was established on 2 November 2004 (at the latest), as this is the date on which a number of estate and lettings agents formed an estate agents' association and elected the Committee.³⁹⁴ The fact that Three Counties was not incorporated as a limited liability company until 1 July 2005³⁹⁵ does not undermine the conclusion that it was an association of undertakings for the purposes of the Chapter I prohibition from 2 November 2004 (at the latest).³⁹⁶ In light of the evidence set out at Chapter 4 above, the CMA has concluded that Three Counties remained an association of undertakings for the purposes of the Chapter I

³⁹¹ See Chapter 3, Section E.

³⁹² See Annex A, paragraph A.12.

³⁹³ See paragraphs 4.1 and 4.2.

³⁹⁴ See Chapter 4, section A above.

³⁹⁵ See Companies House certificate of incorporation dated 1 July 2005 (CMA Document Reference CMA 12).

³⁹⁶ See Annex A, paragraph A.12.

prohibition until 4 August 2014, when Three Counties informed the Current Members that it had ceased its activities.³⁹⁷

C. Agreements between undertakings, concerted practices and decisions by associations of undertakings

- 5.10 As set out in more detail at Annex A, paragraphs A.25 to A.42, the Chapter I prohibition catches all forms of cooperation and of collusion between undertakings, including by means of a collective structure or a common body, such as an association.³⁹⁸ It applies equally to agreements between undertakings, concerted practices and decisions by associations of undertakings.³⁹⁹ The European Courts have confirmed that it is not necessary, for the purposes of finding an infringement, to characterise conduct as exclusively an agreement, a concerted practice or a decision by an association of undertakings.⁴⁰⁰ The aim of the Chapter I prohibition is to catch different forms of coordination between undertakings and thereby to prevent undertakings from being able to evade the competition rules simply on account of the form in which they coordinate their conduct.⁴⁰¹
- 5.11 Moreover, an arrangement may properly be viewed as a single infringement for the time frame in which it existed, covering a range of practices (whether properly characterised as agreements, concerted practices or decisions by associations of undertakings) adopted by various parties in pursuit of a common objective.⁴⁰²
- 5.12 Where an association of undertakings is involved in an infringement of the Chapter I prohibition, the CMA may address an infringement decision to the association, its members, or both.⁴⁰³ Liability for the members is likely to be appropriate where key members emerge as instigators of the infringement or represent the driving force behind the infringement.⁴⁰⁴ In addition, the CMA may address the infringement decision to both the association and its relevant members, as long as it can establish conduct on the part of the association which is separate from that of its members.⁴⁰⁵

³⁹⁷ See paragraph 4.166 above and letter dated 4 August 2014 from [the Managing Director] of Waterfords (on behalf of Three Counties) to all members (CMA Document Reference r_3C 77.3).

³⁹⁸ See Annex A, paragraph A.25.

³⁹⁹ See Annex A, paragraph A.3.

⁴⁰⁰ See Annex A, paragraphs A.25 to A.27.

⁴⁰¹ See Annex A, paragraph A.26.

⁴⁰² See Annex A, paragraphs A.27 and A.43 to A.49.

⁴⁰³ See Annex A, paragraphs A.20 to A.24.

⁴⁰⁴ See Annex A, paragraph A.21 and, in particular, *Welded Steel Mesh* (Commission decision 89/515 OJ [1989] L260/10, paragraph 207).

⁴⁰⁵ See Annex A, paragraph A.24.

Introduction

- 5.13 The CMA has concluded that the evidence set out at Chapter 4 above demonstrates the existence of an arrangement between certain of Three Counties' members (including Waterfords, Castles and Hamptons International), through which they agreed not to advertise their fees, and to deter or prevent other agents (whether members or non-members of Three Counties) from advertising their fees,⁴⁰⁶ in the *Star Courier*.
- 5.14 In order to enforce this arrangement, certain of Three Counties' members (including Waterfords and Hamptons International) pressured TMS to prevent any agents from advertising their fees in the *Star Courier*. Despite initial resistance, TMS ultimately acceded to the pressure and agreed to prevent agents from advertising their fees in the *Star Courier* and thereby became a party to the arrangement.
- 5.15 The CMA has reasonable grounds for suspecting that other undertakings, including the Current Members, would have participated in the arrangement. However, for reasons of administrative prioritisation, the CMA has not made any finding that such other undertakings thereby committed an infringement of the Chapter I prohibition.
- 5.16 Separately, the CMA has concluded that Three Counties itself adopted a rule in its T&CM, which prohibited its members from advertising their fees in the *Star Courier*.

Legal findings - summary

Single and continuous infringement

- 5.17 For the purposes of the Chapter I prohibition, the CMA has found that during the Relevant Period, there was an arrangement consisting of one or more agreements, concerted practices and a decision by an association of undertakings which pursued a common objective, which was to prevent agents from advertising their fees⁴⁰⁷ in the *Star Courier*. The CMA has found that, through its own conduct, each of the Parties intended to contribute to this common objective. In addition, the CMA has found that each Party was aware of the conduct undertaken by each of the other Parties in pursuit of this same

⁴⁰⁶ As noted at 1.3 above, the concept of 'advertising their fees' includes agents advertising their fees or commission rates, or making any direct or indirect references to their fees, commission rates, promotions, discounts or special offers, or any other value proposition. For ease of presentation this is referred to only as 'advertising their fees' for the remainder of this Chapter.

⁴⁰⁷ See footnote 407 above.

objective. The CMA has concluded that this arrangement constituted a single and continuous infringement for the purposes of the Chapter I prohibition.

5.18 The CMA has made the following specific findings in relation to each Party:

Waterfords

5.19 The CMA has found that certain of Three Counties' members, including Waterfords, Castles and Hamptons International,⁴⁰⁸ entered into one or more agreements or concerted practices that:

- 5.19.1 they would not advertise their fees in the *Star Courier* (the Prohibition on Advertising Fees), and
- 5.19.2 they would deter or prevent members of Three Counties from advertising their fees in the *Star Courier*.

5.20 In addition, the CMA has found that certain of Three Counties' members, including Waterfords and Hamptons International agreed or concerted that, with the cooperation of TMS as the publisher of the *Star Courier*, they would prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.

Castles

5.21 The CMA has found that certain of Three Counties' members, including Castles, Waterfords and Hamptons International,⁴⁰⁹ entered into one or more agreements or concerted practices that:

- 5.21.1 they would not advertise their fees in the *Star Courier* (the Prohibition on Advertising Fees), and
- 5.21.2 they would deter or prevent members of Three Counties from advertising their fees in the *Star Courier*.

⁴⁰⁸ As noted at paragraph 5.15 above, the CMA has reasonable grounds for suspecting that other undertakings, including the Current Members, would have participated in this arrangement. However, for reasons of administrative prioritisation, the CMA has not made any finding that such other undertakings thereby committed an infringement of the Chapter I prohibition.

⁴⁰⁹ See footnote 408 above.

Hamptons International

5.22 The CMA has found that certain of Three Counties' members, including Hamptons International, Waterfords and Castles⁴¹⁰ entered into one or more agreements or concerted practices that:

5.22.1 they would not advertise their fees in the *Star Courier* (the Prohibition on Advertising Fees), and

5.22.2 they would deter or prevent members of Three Counties from advertising their fees in the *Star Courier*.

5.23 In addition, the CMA has found that certain of Three Counties' members, including Hamptons International and Waterfords⁴¹¹ agreed or concerted that, with the cooperation of TMS as the publisher of the *Star Courier*, they would prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.

TMS

5.24 The CMA has found that TMS, as the publisher of the *Star Courier*, became a party to the agreement or concerted practice with certain of Three Counties' members, including Waterfords and Hamptons International (as described at paragraphs 5.20 and 5.23), to prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.

Three Counties

5.25 The CMA has found that the subject matter of the Prohibition on Advertising Fees (as set out at paragraphs 5.19.1, 5.21.1 and 5.22.1 above) was reflected by Rule 21 of Three Counties' T&CM; and accordingly, for the purposes of the Chapter I prohibition, Rule 21 constituted a decision by an association of undertakings to prevent its members from advertising their fees in the *Star Courier*.

Agreements or concerted practices

5.26 The concepts of agreement and concerted practice are summarised briefly below, with a detailed explanation set out at Annex A. According to established case law, the concepts of agreements and concerted practices apply to collusion of the same nature which are only distinguishable by their intensity and the forms in which they manifest themselves.⁴¹² Agreements and

⁴¹⁰ See footnote 408 above.

⁴¹¹ See footnote 408 above.

⁴¹² See Annex A, paragraph A.25.

concerted practices can arise between undertakings operating at different levels of the supply chain (such as a relationship between a distributor and a retailer) as well as between those operating at the same level in the supply chain.⁴¹³

Key legal principles

Agreements

- 5.27 For the purposes of the Chapter I prohibition, 'agreements' include oral agreements and 'gentlemen's agreements'.⁴¹⁴ There is no requirement for an agreement to be formal or legally binding, or for it to contain any enforcement mechanisms.⁴¹⁵
- 5.28 An undertaking may be party to an anti-competitive agreement where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition on a specific relevant market, even if that undertaking is not active on that relevant market itself.⁴¹⁶ In addition, an undertaking may also be party to an anti-competitive agreement where it does not restrict its own freedom of action on the market on which it is primarily active.⁴¹⁷ Although it is essential to show the existence of a joint intention to act on (or in relation to) the market in a specific way in accordance with the terms of the agreement, it is not necessary to establish a joint intention to pursue an anti-competitive aim.⁴¹⁸
- 5.29 The fact that members of an association of undertakings are acting through the association does not affect the way in which the Chapter I prohibition applies to their activities; their position is no better and no worse than if they were acting in the same manner outside the forum of such an association.⁴¹⁹
- 5.30 An association of undertakings may enter into an anti-competitive agreement with a third party either as a party (in its own right) to that agreement, or on behalf of its members.⁴²⁰

Concerted practices

- 5.31 The prohibition on concerted practices prohibits, amongst other things, any 'direct or indirect contact' between undertakings, the object or effect of which

⁴¹³ See Annex A, paragraph A.34.

⁴¹⁴ See Annex A, paragraph A.28.

⁴¹⁵ See Annex A, paragraph A.28.

⁴¹⁶ See Annex A, paragraph A.31.

⁴¹⁷ See Annex A, paragraph A.31.

⁴¹⁸ See Annex A, paragraph A.30.

⁴¹⁹ See Annex A, paragraph A.23.

⁴²⁰ See Annex A, paragraph A.21.

is to influence the conduct on the market of an undertaking⁴²¹ thereby creating conditions of competition which do not correspond to the normal conditions of the market in question.⁴²²

- 5.32 An association of undertakings may engage in an anti-competitive concerted practice with a third party, either in its own right, or on behalf of its members.⁴²³

Findings – the Parties

- 5.33 The specific findings in relation to each of the above Parties are set out below.

Waterfords

- 5.34 In light of the evidence set out at Chapter 4 above, the CMA has found that, from 20 July 2005 (at the latest) to 31 January 2014, Waterfords was a party to one or more agreements or concerted practices:
- 5.34.1 with certain of Three Counties' members, including Castles and Hamptons International, that they would not advertise their fees in the *Star Courier*
 - 5.34.2 with certain of Three Counties' members, including Castles and Hamptons International, that they would deter or prevent members of Three Counties from advertising their fees in the *Star Courier*, and
 - 5.34.3 from 14 September 2012 (at the latest), with certain of Three Counties' members, including Hamptons International, and TMS that they would prevent other agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.

⁴²¹ See Annex A, paragraph A.35.3. Although the case law has referred to this part of the test in the context of influencing the conduct of an actual or potential competitor, the CMA considers that the point of principle is not confined to such situations - it extends to relationships between non-competitors and an infringement exists where the other constituent elements of the Chapter I prohibition are satisfied.

⁴²² See Annex A, paragraph A.35.3.

⁴²³ See Annex A, paragraph A.21.

5.35 In support of that conclusion, the CMA has made the following findings of fact in relation to Waterfords:

- 5.35.1 Waterfords was a member of Three Counties from 2 November 2004 (at the latest) to 4 August 2014, when Three Counties informed its members that it had ceased its activities.⁴²⁴
- 5.35.2 [The Managing Director] of Waterfords, was a member of the Committee from 2 November 2004 to 14 May 2014, acting as Chairman from 2 November 2004 to 1 April 2008.⁴²⁵ In addition, [the Managing Director of Waterfords] was a director and shareholder of Three Counties Estate Agents Limited from 1 July 2005, and remains so as at the date of the Decision.⁴²⁶
- 5.35.3 Waterfords actively participated in discussions from November 2004 (at the latest) to January 2005 in relation to whether Three Counties' members should be permitted to advertise their fees in the *Star Courier* (the Prohibition on Advertising Fees, as defined in paragraph 5.19.1 above), unless they met the conditions for exemption from the rule under the Advertising Waiver.⁴²⁷ It was also actively involved in extending the scope and application of the Prohibition on Advertising Fees in relation to Three Counties' members, in July 2005, November 2005 to February 2006 and April 2006.⁴²⁸
- 5.35.4 Three Counties' T&CM and other constitutional documents together constituted the conditions for membership of Three Counties.⁴²⁹ All members of Three Counties were obliged to agree to and abide by the terms contained within these constitutional documents.⁴³⁰
- 5.35.5 The Prohibition on Advertising Fees is reflected by Rule 21 of the T&CM (as amended).⁴³¹ The CMA has concluded that the inclusion of Rule 21 in its T&CM is conduct directly attributable to Three Counties;⁴³² and that Waterfords agreed to include, and supported

⁴²⁴ See paragraphs 4.2 and 4.166 (3C 77.3).

⁴²⁵ See section 26 response dated 6 January 2014, from [the Managing Director] of Waterfords to OFT (CMA Document Reference r_WAT 2).

⁴²⁶ See paragraphs 3.1 and 3.2.

⁴²⁷ See Chapter 4, section B. In particular see paragraphs 4.11, 4.17, 4.23, 4.27, 4.30 and 4.32.

⁴²⁸ See Chapter 4, section B. In particular, see paragraphs 4.21 to 4.42.

⁴²⁹ See Chapter 4, section C. In particular, see paragraphs 4.71 to 4.76.

⁴³⁰ See paragraphs 4.71 to 4.76.

⁴³¹ See Chapter 4, section B. In particular, see paragraphs 4.13 and 4.15 to 4.18.

⁴³² See paragraphs 5.62 to 5.69 below.

the inclusion of, the Prohibition on Advertising Fees in Three Counties' T&CM.⁴³³

- 5.35.6 Rule 21 formed part of the T&CM from 20 July 2005 (at the latest) to 31 January 2014.⁴³⁴ As a member of Three Counties, Waterfords agreed to or acquiesced in the Prohibition on Advertising Fees, as set out in Rule 21 of the T&CM (as amended).⁴³⁵
- 5.35.7 Waterfords actively participated in discussions from January 2005 (at the latest) in relation to whether compliance with the Prohibition on Advertising Fees should be monitored and enforced by the Committee.⁴³⁶ The Committee's power to monitor and enforce compliance with the Prohibition on Advertising Fees was incorporated into Rule 27(xi) and Rule 27(xii) of the T&CM⁴³⁷ and Rule 6(d) of the Committee Rules.⁴³⁸
- 5.35.8 Waterfords used Three Counties as a vehicle for implementing, monitoring and enforcing the Prohibition on Advertising Fees. For example, it:
- (i) encouraged members of Three Counties to comply with the Prohibition on Advertising Fees by, for example, alerting members of Three Counties to or reminding them of the existence of Rule 21 and reminding them that compliance with it was a mandatory condition for membership of Three Counties⁴³⁹
 - (ii) monitored compliance by other Three Counties' members with the Prohibition on Advertising Fees, and⁴⁴⁰
 - (iii) actively enforced or procured the enforcement of the Prohibition on Advertising Fees against Three Counties' members, by:
 - imparting verbal warnings to members that advertised their fees in breach of Rule 21⁴⁴¹

⁴³³ See Chapter 4, section B. In particular, see paragraphs 4.17, 4.29, 4.30 and 4.33.

⁴³⁴ See paragraphs 4.20 and 4.166.

⁴³⁵ See Chapter 4, section C. In particular, see paragraph 4.72.

⁴³⁶ See paragraph 4.23 and Chapter 4, section D.

⁴³⁷ From April 2006 (at the latest). See paragraph 4.74.

⁴³⁸ See paragraphs 4.14 and 4.19.

⁴³⁹ See paragraph 4.78.

⁴⁴⁰ See paragraph 4.83.

⁴⁴¹ See paragraphs 4.83, 4.97, 4.106 and 4.111.

- sending warning letters to members in breach, or procuring such letters to be sent⁴⁴²
- communicating such breaches, or advising or procuring other members of the Committee to communicate such breaches, to the *Star Courier*, to attempt to persuade them to charge the higher 'non-association rate' for the 'offending' advertisement.⁴⁴³

5.35.9 Waterfords actively pressured, or procured other members of Three Counties (including Hamptons International) to put pressure on, the *Star Courier* to enforce the Prohibition on Advertising Fees, by preventing Three Counties' members from advertising their fees,⁴⁴⁴ or to charge higher rates for non-compliant advertisements.

5.35.10 In addition, Waterfords actively pressured, or procured other members of Three Counties to put pressure on the *Star Courier* to prevent non-Three Counties members from advertising their fees in the *Star Courier*.⁴⁴⁵

5.35.11 Whilst the *Star Courier* initially resisted,⁴⁴⁶ ultimately it acceded from 14 September 2012 (at the latest) to the pressure placed on it by Waterfords and certain of Three Counties' members, including Hamptons International, and did, in fact, prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.⁴⁴⁷

5.36 In light of the above findings of fact, the CMA has found a concurrence of wills, constituting one or more agreements (for the purposes of the Chapter I prohibition), between:

5.36.1 Waterfords and certain of Three Counties' members, including Castles and Hamptons International, that they would not advertise their fees in the *Star Courier*

5.36.2 Waterfords and certain of Three Counties' members, including Castles and Hamptons International, that they would deter or

⁴⁴² See Chapter 4, Section D and, in particular, paragraphs 4.88, 4.97, 4.105 and 4.107.

⁴⁴³ See paragraphs 4.89 to 4.91 and 4.107.

⁴⁴⁴ See paragraphs 4.107 and 4.142.

⁴⁴⁵ See paragraphs 4.113 to 4.121.

⁴⁴⁶ See paragraphs 4.116 and 4.117.

⁴⁴⁷ See paragraphs 4.133 to 4.163.

prevent members of Three Counties from advertising their fees in the *Star Courier*, and

- 5.36.3 Waterfords and certain of Three Counties' members, including Hamptons International, on the one hand, and TMS, on the other hand, that they would prevent other agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.

5.37 In the alternative, in light of the findings of fact above, the CMA has found that the arrangements identified above constituted at the very least one or more concerted practices, in that:

- 5.37.1 Waterfords engaged in direct contact with certain of Three Counties' members, including Castles and Hamptons International, with the object and potential effect of influencing each other's conduct on the market. This coordination created conditions of competition that did not correspond to the normal conditions of the market, in that (i) Three Counties' members, including Waterfords, Castles and Hamptons International, did not remain free to advertise their fees in the *Star Courier*, and (ii) it prevented or sought to prevent Three Counties' members from advertising their fees in the *Star Courier*, and

- 5.37.2 Waterfords engaged in direct contact with certain of Three Counties' members, including Hamptons International, and TMS, with the object and potential effect of influencing each other's conduct on the market. This coordination created conditions of competition that did not correspond to the normal conditions of the market, in that it prevented or sought to prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.

5.38 It is sufficient for the CMA to conclude that the above coordination constituted either one or more agreements or concerted practices in order to demonstrate Waterfords' participation in an infringement of the Chapter I prohibition.⁴⁴⁸

5.39 The fact that [the Managing Director] of Waterfords may have been acting in his capacity as an officer of Three Counties does not affect the CMA's findings. As set out at paragraph 5.29 above, and in more detail at Annex A, paragraphs A.20 to A.24, the fact that members of an association of undertakings are acting through the association does not affect the way in

⁴⁴⁸ See Annex A, paragraphs A.25 and A.26.

which the Chapter I prohibition applies to their activities. The CMA has concluded that without [the Managing Director of Waterfords'] initiative and active participation, the agreements or concerted practices described above could not have existed, and Three Counties, as an association, was simply used to give the agreements stronger and wider impact.⁴⁴⁹

- 5.40 In light of the findings of fact set out above, the CMA has concluded that Waterfords was a party to the above agreements or concerted practices from 20 July 2005 (at the latest) (and in respect of the agreement or concerted practice with TMS, from 14 September 2012 (at the latest)) to 31 January 2014.

Castles

- 5.41 In light of the evidence set out at Chapter 4 above, the CMA has found that, from 20 July 2005 (at the latest) to 31 January 2014, Castles was a party to one or more agreements or concerted practices:
- 5.41.1 with certain of Three Counties' members, including Waterfords and Hamptons International, that they would not advertise their fees in the *Star Courier*, and
 - 5.41.2 with certain of Three Counties' members, including Waterfords and Hamptons International, that they would deter or prevent other members of Three Counties from advertising their fees in the *Star Courier*.
- 5.42 In support of that conclusion, the CMA has made the following findings of fact in relation to Castles:
- 5.42.1 Castles was a member of Three Counties from 2 November 2004 (at the latest) to 4 August 2014, when Three Counties informed its members that it had ceased its activities.⁴⁵⁰
 - 5.42.2 [The Managing Director] of Castles, was a member of the Committee from 2 November 2004 to 5 November 2008, acting as Compliance Officer throughout this period.⁴⁵¹
 - 5.42.3 Castles actively participated in discussions from November 2004 (at the latest) to January 2005 in relation to whether Three Counties' members should be permitted to advertise their fees in

⁴⁴⁹ See Annex A, paragraph A.21.

⁴⁵⁰ See paragraphs 4.2 and 4.166 (CMA Document Reference 3C 77.3).

⁴⁵¹ Response to section 26 notice dated 24 January 2014 from [the Managing Director] of Castles (CMA Document Reference r_CAS 3).

the *Star Courier* (the Prohibition on Advertising Fees, as defined at paragraph 5.21.1 above), unless they met the conditions for exemption from the rule under the Advertising Waiver.⁴⁵² It was also actively involved in extending the scope and application of the Prohibition on Advertising Fees, in July 2005, November 2005 to February 2006 and April 2006.⁴⁵³

- 5.42.4 Three Counties' T&CM and other constitutional documents together constituted the conditions for membership of Three Counties.⁴⁵⁴ All members of Three Counties were obliged to agree to and abide by the terms contained within these constitutional documents.⁴⁵⁵
- 5.42.5 The Prohibition on Advertising Fees is reflected by Rule 21 of the T&CM (as amended).⁴⁵⁶ The CMA has concluded that the inclusion of Rule 21 in its T&CM is conduct directly attributable to Three Counties;⁴⁵⁷ and that Castles agreed to include, and supported the inclusion of, the Prohibition on Advertising Fees in Three Counties' T&CM.⁴⁵⁸
- 5.42.6 Rule 21 was incorporated into and remained part of the T&CM from 20 July 2005 (at the latest) to 31 January 2014.⁴⁵⁹ As a member of

⁴⁵² See Chapter 4, section B. In particular see paragraphs 4.11, 4.17, 4.23, 4.27, 4.30, 4.31 and 4.32.

⁴⁵³ See Chapter 4, section B. In particular, see paragraphs 4.21 to 4.42.

⁴⁵⁴ See Chapter 4, section C. In particular, see paragraphs 4.71 to 4.76.

⁴⁵⁵ See paragraphs 4.71 to 4.76.

⁴⁵⁶ See Chapter 4, section B. In particular, see paragraphs 4.13 and 4.15 to 4.18.

⁴⁵⁷ See paragraphs 5.62 to 5.69 below.

⁴⁵⁸ See Chapter 4, section B. In particular, see paragraphs 4.11, 4.17, 4.18, 4.19, 4.29, 4.30 and 4.31. The CMA acknowledges that [the Managing Director] of Castles initially recommended that Rule 21 should not be included in the T&CM (*'My personal view is that the role of the association is not to interfere with how individual companies run their businesses'* (email dated 5 January 2005 from [the Managing Director] of Castles to Committee members (CMA Document Reference 3C 24.91)). However, as set out at paragraph 4.17 above, at the subsequent Committee meeting on 12 January 2005, attended by [the Managing Director] of Castles, the minutes record the Committee's decision to prevent members from advertising their fees and include wording to that effect in Rule 21, as amended to allow for the Advertising Waiver. There is no record in those minutes of any objection by [the Managing Director] of Castles to this decision and the minutes record that *'the members present'* took that final decision (see minutes of meeting dated 12 January 2005, attached to email dated 21 January 2005 from [the Personal Assistant to the Managing Director of Waterfords] to Committee members (CMA Document Reference r_CAS 3.132)). Additionally, the CMA notes that subsequent to that decision, [the Managing Director] of Castles took an active role in extending, strengthening and enforcing Rule 21 (for example, agreeing with [the Managing Director] of Waterfords' suggestion to change the rules to exclude all mention of fees - see email dated 26 October 2005 from [the Managing Director] of Castles to Committee members and [law firm 2] (CMA Document Reference r_CAS 3.31)), and that the Committee *'unanimously agreed'* to prohibit all members from advertising their fees in October 2005 (see paragraph 4.29). The CMA has therefore concluded that [the Managing Director] of Castles agreed to the inclusion of Rule 21 or, at the very least, passively supported the Prohibition on Advertising Fees and it being reflected in Rule 21.

⁴⁵⁹ See paragraphs 4.20 and 4.166. Although the evidence demonstrates that Rule 21 was included in the T&CM from as early as January 2005 and that Three Counties Members may have seen a draft of this (see paragraph 4.20 above), the T&CM were not formally communicated to Three Counties Members until 20 July 2005. On that date, [the Managing Director] of Waterfords wrote to all Three Counties Members to provide them with a copy of the T&CM and advise them that, as members, they would be obliged to comply with the terms contained therein (see paragraphs 4.13 to 4.20 above).

Three Counties, Castles agreed to or acquiesced in the Prohibition on Advertising Fees, as set out in Rule 21 of the T&CM.⁴⁶⁰

5.42.7 Castles actively participated in discussions from January 2005 (at the latest), in relation to whether compliance with the Prohibition on Advertising Fees should be monitored and enforced by the Committee.⁴⁶¹ The Committee's power to monitor and enforce compliance with the Prohibition on Advertising Fees was incorporated into Rule 27(xi) and Rule 27(xii) of the T&CM⁴⁶² and Rule 6(d) of the Committee Rules.⁴⁶³

5.42.8 Castles used Three Counties as a vehicle for implementing, monitoring and enforcing the Prohibition on Advertising Fees. For example, it:

- (i) encouraged members of Three Counties to comply with the Prohibition on Advertising Fees by, for example, alerting members of Three Counties to the existence of Rule 21, and reminding them that compliance with it was a mandatory condition for membership of Three Counties⁴⁶⁴
- (ii) actively enforced the Prohibition on Advertising Fees, by:
 - imparting verbal warnings to members that advertised their fees in breach of Rule 21⁴⁶⁵
 - regularly sending warning letters to members in breach of Rule 21, and⁴⁶⁶
 - suggesting that the *Star Courier* should be asked to charge a higher rate for advertisements from Three Counties members that advertised their fees in breach of Rule 21.⁴⁶⁷

5.42.9 In addition, Castles was aware of, and at least tacitly supported, attempts by other members of Three Counties to pressure the *Star Courier* to enforce the Prohibition on Advertising Fees, by

⁴⁶⁰ See paragraphs 4.71 to 4.76.

⁴⁶¹ See Chapter 4, section D. In particular, paragraph 4.103.

⁴⁶² From April 2006 (at the latest). See paragraph 4.74.

⁴⁶³ See paragraphs 4.14 and 4.19.

⁴⁶⁴ See paragraph 4.78.

⁴⁶⁵ See paragraph 4.111.

⁴⁶⁶ See paragraphs 4.74, 4.83, 4.84, 4.111 and 4.112.

⁴⁶⁷ See paragraph 4.103.

preventing Three Counties' members from advertising their fees, or to charge higher rates for such non-compliant advertisements.⁴⁶⁸

- 5.43 In light of the above findings of fact, the CMA has found a concurrence of wills, constituting one or more agreements (for the purposes of the Chapter I prohibition), between:
- 5.43.1 Castles and certain of Three Counties' members, including Waterfords and Hamptons International, that they would not advertise their fees in the *Star Courier*, and
 - 5.43.2 Castles and certain of Three Counties' members, including Waterfords and Hamptons International, that they would deter or prevent members of Three Counties from advertising their fees in the *Star Courier*.
- 5.44 For the avoidance of doubt, the CMA has not made a finding that Castles entered into an agreement or concerted practice with TMS.
- 5.45 In the alternative, in light of the findings of fact above, the CMA has found that the arrangements identified above constituted at the very least one or more concerted practices. Castles engaged in direct contact with certain of Three Counties' members, including Waterfords and Hamptons International, with the object and potential effect of influencing each other's conduct on the market. This coordination created conditions of competition that did not correspond to the normal conditions of the market, in that (i) Three Counties' members, including Waterfords, Castles and Hamptons International, did not remain free to advertise their fees in the *Star Courier*, and (ii) it prevented or sought to prevent members of Three Counties from advertising their fees in the *Star Courier*.
- 5.46 It is sufficient for the CMA to conclude that the above coordination constituted either one or more agreements or concerted practices in order to demonstrate Castles' participation in an infringement of the Chapter I prohibition.⁴⁶⁹
- 5.47 The fact that [the Managing Director] of Castles may have been acting in his capacity as an officer of Three Counties does not affect the CMA's findings. As set out at paragraph 5.29 above, and in more detail at Annex A, paragraphs A.20 to A.24, the fact that members of an association of undertakings are acting through the association does not affect the way in which the Chapter I prohibition applies to their activities. The CMA has

⁴⁶⁸ See paragraphs 4.113, 4.118 and 4.119.

⁴⁶⁹ See Annex A, paragraph A.25 and A.26.

concluded that without [the Managing Director of Castles'] initiative and active participation, the agreements or concerted practices described above could not have existed, and Three Counties, as an association, was simply used to give the agreements stronger and wider impact.⁴⁷⁰

- 5.48 In light of the findings of fact set out above, the CMA has concluded that Castles was a party to the above agreements or concerted practices from 20 July 2005 (at the latest) to 31 January 2014.

Hamptons International

- 5.49 In light of the evidence set out at Chapter 4 above, the CMA has found that, from 1 January 2008 to 31 January 2014, Hamptons International was a party to one or more agreements or concerted practices:

- 5.49.1 with certain of Three Counties' members, including Waterfords and Castles, that they would not advertise their fees in the *Star Courier*
- 5.49.2 with certain of Three Counties' members, including Waterfords, and Castles, that they would deter or prevent other Three Counties members from advertising their fees in the *Star Courier*, and
- 5.49.3 from 14 September 2012 (at the latest), with certain of Three Counties' members, including Waterfords, and TMS that they would prevent other agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.

- 5.50 In support of that conclusion, the CMA has made the following findings of fact in relation to Hamptons International:

- 5.50.1 Hamptons International was a member of Three Counties from 1 January 2008 to 4 August 2014, when Three Counties informed its members that it had ceased its activities.⁴⁷¹
- 5.50.2 [A Senior Manager of Hamptons International], [X],⁴⁷² was a member of the Committee from 13 May 2009 (at the latest)⁴⁷³ to 14

⁴⁷⁰ See Annex A, paragraph A.21.

⁴⁷¹ See paragraph 4.166. See also Hamptons International's response to the section 26 notice dated 21 January 2014 (CMA Document Reference r_HAMP 6.2) and [the Senior Manager] of Hamptons International voluntary statement dated 13 March 2014 (CMA Document Reference r_HAMP 18.3).

⁴⁷² It should be noted that [the Senior Manager] is not a director of Hamptons International.

⁴⁷³ See minutes of Committee meeting dated 13 May 2009 (CMA Document Reference r_3C 24.13).

May 2014, acting as Chairman from 1 April 2010 to 14 May 2014.⁴⁷⁴

- 5.50.3 Three Counties' T&CM, and other constitutional documents, together constituted the conditions for membership of Three Counties.⁴⁷⁵ All members of Three Counties were obliged to agree to and abide by the terms contained within these constitutional documents.⁴⁷⁶
- 5.50.4 The Prohibition on Advertising Fees is reflected by Rule 21 of the T&CM (as amended).⁴⁷⁷ The CMA infers that Rule 21 was included in the version of the T&CM sent to Hamptons International when it joined Three Counties.⁴⁷⁸ The CMA has therefore concluded that Hamptons International was aware of the existence and content of the Prohibition on Advertising Fees, as set out in Rule 21, when it joined Three Counties.⁴⁷⁹ The CMA has concluded that the inclusion of Rule 21 in its T&CM is conduct directly attributable to Three Counties;⁴⁸⁰ the evidence demonstrates that Hamptons International did not register any objection to the inclusion of Rule 21 in the T&CM.⁴⁸¹
- 5.50.5 The Committee's power to monitor and enforce compliance with the Prohibition on Advertising Fees was incorporated into Rule 27(xi) and Rule 27(xii) of the T&CM⁴⁸² and Rule 6(d) of the Committee Rules.⁴⁸³ As for Rule 21, the CMA infers that Rule 27 (including both subsections (xi) and (xii)) was included in the version of the T&CM sent to Hamptons International when it joined Three Counties.⁴⁸⁴ The CMA has therefore concluded that Hamptons International was aware of the Committee's intent to enforce the

⁴⁷⁴ See first voluntary statement of [the Senior Manager] of Hamptons International dated 13 March 2014, paragraph 27 (CMA Document Reference r_HAMP18.3) and letter dated 1 April 2010 from [the Managing Director] of [Current Member K] (on Three Counties letterhead) to [the Senior Manager] of Hamptons International confirming the appointment of the [Senior Manager] as Chairman (CMA Document Reference r_3C 24.17).

⁴⁷⁵ See Chapter 4, section C. In particular, see paragraphs 4.71 to 4.76.

⁴⁷⁶ See paragraphs 4.71 to 4.76.

⁴⁷⁷ See Chapter 4, section B. In particular, see paragraphs 4.13 and 4.15 to 4.18.

⁴⁷⁸ See Chapter 4, section B. In particular, see paragraphs 4.54 to 4.69.

⁴⁷⁹ [The Senior Manager] of Hamptons International confirmed that he read the T&CM prior to joining Three Counties. First voluntary statement of [the Senior Manager] of Hamptons International dated 13 March 2014, paragraph 22 (CMA Document Reference r_HAMP 18.3).

⁴⁸⁰ See paragraphs 5.62 to 5.69 below.

⁴⁸¹ [The Senior Manager] of Hamptons International noted that, *'None of the clauses stood out as being unprofessional. No clause stood out to me as being improper. By that I mean, something that was encouraging bad business conduct.'* First voluntary statement of [the Senior Manager] of Hamptons International dated 13 March 2014, paragraph 24 (CMA Document Reference r_HAMP 18.3).

⁴⁸² From April 2006 (at the latest). See paragraph 4.74.

⁴⁸³ See paragraphs 4.14 and 4.19.

⁴⁸⁴ See Chapter 4, section B. In particular, see paragraph 4.55.

Prohibition on Advertising Fees, insofar as it was set out in Rule 27, when it joined Three Counties.⁴⁸⁵ The evidence demonstrates that Hamptons International did not register any objection to the inclusion of Rule 27 in the T&CM.⁴⁸⁶

- 5.50.6 Hamptons International used Three Counties as a vehicle for implementing, monitoring and enforcing the Prohibition on Advertising Fees. For example, it:
- (i) encouraged members of Three Counties to comply with the Prohibition on Advertising Fees by, for example, alerting members of Three Counties to the existence of Rule 21, and reminding them that compliance with it was a mandatory condition for membership of Three Counties⁴⁸⁷
 - (ii) monitored advertisements in the *Star Courier* for direct or indirect references to agents' fees⁴⁸⁸
 - (iii) actively enforced the Prohibition on Advertising Fees, by highlighting a potential breach of Rule 21 to the *Star Courier* in an attempt to persuade it to prevent agents from advertising their fees.⁴⁸⁹
- 5.50.7 Hamptons International actively pressured the *Star Courier* to enforce the Prohibition on Advertising Fees, by preventing Three Counties' members from advertising their fees in the *Star Courier*.⁴⁹⁰
- 5.50.8 In addition, Hamptons International actively pressured the *Star Courier* to extend the application of the Prohibition on Advertising Fees as set out in Rule 21 of the T&CM to non-members of Three

⁴⁸⁵ [The Senior Manager] of Hamptons International confirmed that he read the T&CM prior to joining Three Counties. First voluntary statement of [the Senior Manager] of Hamptons International dated 13 March 2014, paragraph 22 (CMA Document Reference r_HAMP 18.3).

⁴⁸⁶ [The Senior Manager] of Hamptons International noted that, "*None of the clauses stood out as being unprofessional. No clause stood out to me as being improper. By that I mean, something that was encouraging bad business conduct.*" First voluntary statement of [Senior Manager of Hamptons International] dated 13 March 2014, paragraph 24 (CMA Document Reference r_HAMP 18.3).

⁴⁸⁷ See paragraph 4.78.

⁴⁸⁸ See email dated 11 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] (CMA Document Reference r_3C 24.43).

⁴⁸⁹ See paragraph 4.133. See also paragraph 4.138, where [the Senior Manager] of Hamptons requested [the Head of Group Property and Regional Sales Manager] of TMS to remind 'all advertisers' that they may not include their fees or discounted rates in advertisements.

⁴⁹⁰ See paragraphs 4.133, 4.138 and 4.140.

Counties by preventing non-Three Counties members from advertising their fees in the *Star Courier*, and⁴⁹¹

5.50.9 Whilst the *Star Courier* initially resisted,⁴⁹² ultimately it acceded from 14 September 2012 (at the latest) to the pressure placed on it by Hamptons International and certain of Three Counties' members, including Waterfords, and did, in fact, prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.⁴⁹³

5.51 In light of the above findings of fact, the CMA has found a concurrence of wills, constituting one or more agreements (for the purposes of the Chapter I prohibition), between:

5.51.1 Hamptons International and certain of Three Counties' members, including Waterfords and Castles, that they would not advertise their fees in the *Star Courier*

5.51.2 Hamptons International and certain of Three Counties' members, including Waterfords and Castles, that they would prevent members of Three Counties from advertising their fees in the *Star Courier*, and

5.51.3 Hamptons International and certain of Three Counties' members, including Waterfords, on the one hand, and TMS, on the other hand, that they would prevent other agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.

5.52 In the alternative, in light of the findings of fact above, the CMA has found that the arrangements identified above constituted at the very least one or more concerted practices, in that:

5.52.1 Hamptons International engaged in direct contact with certain of Three Counties' members, including Waterfords and Castles, with the object and potential effect of influencing each other's conduct on the market. This coordination created conditions of competition that did not correspond to the normal conditions of the market, in that (i) Three Counties' members, including Hamptons International, Waterfords and Castles, did not remain free to advertise their fees in the *Star Courier*, and (ii) it prevented or

⁴⁹¹ See paragraphs 4.134, 4.156, 4.140 and 4.142.

⁴⁹² See paragraphs 4.116 and 4.117.

⁴⁹³ See paragraphs 4.133 to 4.163.

sought to prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*, and

- 5.52.2 Hamptons International engaged in direct contact with certain of Three Counties' members, including Waterfords, and TMS, with the object and potential effect of influencing each other's conduct on the market. This coordination created conditions of competition that did not correspond to the normal conditions of the market, in that it prevented or sought to prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.
- 5.53 It is sufficient for the CMA to conclude that the above coordination constituted either one or more agreements or concerted practices in order to demonstrate Hamptons International's participation in an infringement of the Chapter I prohibition.⁴⁹⁴
- 5.54 The fact that [the Senior Manager] of Hamptons International may have been acting in his capacity as an officer of Three Counties does not affect the CMA's findings. As set out at paragraph 5.29 above, and in more detail at Annex A, paragraphs A.20 to A.24, the fact that members of an association of undertakings are acting through the association does not affect the way in which the Chapter I prohibition applies to their activities. The CMA has concluded that without [the Senior Manager of Hamptons International]'s initiative and active participation, the agreements or concerted practices described above could not have existed, and Three Counties, as an association, was simply used to give the agreements stronger and wider impact.⁴⁹⁵
- 5.55 In light of the findings set out above, the CMA has concluded that Hamptons International was a party to the above agreements or concerted practices from 1 January 2008 (and in respect of the agreement or concerted practice with TMS, from 14 September 2012 (at the latest)) to 31 January 2014.

TMS

- 5.56 The CMA has found that, from 14 September 2012 (at the latest) to 31 January 2014, in response to pressure from certain of Three Counties' members, including Waterfords and Hamptons International, TMS agreed or concerted with at least those undertakings to prevent agents (whether

⁴⁹⁴ See Annex A, paragraphs A.25 and A.26.

⁴⁹⁵ See Annex A, paragraph A.21.

members or non-members of Three Counties) from advertising their fees in the *Star Courier*.

5.57 In support of that conclusion, and in light of the evidence set out at Chapter 4 above, the CMA has made the following findings of fact in relation to TMS:

5.57.1 Three Counties was established as an association of undertakings on 2 November 2004 (at the latest).⁴⁹⁶ The purpose of establishing Three Counties was for it to act, on behalf of its members, as a vehicle to negotiate a volume discount for advertising in the *Star Courier's* property supplement, *Homes and Property*.⁴⁹⁷

5.57.2 Between March 2005 and 31 January 2014, there was a contractual arrangement between Three Counties and [the previous owner of the *Star Courier*] or TMS (as respective owners of the *Star Courier*), by which the *Star Courier* agreed to offer Three Counties' members reduced rates for advertising within the *Star Courier's* property section, *Homes and Property*. This arrangement consisted of a number of formal and informal contractual agreements, including:

- On 29 March 2005, [the previous owner of the *Star Courier*] (the owner of the *Star Courier* until March 2010) entered into an agreement with Three Counties to offer reduced property advertising rates for Three Counties' members within the *Star Courier's* property paper, *Homes and Property*.⁴⁹⁸
- In January 2008, [the previous owner of the *Star Courier*] and Three Counties revised the terms of the March 2005 agreement, and [the previous owner of the *Star Courier*] entered into a formal contract with Three Counties that agreed reduced rates for property advertising for Three Counties' members until January 2011 (the 2008 Contract).⁴⁹⁹
- The 2008 Contract was transferred to TMS in March 2010, following the sale of the *Star Courier* from [the previous owner of the *Star Courier*] to TMS.⁵⁰⁰

⁴⁹⁶ See paragraph 3.1 and 4.2.

⁴⁹⁷ See paragraphs 4.1 to 4.6.

⁴⁹⁸ See paragraph 4.6.

⁴⁹⁹ See paragraphs 4.122 to 4.123.

⁵⁰⁰ See paragraph 4.125.

- The agreement between TMS and Three Counties continued informally beyond the expiry of the 2008 Contract until (at least) the start of the OFT's formal investigation in December 2013.⁵⁰¹

5.57.3 The CMA has found that, although Three Counties was the signatory to the contractual arrangements with the *Star Courier*, these were entered into for the benefit of Three Counties' members.⁵⁰² As such, the CMA has concluded that Three Counties was simply used by its members as a vehicle to facilitate the contractual arrangements on behalf of each of its members. The CMA has therefore found that, for the purposes of the Chapter I prohibition, the relevant parties to the agreements or concerted practices (as described at 5.58 below) are certain of Three Counties' members, including Waterfords and Hamptons International, and TMS.

5.57.4 On 12 August 2005, Waterfords informed the *Star Courier* that Three Counties' T&CM prohibited its members from advertising their fees in the *Star Courier*.⁵⁰³ This was acknowledged by the *Star Courier*.⁵⁰⁴

5.57.5 From time to time between November 2005 and March 2006, Waterfords requested the *Star Courier* to charge the higher, 'non-association' rate for advertising in instances where member agents advertised their fees in breach of Rule 21.⁵⁰⁵ There is some evidence that the *Star Courier* provided such support as requested.⁵⁰⁶

5.57.6 From March 2006 to July 2007, Waterfords further repeatedly requested the *Star Courier* to either charge the higher, 'non-association' rate for advertising, or to block the publication of any advertisement by Three Counties' members that advertised their fees.⁵⁰⁷

5.57.7 In July 2007, [the previous owner of the *Star Courier*], the owner of the *Star Courier* at the time, attended a meeting with certain of Three Counties' members, including Waterfords, which requested the *Star Courier* to prevent any agents from advertising their fees, whether or not members of Three Counties.⁵⁰⁸ However, on 18 September 2007, [the Commercial Director of

⁵⁰¹ See paragraph 4.126 and 4.131. It is not clear whether the agreement to offer reduced advertising rates is still in place for Three Counties' members, notwithstanding that Three Counties has ceased its activities as an association of estate agents.

⁵⁰² See paragraph 4.122.

⁵⁰³ See paragraph 4.89.

⁵⁰⁴ See paragraph 4.90.

⁵⁰⁵ See paragraphs 4.98, 4.101, 4.102, 4.104, 4.105 and 4.107.

⁵⁰⁶ See paragraphs 4.98, 4.101 and 4.102.

⁵⁰⁷ See paragraphs 4.107 and 4.113.

⁵⁰⁸ See paragraph 4.113 to 4.115.

the previous owner of the *Star Courier*] objected to the request, stating that such activity had the potential to breach competition law.⁵⁰⁹

5.57.8 Nonetheless, from time to time between November 2007 and January 2012, the *Star Courier* asked Waterfords to advise it whether the content of certain advertisements – from both members and non-members of Three Counties – would breach the Prohibition on Advertising Fees.⁵¹⁰

5.57.9 The *Star Courier* was sold to TMS on 28 March 2010.⁵¹¹ From January 2012, certain of Three Counties' members, including Waterfords and Hamptons International, significantly increased pressure on relevant TMS employees to prevent any agents from advertising their fees, whether or not members of Three Counties, by rejecting such advertisements for publication in the *Star Courier*.⁵¹² Certain of Three Counties' members, including Waterfords and Hamptons International, threatened to withdraw all of Three Counties' members' advertising business from the *Star Courier*, and to set up a competing property paper, if TMS refused to support it in enforcing the Prohibition on Advertising Fees in relation to Three Counties' members and to extend its application to non-members of Three Counties.⁵¹³

5.57.10 In response to this pressure, from 14 September 2012 (at the latest) to 31 January 2014, TMS acceded to the requests to prevent both members and non-members of Three Counties from advertising their fees in the *Star Courier*.⁵¹⁴ From this date, certain individuals employed by TMS:⁵¹⁵

- (i) Regularly assured certain of Three Counties' members, including Waterfords and Hamptons International, that

⁵⁰⁹ See paragraph 4.116. For the avoidance of doubt, the CMA has not made any finding that the *Star Courier* (or its parent company until 28 March 2010, [the previous ultimate owner of the *Star Courier*]) was, prior to 14 September 2012, a party to an agreement or concerted practice with Three Counties' members for the purposes of the Chapter I prohibition.

⁵¹⁰ See paragraphs 4.121 and 4.127.

⁵¹¹ See paragraph 4.125.

⁵¹² See paragraphs 4.132 and 4.134 to 4.163.

⁵¹³ See paragraphs 4.137, 4.140 and 4.156.

⁵¹⁴ See paragraph 4.133.

⁵¹⁵ For example: [the Commercial Director], TMS Commercial Director (see paragraph 4.147); [an Account Manager], TMS Account Manager (see paragraph 4.158); [the Head of Group Property and Regional Sales Manager], TMS Head of Property Group (see paragraph 4.158); [an Employee] of TMS (see paragraph 4.159); and [the Features and Property Editor], TMS Features and Property Editor (see paragraph 4.148).

- TMS would monitor advertisements submitted by both members and non-members of Three Counties for references to fees⁵¹⁶
 - it would reject advertisements in which agents (whether members or non-members) advertised their fees,⁵¹⁷ and
 - agents (whether members or non-members of Three Counties) would be informed that they would be prevented from advertising their fees.⁵¹⁸
- (ii) Directly informed at least certain agents that they would not be permitted to advertise their fees within their advertisements⁵¹⁹
- (iii) Issued internal instructions to staff in the *Star Courier* advertising team that they should monitor the content of agents' advertisements and reject those that contained fees⁵²⁰
- (iv) Actively monitored advertisements submitted by agents (whether members or non-members of Three Counties) to check they were not advertising their fees,⁵²¹ and

⁵¹⁶ See paragraphs 4.133, 4.135 and 4.138. See, in particular, the emails dated 11 and 12 October 2012 between [the Senior Manager] of Hamptons International and [the Head of Group Property and Regional Sales Manager] in which [the Senior Manager of Hamptons International] requests [the Head of Group Property and Regional Sales Manager] to be 'more diligent' on 'policing' advertisements, to which [the Head of Group Property and Regional Sales Manager] replies '[Senior Manager of Hamptons International], understand and we will be from now on' (CMA Document Reference r_HAMP 9.250; CMA Document Reference r_3C 24.46; CMA Document Reference r_3C 24.47; and CMA Document Reference r_HAMP 9.251).

⁵¹⁷ See paragraphs 4.135 and 4.138. See also paragraph 4.149 (email dated 16 January 2013 from [the Head of Group Property and Regional Sales Manager] to [the Senior Manager] of Hamptons International (CMA Document Reference r_3C 24.57) 'I will be letting [Non Member Agent 5] know anyway that we will not be accepting any wording on beating quotes etc').

⁵¹⁸ See paragraph 4.138 (email dated 26 October 2012 from [the Head of Group Property and Regional Sales Manager] to [the Senior Manager] of Hamptons International) 'Yes we will have the conversations with all advertisers again.' (CMA Document Reference r_3C 24.49). See also paragraphs 4.135, 4.149 and 4.157.

⁵¹⁹ See paragraph 4.157 (email dated 4 February 2013 from [the Head of Group Property and Regional Sales Manager] to [the Senior Manager] of Hamptons International (CMA Document Reference CAS 3.214): 'Agents who wish to run fees or wording associated to unbeatable quotes are being told that we have made a commercial decision not to carry this type of advertising'); paragraph 4.161: 'This is where we had told, I think, one or two agents in the end...that we wouldn't run fees at this moment in time.' (Witness interview with [the Head of Group Property and Regional Sales Manager] dated 7 March 2014, page 61, lines 13-17 (CMA Document Reference r_TM 67.2)).

⁵²⁰ See paragraph 4.158: 'No wording at all now. We can't run any wording at all related to fees' (email dated 11 February 2013 from [the Head of Group Property and Regional Sales Manager] to [an Account Manager] (CMA Document Reference r_TM 27.17)) and paragraph 4.163.

⁵²¹ See paragraph 4.157: 'The original press release that came in had references to fees and other services. They cut the bulk of the editorial sent...Editorial have been vigilant for the last few years on cutting any references to below....On the advertising front [an Account Manager] and [an Employee of TMS] have been checking adverts for any references to fees or quotes. Nothing has ran recently' (email dated 4 February 2013 from [the Head of Group Property and Regional Sales Manager] of TMS to [the Senior Manager] of Hamptons International (CMA Document Reference r_HAMP 9.271); and para 4.159: 'It mentions fees?'; 'I don't think we can use it' (emails dated 23 April 2013 between [an Account Manager] of TMS and [an Employee] of TMS (CMA Document Reference r_TM 27.9)).

- (v) Rejected at least one advertisement submitted by a non-Three Counties member on the grounds it attempted to advertise its fees.⁵²²

- 5.58 On the basis of the above findings of fact, the CMA has therefore found that there was a concurrence of wills constituting an agreement (for the purposes of the Chapter I prohibition) between certain of Three Counties' members, including Waterfords and Hamptons International, on the one hand, and TMS, on the other hand, to prevent agents (whether members or non-members of Three Counties) from advertising their fees⁵²³ in the *Star Courier*.
- 5.59 In the alternative, in light of the findings of fact above, the CMA has found that the arrangements identified above constituted at the very least one or more concerted practices. This consisted of certain of Three Counties' members, including Waterfords and Hamptons International, engaging in direct contact with TMS with the object and potential effect of influencing the conduct of TMS and ultimately members and non-members of Three Counties. This coordination created conditions of competition that did not correspond to the normal conditions of the market, in that it prevented or sought to prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.
- 5.60 It is sufficient for the CMA to conclude that the above coordination constituted either one or more agreements or concerted practices in order to demonstrate TMS' participation in an infringement of the Chapter I prohibition.⁵²⁴
- 5.61 In light of the findings of fact set out above, the CMA has concluded that TMS was a party to the above agreements or concerted practices from 14 September 2012 (at the latest) to 31 January 2014.

Decisions by associations of undertakings

- 5.62 As set out in Annex A, paragraphs A.41 to A.42, any measure that reflects the resolve of an association of undertakings to coordinate the conduct of its members may be characterised as a 'decision' by that association,⁵²⁵ even if that decision is not actually binding on its members⁵²⁶ and even if they do not fully comply with it.⁵²⁷ Accordingly, the constitution or rules of an association

⁵²² See paragraph 4.160 (email dated 23 April 2013 from [an Account Manager] of TMS to [the Managing Director] of [the Complainant] (CMA Document Reference r_[Complainant] 7d): 'We cannot run the advert you have supplied for this weeks [sic] *Star Courier Homes & Property* as we have made a commercial decision across all our property publications to not run any reference to fees and rates'.

⁵²³ As defined in paragraph 1.3.

⁵²⁴ See Annex A, paragraph A.25.

⁵²⁵ See Annex A, paragraph A.41.

⁵²⁶ See Annex A, paragraphs A.41 and A.42.

⁵²⁷ See Annex A, paragraph A.41.

of undertakings may constitute a decision of that association, as may its recommendations or directions to its members.⁵²⁸

- 5.63 In light of the evidence set out at Chapter 4 above, the CMA has found that, during the Relevant Period, Three Counties adopted a decision that prohibited its members from advertising their fees⁵²⁹ in the *Star Courier*. In support of that conclusion, the CMA has made the findings of fact set out below.
- 5.64 The T&CM, as amended from time to time, constituted the rules that governed the relationship between the members of Three Counties.⁵³⁰ Compliance with the T&CM was a mandatory condition of membership of Three Counties from 20 July 2005 (at the latest) to 4 August 2014, when Three Counties informed the Current Members that it had ceased its activities.⁵³¹
- 5.65 The T&CM included, in Rule 21, as amended from time to time, a prohibition on Three Counties' members from advertising their fees in the *Star Courier* (the Rule 21 Prohibition).
- 5.66 The Rule 21 Prohibition took effect from 20 July 2005 (at the latest) and, as amended from time to time, was incorporated into the T&CM from that date and continued to form part of the T&CM throughout the remainder of the Relevant Period.⁵³²
- 5.67 The Rule 21 Prohibition remained part of the T&CM until at least 31 January 2014, when Three Counties confirmed to its members that it had suspended its application and enforcement.⁵³³ In particular, the CMA notes that:
- certain evidence from the years 2008 to 2013 demonstrates that the Rule 21 Prohibition remained part of the T&CM⁵³⁴

⁵²⁸ See Annex A, paragraph A.41.

⁵²⁹ As defined in paragraph 1.3 above.

⁵³⁰ See paragraph 4.20: letter dated 20 July 2005 from [the Managing Director] of Waterfords to [a Director] of [Current Member K] enclosing a copy of the T&CM and noting that, '*as a member you are respectfully asked to adhere to [it]*'. (CMA Document Reference 3C 24.99).

⁵³¹ See paragraphs 4.71 to 4.76.

⁵³² Although the evidence demonstrates that Rule 21 was included in the T&CM from as early as January 2005 and that members may have seen a draft of this (see paragraph 4.20 above), the T&CM were not formally communicated to members until 20 July 2005. On that date, [the Managing Director] of Waterfords wrote to all members to provide them with a copy of the T&CM and advise them that, as members, they would be obliged to comply with the terms contained therein (see paragraphs 4.13 to 4.20 above).

⁵³³ See paragraph 4.166 and letter dated 31 January 2014 from [law firm 1] to committee members (CMA Document Reference r_3C 29.1). The CMA notes Three Counties' contention that Rule 21 was removed from the T&CM following the OFT's investigation in 2008. However, in light of the evidence set out at paragraphs 4.65 4.55 and 4.60 to 4.69 above, the CMA has concluded that this is not the case.

⁵³⁴ See paragraphs 4.60 to 4.69.

- the version of the T&CM submitted to the OFT by [the Complainant] in support of the 2013 Complaint included the Rule 21 Prohibition⁵³⁵
- the version of the T&CM submitted to the OFT by Three Counties on 20 January 2014 (in response to the OFT's request for information under section 26 of the Act) included the Rule 21 Prohibition,⁵³⁶ and
- the all-member communication on 31 January 2014, which confirmed Three Counties would no longer enforce the Rule 21 Prohibition, itself implies that it had been in force up to that date.⁵³⁷

5.68 The purpose and practical impact of the Rule 21 Prohibition, particularly in combination with other sections of the T&CM such as Rule 27,⁵³⁸ was to limit the commercial freedom of Three Counties' members to decide whether to advertise their fees in the *Star Courier*. In particular, the CMA has concluded that:

- Compliance with the T&CM in general, and with the Rule 21 Prohibition specifically, was a condition for membership of Three Counties⁵³⁹
- Members of Three Counties were aware, or reasonably should have been aware, of the existence of the Rule 21 Prohibition, and⁵⁴⁰
- The majority of Three Counties' members abided by the Rule 21 Prohibition, and at least certain members modified their conduct (to remove references to fees from their advertisements) under threat of disciplinary action.⁵⁴¹

5.69 On the basis of these findings of fact, the CMA has found that including the Rule 21 Prohibition in Three Counties' T&CM, along with its subsequent amendments, constituted a decision by an association of undertakings, for the purposes of the Chapter I prohibition, to prohibit Three Counties' members from advertising their fees in the *Star Courier*.

⁵³⁵ T&CM undated, provided by [the Managing Director] of [the Complainant] on 14 January 2013 (CMA Document Reference [Complainant] 1.1).

⁵³⁶ T&CM undated, provided by Three Counties on 20 January 2014 (CMA Document Reference 3C 24.151).

⁵³⁷ Letter dated 31 January 2014 from [law firm 1] to Committee members (CMA Document Reference r_3C 29.1).

⁵³⁸ Rule 27 of the T&CM empowers the Committee to cancel, withdraw, expel or suspend a member's membership of Three Counties for failure to abide by the T&CM in general and Rule 21 in particular (see paragraph 4.74 above).

⁵³⁹ See paragraphs 4.71 to 4.76.

⁵⁴⁰ See paragraphs 4.77 to 4.78.

⁵⁴¹ See paragraphs 4.25, 4.27, 4.79, 4.86 and 4.88.

Single continuous infringement

- 5.70 As set out at paragraph 5.11 above, an infringement of the Chapter I prohibition need not be based on a single, isolated act, but may operate through a pattern of conduct involving a series of agreements, concerted practices or decisions by associations of undertakings entered into over a period of time. Such an infringement may be viewed as a single and continuous infringement where the practices at issue are interlinked in terms of pursuing a common anti-competitive objective.⁵⁴²
- 5.71 In light of the CMA's findings above, the CMA has concluded that the agreements, concerted practices and decision by an association of undertakings identified above pursued a common objective, which was to prevent both members and non-members of Three Counties from advertising their fees in the *Star Courier*. Further, each of the Parties intended to contribute through its own conduct to that common objective, and was aware of the offending conduct planned or put into effect by the other participants in pursuit of that objective, or could reasonably have foreseen it and was prepared to take the risk that it would occur.
- 5.72 The CMA has therefore found that the arrangements described above constitute a single and continuous infringement. In the alternative, the CMA has also found that the arrangements described above amounted to a series of individual agreements, concerted practices, and a decision by an association of undertakings, for the purposes of the Chapter I prohibition.

D. Object or effect of preventing, restricting or distorting competition

- 5.73 The CMA has found that each of the agreements, concerted practices and decision by an association of undertakings described in Chapter 5, Section C above (for ease of presentation together referred to as the Arrangements for the remainder of this Section) had the object of preventing, restricting or distorting competition in the market(s) for residential sales and lettings services in the UK or a part of the UK.
- 5.74 In light of the evidence set out at Chapter 4 above, even if the Arrangements did not have as their object the restriction of competition, the CMA has also found that the Arrangements had the potential effect of preventing, restricting or distorting competition in the market(s) for residential sales and lettings services in the UK or a part of the UK.

⁵⁴² See Annex A, paragraphs A.27 and A.43 to A.49.

Object of preventing, restricting or distorting competition

Key legal principles

5.75 In conducting this assessment, the CMA has applied Annex A and has had particular regard to the following legal principles:

- Object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition⁵⁴³
- The ‘object’ of the coordination (or collusive behaviour) is to be identified primarily from an examination of objective factors, such as the content of its provisions, its objectives and the legal and economic context⁵⁴⁴
- When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.⁵⁴⁵ Where appropriate, the way in which the coordination (or collusive behaviour) is implemented may be taken into account⁵⁴⁶
- Anti-competitive subjective intentions on the part of the parties can also be taken into account in the assessment, but they are not a necessary factor for a finding that there is an anti-competitive restrictive object⁵⁴⁷
- The fact that the coordination (or collusive behaviour) pursues other legitimate objectives does not preclude it from being regarded as having a restrictive object, and⁵⁴⁸
- Both horizontal and vertical agreements may have as their object the restriction of competition.⁵⁴⁹

Findings

Summary

5.76 As set out in Chapter 5, Section C above, the CMA’s finding is that each of the Parties entered into Arrangements to deter or prevent agents (whether or not members of Three Counties) from advertising their fees in the *Star Courier*. In

⁵⁴³ See Annex A, paragraph A.52.

⁵⁴⁴ See Annex A, paragraph A.53.

⁵⁴⁵ See Annex A, paragraph A.53.

⁵⁴⁶ See Annex A, paragraph A.53.

⁵⁴⁷ See Annex A, paragraph A.54.

⁵⁴⁸ See Annex A, paragraph A.56.

⁵⁴⁹ See Annex A, paragraph A.60.

relation to each Party, references in the remainder of this Section of the Decision to 'Arrangements' is to be construed as a reference to the Arrangements as applicable to that Party (for example, in relation to Three Counties, it refers to the matters that comprise the decision by an association of undertakings).

- 5.77 In light of their content and objectives, and when viewed in the legal and economic context in which they operated, the CMA has found that the object of these Arrangements was to restrict competition – the Arrangements were, by their very nature, harmful to the proper functioning of normal competition.
- 5.78 This is further supported by evidence as to the subjective intentions of the Parties when entering into the Arrangements and the way in which the Arrangements were implemented by the Parties.

Content of the arrangements

- 5.79 As set out at paragraphs 5.13 to 5.16 above, the Infringement consisted of Arrangements to prevent agents from advertising their fees in the *Star Courier*. As set out at paragraphs 5.62 to 5.69 above, Rule 21 of Three Counties' T&CM⁵⁵⁰ and Rule 6(d) of the Committee Rules (as originally drafted and amended in July 2005) expressly prohibited Three Counties' members from advertising their fees in the *Star Courier*. In particular:⁵⁵¹

- 5.79.1 The first iteration of Three Counties' T&CM contained an express prohibition on Three Counties' members from advertising their '*sales commission rates whether directly or indirectly*' in the *Star Courier*.⁵⁵² Although the precise wording of Rule 21 was amended from time to time,⁵⁵³ its essence remained that it prohibited Three Counties' members from advertising their fees (as defined in paragraph 1.3 above) in the *Star Courier*
- 5.79.2 Rule 6(d) of the Committee Rules, as amended, obliged the Committee to '*monitor and ensure that Members do not advertise any sales commission rates whether directly or indirectly in the Property Paper and shall make decisions on whether or not an advert should be permitted which in any way contains or refers to a promotion, reduction, fee, special offer or discount*', and⁵⁵⁴

⁵⁵⁰ As originally drafted in November 2004 and amended in January 2005, February 2006, and April 2006. See Annex F.

⁵⁵¹ See Annex F.

⁵⁵² See paragraph 4.13.

⁵⁵³ See paragraph 4.10 and Annex F.

⁵⁵⁴ See paragraph 4.19.

5.79.3 In addition, Rule 27(xii) of Three Counties' T&CM empowered Three Counties to '*cancel, withdraw, expel or suspend*' any member that advertised its fees in breach of Rule 21 of the T&CM.

5.80 As set out at Chapter 4, section D above, the scope of the Arrangements was significantly extended when TMS agreed or concerted with certain of Three Counties members, including Waterfords and Hamptons International, to prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.

5.81 The CMA has therefore concluded that the content of the Arrangements was to prohibit members and, as subsequently extended, any agents, from advertising their fees in the *Star Courier*, whether or not members of Three Counties.

Objectives of the Arrangements

Reducing price competition from actual competitors

5.82 As set out at Annex C, sections B and C, the CMA has concluded that agents advertising their fees⁵⁵⁵ increases the transparency of prices available in the market(s) for residential sales and lettings services. In turn, this increases potential vendors' or lessors' awareness of the various offerings available in the market, and the extent to which lower cost options or different fee structures might be available. A greater understanding of the available options, combined with greater transparency of the range of fees in the market, creates downward pressure on the Market Price, as it is easier for prospective customers to compare quotations⁵⁵⁶ and to negotiate on price.⁵⁵⁷

5.83 As noted at paragraph 5.79.1 above, the Arrangements expressly prohibited agents from advertising their fees. It is clear from this alone that the main objective of the Arrangements was to prevent agents from advertising their fees in the *Star Courier*, and thus to reduce price competition between them and reduce downward pressure on the Market Price.

5.84 That the objective of the Arrangements was to prevent agents from advertising their fees in practice is supported by the fact that Rule 21 was

⁵⁵⁵ As defined at paragraph 1.3 above.

⁵⁵⁶ In the Commission's decision on *EPI code of conduct*, it found a comparative advertising prohibition issued by the Institute of Professional Representatives ('IPR') before the European Patent Office limited the commercial freedom of members and had the object or effect of restricting competition between members of the profession. The Commission noted in its decision that '*Providing information on the services on offer, [...], and comparative advertising, [...], are means of increasing user information to the benefit of users and are important elements of the competitive process.*' Commission Decision IV/36.147 *EPI code of conduct*, at paragraph 41.

⁵⁵⁷ See Annex C, paragraph C.56, in particular footnote 969.

viewed as a compulsory condition of membership by the Committee⁵⁵⁸ and that, from time to time, the Committee reminded the members of this fact.⁵⁵⁹

- 5.85 In addition, the evidence demonstrates that Rule 21 was actively enforced by the Committee under Rule 27 of the T&CM.⁵⁶⁰ It did so with particular frequency when Three Counties was first established, regularly threatening members with expulsion if they repeatedly breached Rule 21.⁵⁶¹ In one instance, the Committee held a formal disciplinary hearing to consider expulsion of a member.⁵⁶²
- 5.86 Contemporaneous discussions concerning Rule 21 also demonstrate that its main objective was to reduce price competition and reduce downward pressure on the Market Price. For example, when Three Counties was first formed, in January 2005 the Committee discussed whether or not the Prohibition on Advertising Fees should be included in Three Counties' T&CM.⁵⁶³ The evidence demonstrates that the aim for including Rule 21 in the T&CM was to prevent agents advertising low prices, with [the Managing Director] of [Former Member 26] noting to the Committee that '*I will not support any one advertising cheap fees*'.⁵⁶⁴ The minutes from the Committee meeting on 12 January 2005 record that the Committee considered this position and were in '*general agreement with [Managing Director of Former Member 26]'s views on agents offering special offers reducing their standard fees...*'.⁵⁶⁵
- 5.87 The CMA infers that the reason for this was to reduce price transparency between 'traditional' agents' fees, and therefore make it harder for vendors and lessors easily to compare the various offerings available from agents and to determine which agents offer the best price for the service offered.⁵⁶⁶ In turn, this would reduce the downward pressure on 'traditional' agents' fees from those in direct competition with them. This is demonstrated by the rationale for the Committee's decision on 12 January 2005 that agents operating without a high street presence would (at that time) be exempted from the application of Rule 21, as those agents '*operate a somewhat different*

⁵⁵⁸ See paragraphs 4.72 to 4.74 and 4.76.

⁵⁵⁹ See paragraphs 4.77 to 4.78.

⁵⁶⁰ See Chapter 4, section D.

⁵⁶¹ See, for example, letter dated 15 November 2005 from [the Managing Director] of Castles (on Three Counties letterhead) to [a Director] of [Former Member 27] (CMA Document Reference CAS 3.221). See also footnotes 240, 282 and 283.

⁵⁶² See paragraph 4.92.

⁵⁶³ See paragraphs 4.15 to 4.17.

⁵⁶⁴ Email dated 6 January 2006 from [the Managing Director] of [Former Member 26] to Committee members (CMA Document Reference 3C 24.92).

⁵⁶⁵ Minutes of meeting dated 12 January 2005 (attached to email dated 21 January 2005 from [the Personal Assistant to the Managing Director of Waterfords] to Committee members) (CMA Document Reference r_CAS 3.132).

⁵⁶⁶ See Annex C, paragraphs C.51 and C.52.

business to the rest of us and are therefore not seen as direct competition to the general marketplace'.⁵⁶⁷

- 5.88 Between 2005 and 2006 the Committee made various amendments to the wording of Rule 21.⁵⁶⁸ The CMA notes that each amendment served to expand the scope of the Prohibition on Advertising Fees and close any 'loopholes' in its application (such as making it clear that it applied to commission rates for both sales and lettings).⁵⁶⁹ It is clear that the objective for doing so was to further reduce opportunities for members to advertise their fees, and consequently, to avoid or reduce price competition between agents in the Three Counties Area and so reduce downward pressure on the Market Price. For example, on 7 November 2005 the Committee made the following comments:

5.88.1 [An Employee] ([Current Member C]): *'Wouldn't it be easier to make the rule no reference to fees or charges? I think these guys will just take the route that "we are cheaper than the rest" which will encourage undercutting even more than putting their low fees in',⁵⁷⁰* and

5.88.2 [The Managing Director] (Waterfords): *"we won't be beaten" published is as damaging to the other members/industry as quoting a ridiculously low %'.⁵⁷¹*

- 5.89 Further, the CMA has concluded that the evidence demonstrates that Three Counties' members considered that advertising low fees would attract customers, which would therefore force other agents to match their offering. For example, on 16 October 2007, a Three Counties member ([Former Member 16] complained that an advertisement publicising 'no set up fees' for its lettings service *'appears to contravene the Associations [sic] rules and gives an unfair advantage'.⁵⁷²* In addition, an email sent 1 November 2013 from [a Director] of [Current Member J] noted *'...I guess if all letting agents advertise Tenants [sic] fees, another war begins on who will be the cheapest'.⁵⁷³* The CMA has concluded that these examples demonstrate that

⁵⁶⁷ Minutes of meeting dated 12 January 2005 (attached to email dated 21 January 2005 from [the Personal Assistant to the Managing Director of Waterfords] to Committee members) (CMA Document Reference r_CAS 3.132).

⁵⁶⁸ See paragraphs 4.21 to 4.42.

⁵⁶⁹ See paragraphs 4.21 to 4.37.

⁵⁷⁰ Email dated 7 November 2005 from [an Employee] of [Current Member C] to [the Managing Director] of Castles (CMA Document Reference CAS 3.27).

⁵⁷¹ Email dated 7 November 2005 from [the Managing Director] of Waterfords to Committee members (CMA Document Reference CAS 3.25).

⁵⁷² Email dated 16 October 2007 from [the Managing Director] of [Former Member 16] to [the Personal Assistant] to the Managing Director of Waterfords] (CMA Document Reference r_CAS 3.287).

⁵⁷³ Email dated 1 November 2013 from [a Director] of [Current Member J] to [the Managing Director] of Waterfords (CMA Document Reference r_[Current Member J] 14).

the purpose of preventing such advertising was to reduce transparency of fees and thus avoid such pressure on the Market Price.

Restricting price competition from potential competitors

- 5.90 The CMA has concluded that the Arrangements also restricted price competition from potential competitors such as new entrants or new business models (including online agents, which although a relatively weak constraint now have the potential to grow in the future). As set out at Annex C, the ability to advertise fees is likely to be particularly important for new competitors in the market(s) for residential sales or letting. For example, a new agent may decide to offer discounted fees or a new or innovative fee structure to entice customers away from 'established' agents.
- 5.91 As noted at paragraphs 5.13 to 5.16 above, the Arrangements purported to prevent non-member agents from advertising their fees, as well as Three Counties' members. The evidence set out at Chapter 4, section D above⁵⁷⁴ demonstrates that the main objective of this element of the coordination (or collusive behaviour) was to remove any remaining opportunities for Three Counties' members and, subsequently, any agents from advertising their fees in the *Star Courier*. This would prevent price competition (through advertisements in the *Star Courier*) from such non-members, which was likely to include new agents or 'non-traditional' business models, both of which are more likely to focus upon fees to differentiate their services from 'traditional' agents.⁵⁷⁵
- 5.92 For example, between October and November 2012, [the Senior Manager] of Hamptons International repeatedly contacted [the Head of Group Property and Regional Sales Manager] of TMS to complain about advertisements by an online estate agency advertising their fees, making the following comments:
- 5.92.1 12 October 2012: *'Estate Agents advertising cheap fees has a direct effect on our fee levels and naturally threatens our profit margins...'*⁵⁷⁶
- 5.92.2 25 October 2012: *'[Non Member Agent 5] advertisement] promotes half price fees...this form of advertising...cheapens and*

⁵⁷⁴ In particular, see paragraphs 4.113, 4.120, 4.121, 4.123, 4.132 to 4.136, 4.140, 4.156 and 4.164.

⁵⁷⁵ See Annex C, paragraphs C.58 to C.65.

⁵⁷⁶ Email dated 12 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_3C 24.47).

compromises our industry and has a direct effect on our revenue',⁵⁷⁷ and

5.92.3 15 November 2012: *'I accepted your comment last week that the wording "Traditional Agency Service – Without the 'traditional' fees was not a direct reference to fees BUT "Show us a written quote from another local agent and we will guarantee to beat it IS. "Fee Wars" and discounts directly effects [sic] all Estate Agents [sic] revenue...' (emphasis as in the original).*⁵⁷⁸

5.93 In light of the above, the CMA has concluded that the objective of the Arrangements was to prevent Three Counties' members and, as subsequently extended, any agents, from advertising their fees in the *Star Courier*. The objective was therefore to deny them the opportunity to use an important local media channel, in the process of competing with each other, to communicate their fees to potential vendors or lessors, and thus to reduce price competition between them and reduce downward pressure on the Market Price.

Context of the Infringement

5.94 In reaching its findings that the Arrangements had the object of restricting competition, the CMA has had regard to the actual context in which the Arrangements operated, including the services affected by them, the conditions of the functioning and structure of the market, and the relevant legal and economic context. The context that the CMA has taken into account is set out in detail at Annex C, section B, but for ease of reference the principal points are summarised below.

Affected services and functioning and structure of the market(s)

5.95 The members of Three Counties are all agencies active in the supply of residential sales and lettings services.⁵⁷⁹ Such agents offer a range of services related to selling or letting a property, including home valuations, marketing of the property, arranging and conducting viewings, and acting as an intermediary between the purchaser and vendor or tenant and lessor.⁵⁸⁰

⁵⁷⁷ Email dated 25 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_HAMP 9.255).

⁵⁷⁸ Email dated 15 November 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_HAMP 9.259).

⁵⁷⁹ See Annex D.

⁵⁸⁰ See Annex C, paragraph C.33.

Agents typically charge vendors or lessors a fixed commission for their services based on the sales or rental value of the property.⁵⁸¹

- 5.96 The market(s) for residential sales and lettings services operate on a very local level (usually within five miles of an agent's branch) and both are very fragmented with most agents being small firms, although there are a number of large national or international corporate players.⁵⁸²
- 5.97 Within the Three Counties Area, a high proportion of local agents are (or were) members of Three Counties. Particularly at its formation, the CMA understands that up to 95% of local agents were members of Three Counties.⁵⁸³ More recently, evidence suggests that Three Counties' members accounted for the vast majority of agents that advertised in the *Star Courier*.⁵⁸⁴

Legal and economic context

- 5.98 The market(s) for residential sales and lettings services are two sided markets⁵⁸⁵ with the estate agent acting as the intermediary between the vendors/lessors and the purchasers/tenants on each side of the market. An agent needs to attract a sufficient number of vendors' or lessors' instructions in order to be attractive to potential purchasers or tenants.⁵⁸⁶ Similarly, agents need to attract sufficient purchasers or tenants in order to be attractive to vendors or lessors. In this situation, marketing and advertising are important elements of competition, as establishing a brand and reputation is crucial for winning new instructions.⁵⁸⁷ Given the very local nature of competition in these markets, advertising to the local market is important for reaching potential customers.⁵⁸⁸ The CMA understands that the *Star Courier* is the only local paper that is delivered free and directly to homes in the Three Counties Area. It has a dedicated property supplement and, given its wide circulation

⁵⁸¹ *Home buying and selling* (OFT1186, February 2010), paragraphs 4.31.

⁵⁸² See Annex C, paragraph C.35.

⁵⁸³ Witness interview with [the Managing Director] of Waterfords dated 5 March 2014, page 28, lines 10-12 (CMA Document Reference r_3C 47.1).

⁵⁸⁴ In her witness interview, [the Head of Group Property and Regional Sales Manager] of TMS said she thought only three or four local agents were not members of Three Counties. (Witness interview with [the Head of Group Property and Regional Sales Manager] dated 7 March 2014, page 32, lines 6-7 (CMA Document Reference r_TM 67.2)). In an email to [the Head of Group Property and Regional Sales Manager] of TMS [Senior Manager] of Hamptons International noted on behalf of Three Counties that where non-members' advertisements were concerned, '*your policing for your majority and regular advertisers would be appreciated.*' Email dated 11 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_3C 24.43).

⁵⁸⁵ A two-sided market is characterised 'by a platform serving (at least) two groups of customers, such that the participation of at least one of these groups raises the value of participation for the other(s) (see *Home buying and selling* (OFT1186, February 2010), paragraph 3.18).

⁵⁸⁶ *Home buying and selling* (OFT1186, February 2010), paragraph 4.16.

⁵⁸⁷ Annex C, paragraph C.34.

⁵⁸⁸ Annex C, paragraph C.35.

and readership within the Three Counties Area, is an important way to reach a wide audience and potential customers.⁵⁸⁹

- 5.99 Previous research suggests that price competition is weak in the market(s) for residential sales and lettings services, due to a variety of factors including the established pricing structure, a widespread use of pricing points, potentially misleading pricing practices, information asymmetries and a lack of innovation or penetration by alternative business models.⁵⁹⁰ Advertising of fees is likely to be a driver of competition because it provides information to customers that is not otherwise easily available.⁵⁹¹

Subjective intent

- 5.100 As set out above in paragraph 5.75 above, whilst the CMA is not required to demonstrate the Parties' subjective intentions when entering into the Arrangements, it may nonetheless take them into account when considering the object of those Arrangements.
- 5.101 The CMA has concluded that the evidence supports its conclusion that the objectives of the Arrangements, as applicable to both members and non-members of Three Counties, was to reduce price competition from actual or potential competitors in the market(s) for residential sales and lettings services in the Three Counties Area. Whilst some of the relevant evidence is already set out in Chapter 4 above, for ease of reference it is repeated in this section where appropriate.

Reducing price competition from actual or potential competitors

- 5.102 Whilst the evidence demonstrates that the overall purpose of establishing Three Counties was to reduce the cost of advertising in the *Star Courier*, the CMA has concluded that it also demonstrates that at least one of the aims pursued by the Parties in prohibiting agents from advertising their fees in the *Star Courier* was to reduce price competition between Three Counties' members (and subsequently also non-members) and thus to reduce downward pressure on the Market Price.
- 5.103 For example, from the evidence set out at paragraphs 4.16 to 4.17 above, it is clear that the key purpose of including Rule 21 in the T&CM was to reduce downward pressure on fees.⁵⁹² The Advertising Waiver was permitted for

⁵⁸⁹ Annex C, paragraph C.36.

⁵⁹⁰ Annex C, paragraph C.42.

⁵⁹¹ See Annex C, paragraph C.43.

⁵⁹² See also additional comments in email dated 6 January 2005 from [the Managing Director] of [Former Member 26] (CMA Document Reference 3C 24.92), who notes: 'Since 1986, I have seen the cost of wages, advertising, rent, copiers, cars, phones etc all go up many times and yet, Agents [sic] fees do not stay the same,

certain members that as they *'operate a somewhat different business to the rest of us and are therefore not seen as direct competition to the general marketplace, [they] could advertise their standard rate'*.⁵⁹³ In other words, price transparency was less of a concern as fees charged by agents that were not in direct competition with the members of Three Counties would not be compared directly by consumers with the members of Three Counties and, for example, used as a basis for negotiating fee reductions.

5.104 As set out in paragraphs 4.24 to 4.37 above, in 2006 the Committee extended the wording of Rule 21 of the T&CM to apply to all members. The CMA has concluded that it is clear from the discussions around this amendment to the T&CM that the reason for preventing any agent from advertising their fees was to prevent or reduce price competition. For example, [an Employee] of [Current Member C] asked: *'Wouldn't it be easier to make the rule no reference to fees or charges? I think these guys will just take the route - "we are cheaper than the rest" which will encourage undercutting even more than putting their low fees in!'*.⁵⁹⁴ [The Managing Director] of Waterfords agreed, noting *'[an Employee of Former Member 22] has to accept the fact 'we won't be beaten' published is as damaging to the other members/industry as quoting a ridiculously low %'*.⁵⁹⁵

5.105 As described in Chapter 4, section D above, in 2007 and again in 2012 certain of Three Counties' members, including Waterfords and Hamptons International, put pressure on the *Star Courier* to extend the Prohibition on Advertising Fees to non-members of Three Counties. The CMA has concluded that it is clear from contemporaneous evidence, particularly in 2012, that the subjective intention of extending the application of the Prohibition on Advertising Fees to non-members was to protect agents' revenues by reducing price competition and thus to reduce downward pressure on the Market Price:

*'Estate Agents advertising cheap fees has a direct effect on our fee levels and naturally threatens our profit margins...'*⁵⁹⁶

5.106 During the CMA's investigation, Waterfords and Hamptons International submitted that the purpose of forming Three Counties, agreeing the

but actually go down! To put it bluntly, we as a group must be bloody mad to work for less than what we worked for over 20 years ago...I've built my business, by getting a decent fee, even 1.5% in my view is too cheap...I will not support any one advertising cheap fees...I believe in a fair fee for a fair job – 1% kills Estate Agents...What do you plan to do for 2005?'

⁵⁹³ Minutes of meeting held on 12 January 2005 (CMA Document Reference r_CAS 3.132).

⁵⁹⁴ Email dated 7 November 2005 (CMA Document Reference CAS 3.27).

⁵⁹⁵ Email dated 7 November 2005 (CMA Document Reference CAS 3.25). See remainder of paragraph 4.33 for further examples.

⁵⁹⁶ Email dated 12 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_3C 24.47). See also the similar

Prohibition on Advertising Fees and including Rule 21 in the T&CM was to raise the quality of the *Star Courier*.⁵⁹⁷ [The Managing Director] of Waterfords noted in interview that *'[t]he feeling was that if we started allowing agents to start putting in 'offer of the week' or, you know, essentially, the fees and that sort of thing, it would cheapen the image of the publication'*.⁵⁹⁸ [The Senior Manager] of Hamptons International submitted that the benefit of Rule 21 was obtaining *'a good quality publication not full of stickers, banners and advertising DFS style – just the best quality publication you can have'*.⁵⁹⁹

5.107 In light of these submissions, the CMA has considered whether the true purpose of including Rule 21 in the T&CM was to raise the quality (whether relating to physical characteristics or its perceived 'image') of the *Star Courier*.

5.108 On the one hand, the evidence demonstrates that part of the original negotiations between Three Counties' members and the *Star Courier* concerned improving the 'quality' of the publication, in terms of its physical characteristics, such as paper quality, clarity of print or colour definition, or its distribution footprint.⁶⁰⁰ However, the CMA has concluded that this evidence

examples in paragraphs 4.136, 4.140, 4.156, in particular documents CMA Document Reference r_HAMP 9.255, CMA Document Reference r_HAMP 9.259 and CMA Document Reference r_HAMP 9.268. See also email dated 1 November 2013 from [a Director] of [Current Member J] (CMA Document Reference r_[Current Member J] 14) where she states: *'...I guess if all letting agents advertise Tenants [sic] fees, another war begins on who will be the cheapest.'*

⁵⁹⁷ Letter dated 25 August 2014 from [law firm 1] to CMA (CMA Document Reference r_3C 77.1). For the avoidance of doubt, the CMA does not understand this submission to have been an attempt to demonstrate that the Prohibition on Advertising Fees or the Rule 21 Prohibition could benefit from an individual exemption under section 9 of the Act; nor does the CMA consider that this would be a legitimate argument for such exemption for (at least) the reasons set out in paragraphs 5.109 and 5.110 below.

⁵⁹⁸ Witness interview with [the Managing Director] of Waterfords dated 5 March 2014, page 43, lines 21-25 (CMA Document Reference r_3C 47.1).

⁵⁹⁹ Witness interview with [the Senior Manager] of Hamptons International dated 14 March 2014, page 15, lines 19-22 (CMA Document Reference r_3C 84.2).

⁶⁰⁰ For example, when Three Counties was first established, it held discussions with a number of publishers around producing an independent property paper. One of the specifications was to obtain *'better quality than the current publication'* (see minutes of Three Counties all member meeting dated 2 March 2005 (CMA Document Reference r_CAS 3.101) and letter dated 26 January 2005 from the Managing Director of Waterfords to all Three Counties' members (CMA Document Reference r_CAS 3.126)), and a draft letter to [the previous owner of the *Star Courier*] offering them the opportunity to pitch for Three Counties' members' advertising business noted that it would have to produce *'A quality publication to be produced weekly to a higher standard than the current Courier Property Paper'* (draft letter dated 9 March 2005 from [the Managing Director] of Waterfords to [the previous owner of the *Star Courier*] (CMA Document Reference CAS 3.125)). The initial agreement reached with [the previous owner of the *Star Courier*] confirmed that *'steps would be taken to improve the quality of reproduction in print'* and that it would *'review the grade of paper used and look at any cost implications of moving up'*, along with improving the distribution of the paper (see minutes of meeting held on 8 March 2005 between the Committee and [the previous owner of the *Star Courier*] (CMA Document Reference CAS 3.98)). Finally, in 2007 [the Managing Director] of Waterfords wrote to [the previous owner of the *Star Courier*] noting that *'The Committee would like to see a number of improvements to the paper, but perhaps the main priority would be to improve the quality of print...'* (letter dated 1 October 2007 from [the Managing Director] of Waterfords to [the Commercial Director of the previous owner of the *Star Courier*] (CMA Document Reference [Current Member K] 11.6)). See also witness evidence from the Managing Director of Castles (*'The circulation [of the Star Courier] was a bit patchy. The quality of the print was often a bit...variable'*) (witness interview dated 4 June 2014, page 9, lines 36-37 (CMA Document Reference r_CAS 23.3)) and [the Managing Director] of [Current Member K] (*'we just thought well we want to see a better quality paper...just basically make it look more professional'*) (witness interview dated 6 June 2014, page 14, lines 18-20 (CMA Document Reference r_[Current Member K] 40)).

only demonstrates that the purpose of establishing Three Counties itself was, at least in part, to improve the quality of the *Star Courier*. It does not, on the other hand, offer any explanation as to how or why prohibiting agents from advertising their fees as members of Three Counties would contribute to improving the 'quality' of the publication.

5.109 On the contrary, on the basis of the evidence available to the CMA, there is no discernible link between complaints about agents (whether members or non-members of Three Counties) advertising their fees and the impact this could have on the quality of the *Star Courier*, whether in relation to physical characteristics or its 'image'. In particular, the CMA notes the following:

5.109.1 When the advertising of fees was discussed or raised in contemporaneous documents – either between the members of the Committee or in the context of enforcing Three Counties' T&CM – the issue of the quality of the newspaper was rarely, if ever, mentioned⁶⁰¹

5.109.2 When Three Counties was first established, the Committee interpreted the Prohibition on Advertising Fees, as reflected in Rule 21 of the T&CM to mean that '*If any agent wants to advertise fees in the Courier they can do so but not as a member of the association*'.⁶⁰² This suggests that the intention behind the prohibition was not (at that point) to stop fees appearing at all in the *Star Courier*, but to ensure that if an agent advertised their fees (and obtained a competitive advantage by doing so),⁶⁰³ then they would not also receive the beneficial 'member' rate for advertising⁶⁰⁴

5.109.3 Certain potential breaches of Rule 21, referring to 'special offers', were not enforced by the Committee, on the grounds that they did not relate directly to fees. In light of [the Managing Director] of Waterfords' and [the Senior Manager] of Hamptons International's comments in interview (see paragraph 5.106 above) it is illogical and

⁶⁰¹ Email dated 25 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_HAMP 9.252).

⁶⁰² Email dated 4 November 2005 from [the Managing Director] of [Former Member 1] to Committee (CMA Document Reference CAS 3.26)).

⁶⁰³ See email dated 16 October 2007 from [the Managing Director] of [the Former Member 16] which complains that another Three Counties member advertising '*no set ups [sic] fees*' gives them an '*unfair advantage*' (CMA Document Reference r_CAS 3.287)

⁶⁰⁴ This was confirmed by [the Managing Director] of Waterfords during interview: '*...our view at the time was that, you know, [an Employee of Former Member 22] could not have it both ways, you know, if he wants to join the association, he was joining it because he wanted to get cheaper rates which he benefited from for quite some time; to then get the better rate and also advertise fees, you know, to us, it just wasn't fair. In our hearts we knew that he would not go off and not become a member of the association, pay £1,000 a page, so he could advertise his cheaper rates....*' Witness interview with [the Managing Director] of Waterfords dated 5 March 2014, pages 66 lines 20 -25 and page 67, lines 1-5 (CMA Document Reference r_3C 47.1).

inconsistent to suggest that advertising fees would affect the 'image' of the paper, whilst advertising 'special offers' would not, and⁶⁰⁵

5.109.4 Finally, the *Star Courier* itself did not agree that including fees or references to fees would negatively affect the 'image' of the publication. [The Head of Group Property and Regional Sales Manager] of TMS noted '*I don't think any would cheapen – absolutely not. We're not even bothered about that, as long as it's legal, true and honest*'.⁶⁰⁶

5.110 Finally, the CMA notes that preventing agents from advertising their fees was not a rational way in which to improve the quality of the newspaper. The quality of the newspaper could have been promoted by other more obvious and direct means that would have been less restrictive of competition, such as improving its physical qualities, for instance improving the clarity of print or photographs, or making effective distribution a contractual condition of retaining Three Counties' members' advertising business.

5.111 In light of the above, the CMA has concluded that the objective of the Prohibition on Advertising Fees, as reflected in Rule 21 of the T&CM, was not to increase the quality of the *Star Courier*. Further, if improving the quality of the paper could be said to be a genuine objective at all, it was merely a subsidiary aim, which would not prevent the CMA from reaching a finding that the object of the Arrangements was to prevent, restrict or distort competition.

5.112 Finally, the CMA notes that other evidence supports the conclusion that Three Counties' members discussed ways to protect their revenue by maintaining fee levels at or above the Market Price. For example:

5.112.1 Minutes of a Committee meeting on 22 January 2008 record: '*General push to keep fees up. Less deals, so need to earn more out of them. Most negs [sic] going in low on fees, all encourage a push to maximise each deal. Proven highest fee earners invariably achieve the best conversion rates. Dodgy ground to push members collectively to up fees (cartel)*', and⁶⁰⁷

5.112.2 Minutes of a further Committee meeting on 9 July 2008 note: '*Same issues still exist despite a tougher climate still a lot of agents overpricing & chopping fees, creating a false market on current*

⁶⁰⁵ See email dated 18 May 2006 from [the Managing Director] of Waterfords to [the Managing Director] of Castles (CMA Document Reference r_CAS 3.176).

⁶⁰⁶ Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS on 7 March 2014, page 73, lines 1-4 (CMA Document Reference r_TM 67.2).

⁶⁰⁷ Minutes of meeting dated 22 January 2008 (CMA Document Reference r_CAS 3.274).

values & making it difficult for the decent agents to educate existing vendors when a large % of the market is incorrectly priced, general push to maintain higher fees'.⁶⁰⁸

5.113 Although the CMA has no evidence of members directly fixing fees or explicitly agreeing to collectively push up their own fee levels, the above evidence is nonetheless consistent with the conclusion that the purpose of prohibiting agents from advertising their fees was to prevent, restrict or distort price competition between the agents and to maintain fees at a supra-competitive level.

5.114 In light of the above, the CMA has concluded that the Arrangements had the object of preventing, restricting or distorting competition in the market(s) for residential sales and lettings services in the UK or a part of the UK.

Potential effect of preventing, restricting or distorting competition

5.115 This section sets out the basis for the CMA's finding that the Arrangements had the potential effect of preventing, restricting or distorting competition in the market(s) for residential sales and lettings services.

Key legal principles

5.116 In conducting its assessment, the CMA has applied Annex A and has had particular regard to the following legal principles:

- The assessment of the actual or potential effect of an agreement must be conducted by reference to the counterfactual; that is, the hypothetical position that would pertain in the absence of the agreement containing the restriction of competition.
- The assessment of effect, by reference to the counterfactual, must take into consideration the actual context in which the coordination in question operates, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question, and
- The examination of the conditions of competition is based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and

⁶⁰⁸ Minutes of meeting dated 9 July 2008 (CMA Document Reference r_CAS 3.246).

legal context within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to penetrate the relevant market and compete with the undertakings already established.

Context of the Infringement

5.117 In reaching its findings that the Arrangements had the potential effect of restricting competition, the CMA has had regard to the actual context in which the Arrangements operated, including the services affected by them, the conditions of the functioning and structure of the market, and the relevant legal and economic context. The context that the CMA has taken into account is set out in detail at Annex C, section B, the principal points of which are summarised at paragraphs 5.95 to 5.99 above.

The counterfactual

5.118 The CMA has concluded that the appropriate counterfactual in the present case is how the market would have operated in the absence of the Arrangements (as applied to both members and non-members) and related provisions of the T&CM and Committee Rules.⁶⁰⁹ For the avoidance of doubt, the counterfactual includes all other material elements of the legal and economic context set out at Annex C, Section B, for example with Three Counties being in existence and representing the agents in question for the purpose of collectively negotiating reduced rates for advertising in the *Star Courier*.

5.119 In the absence of the Arrangements (both for members and non-members) agents would have been free to take independent commercial decisions as to whether or not to advertise their fees in the *Star Courier*. The CMA considers that, in the counterfactual, at least certain of Three Counties' members and other, non-member agents, would have, on occasion, advertised their fees in the *Star Courier*. This is supported by the following evidence:

5.119.1 Between 2005 and 2008, certain of Three Counties' members did in fact advertise their fees in the *Star Courier* despite the existence of the Arrangements⁶¹⁰

⁶⁰⁹ For ease of presentation in the remainder of this section, references to the Prohibition on Advertising Fees should be read to include references to related provisions of the T&CM and the Committee Rules.

⁶¹⁰ See, for example, paragraphs 4.88, 4.97, 4.121 and 4.124; and: (i) email dated 18 January 2006 from [the Managing Director] of [Former Member 1] to Committee Members noting [Former member 18] advertisement stating, '£1000 off our standard fees' (CMA Document Reference r_CAS 3.5); (ii) letter dated 3 November 2005 from [the Managing Director] of Waterfords (on Three Counties letterhead) to all Three Counties members addressing [Former Member 27] advertising '0% fees' (CMA Document Reference 3C 24.118); and (iii) email dated 16 October 2007 from [the Managing Director] of [Former Member 16] to [the Personal Assistant to = the

- 5.119.2 Between 2009 and 2012, at least two non-Three Counties members attempted to advertise their fees⁶¹¹
- 5.119.3 During 2012, certain of Three Counties' members and non-member agents advertised their fees in the *Star Courier*, despite the existence of the Arrangements,⁶¹² and
- 5.119.4 Since 31 January 2014, when Three Counties informed its members and the *Star Courier* that it would no longer be enforcing Rule 21 of the T&CM, a number of agents have advertised or made reference to their fees (or other value proposition) in the *Star Courier*.⁶¹³
- 5.120 In addition, the CMA considers that, absent the extension of the Arrangements to non-members (via the agreement or concerted practice with TMS), certain new entrants into the market(s) for residential sales and lettings services in the Three Counties Area would have advertised their fees. This is supported by numerous examples of or correspondence regarding advertisements by non-members of Three Counties between at least November 2011 and 2013, including [Non Member Agent 5], [Former Member 2] and [Complainant], each of which advertised (or attempted to advertise) their fees.⁶¹⁴
- 5.121 Finally, the CMA considers that in the counterfactual there would have been increased price transparency from advertising fees in the *Star Courier*. This would have incentivised agents to match or beat fees or discounts openly offered by their competitors, or to differentiate themselves on quality of service or offering innovative fee structures or business models. That this would have been the likely scenario is demonstrated by the evidence set out at

Managing Director of Waterfords] noting that [Current Member B] were advertising, 'no set ups [sic] fees' (CMA Document Reference r_CAS 3.287).

⁶¹¹ See paragraph 4.127 above and email dated 23 April 2013 from [the Complainant] to OFT (CMA Document Reference r_[Complainant] 6a) attaching example advertisement dated 30 November 2011 stating 'No hidden charges' and specifying applicable fees (CMA Document Reference [Complainant] 7a).

⁶¹² See [Former Member 5] advertisement in the *Star Courier* dated 26 January 2012 (CMA Document Reference CMA 19); [Complainant] advertisement in the *Star Courier* dated [REDACTED] (CMA Document Reference CMA 20); [Non Member Agent 2] advertisement in the *Star Courier* dated 26 April 2012 (CMA Document Reference CMA 9); Waterfords' advertisements in the *Star Courier* dated 12 June 2012 (CMA Document Reference CMA 11), 6 September 2012 (CMA Document Reference CMA 25) and 4 October 2012 (CMA Document Reference CMA 26); [Non Member Agent 11] advertisement in the *Star Courier* dated 5 July 2012 (CMA Document Reference CMA 22); and [Non Member Agent 3] advertisements in the *Star Courier* dated 16 August 2012 (CMA Document Reference CMA 24) and 1 November 2012 (CMA Document Reference CMA 27).

⁶¹³ See, for example, [the Complainant] advertisement in *Star Courier* dated [REDACTED] (CMA Document Reference CMA 29); [Current Member I] editorial in *Star Courier* dated 5 June 2014 (CMA Document Reference CMA 60); [the Complainant] editorial in *Star Courier* dated [REDACTED] 2014 (CMA Document Reference CMA 59); [Former Member 17] advertisement in *Star Courier* dated 7 August 2014 (CMA Document Reference CMA 44); [Non Member Agent 10] advertisement in *Star Courier* dated 11 September 2014 (CMA Document Reference CMA 50); and [Non Member Agent 9] advertisement in *Star Courier* dated 2 October 2014 (CMA Document Reference CMA 56).

⁶¹⁴ See paragraphs 4.127, 4.129, 4.134 and 4.136.

paragraphs 5.88 to 5.89 above, which demonstrates that at least one rationale for preventing the advertising of fees was to prevent ‘fee wars’⁶¹⁵ and ‘undercutting’⁶¹⁶ by other agents in response to such advertisements.

The impact of the Arrangements

5.122 In light of the counterfactual, as described above, and taking into account the context summarised at paragraphs 5.94 to 5.99 above and, more fully, at Annex C, Section B, the CMA considers that the Arrangements would have the following potential negative effects on competition within the market(s) for residential sales and lettings services in the Three Counties Area:

5.122.1 reduced price competition between actual competitors, and

5.122.2 reduced price competition from potential competitors.

Reduced price competition between actual competitors

5.123 The CMA considers that the Arrangements had the potential to restrict competition for the supply of estate and lettings agency services to vendors and lessors between actual competitors when compared to the counterfactual.

5.124 As set out more fully at Annex C, Sections B and C, transparent pricing is an important feature of active price competition.⁶¹⁷ The CMA considers that the existence of the Arrangements meant that vendors and lessors may not have been prompted to look for better deals on fees and commission rates as they would not have known that better deals were available. For this reason, they would have been much more likely to accept the ‘going rate’.

5.125 In addition, in the absence of transparent fees, the CMA considers that it would have been more difficult and time consuming for vendors and lessors to compare the applicable fees or commission rates for selling or letting a property. Vendors and lessors would have been obliged to contact a number of different agents and potentially invite them to their property for a valuation or rental assessment before being given information on fees and commission rates. This would have increased their ‘search costs’ and, in turn, reduced their incentives to ‘shop around’ for the best deal.⁶¹⁸

5.126 The CMA considers that this would have reduced downward pressure on the level of agents’ fees or commission rates and, therefore, would have restricted

⁶¹⁵ See email dated 1 November 2013 from [a Director] of [Current Member J] to [the Managing Director] of Waterfords (CMA Document Reference r_[Current Member J]14).

⁶¹⁶ See email dated 7 November 2005 from [an Employee] of [Current Member C] to [the Managing Director] of Castles (CMA Document Reference CAS 3.27).

⁶¹⁷ Annex C, paragraphs C.50 and C.51.

⁶¹⁸ Annex C, paragraphs C.53 and C.55.

price competition between agents and reduced the downward pressure on the Market Price. This may have diminished incentives on the part of agents to engage in price competition with other agents,⁶¹⁹ potentially ultimately leading to consumers paying higher prices.

Reduced price competition from potential competitors

5.127 The CMA also considers that the Arrangements had the potential to restrict price competition from new entrants.

5.128 As set out at Annex C, paragraphs C.57 to C.64, the ability to advertise fees is an important way for new entrants to the market(s) for residential sales or letting services to attract instructions. The Arrangements therefore potentially made it harder for new entrants to establish a successful presence in the market(s) for residential sales and lettings services in the Three Counties Area. This is supported by information provided as part of the 2013 Complaint, in which [the Complainant] (the Complainant) noted that it had *'in the past used our low rates as a major focus of our advertising and feel that this is a major factor in Landlords selecting an agent'*.⁶²⁰

5.129 The CMA considers that the barriers to entry into the estate or lettings agency market(s) are relatively low.⁶²¹ This allows the threat of new entrants to impose a competitive constraint on existing agents. Increasing barriers to entry for new entrants has the consequence of reducing the threat to existing agents from potential competition by such new entrants. This, in turn, reduces the 'established' players' incentives to compete on price, and reduces the downward pressure on the Market Price. This can potentially be expected to lead to higher fees or commission rates and/or less choice for vendors or lessors.⁶²²

Conclusion

5.130 In light of the above, the CMA has concluded that, when compared to the counterfactual, the Arrangements had the potential effect of preventing, restricting or distorting competition in the market(s) for residential sales and lettings services in the Three Counties Area by:

5.130.1 reducing price competition between actual competitors, and

⁶¹⁹ Annex C, paragraph C.57.

⁶²⁰ Letter dated 14 January 2013 from [the Managing Director] of [the Complainant] to the OFT (CMA Document Reference [Complainant] 1).

⁶²¹ See Annex C, paragraph C.33.

⁶²² See Annex C, paragraphs C.64 to C.65.

5.130.2 reducing price competition from potential competitors.

E. Appreciability

5.131 In line with the legal principles set out at Annex A, paragraphs A.76 to A.80, the CMA has found that the Infringement appreciably prevented, restricted or distorted competition in the market(s) for residential sales and lettings services in the Three Counties Area.

5.132 As set out in Chapter 5, section D above, the CMA has concluded that the object of the Infringement was to prevent, restrict or distort competition. In line with established case law, the CMA has therefore found that the Infringement constitutes by its nature an appreciable restriction of competition in the market(s) for residential sales and lettings services in the Three Counties Area.⁶²³

5.133 In any event, the CMA has found that the Infringement had an appreciable potential effect on competition in the markets for residential sales and lettings services in the Three Counties Area. This conclusion is based on the fact that:

5.133.1 the Infringement constituted, in essence, an horizontal arrangement between competitors, notwithstanding the involvement (at a later stage of the Infringement) of TMS in a supporting and more peripheral role, and

5.133.2 the aggregate market share of Three Counties' members in the market(s) for residential sales and lettings services in the Three Counties Area ranged from 50%-95%, or almost all agents that advertised in the *Star Courier*.⁶²⁴

5.134 As is explained in further detail at paragraph A.78, the CMA has concluded that an agreement between undertakings with an aggregate market share that does not exceed 10% on any of the relevant markets affected by an infringement of the Chapter I prohibition would not appreciably restrict competition. In this case, the market share of the undertakings involved in the Infringement exceeds that 10% threshold.

5.135 In light of the foregoing, the CMA has concluded that the Infringement had more than an insignificant effect on,⁶²⁵ and appreciably prevented, restricted

⁶²³ See Annex A, paragraph A.80.

⁶²⁴ See paragraphs 3.3, 5.97 and Annex C, paragraph C.41.

⁶²⁵ See Annex A, paragraph A.76.

or distorted competition in, the market(s) for residential sales and lettings services in the Three Counties Area.

F. Application of Article 101 TFEU: Effect on trade between EU member states

5.136 As set out in Annex A, at paragraphs A.81 to A.84, Article 101 TFEU will apply where an agreement, concerted practice or decision by an association of undertakings has the potential to affect trade between EU Member States to an appreciable extent.

5.137 The CMA's finding is that in the present case the Infringement identified above was not cross-border in nature and was entered into by a number of estate and lettings agents in respect of their activities within a local market. The CMA has found that the nature of estate and lettings agency services in the Three Counties Area is inherently local, and services offered by members of Three Counties extend to, on average, within approximately five miles of Fleet.⁶²⁶

5.138 In light of the above, the CMA has concluded that the Infringement would not be likely to have had an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such that the CMA has concluded that currently it has no grounds for action under Article 101 TFEU.

G. Effect on trade within the UK

5.139 As set out in Annex A at paragraphs A.85 and A.86, the Chapter I prohibition applies to agreements, concerted practices and decisions by associations of undertakings which '*...may affect trade within the United Kingdom*' or a part of the UK (where they operate or are intended to operate in that part).

5.140 The CMA has found that the services which are the subject of the agreements, concerted practices and decision by an association of undertakings in question are provided within the three English counties of Hampshire, Surrey and Berkshire, in particular within a five mile radius of the town of Fleet (see Annex C, Section A). The CMA's finding is that the 'effect on UK trade' test for the purposes of the Chapter I prohibition is met in this case.

⁶²⁶ See Annex C, paragraphs C.26 to C.28.

H. Exclusion or exemption

Exclusion

5.141 Section 3 of the Act provides that the Chapter I prohibition does not apply to any of the cases in which it is excluded by or as a result of Schedules 1-3 of the Act.

5.142 None of the exclusions provided for by section 3 of the Act applies to the Infringement.

Exemption

5.143 An agreement, concerted practice or decision by an association of undertakings, which restricts competition is exempt from, and does not therefore infringe, the Chapter I prohibition where the efficiencies generated by it outweigh the restriction on competition.⁶²⁷

5.144 The CMA notes that agreements, concerted practices and decisions by an association of undertakings, which have as their object the restriction of competition are very unlikely to benefit from individual exemption.⁶²⁸ It is for the party claiming the benefit of exemption to adduce evidence that substantiates its claim.⁶²⁹ No such evidence has been provided by any of the Parties.

I. Conclusion on the application of the Chapter I prohibition

5.145 On the basis of the evidence set out, or referred to in Chapter 4 above, the CMA has found that each of the Parties (for the duration stated in relation to each Party in Chapter 5, Section C and Annex B) has infringed the Chapter I prohibition by entering into one or more agreements, engaging in concerted practices or adopting a decision that had as their object and potential effect the appreciable prevention, restriction, or distortion of competition in the market(s) for residential sales and lettings services in the Three Counties Area.

5.146 Specifically, the CMA has found that there was a single and continuous infringement to prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.⁶³⁰ In the alternative, the CMA has found that the Infringement is made up of a series of one or more agreements, concerted practices, and a decision by an association of

⁶²⁷ See section 9 of the Act.

⁶²⁸ See Annex A, paragraph A.92.

⁶²⁹ See Annex A, paragraph A.91.

⁶³⁰ See paragraphs 5.70 to 5.72 above.

undertakings, each of which individually constitutes a breach of the Chapter I prohibition:

- 5.146.1 The CMA has found that certain of Three Counties' members, including Waterfords, Castles and Hamptons International,⁶³¹ entered into one or more agreements or concerted practices that:
- they would not advertise their fees in the *Star Courier* (the Prohibition on Advertising Fees), and
 - they would deter or prevent members of Three Counties from advertising their fees in the *Star Courier*.
- 5.146.2 In addition, the CMA has found that certain of Three Counties' members, including Waterfords and Hamptons International, agreed or concerted that, with the cooperation of TMS as the publisher of the *Star Courier*, they would prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.
- 5.146.3 The CMA has also found that TMS, as the publisher of the *Star Courier*, became a party to the agreement or concerted practice with certain of Three Counties' members, including Waterfords and Hamptons International (as described at paragraphs 5.20 and 5.23), to prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.
- 5.146.4 Further, the CMA has found that the subject matter of the Prohibition on Advertising Fees (as set out at paragraphs 5.19.1, 5.21.1 and 5.22.1 above) was reflected by Rule 21 of Three Counties' T&CM; and accordingly, for the purposes of the Chapter I prohibition, Rule 21 constituted a decision by an association of undertakings to prevent its members from advertising their fees in the *Star Courier*.

⁶³¹ As noted at paragraph 5.15 above, the CMA has reasonable grounds for suspecting that other undertakings, including the Current Members, would have participated in this arrangement. However, for reasons of administrative prioritisation, the CMA has not made any finding that such other undertakings thereby committed an infringement of the Chapter I prohibition.

6. THE CMA'S ACTION

- 6.1 Further to the CMA's finding of an infringement of the Chapter I prohibition, as set out at Chapter 5, Section I above (for ease of reference, the Infringement – see paragraph 1.2), this section of the Decision sets out the enforcement action which the CMA is taking and its reasons for taking that action.

A. Directions

- 6.2 Section 32(1) of the Act provides that if the CMA has made a decision that an agreement⁶³² infringes the Chapter I prohibition, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.
- 6.3 The CMA's finding of Infringement in the present case is in respect of various periods of time ending on 31 January 2014. On 31 January 2014, Three Counties sent a letter to its members confirming that it would not be enforcing Rule 21 of its T&CM and would be suspending its activities under that rule. It also confirmed that the arrangement with the *Star Courier* would be terminated.⁶³³ In the particular circumstances of this case, the CMA considers that this action by Three Counties also effectively amounted to termination of the Infringement by its members. In light of this evidence, the CMA considers that it is not necessary in the circumstances of this case to give directions to any of the Parties.

B. Financial Penalties

General points

- 6.4 Section 36(1) of the Act provides that on making a decision that an agreement⁶³⁴ has infringed the Chapter I prohibition, the CMA may require an undertaking which is a party to the agreement to pay a penalty in respect of the infringement. In accordance with section 38(8) of the Act, the CMA must have regard to the guidance on penalties being in force at the time when setting the amount of the penalty (the Penalties Guidance).⁶³⁵
- 6.5 Penalties in respect of the Infringement are imposed on the addressees of the Decision (as set out in paragraph 1.2 above). The undertakings in question

⁶³² Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.

⁶³³ Letter dated 31 January 2014 from [law firm 1] to Hamptons International (CMA Document Reference r_3C 29.1). See also paragraph 4.166 above.

⁶³⁴ Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.

⁶³⁵ The guidance currently in force is the OFT's *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board.

comprise the legal entities that participated in the conduct that is the subject of the Infringement, and parent companies that are held jointly and severally liable for the Infringement, as set out in relation to each Party in Annex B, section C below.

The CMA's margin of appreciation in determining the appropriate penalty

- 6.6 Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act⁶³⁶ and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the 2000 Order),⁶³⁷ and (ii) the CMA has had regard to the Penalties Guidance in accordance with section 38(8) of the Act, the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.⁶³⁸ The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.⁶³⁹ Rather, the CMA makes its assessment on a case-by-case basis⁶⁴⁰ having regard to all relevant circumstances and the objectives of its policy on financial penalties. In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will also have regard to the seriousness of the infringement and the desirability of deterring the undertaking on which the penalty is imposed and others from engaging in behaviour that breaches the prohibition in Chapter I of the Act (as well as other prohibitions under the Act and the TFEU as the case may be).⁶⁴¹

Small agreements

- 6.7 Section 39(3) of the Act provides that a party to a 'small agreement' is immune from the effect of section 36(1) of the Act (that is, penalties) for infringements of the Chapter I prohibition. A 'small agreement' is an agreement between undertakings the combined applicable turnover of which does not exceed £20 million for the business year ending in the calendar year preceding one

⁶³⁶ Section 36(8) is addressed at paragraphs 6.58 and following below.

⁶³⁷ SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

⁶³⁸ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

⁶³⁹ See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 (*Eden Brown*), at [78].

⁶⁴⁰ See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [116] where the CAT noted that '*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*'. See also *Eden Brown* (fn 639), at [97] where the CAT observed that '*[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case*'.

⁶⁴¹ Section 36(7A) of the Act and *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 1.4.

during which the infringement occurred; and which is not a price fixing agreement.⁶⁴²

- 6.8 The combined applicable turnover of the Parties exceeds £20 million. Accordingly, the Parties do not benefit from immunity from financial penalties under section 39(3) of the Act.

Intention/negligence

- 6.9 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently.⁶⁴³ However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.⁶⁴⁴

- 6.10 The CAT has defined the terms ‘intentionally’ and ‘negligently’ as follows:

*‘...an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition’.*⁶⁴⁵

- 6.11 This is consistent with the approach taken by the CJ which has confirmed:

*‘the question whether the infringements were committed intentionally or negligently... is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty’.*⁶⁴⁶

- 6.12 Ignorance or a mistake of law is no bar to a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.⁶⁴⁷

⁶⁴² Section 39(1) of the Act and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI 2000/262), Regulation 3. The term ‘applicable turnover’ means the turnover determined in accordance with the Schedule to the Regulations.

⁶⁴³ Section 36(3) of the Act.

⁶⁴⁴ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 at [453] to [457]; see also Cases 1014 and 1015/1/1/03 *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [221].

⁶⁴⁵ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [221].

⁶⁴⁶ Case 280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, paragraph 124, referring to Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission* [1983] ECR 3369, paragraph 45 and Case 322/81 *Nederlandsche Banden-Industrie Michelin v Commission*, [1983] ECR 3461, paragraph 107.

⁶⁴⁷ See the CJ’s comments in Case C-681/11 *Bundeswettbewerbshörde v Schenker & Co. AG*, judgment of 18 June 2013, paragraph 38: ‘... the fact that the undertaking concerned has characterised wrongly in law its

- 6.13 Despite certain of the Parties' submissions that they acted in the belief that their conduct and Three Counties' T&CM complied with the Act,⁶⁴⁸ in light of the evidence set out at Chapter 4 above, the CMA considers that each of the Parties must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition.⁶⁴⁹
- 6.14 In the alternative, the CMA considers that at the very least each of the Parties ought to have known that its conduct would result in a restriction or distortion of competition.⁶⁵⁰
- 6.15 In conclusion, the CMA has found that each of the Parties committed the Infringement intentionally or negligently.

Single penalty for each Party

- 6.16 The CMA has discretion whether to impose a single penalty or multiple penalties for infringing behaviour that could in principle be characterised as more than one infringement.⁶⁵¹ In the present case, the CMA considers it appropriate to impose a single penalty on each Party in view of its finding (as set out at paragraphs 5.70 and 5.72 above) that the Infringement comprises one or more agreements, concerted practices and a decision by an association of undertakings, which pursued a common objective. The fact that the CMA has also found, in the alternative, that the Infringement is made up of a series of one or more agreements, concerted practices and a decision by an association of undertakings, each of which individually constitutes a breach of the Chapter I prohibition, does not in the CMA's view require it to impose a separate penalty for each such breach in this case.

conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct'; and paragraph 41: 'It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine.' See also *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.10. See also *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, at [456].

⁶⁴⁸ See paragraph 4.56 above.

⁶⁴⁹ The CMA is not obliged to show that an undertaking knew that its conduct infringed the Act: *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, at [456]. However, the CMA notes that concerns that the Parties' conduct could be anti-competitive were, for instance, formally communicated by [previous ultimate owner of the *Star Courier*] to the Committee (the membership of which included Waterfords and Castles, amongst others) in September 2007. Further, Three Counties, and Waterfords and Castles as members of the Committee, were also made aware that such conduct could be anti-competitive through correspondence with the OFT in relation to the 2008 Complaint, and the CMA understands that the Committee, including Waterfords and Castles at that time, sought independent legal advice on this point. Similarly, TMS raised concerns about the Parties' conduct with [the Managing Director] of Waterfords in November 2012 (in his capacity as a member of Three Counties' Committee), which were directly communicated to [the Senior Manager] of Hamptons International (then acting as Chairman of Three Counties).

⁶⁵⁰ See *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, at [457] and *Enforcement* (OFT407, December 2004), adopted by the CMA Board, paragraph 5.12. See also footnote 649 above.

⁶⁵¹ See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [179].

Calculation of penalties

6.17 As noted at paragraph 6.4 above, when setting the amount of the penalty, the CMA must have regard to the guidance on penalties in force at that time. The Penalties Guidance sets out a six-step approach for calculating the penalty.

Step 1 - starting point

6.18 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 relevant turnover of the undertaking.⁶⁵² The 'relevant turnover' is the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.⁶⁵³ The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.⁶⁵⁴ In the present case, the CMA has determined the relevant turnover for each Party as follows:

6.18.1 For each of Waterfords, Castles and Hamptons International, the relevant turnover in respect of the Infringement comprised turnover (sales or rental commission) that (a) was generated by a branch which falls within the *Star Courier's* distribution area and (b) related to a property situated within approximately five miles of Fleet.

6.18.2 Three Counties did not itself have turnover in the relevant market affected by the Infringement. In the circumstances of this case, the CMA has treated Three Counties' relevant turnover as being zero.⁶⁵⁵

6.18.3 In relation to TMS, the CMA obtained a proxy figure for relevant turnover, comprising the *Star Courier's* property advertising revenue from its property supplement, as TMS did not have turnover in the relevant market affected by the Infringement. In the circumstances of this case, the CMA has treated that proxy as the relevant turnover.

⁶⁵² *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraphs 2.3 to 2.6.

⁶⁵³ *Ibid*, paragraph 2.7. 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* [2006] EWCA Civ 1318, at paragraph 169 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' (at paragraphs 170 to 173).

⁶⁵⁴ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.7.

⁶⁵⁵ In future cases, the CMA may take a different approach, for example, by calculating the relevant turnover of a trade association with reference to the aggregate relevant turnover of its members.

- 6.19 In order to reflect adequately the seriousness of an infringement, the CMA will apply a starting point of up to 30% of the undertaking's relevant turnover.⁶⁵⁶ The actual percentage which is applied to the relevant turnover depends, in particular, upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.⁶⁵⁷ When making its assessment of the seriousness of the infringement, the CMA will consider a number of factors, including the nature of the products or services, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties. The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future. The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.⁶⁵⁸
- 6.20 The starting point for each penalty in this case takes into account the fact that the agreements, concerted practices and the decision by an association of undertakings comprise (and in the case of TMS related to) 'horizontal' restrictions (ie restrictions between competitors), which had the object and potential effect of preventing, restricting or distorting competition between competitors. The CMA regards this to be a serious infringement of the Chapter I prohibition. However, it notes that the Infringement does not fall within the category of the most serious infringements of the Chapter I prohibition (such as price-fixing, market-sharing and other cartel activities), which would ordinarily attract a starting point towards the upper end of the 30% range.
- 6.21 The CMA has also considered the following factors in assessing the seriousness of the Infringement:
- *The nature of the product/services:* The relevant product market(s) comprise the market(s) for residential sales and lettings services, with Three Counties' members offering a range of services related to selling or letting a property.⁶⁵⁹ The market(s) for residential sales and lettings services are two-sided markets, meaning that marketing and advertising are important elements of competition, to ensure that both sides of the market(s) (namely vendors/lessors on the one hand and purchasers/tenants on the other hand) are aware of the agent's portfolio of available properties.⁶⁶⁰ In addition, competition in the

⁶⁵⁶ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.5.

⁶⁵⁷ *Ibid*, paragraph 2.4.

⁶⁵⁸ *Ibid*, paragraph 2.6.

⁶⁵⁹ See Annex C, paragraph C.33.

⁶⁶⁰ See Annex C, paragraph C.34.

market(s) for residential sales and lettings services takes place at a very local level, meaning that an agent needs to establish a strong brand in the local area in order to win instructions from potential vendors or lessors.⁶⁶¹

- *The structure of the market and market shares of the undertakings involved:* Membership of Three Counties ranged from around 20 to 40 agents during its existence.⁶⁶² The aggregate market share in the relevant market⁶⁶³ of the members of Three Counties ranged from 50% to 95%, or almost all agents that advertised in the *Star Courier*.⁶⁶⁴ Therefore, the Infringement had a very wide coverage within the relevant market.
- *Entry conditions:* The need to establish a reputation and win business from existing local estate or lettings agents is a key barrier to entry. New entrants may, initially at least, wish to focus on offering better value for money or lower or discounted fees to entice prospective vendors and lessors away from established brands. Therefore, the ability to engage in informative advertising (including as to fees or other value offerings) is likely to be particularly important for new entrants.⁶⁶⁵
- *Impact on competitors and third parties:* As part of the Infringement, the Parties agreed that they would deter or prevent members of Three Counties (including themselves) from advertising their fees in the *Star Courier*. This potentially made it more difficult for existing competitors or new entrants to attract business through advertising lower fees or other value propositions, particularly when the scope of the restriction was extended to non-members of Three Counties.⁶⁶⁶

6.22 The CMA has also taken into account the need to deter other undertakings from engaging in such infringements in the future. In view of the foregoing, and in particular the fact that the Infringement was serious, although not within the category of the most serious infringements of competition law, the CMA has applied a starting point of 17% of relevant turnover for each of the Parties.

Step 2 – adjustment for duration

6.23 The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an

⁶⁶¹ See Annex C, paragraph C.35.

⁶⁶² See Annex C, paragraph C.41.

⁶⁶³ As defined in Annex C, paragraphs C.29 to C.31.

⁶⁶⁴ See paragraph 3.3 and Annex C, paragraph C.41.

⁶⁶⁵ See Annex C, paragraph C.58.

⁶⁶⁶ See paragraphs 4.129 to 4.165 above.

infringement.⁶⁶⁷ 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 circumstances decide to round up the part year to a full year.⁶⁶⁸

- 6.24 Accordingly, the CMA has applied the following multipliers to the figure reached at the end of step 1 to take account of each Party's duration of involvement in the Infringement. Each Party's duration multiplier has been rounded up to the nearest quarter year.

Party	Period of involvement in the Infringement	Duration	Multiplier to step 1 figure
Three Counties	20 July 2005 (at the latest) to 31 January 2014	8 years, 6 months and 12 days	8.75
Waterfords	20 July 2005 (at the latest) to 31 January 2014	8 years, 6 months and 12 days	8.75
Castles	20 July 2005 (at the latest) to 31 January 2014	8 years, 6 months and 12 days	8.75
Hamptons International/ Countrywide	1 January 2008 to 31 January 2014	6 years and 1 month	6.25
TMS/Trinity Mirror	14 September 2012 (at the latest) to 31 January 2014	1 year, 4 months and 18 days	1.5

Step 3 - adjustment for aggravating and mitigating factors

- 6.25 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are mitigating factors.⁶⁶⁹ A non-exhaustive list of aggravating and mitigating

⁶⁶⁷ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.12.

⁶⁶⁸ *Ibid*, paragraph 2.12.

⁶⁶⁹ *Ibid*, paragraph 2.13.

factors is set out in the Penalties Guidance.⁶⁷⁰ In the circumstances of this case, the CMA considered at step 3 the factors set out below.

*Aggravating factors*⁶⁷¹

Involvement of directors or senior management

6.26 The involvement of directors or senior management in an infringement can be an aggravating factor. In the present case, the CMA has applied an increase to the penalty at step 3 for the involvement in the Infringement of the directors and senior management of Three Counties ([the Managing Director of Waterfords], acting as Director of Three Counties), Waterfords ([the Managing Director]) and Castles ([the Managing Director]). For example, each of the above individuals was engaged in one or more of the following activities, with further details set out in relation to each individual at Chapter 4 above:

- Agreeing to, and extending, the scope and application of the Prohibition on Advertising Fees
- Agreeing to include, and/or actively supporting the inclusion of, the Prohibition on Advertising Fees in Rule 21 of Three Counties' T&CM
- Actively participating in Three Counties' Committee meetings, and/or meetings with members of Three Counties
- Encouraging members of Three Counties to comply with the Prohibition on Advertising Fees
- Monitoring compliance by other Three Counties members with the Prohibition on Advertising Fees
- Actively enforcing the Prohibition on Advertising Fees against Three Counties' members.

⁶⁷⁰ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraphs 2.14 and 2.15.

⁶⁷¹ *Ibid*, paragraphs 2.14.

- 6.27 In the circumstances of this case, the CMA considers that an increase of 10% for each of the Parties named in paragraph 6.26 above is appropriate and proportionate.

Role of the undertaking as a leader in, or an instigator of, the infringement

- 6.28 Where an undertaking acts as a leader in, or an instigator of, an infringement, the CMA may treat that as an aggravating factor. The CMA considers that certain of the Parties played a leading role in driving forward the Infringement, as set out below. The CMA considers that the increase in each case is appropriate and proportionate in the particular circumstances of this case and adequately reflects the degree of the role of each Party as a leader in, or an instigator of, the Infringement.

(a) *Waterfords*

- 6.29 The CMA considers that the evidence set out at Chapter 4 above⁶⁷² demonstrates that Waterfords played a leading role in driving forward the Infringement as it was actively involved in all aspects of the Infringement, including driving forward the agreement(s) or concerted practice(s):

6.29.1 not to advertise Three Counties members' fees in the *Star Courier*,

6.29.2 to deter or prevent Three Counties members from advertising their fees in the *Star Courier*, and

6.29.3 to prevent other agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.⁶⁷³

- 6.30 In light of this and in the circumstances of this case, the CMA considers it is appropriate and proportionate to apply an increase of 10% to Waterfords' penalty.

(b) *Castles*

- 6.31 The CMA considers that the evidence set out at Chapter 4 above⁶⁷⁴ demonstrates that Castles played a leading role in driving forward the Infringement. However, the CMA recognises that Castles was only actively

⁶⁷² Including, but not limited to, paragraphs 4.2, 4.15 to 4.20, 4.22 to 4.37, 4.38 to 4.42, 4.61, 4.64 to 4.67, 4.72, 4.78, 4.84, 4.88 to 4.94, 4.97 to 4.98, 4.101, 4.104, 4.105 to 4.108, 4.113 to 4.123, 4.124, 4.132, 4.137, 4.142, and 4.163.

⁶⁷³ As set out paragraph 5.36 above.

⁶⁷⁴ Including, but not limited to, paragraphs 4.2, 4.15 to 4.20, 4.24, 4.27, 4.29 to 4.31, 4.35, 4.38 to 4.40 and 4.75.

involved in certain aspects of the Infringement, including driving forward the agreement(s) or concerted practice(s):

6.31.1 not to advertise Three Counties members' fees in the *Star Courier*, and

6.31.2 to deter or prevent Three Counties members from advertising their fees in the *Star Courier*.⁶⁷⁵

6.32 In light of this and in the circumstances of this case, the CMA considers it is appropriate and proportionate to apply an increase of 5% to Castles' penalty.

(c) *Hamptons International*

6.33 The CMA considers that the evidence set out at Chapter 4 above⁶⁷⁶ demonstrates that Hamptons International played a leading role in driving forward the Infringement. However, the CMA recognises that Hamptons International was only actively involved in certain aspects of the Infringement, including driving forward the agreement(s) or concerted practice(s) to prevent agents (whether members or non-members of Three Counties) from advertising their fees in the *Star Courier*.⁶⁷⁷

6.34 In light of this and in the circumstances of this case, the CMA considers it is appropriate and proportionate to apply an increase of 5% to Hamptons International's penalty.

*Mitigating factors*⁶⁷⁸

Cooperation

6.35 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 Penalties 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).⁶⁷⁹

6.36 The CMA considers that it is appropriate to decrease the penalty at step 3 to reflect each Party's cooperation in promptly making key staff available for voluntary interviews and responding promptly and comprehensively to all

⁶⁷⁵ As set out at paragraph 5.43 above.

⁶⁷⁶ Including, but not limited to, paragraphs 4.76, 4.103, 4.133 to 4.136, 4.138, 4.140, 4.144, 4.156, 4.157 and 4.165

⁶⁷⁷ As set out at paragraph 5.51 above.

⁶⁷⁸ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.15.

⁶⁷⁹ *Ibid*, paragraph 2.15 and footnote 28.

voluntary requests for information from the CMA, which enabled the enforcement process to be concluded more efficiently. The CMA considers that a 5% reduction for cooperation is appropriate and proportionate for each Party in the circumstances of this case.

Termination of the Infringement

- 6.37 The CMA may decrease the penalty at step 3 to reflect termination of an infringement as soon as the CMA intervenes.⁶⁸⁰
- 6.38 On 31 January 2014, Three Counties sent a letter to its members confirming that it would not be enforcing Rule 21 of its T&CM and would be suspending its activities under that rule. It also confirmed that the arrangement with the *Star Courier* would be suspended.⁶⁸¹ In the particular circumstances of this case, the CMA considers that this action by Three Counties effectively amounted to termination of the Infringement by both Three Counties, its members, and TMS. In light of this evidence, the CMA has found that the Infringement was terminated promptly after the commencement of the formal investigation in December 2013. The CMA therefore considers that a 5% decrease at step 3 is appropriate and proportionate for each Party in the circumstances of this case.

Genuine uncertainty

- 6.39 The CMA may decrease the penalty at step 3 where there is genuine uncertainty on the part of the undertaking as to whether the agreement or conduct in question constituted an infringement of the Act.⁶⁸²
- 6.40 In light of submissions received by the CMA regarding uncertainty arising following particular communications between certain of the Parties and the OFT in 2008, the CMA considers that it would be appropriate and proportionate, in the particular circumstances of this case, to apply a decrease of 15% in the penalty for each of the following Parties: Three Counties, Waterfords, Castles and Hamptons International.

⁶⁸⁰ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.15.

⁶⁸¹ Letter dated 31 January 2014 from [law firm 1] to Hamptons International (CMA Document Reference r_3C 29.1). See also paragraph 4.166 above.

⁶⁸² *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.15.

Compliance

- 6.41 The CMA may decrease the penalty at step 3 where adequate steps have been taken by an undertaking with a view to ensuring compliance with, among other UK and EU competition law prohibitions, the Chapter I prohibition.⁶⁸³
- 6.42 The CMA considers that where a Party can demonstrate that its senior management has taken adequate steps to achieve a clear and unambiguous commitment to achieving a competition law compliance culture throughout the organisation, from the top down, this will likely be treated as a mitigating factor. The CMA is of the view that the requirement to show that adequate steps have been taken includes:
- introducing or reviewing and changing compliance activities as appropriate in the light of the events that led to the investigation in question
 - appropriate competition law risk identification, risk assessment, risk mitigation and risk review, and
 - Board level (or other senior management) commitment to and accountability for the resulting compliance programme.
- 6.43 Following the settlement discussions in February 2015, the CMA considered evidence of the Parties' compliance activities. The CMA has found that Waterfords and Hamptons International have each demonstrated that adequate steps have been taken with a view to ensuring compliance with competition law such that a decrease in their penalty is appropriate. The CMA notes that the identified (or proposed) compliance activities by each of these Parties demonstrate a clear and unambiguous commitment to and accountability for competition law compliance by the Board/senior management, in that they have engaged in appropriate steps relating to risk identification, assessment, mitigation and review. The CMA has been provided with evidence that the senior managers have been trained in competition compliance and that a competition manual has been drafted, and is being applied. The CMA therefore considers that it is appropriate and proportionate to decrease the penalty by 5% for each of Waterfords and Hamptons International to reflect their compliance activities.

⁶⁸³ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.15.

Step 4 - adjustment for specific deterrence and proportionality

- 6.44 The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future), or to ensure that a penalty 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.⁶⁸⁴ At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.
- 6.45 Increases to the penalty figure 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 3.⁶⁸⁵ 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.⁶⁸⁶
- 6.46 Conversely, 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 infringing 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.⁶⁸⁷
- 6.47 In light of the above, the CMA has made the adjustments set out below for each of the Parties.

⁶⁸⁴ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.16. The CMA has considered a range of financial indicators in this regard, based on accounting information publicly available and/or provided by the Parties at the time of calculating the penalty. Those financial indicators included relevant turnover, total worldwide turnover for the last financial year, total worldwide turnover over a three year average, net assets for the last financial year, adjusted net assets for the last financial year, profit after tax for the last financial year, and profit after tax over a three year average. Specific financial indicators that are not referred to in the body of the Decision are those which did not materially affect the CMA's analysis in reaching its conclusion in respect of each Party; for the avoidance of doubt, such financial indicators have been taken into consideration.

⁶⁸⁵ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.17, which also provides that this assessment will be made on a case-by-case basis for each individual infringing undertaking.

⁶⁸⁶ *Ibid*, paragraph 2.19.

⁶⁸⁷ *Ibid*, paragraph 2.20.

Three Counties

- 6.48 In exceptional circumstances 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, the CMA may make more significant adjustments, both for general and specific deterrence, at step 4.⁶⁸⁸
- 6.49 As set out at paragraph 6.18.2 above, in the circumstances of this case the CMA considers that Three Counties has no relevant turnover. The penalty reached at the end of step 3 is therefore zero for Three Counties. Taking into account that Three Counties' total turnover for the year ending 31 December 2013 was approximately [X],⁶⁸⁹ the CMA considers that it is appropriate and proportionate to adjust Three Counties' penalty to £100 at step 4 for specific deterrence. The CMA considers that this Penalty is appropriate for deterrence purposes without being disproportionate or excessive.

Waterfords

- 6.50 Waterfords' penalty after step 3 is [X]. For the reasons set out below, the CMA considers that this figure should be decreased to ensure that the level of penalty is not disproportionate or excessive. In reaching this view, the CMA has had regard to the following factors:
- 6.50.1 *Waterfords' size and financial position:* Having regard to a range of financial indicators,⁶⁹⁰ the CMA considers that Waterfords' penalty at the end of step 3 should be decreased to ensure its penalty is not disproportionate or excessive. For example, the CMA notes that the unadjusted penalty would:

⁶⁸⁸ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.18

⁶⁸⁹ Three Counties' last accounting period was for the 17 months to 31 December 2013, and its turnover for that 17 month period was [X]. In the circumstances of this case, the CMA has determined Three Counties' applicable turnover having regard to article 2(1) of the 2000 Order, pursuant to which "applicable turnover" means the turnover of an undertaking for a business year determined in accordance with the Schedule to this Order; and where a business year does not equal 12 months the applicable turnover shall be the amount which bears the same proportion to the applicable turnover during that business year as 12 months does to that period".

⁶⁹⁰ See footnote 682 above. The Penalties Guidance provides that, in considering whether any adjustments should be made at step 4 for specific deterrence or proportionality, the CMA will have regard to appropriate indicators of the size and financial position of the relevant undertaking as at the time the penalty is being imposed (*Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.16). In the circumstances of this case, the CMA has taken that time to be the date on which the settlement offer by an undertaking was accepted by the CMA. In this case, in relation to Waterfords, the financial year for which the most recent audited accounts were available at that time, is the financial year ending 31 March 2014.

- amount to a substantial proportion of Waterfords' total worldwide turnover of [£] in the year ending 31 March 2014⁶⁹¹
- be significantly in excess of Waterfords' profit after tax, both for the year ending 31 March 2014⁶⁹² and as an average over the last three financial years
- be significantly in excess of Waterfords' relevant turnover for the year ending 31 March 2013.⁶⁹³

6.50.2 *The nature of the Infringement:* The Infringement was a serious breach of the Chapter I prohibition, although it does not fall within the category of the most serious infringements of competition law.⁶⁹⁴ This factor has been taken into account at step 1 above, and in the circumstances of this case the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

6.50.3 *Waterfords' role in the Infringement:* Waterfords played a leading role in driving forward the Infringement, as it was actively involved in all aspects of the Infringement.⁶⁹⁵ This factor has been taken into account at step 3 above, and in the circumstances of this case the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

6.50.4 *The impact of Waterfords' infringing activity on competition:* In the circumstances of this case, the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

6.51 In view of the foregoing, in the circumstances of this case, the CMA has decreased Waterfords' penalty by [£] at step 4, to a figure of [£]. Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty of [£] is appropriate to deter Waterfords from breaching competition law in the future without being disproportionate or excessive.

⁶⁹¹ See footnote 690 above.

⁶⁹² See footnote 690 above.

⁶⁹³ As set out in the Penalties Guidance, the reference year for relevant turnover is the financial year preceding the date when the Infringement ended (*Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.7). In this case, in relation to Waterfords, that is the financial year ending 31 March 2013.

⁶⁹⁴ See paragraph 6.22 above.

⁶⁹⁵ See paragraph 6.29 above.

Castles

6.52 Castles' penalty after step 3 is [X]. For the reasons set out below, the CMA considers that this figure should be decreased to ensure that the level of penalty is not disproportionate or excessive. In reaching this view, the CMA has had regard to the following factors:

6.52.1 *Castles' size and financial position:* Having regard to a range of financial indicators,⁶⁹⁶ the CMA considers that Castles' penalty at the end of step 3 should be decreased to ensure its penalty is not disproportionate or excessive. For example, the CMA notes that the unadjusted penalty would:

- amount to a substantial proportion of Castles' total worldwide turnover of [X] for the year ending 31 July 2014⁶⁹⁷
- be significantly in excess of Castles' profit after tax, both for the year ending 31 July 2014⁶⁹⁸ and as an average over the last three financial years
- be significantly in excess of Castles' relevant turnover for the year ending 31 July 2013.⁶⁹⁹

6.52.2 *The nature of the Infringement:* The Infringement was a serious breach of the Chapter I prohibition, although it does not fall within the category of the most serious infringements of competition law.⁷⁰⁰ This factor has been taken into account at step 1 above, and in the circumstances of this case the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

6.52.3 *Castles' role in the Infringement:* Castles played a leading role in driving forward the Infringement. However, the CMA recognises that Castles was only actively involved in certain aspects of the

⁶⁹⁶ See footnote 682 above. The Penalties Guidance provides that, in considering whether any adjustments should be made at step 4 for specific deterrence or proportionality, the CMA will have regard to appropriate indicators of the size and financial position of the relevant undertaking as at the time the penalty is being imposed (*Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.16). In the circumstances of this case, the CMA has taken that time to be the date on which the settlement offer by an undertaking was accepted by the CMA. In this case, in relation to Castles, the financial year for which the most recent audited accounts were available at that time, is the financial year ending 31 July 2014.

⁶⁹⁷ See footnote 696 above.

⁶⁹⁸ See footnote 696 above.

⁶⁹⁹ As set out in the Penalties Guidance, the reference year for relevant turnover is the financial year preceding the date when the Infringement ended (*Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.7). In this case, in relation to Castles, that is the financial year ending 31 July 2013.

⁷⁰⁰ See paragraph 6.22 above.

Infringement.⁷⁰¹ This factor has been taken into account at step 3 above, and in the circumstances of this case the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

6.52.4 *The impact of Castles' infringing activity on competition:* In the circumstances of this case, the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

6.53 In view of the foregoing, in the circumstances of this case, the CMA has decreased Castles' penalty by [X] at step 4, to a figure of [X]. Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty of [X] is appropriate to deter Castles from breaching competition law in the future without being disproportionate or excessive.

Hamptons International/Countrywide

6.54 The penalty for Hamptons International/Countrywide after step 3 is [X]. For the reasons set out below, the CMA considers that this amount should be increased to deter Hamptons International/Countrywide from breaching competition law in the future. In reaching this view, the CMA has had regard to the following factors:

6.54.1 *Hamptons International's/Countrywide's size and financial position:* The CMA notes that Hamptons International/Countrywide has a significant proportion of its total worldwide turnover ([X]% and [X]% respectively) outside the relevant market. Having regard to that fact and a range of financial indicators,⁷⁰² the CMA considers that the penalty at the end of step 3 should be increased to deter Hamptons International/Countrywide from breaching competition law in the future. For example, the CMA notes that the unadjusted penalty would amount to:

⁷⁰¹ See paragraph 6.31 above.

⁷⁰² See footnote 682 above. The Penalties Guidance provides that, in considering whether any adjustments should be made at step 4 for specific deterrence or proportionality, the CMA will have regard to appropriate indicators of the size and financial position of the relevant undertaking as at the time the penalty is being imposed (*Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.16). In the circumstances of this case, the CMA has taken that time to be the date on which the settlement offer by an undertaking was accepted by the CMA. In this case, in relation to Hamptons International/Countrywide, the financial year for which the most recent audited accounts were available at that time, is the financial year ending 31 December 2013.

- a negligible proportion of Hamptons International's total worldwide turnover of [X] in the year ending 31 December 2013⁷⁰³
- a negligible proportion of Countrywide's total worldwide turnover of [X] in the year ending 31 December 2013⁷⁰⁴
- a small proportion of Hamptons International's profit after tax, both for the year ending 31 December 2013⁷⁰⁵ and as an average over the last three financial years, and
- a negligible proportion of Countrywide's profit after tax in the year ending 31 December 2013⁷⁰⁶
- a substantial proportion of Hamptons International's relevant turnover for the year ending 31 December 2013.⁷⁰⁷

6.54.2 *The nature of the Infringement:* The Infringement was a serious breach of the Chapter I prohibition, although it does not fall within the category of the most serious infringements of competition law.⁷⁰⁸ This factor has been taken into account at step 1 above, and in the circumstances of this case the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

6.54.3 *Hamptons Internationals' role in the Infringement:* Hamptons International played a leading role in driving forward the Infringement. However, the CMA recognises that Hamptons International was only actively involved in certain aspects of the Infringement.⁷⁰⁹ This factor has been taken into account at step 3 above, and in the circumstances of this case the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

6.54.4 *The impact of Hamptons International's infringing activity on competition:* In the circumstances of this case, the CMA does not

⁷⁰³ See footnote 702 above.

⁷⁰⁴ See footnote 702 above.

⁷⁰⁵ See footnote 702 above.

⁷⁰⁶ See footnote 702 above.

⁷⁰⁷ As set out in the Penalties Guidance, the reference year for relevant turnover is the financial year preceding the date when the Infringement ended (*Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.7). In this case, in relation to Hamptons International/Countrywide, that is the financial year ending 31 December 2013.

⁷⁰⁸ See paragraph 6.22 above.

⁷⁰⁹ See paragraph 6.33 above.

consider that it is necessary to make any adjustment at step 4 in respect of this factor.

- 6.55 In view of the foregoing, the CMA has increased the penalty for Hamptons International/Countrywide by [X] at step 4, to a figure of [X]. Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty of [X]⁷¹⁰ is appropriate to deter Hamptons International and Countrywide from breaching competition law in the future without being disproportionate or excessive.

TMS/Trinity Mirror

- 6.56 The penalty for TMS/Trinity Mirror after step 3 is [X]. For the reasons set out below, the CMA considers that this amount should be increased to deter TMS/Trinity Mirror from breaching competition law in the future. In reaching this view, the CMA has had regard to the following factors:

- 6.56.1 *TMS/Trinity Mirror's size and financial position:* The CMA notes that TMS/Trinity Mirror has a significant proportion of its total worldwide turnover [X]% and [X]% respectively) outside the relevant market. Having regard to that fact and a range of financial indicators,⁷¹¹ the CMA considers that the penalty at the end of step 3 should be increased to deter TMS/Trinity Mirror from breaching competition law in the future. For example, the CMA notes that the penalty at the end of step 3 would amount to:

- a negligible proportion of TMS' total worldwide turnover for the year ending 29 December 2013⁷¹²
- a negligible proportion of Trinity Mirror's total worldwide turnover for the year ending 29 December 2014⁷¹³

⁷¹⁰ This represents an adjusted penalty of [X] for Hamptons International, and an adjusted penalty of [X] for Hamptons International, jointly and severally with Countrywide plc and Countrywide Group plc. See paragraph 6.64 below and Annex B, paragraphs B.17 and B.20.

⁷¹¹ See footnote 682 above. The Penalties Guidance provides that, in considering whether any adjustments should be made at step 4 for specific deterrence or proportionality, the CMA will have regard to appropriate indicators of the size and financial position of the relevant undertaking as at the time the penalty is being imposed (*Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.16). In the circumstances of this case, the CMA has taken that time to be the date on which the settlement offer by an undertaking was accepted by the CMA. In this case, in relation to TMS, the financial year for which the most recent audited accounts were available at that time, is the financial year ending 31 December 2013 and in relation to Trinity Mirror, the financial year ending 29 December 2014.

⁷¹² See footnote 711 above.

⁷¹³ See footnote 711 above.

- a small proportion of TMS' average profit after tax over the last three financial years,⁷¹⁴ and
- a negligible proportion of Trinity Mirror's profit after tax for the year ending 29 December 2014.⁷¹⁵
- a significant proportion of TMS'/Trinity Mirror's relevant turnover for the year ending 29 December 2013.⁷¹⁶

6.56.2 *The nature of the Infringement:* The Infringement was a serious breach of the Chapter I prohibition, although it does not fall within the category of the most serious infringements of competition law.⁷¹⁷ This factor has been taken into account at step 1 above, and in the circumstances of this case the CMA does not consider that it is necessary to make any adjustment at step 4 in respect of this factor.

6.56.3 *TMS' role in the Infringement:* As set out at Chapter 5 above, TMS became a party to the Infringement following pressure from certain members of Three Counties⁷¹⁸ and, as such, played a passive role in the Infringement. However, see paragraph 6.62.4 below in terms of the impact of TMS' infringing activity on competition.

6.56.4 *The impact of TMS' infringing activity on competition:* In the circumstances of this case, the CMA notes that notwithstanding TMS' passive role in the Infringement, the agreement or concerted practice to prevent agents (whether members or non-members of Three Counties) from advertising their fees would have been significantly less effective without the cooperation of TMS and, as such, that its participation would have had a significant impact on the overall effectiveness of the arrangements.

6.57 In view of the foregoing, the CMA has increased the penalty for TMS/Trinity Mirror by [~~3~~] % at step 4, to a figure of [~~3~~]. Assessing the resulting penalty in the round, the CMA considers that the adjusted penalty of [~~3~~] is appropriate to deter TMS and Trinity Mirror from breaching competition law in the future without being disproportionate or excessive.

⁷¹⁴ TMS made a loss for the year ended 29 December 2013. The CMA considers TMS' average profit over the last three financial years offers a more accurate view of its size and financial position.

⁷¹⁵ See footnote 711 above.

⁷¹⁶ As set out in the Penalties Guidance, the reference year for relevant turnover is the financial year preceding the date when the Infringement ended (*Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.7). In this case, in relation to TMS/Trinity Mirror, that is the financial year ending 29 December 2013.

⁷¹⁷ See paragraph 6.22 above.

⁷¹⁸ See paragraph 5.56 above.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

- 6.58 The CMA may not impose a penalty for an infringement that exceeds 10% of an undertaking's 'applicable turnover', that is the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision.⁷¹⁹
- 6.59 Where any infringement by an association of undertakings (for example, a trade association) relates to the activities of its members, the penalty shall not exceed 10% of the sum of the worldwide turnover of each member of the association of undertakings active on the market affected by the infringement.⁷²⁰
- 6.60 The CMA has assessed each of the Parties' penalties against the thresholds set out in the preceding paragraphs (as applicable). This assessment has not necessitated any reductions to penalties at step 5 of the penalty calculations.
- 6.61 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another Member State in respect of the same agreement or conduct.⁷²¹ As there is no such applicable penalty or fine, no adjustments are necessary in this case in that regard.

Step 6 - application of reductions for settlement

- 6.62 The CMA will reduce an undertaking's financial penalty at step 6 where the undertaking has agreed to settle the case with the CMA; which will involve, amongst other things, the undertaking admitting its participation in an infringement.⁷²²
- 6.63 As set out at Chapter 3, section F above, each of the Parties has admitted the facts and allegations of infringement as set out in the Statement of Objections (subject to limited representations on manifest factual inaccuracies contained therein), which are now reflected in the Decision. In light of those admissions, and each Party's agreement to cooperate in expediting the process for concluding the investigation, the CMA has reduced each Party's financial penalty by 10% at step 6.

⁷¹⁹ Section 36(8) of the Act and the 2000 Order, as amended. See also *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.21.

⁷²⁰ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.23.

⁷²¹ *Ibid*, paragraph 2.24.

⁷²² *Ibid*, paragraph 2.26.

Payment of penalty

- 6.64 The CMA requires each Party to pay the penalty applicable to it as set out in the table below. A detailed calculation for each Party is set out at Annex G. Both the individual figures and the final penalty figures are rounded to the nearest pound.

Party	Penalty (before settlement discount)	Penalty payable (after settlement discount)
Three Counties	£100	£90
Waterfords	£51,318	£46,186
Castles	£19,275	£17,348
Hamptons International ⁷²³	£258,869	£232,982
Hamptons International, jointly and severally with Countrywide ⁷²⁴	£388,303	£349,473
TMS, jointly and severally with Trinity Mirror	£101,397	£91,257

- 6.65 Each of the above penalties will become due to the CMA in its entirety on 13 July 2015⁷²⁵ and must be paid to the CMA by close of banking business on that date. If that date has passed and (a) the period during which an appeal against the imposition, or amount, of that penalty may be made has expired without an appeal having been made, or (b) such an appeal has been made and determined, the CMA may commence proceedings to recover from the

⁷²³ This represents a total penalty for Hamptons International (before settlement discount) of £647,172. See paragraph 6.55 above.

⁷²⁴ This represents a total penalty for Hamptons International (before settlement discount) of £647,172. See paragraph 6.55 above.

⁷²⁵ The next working day two calendar months from the expected date of receipt of the Decision.

undertaking in question, as a civil debt due to the CMA, any amount payable which remains outstanding.⁷²⁶

SIGNED:

[]

Ann Pope, for and on behalf of the Competition and Markets Authority
Senior Director

8 May 2015

⁷²⁶ Section 37(1) of the Act.

ANNEX A LEGAL FRAMEWORK

A. Introduction

- A.1. This section sets out the legal framework within which the CMA has considered the evidence in this case.
- A.2. The relevant legal provisions are set out in Section 2(1) of the Act and known as the 'Chapter I prohibition'. The CMA is not applying Article 101 TFEU in this case as the CMA has concluded that the requirement for an effect on inter-State trade is not met. However Article 101 is still relevant in view of Section 60 of the Act (see below), and references to it are therefore made where appropriate.

B. The Chapter I prohibition

- A.3. The Chapter I prohibition prohibits agreements and concerted practices between undertakings and decisions by associations of undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. The Chapter I prohibition applies only where the agreement, concerted practice or decision is, or is intended to be, implemented in the UK. References to the UK are to the UK or part of the UK.⁷²⁷

C. Application of section 60 of the Act – consistency with EU law

- A.4. Section 60 of the Act sets out the principle that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law.
- A.5. Section 60 also provides that the CMA must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing that there is no inconsistency with the principles laid down by the TFEU and the European Courts, and any relevant decision of the European Courts.⁷²⁸ The CMA must, in addition, have regard to any relevant decision or statement of the European Commission.⁷²⁹

⁷²⁷ Sections 2(1), 2(3) and 2(7) of the Act.

⁷²⁸ Section 60(2) of the Act. The 'European Courts' mean the Court of Justice (CJ) (formerly the European Court of Justice) and the General Court (GC) (formerly the Court of First Instance); section 59(1) of the Act.

⁷²⁹ Section 60(3) of the Act. The CJ recently held that national competition authorities 'may take into account' guidance contained in non-legally binding Commission Notices (specifically the *Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) [EC]* (*De minimis*), OJ 2001

- A.6. The provision in EU competition law closely corresponding to the Chapter I prohibition is Article 101 TFEU, on which the Chapter I prohibition is modelled.

D. Undertakings and the attribution of liability

- A.7. The Chapter I prohibition applies to agreements and concerted practices between 'undertakings' as well as to decisions by 'associations of undertakings'.

Undertakings

- A.8. The term 'undertaking' has been defined by the CJ to cover '*...every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed...*'⁷³⁰
- A.9. Accordingly, the key consideration in establishing whether an entity is an undertaking is whether it is engaged in 'economic activity'. 'Economic activity' has been defined as conducting any activity '*...of an industrial or commercial nature by offering goods and services on the market...*'⁷³¹
- A.10. The term 'undertaking' encompasses any natural or legal person that engages in commercial or economic activities, regardless of legal form. It therefore includes, among others, companies,⁷³² partnerships,⁷³³ individuals operating as sole traders,⁷³⁴ and trade associations.⁷³⁵
- A.11. The concept also designates an economic unit, even if in law that unit consists of several natural or legal persons.⁷³⁶ The undertaking that committed the infringement can therefore be larger than the legal entity whose representatives actually took part in the infringing activities. When an undertaking infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement.⁷³⁷

Associations of undertakings

- A.12. An 'association of undertakings' consists of 'undertakings of the same general type' and '*makes itself responsible for representing and defending their*

C368/13, but such authorities are not required to do so: Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others*, judgment of 13 December 2012, at paragraphs 29 and 31.

⁷³⁰ Case C-41/90 *Hofner and Elser v Macrotron* [1991] ECR I-1979, at paragraph 21.

⁷³¹ Case C-118/85 *Commission v Italy* [1987] ECR 2599, at paragraph 7.

⁷³² In all their corporate forms, including a limited partnership (see Case 258/78 *Nungesser v Commission* [1982] ECR 2015) or a trust company (see Commission Decision of 31 January 1979 *Fides*, OJ [1979] L57/33, at 34).

⁷³³ Commission decision *Breeders' rights: Roses*, OJ [1985] L369/9.

⁷³⁴ Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045.

⁷³⁵ Case 71/74 *FRUBO v Commission* [1975] ECR 563.

⁷³⁶ Case C-97/08 *P Akzo Nobel NV v. Commission* [2009] ECR-I-8237, at paragraph 55.

⁷³⁷ Case C-97/08 *P Akzo Nobel NV v. Commission* [2009] ECR-I-8237, at paragraph 56.

common interests vis-à-vis other economic operators, government bodies and the public in general'.⁷³⁸ For the purpose of the Chapter I prohibition, any body formed to represent the interests of its members in commercial matters may be an 'association of undertakings'.⁷³⁹ The term 'association of undertakings' is widely construed under EU and UK competition law and covers, for example, trade associations, agricultural cooperatives and associations entrusted with statutory duties, as well as situations in which economic operators coordinate their conduct by acting through a collective structure or a common body.⁷⁴⁰ It is irrelevant how the association is organised, or the exact legal form that the association takes.⁷⁴¹

Attribution of liability

General

A.13. In determining who is liable for any infringement and therefore, who will be the addressee of an infringement decision, it is necessary to identify the relevant legal or natural persons who form part of the undertaking involved in the infringement.

Attribution of liability in relation to undertakings

A.14. For each Party that the CMA finds has infringed the Act, the CMA will first identify the legal entity that was directly involved in the infringement. It will then determine whether liability for the infringement should be on a joint and several basis with another legal entity on the basis that both form part of the same undertaking.

Parent/subsidiary considerations

A.15. It is well established in EU law that the conduct of a subsidiary may be imputed to its parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.⁷⁴² In such a situation, since the parent

⁷³⁸ Case C-309/99 *Wouters* [2002] ECR I-1577, [2002] 4 CMLR 913, paragraph 61 of the Opinion of Advocate General Léger.

⁷³⁹ See *Trade associations, professions and self-regulating bodies* (OFT408, December 2004, adopted by the CMA Board), paragraph 1.4.

⁷⁴⁰ Case 309/99 *JCJ Wouters, JW Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, at paragraphs 50 and 64 and Case C-382/12 P, *MasterCard Inc. v. European Commission*, 11 September 2014, at paragraph 62. See also Opinion of AG Léger in Case C-309/99 *Wouters* [2002] ECR I-1577, [2002] 4 CMLR 913, at paragraph 62.

⁷⁴¹ *Trade associations, professions and self-regulating bodies* (OFT 408, December 2004), adopted by the CMA Board, paragraph 1.4.

⁷⁴² Case C-48/69 *ICI v Commission* [1972] ECR 619, at paragraphs 132 and 133; Case C-97/08 *P Akzo Nobel NV v. Commission* [2009] ECR-I-8237, at paragraph 58.

company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the Chapter I prohibition, the CMA may address an infringement decision imposing fines to the parent company, without having to establish its personal involvement in the infringement.⁷⁴³

A.16. A parent company can be held jointly and severally liable for an infringement committed by a subsidiary company where

A.16.1. the parent company is able to exercise 'decisive influence' over the conduct of the subsidiary, and

A.16.2. in such a case, the parent company does in fact exercise such decisive influence,

such that the two entities can be regarded as a single economic unit and thus jointly and severally liable. In those circumstances, it is sufficient for the CMA to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary, subject to rebuttal of that presumption (see A.18 below).⁷⁴⁴

A.17. As to the interpretation of 'decisive influence', the CAT noted in *Durkan*⁷⁴⁵ that the European Courts have established, among other things, that such influence may be indirect and can be established even where the parent does not interfere in the day to day business of the subsidiary or where the influence is not reflected in instructions or guidelines emanating from the parent to the subsidiary. Further, it is not necessary to show that any influence was actually exercised as regards the infringement in question. Instead, one must look generally at the relationship between the two entities; the factors to which regard may be had when considering the issue of decisive influence '*are not limited to commercial conduct but cover a wide range*'.⁷⁴⁶

A.18. In the case of a wholly-owned subsidiary, the CJ has held that there is a rebuttable presumption of decisive influence by the parent company.⁷⁴⁷ It is for the parent company in question to rebut the presumption by adducing sufficient evidence to demonstrate that the subsidiary company acts

⁷⁴³ Case T-517/09 *Alstom v Commission* Judgment of the GC of 27 November 2014 paragraph 55, Case C-97/08 *P Akzo Nobel NV v. Commission* [2009] ECR-I-8237, at paragraph 59.

⁷⁴⁴ Case C-97/08 *P Akzo Nobel NV v. Commission* [2009] ECR-I-8237, at paragraphs 60 and 61. Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v European Commission*, judgment of 27 October 2010, paragraphs 126 to 130.

⁷⁴⁵ *Durkan Holdings Limited and others v OFT* [2011] CAT 6.

⁷⁴⁶ *Durkan Holdings Limited and others v OFT* [2011] CAT 6 at [22].

⁷⁴⁷ Case T-517/09 *Alstom v Commission* Judgment of the GC of 27 November 2014, paragraph 55; Case C-97/08 *P Akzo Nobel NV v. Commission* [2009] ECR-I-8237, at paragraph 60 and 61. Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v European Commission*, judgment of 27 October 2010, paragraphs 126 to 130.

independently on the market.⁷⁴⁸ The GC has indicated, among other things, that neither the fact that the subsidiary operates independently in specific aspects of its policy on the marketing of the products concerned by the infringement,⁷⁴⁹ nor the lack of any direct involvement in, or knowledge of the facts which constitute, the infringement by directors of the parent company, are sufficient, of themselves, to rebut the presumption.⁷⁵⁰

- A.19. As regards ownership of an infringing subsidiary company by two or more separate parents in succession, if the CMA elects to attribute joint and several liability to each parent together with the subsidiary, it will be attributed to each parent on the basis of the principle of decisive influence as set out above, and in accordance with each parent's period of ownership of the subsidiary during the period of the infringement.⁷⁵¹ The CMA may elect, however, to attribute liability to the subsidiary only.⁷⁵²

Attribution of liability in relation to associations of undertakings

- A.20. An association of undertakings may itself be held liable for an infringement of Article 101 or the Chapter I prohibition.⁷⁵³
- A.21. An association of undertakings may enter into an anti-competitive agreement or concerted practice in its own right; an agreement made by an association may also be considered as a decision of the association or as an agreement between undertakings or associations.⁷⁵⁴ It may itself be a party to that agreement or concerted practice, or may enter into an agreement for the benefit of its members.⁷⁵⁵ Whether this has occurred will be a matter of fact,

⁷⁴⁸ Case T-517/09 *Alstom v Commission* Judgment of the GC of 27 November 2014, paragraph 55; Case C-97/08 *P Akzo Nobel NV v. Commission* [2009] ECR I-8237, at paragraph 61; Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v European Commission*, judgment of 27 October 2010, paragraphs 131.

⁷⁴⁹ Case T-190/06 *Total SA and Elf Aquitaine SA v Commission* ECR I-0, at paragraph 64.

⁷⁵⁰ Case T-189/06 *Arkema France SA v Commission* ECR I-0, (not available in English), at paragraph 65.

⁷⁵¹ Joined cases T-122/07 to T-124/07 *Siemens AG Oesterreich and Others v Commission*, paragraphs 139 and 141 to 144.

⁷⁵² T-541/08 *Sasol v Commission*, paragraphs 182-183; Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others v Commission*, paragraph 331.

⁷⁵³ See Commission decision IV/31.371 *Re Roofing Cartel: BELASCO at paragraph 102*, Decision upheld on appeal Case C-246/86 *BELASCO v Commission* [1989] ECR 2117 and Commission Decision 94/815/EC *Cement* of 30 November 1994, upheld on appeal, T-25/95 *Cement*, [2000] ECR II-491, paragraphs 1325-1328. For further examples, see: *UK Agricultural Tractor Registration Exchange* OJ [1992] L68/19 (Commission decision 92/157/EEC), upheld on appeal, Cases T-34,35/92 [1994] ECR II-905, Case C-7/95P [1998] ECR I-3111COMP/38.238; *Spanish Raw Tobacco* (Decision of 20.10.2004) [2006] 4 CMLR 866; *FENEX* OJ [1996] L181/28. In the UK, see the 2003 decision of 3 February 2002 against the *Northern Ireland Livestock and Auctioneer's Association*, (where the OFT found the association liable, but decided not to impose a fine due to the specific circumstances of the case).

⁷⁵⁴ Case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair* [1985] ECR 391, paragraph 20; *Frubo v Commission* [1975] ECR 563, paragraphs 30-32; *NAVEWA-ANSEAU* OJ 1982, L167/39, paragraph 38; *French inland waterway charter tariff* OJ 1985 L219/35, paragraph 40; *Uniform Eurocheques* OJ 1989 L36/16, paragraph 34.

⁷⁵⁵ Cases T-39 and 40/92 *CB and Europay v Commission* [1994] ECR II-49, paragraphs 76-77; Cases T-217/03 and T-245/03 *FNCBV v Commission (French Beef)* [2006] ECR II-4987, paragraph 231; COMP/38.238 *Spanish Raw Tobacco* (Decision of 20.10.2004) [2006] 4 CMLR 866, paragraph 322.

and the fact that an association has formally entered into the agreement does not prevent liability for that agreement being placed on the members, particularly where they are the instigators and driving force behind the agreement.⁷⁵⁶

- A.22. The members alone, as opposed to the association, may be held responsible for an infringement of Article 101.⁷⁵⁷ Agreements implemented within the framework of an association may be characterised as agreements or concerted practices between its members.⁷⁵⁸ Current CMA guidance explains: *'The fact that members of an association of undertakings are acting through the association does not affect the way in which Article 81 (now Article 101) and/or the Chapter I prohibition apply to their decisions, rules, recommendations or other activities; their position is no better and no worse than if they were acting in the same manner outside the forum of such an association'*.⁷⁵⁹
- A.23. The fact that anti-competitive co-ordination was provided for, or was carried out partly through or pursuant to, a decision of a trade association does not prevent the competition authority from addressing its infringement decision to both the association and its relevant members.⁷⁶⁰
- A.24. It is clear, therefore, that enforcement action may be taken against both an association of undertakings and its members at the same time, and this approach is supported by case law.⁷⁶¹ However, in order to make an

⁷⁵⁶ See, for example, the *Welded Steel Mesh* case (Commission decision 89/515 OJ [1989] L260/1), where the Commission fined only the members of an association on the grounds that *'the senior management of the associations consisted of leading personalities from the largest undertakings among their members... Without the initiative and active participation of the leading individuals in these undertakings, who also held senior positions and important roles in their respective associations, the agreements could not have come into being. In these circumstances, the Commission judges that the main fines should be imposed on those leading member undertakings without taking account of the associations in question'* (paragraph 207). As noted in legal commentary, *'This allowed the associations to be used by their members to give the agreements stronger and wider impact'* - Van Bael and Bellis, *Competition Law of the European Community*, (Kluwer Law International, 2005), page 227.

⁷⁵⁷ See *Welded Steel Mesh*, Commission decision 89/515 OJ [1989] L260/1, paragraph 207.

⁷⁵⁸ See, for example, Case T-25/95 *Cimenteries* [2000] ECR II-491, at paragraph 1329.

⁷⁵⁹ *Trade associations, professions and self-regulating bodies* (OFT 408, December 2004), adopted by CMA Board, paragraph 3.1. See also Case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair* [1985] ECR 391, paragraph 20.

⁷⁶⁰ In Case T-25/95 *Cimenteries* [2000] ECR II-491, [2000] 5 CMLR 204, for example, the GC noted that it was *'normal practice for the Commission, where it finds that an association of undertakings and its members have participated in the same infringement, to impose a fine either on the undertakings which are members of that association of undertakings or on the association of undertakings... If, for particular reasons, such as those mentioned in recital 65, paragraph 8, of the contested decision, it intends to fine both the association of undertakings and the member undertakings of that association, it must make that intention clear in the SO or in a supplement thereto'* (judgment at paragraph [485]; see also paragraph [478]). The GC also held that *'[h]aving regard to the separate roles played by the associations and the undertakings in concluding and implementing the agreement referred to in Article 1 of the contested decision, the Commission was entitled to attribute responsibility for that infringement to both the associations and the members of those associations'* (judgment at paragraph [1328]).

⁷⁶¹ See, for example, Commission decision IV/31.371 *Re Roofing Cartel: BELASCO*, paragraph 115: *'Although Belasco's members were also the members of the cartel, Belasco itself must be held responsible, independently*

infringement finding against an association of undertakings and its members for the same infringement, it is essential to establish conduct on the part of the association which is separate from that of its members.⁷⁶²

E. Co-ordination between undertakings

General

A.25. The Chapter I prohibition applies to ‘agreements’ as well as to ‘concerted practices’ and ‘decisions by associations of undertakings’. It is not necessary, for the purpose of finding an infringement, to distinguish between them, or to characterise conduct as exclusively an agreement, a concerted practice or a decision by an association of undertakings.⁷⁶³ As explained by the CJ, *‘the definitions of ‘agreement’, ‘decisions by associations of undertakings’ and ‘concerted practice’ are intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves’*.⁷⁶⁴

A.26. In the recent *MasterCard* case, the CJ confirmed the principle:

‘... it is settled case-law that, although Article [101 TFEU] distinguishes between ‘concerted practice’, ‘agreements between undertakings’ and ‘decisions by associations of undertakings’, the aim is to have the prohibition of that article catch different forms of coordination between undertakings of their conduct on the market ... and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct’.⁷⁶⁵

of the members, for its involvement in operating the cartel’. Decision upheld on appeal Case 246/86 *BELASCO v Commission* [1989] ECR 2117. See also *Steel Beams* OJ 1994 L/116 1 (and Commission Decision C(2006) 5342 final of 8 November 2006, upheld on appeal) which notes at paragraph 317: *‘Contrary to what some parties have argued in this case, associations of undertakings can infringe the competition rules of the ECSC Treaty... In the absence of special circumstances undertakings must take responsibility for the actions of an association under their control, in proportion to their influence over the association’*. See also *Spanish Raw Tobacco* (Commission decision COMP/38.238, 20 October 2004) [2006] 4 CMLR 866, paragraph 358.

⁷⁶² T-25/95 *Cement* [2000] ECR II-491, paragraph 1325: *‘In order to find that an association and its members have participated in one and the same infringement the Commission must establish conduct on the part of the association which is separate from that of its members’*, citing joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125-129/85 *Ahlstrom Osakeyhtiö and Others v Commission* [1988] ECR 5193 (*Woodpulp I*).

⁷⁶³ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 21. See also Case T-7/89 *Hercules Chemicals v European Commission* [1991] ECR II-1711, paragraph 264; Case T-1/89 *Rhone Poulenc v European Commission* [1991] ECR II-867, paragraph 127; Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, paragraphs 131 and 132 and also case IV/31.371 (*Roofing Felt*) in which the conduct of the undertakings was found to be an agreement as well as a decision of an association.

⁷⁶⁴ Case C-8/08 *T-Mobile Netherlands BV and others v NMa* [2009] ECR I-4529, paragraph 23 (citing Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, paragraph 131). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at [206(ii)].

⁷⁶⁵ Case C-382/12 P, *MasterCard Inc. v. European Commission*, 11 September 2014, paragraph 63 and the case law cited. The unlawful co-ordination between undertakings may, for example, be characterised as a ‘concerted

A.27. It is established that a series of agreements, concerted practices or decisions by associations of undertakings can be characterised as constituting a single continuous infringement where they are interlinked in terms of pursuing a common objective.⁷⁶⁶

Agreements and concerted practices

Agreements

A.28. The Chapter I prohibition is intended to catch a wide range of agreements, including oral agreements and 'gentlemen's agreements'.⁷⁶⁷ An agreement may be express or implied by the parties, and there is no requirement for it to be formal or legally binding, nor for it to contain any enforcement mechanisms.⁷⁶⁸ Acquiescence may also be sufficient to give rise to an agreement for the purpose of the Chapter I prohibition.⁷⁶⁹ An agreement may also consist of either an isolated act or a series of acts or a course of conduct.⁷⁷⁰ As held by the GC:

'...it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way...'.⁷⁷¹

A.29. The key question is whether there has been '*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties' intention*'.⁷⁷²

A.30. Although it is sufficient to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, the

practice' during the first phase of an infringement, but may subsequently have solidified into an 'agreement', and then been further affirmed, or furthered or implemented by, a 'decision of an association. This does not prevent the competition authority from characterising the co-ordination as a single continuous infringement. See Case T-9/99 *HFB* [2002] ECR II-1487, paragraphs 186 to 188; Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125 paragraph 32. See also Case T-305/94 etc *NV Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, [1999] 5 CMLR 303, paragraph 696: '*In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty.*'

⁷⁶⁶ See paragraphs A.43 to A.49 below.

⁷⁶⁷ Case C-41/69 *ACF Chemiefarma NV v European Commission* [1970] ECR 661 (in particular, at paragraphs 106 to 114).

⁷⁶⁸ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [658]; *Greek Ferries*, 1999/271/EC, OJ L 109/24 at paragraph 141 (upheld on appeal).

⁷⁶⁹ See Case C74/04 P, *Commission v Volkswagen AG* 13 July 2006, paragraph 39; and European Commission Guidelines in Vertical Restraints, paragraph 25.

⁷⁷⁰ Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraph 81.

⁷⁷¹ Case T-7/89 *Hercules Chemicals NV SA v Commission* [1991] ECR II-1711, at paragraph 256.

⁷⁷² Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, at paragraph 69 (upheld in appeal in Joined cases C-2/01 P and C-3/01 P *BAI Commission v Bayer* [2004] ECR I-23, at paragraphs 96 and 97.

CMA is not required to establish a joint intention to pursue an anti-competitive aim.⁷⁷³

- A.31. An undertaking may be party to an anti-competitive agreement where the purpose of its conduct, as coordinated with that of other undertakings, is to restrict competition on a specific relevant market, even if that undertaking is not active on that relevant market itself.⁷⁷⁴ An undertaking may also be party to an anti-competitive agreement even if it does not restrict its own freedom of action on the market on which it is primarily active.⁷⁷⁵

Concerted practices

- A.32. As noted at paragraph A.25 the concepts of ‘agreements’, ‘decisions by associations of undertakings’ and ‘concerted practices’ are intended to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves’.⁷⁷⁶
- A.33. The Court of Appeal has noted that ‘*concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for [the] purpose*’ of determining whether there is consensus between the undertakings said to be party to a concerted practice.⁷⁷⁷
- A.34. Although the nature and extent of a concerted practice is addressed in the case law primarily in the context of so-called horizontal relationships (that is, between actual or potential competitors), it is also applicable to vertical relationships (that is, between non-competitors).⁷⁷⁸ The Court of Appeal has observed that:

‘The Chapter I prohibition catches agreements and concerted practices whether between undertakings at different levels or between those at the

⁷⁷³ Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission* [2006] ECR-II-2969 paragraph 77 (upheld on appeal in Joined cases C-501/06P etc *GlaxoSmithKline Unlimited v Commission* [2009] ECR I-9291).

⁷⁷⁴ Case T-99/04 *AC-Treuhand AG v Commission*, [2008] 5 CMLR 13, at paragraph 122.

⁷⁷⁵ *Ibid*, at paragraph 127.

⁷⁷⁶ Case C-8/08 *T-Mobile Netherlands and Others v NMa* [2009] ECR I-4529, paragraph 23, see also Case C- 49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 131 and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(ii)].

⁷⁷⁷ *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, paragraph 22.

⁷⁷⁸ See, for example, Case T-43/92 *Dunlop Slazenger International Ltd v Commission* [1994] ECR-II 441, at paragraphs 101 and following (concerted practice between Dunlop Slazenger and certain of its exclusive distributors in respect of various measures to enforce an export ban). See also the European Commission’s decision in *Video Games, Nintendo Distribution and Omega-Nintendo* OJ 2003 L255/33, paragraphs 323 to 324. (agreements and/or concerted practices between Nintendo and its independent distributors to restrict parallel trade). Other examples include: *Pittsburgh Corning Europe* [1972] L 272/35 (where a concerted practice was found between a supplier and a distributor) and *Konica* OJ 1988, L78/34, paragraph 36 (where there was a concerted practice between a supplier and a distributor).

same level of commercial operation. An agreement between a supplier and a commercial customer, which may be called a vertical agreement, may breach the prohibition as much as an agreement between competing suppliers of the same product or the same type of product, which can be referred to as a horizontal agreement'.⁷⁷⁹

A.35. For present material purposes, the following key points arise from the case law on the concept of a concerted practice:

A.35.1. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market, including the choice of the persons and undertakings to which it makes offers or sells⁷⁸⁰

A.35.2. A concerted practice is a form of coordination between undertakings which falls short of 'having reached the stage where an agreement properly so-called has been concluded'.⁷⁸¹ The CJ has added that: *'By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants'*⁷⁸²

A.35.3. The coordination (which is prohibited by the requirement of independence) comprises 'any direct or indirect contact' between undertakings,⁷⁸³ which has the object or effect⁷⁸⁴ of influencing the conduct on the market of an undertaking⁷⁸⁵ thereby creating

⁷⁷⁹ *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, paragraph 28.

⁷⁸⁰ Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, paragraph 173. The CJ added that the concept of a concerted practice does not require the working out of an actual plan. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(iv)].

⁷⁸¹ Cases 48/69 etc *ICI Ltd v Commission* [1972] ECR 619, paragraph 64. In that case, which concerned coordination between competitors, the CJ added that coordination constitutes a concerted practice where it knowingly substitutes practical cooperation between them for the risks of competition. It stated: *'Article 85 [now Article 101 TFEU] draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'* (at paragraph 64). See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, [2009] ECR I-4529, at paragraph 26 and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [151] to [153].

⁷⁸² Cases 48/69 etc *ICI Ltd v Commission* [1972] ECR 619, paragraph 65. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [151].

⁷⁸³ Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 174. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, [2009] ECR I-4529, at paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(v)].

⁷⁸⁴ Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 174. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, [2009] ECR I-4529, at paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(v)]. The case law provides that a concerted practice also arises in the situation in which the object or effect of the direct or indirect contact is to disclose to a competitor the course of conduct which the disclosing party has decided to adopt or contemplates adopting on the market.

⁷⁸⁵ Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 174. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, [2009] ECR I-4529, at paragraph 33; and *Apex Asphalt and Paving Co*

conditions of competition which do not correspond to the normal conditions of the market in question, and⁷⁸⁶

A.35.4. It follows that '*a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two*'.⁷⁸⁷ However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.⁷⁸⁸

A.36. In terms of the nature of the impact of a concerted practice on the conditions of competition, the CJ has held (for example) that:

A.36.1. It is '*especially the case*' that a concerted practice leads to conditions of competition which do not correspond to the normal conditions of the market '*if the [conduct in question] is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the detriment of ... the freedom of consumers to choose their suppliers*'.⁷⁸⁹

A.36.2. A concerted practice would affect significantly conditions of competition in the market if, in particular, it enabled the undertakings participating in it '*to congeal conditions in their present state thus depriving their customers of any genuine opportunity to take advantage of services on more favourable terms which would be offered to them under normal conditions of competition*'.⁷⁹⁰

Implementation

A.37. The fact that a party may have played only a limited part in setting up an agreement, or may not be fully committed to its implementation, or may have

Limited v Office of Fair Trading [2005] CAT 4, at [206(v)]. Although the case law has referred to this part of the test in the context of influencing the conduct of an actual or potential competitor, the CMA has concluded that the point of principle is not confined to such situations - it extends to relationships between non-competitors and an infringement exists where the other constituent elements of the Chapter I prohibition are satisfied.

⁷⁸⁶ Case 172/80, *Gerhard Züchner v Bayerische Vereinsbank* [1982] ECR I- 2021, paragraph 14; Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 117; and Case C-8/08 *T-Mobile Netherlands and Others v NMa*, [2009] ECR I-4529, at paragraph 33. The CJ (in those cases) added that regard must be had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of the market in question.

⁷⁸⁷ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 118. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(ix)].

⁷⁸⁸ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 124. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(xi)].

⁷⁸⁹ Cases 48/69 etc *ICI Ltd v Commission* [1972] ECR 619, paragraph 67.

⁷⁹⁰ Case 172/80, *Gerhard Züchner v Bayerische Vereinsbank* [1982] ECR I- 2021, paragraphs 19 and 20.

participated only under pressure from other parties, does not mean that it is not party to the agreement.⁷⁹¹

- A.38. Parties may show varying degrees of commitment to the common plan: the fact that a party does not abide by the outcome of meetings⁷⁹² or does not act on or subsequently implement the agreement does not preclude the finding of its liability or relieve that undertaking of responsibility for it.⁷⁹³ In addition, the fact that a party comes to recognise that it can 'cheat' on the agreement at certain times does not preclude the finding of an infringement.⁷⁹⁴
- A.39. Further, where an agreement has the object of restricting competition (as described below), parties cannot avoid liability for the resulting infringement by arguing that the agreement was never put into effect.⁷⁹⁵
- A.40. Where a party takes some action towards implementing an agreement, it is necessary to determine that such party was aware of the existence of the agreement in order to establish its participation in that agreement. If a party was unaware of the existence of the agreement, those actions could not constitute the expression of its accession to or participation in that agreement.⁷⁹⁶ However, an agreement or concerted practice may be made on an undertaking's behalf by its employees acting in the ordinary course of their employment, despite the ignorance of more senior management.⁷⁹⁷

Decisions by associations of undertakings

- A.41. The concept of a decision of an association covers any measure, even if it is not binding or fully complied with by the members,⁷⁹⁸ which, regardless of

⁷⁹¹ *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, at paragraph 2.8. See also, for example, Cases T-25/95 *Cimenteries CBR SA v Commission* [2000] ECR II-491, at paragraphs 1389 and 2557 (this judgment was upheld on liability by the CJ in Cases C-204/00 *P etc Aalborg Portland A/S v Commission* [2004] ECR I-123 although the fine was reduced) and Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraphs 79 and 80.

⁷⁹² Case T-25/95 *Cimenteries* [2000] ECR II-491, at paragraph 1389.

⁷⁹³ Case C-277/87 *Sandoz v Commission* [1990] ECR I-45 (summary judgment), at paragraph 3.

⁷⁹⁴ Case C-246/86 *Belasco v Commission* [1989] ECR 2117, at paragraphs 15 to 16.

⁷⁹⁵ See, for example, Case 19/77 *Miller v Commission* [1978] ECR 131, at paragraph 7; 86/82 *Hasselblad v Commission* (1984) ECR 883, paragraph 46; Case C-277/87 *Sandoz v Commission* [1990] ECR I-45 (at paragraph 3 of the published summary).

⁷⁹⁶ Case T-211/08 *Putters International NV v European Commission* [2011] ECR II-3729, at paragraph 34: 'Restrictive practices can be regarded as constituent elements of a single anti-competitive agreement only if it is established that they form part of an overall plan pursuing a common objective. In addition, only where the undertaking knew, or ought to have known, when it participated in those practices, that it was taking part in the single agreement, can its participation in them constitute the expression of its accession to that agreement'; Case T-25/95 *Cimenteries* [2000] ECR II-491, paragraphs 4027 and 4112; Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraph 87.

⁷⁹⁷ Joined cases 100/80 etc. *Musique Diffusion Francaise v Commission* [1983] ECR 1825, at paragraphs 97 and 98. See also *Tesco Stores Limited v OFT* [2012] CAT 31 at [62]: '[...] any act by any employee could, potentially lead to an infringement attributable to their corporate employer, with whom they comprise the same undertaking'.

⁷⁹⁸ Case T-325/01 *DaimlerChrysler v Commission* [2005] ECR II-3319, paragraph 210, and *Northern Ireland Livestock and Auctioneer's Association*, OFT decision of 3 February 2003, [2003] UKCLR 433, paragraph 35; and *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, at paragraph 2.9.

what its precise legal status may be, constitutes the faithful reflection of the association's resolve to coordinate the conduct of its members.⁷⁹⁹ It may include, for example, the constitution or rules of an association of undertakings, or its recommendations or other activities. In the day to day conduct of the business of an association, resolutions, recommendations or dictats of the management committee or of the full membership in general meeting, binding decisions of the management or executive committee of the association, or rulings of its chief executive, the effect of which are to limit the commercial freedom of action of the members in some respect, will all be decisions of the association. The key consideration is whether the effect of the decision, whatever form it takes, is to limit the freedom of action of the members in some commercial matter.⁸⁰⁰

- A.42. In *Northern Ireland Livestock and Auctioneers' Association* the OFT concluded that a non-binding recommendation by the association as to the commission that its members should charge for the purchase of livestock in Northern Ireland cattle marts amounted to a decision within the Chapter I prohibition.⁸⁰¹

F. Single continuous infringement

- A.43. An infringement need not be based on a single, isolated act, but may operate through a pattern of conduct involving a series of agreements, concerted practices and/or decisions entered into over a period of time. Those arrangements may also vary and adapt to new circumstances, sub-agreements or inner circles of closer cooperation may be established and new implementing mechanisms developed. Some participants may drop out, others may join in, and not every undertaking may necessarily be involved in every aspect of the infringing arrangement.⁸⁰² Where it is established that a set of individual agreements, concerted practices or decisions by associations of undertakings are interlinked in terms of pursuing a single anti-competitive aim, they can be characterised as constituting a single continuous infringement.⁸⁰³

⁷⁹⁹ Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405, paragraph 32.

⁸⁰⁰ *Trade associations, professions and self-regulating bodies* (OFT 408, December 2004), adopted by the CMA Board, paragraph 2.2; *National Sulphuric Acid* [1980] OJ L260/24; *BPICA* [1977] OJ L299/18.

⁸⁰¹ *Northern Ireland Livestock and Auctioneer's Association* OFT decision of 3 February 2003, [2003] UKCLR 433, paragraphs 35 and 36.

⁸⁰² *European Union Law of Competition*, Bellamy & Child, Seventh Edition, at 2.071.

⁸⁰³ Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, paragraph 113. See also Cases T-101&111/05 *BASF v Commission* [2007] ECR II-4949, paragraph 159; and in relation to vertical agreements, the European Commission's decision in *Video Games, Nintendo Distribution and Omega-Nintendo* OJ 2003 L255/33, paragraphs 261 and following.

A.44. As the CJ has held in *Anic*, although the prohibition [in Article 101 TFEU] aims to catch different forms of coordination and collusion between undertakings:

'[i]t does not, however, follow that patterns of conduct having the same anti-competitive object, each of which, taken in isolation, would fall within the meaning of 'agreement', 'concerted practice' or 'a decision by an association of undertakings', cannot constitute different manifestations of a single infringement of Article [101(1) TFEU]'.⁸⁰⁴

A.45. The CJ has held that this approach does not contravene the principle of personal responsibility for infringements, nor does it ignore the individual analysis of evidence or breach the rights of defence of the undertakings involved.⁸⁰⁵

A.46. When establishing that an undertaking was involved in a single overall infringement it is necessary to show that:

'... the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk'.⁸⁰⁶

A.47. Accordingly, various agreements or concerted practices can be considered to form part of a single continuous infringement where:

A.47.1. the agreements or concerted practices pursued a common objective or objectives

A.47.2. through its own conduct, each undertaking intended to contribute to the common objective(s) pursued by all the participants, and

A.47.3. each undertaking was aware of the offending conduct (planned or put into effect) of the other participants in pursuit of the same objective(s) or each undertaking could reasonably have foreseen it and was prepared to take the risk that it would occur.

A.48. In such circumstances, each participating undertaking may bear personal responsibility not only for its own conduct, but also for the operation of the

⁸⁰⁴ Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, paragraph 113.

⁸⁰⁵ *Ibid*, paragraphs 83 to 85 and 203.

⁸⁰⁶ *Ibid*, paragraph 87.

overall anti-competitive arrangement during the period in which it participated in it.⁸⁰⁷

- A.49. Moreover, it is not necessary for an undertaking to be active on the relevant market in order to be party to a single continuous infringement.⁸⁰⁸ The liability of an undertaking for an infringement is not affected by the fact that it did not take part in all aspects of an anti-competitive scheme, or that it played only a minor role in the aspects in which it did participate.⁸⁰⁹

G. Prevention, restriction or distortion of competition

- A.50. As noted above, the Chapter I prohibition prohibits agreements between undertakings or concerted practices which:

'...have as their object or effect the prevention, restriction or distortion of competition'.

- A.51. It is settled case law, at both UK and EU levels, that if an agreement has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement has had, or would have, any anti-competitive effects in order to establish an infringement.⁸¹⁰

Anti-competitive object

- A.52. The CJ has held that object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.⁸¹¹
- A.53. The object of an agreement is to be identified primarily from an examination of objective factors, such as the content of its provisions, its objectives and the

⁸⁰⁷ Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, paragraph 83.

⁸⁰⁸ Case T-29/05 *Deltafina v Commission* [2010] ECR II- 4077, at paragraphs 46 to 49. See also Case T-99/04 *AC-Treuhand v Commission* [2008] ECR II-1501, at paragraphs 129 to 136.

⁸⁰⁹ Case T-99/04 *AC-Treuhand v Commission* [2008] ECR II-1501, at paragraph 132.

⁸¹⁰ See, for example: Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, at page 342; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Portland A/S and Others v Commission* [2004] ECR I- 123, at paragraph 261; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, at paragraph 125; Case C- 209/07 *Competition Authority v Beef Industry Development Society Ltd* [2008] ECR I-8637, at paragraph 16; and Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others*, judgment of 13 December 2012, at paragraph 36.

⁸¹¹ Case C-32/11 *Allianz Hungária Biztosító Zrt and Others*, judgment of 14 March 2013, paragraph 35. This has been affirmed most recently in Case C-67/13 P *Groupement des cartes bancaires v Commission*, judgment of 11 September 2014, paragraph 50 and Case C-382/12P *MasterCard and Others v Commission*, judgment of 11 September 2014, paragraph 185. Both in *Cartes Bancaires* and *MasterCard*, the CJ stated that it is apparent from the case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (Case C-67/13 P *Groupement des cartes bancaires v Commission*, judgment of 11 September 2014, paragraphs 49 and 57; Case C-382/12 P, *MasterCard Inc. v. European Commission*, 11 September 2014, paragraph 184). It went on to state that that case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (Case C-67/13 P *Groupement des cartes*

legal and economic context of the agreement.⁸¹² When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.⁸¹³ Where appropriate, the way in which the coordination (or collusive behaviour) is implemented may be taken into account.⁸¹⁴

- A.54. Anti-competitive subjective intentions on the part of the parties can also be taken into account in the assessment, but they are not a necessary factor for a finding that there is an anti-competitive restrictive object.⁸¹⁵
- A.55. It is well established that there is no need to take account of the actual effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.⁸¹⁶
- A.56. Furthermore, the fact that an agreement pursues other legitimate objectives does not preclude it being regarded as having a restrictive object.⁸¹⁷
- A.57. Whilst vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, the fact that an agreement is entered into in the vertical context does not exclude the possibility that it constitutes a restriction of competition by object.⁸¹⁸

Anti-competitive effect

- A.58. The Chapter I prohibition applies both to actual and potential anti-competitive effects.⁸¹⁹ The CJ has stated that *'[t]he crucial element to be taken into*

bancaires v Commission, judgment of 11 September 2014, paragraph 50; Case C-382/12 P, *MasterCard Inc. v. European Commission*, 11 September 2014, paragraph 185).

⁸¹² Case C-32/11 *Allianz Hungária Biztosító Zrt and Others*, judgment of 14 March 2013, paragraph 36 and Case C- 67/13 P *Groupeement des cartes bancaires v Commission*, judgment of 11 September 2014, paragraph 53. See also cases C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291 at paragraph 58, Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-0000, paragraphs 16 and 21 and C-403/08 *Football Association Premier League and Others* at paragraph 136.

⁸¹³ Case C-67/13 P *Groupeement des cartes bancaires v Commission*, judgment of 11 September 2014, paragraph 53 and Case C-32/11 *Allianz Hungária Biztosító Zrt and Others*, judgment of 14 March 2013, paragraph 36.

⁸¹⁴ *Cityhook Limited v OFT*, [2007] CAT 18, at [268] which noted the provisions of paragraph 22 of the European Commission's *Guidelines on the Application of Article 81(3) of the EC Treaty* (now Article 101(3) of the TFEU), OJ 2004 C101/97. Paragraph 22 provides that: 'The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect'.

⁸¹⁵ Case C-32/11 *Allianz Hungária Biztosító Zrt and Others*, judgment of 14 March 2013, paragraph 37 and Case C- 67/13 P *Groupeement des cartes bancaires v Commission*, judgment of 11 September 2014, paragraph 54.

⁸¹⁶ Cases 56 & 58/64 *Consten and Grundig v Commission* [1966] ECR 299, at 342. See also *Cityhook Limited v OFT*, [2007] CAT 18, at [269].

⁸¹⁷ Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd* [2008] ECR I-8637, at paragraph 21. See also, most recently, Case C-67/13 P *Groupeement des cartes bancaires v Commission*, judgment of 11 September 2014, at paragraph 70.

⁸¹⁸ See Case C-32/11 *Allianz Hungária Biztosító Zrt and Others*, judgment of 14 March 2013, paragraph 43.

⁸¹⁹ See also Case 7/95 P, *John Deere Limited v Commission* [1998] ECR I-3111, paragraph 77.

consideration ... is the actual or potential effect'.⁸²⁰ This means that where no actual or immediate effects on competition are proven, the CMA must consider the potential effects on competition before it can find whether or not there has been an infringement by effect.

- A.59. The assessment of the actual or potential effect of an agreement must be conducted by reference to the counterfactual, which is the hypothetical position that would pertain in the absence of that agreement containing the restriction of competition. As the CJ has held on numerous occasions:

'... in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute'.⁸²¹

- A.60. The assessment of effect, by reference to the counterfactual, must take into consideration the actual context in which the coordination in question operates (or operated at the time, when examining past conduct)⁸²² and in particular the legal and economic context. According to the CJ in *MasterCard*:

'165 ... when appraising the effects of coordination between undertakings in the light of Article [101 TFEU], it is necessary to take into consideration the actual context in which the relevant coordination arrangements are situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question.

⁸²⁰ Case 31/85 *ETA v DK Investment* [1985] ECR 3933, paragraph 12. In another case, where the Commission had decided there was no proof of anti-competitive object or effect, one of the questions for the CJ to consider was whether, having decided that the relevant provisions did not give rise to actual or immediate anti-competitive effects, the Commission also took sufficient account of their potential effects before deciding whether or not there was an infringement of the then Article 85 (now Article 101 TFEU) by effect. The CJ stated that *'account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long term plan'*: see joined cases 142/84 and 156/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities*, judgment of 17 November 1987, at paragraph 39.

⁸²¹ Case 56/65, *Société Technique Minière (SS.T.M.) v Maschinenbau Ulm GmbH* [1966] ECR 235 at page 250; most recently affirmed in Case C-382/12 P *MasterCard v Commission*, judgment of 11 September 2014, paragraph 161 (see also paragraph 128). See also the Commission's *Guidelines on the Application of Article 81(3) of the EC Treaty* (now Article 101(3) of the TFEU), OJ 2004 C101/97, at paragraph 17. In *MasterCard*, the CJ also affirmed that the same applies in the case of a decision of an association of undertakings (at paragraph 161). The CJ also noted that *'the scenario envisaged on the basis of the hypothesis that the coordination arrangements in question are absent must be realistic'* (at paragraph 166).

⁸²² *The Racecourse Association and others v OFT* [2005] CAT 29 at [153].

166 ... it is permissible, where appropriate, to take account of the likely developments that would occur on the market in the absence of those arrangements'.⁸²³

- A.61. The examination of the conditions of competition in which the coordination in question operates is based not only on existing competition at the time of the coordination, but also on potential competition:

'It must also be stressed that the examination of conditions of competition is based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to penetrate the relevant market and compete with the undertakings already established'.⁸²⁴

Restrictions on advertising

- A.62. Both case law and decisional practice of the OFT and the Commission have addressed restrictions on advertising and found that they have the potential to restrict competition between undertakings, even when operating at different levels of the supply chain.⁸²⁵
- A.63. Previous OFT decisions have concluded that restricting retailers' ability to advertise prices is likely to affect price competition between them. In *Lladró*⁸²⁶ the OFT noted that the advertising of resale prices, including discounts, promotes price transparency between retailers and provides a significant incentive for retailers to compete on price. Where provisions restrict a retailer's freedom to inform potential customers of discounts which are being offered, this removes a key incentive for, and constitutes an obstacle to, price competition between retailers. The OFT concluded in *Lladró* that the '*obvious consequence*' of price advertising restrictions is to restrict retailers' ability to

⁸²³ Case C-382/12 P *MasterCard v Commission*, judgment of 11 September 2014, paragraphs 165 and 166. For an example in relation to a decision of an association of undertakings, see Case C-1/12, *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência*, judgment of 28 February 2013, paragraph 70.

⁸²⁴ Joined cases T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141, paragraph 137; affirmed, for example, in Case T-461/07, *Visa Europe v Commission*, [2011] ECR I-1729, paragraphs 68 and 125 and Case T-360/09 *E.ON Ruhrgas AG v Commission*, judgment of 29 June 2012, paragraph 85.

⁸²⁵ See also *Trade associations, professions and self-regulating bodies* (OFT 408, December 2004), adopted by the CMA Board, at paragraph 3.14. The CMA notes that vertical restraints are generally less harmful than horizontal restraints (European Commission *Guidelines on Vertical Restraints* (2010/C 130/01) paragraph 6. Therefore, the CMA has concluded that if restrictions on advertising are harmful to competition even in a vertical context then they will be significantly more harmful to competition in a horizontal context.

⁸²⁶ *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, Decision of the Director General of Fair Trading, 31 March 2003.

determine their own sale prices and that ‘any such provision has as its object the prevention, restriction or distortion of competition’.⁸²⁷

- A.64. In *Roma*,⁸²⁸ the OFT found that restricting dealers from selling Roma-branded mobility scooters online and from advertising their price online limited consumers’ choice and their ability to compare prices and get value for money. In its decision the OFT stated that:

‘By prohibiting retailers from advertising retail prices online, retailers who would otherwise advertise at a lower price are unable (or at least significantly less able) to signal to consumers that they are offering better value (...) Therefore, such a prohibition prevents consumers from easily shopping around for lower-priced retailers (for example, through the use of ‘Google shopping’). As a consequence, by reducing price transparency between retailers, a prohibition on price advertising over the internet is likely significantly to eliminate incentives on the part of retailers to engage in price competition with other retailers selling, whether online or otherwise, Roma-branded Scooters and is thereby liable to lead to consumers paying higher prices. Therefore, the prohibition on online price advertising is liable to prevent, restrict or distort competition between retailers.’⁸²⁹

- A.65. In another recent OFT case, the OFT found that Pride Mobility Products Limited (Pride) and some of its retailers infringed competition law regarding the sale of mobility scooters by entering into arrangements with eight UK-wide online retailers which prevented them from advertising online prices below Pride’s Recommended Retail Price (RRP). The OFT concluded that, among other matters, by reducing price transparency between retailers, the price advertising prohibition in question was likely to eliminate significantly incentives on the part of retailers to engage in price competition with other retailers selling, whether online or otherwise, certain Pride mobility scooters and was thereby liable to lead to consumers paying higher prices. The OFT therefore concluded that the price advertising prohibition in question was liable to prevent, restrict or distort competition between retailers.⁸³⁰

- A.66. As is explained above at paragraphs A.4 and A.5, the CMA must have regard to any relevant decision or statement of the Commission. In the Commission’s

⁸²⁷ *Agreements between Lladró Comercial SA and UK retailers fixing the price for porcelain and stoneware figures*, Decision of the Director General of Fair Trading, 31 March 2003, at paragraph 70.

⁸²⁸ *Roma-branded mobility scooters: prohibitions on online sales and online price advertising*, CE/9578-12, decision of 5 August 2013, at paragraph 3.181.

⁸²⁹ *Roma-branded mobility scooters: prohibitions on online sales and online price advertising*, CE/9578-12 decision of 5 August 2013, at paragraph 3.181. The OFT found that the prohibitions were anti-competitive by ‘object’: see, for example, paragraphs 1.10, 3.13 and 3.234.

⁸³⁰ *Mobility scooters supplied by Pride Mobility Products Limited: prohibition on online advertising of prices below Pride’s RRP*, CE/9578-12 decision of 27 March 2014 at paragraph 3.202. The OFT found that the prohibitions were anti-competitive by ‘object’: see, for example, paragraphs 1.10, 3.13, 3.198 and 3.257.

decision on *EPI code of conduct*,⁸³¹ it found a comparative advertising prohibition issued by the Institute of Professional Representatives before the European Patent Office limited the commercial freedom of members and had the object or effect of restricting competition between members of the profession. The Commission noted in its decision that '*providing information on the services on offer, [...], and comparative advertising, [...], are means of increasing user information to the benefit of users and are important elements of the competitive process.*'⁸³²

- A.67. On appeal, the GC upheld the Commission's decision in this respect.⁸³³ The GC considered that the prohibition on comparative advertising constituted a restriction of competition for the purpose of Article 101(1) TFEU. Significantly, the GC held that '*advertising is an important element of the competitive situation on any given market, since it provides a better picture of the merits of each of the operators, the quality of their services and their fees.*'⁸³⁴
- A.68. The Commission has also considered the application of Article 101(1) TFEU to advertising restrictions imposed by manufacturers in supply agreements in a number of investigations (see, in particular, the *Hasselblad*⁸³⁵ and *Yamaha*⁸³⁶ decisions, described further below).⁸³⁷
- A.69. In *Hasselblad*,⁸³⁸ the Commission condemned a selective distribution agreement which allowed the manufacturer to prohibit adverts by a dealer containing statements that it '*can match any other retailer's selling prices*'. In addition to prohibiting particular adverts, Hasselblad had also threatened to withdraw credit facilities from dealers who did not treat prices in its retail price list as minimum selling prices and had terminated a UK dealership which had advertised its products at discounted prices.
- A.70. The Commission found that Hasselblad's contractual right to prohibit adverts restricted competition within the meaning of Article 101(1) for the following reason:⁸³⁹

'This extensive right of intervention enables Hasselblad (GB) to prevent actively competing and price-cutting dealers..., from advertising their

⁸³¹ Commission Decision IV/36.147 *EPI code of conduct*, OJ 1999 L106/14, at paragraphs 39 to 41.

⁸³² *Ibid*, at paragraph 41.

⁸³³ Case T-144/99 *Institute of Professional Representatives before the European Patent Office v Commission* [2001] ECR II-1090.

⁸³⁴ *Ibid*, at paragraph 72.

⁸³⁵ *Hasselblad*, OJ [1982] L161/18.

⁸³⁶ *Yamaha* (COMP37.975), decision of 16 July 2003.

⁸³⁷ Notwithstanding that in both cases the advertising restrictions were part of a wider strategy by the manufacturers to influence retail prices, the decisions clearly describe the anti-competitive nature of advertising restrictions.

⁸³⁸ *Hasselblad*, OJ [1982] L161/18.

⁸³⁹ *Ibid*, at paragraph 60.

activities, the more so as Hasselblad (GB) is not required to give any justification for its censorship measures’.

- A.71. The Commission concluded that Hasselblad’s distribution policy (including Hasselblad’s right to prohibit adverts) *‘interferes with the freedom of the authorised dealers to fix their prices, using the dealers’ fear of termination of the Dealer Agreement as a means of hindering price competition between authorised dealers’*.⁸⁴⁰ The Commission considered that Hasselblad’s use of its dealer agreements (including the advertising restrictions) *‘as a means to influence retail prices’*, amounted to a restriction of competition under Article 101(1).
- A.72. On appeal,⁸⁴¹ the CJ found that the Commission had been right to conclude that the advertising restriction constituted an infringement of Article 101(1).
- A.73. In *Yamaha*,⁸⁴² the Commission objected to restrictions contained in selective distribution agreements on dealers’ advertising prices which were different to Yamaha’s list prices. In particular, the Commission was concerned by advertising restrictions which formed part of a wider policy by Yamaha to enforce resale price maintenance in a number of territories including the Netherlands and Italy.
- A.74. The Dutch dealer contracts (described as ‘guidelines’) prohibited dealers from advertising prices which differed from Yamaha’s list prices. The Commission stated that Yamaha’s guidelines:
- ‘clearly prevented the dealer from announcing either within or outside the shop a price other than the one established in the price list. Even if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the customer the price it fixed and that such discounts, if the dealer was still willing to offer them, could not be communicated in a way contrary to the guidelines.’*⁸⁴³
- A.75. Meanwhile, the distribution agreement with dealers in Italy prohibited dealers from publishing *‘in whichever form’* prices which differed from Yamaha’s official price lists. The dealers were also prohibited from reproducing advertising material and price lists which were different to Yamaha’s official price lists. The Commission found that *‘the dealers’ freedom to set prices is strictly limited...Dealers cannot attract clients by advertising prices that differ from the ‘published prices’ of [Yamaha], nor by indicating prices in their shops*

⁸⁴⁰ *Hasselblad*, OJ [1982] L161/18, at paragraph 66.

⁸⁴¹ Case 86/82 *Hasselblad v Commission* [1984] ECR 883, at 43.

⁸⁴² *Yamaha* (COMP37.975), decision of 16 July 2003.

⁸⁴³ *Ibid*, at paragraph 125.

different from those indicated by [Yamaha].⁸⁴⁴ The Commission concluded that Yamaha's agreements had the object of influencing resale prices, thereby restricting or distorting price competition.

H. Appreciability

- A.76. An agreement will infringe the Chapter I prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition⁸⁴⁵ within the UK or a part of it.
- A.77. The CMA takes the view (as stated in its guidance)⁸⁴⁶ that in determining whether an agreement has an appreciable effect on competition, it will have regard to the Commission's approach as set out in Commission's Notice on Agreements of Minor Importance.⁸⁴⁷
- A.78. Accordingly, in respect of an agreement between competing undertakings,⁸⁴⁸ the CMA takes the view that it will generally have no appreciable effect on competition if the aggregate market share of the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement.⁸⁴⁹
- A.79. Similarly, in respect of an agreement between non-competitors,⁸⁵⁰ the CMA takes the view that it will generally have no appreciable effect on competition if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement.⁸⁵¹
- A.80. However, an agreement (whether between competing or non-competing undertakings) which has the object of preventing, restricting or distorting

⁸⁴⁴ *Yamaha* (COMP37.975), decision of 16 July 2003, at paragraph 134.

⁸⁴⁵ It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see Case C-226/11 *Expedia Inc v Autorite de la Concurrence and others*, judgment of 13 December 2012, paragraph 16 citing, among other cases, Case 5/69 *Völk v Vervaecke* [1969] ECR 295, paragraph 7.

⁸⁴⁶ *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, at paragraph 2.18.

⁸⁴⁷ *Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) of the Treaty on the Functioning of the European Union (De Minimis Notice)* [2014] OJ C291/01 (the 'Notice on Agreements of Minor Importance'). Note that the principles set out in the *Notice on Agreements of Minor Importance* are stated also to apply to decisions by associations of undertakings and to concerted practices. Although the approach taken in this Notice is not binding on National Competition Authorities, they are entitled to take its thresholds into account: see Case C-226/11 *Expedia Inc v Autorite de la Concurrence and others*, judgment of 13 December 2012, paragraph 31.

⁸⁴⁸ That is, undertakings which are actual or potential competitors on any of the relevant markets affected by the agreement.

⁸⁴⁹ *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, at paragraph 2.16.

⁸⁵⁰ That is, undertakings which are not actual or potential competitors on any of the relevant markets affected by the agreement.

⁸⁵¹ *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, at paragraph 2.16.

competition constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction of competition.⁸⁵²

I. Effect on trade between Member States

- A.81. Where the CMA applies national competition law to agreements or concerted practices which may affect trade between EU Member States, the CMA must also apply Article 101.⁸⁵³
- A.82. An effect on trade means that the agreement or concerted practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU Member States. The concept of 'trade' also encompasses an effect on the competitive structure of the market, for example where it eliminates or threatens to eliminate a competitor.
- A.83. For the purposes of assessing whether an agreement or concerted practice may affect trade between EU Member States the CMA follows the approach set out in the Commission's published guidance.⁸⁵⁴
- A.84. Agreements which cover only part of an EU Member State are not likely to appreciably affect trade between EU Member States, unless they have the effect of hindering competitors from other EU Member States from gaining access to part of the EU Member State, which constitutes a substantial part of the internal market.⁸⁵⁵ Agreements which are local in nature are in themselves not capable of appreciably affecting trade between EU Member States.⁸⁵⁶

J. Effect on trade within the UK

- A.85. By virtue of Section 2(1)(a) of the Act, the Chapter I prohibition applies to agreements which '*...may affect trade within the United Kingdom*'.
- A.86. It is possible that an agreement may be caught by the Chapter I prohibition even if it only affects trade in a limited geographical area. For the purposes of the Chapter I prohibition, the UK includes any part of the UK in which an agreement operates or is intended to operate.⁸⁵⁷ However, the test is not read as importing a requirement that the effect on trade within the UK should be appreciable. Effect on trade within the UK is a purely jurisdictional test to

⁸⁵² Case C-226/11 *Expedia Inc v Autorite de la Concurrence and others*, judgment of 13 December 2012, paragraph 37; and *Notice on Agreements of Minor Importance* at paragraphs 2 and 13.

⁸⁵³ 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, Article 3.

⁸⁵⁴ Commission *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (2004/C 101/07).

⁸⁵⁵ *Ibid*, paragraph 92.

⁸⁵⁶ *Ibid*, paragraph 91.

⁸⁵⁷ Section 2(7) of the Act.

demarcate the boundary line between the application of EU competition law and national competition law.⁸⁵⁸ In any event, the CAT has clarified that given a close nexus between appreciable effect on competition and appreciable effect on trade within the United Kingdom, if one was satisfied, the other was likely to be so.⁸⁵⁹ Finally, an agreement or concerted practice is not in fact required to affect trade provided it is capable of doing so.⁸⁶⁰

K. Exclusion or exemption

Exclusion

A.87. Section 3 of the Act provides that the Chapter I prohibition does not apply to any of the cases in which it is excluded by or as a result of Schedules 1 to 3 of the Act. Schedule 1 covers mergers and concentrations; Schedule 2 covers competition scrutiny under other enactments; and Schedule 3 covers general exclusions.

Exemption

A.88. Agreements which satisfy the criteria set out in section 9 of the Act benefit from an exemption from the Chapter I prohibition.

A.89. In considering this issue of exemption, the CMA has had regard to the Commission's *Guidelines on the application of Article 81(3) of the Treaty* [now Article 101(3) TFEU].⁸⁶¹

A.90. Pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it does not affect trade between EU Member States but otherwise falls within a category of agreement which is exempt from the equivalent prohibition under EU law (Article 101(1) TFEU) by virtue of a Regulation (known as a 'block exemption' regulation).⁸⁶²

A.91. It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.⁸⁶³ The CMA will consider such evidence against the likely impact of the restrictive agreement on competition when assessing whether the criteria in section 9 of the Act are satisfied.

⁸⁵⁸ *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, at [459] and [460]. The CAT considered this point also in *North Midland Construction plc v. Office Of Fair Trading* [2011] CAT 14, at [48]-[51] and [62]) but considered that it was 'not necessary [...] to reach a conclusion'.

⁸⁵⁹ *North Midland Construction plc v OFT* [2011] CAT 14, at [62].

⁸⁶⁰ Case T-202/98 *Tate & Lyle plc v Commission* [2001] ECR II-2035, paragraph 78.

⁸⁶¹ *Guidelines on the application of Article 81(3) of the Treaty*, OJ 2004 C101/97. See also *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, at paragraph 5.5.

⁸⁶² Section 10(2) of the Act.

⁸⁶³ Section 9(2) of the Act.

A.92. Severe restrictions of competition⁸⁶⁴ are unlikely to benefit from individual exemption as such restrictions generally fail the first two conditions for exemption (objective economic benefits and benefits to consumers) and the third condition (indispensability).⁸⁶⁵ However, each case ultimately falls to be assessed on its own merits.

L. Burden and standard of proof

Burden of proof

A.93. The burden of proving an infringement of the Chapter I prohibition lies with the CMA.⁸⁶⁶ However, this burden does not preclude the CMA from relying, where appropriate, on inferences or evidential presumptions. In *Napp*, the CAT stated that:

'[t]hat approach does not in our view preclude the Director,⁸⁶⁷ in discharging the burden of proof, from relying, in certain circumstances, from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example [...] that an undertaking's presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged'.⁸⁶⁸

Standard of proof

A.94. The CMA is required to demonstrate that an infringement has occurred on the balance of probabilities which is the civil standard of proof.⁸⁶⁹ The CAT clarified in the *Replica Kit* appeals that:⁸⁷⁰

'The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled'.

⁸⁶⁴ These are usually 'black-listed' in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices (see paragraph 46).

⁸⁶⁵ *Guidelines on the application of Article 81(3) of the Treaty*, OJ 2004, C101/97, at paragraphs 46 and 79 in respect of severe and so-called 'hardcore' restrictions.

⁸⁶⁶ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, [2002] CAT 1, at [95] and [100]. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [164] and [928] to [931] and *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 31, at [88].

⁸⁶⁷ References to the 'Director' are to the former Director General of Fair Trading (DGFT). The post of DGFT was abolished under the Enterprise Act 2002 and the functions of the DGFT were transferred to the OFT. From 1 April 2014 the OFT's competition and certain consumer functions were transferred to the CMA by virtue of the Enterprise and Regulatory Reform Act 2013.

⁸⁶⁸ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 at [110].

⁸⁶⁹ *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 31, at [88].

⁸⁷⁰ *JJB Sports plc and Allsports Limited v OFT* [2004] CAT 17, at [204]. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [164], [165] and [166].

A.95. The Supreme Court has further clarified that this standard of proof is not connected to the seriousness of the suspected infringement.⁸⁷¹ The CAT has also expressly accepted the reasoning in this line of case law.⁸⁷²

⁸⁷¹ *Re S-B* [2010] 2 WLR, at paragraph 34. See also *Re B* [2009] 1 AC 11, at paragraph 72.

⁸⁷² *North Midland Construction plc v OFT* [2011] CAT 14, at [15] and [16].

ANNEX B: PARTIES' LIABILITY

A. Introduction

- B.1. This section applies Annex A (paragraphs A.13 to A.24) and identifies and sets out the details of the undertakings which the CMA has found liable for the Infringement, including where applicable the joint and several liability of the parent company of the entities directly involved in the Infringement. As set out at Chapter 5, section B above, the CMA has concluded that all of the Parties are companies engaged in economic activity and that they constitute undertakings (or an association of undertakings) for the purposes of the Chapter I prohibition.
- B.2. This section describes each of the Parties' primary activities and corporate structure, including where applicable, each Party's corporate owners during the period of the Infringement.
- B.3. This section also sets out, for each Party to the Infringement, the CMA's conclusions on the attribution of liability.

B. The CMA's approach to assessing liability

Identification of the appropriate legal entity

- B.4. In order to determine who is liable for an infringement, and therefore, who can be the addressee of a statement of objections and any ensuing infringement decision, and subject to any financial penalty which the CMA imposes, it is necessary to identify the legal or natural persons who form part of the undertaking involved in an infringement.
- B.5. For each party which the CMA has found to be liable for the Infringement, it has first identified the legal entity which directly entered into the agreement, engaged in the concerted practice or adopted the decision in question. Second, the CMA has determined whether liability should be shared with another legal entity on the basis that:
 - (i) that entity had the ability to exercise decisive influence, and
 - (ii) actually exercised, or is presumed to have exercised, decisive influence⁸⁷³

⁸⁷³ See Annex A, paragraphs A.17 to A.18.

over the entity directly involved in the Infringement. In that case each legal entity's liability is joint and several on the basis that they form part of the same undertaking.

- B.6. The Parties to whom the Decision is addressed are named in paragraph 1.2.
- B.7. Due to the possibility that there may have been a change in each Party's company name and/or registered address, each Party's company number as recorded by Companies House, is detailed below. This Decision is to be construed as applying to the company registered with the stated company number, however named and/or irrespective of its registered address prior to, at, or subsequent to the time of the Infringement.⁸⁷⁴

Waterfords, Castles and Hamptons International: Active involvement

- B.8. As set out at Annex E, paragraphs E.9 to E.12, on the grounds of administrative prioritisation the CMA has decided not to address the Decision to each and every member of Three Counties.⁸⁷⁵ Instead, the CMA has identified the members that, on the basis of the evidence in its possession, it has concluded were most actively involved in the Infringement over the Relevant Period.
- B.9. On the basis of the evidence as set out at Chapter 4 above, the CMA has identified Waterfords, Castles and Hamptons International as the members of Three Counties that were most actively involved in the Infringement. As such, the Decision is only addressed to Waterfords, Castles and Hamptons International, as well as TMS, as owner and publisher of the *Star Courier*, and Three Counties.⁸⁷⁶

⁸⁷⁴ In circumstances where an entity has ceased to exist or has changed its name, consistent with case law, liability for an infringement may be attributed to the successor to that undertaking where there is functional and economic continuity between the original legal entity and the renamed entity (see Cases 29 and 30/83, *Compagnie Royale Asturienne des Mines SA and Rheinzink v Commission* [1984] ECR 1679 at paragraph 9, where the CJ also stated that 'a change in the legal form and name of an undertaking does not create a new undertaking free of liability for the anticompetitive behaviour of its predecessor when, from an economic point of view, the two are identical.').

⁸⁷⁵ See *Prioritisation principles for the CMA* (CMA16; April 2014).

⁸⁷⁶ As a result, the remaining Current Members are not addressees of this Decision. However, evidence submitted by these undertakings is referred to where relevant within this Decision and relied on as evidence of the Infringement.

C. Assessment of liability

Waterfords (Estate Agents) Limited (Waterfords)

- B.10. As set out in paragraph 5.40 above, the CMA has found that Waterfords was directly involved in the Infringement from 20 July 2005 (at the latest) to 31 January 2014. This is the period of the Infringement for Waterfords.
- B.11. In light of the CMA's conclusions in Chapter 5, Section I above, the CMA has found that Waterfords is liable for the Infringement.

Castles Property Services Limited (Castles)

- B.12. As set out in paragraph 5.48 above, the CMA has found that Castles was directly involved in the Infringement from 20 July 2005 (at the latest) to 31 January 2014. This is the period of the Infringement for Castles.
- B.13. In light of the CMA's conclusions in Chapter 5, Section I above the CMA has found that Castles is liable for the Infringement.

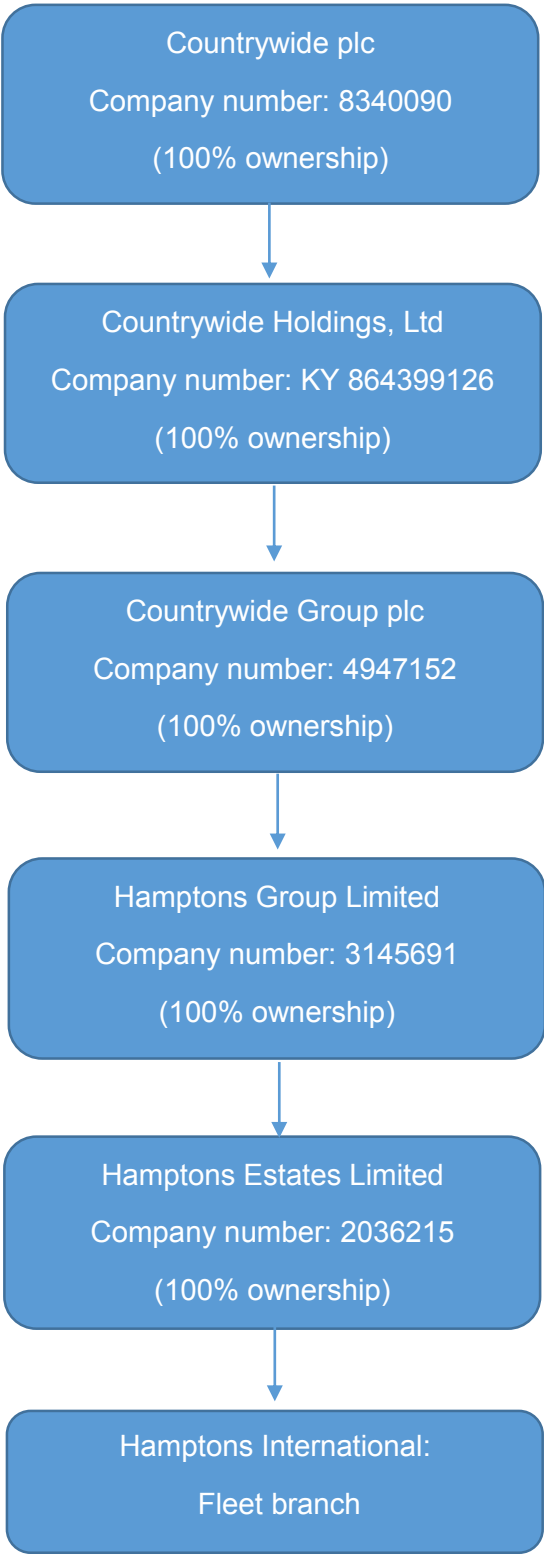
The Countrywide Group: Hamptons Estates Limited (trading as Hamptons International (Hamptons International)), Countrywide Group plc and Countrywide plc (together Countrywide)

- B.14. As set out in paragraph 5.55 above, the CMA has found that Hamptons International was directly involved in the Infringement from 1 January 2008 to 31 January 2014. This is the period of the Infringement for Hamptons International.
- B.15. In light of the CMA's conclusions in Chapter 5, Section I above the CMA has found that Hamptons International is liable for the Infringement.
- B.16. As set out in at Annex A, paragraphs A.15 to A.19, a parent company may be held jointly and severally liable for an infringement committed by a subsidiary company.
- B.17. As set out at paragraphs 3.14 to 3.16 above, Hamptons International has formed part of the Countrywide group of companies since 18 June 2010. From 21 December 2012, the Countrywide group has been ultimately owned and controlled by Countrywide plc. Prior to 21 December 2012, the Countrywide group was ultimately owned and controlled by Countrywide Group plc. For the avoidance of doubt, the CMA has concluded that Hamptons International, Countrywide Group plc and Countrywide plc form part of a single economic undertaking for the purposes of the Chapter I prohibition.

- B.18. This is based on the CMA's understanding that, from 18 June 2010, Hamptons International was a 100% indirectly owned subsidiary of Countrywide plc or Countrywide Group plc. This ownership can be traced through a number of Countrywide's subsidiary companies, each 100% owned by its immediate parent company, as set out in Figure B.1 below.
- B.19. Countrywide (whether Countrywide plc or Countrywide Group plc) therefore had the ability to exercise decisive influence, and is presumed to have exercised decisive influence, over Hamptons International from 18 June 2010.⁸⁷⁷
- B.20. In light of the above, the CMA has found that Countrywide plc and Countrywide Group plc are jointly and severally liable, together with Hamptons International, for the infringing conduct on the part of Hamptons International from 18 June 2010 to 31 January 2014.

⁸⁷⁷ For the avoidance of doubt, the CMA has also concluded that Countrywide did, in fact, exercise decisive influence over Hamptons International. For example, in an email dated 10 August 2013, [Head of Residential Sales] of Hamptons International noted '*...we should continue to encourage co-operation between brands within the [Countrywide] stable and to operate within the agreed guidelines in the greater interests of the group.*' (CMA Document Reference r_HAMP 9.278). Further similar examples include: emails dated 30 January 2013 and 8 February 2013 between [the Sales Director], of [Countrywide group company] and [the Head of Residential Sales] of Hamptons International (CMA Document Reference r_HAMP 9.272) and email dated 18 September 2013 from [the Senior Manager] of Hamptons International to [the Client Manager] of [Current Member C] (CMA Document Reference r_HAMP 9.285).

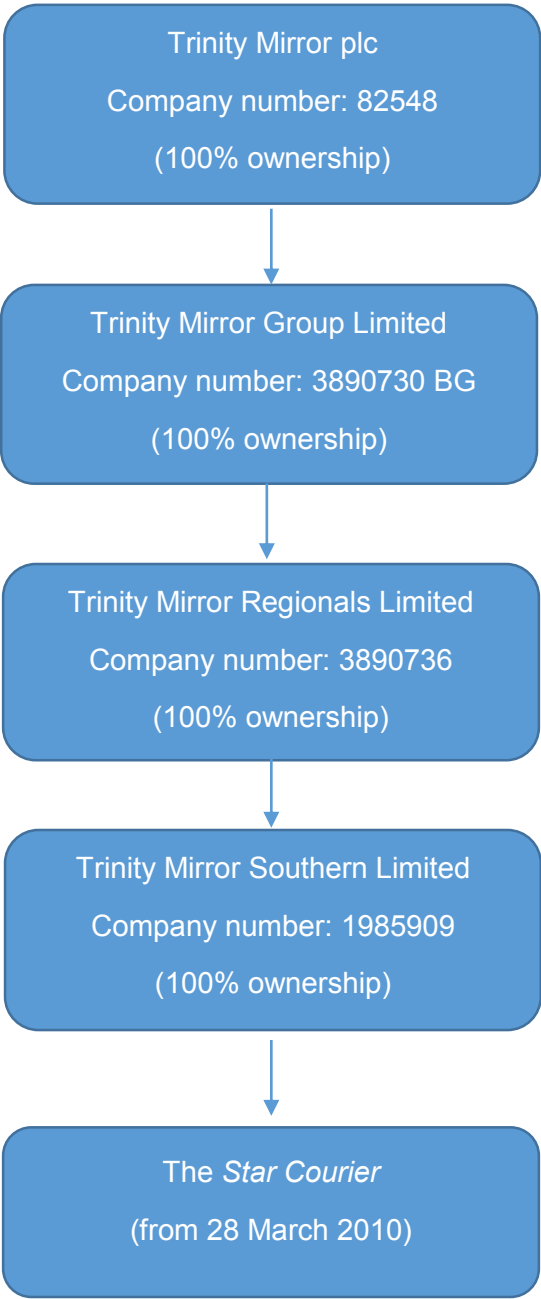
Figure B.1



Trinity Mirror Southern Limited (TMS) and Trinity Mirror plc (Trinity Mirror)

- B.21. As set out in paragraph 5.61 above, the CMA has found that TMS was directly involved in the Infringement from 14 September 2012 (at the latest) to 31 January 2014. This is the period of the Infringement for TMS.
- B.22. In light of the CMA's conclusions in Chapter 5, Section I above, the CMA has found that TMS is liable for the Infringement.
- B.23. As set out at Annex A, paragraphs A.13 to A.19, a parent company may be held jointly and severally liable for an infringement committed by a subsidiary company.
- B.24. As set out at paragraph 3.19 above, TMS is part of the Trinity Mirror group of companies, ultimately owned and controlled by Trinity Mirror. The CMA has concluded that TMS and Trinity Mirror form part of a single economic undertaking for the purposes of the Chapter I prohibition.
- B.25. This is based on the CMA's understanding that, during the period of the Infringement, TMS was a 100% indirectly owned subsidiary of Trinity Mirror. This ownership can be traced through a number of Trinity Mirror's subsidiary companies, each 100% owned by its immediate parent company, as set out Figure B.2 below.
- B.26. Trinity Mirror therefore had the ability to exercise decisive influence, and is presumed to have exercised decisive influence, over TMS.
- B.27. In light of the above, the CMA has found Trinity Mirror jointly and severally liable, together with TMS, for the infringing conduct on the part of TMS from 14 September 2012 (at the latest) to 31 January 2014.

Figure B.2



Three Counties Estate Agents Limited (Three Counties)

- B.28. As outlined in paragraphs 5.63 and 5.67 above, the CMA has found that Three Counties was directly involved in the Infringement from 20 July 2005 (at the latest) to 31 January 2014. This is the period of the Infringement for Three Counties.
- B.29. In light of the CMA's conclusions in Chapter 5, Section I above, the CMA has found that Three Counties is liable for the Infringement.

ANNEX C: THE RELEVANT MARKET, ECONOMIC CONTEXT AND COMPETITION CONCERNS

A. The Relevant Market

Introduction

- C.1. When applying the Chapter I prohibition, the CMA is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether an agreement, concerted practice or decision by an association of undertakings had as its object or effect the appreciable prevention, restriction or distortion of competition.⁸⁷⁸
- C.2. Insofar as the CMA has found that the Infringement comprises agreements, concerted practices and a decision by an association of undertakings that have as their object the restriction of competition (as set out in Chapter 5, section D of the Decision), no such obligation arises in this case.⁸⁷⁹ In contrast, it will be necessary to define the relevant market, or at least a range of candidate markets, when the competitive effect of an agreement is at issue.⁸⁸⁰ However, the CMA considers that it is not necessary to reach a definitive view on market definition in this case to determine whether the Infringement had as its potential effect the appreciable prevention, restriction or distortion of competition because the CMA considers such potential effects are appreciable on any realistic view of the market.
- C.3. Despite the above, the CMA has formed a view of the relevant market in order to calculate the Parties' 'relevant turnover' in the market(s) affected by the Infringement, for the purposes of establishing the level of financial penalties imposed on each Party.⁸⁸¹
- C.4. The CMA is not bound by market definitions adopted in previous cases, although earlier definitions can, on occasion, be informative when considering the appropriate market definition. Equally, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.

⁸⁷⁸ Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, at paragraph 230 and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, at paragraph 74.

⁸⁷⁹ This principle has also more recently been applied by the CAT in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, in which the CAT stated at [176] that '*[i]n Chapter I cases, unlike Chapter II cases, determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement*'.

⁸⁸⁰ Bellamy & Child, *European Union Law of Competition* (7th Edn, 2013), paragraph 4.007.

⁸⁸¹ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraphs 2.1 and 2.3 to 2.11.

- C.5. In this case, the CMA has adopted a conservative approach to market definition, which may result in a narrower relevant market being defined (and therefore a lower potential fine) than would be the case if the CMA carried out a full economic analysis of the relevant market(s).
- C.6. The analysis below first considers what products and/or services are part of the relevant market in this case (the relevant product market), then considers the geographic scope of the relevant market in this case (the relevant geographic market). Finally, it sets out the CMA's findings on the relevant market in this case (conclusion on the relevant market).
- C.7. The CMA has focussed on the market(s) for residential sales and lettings services, as this/these constitute(s) the market(s) directly affected by the Infringement. The CMA acknowledges that the Infringement may also have a direct or indirect impact on the related market for advertising property services in local newspapers, but does not consider it necessary to define the relevant market in that sector in order to assess the Infringement. Annex C, section B below considers the importance of local newspaper advertising, and the *Star Courier* itself, as part of the economic context for the Infringement.

Relevant product market

Introduction

- C.8. For the purposes of defining the relevant market, the CMA considers the competitive pressure faced by companies active in the market. It does so by establishing the closest substitutes to the product(s) or service(s) that is or are the focus of the investigation (the 'focal product(s)')⁸⁸² and considering whether they exercise a competitive constraint on the ability to raise prices of those focal products.⁸⁸³ This includes considering substitutes on both demand side (ie customers switching to alternatives) and supply side substitutes (ie other suppliers being able to quickly and easily supply the same customers).⁸⁸⁴ The CMA will factor supply substitution into market definition if it is reasonably likely to take place, and already has an impact by constraining the supplier of the product(s) or service(s).
- C.9. The members of Three Counties are all agencies active in the supply of residential sales and/or lettings services.⁸⁸⁵ Three Counties is an association of these estate and lettings agents. The vast majority of Three Counties'

⁸⁸² See *Market Definition: understanding Competition Law* (OFT403, December 2004), adopted by the CMA Board, paragraph 3.2.

⁸⁸³ *Ibid*, paragraphs 2.9 to 2.10.

⁸⁸⁴ *Ibid*, Chapter 3.

⁸⁸⁵ See Annex D.

members since its formation (and each of the Current Members) are 'traditional' estate or lettings agents; that is agents operating with a high street presence.⁸⁸⁶

C.10. There are therefore two relevant focal products in this case:

- 'traditional' residential sales services
- 'traditional' residential lettings services

Traditional residential sales and lettings services

C.11. Traditional residential sales and lettings services may be divided into the following categories:

- traditional estate agency services, relating to property sales, and⁸⁸⁷
- traditional lettings agency services, relating to property lettings.

C.12. The CMA has considered whether the two categories of residential property agency services identified above comprise one single product market or two separate product markets.

C.13. On the demand side, residential estate and lettings agency services are provided to two distinct sets of customers - those seeking to buy or sell a property, and those seeking to rent or let a property.⁸⁸⁸ Although some purchasers may buy a property in order to subsequently let it, purchasers would not switch between seeking to buy or rent a property on the basis of changes in fees charged by estate or lettings agents. Similarly, vendors may decide to let a property instead if they are unable to find a purchaser, but would not switch between selling or letting their property on the basis of changes in estate or lettings agent fees. This suggests that the two categories would comprise two separate product markets.

C.14. On the supply side, the services provided by residential estate agents and residential lettings agents are different, although there is a degree of overlap between them. Residential estate agents tend to offer a range of services for vendors including: property valuations; asking price recommendations; promotional services; arranging and conducting viewings; screening of

⁸⁸⁶ *Home buying and selling* (OFT1186, February 2010), paragraph 3.21.

⁸⁸⁷ The term 'estate agent' only applies to the sale of interests in land (section 1 of the Estate Agents Act 1979) and therefore cannot be used in relation to lettings.

⁸⁸⁸ As discussed in paragraph 5.98 above, the market(s) for residential estate and lettings agency are two sided market(s), but the CMA has concluded that this does not impact on how it has defined the relevant market in this case.

potential buyers; negotiation; a range of ancillary services;⁸⁸⁹ and liaison between the parties.⁸⁹⁰ On a 'let only' service, the services offered by residential lettings agents to landlords would be similar (without the ancillary services), but would also typically carry out the following additional services: credit checks on potential tenants; registering and protecting tenant's deposits; and inventory and cleaning services on 'check in' and 'check out'. In addition, for 'fully managed' services, the lettings agent would typically additionally offer landlords the following services: key holding; ongoing maintenance and repair; and property inspections.⁸⁹¹ In light of this, the knowledge, skills and contacts needed for providing estate agency services are likely to be somewhat different to providing lettings agency services.

- C.15. In addition, the regulatory environments are distinct. Whilst estate agents are not required by law to be licensed or qualified, they are principally regulated by the Estate Agents Act 1979 and the Consumer Protection from Unfair Trading Regulations 2008. In addition, since 1 October 2008 it has been compulsory for estate agents to belong to a redress scheme.⁸⁹² Whilst in England there is no requirement for letting agents to be licensed, they are subject to consumer protection law⁸⁹³ and, as of 1 October 2014⁸⁹⁴ must belong to a redress scheme.⁸⁹⁵
- C.16. Finally, the CMA notes that in most cases residential sales and letting businesses are separated within agencies;⁸⁹⁶ certain agencies focus only on lettings⁸⁹⁷ and a small proportion focus only on sales.⁸⁹⁸
- C.17. In light of the above factors, the CMA considers that residential sales and lettings services may comprise two separate relevant product markets. However, given that the CMA has found that the relevant agreements,

⁸⁸⁹ Including provision of Energy Performance Certificates; mortgage and insurance services, provision of surveys (including mortgage valuation surveys, home buyer reports and buildings surveys); and conveyancing services (*Home buying and selling* (OFT1186, February 2010), Chapter 3.

⁸⁹⁰ *Home buying and selling* (OFT1186, February 2010) paragraph 3.21.

⁸⁹¹ *The Lettings Market* (OFT1479, February 2013), paragraphs 3.3 to 3.7.

⁸⁹² Section 23A of the Estate Agents Act 1979, as inserted by section 53(1) of the Consumer, Estate Agents and Redress Act 2007.

⁸⁹³ The Consumer Rights Act 2015 (CRA), which received Royal Assent and became law on 26 March 2015, introduced a new requirement for lettings agents to publish certain details of their fees. The CRA is expected to come into force in October 2015.

⁸⁹⁴ The Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to belong to a Scheme etc) (England) Order 2014 (SI 2014/2359) (Order) came into force in England on 1 October 2014.

⁸⁹⁵ Lettings agents carrying out lettings agency work must also belong to a redress scheme approved by the Secretary of State or a government administered redress scheme to deal with complaints in connection with that work made by a person who is, or has been, a prospective landlord or a prospective tenant. See Sections 83 and 84 Enterprise and Regulatory Reform Act 2013 (ERRA 2013), see also Section 4 (Exclusions: Lettings agency work) The Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to belong to a Scheme etc) (England) Order 2014 (SI 2014/2359) (Order) (came into force in England on 1 October 2014).

⁸⁹⁶ *Competition in markets with commission rates, Five UK case studies* (OFT889a, January 2007), paragraph A.2.

⁸⁹⁷ *The lettings market* (OFT1479, February 2013), paragraph 3.14.

⁸⁹⁸ Information taken from www.zoopla.com (October 2014).

concerted practices and decision by an association of undertakings covered both residential sales and lettings services it is not necessary to reach a final conclusion on this.

- C.18. The CMA has further considered whether there are any close substitutes to traditional estate or lettings agents' services and, consequently, whether the market could be defined more widely. Alternatives to traditional estate agents' services would include private selling (whether through direct sales or through private seller websites); online estate agents; and auctions.⁸⁹⁹ Similarly, traditional lettings agency services may be substituted for private rentals;⁹⁰⁰ or online lettings agents.⁹⁰¹
- C.19. According to the consumer survey carried out by the OFT as part of the *Home buying and selling* market study (the 2010 Consumer Survey), the market for home buying and selling is dominated by traditional estate agents, with 87% of vendors in England and Wales using a traditional estate agent. In contrast, only 11% of vendors chose to sell a property privately, while online estate agents accounted for only 2% and auctions were used very rarely.⁹⁰²
- C.20. In addition, the 2010 Consumer Survey identified that 73% of vendors that used a traditional estate agent had not considered using an alternative method for selling their home. Of those surveyed, 16% said that they had considered using an online estate agent; 17% considered selling privately; and 3% said they had considered auction.⁹⁰³
- C.21. Similarly, according to the OFT's 2013 *Lettings market* report, 66% of all private renting arrangements involved an agent in 2006 as opposed to private lettings arrangements.⁹⁰⁴ However, the 2014 Property Academy Landlord Survey suggests that this figure is far higher, with 75% of respondents 'always' using an agency to find tenants.⁹⁰⁵ In addition, only 7% of landlords in that survey stated that they would consider using an online agent.⁹⁰⁶

⁸⁹⁹ *Home buying and selling* (OFT1186, February 2010), paragraphs 3.44 to 3.60.

⁹⁰⁰ *The lettings market* (OFT1479, February 2013), paragraph 3.17 (44% of private renting arrangements did not involve an agent) and 3.27.

⁹⁰¹ *The lettings market* (OFT1479, February 2013), paragraphs 3.17 and 3.19.

⁹⁰² *Home buying and selling* (OFT1186, February 2010), paragraph 4.7; and Quantitative Consumer Survey Report prepared by GfK NOP Social Research (OFT1140, February 2010), paragraph 5.1.

⁹⁰³ *Home buying and selling*, Quantitative Consumer Survey Report, prepared by GfK Research (OFT1140, February 2010), paragraph 5.9.

⁹⁰⁴ *The lettings market* (OFT1479, February 2013), paragraph 3.17.

⁹⁰⁵ Available at

http://issuu.com/academyblog/docs/2014_landlord_survey_summary_result/1?e=1345703/8787642 (for ease of presentation information extracted and copied into CMA Document Reference CMA 68).

⁹⁰⁶ http://issuu.com/academyblog/docs/2014_landlord_survey_summary_result/1?e=1345703/8787642, page 17 (for ease of presentation information extracted and copied into CMA Document Reference CMA 68).

C.22. In light of the above, the CMA considers that private sales and rentals would be likely to exert only a weak competitive constraint on the traditional estate agency or lettings agency model. A traditional estate or lettings agent, physically based in the local area where the property is located, is likely to be better informed about the value of property and the local housing market than the typical vendor or lessor, as well as offering the skills and experience needed to negotiate and manage the transaction. Arranging and conducting multiple viewings are time-consuming activities that vendors or lessors may wish to delegate to an agent. In addition, the CMA notes that the major internet property portals (such as www.rightmove.co.uk) represent a key marketing tool to access buyers or tenants, but restrict access to advertising properties for sale or to let only to estate or lettings agents (or new homes developers).⁹⁰⁷ Whilst private seller websites are becoming increasingly available (such as HouseWeb (www.houseweb.co.uk/)), the inability to access the major property portals is likely to deter vendors or lessors from selling or renting privately unless they have a purchaser or tenant already arranged, as it will be harder to successfully advertise the property to potential purchasers or tenants.⁹⁰⁸

C.23. In relation to online estate agents, whilst they may be an increasing feature of the market, the CMA considers that they currently also exert only relatively weak competitive pressure on the traditional estate or lettings agency model. As noted above, in 2010 online estate agents accounted for only 2% of sales,⁹⁰⁹ and the position does not seem to have changed between 2010 and 2014.⁹¹⁰ According to the 2010 Consumer Survey, vendors' main reasons for preferring the traditional estate agency model to an online agency were worries about communication (14%), a preference for personal or direct, face-

⁹⁰⁷ *Home buying and selling* (OFT1186, February 2010), paragraph 3.41.

⁹⁰⁸ These considerations are supported by the 2010 Consumer Survey, which found that the main reasons for preferring the traditional estate agency model to selling privately were concerns about how much work the vendors would have to do themselves (31%), a limited marketing ability (21%), the possibility of reaching fewer buyers (12%) and taking too long (11%) (*Home buying and selling*, Quantitative Consumer Survey Report, prepared by GfK Research (OFT1140, February 2010), paragraph 5.13). Similarly, in relation to auctions, the main reasons for preferring the traditional estate agency model were concerns that it would fetch a lower price (49%), simply not thinking of the method as an option (13%), having no experience or knowledge of auctions (11%), too risky (5%) and a perception they are used for repossessions only (5%) (2010 Consumer Survey, paragraph 5.15). See also www.telegraph.co.uk/finance/personalfinance/money-saving-tips/9900988/The-online-estate-agents-that-charge-just-500.html (March 2013) (for ease of presentation information extracted and copied into CMA Document Reference CMA 64), which notes that the big drawback with private sales websites is that the property will not feature on Rightmove and the other portals, 'which can drastically reduce the number of potential buyers'.

⁹⁰⁹ *Home buying and selling*, Quantitative Consumer Survey Report, prepared by GfK Research (OFT1140, February 2010), figure 5.1.

⁹¹⁰ In January 2014, online estate agent hatched.co.uk claimed that online estate agents now account for 5.5% of all sales in the UK – see www.estateagenttoday.co.uk/373-online-estate-agents-have-over-five-per-cent-market-share-claim (for ease of presentation information extracted and copied into CMA Document Reference CMA 65). However, an article published on 1 September 2014 (available at www.propertyindustryeye.com/online-agents-just-2-market-share-says-rightmove/) (for ease of presentation information extracted and copied into CMA Document Reference CMA 66) contradicts the finding, citing a 2% market share for online estate agents, according to an analysis of listings on the property portal Rightmove.

to-face contact (11%), a lack of trust for online estate agents (11%) and the desire for local agents and local knowledge (10%).⁹¹¹ The same is true for lettings, with the 2014 Property Academy Landlord Survey recording that only 7% of landlords would consider using an online agent, with 56% stating that they would not consider doing so, with the remainder unsure.⁹¹² The views of Three Counties' Members appear to support this view:

*'The members present felt that whilst they are in general agreement with [the Managing Director of Former Member 26's] views on agents offering special offers reducing their standard fees, organisations such as [Former Member 22]] who operate a somewhat different business to the rest of us and are therefore not seen as direct competition to the general marketplace, could advertise their standard rate'.*⁹¹³

- C.24. The CMA has also considered whether there are any supply-side substitutes, ie whether online agents or other types of companies could easily switch their resources to providing traditional estate agency services (sales and lettings) such that they should be included in the relevant market. In the CMA's view, this is possible given that there are no significant barriers to entry within the market(s) for estate and lettings services. However, given the significant sunk costs of marketing and advertising we consider online agents or other types of 'non-traditional' agents as potential competitors when looking at ease of entry to this market.⁹¹⁴
- C.25. Therefore, for the purposes of this case, the CMA considers that the relevant product market consists of the residential sales and lettings services offered by traditional estate or lettings agents. In any event, as described in Chapter 5, Section D, the potential effects of the Infringement are likely to be appreciable even if the market comprised online agents as well as traditional agents.

Relevant geographic market

- C.26. In line with its analysis of the relevant product market, the CMA has assessed the relevant geographic market for residential sales and lettings services.

⁹¹¹ *Home buying and selling*, Quantitative Consumer Survey Report, prepared by GfK Research (OFT1140, February 2010), paragraph 5.11.

⁹¹² http://issuu.com/academyblog/docs/2014_landlord_survey_summary_result/1?e=1345703/8787642, page 17 (for ease of presentation information extracted and copied into CMA Document Reference CMA 68).

⁹¹³ Minutes of meeting dated 12 January 2005 (attached to email dated 21 January 2005 from [the Personal Assistant to the Managing Director of Waterfords] to Committee members (CMA Document Reference r_CAS 3.132)).

⁹¹⁴ *Home buying and selling* (OFT1186, February 2010) paragraph 4.19.

- C.27. Previous research has demonstrated that competition for residential sales and lettings services, whether in relation to estate or lettings agency services, takes place at a very local level. A case study conducted by the OFT in 2007 found that 87% of vendors chose an agent located within five miles of their property.⁹¹⁵ In 2009, an OFT survey of estate agents found that 74% of estate agents in the UK typically offered properties for sale within a five-mile radius, with only 3% offering properties in excess of ten miles from the branch.⁹¹⁶ A market study conducted by the OFT in 2004 also found that the majority of estate agents (87%) offered properties within a five-mile radius.⁹¹⁷ Similarly, the 2013 report into the lettings market concluded that lettings markets are likely to be local, with lettings agents offering properties, and tenants looking to rent properties in certain local areas, with prices consequently driven by local competition.⁹¹⁸
- C.28. In line with the above, for the purposes of this case the CMA considers that the geographic scope of the market(s) for residential sales and lettings services is local, ie within approximately a five-mile radius from Fleet (the Three Counties Area). This broadly equates to the readership of the *Star Courier* which includes Aldershot, Camberley, Farnborough, Frimley, Sandhurst and Yateley (in addition to Fleet).⁹¹⁹

Conclusion on the relevant market

- C.29. In summary, the CMA has concluded that the relevant product market(s) for the Infringement are the market(s) for residential sales and lettings services.
- C.30. The CMA has concluded that the relevant geographic market for the Infringement to be an area within a five-mile radius from Fleet in Hampshire.
- C.31. This market definition is without prejudice to the CMA's discretion to adopt a different market definition in any subsequent case in the light of the relevant facts and circumstances in that case, including the purpose for which the market is defined.

⁹¹⁵ *Competition in markets with commission rates, Five UK case studies*, (OFT889a, January 2007), paragraph A.28.

⁹¹⁶ *Home Buying and Selling*, Survey of Estate Agents (OFT1140b, February 2010) and *Home buying and selling* (OFT1186, February 2010), paragraph 4.11. See also *Estate agency market in England and Wales*, (OFT693, March 2004), paragraph 1.9.

⁹¹⁷ *Estate agency market in England and Wales* (OFT693, March 2004), Table 3.9, p.31.

⁹¹⁸ *The lettings market* (OFT1479, February 2013), paragraph 3.26.

⁹¹⁹ Newspaper Readership Report for *Star Courier*, JICREG data as at 1 April 2014 ([CMA Document Reference CMA 2](#)).

B. Economic context

- C.32. The CMA has also considered the relevant economic context in which the Infringement operated.
- C.33. As described at Annex D, the members of Three Counties are all agencies active in the supply of residential sales and/or lettings services. The vast majority of Three Counties' members since its formation (and each of the Current Members) are 'traditional' estate or lettings agents; that is agents operating with a high street presence.⁹²⁰ Agents offer a similar range of services, including property valuations; asking price or rental recommendations; promotional services; arranging and conducting viewings; screening of potential buyers; negotiation; a range of ancillary services;⁹²¹ and liaison between the parties.⁹²² There are no significant barriers to entry within the estate agency and lettings market(s). Regulatory barriers are relatively low.⁹²³ As explained below, the only significant sunk costs required to enter the market(s) for estate or lettings agency services are the costs of marketing and advertising.⁹²⁴
- C.34. The estate agency and lettings market(s) are two-sided markets, with the estate or lettings agent acting as the intermediary between the vendors/lessors and the purchasers/tenants on each side of the market. An agent needs to attract a sufficient number of vendors' or lessors' instructions in order to be attractive to potential purchasers or tenants.⁹²⁵ Similarly, agents need to attract sufficient purchasers or tenants in order to be attractive to vendors or lessors. This means that marketing and advertising are important elements of competition, to ensure that both sides of the market are aware of the agent's portfolio of available properties.⁹²⁶
- C.35. Previous research shows that competition in the estate and lettings agency markets takes place at a very local level.⁹²⁷ In relation to this case, the CMA

⁹²⁰ *Home buying and selling* (OFT1186, February 2010), paragraph 3.21.

⁹²¹ Including provision of Energy Performance Certificates; mortgage and insurance services, provision of surveys (including mortgage valuation surveys, home buyer reports and buildings surveys); and conveyancing services (*Home buying and selling* (OFT1186, February 2010), Chapter 3.

⁹²² *Home buying and selling* (OFT1186, February 2010) paragraph 3.21. See further Annex C, paragraph C.14 above.

⁹²³ See Annex C, paragraph C.15.

⁹²⁴ *Home buying and selling* (OFT1186, February 2010), paragraph 4.13.

⁹²⁵ *Home buying and selling* (OFT1186, February 2010), paragraph 4.16.

⁹²⁶ *Ibid* paragraphs 4.10 and 4.19; and Newspaper Society 2009 survey that notes 60% of sellers said local reputation was important when choosing an agent (page 15 available at: www.newspapersoc.org.uk/research-and-insight-regional-variations#property). For ease of presentation information extracted and copied into CMA Document Reference CMA 67). See also *The lettings market* (OFT1479, February 2013), paragraph 1.9.

⁹²⁷ *Home buying and selling* (OFT1186, February 2010), paragraph 4.11; *The lettings market* (OFT1479, February 2013), paragraph 3.26; *Competition in markets with commission rates, Five UK cases* (OFT 889a, January 2007), paragraph A.28. See also *Estate Agency Market in England and Wales* (OFT 693, March 2004), paragraph 3.47. In an OFT survey of Recent House Sellers 87% said the distance between the office of the estate agent used and the property sold was within five miles.

considers that the geographic market for residential sales and lettings services is within approximately a five mile radius.⁹²⁸ This means that an agent needs to establish a strong brand and good reputation in the local area in order to win instructions from potential vendors or lessors.⁹²⁹

C.36. The importance of establishing a brand in the local area means that advertising in the local market is very important. Whilst there are a number of potential printed advertising channels (including leaflets, 'For Sale' or 'To Let' boards, or sales brochures), in light of the evidence, the CMA considers that local newspapers are a key medium for advertising an agent's services – both in relation to attracting potential vendors and lessors, as well as advertising available properties to prospective purchasers and tenants, even following the structural decline of the market since the increase in online marketing.⁹³⁰ For example, research commissioned by Johnston Press⁹³¹ highlights the importance of local newspaper advertising for estate agents attracting instructions. It also finds that the most common information source when looking to appoint an estate agent is the local newspaper or local newspaper website.⁹³² Comments by estate agents during the CMA's formal investigation⁹³³ and reported in the trade press appear to support this finding.⁹³⁴

C.37. The CMA infers from the evidence that this is true for the *Star Courier*. The publication, including its dedicated property supplement, is a cost effective⁹³⁵ means of reaching a wide audience in the Three Counties Area with a total

⁹²⁸ See Annex C, paragraph C.28.

⁹²⁹ See, for example, *Home buying and selling* (OFT1186, February 2010), paragraph 4.19.

⁹³⁰ OFCOM report 2009, *Local and Regional advertising in the UK*, paragraph 5.61 finds that property advertising appears to be more resilient to the structural decline in local advertising than other categories of advertising such as recruitment.

⁹³¹ Johnston Press 2013 (CMA Document Reference CMA 14.1).

⁹³² 52% of those surveyed said they used local newspaper/local newspaper website to inform their decision when looking to appoint an estate agent. Johnston Press, 2013 (CMA Document Reference CMA 14.1). See also the Newspaper Society 2009 survey that notes 36% of sellers used local media as a source of information when choosing an agent (page 20, available at: www.newspapersoc.org.uk/research-and-insight-regional-variations#property; for ease of presentation information extracted and copied into CMA Document Reference CMA 67).

⁹³³ See [the Managing Director] of Castles: '*I always felt that presence in the paper was a differentiator between us and our competitors that don't advertise in the local paper*' and '*Enquiries are driven by the quality of the properties that you're advertising, and if your advertising their properties...in a professional way with good photographs then...I hope that's meaningful to people when they're considering...who they might look to, to advertise their properties*'. (witness interview with [the Managing Director of Castles] dated 4 June 2014, page 7, lines 34-36 and page 8, lines 7-11 (CMA Document Reference r_CAS 23.3)).

⁹³⁴ For example in the trade press 'Estate Today' (29 October 2012) [Non Member Agent], an estate agent in East Anglia explains '*These days, local newspapers are probably more important in attracting sellers rather than buyers*'. An estate agency consultant [X] is quoted in the same article: '*Offline [ie printed press] still has a place as it is invariably very localised and can attract sellers and landlords if not buyers and tenants*'.

⁹³⁵ [The Managing Director] of Waterfords is quoted in the trade press 'Estate Today' (29 October 2012): '*Local newspaper advertising is cost-effective at £200 per page in a paper distributed to 70,000 homes per week. If you compare that to a 70,000 leaflet drop, the delivery alone, excluding production costs, would be approximately £3,000.*'

readership of nearly 90,000.⁹³⁶ Moreover, it is the only newspaper delivered free of charge to homes in Fleet and the surrounding areas,⁹³⁷ and offers a cost effective method of reaching the target (local) market.⁹³⁸ In light of this, the CMA considers that advertising in the *Star Courier* is an important way to reach potential customers.⁹³⁹

C.38. The format of many recent advertisements within the *Star Courier* also suggests that they have the dual purpose of attracting new instructions and selling the properties listed therein.⁹⁴⁰ For example, certain advertisements include properties that agents have already sold,⁹⁴¹ whilst others include statements such as *'If you want a quick, hassle free sale at the best price, contact [Former Member 27]'*.⁹⁴² In addition, certain evidence from the Parties expressly supports the importance of advertising in the *Star Courier* for

⁹³⁶ JICREG data as at 1 April 2014 (CMA Document Reference CMA 2). The CMA also notes that the *Star Courier's* property supplement is also distributed in its sister publication, the *Aldershot News and Mail*, which increases its circulation and potential readership (see paragraph 2.19 above).

⁹³⁷ Including Aldershot, Camberley, Farnborough, Fleet, Frimley, Sandhurst and Yateley. In Fleet there are two other paid for local titles which are also owned by Trinity Mirror (JICREG data as at 1 April 2014 (CMA Document Reference CMA 2.1)). One of these carries the same property supplement as the *Star Courier*. There are a number of other local titles that overlap in surrounding areas of Fleet, although the CMA understands that the *Star Courier* is the only free newspaper.

⁹³⁸ The *Star Courier* has a readership of around 90,000 in total with a readership of around 15,000 specifically in the Fleet area (approximately half the population of Fleet). JICREG data, as at 1 April 2014 (CMA Document Reference CMA 2).

⁹³⁹ This is supported by witness evidence from [the Managing Director] of Waterfords who said in his witness interview *'It [the Star Courier] was important. It was, you know, considered - at that time most agents advertised in The Courier, so that would obviously imply that it was important to the agents. It was a property publication to help sell houses and there was no other printed media that was going through people's doors at the time advertising properties for sale, so it was important'*. Witness interview with [the Managing Director] of Waterfords dated 5 March 2014 (CMA Document Reference r_3C 47.1), pages 31 -32, lines 23-25 and 1-5.

⁹⁴⁰ Examples of such advertisements include: (i) [Former Member 27], advertisements in the *Star Courier* dated 9 February 2012 (CMA Document Reference CMA 18); 16 August 2012 (CMA Document Reference CMA 23); 15 May 2014 (CMA Document Reference CMA 32); 22 May 2014 (CMA Document Reference CMA 33); 29 May 2014 (CMA Document Reference CMA 34); 19 June 2014 (CMA Document Reference CMA 39); 24 July 2014 (CMA Document Reference CMA 42); 7 August 2014 (CMA Document Reference CMA 45); 21 August 2014 (CMA Document Reference CMA 46); 28 August 2014 (CMA Document Reference CMA 47); 4 September 2014 (CMA Document Reference CMA 48); 18 September 2014 (CMA Document Reference CMA 52); 25 September 2014 (CMA Document Reference CMA 54); 2 October 2014 (CMA Document Reference CMA 57); 9 October 2014 (CMA Document Reference CMA 58); (ii) [Current Member L] advertisement in the *Star Courier* dated 9 February 2012 (CMA Document Reference CMA 17); (iii) Hamptons, advertisements in the *Star Courier* dated 15 March 2012 (CMA Document Reference CMA 21) and 5 July 2012 (CMA Document Reference CMA 13); (iv) [Former Member 13], advertisements in the *Star Courier* dated 28 February 2013 (CMA Document Reference CMA 16); 6 March 2014 (CMA Document Reference CMA 28); 8 May 2014 (CMA Document Reference CMA 31); 5 June 2014 (CMA Document Reference CMA 35); 12 June 2014 (CMA Document Reference CMA 38); 19 June 2014 (CMA Document Reference CMA 40); 18 September 2014 (CMA Document Reference CMA 53); (v) [Former Member 18] advertisement in *Star Courier* dated 12 June 2012 (CMA Document Reference CMA 10); (vi) Castles advertisements in *Star Courier* dated 7 February 2013 (CMA Document Reference CMA 15) and 1 May 2014 (CMA Document Reference CMA 30); (vii) [Former Member 2] advertisement in *Star Courier* dated 5 June 2014 (CMA Document Reference CMA 36); (viii) [Current Member I] advertisements in the *Star Courier* dated 5 June 2014 (CMA Document Reference CMA 37); 31 July 2014 (CMA Document Reference CMA 43); and 25 September 2014 (CMA Document Reference CMA 55); (ix) [Current Member K] advertisement in the *Star Courier* dated 17 July 2014 (CMA Document Reference CMA 41); (x) Waterfords advertisement in the *Star Courier* dated 11 September 2014 (CMA Document Reference CMA 49); and (xi) [Current Member C] advertisement in the *Star Courier* dated 18 September 2014 (CMA Document Reference CMA 51).

⁹⁴¹ See, for example, [Former Member 27] advertisement in the *Star Courier* dated 24 July 2014 (CMA Document Reference CMA 42) or [Former Member 13] advertisement in the *Star Courier* dated 18 September 2014 (CMA Document Reference CMA 53).

⁹⁴² [Former Member 27] advertisement in *Star Courier* dated 15 May 2014 (CMA Document Reference CMA 32).

attracting instructions.⁹⁴³ This means that a prohibition on advertising fees (as defined in paragraph 1.3 above) in this medium would remove an important method of communicating those fees to potential vendors or lessors.

- C.39. Three Counties negotiated a considerable discount from the *Star Courier's* standard page rate paid by agents prior to its formation.⁹⁴⁴ Estate agents in the Three Counties Area would therefore have had a strong incentive to become (and remain) members of Three Counties in order to access significantly reduced advertising rates with the *Star Courier*.⁹⁴⁵ An agent operating in the Three Counties Area which wished to advertise in the *Star Courier* but was not a member of Three Counties would in all likelihood face significantly higher advertising costs than members, potentially making it more difficult for them to compete on price.
- C.40. Three Counties' members were therefore incentivised to adhere to the Prohibition on Advertising Fees, not only through the threat of losing the discount on advertising generally but also in respect of individual advertisements, as the February 2006 version of Rule 21 stipulated that they would be required to pay to Three Counties the difference between the 'non-member' advertising rate and the 'Three Counties' rate. Ultimately, agents faced the threat of expulsion from Three Counties in accordance with Rule 27 of the T&CM (see Chapter 4, section C above) if they did not abide by the Prohibition on Advertising Fees.

⁹⁴³ Email dated 25 October 2013 from [the Managing Director] of Waterfords to [the Head of Group Property and Regional Sales Manager] (CMA Document Reference r_3C 24.73).

⁹⁴⁴ A presentation made to Three Counties' members on 2 March 2005 set out the potential savings per agent per year. Estimated savings per agent per year (based on 50 weeks advertising) ranged from £3,250 for agents using half a page to £55,000 for agents using 10 pages. Presentation dated 2 March 2005 (CMA Document Reference r_CAS 3.105), page 52. The CMA acknowledges that the actual savings available to members' agents may have been less than this, as witness and documentary evidence suggests that few agents actually paid the published list price for advertising. See, for example, witness interview with [the Commercial Director of a Trinity Mirror group company] (witness interview dated 10 June 2014, page 29, lines 5-6 (CMA Document Reference r_TM 67.3)), and email dated 27 March 2013 from [an Account Manager] of TMS to [the Managing Director] of [the Complainant] (CMA Document Reference r_[Complainant] 7c). However, the CMA has concluded that at least the perception of the members was that membership of Three Counties afforded them a significant discount from the rate card, and this perception would be sufficient to incentivise them to adhere to the Prohibition on Advertising Fees.

⁹⁴⁵ See, for example, submissions to the OFT dated 20 January 2014 in response to the OFT's request for information under section 26 of the Act from [Current Member A]: *'I remember that the Three Counties Association had/were negotiating a group deal with the local property paper – The Courier – which enabled its members to receive a significant discount on the charges levied by the paper for advertising space in the property section, I think it represented a saving of circa 50%, given the fact that we were a new company and needed to establish a presence in the paper it seemed an obvious decision to join the Association'* (CMA Document Reference r_[Current Member A] 3); [Current Member B]: *'As a small business we felt we had very little choice but to join. The benefits of reducing advertising costs were obvious and something we had no option but to join in with, especially as our competition would have benefited from those reduced costs'* (CMA Document Reference r_[Current Member B] 3); and [Current Member F]: *'we joined the Three Counties Membership in November 2012 and the only reason was that there was the benefit of large discounted fees on advertising'* (CMA Document Reference [Current Member F] 2b).

- C.41. As set out at Chapter 3, Section A above, membership of Three Counties ranged from around 20 to 40 agents during its existence. Particularly at formation, the CMA understands that up to 95% of local agents were listed as members, meaning that the majority of local agents in the Three Counties Area would have been prohibited from advertising fees in the *Star Courier*.⁹⁴⁶ More recently, evidence suggests that the members accounted for the majority of agents that advertised in the *Star Courier*.⁹⁴⁷ This afforded Three Counties significant power in the market, increasing the impact of the Prohibition on Advertising Fees. This could have had a marked impact on agents' fees, since the majority of agents in the area had reduced incentives to compete on price as a result. This would prevent potential vendors or lessors from obtaining information about prices available in the market from a wide range of agents. The impact was increased further when the Prohibition on Advertising Fees was extended to all agents in the Three Counties Area.
- C.42. It is notable that previous research has highlighted that price competition is weak in the market for residential sales services, with 'sticky' commission rates which are not responsive to changes in market conditions or not reflective of cost differences, or both.⁹⁴⁸ A number of factors are identified including the lack of innovation by traditional estate agents, and the lack of significant penetration by alternative business models.⁹⁴⁹ Similarly, previous research into the lettings market suggested that fees and charges may not be exposed to effective competitive pressure, due to factors such as unclear or misleading upfront pricing practices, drip pricing and information asymmetries.⁹⁵⁰ This would further increase the impact of a restriction on agents from advertising fees, including discounts/value offerings, or an innovative business model with a different pricing structure.
- C.43. Nonetheless, agents' fees were identified as one of the most important factors in deciding which agent to instruct to sell or let a property.⁹⁵¹ However,

⁹⁴⁶ Witness interview with [the Managing Director] of Waterfords dated 5 March 2014 (CMA Document Reference r_3C 47.1) page 28, lines 10-12.

⁹⁴⁷ [The Head of Group Property and Regional Sales Manager] of TMS said she thought only three or four local agents were not members of the Association. Witness interview with [the Head of Group Property and Regional Sales Manager] of TMS dated 7 March 2014, page 32, lines 6-7 (CMA Document Reference r_TM 67.2). In an email to [the Head of Group Property and Regional Sales Manager] of TMS, [Senior Manager] of Hamptons International noted on behalf of Three Counties that where non-members adverts were concerned, "*your policing for your majority and regular advertisers would be appreciated.*" Email dated 11 October 2012 from [the Senior Manager] of Hamptons International to [the Head of Group Property and Regional Sales Manager] of TMS (CMA Document Reference r_3C 24.43).

⁹⁴⁸ *Home buying and selling* (OFT1186, February 2010), paragraphs 4.2.

⁹⁴⁹ *Home buying and selling* (OFT1186, February 2010), paragraphs 4.75 to 4.80.

⁹⁵⁰ *The lettings market* (OFT1479, February 2013), paragraphs 2.6 to 2.10.

⁹⁵¹ The CMA recognises that whilst price is an important aspect, consumers will not only focus on price when deciding on an agent to sell or let their home. For example, in *Home buying and selling* (OFT1186, February 2010) the OFT found that the main factors taken into account by sellers when choosing which estate agent to instruct were reputation (30%), professionalism (29%) and fees (28%) (*Home buying and selling* (OFT1186, February 2010, paragraph 4.25). However, see also the Newspaper Society's 2009 survey that notes 61% of

consumers in the market for traditional estate agents' services are likely to be first time or infrequent purchasers of such services.⁹⁵² It follows that prospective vendors or lessors are less likely to have a good understanding of different firms' offerings (ie price and quality) than they would if they made repeated and frequent purchases. In this situation, advertising of fees is likely to be an important driver of competition because it provides information to customers that is not otherwise easily available. Moreover, it makes vendors and lessors aware that they do not have to accept the 'going rate' and that better deals are available. Inviting agents to the property to conduct market valuations is time consuming for potential vendors, so it is unlikely that vendors or lessors will discuss fees with a large number of agents. Of those vendors and lessors that shop around, most will compare around three agents.⁹⁵³ If agents are prevented from advertising their fees, vendors and lessors are in effect much less able to compare prices across a larger number of agents, or to be sure they included a low cost agent in their search, if they wished to do so. As a result, it is more difficult for vendors or lessors to benchmark quoted fees and negotiate away from 'standard' fees.

- C.44. Finally, the CMA notes that the potential gains from negotiating quoted fees are considerable, given that selling or letting a home is a high value transaction for customers. With particular reference to the market for estate agents' services, the level of commission or fees charged by estate agents represents a significant expenditure. For example, if an estate agent charges fees of 1.3%⁹⁵⁴ of the purchase price of the property, and the property costs £340,000,⁹⁵⁵ the commission payable would be almost £4,500. Negotiating even a small percentage point reduction in commission results in large savings to customers. For example, a discount of 0.3 percentage points (ie

consumers said the price of commission was an important factor when choosing an agent (page 15, available at: www.newspapersoc.org.uk/research-and-insight-regional-variations#property; for ease of presentation information extracted and copied into CMA Document Reference CMA 67). Price appears to be less important for lettings, although the 2011 Which? survey found that fees were rated as one of the most important factors when selecting an agent for 92% of landlords (*Renting Roulette*, Which? November 2012). In addition, the 2014 Property Academy Landlord Survey noted that 45% of landlords wanted their agent's fees to be as cheap as possible, although this was not the main reason they selected their agent (with only 4% stating that they chose the agent with the cheapest fee) (page 29, available at: http://issuu.com/academyblog/docs/2014_landlord_survey_summary_result/1?e=1345703/8787642; for ease of presentation information extracted and copied into CMA Document Reference CMA 68).

⁹⁵² *Home buying and selling* (OFT1186, February 2010), paragraph 4.15; and *ARLA Members Survey of the Private Rented Sector* (December 2013, available at: www.arla.co.uk/media/466322/ARLA-PRS-Report-Q4-13.pdf), section 4.9, which noted that the average length of a tenancy agreement was 19.4 months.

⁹⁵³ *Home buying and selling* (OFT1186, February 2010), paragraph 4.23 and associated Quantitative Consumer Survey Report (OFT1140, February 2010), chart 5.9. See also the Newspaper Society 2009 survey that notes 71% of vendors considered one to three agents, with an average of 2.9 (page 14 available at: www.newspapersoc.org.uk/research-and-insight-regional-variations#property; for ease of presentation information extracted and copied into CMA Document Reference CMA 67).

⁹⁵⁴ The average commission rate for properties over £300,000, see *Home buying and selling* (OFT1186, February 2010), Table 4.11.

⁹⁵⁵ The average property price in Fleet, Hampshire – data from www.rightmove.com (accessed on 23 October 2014), based on data taken from the Land Registry (for ease of presentation information extracted and copied into CMA Document Reference CMA 71).

reducing the fee from 1.3% to 1%) results in a saving of over £1,000 in commission in the above example. If price competition is dampened, or if downward pressure on the Market Price is reduced due to a lack of competition and transparency, the scale of the detriment for each affected customer could be considerable.

C. Competition aspects

- C.45. Markets function effectively where competition works well and consumers make good choices. Consumers drive competition where they are able to shop around through access to readily available and accurate information about the products or services they are seeking and the various offers available in the market. Therefore, the provision of clear and accurate price, product and service information plays an important role in engendering competition between market players as it encourages and empowers consumers to seek out the best offers available for a particular product or service, which in turn drives sellers to be more competitive.⁹⁵⁶
- C.46. Further, competition operates most effectively where entry and potential entry impose competitive constraints on current market players, and where innovation that benefits consumers is rewarded by increased market share.⁹⁵⁷
- C.47. Therefore, in a well-functioning market for residential sales and lettings services, the CMA would expect agents to compete on price (ie their fees), as well as on other aspects of their offering, such as reputation, service or local presence, thus creating better choice for consumers who are thereby able to weigh cost against service.⁹⁵⁸
- C.48. As set out in Annex C, Section B, local newspapers are a key medium for advertising an agent's services, both in relation to attracting potential vendors and lessors, as well as advertising available properties to prospective purchasers and tenants.⁹⁵⁹

⁹⁵⁶ See K. Judit Cseres, *Competition Law and Consumer Protection* (2005, Kluwer Law International), section 4.6.1. See also M.E. Stucke and A. Ezrachi, *The Curious Case of Competition and Quality* (October 2014, University of Tennessee Research paper, available at <http://ssrn.com/abstract=2494656>), page 12, (CMA Document Reference CMA 69) which describes 'perfectly competitive markets' as those which have 'transparent prices, highly elastic demand curves, easy entry and exit, and perfectly-informed, profit-maximizing buyers and sellers who are so numerous that each can act as a price-taker'.

⁹⁵⁷ *Home buying and selling* (OFT1186, February 2010), paragraph 4.1.

⁹⁵⁸ *Ibid* paragraph 4.2; see also *The lettings market* (OFT1479, February 2013), paragraph 2.18: 'In a healthy lettings market...competition between agents (and from other sources) ensures landlords and tenants are clear up-front regarding the structure and level of fees they may be charged...'. See also M.E. Stucke and A. Ezrachi, *The Curious Case of Competition and Quality* (October 2014, University of Tennessee Research paper, available at <http://ssrn.com/abstract=2494656>), page 11-12 (CMA Document Reference CMA 69): 'advertising, being the most visible way through which companies communicate their products' and services' price and quality, can make markets more competitive and efficient'.

⁹⁵⁹ See paragraphs C.36 and C.37 above.

C.49. In light of the above, the CMA considers that the clear, upfront advertising of prices for residential sales and lettings services in local newspapers is beneficial to competition and consumers.⁹⁶⁰ The CMA considers that the prevention or restriction of such advertising would therefore have the following consequences on competition within such market(s):

D.49.1. to reduce price competition between estate and lettings agents, and thus to reduce downward pressure on the Market Price⁹⁶¹ in the Three Counties Area, and/or

D.49.2. to reduce price competition from potential competitors.

Restricting price competition from actual competitors

C.50. Previous research has demonstrated the importance of transparent pricing to active price competition in general, and the CMA considers that this is equally applicable to the market(s) for residential sales and lettings services.⁹⁶²

C.51. In the absence of transparent fees, it is more difficult and time consuming for vendors and lessors to compare the various offerings available from agents and to determine which agent offers the best price for the service offered.⁹⁶³ As a result, vendors and lessors may not be incentivised to look for better deals on fees and commission rates as the process may be too time consuming (increased search costs).⁹⁶⁴

C.52. For example, where there is little or reduced price transparency, vendors and lessors may be less well informed about the range of available fees in the market.⁹⁶⁵ The CMA acknowledges that agents may offer a range of fees to

⁹⁶⁰ See OFT market study: *Advertising of prices* (OFT1291, December 2010), paragraph 1.2.

⁹⁶¹ As defined in section 1.22.1 above.

⁹⁶² See *Advertising of prices* (OFT1291, December 2010), paragraph 1.3; see also *The lettings market* (OFT1479, February 2013), paragraph 3.39.

⁹⁶³ According to economic theory, when consumers have imperfect information on price and quality, they will have to spend search costs, including financial expenses or free time, to acquire the lacking information: K. Judit Cseres, *Competition Law and Consumer Protection* (2005, Kluwer Law International), page 179. The Which? 2011 consumer survey noted that 43% of landlords considered that their lettings agents' fees were not transparent, and some complained that they had to call around different agents to obtain information on fees, as they were not available on websites. This was noted to be '*time consuming and made it more difficult to ensure they were getting competitive rates*' (*Renting Roulette*, Which?, November 2012).

⁹⁶⁴ This is supported by research by the European Commission, which noted: '*Advertising restrictions may thus reduce competition by increasing the costs of gaining information about different products, making it more difficult for consumers to search for the quality and price that best meets their needs.*' Communication from the Commission: *Report on Competition in Professional Services* (COM(2004) 83, 9 February 2004), paragraph 43.

⁹⁶⁵ The CMA notes the OFT's finding in 2010 that '*of those who had used a traditional estate agent, 92% had compared fees, with 88% having found it easy to do so*': *Home buying and selling* (OFT1186, February 2010), paragraph 4.27. However, the CMA notes that research undertaken by iPostcode in January 2012 suggests that around 20% of agents had refused to disclose their fees over the telephone or via email, with only one of 250 agents surveyed detailing their fees on their website (see www.propertywire.com/news/europe/uk-estate-agent-fees-201201246041.html; for ease of presentation information extracted and copied into CMA Document Reference CMA 70). It also notes that the OFT's market study into the lettings market noted that the ability of

vendors and lessors, depending on a number of factors, including the value of the property to be sold or let, how quickly the agent feels it can sell or let the property, or the motivation of the vendor or lessor.⁹⁶⁶ However, past research suggests that there are 'standard' price points within the market(s) for residential sales and lettings services, around which the majority of agents cluster,⁹⁶⁷ and which a prospective vendor or lessor may accept as a 'standard' quotation.

- C.53. The CMA considers that reduced transparency on fees would reduce vendors' and lessors' ability and incentives to 'shop around' for the best deal available.
- C.54. Even if the majority of agents would freely and unilaterally decide not to advertise their fees, having just a small number of agents advertising their fees (or an increase in the number of agents advertising) would provide prospective vendors and lessors with the knowledge that better deals are available, prompting them to seek a better deal, and therefore effectively constraining the pricing behaviour of the remainder of agents.
- C.55. In addition, without ready access to information on fees, vendors and lessors would be obliged to contact a number of different agents in order to compare the fees for selling or letting a particular property. This is likely to involve inviting a number of selected agents to their property for a valuation or rental assessment before being given information on fees, meaning they are only considering a subset of the fees available in the local market.⁹⁶⁸
- C.56. Moreover, with limited transparency on fees, it is more difficult for prospective vendors and lessors to benchmark and compare quotations, and to negotiate on price. Negotiation on price is important since survey evidence shows that, in cases of property sales, where vendors have successfully negotiated a lower fee, they have paid, on average, a lower commission rate by 0.4

lessors to compare their overall costs are reduced if agencies' fees are not made clear upfront (*The lettings market* (OFT1479, February 2013), paragraph 6.25).

⁹⁶⁶ See, for example, letter from [Current Member L] dated 20 January 2014 to OFT (CMA Document Reference r_[Current Member L] 3), page 4.

⁹⁶⁷ *Home buying and selling* (OFT1186, February 2010), paragraph 4.53 (93% of agents quote between 1% and 2%, with clear evidence of pricing points in standard quoted fees, with a large majority of agents' fees clustering at 1, 1.25, 1.5, 1.75 and 2%. See also the 2014 Property Academy Landlord Survey, which noted that around one third of agents charged 10% for a tenant find and full management service, with the majority clustered between 10-12% (page 23, available at

http://issuu.com/academyblog/docs/2014_landlord_survey_summary_result/1?e=1345703/8787642. For ease of presentation information extracted and copied into CMA Document Reference CMA 68).

⁹⁶⁸ Vendors/lessors would be expected to obtain several valuations to test the valuation of their chosen agent – in 2009 almost 65% of consumers compared two or three estate agents before making a choice (Quantitative Consumer Survey Report, GfK, OFT1140, February 2010). See also the 2009 research conducted by the Newspaper Society, which identified that 71% of vendors contacted between one and three agents (with an average of 2.9 agents contacted by that 71%) (*The property market and the role of communications in a recession*, 2009, page 14 (CMA Document Reference CMA 67)).

percentage points.⁹⁶⁹ As an example, this could represent a saving of almost £1,400 (or nearly 30%) on a property sold for £340,000⁹⁷⁰ with a fee of 1.4% reduced to 1% after negotiation.

- C.57. In light of the above, the CMA considers that less transparent fees can be expected to reduce downward pressure on the Market Price, which in turn would reduce agents' incentives to engage in price competition with other agents, ultimately leading to consumers paying higher prices.⁹⁷¹

Restricting price competition from potential competitors

- C.58. Previous research has shown that establishing a reputation and winning business from existing local estate or lettings agents is a key barrier to entry for new businesses or those expanding into a new geographic area.⁹⁷² New entrants may, initially at least, wish to focus on offering better value for money or lower or discounted fees to entice prospective vendors and lessors away from established brands. Therefore informative advertising (both in relation to fees and/or the characteristics of a particular product or service offered) is likely to be particularly important for new entrants.⁹⁷³

⁹⁶⁹ *Home buying and selling* (OFT1186, February 2010), paragraph 4.68 found that sellers who successfully negotiate commission on home selling pay on average 1.4%, while those that do not pay on average 1.8%, with an associated consumer detriment. See also *The lettings market* (OFT1479, February 2013), which noted there is unlikely to be effective competitive pressure on fees that are not clear upfront (paragraphs 3.39 and 6.45) and that misleading or inaccurate descriptions of services or pricing may impede the operation of the market, as the lessor may have otherwise wished to negotiate on the price (paragraph 6.37).

⁹⁷⁰ The average property price in Fleet (data from www.rightmove.com (accessed on 5 December 2014), based on data taken from the Land Registry (CMA Document Reference CMA 71).

⁹⁷¹ Whilst it does not constitute binding precedent, the CMA notes the dissenting comments of Justice Breyer of the US Supreme Court in *California Dental Association v Federal Trade Commission* 526 US 756 (1999), where he makes the following comment in relation to a restriction on advertising discounts: 'Do each of the three restrictions mentioned have 'the potential for genuine adverse effects on competition'?...I should have thought that the anticompetitive tendencies of the three restrictions were obvious. An agreement not to advertise that a fee is reasonable, that service is inexpensive, or that a customer will receive a discount makes it more difficult for a dentist to inform customers that he charges a lower price. If the customer does not know about a lower price, he will find it more difficult to buy lower price service. That fact, in turn, makes it less likely that a dentist will obtain more customers by offering lower prices. And that likelihood means that dentists will prove less likely to offer lower prices. But why should I have to spell out the obvious? To restrain truthful advertising about lower prices is likely to restrict competition in respect to price – 'the central nervous system of the economy' (*United States v Socony-Vacuum Oil Co* 310 US 150, 226 n59 (1940)). The CMA also notes the comment of US commentators Areeda and Hovenkamp that in simpler markets than that at issue in the above case, restrictions on price advertising would constitute a *per se* offence under US antitrust law (Areeda and Hovenkamp, *Fundamentals of Antitrust Law*, Wolters Kluwer Law and Business, Fourth Edition, May 2014, page 20-49), referring to *United States v Gasoline Retailers Assn* 285 F.2d 688, 691 (7th Cir 1961), which held it was *per se* unlawful and criminal offence for gasoline retailers to agree not to advertise their gasoline prices except by posting it directly on the pump.

⁹⁷² *Home buying and selling* (OFT1186, February 2010), paragraph 4.19; see also C. Ball, *The Paradox of Estate Agents' prices*, Centre for Competition Policy Newsletter, Issue 14, page 7 (May 2008).

⁹⁷³ This is supported by research by the European Commission, which noted: 'It is also widely recognised that advertising, and in particular comparative advertising, can be a crucial competitive tool for new firms entering the market and for existing firms to launch new products'. Communication from the Commission: *Report on Competition in Professional Services* (COM(2004) 83, 9 February 2004), paragraph 43.

- C.59. In addition, independent research has concluded that maintaining a presence in local media is crucial to winning new instructions,⁹⁷⁴ which implies that access to the local newspaper, and at reasonable rates, would be important for new entrants.
- C.60. In light of this, preventing agents from advertising their fees in local newspapers would make it more difficult for new entrants to access the market.
- C.61. A prohibition on advertising fees, such as that in this case, left new entrants (or simply smaller competitors) that may have wished to attract instructions through advertising lower fees (or some other value proposition such as an innovative charging structure) in the *Star Courier* with the choice of not advertising their fees in their chosen medium, or having to forego the significantly reduced advertising costs associated with joining Three Counties.⁹⁷⁵ Once the prohibition was extended to all agents wishing to advertise in the *Star Courier*, such businesses were left even without that choice.
- C.62. The inability of new entrants to advertise their fees has the consequence of reducing the threat to the 'established players' from potential competition by such new entrants. This, in turn, reduces the 'established players' incentives to compete, and reduces downward pressure on the Market Price.⁹⁷⁶ This can be expected to lead to higher fees or commission rates, less choice and/or a reduced quality of service for vendors or lessors.⁹⁷⁷
- C.63. Similarly, the CMA considers that preventing agents from advertising their fees makes it harder for agents that wish to offer new or innovative pricing structures (such as a fixed fee rather than a 'flat' percentage fee based on the value of the property to be sold or let, a stepped percentage fee, or an unbundled low cost service)⁹⁷⁸ to communicate their offerings and entice prospective vendors and lessors away from other agents on the basis of these features.⁹⁷⁹

⁹⁷⁴ See *Winning instructions and selling properties* (survey conducted by Johnston Press, 2013) (CMA Document Reference CMA 14).

⁹⁷⁵ See letter dated 14 January 2014 from [the Complainant] in relation to the 2013 Complaint (CMA Document Reference [Complainant] 1).

⁹⁷⁶ C. Ball, *Competition in the Estate Agency Market*, Centre for Competition Policy Newsletter, Issue 14, page 4 (May 2008).

⁹⁷⁷ See, for example, *Home buying and selling* (OFT1186, February 2010), paragraph 4.105 which notes that the emergence of low cost business models could sharpen price competition.

⁹⁷⁸ I.e that reduces the extent to which consumers pay for a 'gold-plated' service that goes beyond their needs.

⁹⁷⁹ The OFT's 2010 market study into home buying and selling noted that '*sluggishness in innovative effort, coupled with the, so far, limited penetration of alternative business models has meant that the traditional [estate agency] sector has to an extent been shielded from vigorous price competition*' (*Home buying and selling* (OFT1186, February 2010), paragraph 4.79).

- C.64. This is particularly acute in the market(s) for residential sales or lettings services, which, despite low concentration and low entry barriers, have long-established pricing structures (based on a fixed 'flat' percentage of the value of the property for sale or to let) and business models.⁹⁸⁰ Consequently, prospective vendors and lessors are unlikely to expect an innovative approach to fees or business models, and if agents are unable to advertise new approaches using a key channel such as local media, prospective vendors and lessors are unlikely to be made aware of and/or search for such innovations.
- C.65. This has the consequence of reducing the competitive threat from potential competition from (new or existing) innovative market players, and thus reduces the 'established' players' incentives to innovate to try and match or exceed other firms' offerings. In turn, this can be expected to reduce pressure on the Market Price, resulting in higher prices and/or less choice for vendors or lessors.⁹⁸¹

⁹⁸⁰ See *Home buying and selling* (OFT1186, February 2010), paragraph 4.75; and C.Ball, *Competition in the Estate Agency Market*, Centre for Competition Policy Newsletter, Issue 14, page 5 (May 2008).

⁹⁸¹ See, for example, *Home buying and selling* (OFT1186, February 2010), paragraph 4.105, which notes that the emergence of low cost business models could sharpen price competition.

ANNEX D: CURRENT MEMBERS

D.1. According to Three Counties' response to the section 26 notice issued on 18 December 2013,⁹⁸² the following agents were members of Three Counties as at that date:

Name	Company number	Registered Address	Principal business activity
[Current Member A]	[REDACTED]	[REDACTED]	Residential sales ⁹⁸³
[Current Member B]	[REDACTED]	[REDACTED]	Residential sales and lettings ⁹⁸⁴
[Current Member C]	[REDACTED]	[REDACTED]	Marketing and sales of residential property, letting services and financial services ⁹⁸⁵
Castles Property Services Limited	05148441	Turnpike House 1208-1210 London Road Leigh-on-sea Essex SS9 2UA	Residential sales ⁹⁸⁶

⁹⁸² CMA Document Reference 3C 15.5C.

⁹⁸³ Section 26 response dated 6 January 2014 from [a Director] of [Current Member A] to the OFT (CMA Document Reference r_[Current Member A] 3).

⁹⁸⁴ Section 26 response dated 14 January 2014 from [the Group Managing Director] of [Current Member B] to the OFT (CMA Document Reference r_[Current Member B] 3).

⁹⁸⁵ Section 26 response dated 20 January 2014 from Countrywide PLC to the OFT (CMA Document Reference r_[Current Member C] 2).

⁹⁸⁶ Section 26 response dated 24 January 2014 from [the Managing Director] of Castles to the OFT (CMA Document Reference r_CAS 3).

Name	Company number	Registered Address	Principal business activity
[Current Member E]	[✂]	[✂]	Residential estate agency (purely sales) ⁹⁸⁷
[Current Member F]	[✂]	[✂]	Residential sales ⁹⁸⁸
[Current Member G]	[✂]	[✂]	Estate agents, letting agents and chartered surveyors ⁹⁸⁹
Hamptons Estates Limited ⁹⁹⁰	02036215	32 Grosvenor Square Mayfair London W1K 2HJ	Property services in the form of residential estate agency, residential lettings, land and new homes ⁹⁹¹
[Current Member I]	[✂]	[✂]	Letting agents of residential property ⁹⁹²

⁹⁸⁷ Section 26 response dated 16 January 2014 from [a Director] of [Current Member E] to the OFT (CMA Document Reference r_[Current Member E] 4).

⁹⁸⁸ Section 26 response dated 21 January 2014 from [the Managing Director] of [Current Member F] to the OFT ([CMA Document Reference [Current Member F] 3).

⁹⁸⁹ Section 26 response received on 20 January 2014 from [Current Member G] to the OFT (CMA Document Reference r_[Current Member G] 2.1).

⁹⁹⁰ Trading as Hamptons International. Hamptons International has been a wholly owned subsidiary of Countrywide Group plc (company number 4947152) and Countrywide plc (company number 8340090) since 18 June 2010.

⁹⁹¹ Section 26 response dated 21 January 2014 from Countrywide PLC to the OFT (CMA Document Reference r_HAMP 6.2).

⁹⁹² Section 26 response dated 9 January 2014 from [law firm 4] of [Current Member I] ([CMA Document Reference Current Member I] 4.1).

Name	Company number	Registered Address	Principal business activity
[Current Member J]	[REDACTED]	[REDACTED]	Rental of private properties ⁹⁹³
[Current Member K]	[REDACTED]	[REDACTED]	Estate agency services ⁹⁹⁴
[Current Member L]	[REDACTED]	[REDACTED]	Estate agency services, residential sales and residential lettings ⁹⁹⁵
[Current Member M]	[REDACTED]	[REDACTED]	Residential estate agency ⁹⁹⁶
[Current Member N]	[REDACTED]	[REDACTED]	Selling and letting of residential property ⁹⁹⁷
[Current Member O]	[REDACTED]	[REDACTED]	Estate agents ⁹⁹⁸
[Current Member P]	[REDACTED]	[REDACTED]	Estate agency, surveying and property management ⁹⁹⁹

⁹⁹³ Section 26 response dated 21 January 2014 from [a Director] of [Current Member J] to the OFT (CMA Document Reference r_[Current Member J]5).

⁹⁹⁴ Section 26 response dated 13 January 2014 from [the Managing Director] of [Current Member K] to the OFT (CMA Document Reference r_[Current Member K] 11.1).

⁹⁹⁵ Section 26 response dated 20 January 2014 from [a Director] of [Current Member L] to the OFT (CMA Document Reference r_[Current Member L] 3).

⁹⁹⁶ Section 26 response dated 28 January [a Director] of [Current Member M] to the OFT (CMA Document Reference r_[Current Member M] 3).

⁹⁹⁷ Section 26 response, undated (CMA Document Reference r_[Current Member N] 2).

⁹⁹⁸ Section 26 response (undated) from [Current Member O] to the OFT (CMA Document Reference r_[Current Member O] 6.1).

⁹⁹⁹ Section 26 response dated 13 January 2014 from [the Group Finance Director] of [Current Member P] to the OFT (CMA Document Reference r_[Current Member P] 2).

Name	Company number	Registered Address	Principal business activity
[Current Member Q]	[✂]	[✂]	Management of real estate on a fee or contractual basis ¹⁰⁰⁰
[Current Member R]	[✂]	[✂]	Residential sales and lettings agents ¹⁰⁰¹
Waterfords (Estate Agents) Limited	03089973	90 Park Street Camberley Surrey GU15 3NY	Estate agency services including sales, land & new homes and lettings ¹⁰⁰²

¹⁰⁰⁰ Fame – company report of [Current Member Q] dated 23 October 2014 (CMA Document Reference CMA 61).

¹⁰⁰¹ Section 26 response dated 15 January 2014 from [a Director] of [Current Member R] to the OFT (CMA Document Reference r_ [Current Member R] 2.1).

¹⁰⁰² Section 26 response dated 6 January 2014 from [the Managing Director] of Waterfords to the OFT (CMA Document Reference r_WAT 2).

ANNEX E: SUMMARY OF OFT/CMA'S INVESTIGATION

- E.1. In January 2013, the OFT received a complaint from a lettings agent, [the Complainant] (the 2013 Complaint), which raised a number of concerns about Three Counties' T&CM. On December 2013, the OFT launched a formal investigation under section 25 of the Act, having established reasonable grounds for suspecting a breach of the Chapter I prohibition in relation to the Infringement.
- E.2. The OFT sent formal requests for information under section 26 of the Act to the Parties on 18 December 2013, followed by further requests to the remaining Current Members on 20 December 2013. Between 21 and 29 January 2014, the OFT also conducted on-site inspections (with notice) at certain of the Parties' and Current Members' premises,¹⁰⁰³ using powers provided by Section 27 of the Act.
- E.3. During these inspections, the OFT was provided with documentary evidence in both hard-copy and electronically. A copy of the hard-copy documentary evidence retained by the OFT was provided to the respective Parties for their records.
- E.4. In March 2014, the OFT conducted interviews with a number of individuals, as set out below:

Name of Party	Name of witness	[Position at date of interview]
Hamptons International	[X]	Senior Manager [X] ¹⁰⁰⁴
Three Counties	[X]	Chairman
Three Counties	[X]	Member of management committee
TMS	[X]	Head of Group Property and Regional Sales Manager
Waterfords	[X]	Managing Director

¹⁰⁰³ Inspections were carried out at the premises of Three Counties, Waterfords, Hamptons International, [Current Member O] and Trinity Mirror. Certain inspections were held at the premises of the Parties' legal representatives.

¹⁰⁰⁴ [The Senior Manager] of Hamptons International is not listed as a director of Hamptons International at Companies House - see voluntary witness statement by [the Senior Manager] of Hamptons International dated 13 March 2014 (CMA Document Reference r_HAMP 18.3).

- E.5. In April 2014, the CMA held State of Play meetings or telephone conferences with each of the Parties and the Current Members.
- E.6. In June 2014, the CMA subsequently conducted interviews with the following individuals:

Name of Party	Name of witness	[Position at date of interview]
Castles	[X]	Managing Director
[Current Member K]	[X]	Managing Director
Trinity Mirror	[X]	Commercial Director of [a Trinity Mirror group company] ¹⁰⁰⁵

- E.7. In February 2014 and May 2014,¹⁰⁰⁶ Three Counties and Waterfords offered to enter into discussions with the CMA to terminate the investigation by way of formal commitments, pursuant to section 31A of the Act.¹⁰⁰⁷ In June 2014, Trinity Mirror also made a proposal for an offer of binding commitments.¹⁰⁰⁸
- E.8. After due consideration of each offer, the CMA concluded that it would not be appropriate to accept formal commitments in this case.¹⁰⁰⁹ In reaching this decision, the CMA took into account that in this case not to complete its investigation would undermine deterrence.

Application of the CMA's prioritisation principles

- E.9. During its preliminary stages, the investigation focused on the 19 Current Members of Three Counties, Three Counties itself, and the *Star Courier*.
- E.10. However, the CMA concluded that including each of the Current Members as individual addressees to the Decision would be very resource intensive and a disproportionate use of the CMA's resources. In addition, it became clear to the CMA during the course of its investigation that certain members played a more active role in the management of Three Counties by serving as members of the Committee, contributing to oral and/or written discussions

¹⁰⁰⁵ Formerly General Manager and Director of [the previous owner of the *Star Courier*], the publisher of the *Star Courier* until 28 March 2010. See witness interview with [the Commercial Director of [a Trinity Mirror group company]] dated 10 June 2014, page 5, line 9 (CMA Document Reference r_TM 67.3).

¹⁰⁰⁶ Letter from [law firm 1] to CMA dated 7 May 2014 (CMA Document Reference r_3C 61.1) and 13 May 2014 (CMA Document Reference r_3C.65.1).

¹⁰⁰⁷ As inserted by the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (SI 2004/1261), Regulation 18.

¹⁰⁰⁸ Letter dated 19 June 2014 from [law firm 3] to CMA (CMA Document Reference r_TM 49.1).

¹⁰⁰⁹ Letter from CMA to [law firm 1] dated 31 July 2014 (CMA Document Reference r_3C 72a) and letter from CMA to [law firm 3] dated 31 July 2014 (CMA Document Reference r_TM55).

about the development, implementation or monitoring of the Infringement, or enforcing the Infringement.

E.11. For reasons of administrative prioritisation, the CMA therefore carried out a two-stage scoping process involving a series of objective, transparent and non-discriminatory criteria in order to determine which of the Current Members should be included or excluded from the scope of the investigation. The process was undertaken by reference to the CMA's Prioritisation Principles of impact, strategic significance, risks and resources,¹⁰¹⁰ and focused on identifying those undertakings:

- which were involved in contributing to consumer harm as at the start of the investigation in December 2013, and
- which were most actively involved in the Infringement over the Relevant Period, consisting of those that:
 - served as members of Three Counties' management committee, and
 - contributed to oral and/or written discussions about the formation, development, implementation or monitoring of the Infringement, and/or
 - actively enforced the Infringement.

E.12. As a result of the above scoping process and the ensuing administrative procedure, the CMA has addressed the Decision only to Waterfords, Castles and Hamptons International, as well as Three Counties and TMS. In addition, the Decision is addressed to certain parent companies which are considered to be part of the same undertaking as the legal entity directly involved in the Infringement.

¹⁰¹⁰ See *Prioritisation principles for the CMA* (CMA16; April 2014).

ANNEX F: DEVELOPMENT OF RULE 21

Table F.1: Development of Rule 21 of the T&CM and Rule 6(d) of the Committee Rules

Year	Reference	Rule
2005	Rule 21, T&CM	<i>'Members shall not advertise sales commission rates whether directly or indirectly in the property paper.'</i> ¹⁰¹¹
2005	Rule 6(d), Committee Rules	<i>'The Secretary shall monitor and ensure that Members do not advertise any sales commission rates whether directly or indirectly in the Members Property Paper and shall make decisions on whether or not an advert should be permitted which in any way contains or refers to a promotion, reduction, fee, special offer or discount.'</i> ¹⁰¹²
2005-2006 ¹⁰¹³	Rule 21, T&CM	<i>'Members shall not, unless granted a waiver by the Committee in writing, advertise any sales commission rates whether directly or indirectly in the Property Paper and shall obtain the express approval of the Committee for any proposed advert (or alteration or amendment to an existing approved advert) which in any way contains reference to a promotion, reduction, fee, special offer or discount. A copy of the proof of any such advert shall be forwarded to the Committee no less than 21 days prior to the date that the member wishes the advert to appear. Any waiver by the Committee permitting the advertising of sales commission shall be at the discretion of the Committee and will only be granted in exceptional circumstances and only where the advertiser has no shop fronted premises at all in the area covered by the paper.'</i> ¹⁰¹⁴

¹⁰¹¹ CMA Document Reference r_CAS 3.16.

¹⁰¹² The CMA does not have a copy of the original Committee Rules but an email dated 15 July 2005 from [the Managing Director] of [Former Member 1] to [the Managing Director] of Castles and [the Managing Director] of Waterfords (CMA Document Reference CAS 3.66) noted *'I believe that these were the original rules as issued'*.

¹⁰¹³ The exact date is not clear to the CMA but the change would seem to coincide with the July 2005 amendment to the Committee Rules.

¹⁰¹⁴ CMA Document Reference 3C 24.151.

July 2005	Rule 6(d), Committee Rules	<i>'The Secretary shall monitor and ensure that Members do not advertise any sales commission rates whether directly or indirectly in the Members Property Paper and shall make decisions on whether or not an advert should be permitted which in any way contains or refers to a promotion, reduction, fee, special offer or discount. The Committee shall consider an application in writing from a Member whether they should grant a waiver to enable the member to advertise their fees. This discretion shall only be used in exceptional circumstances and is predominately intended to deal with advertisers who have no shop fronted premises at all in the area where the paper is distributed.'</i> ¹⁰¹⁵
2006	Rule 21, T&CM	<i>'Members shall not advertise sales or lettings commission rates whether directly or indirectly in the property paper nor refer to their commission rates or any other agents [sic] rates in any way.</i> <i>Should any member attempt to advertise fees in any way whatsoever the committee will immediately inform the Property Paper to charge the non association rate for that advert and the member will be immediately contacted to discuss further action under clause 27.'</i> ¹⁰¹⁶
2008	Rule 21, T&CM	<i>'Members shall not advertise sales or lettings commission rates whether directly or indirectly in the property paper nor refer to their commission rates or any other agents [sic] rates in any way.</i> <i>Should any member attempt to advertise fees in any way whatsoever the committee will immediately raise an invoice for the difference between the 'association rate for page advertising' and the non association rate for agents pages in that weeks [sic] advertising and this amount will be payable to the association within 28 days. The</i>

¹⁰¹⁵ CMA Document Reference [Current Member K] 11.12.

¹⁰¹⁶ See CMA Document Reference 3C 24.150. See also a letter dated 27 January 2006 from [the Managing Director] of Castles to [an Employee] of [Former Member 40] (CMA Document Reference CAS 3.218) and a letter dated 3 February 2006 from [the Managing Director] of Waterfords (on Three Counties letterhead) to [the Managing Director] of Castles (CMA Document Reference CAS 3.217) for corroboration. This was still the wording in force in February 2008 (CMA Document Reference CAS 3.270).

		<i>member will be immediately contacted to discuss further action under clause 27 and membership suspension if fee not paid.</i> ¹⁰¹⁷
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¹⁰¹⁷ This is the version submitted to us by [the Complainant] (CMA Document Reference [Complainant] 1 and CMA Document Reference [Complainant] 1.1).

ANNEX G: INDIVIDUAL PENALTY CALCULATIONS**G.1. Castles**

Step	Description		Adjustment	Figure
	Relevant turnover			[✂]
1	Starting point as a percentage of relevant turnover		17%	[✂]
2	Adjustment for duration		x 8.75	[✂]
3	Adjustment for aggravating and mitigating factors	Aggravating: Involvement of directors or senior management	+ 10%	[✂]
		Aggravating: Role of the undertaking as a leader in, or an instigator of, the infringement	+ 5%	[✂]
		Mitigating: Cooperation	- 5%	[✂]
		Mitigating: Termination of the infringement	- 5%	[✂]
		Mitigating: Genuine uncertainty	- 15%	[✂]
		Total adjustment	[✂]	[✂]
4	Adjustment for specific deterrence and proportionality		[✂]	[✂]
5	Adjustment to prevent the statutory maximum penalty being exceeded		N/A	N/A
	Total penalty			£19,275
6	Settlement discount		- 10%	(£1,928)
	Total penalty payable			£17,348

G.2. Hamptons International/Countrywide

Step	Description	Adjustment	Figure
	Relevant turnover		[X]
1	Starting point as a percentage of relevant turnover	17%	[X]
2	Adjustment for duration	x 6.25 ¹⁰¹⁸	[X]
3	Adjustment for aggravating and mitigating factors	<i>Aggravating: Role of the undertaking as a leader in, or an instigator of, the infringement</i>	[X]
		<i>Mitigating: Cooperation</i>	[X]
		<i>Mitigating: Termination of infringement</i>	[X]
		<i>Mitigating: Genuine uncertainty</i>	[X]
		<i>Mitigating: Compliance</i>	[X]
		Total adjustment	[X]
4	Adjustment for specific deterrence and proportionality	[X]	[X]
5	Adjustment to prevent the statutory maximum being exceeded	N/A	[X]
	Total penalty		£647,172¹⁰¹⁹
6	Settlement discount	- 10%	- £64,717
	Total penalty payable		£582,455

¹⁰¹⁸ Countrywide is liable, on a joint and several basis with Hamptons International, only for the 3.75 years attributable to its ownership of Hamptons International.

¹⁰¹⁹ This represents a total penalty of £258,869 for Hamptons International, and a total penalty of £388,303 for Hamptons International, jointly and severally with Countrywide plc and Countrywide Group plc. See paragraph 6.64 and Annex B, paragraphs B.17 and B.20.

G.3. Three Counties

Step	Description		Adjustment	Figure
	Relevant turnover			[X]
1	Starting point as a percentage of relevant turnover		17%	[X]
2	Adjustment for duration		x 8.75	[X]
3	Adjustment for aggravating and mitigating factors	Aggravating: Involvement of directors or senior management	+ 10%	[X]
		Mitigating: Cooperation	- 5%	[X]
		Mitigating: Termination of the infringement	- 5%	[X]
		Mitigating: Genuine uncertainty	-15%	[X]
		Total adjustment	£0	[X]
4	Adjustment for specific deterrence and proportionality		[X]	[X]
5	Adjustment to prevent the statutory maximum penalty being exceeded		N/A	N/A
	Total penalty			£100
6	Settlement discount		- 10%	- £10
Total penalty payable				£90

G.4. Trinity Mirror

Step	Description	Adjustment	Figure
	Relevant turnover		[X]
1	Starting point as a percentage of relevant turnover	17%	[X]
2	Adjustment for duration	x 1.5	[X]
3	Adjustment for aggravating and mitigating factors	<i>Mitigating: Cooperation</i>	- 5%
		<i>Mitigating: Termination of infringement</i>	- 5%
		Total adjustment	([X])
4	Adjustment for specific deterrence and proportionality	[X]	[X]
5	Adjustment to prevent the statutory maximum penalty being exceeded	N/A	N/A
	Total penalty		£101,397
6	Settlement discount	- 10%	(£10,140)
	Total penalty payable		£91,257

G.5. Waterfords

Step	Description		Adjustment	Figure
	Relevant turnover			[✂]
1	Starting point as a percentage of relevant turnover		17%	[✂]
2	Adjustment for duration		x 8.75	[✂]
3	Adjustment for aggravating and mitigating factors	Aggravating: Involvement of directors or senior management	+ 10%	[✂]
		Aggravating: Role of the undertaking as a leader in, or an instigator of, the infringement	+ 10%	[✂]
		Mitigating: Cooperation	- 5%	[✂]
		Mitigating: Termination of the infringement	- 5%	[✂]
		Mitigating: Genuine uncertainty	-15%	[✂]
		Mitigating: Compliance	- 5%	[✂]
		Total adjustment	[✂]	[✂]
4	Adjustment for specific deterrence and proportionality		[✂]	[✂]
5	Adjustment to prevent the statutory maximum penalty being exceeded		N/A	N/A
	Total penalty			£51,318
6	Settlement discount		- 10%	(£5,132)
	Total penalty payable			£46,186